AGK (Suing on Behalf of WK - Minor) v Oyatsi (Civil Suit E197 of 2021) [2026] KEHC 4834 (KLR) (Civ) (16 April 2026) (Ruling)

Neutral citation: [2026] KEHC 4834 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT E197 OF 2021

JN MULWA, J

APRIL 16, 2026

BETWEEN

AGK (SUING ON BEHALF OF WK - MINOR) ..... PLAINTIFF

AND

DR. DONALD P. OYATSI ..... DEFENDANT

RULING

1. For determination is the motion dated 23/05/2025 filed by Dr. Donald P. Oyatsi (hereafter the Defendant) as against Ann Gathoni Kimondo pursuant to Section 3A of the *Civil Procedure Act* (CPA) and Order 26 Rule 1 of the Civil Procedure Rules (CPR), seeking inter alia -:

    a. That the suit be dismissed and or struck out.

    b. Alternatively, the Plaintiff be ordered to give security for costs in the sum of Kshs. 3,000,000/- or any other sum the Court deems fit into a joint interest earning account to be opened by the Advocates herein as security for the costs of the Defendant within 30 days of the order.

    c. That the costs of this application be borne by the Plaintiff.

2. The application is premised on grounds amplified in the supporting affidavit sworn by the Defendant on even date.

3. Ann Gathoni Kimondo (hereafter the Plaintiff) on her part opposes the motion by way of a replying affidavit dated 05/09/2025.

    Directions were taken on disposal of the motion by way of written submissions. The parties duly complied.

Analysis and Determination

4. The Court has considered the rival material and submissions, and postulates the issues for determination thus:

    a. Whether the Plaintiff's suit ought to be dismissed and or struck out?

    b. Whether the Plaintiff ought to be ordered to give security for costs in the sum of Kshs. 3,000,000/-?

    c. Who ought to bear the costs of instant motion?

Whether the suit ought to be dismissed and or struck out?

5. In presenting the instant Applicant, the Defendant relies on among other provision Section 3A of the CPA which specifically reserves "the inherent power of the court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court", to wit, this Court's inherent powers was judiciously addressed by the Court of Appeal in Rose Njoki Kingau & another v Shaba Trustees Limited & another [2010] KECA 87 (KLR) and requires no restatement.

6. Ordinarily, applications seeking to dismiss and or summarily strike out pleadings are brought pursuant to the relevant provisions of Order 2 Rule 15 of the CPR. Which provides in part that-;

> " At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that—

    a. .....; or

    b. it is scandalous, frivolous or vexatious; or

    c. it may prejudice, embarrass or delay the fair trial of the action; or

    d. it is otherwise an abuse of the process of the court"

7. Concerning the striking out of pleadings, the Court of Appeal in Cooperative Merchant Bank Ltd v George Fredrick Wekesa Civil Appeal No. 54 of 1999 as cited with approval in Jubilee Insurance Company Limited v Grace Anyona Mbinda [2016] KEHC 4003 (KLR), stated that-;

> " The power of the court to strike out a pleadings under Order 6 Rule 13 (1) (b) (c) & (d) is discretionary ..... Striking out a pleading is a draconian act, which may only be resorted to, in plain cases. Whether or not a case is plain in a matter of fact...."

8. Madan J.A in the of-cited decision of D.T. Dobie & Company (Kenya) Ltd v Muchina [1982] eKLR, enunciated several principles to be applied in an application brought under then, Order VI Rule 13 (now Order 2 Rule 15) of the CPR. Referring to various English decisions, Madan J.A observed that:

> " a) The rule is to be acted upon in plain and obvious cases and the jurisdiction exercised sparingly and with care.
>
> b) ...
>
> c) ...."
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> It is relevant to consider all averments and prayers when assessing under Order 6 Rule 13 whether a pleading discloses a reasonable cause of action, and also

the contents of any affidavits that may be filed in support of an application that a pleading is otherwise an abuse of the process of the court... The court ought to act very cautiously and carefully and consider all the facts of the case without embarking on a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court... A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal... No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment." [Emphasis Added]

