



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LANDS DIVISION

ELC CASE NO. 657 OF 2013

FRIENDRICH PEITZ.....1ST PLAINTIFF/RESPONDENT

TOMOTHY WANGAI MWATHE.....2ND PLAINTIFF/RESPONDENT

VERSUS

GUY SPENSER ELMS.....DEFENDANT/APPLICANT

AND

NATIONAL LAND COMMISSION.....INTERESTED PARTY

CONSOLIDATED WITH

ELC CASE NO. 612 OF 2013

FRANSIC ODINGA WALUCJIO.....PLAINTIFF/RESPONDENT

VERSUS

GUY SPENSER ELMS.....1ST DEFENDANT/RESPONDENT

DANIEL KISINGA.....2ND DEFENDANT/RESPONDENT

BONFACE MITHINI KING'OO.....3RD DEFENDANT/RESPONDENT

RULING

The application for the Court's determination is the Notice of Motion dated 24th June 2014 brought under *Order 26 Rules 1,5(1) and 6 (1) of the Civil Procedure Rules and sections 1A,3A &63 (b) & (e) of the Civil Procedure Act* seeking for orders that:-

1. *This court orders the plaintiff s to deposit the sum of Ksh 15,000,000/=or any other sum this court deems fit into a joint interest earning account to be opened by the plaintiffs' and the defendants' advocates at Diamond Trust Bank Limited as security for costs of the defendants within 30 days from the making of such order.*
2. *That the court be pleased to order that unless the security for the costs is deposited within the*

time limit set out in prayer 1 above or within such other time as the court may determine the plaintiffs' suit be dismissed with costs.

This application is premised on the grounds stated on the face of the application and the supporting affidavit of **Guy Spenser Elms**. The deponent avers that he is the defendant in Nairobi **ELC No 657 of 2013**, which relates to **LR No. 2327/117** and the 1st defendant in Nairobi **ELC No 612 of 2013**, which relates to **LR No. 2327/10**. He further averred that in **ELC No 612 of 2013**, the plaintiff is seeking to evict him from the suit property and a permanent injunction restraining him from accessing, entering, remaining and /or dealing with **LR No. 2327/117**. In **ELC No. 612 of 2013** the plaintiff is seeking for eviction orders and a permanent injunction. He also averred that he has filed a defence and counterclaim which on a probative glance is bonafide and has a strong chance of success. He claimed that the suit properties belonged to **Rodger Bryan Robson** and were never sold to anyone. He added that the property were bought through a joint conveyance which was registered in the Government Lands Registry on **5th May 1978**, in volume **N44 Folio 246/9**, File Number 13785 for property A volume **N40 Folio 423/13**, File Number **12632** for property B and added that the reason for such a joint acquisition in the conveyance was that it was physically impossible to access property A without having access to property B. He also stated that he was **Rodger Bryan Robson's** advocate and when he passed on he left a **Will**, nominating him as the executor of his **Will**. In the course of going through the deceased's documents, he found an official search dated **27th April 2006**, of **LR No 2327/10**, which showed that Rodger was still the registered proprietor of the property and the said search did not show any evidence of the conveyances dated **9th February 1994** that the plaintiffs are relying on as the base of their cause of action. He averred that Rodger's relatives and neighbors confirmed that he never sold the properties to anybody but resided therein until his death. It was his contention that the 1st plaintiff was not a resident of Kenya and therefore there is a real risk that the 1st plaintiff maybe unable to pay the costs of the defendants. He further deposed that the 2nd plaintiff in **ELC No 657 of 2013**, is a donee of a specific power of attorney which only allows the 2nd plaintiff to protect the alleged ownership rights of the 1st plaintiff and does not convey any legal powers in relation to the other assets that the 1st plaintiff may have in order to pay the costs of the defendants and a part from the suit properties, the plaintiffs do not have any assets and/or income to sufficiently meet the costs of the defendants in the event that the court finds in favour of the defendants. It was his believe that it is trite law that a property in dispute cannot be used to show sufficient means of meeting the costs of the defendants. He also deposed that his advocates have drawn a draft bill of costs that has projected the costs to be **Kshs 8,675,202.40/=** for **ELC No 657 of 2013** and **Kshs 8,577,053.80/** for **ELC No 612 of 2013** which will exceed **Ksh 15,000,000/=** and it is only fair that the plaintiffs be ordered to deposit this sum in a joint interest earning account to protect the Estate of **Rodger Bryan Robson** from being drained of all assets in order to defend these suits.

