



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

ENVIRONMENT AND LAND CASE NO. 36 OF 2018

KARIM OJIAMBO ABUDO.....PLAINTIFF/RESPONDENT

VERSUS

DOROTHY SIKADA OGOMBO BWIRE

ELIZABETH AKUMU WASIKE (Legal Representatives

of JOSEPH OGOMBO BWIRE.....DEFENDANT/APPLICANTS

R U L I N G

1. The application under consideration is the Notice of Motion application dated 30th July 2018 by the Defendants - **DOROTHY SIKADA OGOMBO BWIRE** - and - **ELIZABETH AKUMU WASIKE**. It is brought under Order 26 Rule 1 of the Civil Procedure Rules 2010 seeking orders that the Plaintiff deposits security of Kshs.200,000 to cater for the Defendant's costs in the suit and in default, an inhibition do issue against the Plaintiff's Parcel of Land Number **BUNYALA/BULEMIA/358** for the same purpose.

2. The application is supported by the affidavit of **DOROTHY SIKADA OGOMBO BWIRE**. She depones that the Plaintiff resides in Uganda which issue is the ground upon which she seeks security. She contends if the Plaintiff does not succeed in his claim the Defendants will be unable to recover their legal fees from him as he has no fixed abode. She has annexed a Certificate of Search for **LR BUNYALA/BULEMIA/358** as proof of the Plaintiff's ownership of the said property.

3. The application is opposed vide the Plaintiff's Replying Affidavit and Further Replying Affidavit filed on 5th and 25th September 2018 respectively. He avers that he is a Kenyan citizen and only travels to Uganda for business purposes. He depones further that he has been readily accessible residing in his home in Bunyala from 1998 when he was released from a Ugandan prison. The Plaintiff annexed correspondence and summons from the District Officer, Budalangi on various dates spanning February 2007 to January 2009. The said documents relate to the dispute concerning the suit property **LR BUNYALA/BULEMIA/2426** among others and the parties to the current suit. The Plaintiff claims they were served upon him through the area Chief.

4. Parties canvassed the application by way of written submissions. The Applicants' submissions were filed on 9th November 2018. Counsel for the Defendants submitted that the Plaintiff's claim is a non-starter that is statute barred in light of the provisions of the Limitations of Actions Act. The Plaintiff discovered the alleged fraud in 1998 but only filed suit 20 years later. The Defendants further opine that the Green Card reflects that the late Defendant's husband's ownership of the suit property was a first registration hence it cannot be challenged. They state that being his neighbours they know the Plaintiff's home and confirm that he does not reside there. Moreover, they contend that the Plaintiff's carrying on undisclosed business in Uganda is an admission that he does not reside within the jurisdiction of this Court.

5. The Plaintiff's submissions were filed on 29th November 2018. He denies that he lives in Uganda and states that he has a permanent residence in Kenya being **LR BUNYALA/BULEMIA/358**. He asserted that his claim is not a non-starter as what is challenged if the registration of the suit property. He admitted that he travels to Uganda periodically for business but contended that his traveling did not amount to residency. He prayed that the Application be dismissed with costs.

6. I have read the parties' pleadings, submissions and the applicable law. The need for security for costs arises when a party is reasonably apprehensive that if one succeeds one's legal costs and fruits of the resultant judgment will not be paid by the losing party. It is a discretionary measure that is commonly used when there is a strong impending possibility of the aforementioned scenario. The Court is called upon to balance the interests of both parties. In **KEARY DEVELOPMENTS LIMITED VS. TARMAC CONSTRUCTION LIMITED & ANOTHER [1995] 3 ALL ER 534** the Court held as follows:

“The court will not be prevented from ordering security simply on the ground that it would deter the Plaintiff from pursuing

its claim. Instead, the court must balance the injustice to the Plaintiff if prevented from pursuing a proper claim by an order for security 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 from the Plaintiff the costs which have been incurred by him in his defence of the claim."

7. In the current Application, the Plaintiff's financial capacity to pay the Defendants' legal costs in the event that he loses is not in question. The main issue is that of his residence. The onus of proof herein lies with the Defendant/Applicants. The Plaintiff is represented with his address of service being that of his advocates. In his affidavits, his address is disclosed as **"P.O BOX 138 Port Victoria, in the Republic of Kenya."** The Plaintiff has also presented correspondence and summons from the local administration served upon him on various occasions. The Defendants on the other hand have not provided an iota of evidence to rebut these statements. Further, the Applicants have annexed a Certificate of Search for **LR BUNYALA/BULEMIA/358** as proof of the Plaintiff's ownership. It is diametrically opposed to their assertion that the Plaintiff resides in Uganda as it is proof that he has traceable assets within the jurisdiction which can be realized by way of execution.

8. In both the Plaintiff and Defence, parties disclosed a previous case between the parties being **ELC NO. 15 OF 2016** which was withdrawn. The Defendants in paragraph 7 of the Defence state that the case was withdrawn without notice and payment of costs to the Defendants which could be their motivation for seeking security for costs in the current case. However, they have not demonstrated whether they made any efforts to realize their costs and that the said efforts were thwarted by their assertion that the Plaintiff does not reside within the jurisdiction.

9. Another issue of interest is that the parties' pleadings indicate that there may be a relationship between the suit property **LR BUNYALA/BULEMIA/2426** and **LR BUNYALA/BULEMIA/358**; whereby the former may be a subdivision of the latter. The Defendants are jumping the gun by delving into issues that can only be determined at the main hearing and supported by way of evidence. Moreover, it is unconscionable to argue extraneous issues by way of submissions. The Defendants apart from arguing that the suit is a non-starter, have also introduced the issue of time-bar within the meaning of the Limitation of Actions Act in an application requiring a totally different remedy from that available if it is in fact time-barred. It all seems to be a way to sneak in an unmerited inhibition order and the Defendants are urged to move the Court appropriately.

10. The upshot of the foregoing is that the Notice of Motion Application dated 30th July 2018 is hereby dismissed. Costs in the cause.

Dated, signed and delivered at Busia this 25th day of June, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff/Respondent: Absent

Defendant/Applicants: Absent

Counsel of the Plaintiff/Respondent: Absent

Counsel of the Defendant/Applicants: Present

Court Assistant: Nelson Odame