



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

**AT NAIROBI**

**ELC SUIT NO. 23 OF 2012**

**MANAN JAYENDRA CHUNIBHAI.....1<sup>ST</sup> PLAINTIFF**

**ANERI JAYENDRA CHUNIBHAI.....2<sup>ND</sup> PLAINTIFF**

**(Suing as guardians of PANNABEN JAYENDRA PATEL)**

**VERSUS**

**JITENDAKUMAR C. PATEL.....1<sup>ST</sup> DEFENDANT**

**JAISHRI JITENDRAKUMAR PATEL.....2<sup>ND</sup> DEFENDANT**

**RULING**

**The Application**

The application before the Court for determination is a Notice of Motion by the Defendants dated 19<sup>th</sup> June 2012 seeking the following orders:

- a. That the Plaintiffs do deposit into court a further sum of Kshs.3,546,299.19 within fourteen(14) days or within such time as may be determined by this Court as security for rent that may be found to be due to the Defendants.
- b. That the Plaintiffs be ordered to pay into Court such monthly sums equivalent to the monthly rent at the prevailing market rate until further orders of the court.
- c. That in default of payment of the sum ordered in prayer (a) and/or (b) above, the Defendants' injunction orders granted on 11<sup>th</sup> December 2012 be deemed to have lapsed and/or discharged.

The application is premised on the grounds that this Court in rulings given on the Plaintiff's earlier application dated 17<sup>th</sup> January 2012 ordered the Plaintiff to *inter alia* deposit in court sums totaling Kshs.2,200,000/= as security for any rent that may be found to be due to the Defendants. Further, that the deposit paid was representative of the sum of Kshs.3,563,973.69 claimed to be owing to the Defendants as at September 2012. However, that since September, 2012, the sum due as rent and utility bills for security, water and electricity has accrued to Kshs.3,546,299/=. Further, that this has manifestly altered the risk that the Defendants are exposed to in the event that judgment is eventually entered in their favour and the Plaintiffs fail to pay.

The application is supported by an affidavit and supplementary affidavit sworn on 19/6/2014 and 8/8/14 by the 1<sup>st</sup> Defendant, who deponed that it is the Defendants' case and counterclaim that the Plaintiffs owe them rent and utility bills for security, water and electricity consumed, and not paid for while in occupation of the suit property, and that the sums continue to accrue. He attached a breakdown of the said sums owing and a bundle containing monthly utility Bills from October 2011 to May 2014. They also attached a copy of a rent assessment report showing rent payable for the premises occupied by the Plaintiffs to be Kshs 120,000/=.

The deponent further stated that since making the initial deposit of Kshs.2,200,000/= in court, the Plaintiffs have remained and by virtue of the court order of 11<sup>th</sup> December 2012 will remain on the suit property and will continue to consume the utility services to the detriment of the Defendants. He also stated that the water and security services are common to both the Plaintiffs' and Defendants' premises. The Defendants are apprehensive that in the event the judgment is entered in their favour, it would be impossible or unduly onerous to recover the aforesaid rent and utility bills from the Plaintiffs.

### **The Plaintiffs' Response**

The application was opposed by the Plaintiffs, and the 1<sup>st</sup> Plaintiff swore a Replying Affidavit on 16/7/2014 wherein he stated that the Defendants' application lacks merit because it is premised on false allegations that there are utility bills which they are paying or incurring on behalf of the Plaintiffs. He further stated that the electricity bills annexed by the Defendants are falsified since they disconnected electricity to the premises upon the institution of this suit, and that the Plaintiffs were forced to buy water from water vendors and to connect their own electricity, and have been paying for what is consumed in the premises. The 1<sup>st</sup> Plaintiff annexed copies of a bundle of receipts for water and of electricity bills and receipts.

The Plaintiffs claimed that the Defendants were out to unjustly enrich themselves by claiming rent, yet the security already deposited is sufficient in the circumstances, and to delay the hearing of this suit on its merits. They also urged the court to factor that the rent at Kshs.100,000/= claimed was greatly exaggerated and inflated.

### **The Submissions**

This application was canvassed by way of written submissions. The Defendants' Counsel filed submissions dated 13/8/2014 wherein they reiterated the facts of their application. It was their submission that the prejudice the Defendants stand to suffer outweighs that of the Plaintiffs, as any sum when deposited in court will be available to the Plaintiffs in the event that they succeed in their claim. The Defendants relied on the decisions in **Chevron Kenya Ltd (Formerly Caltex Oil Kenya Ltd) vs Muvir Holdings & Another (2009) eKLR** and **Mat International Terminal Ltd vs Multiple ICD (Kenya) Ltd & 3 Others (2012) eKLR** for the position that a party enjoying temporary orders ought to provide security as a protection for the respondent.

