



**Karaya v Lubulellah & another (Environment and Land Case
E044 of 2022) [2023] KEELC 15955 (KLR) (27 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15955 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E044 OF 2022
JO MBOYA, J
FEBRUARY 27, 2023**

BETWEEN

JOHN NYAGA KARAYA RESPONDENT

AND

ANTHONY MILIMU LUBULELLAH 1ST APPLICANT

JANE MAKONJIO LUBULELLAH 2ND APPLICANT

RULING

1. Vide Notice of Motion Application dated the 5th October 2022, the 1st and 2nd Defendants/Applicants have approached the court seeking for the following reliefs;
 - i. That this Application be heard Ex-Parte in the first instance and on a priority basis on the ground that the Respondent/Plaintiff has no known assets within the Jurisdiction of this Honourable court and the Applicants/Defendants are reasonably and genuinely apprehensive that they will be unable to recover any costs as may be awarded to them as against the Respondent/Plaintiff by this court.
 - ii. That the Honourable court be pleased to order that the Plaintiff does furnish, within 7 days hereof, security for the whole of the costs of the 1st & 2nd Defendants by making payment of the same to a bank or a reputable financial institution in the Joint name of himself and the 1ST & 2ND Defendants or in the names of their respective Advocates herein.
 - iii. That in the event of the Plaintiffs default in compliance with the orders above, the Plaintiffs suit stands dismissed.
 - iv. That the Costs of this Application be provided for.
2. Besides, the instant application is premised and anchored on the various grounds that have been captured at the foot of the application. Furthermore, the application is supported by the affidavit of



the First Defendant/Applicant sworn on even date and in respect of which the deponent has averred inter-alia, that same is the legitimate owner of the suit property, which is the subject of claim on the basis of adverse possession by the Plaintiff/Respondent.

3. Upon being served with the instant application, the Plaintiff/Respondent responded thereto vide Replying Affidavit sworn on the 5th December 2022, and in respect of which, the Plaintiff/Respondent has stated inter-alia, that the current application is meant and/or intended to curtail the right of the Plaintiff/Respondent to access justice and have the subject suit determined on merits.
4. Other than the foregoing, it is also important to note and underscore that the Defendants/Applicants subsequently sought for and obtained leave to file a further affidavit. For clarity, the Defendants/Applicants duly filed a Further affidavit sworn by the 1st Defendant/Applicant.
5. In addition, it is worthy to state that the application herein came up for directions on the 19th January 2023, on which date the advocate for the respective Parties agreed to canvass and ventilate the subject application by way of written submissions.
6. Based on the foregoing, the Defendants/Applicants duly filed two sets of written submissions, one dated the 7th November 2022 (which was filed earlier than the directions of the court) and the second submissions is dated the 27th January 2023.
7. On his part, learned counsel for the Plaintiff/Respondent filed written submissions dated the 8th December 2022. For clarity, all the three sets of written submissions filed by and on behalf of the Parties herein form part and parcel of the record of the Honourable court.

Submissions by the Parties

Applicants' Submissions:

8. Learned counsel for the Applicants' has raised and ventilated four issues for consideration and determination by the Honourable court.
9. Firstly, learned counsel for the Applicants has submitted that this Honourable court is seized and possessed of the requisite Jurisdiction to entertain and adjudicate upon of the provision of security for costs. In this regard, counsel has invited the court to take cognizance of Order 26 Rules 1, 5 and 6 of the *Civil Procedure Rules 2010*.
10. In addition, learned counsel for the Applicants has also cited and quoted inter-alia, the case of *Official Receiver and Liquidator of Seipai Ltd v Narandas Nanji Chandrani* 91961)EACA and *Noormohamed Abdulah v Ranchbodbhai J Patel & Another* (1962)EACA, respectively, to underscore the contention that in appropriate cases, the court ought to decree provision of security for costs.
11. Secondly, learned counsel for the Applicants has submitted that upon being served with the current application, it was incumbent upon the Plaintiff/Respondent, not only to file a Replying Affidavit but also to file an Affidavit of Means, showing his ability to pay/liquidate, any costs that may become payable if the claim is ultimately found to be untenable.
12. To the extent that the Plaintiff/Respondent failed or neglected to file the requisite affidavit of means, learned counsel for the Applicants has therefore implored the court to find and hold that indeed the Plaintiff/Respondent is devoid of the requisite capacity and capability to pay the costs that may ultimately ensue.
13. In respect of the submissions that it was incumbent upon the Plaintiff/Respondent to file an affidavit of means, learned counsel for the Applicants has cited and relied upon the case of *Kibiwot & 4 Others v*



Registered Trustees of Monastery Our Lady of Victory (2004)eKLR, where the question and importance of affidavit of means was canvassed and deliberated upon.

