



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ENVIRONMENT AND LAND COURT

ELC CASE NO.207 OF 2013

MICHAEL ODERA OTOM (SUING AS THE ADMINISTRATOR OF THE ESTATE OF

THOMAS OTOM AGULLO.....PLAINTIFF

VS.

COMMISSIONER OF LANDS.....1ST DEFENDANT

THE ATTORNEY GENERAL..... 2ND DEFENDANT

KENYA RAILWAYS CO-OPERATIVE SOCIETY.....3RD DEFENDANT

RULING

1. **Railway Housing Co-operative Society Limited**, the 3rd Defendant, filed the notice of motion dated 11th May 2015 against **Michael Odera Otom**, the Plaintiff, seeking for a deposit of Kshs1,500,000/= or any other sum the court may direct as security for costs pending the hearing of this suit. The 3rd Defendant also prays that in the event the Plaintiff fails to deposit the amount determined as security for costs, the suit be dismissed with costs. The notice of motion is based on the five grounds on its face and supported by the affidavit of **Evans Orangi Bogonko**, the chairman of the 3rd Defendant, sworn on 11th May 2015.
2. The application is opposed by the Plaintiff through the affidavit in reply sworn by **Michael Odera Otom** on 7th October 2015.
3. The counsel for the parties appeared in court on 4th November 2015 for the hearing of the main suit but agreed to have the notice of motion dated 11th May 2015 disposed off first. The counsel for 1st and 2nd Defendant indicated that the application did not touch on his clients and had not been served. The counsel for 3rd Defendant then filed their submission dated 4th December 2015 while the Plaintiff's counsel filed theirs dated 15th December 2015. The following is a summary of the two submissions:

a) **3RD DEFENDANT'S SUBMISSIONS;**

That the Plaintiff has since the filing this suit in 2013 been intent in prolonging the 3rd Defendant's agony of having to attend court for interlocutory proceedings resulting to delay in finalization of the suit. That the court should exercise its discretion in favour of the 3rd Defendant and order the Plaintiff to offer security for costs as the Plaintiff has no known means of income and has failed to pay the costs already awarded to the 3rd Defendant. The counsel referred the court to the following two cases on the principles that guides the court in

exercising its discretion in an application for costs.

- i) **Keary Development -V- Tarmac Construction** (1995) All E.R. 534 and
 - ii) **Essav Telecom Kenya Limited & Another** [2015] eKLR.
- b) **PLAINTIFF'S SUBMISSIONS;**

That an order to require the plaintiff to provide security for costs would amount treating the Plaintiff in a discriminatory way contrary to **Article 27(1) of the Constitution** which provides that every person is equal before the law and has a right to equal protection and benefit of the law. That the application is oppressive and obstructing the Plaintiff's claim and will result in delaying the fair trial of suit. That the provision of **Order 26 Rule 1 of the Civil Procedure Rules** gives the court discretion in considering application for security of costs. The counsel referred to the following decided cases.

- I) **Noor Mohammed Abdulla -V- Patel** {1962} E.A.447, 453,
- ii) **Marco Tools & Explosives Ltd -V- Mamujee Brothers Ltd** [1988] KLR 730
- iii) **Sir Lindsay Parkinson & Co Limited -V- Triplan Ltd** [1973] 2 WRR 684
- iv) **Keary Development -V- Tarmac Constructions** [1995] 3 All ER 534
- v) **Bamburi Cement Co. Ltd -V- Lawi Duda & 21 others Nairobi Civil Application No.6 of 2013.**

The counsel further submitted that the 3rd Defendant has the onus to prove that the plaintiff would be unable to pay the costs if unsuccessful in his claim as alleging poverty alone was not enough as the Plaintiff has a legitimate claim. That the Plaintiff is entitled to the suit land which is Community land and was obtained by the Government fraudulently and illegally. That the 3rd Defendant's title is therefore defective for having been obtained through fraud. That the application should be dismissed with costs as it is meant to stifle the Plaintiff's claim.

4. The court has considered the ground on the notice of motion, the affidavit evidence by both parties, the pleadings filed and the submissions by counsel and come to the following findings:

a) That this application brought under **Order 26 Rules 1, 5(1) and 5, Order 51 Rule 1 of the Civil Procedure rules and Section 3A of civil Procedure Act**. The Provision of **Order 51 Rule 1 of the Civil Procedure Rules** provides the procedure of moving the court through the motion while **Section 3a of the Civil Procedure Act** restates the court's inherent power " **to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.**" **Order 26 of the Civil Procedure Rules** provides for security for costs. While Rule 1 of the said Order allows the court to make orders on security for costs either in whole or in part. **Rule 5 (1)** of the Order provides for what happens when the order for security of costs is not provided within the time given while **Rule 6** provides for the investment of the security of costs in a financial institution.

b) That as both counsel for the 3rd Defendant and Plaintiff have correctly submitted the court has the discretion in appropriate cases to allow or decline the application for security for costs under **Order 26 Rule 1 of the Civil Procedure Rules**. That counsel also agreed that some of the principles to guide the court in determining the application are as set out in the case of **Keary Development -V- Tarmac Construction (1995) 3 ALL E.R. 534 as adopted in Ocsan View Beach Hotel Ltd – V- Salim Sultan Mollo & 5 others (2012) EKLR by Tuiyot J and in Moses Wachira – V- Niele Bruei & 2 others [2015] eKLR by J. Mohammed JA. The principles are as follows:**

" 1. That the court has a complete discretion, whether to order security, and accordingly it will act in the light of all the relevant circumstances.

2. The possibility or probability that the Plaintiff company will be deterred from pursuing its claim by an order for security is not without a more a sufficient reason for not ordering security.

