



REPUBLIC OF KENYA



**Shikuku v County Government of Kakamega & 3 others; Mutoka & 2 others (Interested Parties)  
(Environment & Land Petition 8 of 2016) [2018] KEELC 3146 (KLR) (23 May 2018) (Ruling)**

*James Shikwati Shikuku v County Government of Kakamega & 6 others [2018] eKLR*

Neutral citation: [2018] KEELC 3146 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND PETITION 8 OF 2016**

**NA MATHEKA, J**

**MAY 23, 2018**

**BETWEEN**

**JAMES SHIKWATI SHIKUKU ..... PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF KAKAMEGA ..... 1<sup>ST</sup> RESPONDENT**

**THE KAKAMEGA COUNTY EXECUTIVE MEMBER FOR TRANSPORT,  
INFRASTRUCTURE, PUBLIC WORKS & ENERGY ..... 2<sup>ND</sup> RESPONDENT**

**MIDLAND CONSTRUCTION COMPANY LTD ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**ISAAC SHIVACHI MUTOKA ..... INTERESTED PARTY**

**CHARLES AMEYO AMUKOA ..... INTERESTED PARTY**

**ISAAC OTENYO ..... INTERESTED PARTY**

**Principles to be considered in awarding security for costs**

*The applicant sought to be struck out of the petition and requested security for costs. The court outlined principles for awarding security for costs, including the bona fides of the claim and the financial position of the claimant. It also emphasized that a prima facie case should not be dismissed summarily. The applicant failed to prove grounds warranting security for costs or its exclusion from the suit. The court dismissed the application, directing parties to proceed to trial without delay, with costs in the cause.*

Reported by Kakai Toili



**Civil Practice and Procedure** – orders – orders for security of costs – awarding of orders for security of costs – principles to be considered - what were the principles to be considered in awarding security for costs – Constitution of Kenya, 2010, article 48.

**Civil Practice and procedure** – suits – parties to a suit – striking out of parties to a suit – factors to consider - what were factors to consider before striking out a party from a suit.

### **Brief facts**

The applicant filed the instant application seeking orders that it be struck out of the petition and that the respondent provides security for costs in its favour. The application was based on the ground that the applicant was a stranger to the respondent's claim as it did not tender or apply to conduct any construction of or along the Elukaka – Mushilango road (the road). The applicant claimed that it had no part in the suit and that it neither trespassed nor caused any damage upon the petitioner's property.

### **Issues**

- i. What were the principles to be considered in awarding security for costs?
- ii. What were the factors to consider before striking out a party from a suit?

### **Relevant provisions of the Law**

#### **Constitution of Kenya, 2010**

##### **Article 48 - Access to justice**

*The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.*

### **Held**

1. The following principles ought to be followed by the courts in considering security for costs.
  - a. Whether the claimant's claim was *bona fide* and not a sham.
  - b. Whether the claimant had a reasonably good prospect of success.
  - c. Whether there was admission by the defendant on the pleadings or elsewhere that money was due.
  - d. Whether there was a substantial payment into court or an open offer of a substantial amount.
  - e. Whether the application for security was being used oppressively, for example so as to stifle a genuine claim.
  - f. Whether the claimant's want of means had been brought about by the conduct of the defendant's, such as delay in payment or in doing their part of the work.
  - g. Whether the application for security was made at a late stage in the proceedings.
  - h. Whether the plaintiff resided out of the jurisdiction.
  - i. Whether the plaintiff was in a position to pay for costs.
2. On the face of the respondent's pleadings it emerged that the respondent raised sincere and genuine triable issues that deserved determination on their merits. In considering the *bona fides* of a claim the court ought not to look at the success of the suit but rather the fact that there was a *prima facie* case that had to proceed for adjudication. The petition was not a sham but a *bona fide* claim.
3. The issue of proprietorship was not in dispute; expansion of the road had not been denied or controverted by the applicant. The applicant had not challenged or denied the *bona fides* of the claim. Upon review of the applicant's pleadings and response to the petition it appeared that the same were mere denials that could not amount to a defence at law.
4. Among the interested parties who would testify at the hearing of the petition were eye witnesses of the machines that were used to trespass on to suit land owned and occupied by the interested parties. They bore witness that the machines were written on the name of the applicant. The machines of the applicant, having been seen, it was only fair that the applicant be joined as respondent along with the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the petition. The court had to determine on merit who was responsible for the trespass onto and destruction of the property of both the respondent and the interested parties.



