



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT & LAND COURT

ELC CASE NO. 1030 OF 2016

FREDNARD MUAIA SILA.....PLAINTIFF

=VERSUS=

AL-HAIEE INVESTMENTS LIMITED.....1ST DEFENDANT

DIAMOND HASHAM LALJI.....2ND DEFENDANT

MAURICE OTIENO OMUGA.....3RD DEFENDANT

SHAHID LALJI.....4TH DEFENDANT

TRIDENT INSURANCE LIMITED.....5TH DEFENDANT

PROP INVESTMENTS LIMITED.....6TH DEFENDANT

FREDRICK KATHANZU KAVUTHI T/A

KANYUNI CONSTRUCTORS.....7TH DEFENDANT

JAMES KYALO t/a SECOND TRY

CONSTRUCTION COMPANY.....8TH DEFENDANT

REGISTRAR OF COMPANIES.....9TH DEFENDANT

CHIEF LAND REGISTRAR.....10 DEFENDANT

RULING

1. This is a Ruling in respect of three separate applications. The first application is dated 26th September, 2016. It is brought by the 5th Defendant and it seeks striking out of the Plaintiff's suit against it for disclosing no cause of action against it. The second application is dated 27th September, 2016. It is brought by the 2nd, 3rd and 4th Defendants and it seeks striking out of the Plaintiff's suit against them for disclosing no reasonable cause against them. The third application is dated 27th September, 2016. It is brought by the 2nd, 3rd and 4th Defendants. It seeks orders that the Plaintiff provides security for costs in the sum of Kshs.2,500,000/= within a period to be determined by the Court failing which the suit be dismissed with costs.

2. I will deal with the first two applications together because they are seeking same orders based on same provisions of the law. The Applicants in the second application contend that the Plaintiff having sued the 1st Defendant which is a company capable of being sued in its name, he cannot again sue its directors in the same case. In the first application, the Applicant contends that the 1st Defendant is a legal entity separate from its shareholders, directors or creditors and that any claim which is brought against the 1st Defendant cannot in law be visited upon the 5th Defendant.

3. The Plaintiff/Respondent opposed the two applications based on a Replying Affidavit sworn on 26th October, 2016 and two other Replying Affidavits sworn on 13th November, 2018. In the affidavit sworn on 26th October, 2016 the Respondent contends that the two applications are defective in that there is no supporting affidavits and that his claim against the Applicants in the two applications is predicated on fraud and that therefore the suit against them cannot be struck out.

4. In the Replying Affidavits sworn on 13th November, 2013 the Respondent contends that the suit against the Applicants should not be struck out as it is based on alleged fraud which was committed by the directors and that it is only the directors who can answer to those fraud allegations. The Respondent further argues that removal of the suit against the Applicants will severely compromise his case.

5. Though the 9th and 10th Defendants had indicated on 29th May, 2018 that they will not participate in the two applications, their counsel later changed their mind and filed grounds of opposition dated and filed in Court on 8th February, 2019. The 9th and 10th Respondents contend that the two applications are premature and are only intended to lock out the Plaintiff from the seat of justice.

6. I have carefully considered the two applications as well as the opposition to the same by the Plaintiff and the 9th and 10th Defendants. I have also considered the submissions filed by the parties herein. The only issue for determination is whether there is a reasonable cause against the Applicants. The Plaintiff's claim is based on adverse possession. The Plaintiff contends that he has acquired L.R No. 209/12071/1 IR 61996 (Suit property) through adverse possession. The suit property is registered in the name of the 1st Defendant.

7. Though the Plaintiff contends that the suit property was not lawfully registered in the 1st Defendant's name, I do not think that this argument will assist his claim. His claim is based on adverse possession and it is not his business to know how the suit property was registered in the 1st Defendant's name unless he is fighting his own claim by saying that he should have sued a different party. In a claim of this nature, what the Court is interested in is whether the Plaintiff has demonstrated that the property he is claiming is registered in the name of the 1st Defendant and that he is able to prove that he has been in adverse possession for the Statutory period required for one to mount such a claim.

8. The 2nd, 3rd and 4th Defendants are directors of the 5th Defendant company. The 5th Defendant is said to have taken a loan of Kshs.70,000,000/= over which a charge was registered against the suit property. The Plaintiff has sued the 1st Defendant. Considering the nature of the Plaintiff's claim, it is not necessary to sue the parties who are seeking to have the suit against them struck out.

9. The Plaintiff's argument that the two applications are defective for lack of supporting affidavits has no merit. In an application brought under Order 2 Rule 15(1) (a), no evidence is required. The Applicant is only expected to state concisely the grounds upon which it is made. The Applicants have shown the grounds upon which the applications are made.

