



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 70 OF 2009

CHRISTOPHER MUSYOKA MUSAU.....PLAINTIFF

VERSUS

KATHERINE BROWNDEFENDANT

RULING

1. In the Application dated 29th September, 2016, the Plaintiff is seeking for the following orders:

a. That the Defendant do furnish the Plaintiff with security for costs in the sum of Kshs. 2,000,000.00.

b. That this Honourable Court be pleased to order that a government caveat be placed on all that parcel of land known as L.R. No. 19270 pending the hearing and determination hereof.

c. That costs for this Application be provided for.

2. The Application is premised on the grounds that the Defendant has disclaimed ownership of land known as L.R. No. 19270; that the Defendant has relocated to the UK and has no known assets that could satisfy the decree of the court and that the Plaintiff will be prejudiced unless security is furnished as prayed in the Application.

3. In his Affidavit, the Plaintiff has deponed that he entered into an oral agreement with the Defendant to purchase a portion of land of L.R. No. 19270 measuring 5 acres; that the sub-division of the suit land delayed; that a disclaimer agreement was entered into by the Defendant against payment of Kshs. 700,000 by the Plaintiff and that after the payment of the sum of Kshs. 700,000, the Plaintiff came to learn that a grant in respect of L.R. No. 129586 had been fraudulently issued in favour of the Defendant without his (*the Plaintiff*) knowledge.

4. According to the Plaintiff, the Defendant has relocated to the UK and that should he succeed in these proceedings, there is a high chance that it will be difficult to execute the decree.

5. In response, the Defendant's advocate deponed that the Application is fatally defective and should be struck out; that the Defendant purchased a portion of the suit land measuring 5 acres; that after paying the purchase price of Kshs. 350,000, the Defendant took possession of the land; that out of the Plaintiff's fraud and misrepresentations, the Defendant entered into a further agreement with the Plaintiff in 2007 and that after the disclaimer, the Defendant realised that the Plaintiff had obtained a Grant over the land that she had purchased.

6. The Defendant's counsel deponed that the basis of the Defendant signing the surrender documents was on the ground that the Grant had not been issued; that the Plaintiff is still in custody of the Grant; that the Defendant is willing to transfer the additional two acres of land to the Plaintiff and that the Plaintiff is frustrating the hearing of the main suit.

7. In the Further Affidavit, the Plaintiff deponed that the Defendant's advocate has descended into the arena of the litigants by arguing the merits of the suit; that the Defendant has not shown any assets that she owns in Kenya and that the Application should be allowed.

8. In his submissions, the Plaintiff's advocate submitted that Order 26 Rule 1 of the Civil Procedure Rules confers to this court the discretion to order the provision of security for costs; that the Defendant has admitted that she has relocated to the UK after her divorce and subsequent re-marriage and that the Plaintiff has a bona fide claim against the Defendant.

9. The Defendant's advocate submitted that the Defendant has not disclaimed her interest in the suit land as claimed by the Plaintiff and that the Defendant has a right to be heard. Counsel submitted that the proper party to make the Application for costs is the Defendant and that in any event, there is in place the Foreign Judgment (*Reciprocal Enforcement*) Act which the Plaintiff can utilize in case he is awarded costs.

10. This suit was commenced by way of a Plaint dated 20th March, 2009. In the Plaint, the Plaintiff alleged that he offered to sell to the

Defendant a portion of land of L.R. No. 19270 measuring 5 acres for Kshs. 500,000; that the Defendant made a part payment of Kshs. 350,000 and that after rescinding the agreement, the Defendant executed a disclaimer dated 4th July, 2007.

11. The Plaintiff finally averred in the Plaint that pursuant to the disclaimer, the Plaintiff wholly paid to the Defendant a refund of Kshs. 700,000. However, it later transpired that the portion of the suit land had been fraudulently registered in favour of the Defendant. The Plaintiff is seeking for the re-transfer of L.R. No. 19270 back to him and the costs of the suit.

12. In the Defence and Counter-claim, the Defendant averred that the signing of the disclaimer was informed by the non-disclosure of material facts by the Plaintiff and that the disclaimer was voidable at the Defendant's option, which option she exercised when she discovered that the land had been registered in her favour.

13. In the Counter-claim, the Defendant averred that the Plaintiff knowingly and fraudulently concealed the fact that a Grant to the suit land had already been issued and got the Defendant to sign the disclaimer out of frustration with the intention of defrauding her. The Defendant has sought for a declaration that she is the rightful owner of the five (5) acres of L.R. No. 19270 that she purchased from the Plaintiff.

14. Order 26 Rule 1 of the Civil Procedure Rules confers to this court the discretion to order the provision of security for costs "of any Defendant or third party" during the pendency of proceedings. In the case of **Shah vs. Shah (1982) KLR 95**, Law J.A held as follows:

"The general rule is that security is normally required from Plaintiffs resident outside the jurisdiction but as was agreed in the court below, a court has discretion, to be exercised reasonably and judicially, to refuse to order that security is given."

15. In the case of **Gatirau Peter Munya vs. Dickson Mwenda Githinji & 2 others, Civil Appeal No. 38 of 2013[2014] eKLR**, the Court of Appeal emphasized that in an application for security of 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.

16. Indeed, while dealing with an Application for costs, the court must balance the injustice that may be occasioned to the Plaintiff if prevented from pursuing a proper claim against the injustice to the Defendant if no security for costs is ordered.

17. The Defendant in this matter has filed a Defence and Counter-claim. The Defendant has not denied that she is no longer a resident of Kenya. Indeed, the Defendant did not respond to the depositions by the Plaintiff that she is likely not to be able to pay him the costs of the suit in the event her Counter-claim is dismissed. That notwithstanding, my reading of Order 26 of the Civil Procedure Rules and the decisions of this court and the Court of Appeal shows that it is the Defendant or a third party who ought to file an Application for security for costs either before filing a Defence or after filing a Defence. Order 26 Rule 5(1) of the Civil Procedure Rules provides that if security for costs 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.

18. Having sued the Defendant, the Plaintiff cannot claim for security for costs. Indeed, it is trite that he who desires the court to give Judgment in his favour must prove the existence of the facts he asserts. The Defendant, having been sued, was entitled to file a Defence and Counter-claim. The Plaintiff cannot sue the Defendant and at the same time insist on locking her out of defending the suit by asking for security for costs. That is not what the law contemplated.

19. Having found that a Defendant is not under a legal obligation to provide security for costs, I shall, which I hereby do, dismiss the Application dated 29th September, 2016 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 7TH DAY OF DECEMBER, 2018.

O.A. ANGOTE

JUDGE