5. The applicant would not suffer any prejudice by remaining as a respondent in the petition. The respondent and interested parties could suffer prejudice if the applicant whose machines were witnessed in offending actions was disjoined.
6. The applicant failed to persuade the court and attain or prove the legal standards and thresholds that warranted orders for the provisions of security for costs. There was no reasonable cause to warrant the court to exercise its discretion in favour of the applicant and it would, therefore, not call up for any security for costs from the respondent.
7. The applicant failed to prove inability or lack of good faith on the part of the respondent that would make an order for security reasonable. It was a right under article 48 of the Constitution for every Kenyan to be able to access justice.
8. Whether the applicant was a stranger to the respondent's claim as it did not tender or apply to conduct any construction along the road and therefore had no part in the suit, was a matter of evidence. It was therefore fair that in pursuance of justice a full trial of the petition be carried out.

*Application dismissed.*

#### **Orders**

- i. *Parties advised to take steps in order to progress the case to trial without delay.*
- ii. *Costs to be in the cause*

#### **Citations**

##### **Statutes**

1. Civil Procedure Act
2. Constitution of Kenya, 2010

##### **Advocates**

None mentioned

## **RULING**

1. The application is dated 12<sup>th</sup> April 2017 and brought under order 26 rule 1 of the Civil Procedure Rules and section 3A of the [Civil Procedure Act](#) seeking the following orders;
  1. That the petitioner do provide security for costs of the 3<sup>rd</sup> respondent of the whole suit and all application herein estimated at Ksh. 500,000/=.
  2. That costs of this application be provided for.
2. It is grounded on the affidavit of Divyesh Kotecha, the nature of the case the general grounds herein and reasons to be adduced at the hearing hereof. The 3<sup>rd</sup> respondent is a stranger to the petitioner's claim. The 3<sup>rd</sup> respondent never tendered/applied for, or award any works, or undertook or intends to undertake any constructions of a road –Elukaka-Mushilongo affecting the subject matter. The 3<sup>rd</sup> respondent has never through any other person trespassed onto and damaged the petitioner's property. The petitioner was put on notice vide the defendant and replying affidavit filed herein but the petitioner has not taken any actions to mitigate further expenses/costs. The reliefs sought shall meet ends of justice.
3. The respondent submitted that he is one of the directors of the 3<sup>rd</sup> respondent-Midland Construction Company Ltd and have authority of his co-directors to swear the affidavit. That Midland Construction Company Ltd., its directors, employees or any of its agents are not aware of or involved in the alleged construction of a road for purpose of expanding the Elukaka – Mushilongo path. That Midland Construction Company Limited or any of its employees or agents are not aware of the whereabouts of



land parcel LR. Marama/Inaya/1165 and have never trespassed onto or destroyed property thereon. That Midland Construction Company Limited have never applied/tendered for, or awarded any works/contract/or undertook the construction of a road to expand the Elukaka – Mushilango path, which affects the purported land parcel LR. Marama/Inaya/1165. That on 11<sup>th</sup> May 2016 his counsel on record raised the issue of the 3<sup>rd</sup> respondent having been wrongly enjoined in this case. That despite the clear notice in the defence and replying affidavit and subsequent submissions, the petitioner has not caused the 3<sup>rd</sup> respondent to be struck off the record. That the petitioner’s means are unknown. That the petitioner has not demonstrated in any form his ability to meet the 3<sup>rd</sup> respondent’s costs. That it is in the interest of justice to grant the reliefs sought.

