



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 137 OF 2011

WINNIE WANJIKU MWENDIA.....PLAINTIFF/RESPONDENT

VERSUS

CATHERINE WANGARI MWEDIA.....1ST DEFENDANT/APPLICANT

SAMMY ELIZA MWEDEKELI.....2ND DEFENDANT/APPLICANT

JOSEPHINE ADEBORA MWEDEKELI.....3RD DEFENDANT/APPLICANT

PACIFIC FIRM LIMITED4TH DEFENDANT/APPLICANT

RULING

There are two pending applications filed against the plaintiff seeking that the plaintiff be ordered to provide security for costs. The first application was filed by the 4th Defendant on 10th July 2013 and the second application was filed by the 2nd and 3rd Defendants on 25th November 2013. These two applications by the Defendants are the subject of this ruling.

The basis for the two applications are indeed common that the Defendants/Applicants have good reasons to believe that if the plaintiff/Respondent's suit is unsuccessful the plaintiff/Respondent will not be in a financial position to pay the costs and that the suit by the plaintiff is frivolous and has high chances of being dismissed. The Applicants in both applications further in the affidavits in support of the applications depone that the plaintiff/Respondent has in her own affidavit dated 1st April 2011 stated that she has been unable to get employment since returning to Kenya from the United States of America and she does not have a home and that she is surviving on the goodwill of friends. The Applicants further state they are unaware of any assets of the plaintiff and also unaware of the Plaintiff/Respondents whereabouts and they therefore have reason to believe that the Plaintiff/Respondent may not be able to pay the costs of the suit in the event that this suit is unsuccessful.

The plaintiff/Respondent filed grounds of opposition to the 4th Defendants application on 2nd October 2013 which grounds can be summarized thus:-

- i. That the application is misconceived, bad in law and frivolous,
- ii. That the Applicant is guilty of delay and the applicants intention in filing them is to obstruct, delay

and prevent the matter from proceeding to full trial.

- iii. That as a general rule security for costs will ordinarily be granted against plaintiffs resident outside the country though the court has jurisdiction to order security to be given in exercise of its discretion which however ought to be exercised reasonably and judiciously.
- iv. The plaintiff should not be hampered in the pursuit of justice only by reason of his or her financial incapacity.

Order 26 Rule 1 of the Civil Procedure Rules clothes the court with the discretion to make an order for security for costs and provides as follows:-

26. (1) In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party.

The court under Order 26 Rule 1 of the Civil Procedure Rules has unfettered discretion to order and/or not to order security to be given. The Court of Appeal in the case of **Shah –vs- Shah (1982) KLR 95** while considering an appeal arising out of a decision of the High Court refusing to give an order for security under an application made under the previous Order XXV Rules 1 and 4 similar to the current Order 26 Rules 1 and 4 of the Civil Procedure Rules 2010 held that the application of Rule 1 was not subject to Rule 4. Order 26 rule 4 provides as follows:

26.(4) In any suit brought by a person not residing in Kenya, if the claim is founded on a bill of exchange or other negotiable instrument or on a judgment or order of a foreign court, any order for security for costs shall be in the discretion of the court.

The Court of Appeal in **Shah –vs- Shah (Supra)** held:

1. If it was intended that Order XXV Rule 4 of the Civil Procedure Rules should fetter the very wide discretion conferred by rule 1, then rule 1 would have the words “**subject to rule 4**” at the beginning.
2. 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.
3. 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 parties filed written submissions in this matter in which they canvassed their respective positions. The 4th Defendant filed their submissions on 1st April 2014, the 2nd and 3rd Defendants on 22nd April 2014 and the plaintiff filed hers on 30th April 2014. The gist of the applicants submissions is that the plaintiff having acknowledged in her affidavits that she was unemployed and impecunious and she having not filed any response to the applicants application to verify her current financial standing it must be assumed that her financial status has not changed which puts the Applicant to risk that they may never recover their costs in the event the plaintiff loses her suit and they are awarded the costs of the suit.

The Applicants have argued that they have brought their application for security for costs timeously considering that the plaintiff only withdrew her application for interlocutory injunction filed under certificate of urgency on 29/6/2011 on 29/1/2013. The Applicants aver that it would have been inappropriate to file their present application during the pendency of the said plaintiff’s application.

The principles on which a court would exercise its discretion in an application such as the present one were considered by **F. Tuioyot, J** in the case of **Ocean view Beach Hotel Ltd –vs- Salim Sultan Mollo & 5 others (2012) eKLR** where he cited with approval the court of Appeal decision in **C.A. NO. 9 of 2005. Messina & another –vs- Stallion Insurance Ltd (2005) EA 264(CAK)** where the Court of Appeal had adopted the principles laid down in **Keary Development –vs- Tarmac Construction (1995) 3 ALL ER 534**. The Honourable Judge stated that the principles outlined in **Keary Development Ltd (supra)** were summarized as follows:

1. **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 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 finds 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 ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, 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”.**

I accept the outlined principles provide an appropriate guide to the court for the exercise of discretion in an application such as the one before the court and I will largely place reliance on them in making my determination in this matter.