14. Thirdly, learned counsel for the Applicants has submitted that an order for provision of security for costs does not by itself constitutes a violation of the Respondent's Constitutional right of access to justice, either as alleged or at all.
15. Furthermore, learned counsel has added that an order for provision of security for costs has variously been deliberated upon and granted in circumstances that were deemed appropriate, just and expedient.
16. To underscore the submissions that an order for provision of security for costs does not constitutes a violation of the right of access to justice, learned counsel has cited and quoted the decision in the case of Johnson Muthama v Minister of Justice and Constitutional Affairs & Others, Nairobi Petition No. 198 of 2011 (Unreported) and Gitarau Peter Munya v Dickson Mwenda Kithinji & 2 Others (2014)eKLR, respectively.
17. Fourthly, learned counsel for the Applicants has also submitted that the Plaintiff/Respondent herein is fond of filing a plethora/multiplicity of suits, claiming adverse possession, merely to vex the registered owners of various properties claimed by himself.
18. In this respect, learned counsel for the Applicants has invited the court to take cognizance of the contents of the Further Affidavit sworn on the 27th January 2023 and in particular paragraph 5 thereof, wherein the deponent of the affidavit has itemized the various suits, which have hitherto been filed by the same Plaintiff/Respondent.
19. Additionally, learned counsel for the Defendants/Applicants has further submitted that it is not legally possible and/or feasible for the Plaintiff herein to purport to be in actual, physical and active possession of four (4) separate and distinct parcels of land situate within the City of Nairobi (sic) at the same time.
20. Consequently and in the premises, learned counsel has therefore submitted that from the totality of the facts which have been placed before the court, it is evident and apparent that the Plaintiff/Respondent herein is on a Fishing expedition and is driven by ulterior motives, in the filing of the various suits claim adverse possession.
21. Furthermore, learned counsel for the Applicants has contended that based on the multiplicity of suits filed by the same Plaintiff herein, what comes to the fore is that the Plaintiff/Respondent suit herein and even the others which have hitherto been filed, are lacking in bona fides.
22. In addition, learned counsel for the Applicants has also submitted that the Plaintiff/Respondent herein is merely intent on vexing the Applicants, with a view to having same incur unnecessary costs, which ultimately, will not be recoverable from the Plaintiff/Respondent.
23. Based on the foregoing submissions, learned counsel for the Applicants has therefore impressed upon the Honourable court to find and hold that where a claim filed by and at the instance of a particular Party, in this case the Plaintiff/Respondent, is lacking in bona fides, then it behooves the court to decree provision of security for costs.
24. Consequently and in the premises, the learned counsel for the Applicants has therefore contended that this is a fit and proper case to decree provision for costs in the sum of kes.1, 600, 000/= only to be paid or deposited in an Escrow account in the names of the Advocates for the respective Parties.