4. The petitioner’s submissions hereunder are made in response to the 3<sup>rd</sup> respondent’s application dated 12<sup>th</sup> April, 2017 wherein it seeks this court to issue orders that require the petitioner to provide security for costs, in favour of the 3<sup>rd</sup> respondent, for the suit. The order is sought based on the allegation by the 3<sup>rd</sup> respondent that it is a stranger to the petitioner’s claim as it did not tender and/or apply to conduct any construction of and/or along the Elukaka – Mushilango road, therefore, have no part in the suit. The 3<sup>rd</sup> respondent, further, alleges that it has neither trespassed upon the petitioner’s property nor has it caused any damaged thereto. The application offends the spirit of Article 48 of *the Constitution* as it is an attempt to impede access to justice. From the above brief background it is apparent that the main issue for determination before this court is that of security for costs. The courts have severally pronounced themselves on consideration that ought to be made when the court considers security for costs. In stare decisis, especially in the celebrated authority of Sir Lindsay Parkinson and Company Limited vs. Triplan Ltd, [1973] 2 WRR at page 684, which was quoted with approval in Moses Wachira vs. Niels Bruel & 2 others [2015] Eklr, Lord Denning M.R. propounded the following principles as those which ought to be followed by the courts:
  - i. Whether the claimant’s claim was bona fide and not a sham;
  - ii. Whether the claimant had a reasonably good prospect of success;
  - iii. Whether there was admission by the defendant on the pleadings or elsewhere that money was due;
  - iv. Whether there was a substantial payment into court or an “open offer” of a substantial amount;
  - v. Whether the application for security was being used oppressively, for example so as to stifle a genuine claim;
  - vi. Whether the claimant’s want of means had been brought about by the conduct of the defendant’s, such as delay in payment or in doing their part of the work;
  - vii. Whether the application for security was made at a late stage in the proceedings.
5. Further, too, in the decide case of Saudi Arabian airlines Corporation vs. Sean Express Services Ltd [2014] e KLR, the following principles were laid out:
  1. If the plaintiff resides out of the jurisdiction.
  2. If the plaintiff is in a position to pay for costs.
6. The gist of the petitioner’s claim is that there has been grave encroachment and trespass on his suit property, comprised of his homestead, purported as expansion of the Elukaka-Mushilongo path. The petitioner initially moved this court on the 27<sup>th</sup> April, 2016 under certificate of urgency seeking interim relief and/or protection of the court pending the hearing and determination of the



petition. In his application and petition the petitioner attached various material of probative value that would assist the court in adjudication and determination, inter alia, survey plans, a title document and photographic images of the suit property depicting trespass and destruction occasioned by the respondents. The court upon review and examination of the documents adduced appreciated that there existed a prima facie case and that the petitioner was exposed to the eminent risk of loss of proprietorship of his property, therefore, his right and liberties would be transgressed. Consequently, the court granted injunctive relief for the protection of his rights and for the purpose of preservation of the suit matter until substantive determination. Instantly, from the determination of the court at that juncture, it becomes resoundingly clear that the court identified that the petition and claim are bona fide.