The plaintiff's claim is to the effect that she and the 1st Defendant, who is her mother were the beneficial owners of title **L.R.NO.14970/118** situated at Runda, Nairobi (the suit property) having acquired the same pursuant to an agreement for sale entered into on 16th December 2004 with the 4th Defendant whereby the plaintiff and the 1st Defendant, as purchasers, contracted to buy the suit property from the 4th Defendant. The transfer of the suit property to the plaintiff and the 1st Defendant was however not completed. The plaintiff contends that the 1st Defendant, without involving her as a joint owner fraudulently and with connivance of the other defendants sold and transferred the property to the 2nd and 3rd Defendants for the consideration of **Kshs.23,000,000/-**. The plaintiff and the 1st Defendant on the basis of the record were represented in the sale transaction to the 2nd and 3rd Defendants by the law firm of **Waruhiu Kowade & Nganga Advocates** and the plaintiff's signature in the sale agreement is shown to have been attested by one M.N. Ng'ang'a Advocate though the plaintiff denies having executed the agreement before the said Advocate.

The 1st Defendant has not appeared and/or filed any defence in this matter. The 2nd and 3rd Defendants in their filed defence state they are strangers to the allegations contained in the plaintiff's plaint and assert that they were innocent purchasers for value of the suit property having regularly purchased the same from the plaintiff and 1st Defendant who were represented by counsel. The 2nd and 3rd Defendant state the suit property was transferred to them by the 4th Defendant in whose name the property was still registered pursuant to a nominee clause contained in the agreement for sale dated 16/12/2004 between the plaintiff and the 1st Defendant on the one part and the 4th Defendant on the other part which allowed the property to be transferred to a Nominee or Nominees of the purchasers.

The 4th Defendant for its part denies all the allegations attributed to it by the plaintiff and asserts in its defence that it acted in compliance with the agreement it had entered into with the plaintiff and the 1st Defendant in that it executed the transfer of the suit property in favour of the 2nd and 3rd Defendant as it was obliged to do once the purchasers had exercised their right to nominate a Nominee for purposes of receiving the transfer.

While I am not prepared to hold the plaintiffs suit against the Defendants to be frivolous and vexatious so as to be deemed to be an abuse of the process of the court I am not equally prepared to hold that the plaintiff has an overwhelming chance of succeeding at the trial. The plaintiff simply has an arguable case.

In regard to the 2nd and 3rd Defendants on the one hand and the 4th Defendant on the other hand I would say they have demonstrated they have credible defences with chances of being upheld at the trial. As rightly stated by **F. Tuiyot, J** in the case of **Ocean View Beach Hotel Ltd –vs- Salim sultan Mollo & others (Supra)** the purpose of an order for security for costs is to protect a party from incurring expenses on a litigation which it may never recover from the losing side and it is not to deter the plaintiff from pursuing her claim. In the present case the plaintiff has deponed that she lacks the means to sustain herself and thus the Defendants are apprehensive that they may be taken through a costly litigation by the plaintiff and they may be unable to recoup their costs in the event the plaintiff is not successful in her quest. A party that comes to court ought to be aware that litigation entails running costs of the litigation and the norm is that the costs follow the event such that where a plaintiff is unsuccessful the costs will be awarded to the Defendants and vice versa. Order 26 Rule 1 of the Civil Procedure Rules is intended to put plaintiffs on guard that in appropriate cases the court on application by a defendant in the suit may order that security for costs be provided.

In the present case the plaintiff has described herself as impecunious and there is no suggestion that she would be in a position to meet the costs if she was unsuccessful. On the face of it, the Defendants defence appears credible weighed against the plaintiff's claims and I would thus say the Defendants have bona fide defences.

The plaintiff has submitted that the Applicants applications are intended to subjugate and frustrate the plaintiff from prosecuting her claim. I do not think so. The Defendant/Applicants are under Order 26(1) of the Civil Procedure Rules entitled to make such an application to secure their rights in the event the matter proceeds to trial and the plaintiff is unsuccessful and they are awarded costs. If the Applicants are exercising and pursuing their right under the law I do not think they can be rightly accused of attempting to subjugate and obstruct the plaintiff from pursuing her claim. They definitely are acting within their rights and the law is on their side.

Unlike in public interest litigation matters and/or matters falling under the Bill of Rights under the constitution where the courts will ordinarily not award costs in a matter such as the present one where private individuals are involved the court at the conclusion of the trial will in all probability award costs against the unsuccessful party.

Thus in the circumstances of this matter and having considered the pleadings and the submissions by the parties, I am satisfied that this would be a proper case for the court to exercise its discretion and order security for costs. The 4th Defendant suggested a sum of Kshs.750,000/- based on the value of the subject matter as reasonable security. The 2nd and 3rd Defendants did not make any suggestion as to the security they sought to be furnished. I have however to bare in mind the value of the subject at the time the suit was filed was stated to be about Kshs.50,000,000/- and thus the security has to be commensurate with that value.

While I have to be cautious that I do not make an order for security that may have the effect of driving the plaintiff from the seat of justice, I have also to be mindful that the Defendants would be entitled to recover their costs should they succeed in their defences. Being cognizant that the 2nd, 3rd and 4th Defendants have made the instant applications I in exercise of my discretion make an order for security of costs in the sum of **Kshs.800,000/-** and I direct as follows:-

- i. The plaintiff do deposit the said sum of Kshs.800,000/- into an interest earning account to be held in the joint names of the plaintiff's Advocates the 2nd and 3rd Defendants Advocates and the 4th Defendants Advocates.
- ii. The security deposit to be placed within a period of sixty (60) days from the date of this ruling.

iii. In default the 2nd, 3rd and 4th Defendants shall be at liberty to apply for the dismissal of the suit under Order 26 Rule 5 of the Civil Procedure Rules 2010.

iv. The costs of the Applications dated 10th July 2013 and 25th November 2013 shall be in the cause.

Ruling dated, signed and delivered at Nairobi this 2ND day of **DECEMBER** 2014.

J. M. MUTUNGI

JUDGE

In the presence of:

.....for the plaintiff

..... for the Defendants