



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL SUIT 940 OF 2001

- ***Order XXXVIII rules 1, 2, 5 and 12 of the Civil Procedure Rules and sections 3A, of Civil Procedure Act.***
- ***Furnishing of security for a counterclaim by a party not within the jurisdiction of this court***
- ***Principles applicable***

HEALTHWISE PHARMACEUTICALS LTD.....PLAINTIFF/RESPONDENT

VERSUS

SMITHKLINE BEECHAM CONSUMER

HEALTHCARE LIMITED.....DEFENDANT/APPLICANT

R U L I N G

The application under consideration is a Chamber Summons dated 14th May, 2009 expressed to be brought under Order XXXVIII rules 1, 2, 5 and 12 of the Civil Procedure Rules and sections 3A, of Civil Procedure Act. The Applicant seeks prayers 2 to 5 of the Chamber summons namely:

2. *That the Plaintiff/Respondent do supply security for the Defendant's counterclaim amount of USD \$85,000/-.*
3. *THAT the Plaintiff/Respondent do deposit the aforesaid amount of USD \$85,000/- in an account in the joint names of its Advocates, Khaminwa & Khaminwa Advocates and Kamotho Maiyo & Mbatia Advocates in Co-operative Bank of Kenya Limited in the Republic of Kenya within fifteen (15) days of the above order.*
4. *THAT the Defendant/Applicant be at liberty to apply for such further orders and directions this Honourable Court may deem fit and just to grant.*
5. *THAT the costs of this application be provided for.*

The grounds in support of the application are on the face of it, the gist of which are that the Plaintiff is a Corporation with its head office in Uganda which is outside the jurisdiction of this court and that it has no known assets in Kenya and that the Defendant believes it is impecunious and may not meet the Defendant's counterclaim if it succeeds.

This application is opposed. The Plaintiff has sworn an affidavit through its Director Mr. Amin Ladha. In that affidavit Mr. Ladha deposes that he is a Kenyan Citizen and has annexed his passport as proof of the same. The deponent has also drawn the court's attention to the fact that the Plaintiff has already provided security for the Defendant's costs in the sum of USD\$ 45,000 as ordered by the court on the 20th June, 2001.

I have considered the application together with the cases which have been relied upon. The courts have been very slow and extremely cautious in ordering for attachment before judgment. The courts power to order for attachment before judgment is exercised only upon very clear proof, especially of mischief where the Defendant is in the process of disposing property or removing it from the jurisdiction of the court. That was the holding in the case of Kuria Kanyoko vs. Francis Kuria Nderu & Others, [1988] 2 KAR 126 which was cited by the Applicant's Advocate. However, counsel was seeking to rely on a holding that was made per curium and which I have ignored.

The Applicant also relied upon the case of Gotke vs. Settlement Funds Trustee [1966] EA 473. With due respect to Mrs. Kiama for the Applicant, that case is not applicable to the instant one. The application in the cited case had been made on the basis that the Defendant was in the process of transferring property in order to ensure that it is beyond the reach of the Plaintiff in case it succeeded in its case. There is no such an allegation in this case. All the Applicant wishes to do in this application is to secure its judgment in the case incase it will be successful in its counterclaim. The application has been made solely on the ground the Plaintiff/Respondent has no known attachable asset in Kenya.

Mr. Khaminwa for the Respondent has submitted that the Applicant has not been able to bring the application within the conditions under which the orders sought can be made. Counsel has invoked order XXXVIII rule 1(a) and (b) which gives those instances as; where it is shown that he Respondent is delaying the matter, or is guilty of obstruction of the court process, or that it is guilty of acts geared towards avoiding meeting any decretal sum.

I have considered all the arguments by the parties. I have considered that the prayer sought is a discretionary one. I have considered the fact that the Plaintiff, who is the Respondent in this application, has already provided security for costs in the sum of US\$ 45,000. Even though the order to deposit the security for costs was made pursuant to XXV rule 1 and the fact the deposit secured only the Defendant's costs means that the Plaintiff has already provided some measure of security to the Defendant and Plaintiff in the counterclaim.

The Applicant has not demonstrated that the Plaintiff is guilty of any acts or omissions geared towards avoiding any judgment against it; or of any attempts to either delay or obstruct the process of the court. The Applicant has not brought any evidence to show that the Plaintiff is trying to avoid meeting any decretal sum which may arise from this case. I have also considered that this application has been made rather late in the day. The Applicant has all along known that it has a counterclaim against the Respondent. It is rather late for the Applicant to wake up from its slumber and demand deposit of the sum in the counterclaim, eight years after the suit was filed and at the time when the case is about to be concluded. So far in this case the Plaintiff has not admitted any part of the Defendant's claim in the counterclaim. That is also an important consideration to make in an application of this nature. Further, having heard a substantial part of the case, I cannot say at this stage that there is a strong prima facie presumption which party is likely to succeed in its case. The Plaintiff is claiming quite a substantial sum in its case higher than the Defendant. I see no strong basis upon which to rule in the Applicants favour.

In exercise of my discretion in this matter, I decline to allow the Applicant's application dated 14th May 2009, and accordingly I dismiss it with costs.

Dated at Nairobi this 12th day of June, 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Mr. Ondieki holding brief Mrs. Kiama for the Defendants/Applicant Mr. A. Khaminwa for the Plaintiff/Respondent

LESIIT, J.

JUDGE