



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CORAM: F. MUGAMBI, J
CIVIL SUIT NO. E637 OF 2024

BETWEEN

PAUL NGOTHO
APPLICANT

VERSUS

GOODISON SIXTY-ONE SCHOOL LTD
RESPONDENT

RULING

Introduction and Background

1. For determination is the Notice of Motion dated 24th October 2024. The applicant was the Arbitrator in proceedings involving the respondent and a third party, **Symbion Kenya Limited**. He seeks by this application, orders compelling the respondent to deposit in Court the sum of Kshs. 3,390,200/=, being the principal amount awarded as costs, together with interest accruing thereon

from the date the said sums became due, pending the hearing and determination of the suit in which the learned Arbitrator seeks to recover the said sums. The applicant further prays that this Court declares the respondent a vexatious litigant and issue an order restraining it from instituting or continuing with any other proceedings touching on or arising from the same subject matter as that in dispute herein.

2. The applicant avers that insolvency proceedings are currently pending against the respondent. Consequently, he expresses apprehension that unless the impugned sums are deposited in Court pending the hearing and determination of the substantive suit, he stands to suffer prejudice and irreparable loss. In addition, the applicant contends that the respondent has persistently filed multiple suits in various courts arising from the same arbitral proceedings, all of which have been dismissed. On this basis, the applicant urges this Court to exercise its inherent jurisdiction and declare the respondent a vexatious litigant, so as to curtail further abuse of the judicial process.

3. The respondent has opposed the application through Grounds of Opposition and a Replying Affidavit sworn on 9th January 2025 by one **Zainab Jaffer**, a director and shareholder of the respondent. In the said affidavit, the respondent principally impugns the arbitral process that culminated in the award of the impugned sums, contending that the proceedings were flawed and that the resultant award is unenforceable. The respondent further denies the characterization advanced by the applicant that it is a vexatious litigant, asserting instead that the suits previously instituted were bona fide attempts to ventilate legitimate grievances and not an abuse of the court process.

Analysis and Determination

4. I have carefully considered all the filings by the parties in respect of this application. It is pertinent to recall that by a Ruling dated and delivered on 7th October 2025, this Court had already pronounced itself on the preliminary objection anchored on the contention that the suit instituted by the learned Arbitrator was statute-barred. In that earlier determination, the Court held that the issues

raised could not be conclusively resolved on the basis of the pleadings alone. For the avoidance of doubt, this Court stated as follows:

“The assertions by the parties introduce factual disputes that require the Court to examine and verify whether such stay orders were indeed issued, whether the plaintiff was a party to the relevant proceedings, and whether those orders had the legal effect of interrupting the limitation period. These are not matters that can be resolved on the basis of the pleadings alone; they necessitate a factual inquiry and possibly the production of supporting evidence.”

5. Turning now to the prayer seeking a declaration that the respondent is a vexatious litigant, it is necessary to consider the governing statutory framework. ***The Vexatious Proceedings Act, at Section 2***, is explicit in its terms that such an application may only be instituted by the

Honourable Attorney-General. The legislative intent behind this provision is clear. It is designed to safeguard the constitutional guarantee of access to justice enshrined under **Article 48 of the Constitution**, thereby ensuring that litigants are not arbitrarily or capriciously barred from approaching the courts.

6. In the present matter, the application has been brought not by the Attorney-General, but by a private litigant. I am therefore constrained to find that the prayer is incompetent in law. It fails for want of proper foundation and must accordingly be dismissed.
7. The final substantive prayer before this Court is that the respondent be ordered to furnish security for costs. The governing provision is **Order 26 Rule 1 of the Civil Procedure Rules**, which vests this Court with discretion to direct the giving of such security. The exercise of that discretion is not unfettered. It is guided by established principles of law. The Court of Appeal, in **Gatirau Peter Munya V Dickson Mwenda Githinji & 2 Others, [2014] eKLR**, articulated the applicable

principles. It held that the applicant bears the burden of demonstrating that the respondent, if ultimately unsuccessful, would be unable to satisfy any order for costs due to impecuniosity. Mere allegations of poverty or inability are insufficient. The applicant must place before the Court cogent material showing either financial incapacity or lack of bona fides in the prosecution of the claim. The Court stated as follows:

“In an application for further security for costs, the Applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a Respondent will be unable to pay costs in the event that he is unsuccessful. And the onus is on the Applicant to prove such inability or lack of good faith that would make an order for security reasonable.”

8. The rationale behind the requirement for security for costs was elaborated in the ***Munya*** case and subsequently emphasized by the Supreme Court in ***Westmont Holdings SDN BHD V Central Bank of Kenya & 2 Others; Petition No. 16(E023) of 2021***. The apex Court emphasized that security for costs serves a dual purpose in that it protects litigants from the risk of unenforceable cost orders while simultaneously preserving the constitutional imperative of access to justice under **Article 48**. The Court must therefore strike a delicate balance, ensuring that impecunious litigants are not unjustly shut out of the judicial process, while also safeguarding successful parties from the prejudice of unrecoverable costs. The prayer for security for costs must be considered against this jurisprudential backdrop.
9. In the present case, the applicant has expressed apprehension that the respondent may be unable to satisfy any decree that might ultimately be issued in his favour. The basis of this apprehension is the alleged pendency of insolvency proceedings against the respondent. No documentary evidence has been tendered before this Court to

substantiate the existence of such insolvency proceedings or to demonstrate the respondent's inability to meet its financial obligations. The averments advanced by the applicant therefore remain speculative. While it is true that the respondent has not placed before the Court evidence of its financial capacity, the burden of proof in such applications lies squarely upon the applicant. It is incumbent upon the party seeking security for costs to establish, by credible and cogent evidence, that the opposing party is impecunious or is acting in bad faith.

- 10.** In the absence of such demonstration, this Court cannot properly exercise its discretion under **Order 26 Rule 1 of the Civil Procedure Rules** to order the furnishing of security for costs. To do so on the basis of mere allegations would be to undermine the constitutional imperative of access to justice under **Article 48 of the Constitution**. Accordingly, the prayer for security for costs is found to be unmerited and is hereby declined.

Disposition

11. Consequently, the Notice of Motion dated 24th October 2024 is devoid of merit and is hereby dismissed. Costs of the application shall abide the outcome of the main suit.

**DATED, SIGNED AND DELIVERED IN NAIROBI
THIS 23RD DAY OF MARCH 2026.**

**F. MUGAMBI
JUDGE**

Delivered in presence of:

Mr Kibet HB for Ms Lumallas for the applicant
Court Assistant: Lillian