



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MILIMANI LAW COURTS
ELC NO. 1073 OF 2014

YOUNG MOON CHOI.....1ST PLAINTIFF
BHARAT RAMJI MANJI.....2ND PLAINTIFF
ALLOTROPE TRUST COMPANY LIMITED.....3RD PLAINTIFF
MASAI ROSES LIMITED.....4TH PLAINTIFF

VERSUS

GOLDSTEIN GROUP SERVICES LIMITED.....1ST DEFENDANT
JAMII BORA BANK LIMITED.....2ND DEFENDANT
CHIEF LANDS REGISTRAR.....3RD DEFENDANT

RULING

Coming up for determination is the 2nd Defendant's application dated **13th November 2014** wherein it seeks orders that:

1. *The 1st and 2nd Plaintiff's do furnish security jointly and severally for costs for the 2nd Defendant for the sum of Kshs. 2,822,896.54 within 14 days of the orders of the Court.*
2. *Pending the provision of such security, an order does issue restraining the 1st Plaintiff from leaving the local jurisdiction of the Court.*
3. *Pending the provision of such security, and order do issue compelling the 1st Plaintiff to deposit his passport and other travel documents with the Court until further orders of the Court and/or the hearing and determination of the suit.*
4. *The Court be at liberty to make any order in the interest of justice.*
5. *Costs of the application be provided for.*

The application is premised on grounds on the face of the application and supported by an affidavit sworn by **Fred Chumo**, the Head of Legal Services of the 2nd Defendant. The deponent states that the 1st

Plaintiff is a foreigner and is likely to leave the jurisdiction of the court. Further, that the Plaintiffs have no known assets in Kenya and have not disclosed the nature of their businesses and the physical locations. Thus, that the 2nd Defendant stands to suffer immensely on account of the present suit as there is no indication that the Plaintiff's will have the means to meet the costs on a full indemnity basis. The deponent contends that there would no prejudice to be suffered by the Plaintiffs if they were ordered to deposit the amount in an interest earning account.

(Plaintiff's Replying Affidavit sworn on 13th March 2015 not in the Court file)

The 1st Plaintiff swore a Replying Affidavit on **13th March 2015** and a Supplementary Affidavit on **21st May 2015** in opposing the application. Therein he deposed that since his arrival into the country, he has invested heavily in different business enterprises including the subject matter of this suit, namely, **L.R. No. 21075**, situate in Loresho. Further, that he resides in Nairobi and holds a valid class G work permit as an investor from the Immigration Department of Kenya. The deponent stated that he has vast business interest in the Country running into millions of shillings in real estate and commodity trading. He made reference to annexed documents in support of this deposition including: a search from the Registrar of Companies as at **23rd September 2010**, showing that he is a Shareholder and Director of **A-PLUS PVC Technology Company Limited**; a Memorandum and Articles of Association of **Mount Kipipiri Golf Resort Limited** showing that he is a shareholder and director; a search from the Registrar of Companies as at **2nd April 2015**, showing that the 2nd Plaintiff is a shareholder and director of **Gami Properties Limited and King's Wear Limited**. The deponent prayed that the 2nd Defendant's application be dismissed with costs as the allegations that he and the 2nd Plaintiff were a flight risk or would be unable to meet the costs were unsubstantiated.

The application was canvassed by way of written submissions. On behalf of the 2nd Defendant, Counsel submitted that the Plaintiffs had not adduced evidence to show the worthiness of their alleged businesses and assets owned in the businesses enabling them to meet the costs of the proceedings. Further, that the Plaintiffs had not pointed out their physical which raises a good cause for concern regarding the **2nd Defendant's** costs in the event that the suit was dismissed. In support of the submission, counsel relied on the cases of

Crested Sea Agencies Limited Vs Muranga County Council HCCC No. 2714 of 1997 where the Court observed that:

“It would have been the easiest thing to do for a Replying Affidavit to be filed on behalf of the Plaintiff pointing out clearly its physical address, its place of business, and the particular assets it might own.”

Shah v Shah Civil Appeal No. 34 of 1981 (1982) KLR where the Court of Appeal observed that:

“The general rule is that security is normally required from Plaintiffs resident outside the jurisdiction; however, a court has a discretion to be exercised reasonably and judicially, to refuse to order that security be given....The test on an application for security for costs is not whether the Plaintiff has established a prima facie case but whether the Defendant has shown a bona-fide defence.”

