



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.767 OF 2017

LIZA WAIRIMU IRAKI.....1ST PLAINTIFF/RESPONDENT

PETER IRAKI MWAURA.....2ND PLAINTIFF/RESPONDENT

-VERSUS-

MAGDALENE WANGUI NDUNGU.....1ST DEFENDANT/APPLICANT

LILIAN WAIRIMU NGARUIYA.....2ND DEFENDANT/APPLICANT

RULING

The matter for determination is the *Notice of Motion* application dated **22nd May 2017**, brought by the 2nd Defendant herein **Lilian Wairimu Ngaruiya**, against the Plaintiffs. The said application has sought for the following orders:-

- 1. There be a stay of proceedings herein until the Plaintiffs/ Respondents herein pay to the 2nd Defendant/Applicant the costs awarded in SPMCC 223 of 2015, Kikuyu Law Courts – Peter Iraki Mwaura & 2 Others..vs..Magdalene Wangui Ndungu & Another.***
- 2. The Plaintiffs/Respondents be ordered to deposit into court or into an interest earning account in the joint names of the advocates for the Plaintiffs/Respondents and the advocates for the 2nd Defendant/Applicant herein to be opened with Kenya Commercial Bank Ltd, Kshs.1,500,000/= being security for costs for this suit within ninety (90) days of the honourable court so ordering.***
- 3. Costs of this application be provided for.***

The application is based on the following grounds:-

- a. Despite due demand and notice, the Plaintiffs/Respondents have failed, refused and/or neglected to pay Kshs.67,750/=, the costs awarded in SPMCC 223 of 2015, Kikuyu Law Courts – Peter Iraki Mwaura & 2 Others..vs.. Magdalene Wangui Ndungu & Ano. Which was a suit over the same suit property as herein being Karai/Gikambura/482.***
- b. The Plaintiffs/Respondents have come to this Honourable Court to seek equity with unclean hands and whereas they themselves are not willing to do equity and obey court orders.***

- c. The Plaintiffs/Respondents physical address or their places of work or their homes remains a mystery and unknown to the 2nd Defendant thus making recovery of the said costs impossible.**
- d. There is no guarantee thus that the Plaintiffs/Respondents shall meet the costs of this suit for the 2nd Defendant/ Applicant going by their aforesaid past conduct as regards costs.**
- e. It would be unfair for the Plaintiffs/Respondents to drag the 2nd Defendant/Applicant through this litigation without security for costs in the circumstances.**
- f. It would also be unfair and unjust for the Plaintiffs/ Respondents to continue prosecuting this case in this Honourable Court whereas costs awarded to the 2nd Defendant/Applicant against them by the lower court in a similar matter over the same suit property remain unpaid to date.**
- g. It is only fair and just that this application be allowed.**

The application is also supported by the affidavit of **Lilian Wairimu Ngaruiya**, in which she reiterated the contents of the grounds in support of the application. She further averred that the value of the suit property wherein she is the registered owner is approximately **Kshs.50,000,000/= (50 M)**. She therefore urged the Court to direct that the Plaintiffs do deposit **Kshs.1,500,000/=** as security for costs as that is a reasonable amount. She urged the Court to allow her instant application.

The application is vehemently opposed and **Liza Wairimu Iraki**, the 1st Plaintiff/Respondent swore a Replying Affidavit on her behalf and on behalf of the 2nd Plaintiff. She averred that the said application is **misconceived, vexatious, bad in law** and **an abuse** of the court process as advised by her advocate on record. Further that the instant application is only calculated to derail this matter further since the same had been fixed for Pre-trial Conference. She contended that their previous advocate did not inform them of the costs but since they are not aware, they are ready to settle the same. However, the Applicant has insisted that the Court should determine prayer no.2 of the application first. Further she averred that once costs are awarded, there are procedure on how to recover such costs. Therefore the awarded costs at the Magistrate's Court should not derail the expeditious disposal of this matter. It was her contention that they are ready to pay costs as awarded in the Magistrate's Court and if the Applicant is not ready to accept the payment, she can then follow the due process. She further contended that this application is a ploy by the Applicant to delay the matter as she is enjoying the *status quo* order.

The Applicant filed a further affidavit and averred that at no time did the Plaintiffs/Respondents or their advocates forward the payment of costs in issue and her advocate refused to receive the same and no evidence has been exhibited to that regard. She urged the Court to allow the application.

The application was canvassed by way of written submissions which this Court has carefully read and considered. The Court has also considered the relevant provisions of law and it renders itself as follows:-

The application herein is premised under Order 26 Rule 1 of the Civil Procedure Rules which provides:-

“In any suit, the Court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party”.

