



REPUBLIC OF KENYA

THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 138 OF 2015

JESCA SONGOLE :::::::::::::::::::::1ST PLAINTIFF/ RESPONDENT

BERNARD SONGOLE :::::::::::::::::::::2ND PLAINTIFF/RESPONDENT

VERSUS

CHARLES AMUYUNZU LWENYA :::::::1ST DEFENDANT/APPLICANT

GEROGE BWOYERE AKOTO :::::::::::::::2ND DEFENDANT//APPLICANT

RULING

The application is dated 5th September 2016 and is brought under order 26 Rule 1 and 5 Civil Procedure Rules 2010 seeking the following orders;

1. THAT this application be certified urgent and be heard in priority.
2. THAT an order do issue directing the plaintiffs to provide security for costs for the respondents in the sum of Ksh. 600,000/= or such other sum as the court may find just to be deposited in an interest earning account in the joint names of the advocates.
3. THAT in default of the furnishing security within the prescribed time, plaintiffs' application dated 24th June, 2016 be dismissed with costs to the respondents.
4. Costs of this application.

The grounds of the application are that, the plaintiffs' applicant application dated 24th June, 2016 lacks any merit or at all the same is purely *res judicata*, scandalous and an abuse of the court process. That there is real and justifiable risk that in the event the respondent succeeds they shall not be able to recover their costs. The costs of the main suit awarded on 11th May, 2016, by Hon. S. Mukunya remain unsettled to date. The plaintiff has no attachable assets and as such the need to secure costs of this application and other expenses already incurred. The plaintiffs are vexatious litigants, who litigate *ad infinitum* over the same subject matter.

The defendants/applicants submitted that the application dated 27th July, 2015 principally seeks to struck out the plaint for being frivolous, vexatious and an abuse of the court process. The defendants argued that the plaint was *res judicata* as the parties had already litigated on the issues raised in the plaint in previous suits to *wit*, Award 64 of 1985, Miscellaneous No 1 of 1995, Succession Cause No. 2344 of 2007. The Honourable Court on the 11th of May, 2016 ruled in favour of the defendants whereby it allowed the

defendants' application by holding that the plaintiffs' suit was *res judicata*. The court consequently struck out the suit with costs to the defendants. The plaintiffs/respondents being dissatisfied with the honourable court's decision filed for review of the same through their Notice of Motion Application dated 24th June, 2016 which is still pending before the court. The said application has been challenged by the defendants' for being frivolous, vexatious and an abuse of the court's process. The defendants/applicants then filed this present application in which they are seeking security for costs to be paid by the plaintiffs before their application for review is set for hearing. The plaintiffs'/respondents' despite having been served with the ruling and decree of this court had failed, neglected and/or refused to settle the defendants costs as awarded by this court. This has frustrated the defendants/applicants as they are unable to enjoy the fruits of the ruling. In their attempt to obtain the costs awarded to them from the plaintiffs/respondents, the defendants/applicants realized that the plaintiffs have no assets and/or properties capable of being attached and sold. Therefore in the event they are unsuccessful in their application in which they seek to review this court's delivered on the 11th of May, 2016, they will be unable to pay the plaintiffs their costs due to poverty and hence the need for the security for costs to be paid prior to the determination of their application. They relied on the following cases;

1. Gatiou Peter Munya vs. Dickson Mwenda Kithinji & 2 others (2014) eKLR
2. Hall vs Snodon Hubbard & Co. (I), (1899) 1 Q.B. 593,
3. Noormohamed Abdulla vs. Ranchodbhal J. Patel & Another (1962) E.A. 448,
4. Simon Kiprono Sang vs. Zakayo K. Cheruiyot & 2 others [2013] eKLR
5. Patrick Ngetakimanzi vs. Marcus Mutuamuluvi & 2 others – High Court Election Petition No. 8 of 2013

The Plaintiff/respondent submitted that vide an application dated 5/9/2016 the defendants/applicants herein sought inter-alia provision for security of costs in the sum of Ksh. 600,000/= within a prescribed time or the plaintiff's application dated 24/6/2016 be dismissed with costs of such security as the court shall deem fit is not furnished. The said application is supported by the affidavit of one GEORGE AKOTO the 2nd defendant herein where he depones that the plaintiff has no attachable assets and is a vexatious litigant. The defendant/applicant does not substantiate at all in his affidavit why he thinks the plaintiff is a man of straw. Further the costs herein have not been taxed as they are scheduled for 30/5/2016. The application therefore is premature and speculative. The plaintiff/respondent relied on the following cases;

1. Saudi Arabian Airlines Corporation vs. Sean Express Services Ltd Milimani Commercial & Admiralty Division Civil Case No. 79
2. Shah vs Shah [1982] KLR

The applicant/defendant has not provided any special circumstances that would warrant an order of furnishing of security for costs to be granted. That, the power to order provision of costs should not be used oppressively so as to stifle a genuine claim. The applicant herein seem inclined to stop the respondent from advancing his application for Review. Finally that the applicant has not placed before court decisive material evidence to enable this court exercise its discretion in his favour.

This Court has carefully considered the Instant Notice of Motion and the Court record in totality. The Court has also considered the relevant provisions of law, the written submissions, and the cited authorities. In the case of **Kenya Educational Trust Ltd v Katherine S. M Whitton civil Appeal No. 301 of 2009** it is held that 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. In the case of **Marco Tool & Explosives Ltd v Mamujee Brothers Ltd(1988) KLR 730** the court stated that;

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

The defendants/applicants herein sought inter-alia provision for security of costs in the sum of Ksh. 600,000/= within a prescribed time or the plaintiff's application dated 24/6/2016 be dismissed with costs of such security as the court shall deem fit is not furnished. The defendant/applicants' stated that the plaintiff/respondent has no attachable assets and is a vexatious litigant. The defendant/applicant does not substantiate at all these allegations.

For the above reasons, the court finds that the defendant/applicant's Notice of Motion dated 5th September 2016, is not merited. The upshot thereof is that the said application is dismissed entirely with costs to the plaintiff/respondent herein.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 12TH DAY OF JULY 2017.

N.A. MATHEKA

JUDGE