



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC PETITION NO 174 OF 2015

YUSUF ATHMANI HASSAN & ANOTHER.....PLAINTIFFS

-VERSUS-

DISTRICT LAND REGISTRAR, KWALE & ANOTHER....DEFENDANTS

IDDI A. M GANGUMA & 6 OTHERS.....INTERESTED PARTIES

RULING

1. The 3rd Interested Party has moved this court under Order 42 rule 6(2) Order 51 rule 1 of the Civil Procedure Rules as well as Section 1A, 1B and 3A of the Act seeking the following orders;

- (a) That this Honourable Court be pleased to order the petitioners to provide security for costs of Kshs8,000,000/= by depositing the same in court pending the hearing and determination of this suit.
- (b) That in the event of failure to provide such security within a period of 30 days the petition to stand dismissed with costs.
- (c) That the costs of this application be in the cause.

2. The application is premised on the grounds inter alia; that the applicant is the registered owner of the suit property and the petitioners have no justifiable claim against him. That the applicant has incurred and will continue to incur huge expenses defending a hopeless suit which it may never recover.

3. The application is supported further by the affidavit deposed on 21st December 2017 by Kenedy Mungai – applicant. He deposed that the petitioners have no fixed abode and have no known assets that may be disposed off to recover costs. That he has been advised by his advocate on record that the petitioners should provide security for costs in the sum of Kshs.8,000,000/= as a condition pending hearing and determination of the petition. That the petition as filed is a non-starter because the petitioners are not the registered owners of the suit property. The 3rd Interested Party/Applicant swore a supplementary affidavit dated 2nd November 2018 where he deposed that the value of the suit property is Kshs23,300,000/=. He annexed a valuation report to support this fact. He therefore urged the court to grant the orders sought in his application.

4. The application is opposed by the petitioners through the replying affidavit sworn by Micheal Gitonga advocate on 21st November, 2018. Mr. Gitonga deposed that the petitioners are the beneficiaries and administrators of the first allottee of the suit land. That the issue before court is determination of ownership of the suit property. That it will be a great miscarriage of justice if the court grants an order for security before hearing the parties as the same amounts to giving summary judgment and making a final decision.

5. During oral submission, Mr. Ondabu advocate for the applicant submitted that the petitioners have lost interest in prosecuting their petition. He urged the court to set a sum for security and also limit the period for payment. That in default, the petition be dismissed.

6. This petition has not been heard. Order 42 rule 6 (2) under which the applicant is seeking to be granted costs is applicable where a decree has been passed. Secondly the applicant is seeking to be granted an order for security of his costs. The applicant has given the value of the land at Kshs.23,300,000/=. Instruction fees on party and costs on the sum of Kshs23,300,000/= cannot be Kshs8,000,000/= under the advocates remuneration Order 2016. No justification has been made for asking for the sum of Kshs8,000,000/=.

7. Further, the applicant did not elaborate to this court how the petitioners are causing any damage to the land so that if this petition fails, the value of the land would depreciate. On the issue of the petition not disclosing any reasonable cause of action was not argued to the satisfaction of the court. The applicant merely set it as a ground but did not endeavour to prove it. The petitioners in their replying affidavit

have stated that they are claiming the land as beneficiaries of the estate of the first allottee and that they have been in occupation since 1974. The issue of who is entitled to the suit land can only be determined in a hearing.

8. The applicant introduced a new issue during his submissions that since inception the petitioners have not set down the matter for hearing thus they are not interested in the matter. However I note from the record that on 10th May 2016, the petitioners set the matter for hearing but the matter could not proceed due to nonappearance of the Respondents and the Interested Parties. The matter has been listed in court on various dates. This ground was also an afterthought since it was not pleaded in the application or the affidavits in support of the motion.

9. In conclusion, I find the application to be misplaced, without merit and an abuse of the court process. The same is dismissed with costs to the petitioners.

Ruling, DATED, SIGNED & DELIVERED at Mombasa this 30th day of April, 2019.

A. OMOLLO

JUDGE.