



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 116 OF 2017

JOHN KIBET ROTICH.....PLAINTIFF

VERSUS

ELIJAH KIBET SIELE.....DEFENDANT

RULING

Introduction

1. This ruling is in respect of the defendant's application dated 14th March 2017 seeking the following orders:

- a) *That this honourable court be pleased to order the stay of proceedings in this suit pending the payment of the sum of Kshs. 183,440 by the plaintiff/respondent to the defendant/applicant on account of costs incurred by the defendant in BOMET PMCC No. 53 of 2015 John Kibet Rotich V Elijah Kibet Siele and KERICHO ELC MISC APPLICATION No. 56 Of 2016 John Kibet Rotich V Elijah Kibet Siele.*
- b) *That this honourable court be pleased to order the Plaintiff/ Respondent to deposit in court a sum of Kshs. 200,000 as security for costs in respect to this suit*
- c) *That this honourable court be pleased to order a timeframe within which the Plaintiff/Respondent should comply with orders 1 and 2 above*
- d) *That in default of compliance with the orders 1 and 2 above, the Plaintiff/respondent's suit be dismissed with costs*
- e) *That in any event the costs of this application be borne by the plaintiff/ respondent*

2. The application is supported by the defendant's affidavit sworn on the 14th March 2014. In the said affidavit the defendant depones that the plaintiff filed Bomet PMCC No 53 of 2015 which he withdrew on 17th October 2017. He was subsequently ordered to pay a sum of Kshs. 90,450 in respect of the said suit.

3. He depones that the plaintiff filed Kericho Misc Application No. 56 of 2016 which was dismissed with costs on 2nd June 2017. The plaintiff was then ordered to pay Kshs. 92,990 as costs following taxation of the said costs on 15th November 2017.

4. The defendant avers that the Plaintiff has not paid the said costs signifying that he is a man of straw and he has reason to believe that in the event that costs are awarded to him in this suit, the plaintiff will not be able to pay the costs.

5. The application is opposed by the Plaintiff through his Replying affidavit sworn on 16th April 2018 in which he argues that he was never served with the Notice of assessment of costs in the above-mentioned suits and he was therefore denied the opportunity to be heard during the taxation of the said costs. He depones that he has instructed his advocate to challenge the said costs. He further depones that the defendant has not made any attempts to execute for recovery of the said costs and he is therefore not justified in alleging that the defendant is a man of straw. He argues that he should not be driven from the seat of justice because he is perceived to be a man of straw.

6. The parties canvassed the application by way of written submissions and their respective counsels filed their submissions.

Issues for Determination

7. There are two issues for determination:

1) Whether the current suit should be stayed pending payment of costs in BOMET PMCC No. 53 of 2015 John Kibet Rotich V Elijah Kibet Siele and KERICHO ELC MISC APPLICATION No. 56 Of 2016 John Kibet Rotich V Elijah Kibet Siele.

2) Whether the plaintiff should be ordered to provide security for costs

Analysis and Determination

8. Section 25 Rule 4 of the Civil Procedure Rules provides as follows:

If any subsequent suit shall be brought before payment of costs of a discontinued suit upon the same or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs are paid.

9. With regard to the first issue, it is common terrain that the plaintiff had before the institution of this suit filed BOMET PMCC No. 53 of 2015 John Kibet Rotich V Elijah Kibet Siele and KERICHO ELC MISC APPLICATION No. 56 Of 2016 John Kibet Rotich V Elijah Kibet Siele. The case filed in Bomet court was withdrawn with costs to the defendant while the Miscellaneous application was dismissed with costs to the defendant. It is not in dispute that the plaintiff has failed to pay the costs in both suits amounting to Kshs. 183,440. The only excuse raised by the plaintiff is that he was not invited for taxation of the costs. The defendant however maintains that the plaintiff was served with the taxation notice.

10. Order 25 of the Civil Procedure Act is clear that if such costs are not paid, the court has a discretion to order that the subsequent suit be stayed. In the case of **I.M. N V P.M.K Murang'a HCCC No 38 of 2015 (O.S)** Waweru J held as follows:

“The court has an unfettered discretion under Order 25 Rule 4 of the Civil Procedure Rules , 2010 . The court may order a stay of any subsequent suit brought upon the same or substantially the same cause of action in a previous suit before payment of costs of the discontinued suit, but exercise of such discretion must accord with the dictates of justice and will depend upon the particular circumstances of the case”

11. See also the case of **John Kibet Kibor V Daniel Kiplangat Chepkwony (2017) eKLR**

12. It is therefore my finding that the said costs are due and payable.

13. On the second issue regarding security for costs, Order 26 Rule 1 of the Civil Procedure Rules provides that

“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.”

14. Counsel for the defendant has cited the case of **Gatirau Peter Munya V Dickson Mwenda Kithinji & 2 Others, Nyeri C.A No 38 of 2013** where the court observed as follows:

*“The rationale for security for costs is to ensure firstly, 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; Secondly, it ensures that a litigant who by reason of his financial inability is unable to pay costs of the litigation if he loses, is disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party. In **Noormohammed Abdalla V Ranchodbhal J. Patel & Another (1962) E.A 448** it was held that:*

“The order for security for costs in such a case is not directed towards enforcing payment of the costs as such, but is designed to ensure that a litigant who by reason of near insolvency is unable to pay the costs of the litigation when he loses, is disabled from carrying on litigation indefinitely except upon terms and conditions which afford a measure of protection to the other parties”

15. In an application for security for costs the court must balance the competing rights of the parties, that is the right to access justice enshrined in the Constitution of Kenya and the right to security for costs.

16. In the instant case, the plaintiff's conduct demonstrates that he does not intend to pay the costs already ordered against him yet he wants to proceed with the instant suit. This is an abuse of the process of the court. The defendant has pointed out that he is apprehensive that the plaintiff may not be able to pay the costs of this suit if it is dismissed. This apprehension is well founded given the plaintiff's previous conduct.

17. I have carefully considered the application, the rival affidavits and submissions herein and I am satisfied that the application has merit. Accordingly, I grant the application and direct as follows:

a) That the suit herein be and is hereby stayed pending the payment of the sum of Kshs. 183,440 by the plaintiff/respondent to the defendant/applicant on account of costs incurred by the defendant in BOMET PMCC No. 53 of 2015 John Kibet Rotich V Elijah Kibet Siele and KERICHO ELC MISC APPLICATION No. 56 Of 2016 John Kibet Rotich V Elijah Kibet Siele.

b) That the Plaintiff/ Respondent shall deposit in court a sum of Kshs. 100,000 as security for costs in respect to this suit within 30 days. If the total sum of Kshs. 283,440 is not paid within the stipulated period of 30 days, time being of essence, the suit shall be struck out.

c) The costs of this application shall be borne by the plaintiff/respondent

Dated, signed and delivered at Kericho this 13th day of June 2018

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J.M ONYANGO

JUDGE

In the presence of

1. Mr. Langat for the Defendant/Applicant
2. Miss Kitur for the Plaintiff
3. Court assistant - Rotich