



Prism Life Sciences Limited v Galaxy Pharmaceuticals Limited & another (Commercial Case E065 of 2025) [2025] KEHC 10038 (KLR) (Commercial & Admiralty) (10 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10038 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
COMMERCIAL CASE E065 OF 2025**

PM MULWA, J

JULY 10, 2025

BETWEEN

PRISM LIFE SCIENCES LIMITED PLAINTIFF

AND

GALAXY PHARMACEUTICALS LIMITED 1ST DEFENDANT

PHARMACY & POISONS BOARD 2ND DEFENDANT

RULING

1. This matter was filed under a certificate of urgency with an application dated 31st January 2025, seeking an injunctive relief against the Defendants dealing with pharmaceutical products owned or similar molecules owned by the applicant.
2. Upon initial perusal, the Court declined to certify the application as urgent and instead directed that the Plaintiff/Applicant serve the Defendants. The matter was thereafter scheduled for directions on 4th March 2025.
3. Upon service, the 1st Defendant filed a Notice of Preliminary Objection dated 24th February 2025, raising objections to the admissibility and validity of the Plaintiff's supporting affidavit and annexures. The grounds of objection are as follows:
 - i. That the supporting affidavit is incurably defective and should be expunged from the record;
 - ii. That the Notary Public in India failed to properly certify the 258 exhibits attached to the affidavit, contrary to legal practice;
 - iii. That the affidavit is not accompanied by an apostille from the Indian Ministry of External Affairs as required under the Hague Convention Abolishing the Requirement of Legalization



for Foreign Public Documents, 1961 (the Apostille Convention), to which Kenya is a signatory;

- iv. That the deponent refers to only 10 annexures in the affidavit, while 258 documents have been annexed without proper identification or certification;
 - v. That the affidavit is misleading and false on its face when compared to the annexures;
 - vi. That several documents are annexed without having been referred to in the body of the affidavit;
 - vii. That some annexures concern entities that are not party to the suit, contrary to procedural rules;
 - viii. That the affidavit does not contain factual depositions but speculative opinions, conjecture and assertions outside the deponent's competence.
4. Pursuant to the directions issued by the Court, the parties agreed to canvass the Preliminary Objection by way of written submissions. The 1st Defendant filed submissions dated 4th April 2025, while the Plaintiff responded with submissions dated 11th April 2025. The 2nd Defendant indicated it would not participate in the proceedings.

Analysis and determination

5. Two issues arise for determination:
- i. Whether the Preliminary Objection as raised by the 1st Defendant is meritorious and,
 - ii. Whether the impugned supporting affidavit should be struck out for being incurably defective.

Whether the Preliminary objection is merited

6. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696 found that a preliminary objection must be on a point of law. Law JA as he then was had this to say:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

7. Similarly, the Supreme Court of Kenya in *Application No. 11 of 2016, Hassan Nyanje Charo v Khatib Mwashetani & 3 others* [2016] eKLR, reaffirmed that:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. A preliminary objection must not deal with disputed facts.”

8. In *David Nyekorah Matsanga & Anor Vs Philip Waki & 3 Others* (2017) eKLR it was held that a preliminary objection should not be raised where facts had to be ascertained or where what was sought is the exercise of judicial discretion.

9. The 1st Defendant's core contention is that the affidavit and exhibits relied upon by the Plaintiff are inadmissible for failure to comply with the provisions of the Hague Convention Abolishing the



Requirement of Legalization for Foreign Public Documents of 1961 (commonly referred to as the Apostille Convention). Kenya is a signatory to the Convention, and by virtue of Article 2(6) of *the Constitution* of Kenya 2010, the same forms part of the laws of Kenya. It is asserted that the affidavit sworn in India and the annexed exhibits must bear an apostille issued by the competent Indian authority to be admissible in these proceedings.

