



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 715 OF 2009**

**PRIDE PROPERTIES LIMITED.....PLAINTIFF**

**VERSUS**

**CONSOLIDATED BANK OF KENYA LIMITED.....1<sup>ST</sup>DEFENDANT**

**GAMI PROPERTIES LIMITED.....2<sup>ND</sup>DEFENDANT**

**RULING**

This suit has been pending in court for the last eight (8) years. During the entire period, no genuine attempt has been made by the parties to prepare the case for full trial. What the parties have been involved in are interlocutory applications which they have filed one after the other since the suit was filed. What I now have before me is one such application by the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant's application was brought by way of Notice of Motion dated 29<sup>th</sup> February, 2016. The application itself has been pending hearing for the last two years.

In the application, the 2<sup>nd</sup> defendant has sought an order for security for costs in the sum of Kshs.150,000,000/- to be deposited by the plaintiff in an account to be held in the joint names of the plaintiff's and the 2<sup>nd</sup> defendant's advocates. The 2<sup>nd</sup> defendant has sought a further order that the 1<sup>st</sup> defendant does deposit the balance of the proceeds of sale amounting to Kshs.64,000,000/-in an account to be held in the joint names of the plaintiff and the 2<sup>nd</sup> defendant's advocates as part of security for costs.

The 2<sup>nd</sup> defendant's case:

The application was brought on the grounds set out on the face thereof and on the affidavit sworn by the 2<sup>nd</sup> defendant's director Bharat Ramji. The 2<sup>nd</sup> defendant has averred that it is the registered proprietor of the property known as LR 4858/3 (hereinafter referred to as "the suit property") which it purchased from the 1<sup>st</sup> defendant at a consideration of Kshs. 75,000,000/-. The 2<sup>nd</sup> defendant has averred that the 1<sup>st</sup> defendant sold the suit property in exercise of its statutory power of sale. The 2<sup>nd</sup> defendant has averred that despite the said property having been transferred to its name, the plaintiff who was previously registered as the owner of the suit property has refused to vacate and hand over possession of the property to the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant has averred that the plaintiff has been benefiting from the suit property which generates rental income of Kshs. 1,200,000/- per month. The 2<sup>nd</sup> defendant has averred that it has suffered and continues to suffer massive financial loss owing to its inability to utilize the suit property since the year 2009. The 2<sup>nd</sup> defendant has averred that the plaintiff's remedy if any is in damages against the 1<sup>st</sup> defendant. The plaintiff has contended that it would serve the interest of justice to grant the orders sought so as to remove the plaintiff from its position of advantage as against the 2<sup>nd</sup> defendant who is the registered owner of the suit property. The 2<sup>nd</sup> defendant has contended that the plaintiff should be ordered to provide security for costs failure to which its suit should be dismissed.

The plaintiff's case:

The application was opposed by the plaintiff through a replying affidavit sworn by its managing director, Mansukhlal Raichand Gudka on 11<sup>th</sup> October, 2016. The plaintiff has averred that in the application before the court, the 2<sup>nd</sup> defendant has sought security for costs from the plaintiff in the aggregate sum of Kshs. 214,000,000/-. The plaintiff has averred that the security demanded is in excess of the proceeds of sale of the suit property. The plaintiff has averred that it instituted this suit to challenge the manner in which the suit property was sold by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant which it has contended was illegal. The plaintiff has contended that the 1<sup>st</sup> defendant's power of sale had not arisen when it purported to sell the suit property by private treaty. The plaintiff has averred further that the property was sold at gross under value in that, whereas the suit property was valued at Kshs 170,000,000/-, the same was sold at Kshs. 75,000,000/-.

The plaintiff has contended that, in normal circumstances, the costs of a suit cannot exceed the value of the subject matter of the suit. The plaintiff has averred that the 2<sup>nd</sup> defendant has sought security which is more than the value of the suit property. The plaintiff has contended that the application for security for costs is intended to embarrass it and to stifle its right to access justice. The plaintiff has averred that in the

ruling that was delivered by the court on 15<sup>th</sup> July, 2011 on its application for injunction, the court had found that it has a prima facie case with a likelihood of success. The plaintiff has contended that the 2<sup>nd</sup> defendant's application is misconceived and has been brought in bad faith without any basis. The plaintiff has averred it is duly registered in Kenya and that it has a valuable asset which is the subject matter of this suit. The plaintiff has averred that the 1<sup>st</sup> defendant is holding on its behalf a sum of Kshs 64,000,000/- which the defendants can access for the recovery of their costs in the unlikely event that the suit herein is dismissed.

#### The submissions by the parties:

The application was argued by way of written submissions. The 2<sup>nd</sup> defendant in its submissions dated 27<sup>th</sup> February, 2017 discussed at length the principles upon which the court exercises its discretion in applications for security for costs. The 2<sup>nd</sup> defendant cited the cases of Keary Development vs. Tarmac Construction [1995] 3 ALL ER 534 and Ocean View Beach Hotel Ltd vs. Salim Sultan Mollo & 5 others [2012] eKLR for the said principles. The 2<sup>nd</sup> defendant submitted that the law treats natural and artificial persons differently in relation to the provision of security for costs against them as plaintiffs in an action. In support of this submission, the case of Ignazio Messina & another vs. Stallion Insurance Company Ltd. [2005] eKLR was cited.