9. In Kivanga Estates Limited v National Bank of Kenya Limited [2017] KECA 591 (KLR) for instance, the Court of Appeal echoing the dicta in D.T Dobie (supra) stated -;

> "It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction capable of bringing a suit to an end before it has even been heard on merit. Yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations ... Striking out a pleading though draconian, the Court will in its discretion resort to it, where, for instance the court is satisfied that the pleading has been brought in abuse of its process or where, it is found to be scandalous, frivolous and vexatious".

See also: - Crescent Construction Co. Ltd v Delphis Bank Ltd [2007] KECA 500 (KLR)

10. Keeping in mind the above principles, what I gather to be the gist of the Defendant's affidavit material in support of the motion is that the Plaintiff's suit is scandalous, frivolous or vexatious; and or is otherwise an abuse of the process of the Court. I further garner it to be the Defendant's position that the Plaintiff's claim on alleged medical negligence, as against him, is unfounded; that the suit as presented is an attempt by the Plaintiff towards unjust enrichment.

11. Additionally, it is the Defendant's case that the Plaintiff's concealment and non-disclosure of material facts towards disguising the true nature of her cause of action is illegal and immoral, for which the Court is precluded by law from sustaining the instant cause.

12. In her response, the Plaintiff contends that the Defendant prescribed wrong medication to the minor that failed to control her seizures and exposed her to further neurological injury. That as a result of the Defendant's negligence, the Plaintiff has expended onwards of Kshs. 26 million on the Plaintiff-minor's treatment abroad, in addition to enduring immense emotional distress. She goes on to depose that despite determination of her complaint against the Defendant before the Kenya Medical Practitioner's and Dentist Council, vide PIC Case No. 3 of 2017, the latter decision does not oust this Court of jurisdiction to entertain the instant proceedings. She concludes by stating that the Plaintiff's suit raises weighty and triable issues concerning medical negligence, which can only be determined at full hearing of the suit, urging that the Defendant's claim for security for costs is unjustified; therefore the Court ought to dismiss the instant motion with costs.

13. Applying my mind to settled position, on the question concerning dismissal and or summarily striking out pleadings as juxtaposed alongside the facts of this case, the Court of Appeal in Kivanga Estates Limited (supra) cited with approval the decision in Trust Bank Limited v Amin Company Ltd & Another (2000) KLR 164 wherein it was observed that-;

> " A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action?"

14. As regards pleadings that are an abuse of the Court process, the term abuse of the Court process was pithily discussed in the decision in Energy Regulatory Commission v John Sigura Otido [2021] KECA 1060 (KLR) where the Court stated that -:

> " 24. We start with the issue of alleged abuse of the court process. What is the meaning of "abuse of the court process"" That term has been the subject of consideration in a number of decisions by this Court and other Courts. In Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others (supra) this Court observed that it is difficult to comprehensively list all possible forms of conduct that constitute abuse of judicial process. The Court cited the Nigerian case of Sarak v Kotoye [1992] 9 NWLR 9Pt 264 where abuse of judicial process was defined as follows:-
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> > "The concept of abuse of judicial process is imprecise; it implies circumstances and situations of infinite variety and conditions. It's one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice..."
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> 25. The same Court went on to cite examples of abuse of judicial process which include: -
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> > "(a) Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
> >
> > (b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
> >
> > (c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice."

15. Here, a cursory review of the Plaintiff's Amended Plaint, as rightly deposed by the Defendant, the suit is premised on particulars of medical negligence, to wit, the Plaintiff seeks inter alia special damages in the sum of Kshs. 26,365,100/-; general damages for pain, suffering, mental distress, anguish, loss of amenities, costs of minders & future medical expenses; punitive damages; and costs of the suit.

