



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELCNO.342 OF 2013

ABARDARE INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

PAUL NYANJUI KAMOCHU & 34 OTHERS.....DEFENDANTS

RULING

1. This is a ruling in respect of two separate applications. The first application is dated 6th July 2016 brought by the third party. The second application is dated 26th July 2016 brought by the Plaintiff. Both applications are seeking the defendants to deposit security for costs. In the case of the first application the third party is seeking security of Kshs.12,000,000/- or such other sums as the court may order. In the case of the second application the plaintiff is seeking security of Kshs.24,000,000/-.

2. The plaintiff had brought a suit against some four defendants in the Chief Magistrate's Court at Thika. The plaintiff was seeking a declaration that the four were trespassers on its property and for an order of eviction. The other defendants were brought on board and the suit was transferred to Milimani ELC Court. The defendants filed a defence and raised a counter-claim against the plaintiff. The defendants also filed third party proceedings which finally brought in the third party.

3. It is the plaintiff and third party's contention that the defendants' counter-claim has no merit. The defendants contend that they bought their respective plots from one Margaret Wangui Kimani (now deceased) whose administrator is the 36th defendant. The defendants contend that the deceased had purchased the suit property during a public auction conducted pursuant to instructions from the third party who were realizing the suit property.

4. The third party has since denied that it sold the suit property in a public auction. It is on this basis that the plaintiff and third party argue that the counter-claim will fail and that they will not recover their costs as the defendants have no known assets or fixed abode; that the defendants had been evicted from the suit property and as their place of abode is not known or even their assets, it will be difficult to recover costs.

5. The defendants save for 25th and 36th defendants responded to the second application through replying affidavit sworn on 21st August 2017. They contend that the application by the plaintiff is baseless, speculative and unsubstantiated. They contend that some of them have constructed and live on the suit property. They further argue that the plaintiff is out to curtail their rights under Articles 40, 50 and 159 of the Constitution.

6. The 36th defendant separately filed a replying affidavit sworn on 15th January 2018 opposing both applications. The 36th defendant contends that the security for costs which in aggregate is in excess of 36 million is not justified; that costs follow the event and that to demand striking out of the counter-claim without first being proved amounts to a bar to access to justice.

7. The 36th defendant further contends that the suit land itself is sufficient security and that the security of costs is discretionary and that the applicants have not met the threshold for grant of such orders. He contends that the applicants in the two applications are out to delay the conclusion of the case.

8. I have carefully considered the two applications as well as the opposition to the same by the respondents. I have also considered the submissions filed by the parties herein. I must now determine whether to order security for costs or not. In the case of **Saudi Arabian Airlines Corporation –Vs- Sean Express Services Limited [2004]eKLR** the criteria for consideration of an application for security was stated thus:-

“such matters as; absence of known assets within the jurisdiction of the court; absence of an office within the jurisdiction of the 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 circumstances or conduct of the plaintiff or the defendant"

9. In the instant case, the defendants' suit is based on an alleged purchase from the 36th defendant who allegedly bought the suit property which was up for sale in a public auction. The alleged auction was on the instructions of the third party which has denied such claims. There was an eviction which was carried out pursuant to orders from the Chief magistrate's court at Thika before any such further demolitions were halted after the case came to this court. It is therefore clear that most defendants if not all do not reside on the suit property. The defendants assets are not known if any. They did not swear an affidavit of means to confirm their ability to pay costs. In the absence of evidence of means to pay costs, a justifiable case is made for grant of an order for security for costs.

10. The 1st to 24th defendants and 26th to 35th defendants in their submissions have tried to claim that a counter-claim is not a suit and as such it cannot come under the purview of order 26 Rule (1). This submission is without basis. A counter-claim is an independent suit that is why even if the main suit is dismissed, the counter-claim will still stand. The contested suit property cannot be a security for costs as the 36th defendant claims. A look at the counter-claim filed herein and the whole case by the plaintiff, shows that it is on shaky grounds and may possibly not stand. As was held in the case of **Ocean View Beach Hotel Limited –Vs- Salim Sultan Motor & 5 others [2012] eKLR**, the purpose of an order for security for costs is to protect a party from incurring expenses on a litigation which it may never recover from the losing side. It is not to deter the plaintiff from pursuing the claim.

11. In the third party's submissions, the suit property is said to be worth Kshs.120,000,000/- as of 25th April 2014. Though the submissions refer to a valuation by the Standard Property, there is no such valuation in the file. The issue of how much is to be deposited is in the discretion of the court. The suit property is said to be about 5 acres in Thika Municipality. This is no doubt a prime property. I will therefore order a combined security for costs of Kshs.10,000,000/- to cover both the Plaintiff and third party. The defendants are hereby ordered to deposit in court Kshs.10,000,000/- as security for costs within 90 days failing which the Plaintiff and the third party shall be at liberty to apply for dismissal of the counter-claim as per Order 26 Rule 5(1) of the Civil Procedure Rules. Costs of these applications shall be costs in the cause.

It is so ordered.

Dated, signed and delivered at Nairobi on this 13th day of **June, 2018**.

E.O.OBAGA

JUDGE

In the presence of:-

Mr Udoto for Mr Nyakundi for Plaintiff/Applicant

Mr Ngugi for third Party/Applicant

Mr Mathenge for defendants

Court Assistant: Hilda

E.O.OBAGA

JUDGE