10. Article 4 of the Apostille Convention provides that public documents executed abroad must bear an apostille certificate issued by the designated authority of the country where the document originated. This certificate serves to authenticate the signature, capacity of the notary public signing the affidavit, and, where appropriate, the seal or stamp affixed. The obligation to comply with this requirement has been domesticated through Article 2(6) of *the Constitution* and is supported by the provisions of the *Evidence Act* (Cap 80), which govern the admissibility of documentary evidence.
11. Moreover, Order 19 Rule 4 of the Civil Procedure Rules requires that affidavits filed in court proceedings must be confined to facts within the personal knowledge of the deponent. The evidentiary value of affidavits is therefore contingent not only upon the substance of the deposed facts, but also upon the procedural and formal regularity of their execution.
12. In the present case, the supporting affidavit was executed in Mumbai, India, before a notary public, and bears a notation that it was drawn by the Plaintiff's advocates based in Nairobi. However, no apostille certificate is annexed to authenticate the said affidavit, nor has the Plaintiff filed an affidavit or other admissible evidence proving that the deponent appeared before a duly appointed Indian notary public and that the notary's seal and signature are genuine.

The Court in *Pastificio Lucio Garofalo SPA v Security & Fire Equipment Co & Another* [2001] eKLR, per Ringera, J (as he then was), was confronted with a similar issue where an affidavit sworn in Italy was not accompanied by proof of proper notarization or translation. The learned Judge held that in the absence of such authentication, the affidavit could not be accepted by the Court, stating:

“...it follows that the affidavit in the instant case which was taken in Napoli, Italy, has to be proved by affidavit or otherwise to have been taken by a Notary Public in Italy and that the signature and seal of attestation affixed thereto was that of such Notary Public. There is no such proof here. It may very well be that the certificates in Italian and the other writing in Italian were meant to do that. However, as there was no translation of the same into English - which is the official language of the High Court cannot and will not know the position.”

13. I find this reasoning to be sound and applicable to the instant case. The requirement for apostille or equivalent authentication is not a mere technicality but a substantive procedural safeguard aimed at ensuring the integrity and reliability of evidence presented before Kenyan courts.
14. Consequently, it is my finding that the Plaintiff's supporting affidavit, having been executed outside the jurisdiction without an apostille certificate or sufficient proof of proper notarization and authentication, offends the requirements of both the Apostille Convention and the *Evidence Act*, and is therefore inadmissible.
15. The defect is not curable by amendment or subsequent rectification, as the very foundation of the affidavit's admissibility is absent. The Court is accordingly constrained to disregard the said affidavit and the annexures thereto in determining the present application.
16. I also find that the deponent references only ten annexures to his affidavit, but proceeds to list over 250 documents. The 1st Defendant contends that many of these documents are not identified, referenced, or certified, while several relate to entities that are not parties to the proceedings, without any



explanation as to their relevance. This not only raises procedural irregularities but also creates serious concerns about the authenticity, materiality, and potential prejudice occasioned to the Defendants.

17. While Order 19 Rule 7 of the Civil Procedure Rules allows the Court discretion to strike out offensive or inadmissible portions of affidavits, where the defects affect the foundation of the affidavit, such as lack of proper authentication, unverified annexures, and factual misrepresentations, the appropriate remedy is to strike out the entire affidavit.
18. It is trite law that affidavits are the primary vehicles through which evidence is presented in interlocutory applications.
19. For the foregoing reasons, I find merit in the Preliminary Objection dated 24th February 2025. The supporting affidavit sworn in support of the Motion dated 31st January 2025, is incurably defective and is hereby struck out. Consequently, the Notice of Motion application dated 31st January 2025 is rendered incompetent and is likewise struck out.
20. I uphold the Preliminary Objection. The Plaintiff shall bear the costs of the objection as incurred by the 1st Defendant.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF JULY 2025.

PETER M. MULWA

JUDGE

In the presence of:

Mr. Elias Mutuma for Plaintiff

Mr. Bowry, SC for 1st Defendant

Mr. Kang'u for 2nd Defendant

Court Assistant: Carlos