7. On the face of the petitioner's pleadings it emerges, simply, that the petitioner raises sincere and genuine triable issues that deserve determination upon their merits. Further, in the alternative and without prejudice to the foregoing, in considering the bona fides of a claim the court ought not to look at the success of the suit but rather the fact that there is a prima facie case that should proceed for adjudication. From the above, it is submission on behalf of the petitioner that the petition filed is not a sham but a bona fide claim. Implicitly, the court espoused this upon review of the facts with subsequent grant of injunctive relief.
8. The substratum of the petition herein is the trespass and violation of the petitioner's property's boundaries. The issue of proprietorship is not in dispute; expansion of the road has not been denied or controverted by the 3<sup>rd</sup> respondent/applicant. In fact, the 3<sup>rd</sup> respondent applicant has not challenged and/or denied the bona fides of the claim. Upon review of the applicant's pleadings/response to the petition it appears that the same are mere denials that cannot amount to a defence at law.
  1. ERF Kenya Limited vs. Bus track Limited & Another [2005] e KLR
  2. Magunga General Stores vs. Pepco Distributors ltd [1987] 2 KRA 89 Nairobi Flour Mills Limited vs. Johnson Kithete t/a Farmers General Stores [2005] e KLR.
  3. Mama Ngina Kenyatta and another vs. Mahira Housing Company, Civil Application no. Nai 256 of 2003 [2005] e KLR.
  4. Pancras t. Swai vs Kenya Breweries Limited (2004) e KLR
  5. Shah vs. Shah (1982) KLR 85
  6. Saudi Arabian Airlines Corporation vs. Sean Express Services ltd (2014) e KLR.
  7. Kibiwot and 4 Others vs. Registered Trustees of Monastery of Our Lady of Victory Nakuru HCCC No. 146 of 2004 (2004) e KLR
  8. Marco Tools & Explosives ltd vs. Mamujee Brothers Ltd.
  9. Moses Wachira vs. Niels Bruel & 2 others [2015] e KLR.
  10. Bamburi Cement Co. Limited vs. Lawi Duda & 21 others Civil Application No. Nair 6 of 2013.
9. The submission, on behalf of the petitioner herein, that this application is not meritorious and it is frivolous, brought in bad faith with its only purpose being to stifle the claim by the petitioner.
10. This court has carefully considered the application and the submissions therein. The 3<sup>rd</sup> respondent herein filed an application dated 12/4/2017, in which he sought to be struck out of the petition No. 8 of 2016 on the ground mainly that the petitioner and by extension, the interested parties have no prima



facie, cause against him. It seeks this court to issue orders that require the petitioner to provide security for costs, in favour of the 3<sup>rd</sup> respondent, for the suit. The order is sought based on the allegation by the 3<sup>rd</sup> respondent that it is a stranger to the petitioner's claim as it did not tender and/or apply to conduct any construction of and/or along the Elukaka – Mushilango road, therefore, have no part in the suit. They opposed the said application on the grounds that among the interested parties in this petition and who will testify at the hearing of the petition, are eye witnesses of the machines that was used to trespass on to the private property, the subject pieces of land the in this petition owned and/or lawfully occupied by the interested parties. They bear witness that the machines were written on the name of the 3<sup>rd</sup> respondent. This is true of witnesses from both the affected LUKAKA-SHIRONGO path and Bukura-Shiwata path. The machines of the 3<sup>rd</sup> respondent, having been seen, it is only fair that the said 3<sup>rd</sup> respondent be joined as respondent along with the 1<sup>st</sup> and 2<sup>nd</sup> respondents. This court should determine on merit who is responsible for the trespass onto and destruction of the property of both the petitioner and the interested parties herein. They urge the court not to allow the application as it would pre-empt the necessary trial for the fair determination of the petition. This is in accordance with article 50 sub-article 1 of *the Constitution* of Kenya 2010 which states inter-alia.

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.

11. The issues involved in this dispute are such as required the petition to be heard with all parties as they are currently. The said application is also based on the same issues. The 3<sup>rd</sup> respondent will not suffer any prejudice by remaining as a respondent in this petition. The petitioner and interested parties however, may suffer prejudice if the respondent whose machines were witnessed in offending actions is disjoined at this stage. They are of the strong view that the 1<sup>st</sup> and 2<sup>nd</sup> respondents must have contracted the 3<sup>rd</sup> respondent to carry out the offending actions or otherwise the said 3<sup>rd</sup> respondent should disclose to the court under whose instructions he carried out the said actions.

12. The Court in the case of *Marco Tools & Explosives Ltd v Mamujee Brothers Ltd*, [1988] KLR 730 held:

“As the cases show the Court has unfettered judicial discretion to order or refuse security. Much will depend upon the circumstances of each case, though the guidance from *Noor Mohamed's* case is that the final result must be reasonable and modest.”

13. In the decisions in *The Official Receiver and Liquidator of Seipai Ltd. -vs- Narandas Nanji Chandrani* (1961) E.A.C.A & *Noor Mohamed Abdulla -vs- Ranchhodbhai J. Patel & Another* (1962) E.A.C.A, the applicant argued that the purpose of an order for security for costs is merely to secure costs that may become payable, irrespective of whether the amount is in dispute. This is to ensure that frivolous, vexatious and/or unsuccessful proceedings do not prejudice defendants.