Therefore, it is evident from the above provisions of law that security of costs is awarded at the discretion of the court which discretion must be exercised judicially. See the case **of Keary Developments...Vs...Tarmac Construction (1995) 3 ALL ER 534**, where the Court held that:-

“some of the principles to be considered in exercising its discretion on whether to order for security of costs are.... the court has a complete discretion whether to order for security of costs and accordingly it will act in the light of all the relevant circumstances”.

Further, the application is also anchored under Rule 5(1) which also provides that:-

“If security for cost is not given within the time ordered and if the Plaintiff is not permitted to withdraw the suit, the court shall upon application dismiss the suit”.

The application has also been anchored under Section 3A of the Civil Procedure Act which gives the court the inherent power to make such orders that are necessary for the end of justice to be met and to prevent abuse of the court process.

Again the Court is also called upon to be guided by the overriding objective of the Civil Procedure Act as provided by Section 1A & 1B of the said Act.

The Court has noted that the Applicant is seeking for stay of this proceedings until the cost awarded in ***SPMCC.No.223 of 2015***, are paid. Indeed the Court has noted that the Applicant herein was awarded costs in ***SPMCC.No.223 of 2015*** which cost was assessed at ***Kshs.67,700/=***.

It is clear that the costs awarded therein was quantified and it is a known amount. The Applicant has options of recovering the said costs in the stated Civil suit. The Applicant cannot seek for payment of the awarded costs through a separate suit. The Court will concur with the Respondent's submissions that the Applicant has not shown any attempt to execute the decree on the issue of costs and such attempt was thwarted by the Plaintiffs/Respondents. It is trite that the Court has discretionary power to issue the orders sought herein but such discretion should be exercised judicially. The Court finds that it would not be prudent to stay this matter just because the Applicant has not been paid costs in another suit.

Further, the Court finds that the necessary order that it is called upon herein is to ensure that there is no abuse of the court process. Therefore the Court finds that the necessary order herein is to decline to stay the proceedings herein given that the overriding objective of the Civil Procedure Act is to ensure that matters that are before courts are determined fairly and expeditiously.

On the second prayer of ordering the Plaintiffs/Respondents to deposit security into court in the tune of ***Kshs.1,500,000/=***, the Court finds such an order is issued at the discretion of the court. The Court finds that whether to grant security of costs or not will depend on the circumstances of each case. See the case of ***Marco Tools & Explosives Ltd...Vs...Mamujee Brothers Ltd (1988) (KLR 730***, where the Court held that:-

“As the cases show, the court has unfettered judicial discretion to order or refuse security. Much will depend upon the circumstances of each case...”.

Further in the case of ***Gatirau Peter Munya...Vs...Dickson Mwenda Githinji & 2 Others, CA Appl. No.38 of 2013***, the Court held that:-

“the applicant ought to establish that the respondent if unsuccessful in the proceedings would be unable to pay costs due to poverty. It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful”.

The Applicant has alleged that Plaintiffs/Respondents have not paid costs in the previous suit ***SPMCC.No.223 of 2015***. However, the Plaintiffs have alleged that they were not aware of the said costs and now that they are aware, the Applicant declined to accept costs until prayer no.2 is awarded. The Applicant has not demonstrated that in the event the Plaintiffs are unsuccessful, they would be unable to pay costs due to poverty or other circumstances.

For the above reasons and being guided by the provisions of Sections 3A and 1A & 1B of the Civil Procedure Act, the Court finds that the necessary order herein is to decline to allow the Applicant's prayers as sought in the instant Notice of Motion. Consequently, the Court finds that the Applicant's ***Notice of Motion*** dated ***22nd May 2016***, is not merited. The same is hereby dismissed entirely with costs to the Plaintiffs/Respondents.

Further, the Court directs that the parties herein to fix the matter for Pre-trial directions before the Deputy

Registrar of this Court within a period of 45 days from the date of this Ruling so that the matter can be set down for hearing of the main suit expeditiously.

It is so ordered.

Dated, Signed and Delivered at Thika this **9th** day of ***February*** **2018**.

L. GACHERU

JUDGE

In the presence of

Mr. Nyamweya for Plaintiffs/Respondents

No appearance for 1st Defendant/Applicant

M/S Momanyi holding brief for Wamiti Njagi for 2nd Defendant/Applicant

Lucy - Court clerk.

Court – Ruling read in open court.

L. GACHERU

JUDGE

9/2/2018