16. Further, notwithstanding the proceedings before the Medical Practitioner's and Dentists Council - Disciplinary and Ethics Committee, this Court is not ousted of jurisdiction by dint of limited relief(s) provided for in Section 20(6) of the *Medical Practitioners and Dentists Act*. In any event, proceedings before the Disciplinary and Ethics Committee of the medical council are disciplinary in nature and not within the ambit of the tort of negligence that is a preserve of civil proceedings before this Court.

17. The above position was similar observed by this Court in Wanjiku (Suing as the next friend and mother to JM - A Minor) v Kenyatta National Hospital & 2 others [2024] KEHC 13661 (KLR).

18. Meanwhile, applying my mind to the dicta in D.T. Dobie (supra) and Trust Bank Limited (supra), a perfunctory perusal of the averments in the Plaintiff's amended plaint, the suit does not appear so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. Ex-facie the Plaintiff's cause of action being one premised medical negligence notwithstanding the circumstance preceding the filing of the suit, the averment therein ought to be tested at trial.

19. In any event, should the Plaintiff fail in discharging her burden of proof on a balance of probabilities, the invariable conclusion would be that the suit would ultimately be dismissed with costs to the Defendant, thus assuaging any prejudice meted on the later. In light of above the Court is not persuaded to dismiss and or strike out the suit in limine.

Whether the Plaintiff ought to be ordered to give security for costs in the sum of Kshs. 3,000,000/-?

20. As concerns security for costs, in the course of litigation, there is no sufficiency of authorities on the question. That said, the Supreme Court of Kenya in the case of Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others [2023] KESC 11 (KLR) set out the guidelines that a Court ought to consider when issuing an order for security for costs. It observed that-;

> 62 .....the imposition of security for costs by a court is in itself constitutional; there are no clear guiding principles on what a court considers when making an order for security for costs; at times the amount payable is left to the discretion of the court; in other times, the amount payable is set out in statute or regulations; in other times, although the amount payable is prescribed by legislation or regulation, the court has the discretion of reducing or enhancing the same or even waiving payment of the same; a suit may be dismissed for non-payment of security for costs; and a dismissed suit may be reinstated upon the appellant or plaintiff showing cause for the non-payment of ordered costs. We are also cognizant of the fact that different courts in our judicial system have crafted their own rules of procedure to govern them including those of security for costs. However, there are no standard guidelines on factors to be considered whilst making an order for security for costs.
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> 63. In the result, and conscious of this court's core mandate under section 3 of the *Supreme Court Act* as the court with final judicial authority, we deem it fit to set guiding principles which will assist courts below when considering an application by a defendant or respondent for security for costs. Thus, in determining whether it is appropriate to make an order that a party gives security for costs, the court may have regard to the following matters and such other matters as it considers relevant in the peculiar circumstances of each case: –
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> i. the prospects of success or merits of the proceedings, ii. the genuineness of the proceedings, iii. the impecuniosity of the plaintiff, iv. whether the plaintiff's impecuniosity is attributable to the defendant's conduct, v. whether the plaintiff is effectively in the position of a defendant, vi. whether an order for security for

