



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC NO. 156 OF 2016

(Formerly Constitutional Petition 69/12)

BAKAMOYO LTD.....PLAINTIFF/RESPONDENT

VERSUS

THE REGISTRAR OF MOMBASA DISTRICT.....1ST RESPONDENT

COMMISSIONER OF LANDS.....2ND RESPONDENT

THE CHIEF LAND REGISTRAR.....3RD RESPONDENT

AND

1. KENGA KIRAO NYUNDO

2. DONALD SCAVER MWAKIO

3. FRANCIS LEWA

4. ALEX NYANJE

5. SAMUEL KATANA KIMANDO

6. MATHIAS NYAMBU

7. SALIMU SAIDI MWANZUGA

8. AISHA SHERMOHAMAD JAMI..INTERESTED PARTIES/APPLICANTS

RULING

1. For determination is the Notice of Motion dated 8th September 2016 brought under the provisions of Order 26 Rule, 1 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act. The Interested Parties/Applicants seeks for orders :

1) THAT the Petitioner do furnish security for costs by depositing the sum of Kshs.800,000.00 in a joint interest earning bank account in the names of Advocates for the petitioner and Advocates for Interested Parties within 14 days.

2) THAT in default of the Petitioner furnishing security for costs within the period specified above, the proceedings herein be stayed.

3) THAT costs of this Application be to the Interested Parties.

2. The Applicants have pleaded that they were awarded costs in **JR No.82 of 2011** which costs were taxed at Kshs.555, 885. That on diverse dates they demanded for payment of the said sums of money from the Petitioners but there has been no payment made. The Applicants deposed they are apprehensive similar conduct is likely to be repeated in this Petition thus making it difficult for them to recover costs when this litigation comes to an end. On this account, they urged the Court to grant the orders prayed for in the motion.

3. The Application is opposed by the Petitioner/Respondent who through the Affidavit of Mr. Kibara Advocate deposed that in **JR 82 of 2011**, the Petitioner was sued as an Interested Party and thus its role in that suit was very minimal. Secondly, that the costs awarded to the Applicants did not have specifics on who should pay them as there were several Respondents. The Petitioner in paragraph 5 of its Replying Affidavit deposed that it was agreed that the Applicant was to recover the remainder of the costs from the Attorney General after the Petitioner herein had paid a sum of kshs.250,000.00. That the Petitioner ought not to be punished for being dragged into a **Suit JR No.82 of 2011**. Lastly that costs being demanded originated from a separate File/Suit and the Applicant has alternative way of recovering the same. He urged this Court does consider the efforts already made by the Petitioner in settling part of those costs and proceed to dismiss the present Application with costs.

4. In responding to the issues raised in the Replying Affidavit Ms. Omondi Advocate for the Applicants swore a Further Affidavit in which she deposed that the costs were taxed as between the Applicants and the present Petitioner. Further that recovering of part of the costs from the Attorney General was a proposal made by the Petitioner which was accepted on condition that the Petitioner pays the balance within certain timelines which has not been met. That given the admission by the Petitioner's Advocate vide their letter dated 13/3/2017 that the Petitioner is undergoing financial difficulties, it will be difficult for the Applicants to recover the costs of these proceedings hence the Application should be allowed.

5. The Advocates thereafter filed Written Submissions supported with case laws annexed. I have read the same and taken their contents into consideration in this ruling. It is noteworthy:

a) That the present Petitioner is not the one who commenced the previous Suit No. JR 82 of 2011. The same was initiated by the current Interested Parties/Applicants

b) The Petitioner has already paid half of the taxed costs in the sum of Kshs.250,000 and what is outstanding as per agreement reached between them is Kshs.89,000 being interest on the taxed costs.

c) The Petitioner was not the sole party sued. There was also the Chief Land Registrar and Land Registrar, Kilifi sued as 1st and 2nd Respondents respectively.

d) In the judgment in JR 82 of 2011, costs were awarded to the ex-parte Applicants and the decisions challenged in the JR proceedings was made by the 1st and 2nd Respondents.

6. In paragraph 12 of the judgment, the Trial Judge had this to say, **"It is not for this Court to determine the legality or otherwise of the Applicants title. In the course of the hearing, this Court was told of the existence of Mombasa Petition No.69 of 2012 in which the substantive issue is ownership of the land herein. That petition is yet to be determined. The parties will have opportunity; I think to ventilate their positions through evidence."** Mombasa Petition No.69 of 2012 was transferred to this Court from the High Court and given the current **Number 156 of 2015** by the ELC Registry. The inference I draw is that even before **JR 82 of 2011** was concluded, this suit was already existing. The Petitioner cannot therefore be accused of filing it while being aware of his obligation to settle costs in the previous proceedings, since the judicial review proceedings had not been determined and an order on costs made.

For this reason and for the reasons given in paragraph 5 above, I find the circumstance of this case distinguishable and not falling under the provisions of Order 26 of the Civil Procedure Rules and the cases of **Martha Wambui vs Irene Wanjiru and Another (2015) eKLR, Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others (2014) eKLR or Patrick Kigera Mathia & Another vs DR Peter Mungai Ngugi & 2 other (2011) eKLR** referred to by the Applicants.

7. I am also not satisfied that there is need for costs to be deposited as the winning party in this suit will have the provisions of the Civil Procedure Act and Rules to recover the ensuing costs including but not limited to attachment of property and sale by Public Auction. In my opinion and I so hold, the letter of 13th March 2017 can be taken as not conclusive evidence that the Petitioner is of meagre means. The Applicant ought to have dug more about the Petitioner to show that it was of little means if they wanted the Court to believe so. Given that the Petitioner already raised and paid them Kshs.250,000 is no small feat. In conclusion I find the Application of 8th September 2016 devoid of merit and proceed to dismiss it with costs to the Petitioner.

Ruling dated, signed and delivered at Mombasa this 16th day of January 2018

A. OMOLLO

JUDGE