On behalf of the **1st and 2nd Plaintiff's**, counsel submitted that the 2nd Defendant lacks legitimate foundation for its application and thus ought to be dismissed on the basis that the core dispute is between the Plaintiff and the 1st Defendant as to who holds the genuine title to the suit property. Secondly, that the 2nd Defendant was joined so as to participate in the legal proceedings in keeping with the rules of natural justice and also to be bound by the orders given by the Court as the nature of the reliefs sought by the Plaintiffs are substantively against the 1st and 3rd Defendants and will only affect the 2nd Defendant collaterally. Further that the loan secured by the property in dispute is neither part of the Plaintiff's claim nor relevant to the outcome of the suit and therefore cannot be relied upon as a legitimate basis for

assessing the 2nd Defendant's fees.

Counsel further submitted that a security of costs motion acts as a deterrent to frivolous litigation. However, that the Plaintiff's claim as against the 1st and 3rd Defendants and collaterally affecting the 2nd Defendant is meritorious. It was also submitted that despite the 1st Plaintiff being a foreigner, he has demonstrated that he has made investments in the country, including the disputed property, and has no incentive to leave the jurisdiction of the Court. Additionally, that the 2nd Plaintiff is Kenyan and has aptly demonstrated that the assets are more than sufficient to meet the costs of the proceedings. Counsel contended that there was no sufficient and probable ground to question the capacity of the Plaintiffs to pay costs.

The Court has been directed to the rules of procedure that provides for security for costs (**Order 26 of the Civil Procedure Rules**) and leading decisions that set out the principles of awarding security for costs. The 2nd Defendant's concern is that the 1st Plaintiff is a foreigner who can skip the country at any moment and that both the 1st and 2nd Plaintiffs have not given their physical addresses or shown ownership of any assets. Thus, it is apprehensive that its costs may not be paid in the event that the suit is dismissed with costs in his favour. The 1st and 2nd Plaintiffs on the other hand insist that they have invested heavily in the country and have no incentive to leave the country.

In the case of **Shah v Shah**, the Court of Appeal stated that the general rule was that security is normally required from Plaintiffs resident outside the jurisdiction. The Appellate Court did however state that an order of security of costs was discretionary and that the trial court would have to exercise its discretion reasonably and judicially. I have carefully analyzed the affidavits and submissions made by the parties. Whereas the 1st Plaintiff is a foreigner, he has demonstrated to this court that he has made long-term investments in the country. The 2nd Plaintiff is a Kenyan citizen and has shown that he has shareholding in various companies. Notably, the Plaintiffs have not pointed out the assets they own in the companies but the 2nd Defendant has not also shown that the Plaintiffs are in dire financial straits so as not to meet its costs. I associate myself fully with the reasoning of Mwera J. (now JA.) in the case of

Cancer Investments Ltd. v. Sayani Investments Ltd., Nairobi HCCC No. 854 of 2004 [2010] eKLR (Mwera, J):

“...Has 1st Defendant laid out concrete grounds on which to base a reasonable belief that the plaintiff may be unable to pay costs in the event it loses this case? It needs no repeating that ordering security for costs is in the discretion of the Court. But the Court must be shown that there is reason to believe that a party would be unable to pay the other's (applicant's) costs if the suit is successful or is lost. The Court also has discretion to set the level of the security if one has to be posted. In the present case the 1st defendant is only apprehensive that it may not recover costs in the event the suit is dismissed. Being apprehensive is not what it takes to get an order for security for costs. There should be [a] demonstration with evidence laid, portraying the respondent as a party in such dire financial straits that paying the costs will be difficult. The applicant did not so demonstrate and, again on that point, this application must be dismissed.”

From the foregoing, I find no merit in the 2nd Defendant's application and hereby dismiss it. Costs shall be in the cause.

Dated, Signed and Delivered this 12th day of **June, 2015**

L.GACHERU

JUDGE

In the Presence of:-

Mr Ochieng for the 3rd and 4th Plaintiffs/Respondents.

None attendance for 1st & 2nd Plaintiffs.

None attendance for 1st Defendant.

None attendance for 2nd Defendant/Applicant

Mr Kamau for the 3rd Defendant

Hilda: Court Clerk

Court:

Ruling read in open Court in the absence of **Mr Rashid** for 1st & 2nd Plaintiffs. **Mr Mwangi** for 1st Defendant and **Mr Wawire** for 2nd Defendant/Applicant and in the presence of **Mr Ochieng Odour** for 3rd & 4th Plaintiffs and **Mr Kamau** for the 3rd Defendant.

L.GACHERU

JUDGE

12/6/2015

Court:

Interim orders extended. Further mention on **18/6/2015** for further Orders.

L.GACHERU

JUDGE

12/6/2015