Respondent's Submissions

25. The learned counsel for the Respondent filed written submissions dated the 8th December 2022 and in respect of which same has raised two salient and pertinent issues for consideration and determination by the court.
26. First and foremost, learned counsel for the Plaintiff/Respondent has submitted that an order for provision of security for costs falls at the discretion of the court, which discretion, however ought to be exercised reasonably, justly and taking into account the circumstances of each case.
27. In this regard, learned counsel has cited and relied upon various decisions inter-alia [*Jayesh Hasmukh Shah v Narin Haira & Another*](#) (2015)eKLR, [*Marco Trolls & Explosive Ltd v Mamunje Brothers Ltd*](#) (1988)eKLR and [*Aggrey Shivona v Standard Group PLC*](#) (2020)eKLR.
28. Secondly, learned counsel for the Plaintiff/Respondent has submitted that an order for provision for security for costs, if not properly interrogated, has a likelihood of restricting, hindering and/or otherwise, violating the Respondent's Constitutional right of access to justice.
29. Based on the foregoing, learned counsel for the Respondent has submitted that prior to and or before decreeing provision of security for costs, the Honourable court ought to exercise due caution and circumspection and to ensure that such an order is not calculated to deprive poor Litigants from accessing the corridors of the court and prosecuting their matters in the conventional way.
30. To this end, learned counsel has cited and quoted the decision in the case of *Noormohamed Abdulab v Ranchhodhbhai J Patel & Another* (1962)EACA and [*Keystone Bank Ltd & 4 Others v I & M Holdings Ltd & Another*](#) (2017)eKLR, respectively.
31. Additionally, learned counsel for the Plaintiff/Respondent has submitted that the question and issue for costs is at the discretion of the court and hence the Applicants herein cannot be heard to demand provision for security of costs, as if an award of costs arises as a matter of right.
32. Furthermore, learned counsel for the Plaintiff/Respondent has invited the court to take cognizance of the provisions of Section 27 of the [*Civil Procedure Act*](#), Chapter 21, Laws of Kenya, and to find and hold that the court has a discretion in the award of costs and hence the Applicants herein cannot purport and/or imagine that same shall be entitled to an award of costs (sic) at the conclusion of the subject proceedings.
33. To vindicate the foregoing submissions, learned counsel for the Plaintiff/Respondent has cited and relied on various decisions *inter-alia*, [*Thomas Nyaga Njuki v Alexander Ireri Karimi*](#) (2020)eKLR, [*Millicent Wamaitha Njogu v Paulin Nyambura Waweru*](#) (2022)eKLR and [*County Government of Tana River & Another v Hussein Fumo Hiribae*](#)(2021)eKLR.
34. In a nutshell, learned counsel for the Plaintiff/Respondent has therefore submitted that the Applicants herein have neither established nor proved the requisite conditions/ingredients to warrant the grant of an order for provision of security, either as sought or at all.
35. In the premises, learned counsel has implored the Honourable court to find and hold that the instant application is not only premature and misconceived, but that same is devoid of merits and thus courts dismissal.



Issues for Determination

36. Having reviewed and evaluated the instant application, together with the Supporting and Further affidavit, attached thereto and having taken into account the Replying Affidavit sworn on the 5th December 2022; and upon considering the written submissions filed by and on behalf of the Parties, the following issues do arise and are thus germane for determination;
- i. Whether the Applicants herein have established and demonstrated the requisite circumstances to warrant the grant of an Order for Provision of Security for Costs.
 - ii. If the answer to number (i) above is in the affirmative, then what is the Quantum of costs to be decreed in the circumstances.

Analysis and Determination

Issue Number 1. Whether the Applicants herein have established and demonstrated the requisite circumstances to warrant the grant of an order for provision of security for Costs.

37. The instant suit and/or proceedings were filed and commenced by the Plaintiff/Respondent, who contended that same has been in actual, physical and active possession of the suit property and thus same is entitled to declaration of ownership on the basis of adverse possession.
38. Subsequent to the filing of the instant proceedings and upon being served with the court process, the Defendants/Applicants duly entered appearance and filed their response, wherein same contended that the Plaintiff/Respondent herein has never been in possession or occupation of the suit property or at all.
39. Furthermore, the Defendants further added that the claims by the Plaintiff pertaining to and concerning occupation and possession of the suit property, are informed by deceit, misrepresentation and mala fides.
40. Other than the foregoing, the Defendants/Applicants latter on filed before the Honourable court evidence to show that other than the instant suit, the Plaintiff/Respondent herein has filed various other suit claiming adverse possession against other Parties. In this regard, the Defendants/Applicants pointed out the following suits;
- i. ELC OS No. E029 Of 2022 Between *John Nyaga Karaya v Dt Dobbie & Company (ea) Ltd.*
 - ii. ELC OS No. E080 Of 2022 Between *John Nyaga Karaya v Makimwa Consultant Ltd*
 - iii. ELC OS NO. E082 Of 2022 Between *John Nyaga Karayav Equity Traders Ltd.*
41. Despite being served with the Further affidavit advertizing to the numerous cases filed and mounted by himself, the Plaintiff/Respondent herein, did not deem it fit and expedient to respond to the averments thereunder and to clarify why same has been filing a plethora of claims for adverse possession against various Third parties.
42. In the absence of any response by the Plaintiff/Respondent and taking into account the ingredients that bely a claim for adverse possession, the question that remains lingering in the mind of the court, is whether the current Plaintiff/Respondent can certainly be in adverse possession of various and numerous properties, which are being litigated against.
43. Whereas this Honourable court is not called upon to make any precipitate and substantive pronouncement on question/issues of facts, albeit at an interlocutory stage, what arises in respect of



the subject matter is a serious doubt as to the bona fides of the claims being litigated before this court and in particular, the one beforehand.

