



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC CASE NO. 100 OF 2014

IN THE MATTER OF LR NO. LOC.2/GACHARAGE/3556

AND

IN THE MATTER OF DECLARATION OF
CUSTOMARY TRUST

BETWEEN

ARNEST NJOROGE MAINA 1ST APPLICANT

FLORENCE WANJA NJOROGE 2ND APPLICANT

-VERSUS-

SAMUEL MAINA MACHARIA RESPONDENT

RULING

1. **Arnest Njoroge Maina and Florence Wanja Njoroge** (hereinafter referred to as the Applicants) brought the notice of motion dated **30th May, 2015** praying that the order issued in favour of the respondent on **12th May, 2014**, inhibiting dealings with the parcel of land known as L.R No. Loc.2/Gacharage/3556 be lifted/discharged forthwith.
2. The application is premised on the grounds that on **3rd March, 2015** the court ordered the respondent to deposit **Kshs. 100,000/-** as security for costs; that the respondent failed, refused and/or neglected to deposit the security ordered by the court within the time ordered and at all.
3. The application is supported by the affidavit of **Samuel Maina Macharia** sworn on **30th May, 2015** where the grounds on the face of the application are reiterated.
4. Despite having been served with the application through his advocates, **C.M King'ori Advocates**, as attested by the affidavit of service of **Samau Kamau Ngigi**, sworn on **13th October, 2015**, the respondent did not file any response to the application.

Analysis and determination

5. Vide the ruling of this court delivered on 3rd March 2015, this court issued an order inhibiting any further dealings with LR No. Loc.2/Gacharage/3556 pending the hearing and determination of the originating summons hereto. The order was issued pursuant to an application by the applicants dated 12th May, 2014 in which the applicants sought to inhibit dealings in the suit property pending the hearing and determination of the application. In finding in favour of the applicant the court observed:-

“...it is the court’s duty to preserve the land pending the hearing and determination of the originating summons because if the same is not preserved, the applicants rights over the suit land may be extinguished if the transfer is concluded.”

6. With regard to the respondent’s application for security for costs, the court observed:-

“...Since the proceeds from the sale of the suit land have been used by the respondent to purchase another property for his sole benefit, I will only allow the application to the extent that the applicants do deposit as security for costs Kshs. 100,000/- as security for any decree that may be obtained by the purchaser Douglas Mwangi Nderu against the respondent. The same to be deposited in court within 45 days from the date hereof.”

7. Apparently, the applicants failed to comply with the order requiring them to deposit the security for costs within the time ordered by the court and at all rendering the current application necessary.

8. The sole issue for determination is whether the applicant has made up a case for lifting or discharge of the orders issued in favour of the respondent.

9. The rationale for issuance of an order for security of costs was stated by the Court of Appeal in the case of **Peter Munya Vs Dickson Mwenda** thus:

“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 ability 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.

10. The effect of failure to provide security for costs was provided in the case of **Bulk Medicals Limited (In Receivership) v. Paramount Universal Bank Ltd & 2 Others (2012)eKLR** thus:-

“... Court orders must be honoured in observance and never in breach. By its failure to obey the order to deposit security for costs, the Plaintiff invited upon itself the wrath of Order XXV Rule 5(1). Since that rule does not accord the court any discretion, I hereby order that this suit be and is hereby dismissed with costs.”

11. **Order XXV Rule 5(1)** cited in **Bulk Medicals Limited (In Receivership) v. Paramount Universal Bank Ltd & 2 Others** (*supra*) is replicated in **Order 26 Rule 5(1)** of the Civil Procedure Rules, 2010.

12. Like in the case of **Bulk Medicals Limited (In Receivership) v. Paramount Universal Bank Ltd & 2 Others** (*supra*), the respondents in this case did not furnish the security ordered by the court within the time ordered by the court and at all. To make matters worse, the respondents did not bother to offer any explanation why they did not comply with the orders of the court hereto. That being the case, this court invokes the provisions of **Order 26 Rule 5(1)** of the Civil Procedure Rules which are in the following terms:

“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.”

13. Although the current application is not for dismissal of the suit as contemplated in **Order 26 Rule**

5(1) *supra*, I am satisfied that a case has being made for granting the orders sought. Consequently, I allow the application as prayed.

Dated, signed and delivered at Nyeri this 7th day of October, 2016.

L N WAITHAKA

JUDGE

In the presence of:

N/A for the applicants

N/A for the respondent

Court assistant - Lydia