IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, OUKO & MURGOR, JJ.A)

CIVIL APPEAL NO. 173 OF 2010

BETWEEN

GEORGE GIKUBU MBUTHIA.....1ST APPELLANT

PALACE INVESTMENTS LTD.....2ND APPELLANT

EQUITY PROTECTORS (K) LTD.....3RD APPELLANT

AND

HOUSING FINANCE COMPANY (K) LTD.....1ST RESPONDENT

MUHAMUD SHEIKH HUSSEIN.....2ND RESPONDENT

JANE WANJIRU NDIBA.....3RD RESPONDENT

(An appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (H.M Okwengu J.) dated 23rd June, 2010

In

E.L.C No. 358 of 2009)

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RULING OF THE COURT

Before us is an appeal from the ruling of Okwengu J. (as she then was) directing the appellants to deposit Kshs.5,000,000/= as security for costs. The learned judge further directed that upon compliance the appellant's suit would be stayed pending compliance with this order.

The dispute itself is fairly old having spawned several suits and applications over the course of the years from 1990, all centred around ownership of suit property L.R 36/11/1 Eastleigh Section II Nairobi. On this particular occasion, the appellant, filed suit against the respondents challenging the sale of the property. He sought a myriad of reliefs including damages and compensation for losses suffered amounting to well over a billion Kenya Shillings. The respondents filed their respective statements of defence wherein they contended that the suit was *res judicata* since the issues raised by the appellant had already been conclusively determined by the courts on previous occasions. And that no germane issue was being raised by the appellant.

The 2nd respondent via Chamber Summons application dated 24th November, 2009 brought under **Order XXV Rules 1, 5 & 6** Civil Procedure Rules sought security for costs. The application was anchored on the ground that the appellant had filed multiple suits on the same subject matter, which suits had consequently been dismissed with costs. The 2nd respondent contended that he had spent a lot of money defending the suits and that the appellant had yet to pay costs in those suits.

The 1st and 3rd respondents sought similar orders in their application dated 2nd December, 2009. The respondents contended that there was no evidence that the appellants had the means to satisfy their costs in the event the suit was to fail, especially since the appellants had yet to settle previous costs entered against them.

After hearing both parties, Okwengu J. (as she then was) held:

> ***"… In this case, the defendants have clearly demonstrated that there have been previous suits which were filed by the 1st plaintiff. Costs of the previous suits have not been paid. Secondly, the defendants have all filed plausible defence to the plaintiffs' claim which includes a plea of res judicata and a plea that the plaintiffs' claim against the 3rd defendant's misconceived*** [sic].
>
> ***Although I concur that the plaintiffs have the right to come to court and pursue their claim, the defendants are entitled to protection by the court where there is a likelihood that the plaintiff may not be able to pay costs awarded against it if the plaintiff loses. … The plaintiffs have not demonstrated their financial ability to meet any such costs."***

It is on this basis that Okwengu J. ordered the appellants to furnish Kshs.5,000,000/= jointly as security for costs. It is this decision that has spurred this appeal, anchored on 32 grounds recorded in the appellants' amended memorandum of appeal. The essence of which are grievances against the errors and illegalities that the appellants contend taint and consequently nullify the sale of the suit property.

When called upon to make submissions in support of their appeal, the appellants, represented by the 1st appellant contended that since he had cleared the debt secured by the suit property, the learned judge ought not to have ordered him to furnish security for costs.

Mr. Munge, learned counsel for the 1st and 3rd respondents, opposed the appeal and concurred with the decision of the learned judge on the strength of argument that she had exercised her discretion properly. Counsel urged us to dismiss the appeal. Counsel for the 2nd respondent, Ms. Lipwop, was of a similar view and referred us to the principles set out in **Mbogo & Another V Shah (1968) 1 EA 93.** Counsel asserted that there was no misdirection on the part of the learned judge and therefore no reason for this Court to interfere with her decision**.**

We have considered the record of appeal, the submissions by the respective parties and the law. It is not in dispute that the learned judge had discretion to order or refuse to grant security. The appellants are now asking us to interfere with that discretion. The principles guiding such interference are commonplace and were well enunciated by Sir Clement De Lestang VP in ***Mbogo & Another V Shah (1968) 1 EA 93*** whom we now quote as having stated that:

> ***"…this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

The simple and straightforward question for us is whether the trial court's decision is clearly wrong or if it directed its mind to wrong issues not set for its determination or outside the realm of its jurisdiction. Our answer is that the trial court did not exceed the perimeters set out in the ***Mbogo*** case and clearly appreciated the nature of the issues in dispute and addressed her mind correctly in making the orders subject of this appeal.

The purpose of an order for security for costs is designed to ensure that a litigant, who is unable to pay costs of the litigation should he lose, is disabled from carrying on the litigation except upon terms that afford some measure of protection to the other parties: see **Upward Scale Investments Co. Ltd & 7 others v Mwangi Keng'ara & Co. Advocates [2017] eKLR.** The onus was therefore on the respondents to prove such inability or lack of good faith on the part of the appellants which would make such order for security of costs reasonable. Okwengu, J. was alive to the burden upon the respondents and was satisfied, under the circumstances, that they had discharged it.

Again such an order is to protect both parties so that the court does not readily employ or use the power of striking out a suit. In essence, it is defined to risk the suit.

As recognized by the trial judge the substratum and basis of the application for security for costs was the conduct of the 1st appellant, filing multiple and limitless suits over the same subject matter and his failure to recognize that no matter the number of suits filed, the result or outcome would be the same. Such conduct exposed the respondents to great financial loss in terms of costs, not to mention, time spent on such expensive litigation. In essence, the application was intended to mitigate the respondents against limitless litigation and resultant costs arising therefrom. That was the issue central before the High Court and clearly, the trial court cannot be said to have exceeded the boundary and limits set for the exercise of a judicial discretion. In the eyes of a reasonable bystander, we too think the trial court was right.

Before us, the appellants have failed to convince us that the learned judge misdirected herself in anyway. Apart from delving into the merits of the substantial dispute, which is not an issue before us, the appellants have not shown any evidence of their ability to settle the costs. Further, we find no fault in the learned judge's consideration of their past conduct, that is, their failure to pay costs of the previous suits, as an indicator of their inability to pay costs should their suit fail. This is clearly a case calling for the court to protect the respondents. There is nothing before us to justify interfering with the learned judge's decision.

The upshot of these findings is that we find no merit in this appeal and accordingly stands dismissed.

Dated and delivered at Nairobi this 11th day of May, 2018.

M. WARSAME

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JUDGE OF APPEAL

W. OUKO

…….....

JUDGE OF APPEAL

A. K MURGOR

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JUDGE OF APPEAL

I certify that this is a

True copy of the original

DEPUTY REGISTRAR