



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO. 38 OF 2012**

**SAID ADAM KAZUNGU.....PLAINTIFF/RESPONDENT**

**VERSUS**

**KIBOKONI PROPERTIES LTD.....DEFENDANT/APPLICANT**

**R U L I N G**

**Introduction:**

1. What is before me is the Defendant's Application dated 4<sup>th</sup> July 2012 seeking for the following orders:

**(a) That the Plaintiff do hereby provide security of the costs of the Defendant in the sum of Kshs.1,500,000 or such other sum as the court deems fit and just to grant within 30 days of the Order failing which the suit be dismissed or struck out with costs to the Defendant.**

**(b) That the costs of this Application be provided for and paid by the Plaintiff in any event.**

2. The Application is supported by the Affidavit of the Defendant's Director, Giuseppe Passogla.

**The Defendant's/Applicant's case:**

3. According to the affidavit of the Defendant's Director, the Defendant purchased the suit property in the year 2008 and spent Kshs.5,000,000 to erect a perimeter stone wall around the property; that the property is valued at Kshs.120,000,000 and the advocate legal fees is in excess of Kshs.1,500,000.
4. The Defendant's director has deponed that the Plaintiff is facing several criminal cases in respect of the suit property and forgery of court orders. Consequently, it was deponed, the Plaintiff's ability to meet any resultant costs in these proceedings is doubtful as the Plaintiff has no known property or source of livelihood to meet the enormous costs being incurred.
5. The Defendant's director finally deponed that the Plaintiff has no locus standi or a prima facie interest in the suit property and that the suit is frivolous, vexatious, incompetent, misconceived and otherwise an abuse of the process of the court.

**The Plaintiff's/Respondent's case**

6. On his part, the Plaintiff deponed that the Application by the Defendant is meant to deny him a hearing; that this court is bound by Article 159 of the Constitution to decide matters in court on substance rather than technicalities and that the value of Shs 120,000,000 is not supported by an independent valuer.
7. The Plaintiff/Respondent finally averred that he has a locus standi to file this suit being the administrator of his late father's estate and that the Defendant has not demonstrated his inability to pay the costs in the event that he loses the case.
8. The Plaintiff/Respondent finally deponed that he intends to amend his Plaint to make it water tight and that he has evidence to show that the title used by the Defendant to have the property transferred to him was among those cancelled by the Government vide a gazette notice number 2505 of 30<sup>th</sup> May 1986.

### **Submissions:**

9. Mr. K'opere, the Defendant's learned counsel submitted that this suit was stayed by the court to await judgment in HCCC No. 2 of 2007 and HCCC No. 9 of 2012.
10. Counsel submitted that the Judgment in the said two consolidated matters was delivered by the court in favour of the Defendant/Applicant.
11. Counsel submitted that the Plaintiff in this matter has been charged with numerous offences in respect to the suit property, including forging of a court order. Counsel submitted that the Plaintiff is hell bent to vexing the Defendant in view of the fact that this court has held that the suit property belongs to the Defendant.
12. For the Plaintiff to be allowed to proceed with the suit, it was submitted, the Plaintiff should be ordered to furnish security for costs.
13. According to counsel, the Plaintiff has never extracted summons since he filed the suit and that a valuation report annexed on the Application shows the value of the suit property.
14. The Defendant's counsel finally submitted that a decision on the proprietorship of the suit property having been made, this court cannot entertain this suit; that the Plaintiff has not disclosed his assets in the Replying Affidavit to show that he is able to pay costs in the event he loses the case and that the circumstances of this case shows that it will be difficult to recover costs from the Plaintiff.
15. Mr. Mouko, the Plaintiff's/Respondent's learned counsel submitted that the Defendant's Application is meant to frustrate the Plaintiff from pursuing the suit; that the Defendant has not made any efforts to trace the Plaintiff's assets and that the Plaintiff has filed the suit as an administrator of the Estate of his late father.
16. The Plaintiff's advocate submitted that the decree alluded to in HCCC No. 49 of 2010 is in respect to his late father and not him and that it is not true that the Defendant has an indefeasible title in respect to the suit property.
17. Counsel submitted that the issue of the validity of the Defendant's title was decided in a matter in which his client was not a party; that the Defendant withdrew HCCC No. 15 of 2005 in which he was a party without his client's consent and that the Plaintiff should be given an opportunity to be heard.
18. The Plaintiff's counsel finally submitted that the Defendant has used tactics to deny the Plaintiff the suit property and that the amount of Kshs.1,500,000 for security for costs is punitive and unwarranted.