The 2<sup>nd</sup> defendant submitted that the court has unfettered discretion on whether to order security for costs and that the discretion must be exercised judiciously depending on the circumstance of each case. In support of this submission the 2<sup>nd</sup> defendant cited the cases of Godfrey Otieno Onyango & 2 others vs. Crispin Oduor Obudo & 8 others (2014) eKLR and Sir Lindsay Parkinson & Company Ltd vs. Triplan Ltd. (1973) 2 ALL ER 273 as cited in Graham Vetch vs. Calvin Burges & another (2014) eKLR. The 2<sup>nd</sup> defendant submitted that the plaintiff has not demonstrated its financial capabilities in its replying affidavit and that it is prudent in the circumstances to secure the balance of the purchase price held by the 1<sup>st</sup> defendant as security for costs.

The 2<sup>nd</sup> defendant submitted further that in considering the plaintiff's chances of success, the court must have regard to section 68B of the Transfer of Property Act, 1882. The 2<sup>nd</sup> defendant submitted that under that section of the Transfer of Property Act, 1882 (now repealed), the plaintiff has no cause of action against the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant averred that the plaintiff's only remedy is damages against the 1<sup>st</sup> defendant. In support of this submission, the 2<sup>nd</sup> defendant relied on the cases of Downhill Ltd vs. Harith Ali El Busaidy & another, NRB CA No. 254 of 1999, Priscillah Krobought Grant vs. Kenya Commercial Finance Co. Ltd. and 2 Others, NRB CA No. 227 of 1995 and Maranya vs. National Bank of Kenya Ltd & another (1995-1998) 1 EA 177.

On its part, the plaintiff filed its submissions dated 21<sup>st</sup> March 2017 on 28<sup>th</sup> April, 2017. The plaintiff submitted that it has a *bonafide* claim against the defendants with good chances of success. The plaintiff reiterated that, it is a company duly registered in Kenya with a valuable asset which is the subject matter of this suit in respect to which the 1<sup>st</sup> defendant is holding Kshs. 64 million on its behalf. The plaintiff relied on the case of Saudi Arabian Airlines Corporation vs. Sean Express Services Corporation, NRB HCCC No. 79 of 2013 whereon an application for security for costs, the court found that the defendant had not adduced evidence to show financial limitation on the part of the plaintiff that would have warranted the shifting of evidential burden to the plaintiff to show its financial means. The plaintiff also cited the case of Shakhalaga Khwa Jirongo vs. The Board of Trustees of National Social Security Fund, NRB HCCC No. 957 of 2000 in support of its submission that poverty is not a sufficient ground to warrant the grant of an order for security for costs.

The plaintiff submitted further that the 2<sup>nd</sup> defendant's application that was brought 7 years after the suit was filed was brought after undue delay. In support of this submission, the plaintiff cited the case of Shakhalaga Khwa Jirongo (supra) where the court found an application for security for costs that was brought 4 years after the filing of the suit prejudicial to the plaintiff. The plaintiff also relied on the case of Noormohamed Abdulla vs. Patel [1962] E.A.447 where the court stated that applications for security must be made promptly.

The plaintiff submitted further that the court's discretion under Order 26(1) of the Civil Procedure Rules to order security for costs must be exercised judiciously. In support of this submission, the plaintiff cited the case of Gulf Engineering (East Africa) Ltd vs. Amrik Kalsi [1976] KLR 277. The plaintiff submitted further that the order seeking dismissal of a suit in the event that security is not furnished is draconian. The plaintiff submitted that this is not a proper case for an order for security for costs.

The application was opposed also by the 1<sup>st</sup> defendant. In its submissions dated 15<sup>th</sup> April, 2017 filed in court on 13<sup>th</sup> July, 2017, the 1<sup>st</sup> defendant relied on the case of Pyaralal Mhand Bheru Rajput vs. Barclays Bank & others HCCC 38 of 2004 cited in Beta Health care International vs. Grace Mumbi Githaiga & 2 others (2016) eKLR and argued that the 2<sup>nd</sup> defendant's application is defective, omnibus in nature and unfounded in law. The 1<sup>st</sup> defendant referred to Order 26 Rule 1 of the Civil Procedure Rules as well as the principles laid down in the cases of Sir Lindsay Parkinson & Company Ltd (supra) and Keary Development (supra) and submitted that the 2<sup>nd</sup> defendant has not met the threshold set out in the aforesaid cases for grant of an order for security for costs. The 1<sup>st</sup> defendant submitted that the court has unfettered power to order or refuse security and that the court's power must be exercised judiciously as was stated in the case of Marco Tool & Explosives Ltd vs. Mamujee Brothers Ltd (1988) KLR 730.

