



**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**  
**CIVIL APPEAL 302 OF 2004**  
**BETWEEN**

MAGIRI NGUTHARI ..... APPELLANT

AND

GIDEON KIMATHI M'NGUTHARI ..... RESPONDENT

*(Appeal from the Ruling of the High Court of Kenya at Meru (Omwitsa, Commissioner of Assize) dated 18<sup>th</sup> day of August, 1999*

in

**H.C.C.C. NO. 100 OF 1997)**  
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**JUDGMENT OF THE COURT**

The respondent herein who was the defendant in High Court of Kenya (at Meru) Civil Suit No. 100 of 1997 filed a Chamber Summons stated as having been filed “**Under section 27** of the *Civil Procedure Code* and **Order XXV Rule 1** and **7 Civil Procedure Rules**” in which he sought the following orders from the superior court:-

- “1. **THAT this Honourable court be pleased to order the plaintiff to provide security for costs in this suit by depositing Kshs.100,000/= in court or alternative (sic) in an account in both names of the counsel for the plaintiff and the defendant pending the hearing of this suit any further (sic).**
2. **THAT cost of this application be provided for.”**

In support of that application, the respondent filed an affidavit in which he deponed:-

- “1. **THAT I am the defendant in this suit and thus competent to swear this affidavit.**
2. **THAT the plaintiff has filed this suit frivolously and maliciously without any basis so as to punish me and try to grab my land and make it a road.**
3. **THAT the plaintiff's claim has no basis either in law or facts as the plaintiff has no rights whatsoever over my land which I inherited from my deceased father.**
4. **THAT the claim by the plaintiff that his land has no access road is against the facts on ground.**

5. ***THAT the plaintiff has always promised me even in presence of village elders that he shall make me poor through this case.***
6. ***THAT the plaintiff has also threatened and promised me that he shall do cases with me until we die doing cases and that I shall never get any costs even if I win the suit eventually.***
7. ***THAT the plaintiff is now making arrangements to transfer all his properties to his sons and wife so that If I win this suit I shall have nothing on which to execute the decree.***
8. ***THAT I swear this affidavit in support of my application which has merit to be allowed in the circumstances so that justice can be done and be seen to be done.***
9. ***THAT if the plaintiff is sure of his claim then he should not hesitate to deposit security so that he can prosecute his claim but not to make me undergo all this litigation which is expensive in vain.***
10. ***THAT what is deponed to herein is true to the best of my knowledge, information and belief.***

Further to the foregoing the application was brought on the following grounds:-

- “1. ***THAT the plaintiff’s (sic) has no known property other than the land in dispute to provide for costs of the suit in the event of losing this suit.***
2. ***THAT the plaintiff intends to transfer the land he has to his family members as it is a family land.***”

That application was placed before the learned Commissioner of Assize (the late G.A. Omwitsa) for determination. Both parties were represented by counsel who made submissions and after considering the rival submissions the learned Commissioner of Assize was satisfied that the respondent was entitled to the reliefs sought in his chamber summons application. In a one page ruling delivered on 18<sup>th</sup> August, 1999 the learned Commissioner said inter alia:-

***“I order that the plaintiff deposit into court a sum of K.Shs.80,000/= as security for defendant’s costs within thirty days from the date hereof, in default the plaintiff’s suit shall stand dismissed.”***

It is the foregoing order that has provoked this appeal and pursuant to the said order the appellant, through his counsel, filed this appeal setting out the following grounds of appeal.

- “1. ***The learned Commissioner determined the entire suit on an application for security for costs.***
2. ***The learned Commissioner failed to advert his mind properly on the proper law concerning security for costs and he even failed to consider the authorities presented to him.***
3. ***The learned Judge was wrong to consider some paragraphs of the plaintiff’s affidavit offending without stating in which way the said paragraphs were offensive or scandalous.***
4. ***The learned Commissioner misdirected himself on the principles of law concerning security for costs in civil litigation.***
5. ***The learned Commissioner also misdirected himself on the provisions of Registered Land Act particularly on Section 94 thereof.***

**6. *The learned Judge pre-determined the plaintiff's claim before hearing all the facts in issue.***

That is the appeal that came up for hearing before us on 12<sup>th</sup> May, 2010 when Mr. K. Kioga appeared for the appellant, while Mr. G. Anampiu appeared for the respondent.

In his submissions Mr. Kioga faulted the learned Commissioner for determining the entire suit on a mere application which application had been brought under the wrong provision of the law. Mr. Kioga contended that an application for security for costs could only be brought when the plaintiff has no property within the jurisdiction of the court which was not the case here since the appellant had a piece of land in Kenya.

In response to the foregoing, Mr. Anampiu submitted that the order by the Commissioner of Assize was discretionary and that he (the Commissioner) exercised his discretion judicially.

In our view, the issue to be decided in this appeal was simple. It related to security for costs by the plaintiff. The learned counsel for both parties went into details of the merits of their respective client's case in the superior court which, in our view, was not relevant in this appeal.

Security for costs is governed by **Order XXV** of the *Civil Procedure Rules*. **Rule 1** of **Order XXV** reads as follows:-

***“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.”***

**Rule 4** reads as follows:-

***“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.”***

In ***SHAH V. SHAH*** [1982] KLR 95 at p. 98 this Court said:-

***“The general rule is that security is normally required from plaintiff's resident outside the jurisdiction, but as was agreed in the court below, a court has a discretion, to be exercised reasonably and judicially, to refuse to order that security be given; see *Kotecha v. Bank of Baroda* (CA Civil Application No. 43 of 1978, unreported).”***

We respectfully agree with the foregoing. In the present appeal it is to be noted that the parties are members of the same family who are quarreling over a road of access. We have perused the affidavits filed by both sides to the dispute and it would appear that there is no love lost between the parties. Ordering the appellant to pay security for costs may be oppressive. Since the appellant has property within the jurisdiction of the court and in view of the fact that this is a family dispute, we are of the view that it was not a proper case for an order of security for costs. If the respondent and his legal advisers thought that the appellant's claim was frivolous, the alternative procedure should be an application for striking out the plaint rather than force a litigant to be made to pay security for costs in order to pursue what he thinks is a rightful claim.

In view of the foregoing we allow this appeal, set aside the ruling of the Commissioner of Assize, and order the suit in the superior court to proceed for hearing. As this matter involves members of the same family we order that each party do pay his own costs of the appeal and also the costs of the application in the superior court.

*Dated and delivered at NYERI this 24<sup>th</sup> day of June, 2010.*

**R.S.C. OMOLO**

.....  
**JUDGE OF APPEAL**

**E.O. O'KUBASU**

.....  
**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....  
**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**