44. In view of the foregoing observation, this court is driven to believe that the current suit, could very well be one of those litigations that have gained currency within the City of Nairobi; and wherein persons who are thirsty for land, particularly, in the Up-market areas, Karen, not excepted, are now on the prowl.
45. In view of the foregoing position, I come to the conclusion that the Defendant/Applicants herein, may very well be subjected to a lengthy litigation, over and in respect of the subject matter, and ultimately upon the conclusion of the dispute, same will be left high and dry, without any atonement or indemnity on the question of costs.
46. Be that as it may, I must point out that prior to and before making a positive finding for provision for security for costs, the court is called upon to exercise its discretion in a reasonable and just manner, taking into account the circumstances of each case and endeavoring to balance the Interests of the Parties before the Honourable Court.
47. However, it is not lost on this court that whilst exercising such discretion, the honourable court is called upon to undertake a delicate balance between the interest of the Applicant on one hand and those of the Respondent on the other hand.
48. Nevertheless, having taken into account the interest of both the Applicants and the Respondent and upon considering the totality of the evidence that has been placed before the Honourable court, I am minded to agree with the Applicants that this is a fit and proper case, wherein the claimant/ Respondent, ought to be called upon to provide security for costs.
49. In any event, in arriving at the foregoing conclusion, I have endeavored to and indeed reviewed various decisions of the Superior Courts, who have had occasion to consider the question of security for costs and in particular, the circumstances wherein such an order ought and should issue.
50. Firstly, I took into account the holding and observation of the court in the case of In *Johnson Muthama -v-versuss- Minister of Justice and Constitutional Affairs and Others* - Nairobi Petition No. 198 of 2011, where the court observed as hereunder;

“(69) Provision of payment of costs by a party coming before the court does not in my view, violate any provision for *the constitution*. It is a common practice in civil proceedings intended to safeguard the interests of the party against who a claim is brought and to prevent abuse of the court process.

Given the nature of elections, it serves a useful and rational purpose of ensuring that only those who have a serious interest in challenging the outcome of an election do so.”

51. Furthermore, the question and issue pertaining to provision of security for costs was also adverted to in the case of *Patrick Ngetakimanzi -v- Marcus Mutuamuluvi & 2 others*-High Court Election Petition No. 8 of 2013, where the court stated and held as hereunder;

“Security of costs ensures that the respondent is not left without recompense for any costs or charges payable to him. The duty of the court is therefore to create a level ground for all the parties involved, in this case, the proportionality of the right of the petitioner to access



to justice vis-a-vis the respondent's right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him.”

52. Additionally, the court in the case of In *Harit Sheth Advocate v Shamas Charania*-Civil Appeal No. 68 of 2008, stated and held as hereunder;

“The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing.”

53. Surely, given the amount of litigation that the Plaintiff/Respondent herein is involved in, details which were alluded to elsewhere herein before, it is apparent that at some point in time, the Plaintiff would be saddled with costs depending on the outcome of the impugned suits.
54. For example, if the Plaintiff herein were to lose all the suits, namely, the four of them and each of the decree holder be awarded costs, then there is a likelihood that some of the Decree holders, the Defendants/Applicants herein not excepted, may not be able to recover their costs.
55. Finally, it is not lost on this Honourable court, that even though his ability and capability to pay the costs, if any, that may arise has been questioned, the Plaintiff/Respondent has remained mute and chosen to remain quiet, on his means.
56. Having failed to respond to the various queries pertaining to his ability to pay costs, if any, that may ultimately ensue, the court is left with no option but to make an adverse inference.
57. Furthermore, where a Respondent fails to avail and/or file an affidavit of means, the court is left with no option but to find and hold that indeed such a Respondent would not be capable of paying/settling the costs, if any may arise. See the provisions of Section 112 of the *Evidence Act*, Chapter 80, Laws of Kenya.
58. To this end, it is imperative to adopt and reiterate the holding of the court in the case of In *Kibiwott & 4 others v Registered Trustees of Monastery Our Lady of Victory* [2004] eKLR, where the Honourable held that it is incumbent upon the Plaintiff when served with an Application seeking the provision of security for costs to, as a matter of course, provide an “affidavit of means” stating that he is capable of paying the costs if he is unsuccessful in his case.
59. For coherence, Hon. Justice Kimaru stated thus:-
- “When the Plaintiffs were served with the Application seeking that they provide security for costs, the Plaintiffs ought to have, as a matter of course, provided an affidavit of means stating that they were capable of paying the costs, if they were unsuccessful in their case.”
60. Without belaboring the point, I come to the conclusion that the circumstances herein warrant an order for provision of costs, as against the Plaintiff herein, who despite being served with the Application querying his capability, kept silent on his (sic) means, if any. Consequently, my answer to issue number one (1) is in the affirmative.