The Plaintiffs' Counsel filed submissions dated 3/10/2014. He too reiterated the Plaintiffs' arguments that the security already paid is sufficient, and that the rent and utility bills charged are not justified. It was the counsel's submissions that that a party is only entitled to pay costs when he or she has no visible means of paying costs, and that in this case the Plaintiffs are in gainful employment. He asked the court to be guided by the decisions in **Ndafara Company Ltd vs Paul Kibugi Muite and Others (2008) e KLR** and **Nyanza Spinning & Weaving Milks Ltd vs Credit Bank Ltd & 2 Others (2013) e KLR** that the Court has discretion to decline to order security to be paid where a party has not shown a strong case.

### **The Issues and Determination**

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. The issue to be determined is whether the Defendants have made a case for the Plaintiffs to provide additional security for costs and to pay monthly rent.

This Court has discretion under Order 26 Rule 1 of the Civil Procedure Rules to 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 in any suit. It was held by the Court of Appeal in **Shah vs Shah (1982) KLR 95** that this provision gives the court a wide and unfettered discretion that is only subject to the conditions that it must be exercised judicially and reasonably. Further, that 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 factors that a court should take into account when exercising its discretion were explained by Bosire J. (as he then was) in **Nderitu & 2 Others t/a African Club vs Harun (No 3) (1992) KLR 417** as follows:

**“...The Court’s power to order security for costs of a suit is discretionary. That is what O.25 rule 1 Civil Procedure Rules says and that is what it means. The wording of the rule 1 is that the “Court may order.” Being a discretionary power it has to be exercised on the basis of evidence. That is to say the Court must have a basis for ordering security for costs to be given.**

**The rule says that security for costs may be ordered to be given in any suit. It does not however state at what stage of the suit the order may be made. The Court is left with the power to determine when security may be given. The discretion is quite wide. A careful reading of the rule reveals that the Court needs to consider each case on the basis of its peculiar facts...”**

This Court has in this regard previously ordered that the Plaintiffs deposit the amount of Kshs 2,200,000/= with the Court as security for costs. It was then incumbent upon both parties to ensure that the suit herein proceeds to hearing expeditiously so that their respective rights and responsibilities can be determined with finality, including on the issue of costs. This Court is obliged to ensure expeditious hearing of civil disputes and on merit by section 1A and 1B of the Civil Procedure Act and Article 159 of the Constitution, and cannot therefore be seen to encourage payment of additional security for costs in lieu of, and at the expense of final determination of a suit. I note in this respect that there has been compliance with Order 11 of the Civil Procedure Rules by both parties, and that the suit herein is more or less ready for hearing.

It is also my view that the security deposited cover any costs that the Defendants are incurring in terms of any rent that may be found to be due to them from the suit premises upon conclusion of this suit. It is therefore my finding that the second prayer for payment of monthly rent by the Plaintiff is in this respect not only excessive, but cannot also be granted at this stage as the issue of the Defendants’ entitlement to the suit property is yet to be resolved. It was in this regard held by the Court of Appeal in **Kenya Breweries Ltd and Another v Washington Okeyo (2002) 1 E.A. 109** that the requirements for such a mandatory injunction to issue are that there must be special circumstances that exist over and above the establishment of a *prima facie* case, and even then such an injunction can only issue in clear cases where the court thinks that the matter ought to be decided at once.

Arising from the foregoing reasons, I will exercise my discretion and will allow the Defendants’ Notice of Motion dated 19<sup>th</sup> June 2012 only to the extent of the following orders:

1. That the Plaintiffs shall set the suit herein for hearing within 6 months of the date of this ruling.
2. That in the event of default or failure by the Plaintiffs to set this suit for hearing within 6 months of the date of this ruling, the injunction orders granted herein on 11<sup>th</sup> December 2012 shall automatically lapse.
3. The costs of the Defendants’ Notice of Motion dated 19<sup>th</sup> June 2012 shall be in the cause.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_2<sup>nd</sup>\_\_\_\_ day of \_\_\_\_December\_\_\_\_,

2014.

**P. NYAMWEYA**

**JUDGE**