### **Analysis and findings:**

19. The Application before me is for security of costs in the sum of Kshs.1,500,000 or such other sum as the court deems fit and just to grant failing which the suit should be dismissed or struck out. The Application has been filed pursuant to the provisions of Order 26 Rules 1, 2 and 5 of the Civil Procedure Rules.
20. 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 or any Defendant or third or subsequent party be given by any other party.
21. Order 26 Rule 2 on the other hand provides that if an application for security for costs is made

before a Defence is filed, there shall be filed with the application an affidavit setting out the grounds of the Defence.

22. A perusal of this file shows that this suit was commenced by way of a Plaint on 12<sup>th</sup> March 2012. The said Plaint was filed simultaneously with an application for injunctive orders.
23. The Application for injunctive orders was heard by the court and a Ruling was delivered on 31<sup>st</sup> October 2012. In the said Ruling, the court held as follows:

**“These developments however, cannot be an excuse for the applicant herein (the Plaintiff/Respondent) to file yet another suit in the High court during the pendency of the previous suits....in view of the history of this matter, I think such an action is tantamount to an abuse of the court process leading to unnecessary proliferation of suits and backlog. I do therefore decline to entertain the present suit pending the hearing and determination of HCCC NO. 2 of 2007 as consolidated with HCCC No. 9 of 2012 and appropriate disposal of CMCCC NO. 459 of 2010. This suit is accordingly stayed”.**

24. It would appear that the Plaintiff/Respondent did not apply to be enjoined in HCCC No. 9 of 2012 and 2 of 2007 after the Ruling of the Court staying this matter. The said two suits were finalised and a joint judgment delivered on 25<sup>th</sup> July 2014 in favour of the Defendant herein is so far as the ownership of the suit property is concerned.
25. I have gone through the entire file and I have not come across the Summons to Enter Appearance which were supposed to be extracted and served upon the Defendant. Indeed, there is no indication that the said summons were ever extracted by the Plaintiff, the stay of the suit notwithstanding.
26. Order 26 of the Civil Procedure Rules does not state the circumstances under which the court may order for security for costs. The discretion to order for security for costs is left to the court, which discretion has to be exercised judicially.
27. Unlike persons or companies resident within the jurisdiction of the court, a Plaintiff who is a resident outside the jurisdiction of the court more often than not is required to provide security for costs. In the case of **Parmax Limited Vs Austin & Partners Limited (2006) eKLR**, it was held as follows:

**“I also remind myself that in general, Plaintiffs who were resident outside jurisdiction should ordinarily provide security for costs, even though the court may decide otherwise.”**

28. In **Re-Percy Kelly Nickel, Cobalt and Choma Thon Mining Company (1875-76) CLD 531**, Jessel MR states as follows:

**“The Principle is well established that a person instituting legal proceedings in this country, and being abroad, so that no adverse order could be effectually made against him if unsuccessful, is by the rules of the court compelled to give security for costs. That is a perfectly well established and a perfectly reasonable principle.”**

29. In **Cozat Vs Brogden (1894) 2 Q. B. 30 at 33**, Collins L. J held that if there is a strong prima facie likelihood that the defendant will fail in his defence, he may be refused security of costs.
30. In the case of **Thune and Another Vs London Properties Ltd. & Others (1990) 1 ALL ER 972**, Bingham L.J. Cited the decision of **Barkely Administration Inc. Vs Mc. Clerllard (1990) 1 All ER 972** which summarized the legal position in England as follows:

**“As I have stressed, residence abroad merely confers jurisdiction. The Court must then consider when in all the circumstances it would be just to make an order. The English authorities make it plain that residence abroad is not per se a ground for making an order. As to the current practice it is, I accept, common for orders to be made on little, if anything, more than the fact of residence outside the jurisdiction, but this is because it is also commonly the case that it is obvious from the pleadings that the enforcement of any judgment for costs in**

**the event of the Plaintiff's action being dismissed would be difficult and costly to enforce.”**

31.The Court of Appeal came up with a further criterion on the test to be applied by the court while determining whether or not the Plaintiff should be ordered to tender security for costs in the case of **Shah Vs Shah (1982) KLR 95** 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 a discretion, to be exercised reasonably and judicially to refuse to order that security be given. The test on application for security is not whether the Plaintiff has established a prima facie case, but whether the defendant has shown a bona fide defence.” (emphasis mine).**

32.The Plaintiff in this matter is seeking for a declaration that he is the true and bona fide owner of Kilifi/Chembe/Kibabamshe/404. The Plaintiff is also seeking for an order of cancellation of the certificate of lease held by the Defendant.

33.The Plaintiff has averred in his Plaintiff that the said certificate of lease was issued to the Defendant fraudulently.

34.The issue of the proprietorship of Kilif Chembe Kibabamshe/404 was the one that was before the court in HCCC NO. 2 of 2007 and HCCC No. 9 of 2010. Although the Plaintiff herein was not a party to those proceedings, he was made aware of the said proceedings when the court delivered its Ruling in this matter on 31<sup>st</sup> October 2012.

35.In that Ruling, the Court observed as follows:

**“A perusal of this suit discloses that the matter in issue in the present sit is also directly and substantial in issue in the previous suit instituted in the lower court. This is also true for HCCC No. 2 of 2007 as consolidated with HCCC No. 9 of 2012. The present suit therefore appears to be a collateral attack on Kibokoni Ltd (the Defendants herein)....”.**

36.The court went ahead and stayed this suit pending the outcome of HCCC No. 2 of 2007 and HCCC No. 9 of 2012, which , as I have already stated was decided in favour of the Defendant.

37.The finding of the court in HCCC No. 9 of 2012 and HCCC No. 2 of 2007 is consistent with the Defendant's claim in its affidavit that since it is the registered owner of the suit property, the Plaintiff has no locus standi to bring this suit. That in my view is a bona fide defence raised by the Defendant, notwithstanding the fact that this suit has not been heard and determined.

38.I say so because the court while delivering its judgment in HCCC No. 2 of 2007 and HCCC No. 9 of 2012 made reference to the Plaintiff's claim as follows:

**“In a very real sense the present litigation is between Kibokoni who claim title derived from the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiff and Mallini and those whose alleged interest are derived from the interest which can be traced back to Adam Kazungu Nzamba and the 1<sup>st</sup> Defendant. Hence it is a continuation of the old war as to who is the true owner of the suit property.”**

39.In view of the holding of the court in the said two matters and considering that there is no evidence that the Plaintiff has ever extracted and served Summons to Enter Appearance in this matter, I find and hold that the Defendant has a bona fide Defence. The circumstances of this case demand that the Plaintiff deposit in this court security for costs.

40.Although the Defendant annexed on its affidavit a valuation report in respect of the suit property, the Plaintiff did not annex any valuation report to enable the court to ascertain the value of the suit property. I shall take the valuation report annexed on the Defendant's affidavit as the true value of the land in question for the purpose of this application.

41.Consequently, I make the following orders.

**(a) The Plaintiff to deposit in this court Kshs.800,000 being security of costs of the**

**Defendant within 30 days from the date hereof failing which the suit shall stand dismissed with costs.**

**(b) The Plaintiff to pay to the Defendant the costs of this Application.**

Dated and delivered in Malindi this **20<sup>th</sup>** day of **February**, 2015.

**O. A. Angote**

**Judge**