3. The court must carry out a balancing exercise on one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the Plaintiff's claim fails and the defendant find himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.

4. In considering all the circumstances the court will have regard to the Plaintiff's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure.

5. The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply, nominal amount; it is not bound to make an order of a substantial amount.

6. Before the court refuses to order security on the unfairly stifle a valid claim, the court must be satisfied that in all the circumstance, it is probable that the claim would be stifled.

7. The lateness of the application for security is a circumstance which can properly be taken into account."

c) That the main basis for the 3rd Defendant to seek for the order of security for costs is that the plaintiff has not paid or has failed to pay the costs already awarded against him in the interlocutory applications, that the plaintiff has been delaying the finalization of the suit by filing many interlocutory applications that demand of the 3rd Defendant and his counsel, who are based in Nairobi to incur substantial expenses to come to court, and that the Plaintiff's means of livelihood is unknown. The Plaintiff has countered that argument by submitting that the 3rd Defendant title to the suit land is defective having been obtained through fraud and illegally and that the application itself has led to delay in finalization of his suit. He has further submitted that an order of security for costs would be discriminatory against him and would hinder his right to access justice. The court has considered the rival submissions and noted that there is no evidence tendered to show whether timelines had been given within which the Plaintiff was to pay the awarded costs and failed to do so. There is also nothing on record to show whether the party in whose favour the costs were awarded has commenced the execution process in accordance with the law against the plaintiff and failed to raise the amount for reasons of the Plaintiff being a man of straw. The court further find that the previous interlocutory application filed by the plaintiff may have caused the commencement of the hearing of main suit to delay. However the record shows that the Plaintiff's counsel moved the court on 4th June 2015 and fixed the matter for hearing of the main suit on 4th November 2015, and when the matter was called for hearing the counsel indicated that he was ready for hearing with one witness. The hearing could not however commence because the 3rd Defendant's counsel wanted their application dated 11th May 2015, which is subjected matter of this ruling, to be disposed off first. In spite of all the previous interlocutory applications by the Plaintiff, the records shows that he is now ready for the main hearing to commence.

d) That the plaintiff claim under the plaint dated 7th August 2013 is for an order declaring

that the registration of the suit land with the 3rd Defendant was fraudulently obtained and that the suit land belongs to the estate of **Thomas OtomAgullo**. The amended plaint dated 3rd June 2015 added the prayer of cancelling the 3rd Defendant title document among others. The 3d Defendant in the initial defence dated 16th August 2013 and amended defence dated 17th June 2015 prayed for the plaintiff's suit to be dismissed with costs averring that they are bona fide purchaser's for value and that they have had uninterrupted possession since 2004. This court is required to balance the interest of both the Plaintiff and the 3rd Defendant in deciding in favour or against the order of security for costs. The court is not in a position to pronounce itself on the merits of the plaintiff's case as against the 3rd Defendants defence. The application for security for costs was filed almost two years after the commencement of the suit and filing of the defence and that is a factor the court has to consider. That though the value of the suit property is not apparent from the pleadings the 3rd Defendant has prayed for security for costs to be Kshs1,500,000/= taking the value of the suit property and developments therein at Kshs.15,000,000/=. The costs to the successful party will be ascertained at the end of the trial upon taxation or parties agreeing on the quantum. The figure proposed by the 3rd Defendant can only be taken as an estimate for purposes of their application. It is the responsibility of the court to set or fix the amount of security for costs where it exercises its discretion in favour of requiring the same to be provided.

e) That though the 3rd Defendant has questioned the Plaintiff financial standing by stating that his means of livelihood is unknown, the Plaintiff did not offer any facts to dispute the 3rd Defendant's concern that he may, if not successful, fail to meet their costs. The Plaintiff could have addressed the 3rd Defendant's concerns by disclosing indicators of his ability to meet such costs in the event an order is made against him. The affidavit in reply contains among the annexures a photograph of a permanent house possibly constructed on the suit land. However no details of properties or assets owned by Plaintiff was given.

f) That in view of the number of applications so far filed by the Plaintiff, the 3rd Defendant's application on the issue of the security for costs cannot be said to be unjustified. In deciding on the amount of security for costs the court should bear in mind that the figure should be reasonable so as not to shut the Plaintiff from the seat of justice.

5. That flowing from the foregoing the court is of the view that an amount of Kshs.500,000/= as security for costs would be fair and just. The 3rd Defendant's notice of motion dated 11th may 2015 is hereby allowed and the flowing orders issued..

a) That the plaintiff is directed to provide security for costs by depositing Kshs500,000/= (five hundred thousand) in an interest earning account in a financial institution agreed between his Advocates and that of the 3rd Defendant's advocate in the joint names of the two parties advocates within thirty (30) days or alternatively deposit a security or securities of a similar amount with the court within thirty (30) days.

b) That in default to the Plaintiff complying with (a) above, the 3rd Defendant be at liberty to move the court for a dismissal order in accordance with Order 26 rule 5(1) of civil Procedure Rules.

c) The costs will be in the cause.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 9TH DAY OF MARCH 2016

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr Omondi for Plaintiff/Respondent

M/S Alinatine for Njogu for 3rd Defendant/Applicant.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

9/3/2016

9/3/2016

S.M. Kibunja J

Court Assistant Oyugi

Parties absent

Mr Omondi for Plaintiff/Respondent

M/S Alinatine for Njogu for 3rd Defendant/Applicant

Court: Ruling delivered in open court in presence of Mr Omondi for Plaintiff/Respondent and M/S Alinatine for 3rd Defendant/Applicant.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

9/3/2016