10. The Plaintiff is not being driven off the seat of justice by the striking out of the suit against the 2nd, 3rd, 4th and 5th Defendants. The Plaintiff's recourse lies against the 1st Defendant if he finally proves that he has been in adverse possession of the suit property. I therefore find that the suit against the 2nd, 3rd, 4th and 5th Defendants cannot stand. It is hereby struck out with costs to the 2nd, 3rd, 4th and 5th Defendants.

It is so ordered.

The Third Application

11. In this application, the 2nd, 3rd and 4th Applicants contend that the case against the Respondent will not succeed and that they want the Respondent compelled to deposit security for costs in the sum of Kshs.2,500,000/= within timelines to be given by the Court failing which the Respondent's suit be dismissed with costs. The Applicants contend that the Respondent herein had filed an application in ELC 1264 of 2013 (OS) which application he withdrew with costs to the Applicants but that the Respondent has not paid those costs. The Applicants therefore contend that the Respondent is not a person of means and cannot pay costs in case he loses the present suit.

12. The Respondent has opposed the Applicants' application based on a Replying Affidavit sworn on 26th October, 2016 and another one sworn on 13th November, 2018. The Respondent contends that this application is misconceived and that it is intended to delay the finalization of this suit. The Respondent argues that the Applicants cannot use costs from a different suit to build their case for security for costs and that if the Applicants want their costs arising out of ELC 1264 of 2013 (OS), they should tax their bill of costs.

13. The Respondent further states that he has a good case with high chances of success. He further argues that the application for security for costs is meant to strangle his financial resources in order to compromise his ability to prosecute his case.

14. The 9th and 10th Respondents also opposed the application by the Applicants based on grounds of opposition dated and filed in Court on 8th February, 2019. The 9th and 10th Respondents contend that the

application by the Applicants is intended to drive away the Respondent from the seat of justice.

15. I have considered the Applicants' application as well as the opposition to the same by the Plaintiff/Respondent as well as the 9th and 10th Respondents. I have also considered the submissions filed herein. The guiding principles in matters relating to security for costs were well laid out in the case of Moses Wachira Vs Niels Bruel & 2 Others [2015] eKLR in which the Court of Appeal cited the case of Keary Developments Vs Tarmac Construction [1995] 3 ALL ER 534 which laid the principles as follows:-

1. *The Court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.*
2. *The possibility or probability that the Plaintiff company will be deterred from pursuing its claim by an order for security is not without a more sufficient reason for not ordering security. It is implicit that a company may have difficulty meeting an order.*
3. *The Court must balance the injustice to the Plaintiff prevented from pursuing a proper claim against the injustice to the Defendant if no security is ordered and at the trial the Plaintiff's claim fails and the Defendant finds himself unable to recover his costs. The power must neither be used for oppression by stifling a claim particularly when the failure to meet that claim might in itself have been a material cause of the Plaintiff's impecuniosity, nor as a weapon for the impecunious company to put pressure on a more prosperous company.*
4. *The Court will look to the prospects of success, but not go into the merits in detail.*
5. *In setting the amount it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount.*
6. *Before refusing security the Court must be satisfied that, in all the circumstances, the claim would be stifled. This might be inferred without direct evidence, but the Court should also allow that external resources might be available.*
7. *The lateness of the application can properly be taken into account.*

16. I have considered the principles laid down in the Keary Developments case (supra). I have considered the circumstances in this case as seen from the affidavits filed herein. I do not find that an order of security for costs is appropriate. If I ordered security for costs, it may drive the Respondent from the seat of justice.

In the case of *Patrick Ngata Kimanzi Vs Marcus Mutua Muturi & 2 Others (2013)eKLR* it was held as follows:-

“The duty of the Court is therefore to create a level playing ground for all the parties involved, in this case, the proportionality of the right of the Petitioner to access justice vis- à-vis the Respondent's right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him”.

17. The issue of security for costs is at the discretion of the Court. Such discretion ought to be exercised judiciously. After taking all the circumstances of this case into consideration, I find that an order of security for costs should not be granted. I therefore disallow the application with costs to the Respondent.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 4th day of April, 2019.

E.O.OBAGA

JUDGE

In the presence of Mr. Saenyi for Plaintiff, M/s Rashid for Mrs. Rashid for 2nd, 3rd and 4th Defendants, Mr. Omuga for Mr. Omuga Otieno for 1st Defendant and for Mr. Lutta for 5th and Mr. Wakla for 6th Defendant and Mr. Sinachi for Mr. Okadia for 7th and 8th Defendants.

E.O.OBAGA

JUDGE

4.4.2019