This application has been contested. The plaintiff in **ELC No 657 of 2013 Timothy Wangai Mwathe**, in his replying affidavit stated that the applicant has not taken out letters of administration to represent the Estate of **Rodger Bryan Robson**, and in the absence of this he will move the court to strike out the statement of defence, the counter claim and the Notice of Motion since they were incompetent. He believes that the wealth declaration is not a requirement for him to pursue his rights under **Article 40** of the Constitution and the **Land Act 2012** and that he had a solid asset base including the suit property. He further contended that in the contrary the applicant who is a foreigner should deposit **Ksh 20,000,000/=** as he was a flight risk. He therefore does not find merit in the application and asks the court to dismiss it with costs.

In a rejoinder the applicant filed a supplementary affidavit wherein he stated that he was issued with a grant of probate dated **30th October 2013**, and that he was a Kenya citizen and an advocate of the High Court of Kenya and a partner in the firm of **Raffman Dhanji Elms & Virdee Advocates** and cannot be a flight risk. That he was not the owner of the suit properties and the plaintiffs should not have sued him in his own capacity but should have sued the Estate of **Rodger Bryan Robson** a statement he disclosed in his statement of defence.

The plaintiff in **ELC No 612 of 2013, Francis Odinga Waluchio**, in his Replying Affidavit stated that what the applicant referred to as an official search was an application for search and as such the

plaintiffs could not use it as a basis of showing that the suit property had not been sold and concluded by stating that the allegations by the applicant were speculative and are issues that could only be addressed during the hearing of the case adding that he was the owner of the suit property and did not see the reasons why he should deposit security over his own property.

The application was canvassed by way of written submissions which this court has taken consideration in making a finding on whether to grant the orders sought in the application. I have carefully analyzed the affidavits and submissions made by the parties. The Court of Appeal in **Shah vs. Shah Civil Appeal No. 34 of 1981 (1982) KLR** 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.”

The order to deposit security for costs by the plaintiffs is discretionary. In this case the 1st plaintiff in *ELC No 657 of 2013*, does not reside in Kenya and has donated his power of attorney to the 2nd plaintiff while the plaintiff in *ELC No 612 of 2013*, resides in Kenya. However none of the plaintiffs have shown that they have any properties apart from the claim that the suit properties belong to them. However the applicant has not also shown that the Plaintiffs are in dire financial straits so as not to meet the costs of this suit. Mwera J [as he then was] in the case of **Cancer Investments Ltd. v. Sayani Investments Ltd., Nairobi HCCC No. 854 of 2004 [2010] eKLR** made an observation that,

“...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.”

This suit is premised on land and land is not only emotive here in Kenya but parties hold sentimental value to land and for this reason the court will only make a determination during the full hearing on who owns the suit properties and since allegation of fraud have been claimed by the parties in acquiring the said properties.

From the foregoing and having carefully considered the applicants Notice of Motion dated **24th June 2014** , the Court finds it not merited and the same is dismissed with costs to the Respondents.

It is so ordered.

Dated, Signed and Delivered this **19th** day of **October ,2015**

L. GACHERU

JUDGE

In the Presence of:-

Me Were for Plaintiff in 612 of 2013

None attendance for the 2nd Plaintiff/Respondent

Mr Kisinga for the Defendants/Applicants

None attendnace for the Interested Party

Hilda: Court Clerk

L. GACHERU

JUDGE