14. Again also in the case of *Saudi Arabian Airlines Corporation v Sean Express Services Ltd* [2014] eKLR the court held that;

“Yet again, the law is settled in this area that an order for security for costs is a discretionary one. Order 26 rule 1 of the Civil Procedure Rules actually confers discretion on the court, which is recognition that there may be many cases where a call for security for costs may be refused. In fact, even where a company is insolvent, the court would still refuse to order security to be lodged if circumstances do not support any lodgment of security. The discretion is, however, to be exercised reasonably and judicially by taking absolute reference to the circumstances of each case. Such matters as; absence of known assets within the



jurisdiction of court; absence of an office within the jurisdiction of court; insolvency or inability to pay costs; the general financial standing or wellness of the Plaintiff; the bona fides of the Plaintiff's claim; or any other relevant circumstance or conduct of the Plaintiff or the Defendant. And the list is not, and I do not pretend to make it exhaustive. In the latter category, conduct by the Plaintiff will include activities which may diminish the chances of or makes recovery of costs very difficult, for instance recent close or transfer of bank accounts, close or minimizing of operations, and disposal of assets. And the conduct of the Defendant includes, filing of application for security for costs as a way of oppressing or obstructing the Plaintiff's claim, for instance, where the defence is mere sham, or there is an admission by the Defendant of money owing except there is deliberate refusal or delay to pay money owing or refusal to perform its part of the bargain”.

15. In the case of Abdalla vs Patel and another (1962) EA 447 the Court of Appeal for Eastern Africa, noted that:-

“It is right that a litigant however poor should be permitted to bring his proceedings without hindrance and have his case decided.”

16. It was stated in the case of Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others CA No. 38 OF 2013 [2014] eKLR that in an application for further 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. In Marco Tools & Explosives Ltd v Mamujee Brothers Ltd it was further held that

“The onus is on the applicant to prove such inability or lack of good faith that would make an order for security reasonable”.

17. In the case of Bamburi Cement Co Ltd vs Lawi Duda & 21 Others, Civil Application No. Nai 6 OF 2013, it was held that:

“The reasoning appears to be that a litigant, however poor, should be permitted to bring his proceedings without hindrance and have his case decided. The letter and spirit of our Constitution appears to support this position. Article 48 provides that:

The state shall ensure access to justice for all persons and, if any fee is required it shall be reasonable and shall not impede access to justice. The Article is couched in mandatory terms.

Similarly and further in Article 50 (1) of *the Constitution*, it provides that:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

We are therefore of the persuasion that a litigant is not to be shut out because of his/her impecunious position, as this may lead to discrimination based on the size of one's pocket.”

18. From the foregoing the applicant has failed to persuade this court and/or attain or prove the legal standards and thresholds that warrant orders for the provisions of security for costs. There is no reasonable cause why the court should exercise its discretion in favour of the applicant. It will, therefore, not call up for any security for costs from the petitioner. The applicant has failed to prove inability or lack of good faith on the part of the petitioner that would make an order for security reasonable. Every



Kenyan should be able to access justice is a constitutional right as stated in Article 48 of *the constitution* of Kenya 2010 thus,

“The state shall ensure access to justice to all persons ..... and shall not impede access to justice.”

19. They are of a strong view that the petitioner and interested parties, by bringing this petition in the court, are seeking justice in view of the offending and unlawful actions perpetrated against them by the respondents. The issue as to whether the 3<sup>rd</sup> respondent that it is a stranger to the petitioner’s claim as it did not tender and/or apply to conduct any construction of and/or along the Elukaka – Mushilango road, therefore, have no part in the suit is a matter of evidence. It is therefore fair that in pursuance of justice a full trial of the petition be carried out. The application is not merited and is dismissed. Costs of the application shall be in the cause. Parties are advised to take steps in order to progress the case to trial without delay.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23<sup>RD</sup> DAY OF MAY 2018.**

**N.A. MATHEKA**

**JUDGE**