Issue Number 2. If the answer to number (i) above is in the affirmative, then what is the Quantum of costs to be decreed in the circumstances.

61. Having found and held that obtaining circumstances warrants an order for provision of security for costs, the next question that now merits determination relates to the quantum of such security for costs.
62. It is worthy to recall that the Applicants herein contended that the suit property is worth approximately Kes.80, 000, 000/= and hence the instruction fees and incidental charges are likely to be in the region of Kes.1, 600, 000/= only.
63. However, despite making the foregoing averment, the 1st Applicant herein neither availed nor tendered any valuation report to anchor and vindicate the value alluded to in the supporting affidavit. In this regard, the named value, remains merely an approximation, albeit in the mind of the 1st Applicant.
64. Furthermore, I must also state and underscore that where a claimant/Applicants files an application for provision for security for costs, (save for an election petition), there is need for the Applicant to annex to the application for security for costs, a Draft Bill of costs giving a glimpse of what the costs may look like at the conclusion of the trial.
65. Notwithstanding the foregoing, it is imperative to observe that the Plaintiff/Respondent on his part neither challenged the estimated value of the suit property, which was stated to be in the region of Kes.80, 000, 000/= only.
66. Other than the foregoing, it is also worthy to state that the Plaintiff/Respondent also did not controvert or challenge the proposed quantum of costs, which was estimated to be in the sum of Kes.1, 600, 000/= only.
67. Given the foregoing observations and taking into account that the question of security for costs is one for discretion of the Honourable court, which discretion extends, also to the issue of quantum, I am minded to decree and order that the Plaintiff/Respondent shall provide security for costs in the sum of Kes.800, 000/= only.
68. For coherence and good measure, the said sum sounds reasonable and expedient, taking into account the indisputable fact that the suit property is situated within the up-market area of Karen, in the City of Nairobi.

Final disposition

69. Having considered and dealt with the two pertinent issues that were alluded to and enumerated in the body of the Ruling, I come to the conclusion that the Defendants/applicant's application under reference is meritorious and thus deserving of being granted.
70. Consequently and the premises, the Application dated the 5th October 2022 be and is hereby allowed on the following terms;
 - i. The Plaintiff/Respondent be and is hereby ordered to furnish security for costs in the sum of Kes.800, 000/= only to be deposited in an Escrow/Joint Interests Earning account in the names of the advocates for the respective Parties, in a reputable banking/financial institution to be agreed upon by the advocates for the Parties.
 - ii. The Escrow account, details in terms of clause (i) above to be opened and operationalized within a duration of sixty (60) days from the date hereof.



- iii. In default to provide the requisite security for costs in the sum provided in terms of clause (i) hereof and within the duration stipulated in clause (ii) above, the Plaintiff's suit shall automatically stand dismissed.
- iv. In the event of compliance with clause (i) and (ii) hereof, the Plaintiff shall take necessary and appropriate steps to ensure that the suit herein is heard and disposed of within a duration of six (6) months, from the date of compliance with the terms of clause (ii) hereof.
- v. Costs of the Application herein be and are hereby awarded to the Defendants/Applicants.
- vi. Either party shall be at liberty to apply.

71. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2023.

HON. JUSTICE OGUTTU MBOYA,

JUDGE

In the Presence of:

Benson - Court Assistant.

Ms. Bridgit Achieng h/b for Mr. Joseph Angwenyi for the Plaintiff/Respondent.

Mr. Eugene Lubullelah for the Defendants/Applicants.

