



**Mwathe v Muthoni & 2 others (Environment & Land Case  
239 of 2015) [2024] KEELC 6762 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6762 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE 239 OF 2015  
A KANIARU, J  
SEPTEMBER 24, 2024**

**BETWEEN**

**PAUL NJERU MWATHE ..... PLAINTIFF**

**AND**

**CATHERINE MUTHONI ..... 1<sup>ST</sup> DEFENDANT**

**MARTY WARUE JOHN ..... 2<sup>ND</sup> DEFENDANT**

**ALOIS NYAGA MBOGO ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Before me for determination is a motion on notice dated 21.03.2023 brought under Order 40 of the Civil Procedures Rules, Sections 1A, 3A of the Civil Procedure Act, and Article 159 of the Constitution of Kenya. The motion was filed by the 1<sup>st</sup> - 3<sup>rd</sup> defendants – Catherine Muthoni, Martin Warue John & Alois Nyaga Mbogo - respectively. It came with five prayers but two of the prayers are now spent. The prayers left for determination are:

Prayer 3 - That a prohibitory order do issue on land parcel no. Kyeni/Mufu/10439 until the bill of costs dated 24.08.2018 is taxed.

Prayer 4 - That the respondent be compelled to furnish security for costs of this suit.

Prayer 5 - That the costs of this application be provided for.

2. The application is premised on the grounds on the face of it and on a supporting affidavit by the 1<sup>st</sup> applicant sworn on 21.03.2023 mainly stating that: judgment was delivered in this suit on 03.03.2017; that thereafter the respondent filed a myriad of applications which were dismissed and the applicants awarded costs of the said applications; the applicants filed a bill of costs on 20.09.2018 which is yet to be taxed; the respondent is intending to dispose of his only property Kyeni/Mufu/10439 and has been conducting site visits with potential buyers; and that the applicants are apprehensive they may



- not be able to satisfy such a decree as may ultimately issue against him in respect of the bill of costs. They attached to their application the applications complained of as well as a copy of the title deed to the subject property.
3. The respondent opposed the application by way of a replying affidavit filed on 02.10.2023. He deposed that the judgement issued on 03.03.2017 did not award costs to anyone as each party was to bear their own costs. That the orders sought are not available as the subject land belongs to the respondent absolutely and he is at liberty to deal with it as he wishes. That security for costs is also not available as that would amount to a pre-determination of the bill of costs.
  4. The parties did not file any written submissions and opted to rely on their affidavits to dispose of the application. Having considered the application and the response made to it, I find that the issues for determination are whether:
    - a. The applicants are entitled to an order of prohibition against land parcel Kyeni/Mufu/10439.
    - b. The respondent should be compelled to furnish security for costs.
    - c. Who should bear the costs of this application.
  5. The respondent had instituted this suit seeking a declaration that the 1<sup>st</sup> applicant was holding land parcel L.R/Kyeni/Mufu 1189 in trust for him and that he had obtained an adverse title to the same. The suit was heard and determined in a judgement delivered on 03.03.2017 and each party was directed to meet their own costs of the suit. Since then, the respondent seemingly dissatisfied with the judgement filed a number of applications seeking various orders, which applications were all dismissed and costs awarded to the applicants. The applicants on the other hand filed a bill of costs on 20.09.2018 for taxation, which bill is yet to be taxed. Their complaint is that the respondent is intending to dispose of his only property Kyeni/Mufu/10439 and so they are apprehensive they may not be able to satisfy such a decree as may ultimately issue against him in respect of the bill of costs.
  6. The purpose of a prohibitory order was stated in the case of *Ogembo Ondieki v Samuel Bosire Angwenyi & 2 Others* [2020] eKLR in Kisii ELC Case No. 942 of 2016:

“A Prohibitory order is an order obtained from the Court prohibiting a Judgment debtor from effecting any dealings in relation to his or her landed properties or interest in land held by him or her. Where judgment is obtained for the payment of money, in the event that a judgment debtor refuses or neglects to comply with the judgment made by the Court, the judgment creditor can proceed to obtain a Prohibitory Order, where the properties of the judgment debtor involves land”.
  7. In the instant case, the applicants are seeking to place a prohibitory order on respondent’s parcel of land pending the taxation of their bill of costs. The respondent on the other hand argues that as the registered proprietor of his land he is at liberty to deal with it as he pleases. As seen above, the purpose of a prohibitory order is to prevent a party from effecting any dealings in relation to his or her properties or interest in land held by him or her pending any further orders by the court. The respondent does not deny that there is a pending bill of costs that is yet to be taxed, neither does he deny being the registered proprietor of the land sought to be the subject of the prohibition order. It is also clear from the proceedings that the applicants were indeed awarded costs of the applications which are the subject of the bill of costs. In my view there would be no reason to deny the applicants the order of prohibition save to say that the taxation of the bill of costs ought to be expedited.



8. On the issue of security for costs, the applicable law in an application for security for costs is order 26 Rule 1 of the *Civil Procedure Rules* which provides as follows;

“(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”.

9. It is clear from the above that an order for security for costs is discretionary in nature and the same therefore must be decided based on the circumstances of each case. In this particular case, the applicants contend that they are apprehensive that the respondent may not be able to satisfy such a decree as may ultimately issue against him in respect of the pending bill of costs. The respondent on the other hand laments that ordering him to furnish security for costs would amount to a pre-determination of the bill of costs. I hold a similar view as the respondent, the applicant’s fears that the respondent may not satisfy a potential decree are noted. However, the respondent’s contention that requiring security would pre-determine the issue of the bill of costs holds merit. As the bill has not yet been taxed, compelling security at this stage would be premature. Besides, a prohibitory order placed on the land is in my view enough to take care of the situation.

10. For the foregoing reasons, the applicants’ notice of motion dated 21.03.2023 is allowed in terms of prayer three (3), prayer four (4) is dismissed. It is also ordered that each party shall bear their own costs of this application.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

In the presence of the respondent.

Court Assistant - Leadys

**A. KANIARU**

**JUDGE – ELC, EMBU**

**24.9.2024**