The 1<sup>st</sup> defendant submitted that the circumstances of this case do not warrant the orders sought by the 2<sup>nd</sup> defendant to have the 1<sup>st</sup> defendant deposit the excess proceeds of sale as part of security for costs. The 1<sup>st</sup> defendant submitted that no injustice would be occasioned to the 2<sup>nd</sup> defendant if the 1<sup>st</sup> defendant continues to hold the sale proceeds. The 1<sup>st</sup> defendant submitted that if the plaintiff succeeds at the trial, the 2<sup>nd</sup> defendant would be placed in the state in which it was before the suit and will have the monies held by the 1<sup>st</sup> defendant released back to it. The 1<sup>st</sup> defendant contended that this application was an attempt at double enrichment by the 2<sup>nd</sup> defendant who holds the title for the suit property and is still pursuing monies it had paid as part of its obligation under the sale agreement. The 1<sup>st</sup> defendant submitted that the applicant had failed to prove its inability to pay costs and reliance was placed on the cases of Marco Tools (supra) and Saudi Arabian Airlines Corporation (supra).

The 1<sup>st</sup> defendant submitted that no claim exists between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant cited the case of Patrick

Ngeta Kimanzi vs. Marcus Mutua Mulivi & 2 others HC EP 8 of 2013 cited in Mwadhahabu Rajabu Tayari vs. Kenya Power & Lighting Company Ltd(2016) eKLR and argued that the 2<sup>nd</sup> defendant's application against the 1<sup>st</sup> defendant is vexatious and do not meet the threshold set in the aforementioned cases. In conclusion, the 1<sup>st</sup> defendant referred to the case of Shakalanga Khwa Jirongo (supra) and submitted that the 2<sup>nd</sup> defendant is guilty of laches and as such it is disqualified from obtaining the orders sought.

Analysis and determination:

I have considered the 2<sup>nd</sup> defendant's application together with the affidavit filed in support thereof. I have also considered the affidavit in reply by the plaintiff in opposition thereto and the rival submissions by the advocates for the parties. The only issue arising for determination is whether the order for security for costs sought should be granted. Order 26 rule 1 of the Civil Procedure Rules provides as follows:

*“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.”*

It was common ground that the order for security for costs is discretionary and that the discretion must be exercised reasonably and judiciously depending on the circumstances of each case. See, Keary Development vs. Tarmac Construction (supra) and Ocean View Beach Hotel Ltd vs. Salim Sultan Mollo & 5 others (supra). In the Court of Appeal case of Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others (2014) eKLR the court stated that:

*“The rationale for security for costs is to ensure first, that a party is not left without recompense for costs that might be awarded to him in the event that the unsuccessful party is unable to pay the same due to poverty and secondly, that a litigant who by reason of his financial ability is unable to pay costs of litigation if he loses is disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party.”*

The onus was on the 2<sup>nd</sup> defendant to establish the plaintiff's inability to pay costs should the suit be dismissed. In the Court of Appeal case of Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others (supra) the court stated as follows:

*“In an application for security for costs, 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 same must be proven. See Hall -vs- Snowdon Hubbard & Co. (I), (1899) 1 Q.B 593, the learned Judge at page 594 stated:- “The ordinary rule of this court is that, except in applications for new trials, when the respondent can show that the appellant, if unsuccessful, would be unable through poverty to pay the costs of the appeal, an order for security for costs is made.” In Marco Tool & Explosives Ltd – vs- Mamujee Brothers Ltd. (supra), this Court expressed itself thus:- “The onus is on the applicant to prove such inability or lack of good faith that would make an order for security reasonable.”*

On the material before me, I am not satisfied that the 2<sup>nd</sup> defendant has discharged the burden of proof that was upon it. The 2<sup>nd</sup> defendant placed no evidence before the court showing that the plaintiff would be unable to offset its costs in the event the suit is dismissed. The onus was not on the plaintiff to demonstrate its ability to meet the 2<sup>nd</sup> defendant's costs. In any event, I am in agreement with the submission by the plaintiff that the sum of Kshs. 64 million held on its account by the 1<sup>st</sup> defendant is sufficient to meet the 2<sup>nd</sup> defendant's costs in the event that the suit is dismissed. I am of the view that this court having found that the plaintiff has a prima facie case with a probability of success it would amount to stifling the plaintiff's right to access justice if an order for security for costs was to be made in the circumstances of this case. I am also in agreement with the submissions by the plaintiff and the 1<sup>st</sup> defendant that the 2<sup>nd</sup> defendant's application has been brought late in the day and must fail on account of laches.

In the final analysis and for the foregoing reasons, it is my finding the 2<sup>nd</sup> defendant's application is misconceived and has no merit. The Notice of Motion dated 29<sup>th</sup> February, 2016 is accordingly dismissed with costs to the plaintiff and the 1<sup>st</sup> defendant.

**Delivered and Signed at Nairobi this 23<sup>rd</sup> day of February, 2018**

**S. OKONG'O**

**JUDGE**

Ruling read in open court in the presence of:

No appearance for the Plaintiff

Ms. Kinyanjui for the 1<sup>st</sup> Defendant

Mr. Mugo holding brief for Khakula for the 2<sup>nd</sup> Defendant

Catherine Court Assistant