costs would stifle the proceedings and/or impede access to justice, vii. whether the proceedings involve a matter of public importance, viii. whether there has been an admission or payment in court, ix. whether delay by the plaintiff in commencing the proceedings has prejudiced the defendant, x. the costs of the proceedings, xi. whether the security sought is proportionate to the importance and complexity of the subject matter in dispute, xii. the timing of the application for security for costs, xiii. whether an order for costs made against the plaintiff would be enforceable within the republic of Kenya, xiv. the ease and convenience or otherwise of enforcing a Kenyan court judgment or order in the country of a non-resident plaintiff or appellant. xv. if the plaintiff is a natural person, an order for security for costs cannot be made merely on account of his or her impecuniosity. xvi. security for costs is to be given in such manner, at such time and on such terms (if any) as the court may by order direct. xvii. if the plaintiff fails to comply with an order under this rule, the court may order that the proceeding on the plaintiff's claim for relief in the proceedings be dismissed. xviii. the provisions of any Act under which the court may require security for costs to be given such as the *Elections Act*. xix. a second motion for security for costs will not succeed unless there is an unforeseen and material change in circumstances since the first order for security. An example of an unforeseen and material change in circumstances might be where a plaintiff has come into a sum of money sufficiently large that they could no longer make an impecuniosity argument .xx .the defendant seeking increased security bears the onus of demonstrating a significant gap between the security ordered and the actual expenses which were not foreseeable and that in hindsight the original request for security for costs was based on an assessment of the complexity of the case which hindsight has established was not realistic. xxi. the jurisdiction to increase or decrease the amount of security already ordered should not be exercised lightly or be used to second guess the court that made the original order, whether on consent or otherwise, unless the gap between what was ordered and what later appears to be necessary is significant.

64. We agree with the jurisprudence from other jurisdictions that a court ought to take into consideration several factors before making an order for security for costs.

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69. To that end, we are of the considered view that a court may impose a condition precedent when imposing an order for security for costs in special and exceptional circumstances such as extraordinary and important cases, for instance, election petitions. The same should, however, be done in a manner that is reasonable and not to punish or subdue a genuine claim. In that regard, imposing a condition precedent is not in itself unconstitutional provided it is not unreasonable to the extent that it impedes a party's access to justice. [Emphasis mine]

21. Earlier, the Court of Appeal, though in an electoral dispute, in Abdinasir Yasin Ahmed & 2 others v Ahmed Ibrahim Abass & 2 others [2014] KECA 104 (KLR), addressed itself as such concerning the question of security for costs-;

> " 11.....It was stated by the predecessor of this Court in Noormohamed Abdulla v Patel [1962] EA 447 at 453:
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> > "It is right that a litigant, however poor, should be permitted to bring his proceedings without hindrance and have his case decided."
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> This principle had been stated in the earlier case of Siri Ram Kaura v Morgan [1961] EA 462. It is the principle applicable in this matter as the appellants are natural persons and not limited liability companies.
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> 12. This is indeed a laudable principle. Roadblocks should not be erected to prevent poor people, who unfortunately are the majority in our country, from urging their causes. An application for security should not even be entertained if the respondent's poverty has been occasioned or contributed to by the act of the applicant.
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> 13. In our view, however, poverty is just but one criterion that should be considered in applications for security for costs. The other criteria include the types and bona fides of the litigants and the nature and merits of their cases. Known vexatious litigants should be required to deposit security for costs before their cases are heard. On the merits of the suit or appeal, clear frivolity will attract orders for security for costs. Each case should, however, be decided on its own merits care always being taken to ensure that the grounds upon which such applications are based are proved to the required standard.
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> 14 ....."

22. Here, what I garner to be the Defendant's position is frivolity of the suit and impecuniosity of the Plaintiff. The latter is premised on the fact that this Court having ordered the Plaintiff to pay the Defendant adjournment costs of Kshs. 5,000/- it took the Plaintiff close to four (4) months to raise and pay the said adjournment costs to the Defendant.

23. The Plaintiff's retort to the above is that an order of security of costs in the sum sought-Kshs. 3,000,000/= is unjustified, oppressive, insensitive and designed to deprive the Plaintiff-minor of her constitutional right to access to justice pursuant to Article 48.

24. As earlier noted in this ruling, a review of the Plaintiff's pleadings ex facie exudes triable issues that warrant canvassing at trial. Further despite the proceedings before the Medical Practitioner's and Dentists Council - Disciplinary and Ethics Committee, the latter does not oust this Court of jurisdiction to entertain the instant proceedings therefore the Defendant's argument frivolity cannot sustain in the circumstance.

25. As to impecuniosity of the Plaintiff, while it is noted that the Plaintiff did not deflect the Defendant's deposition on adjournment costs, nor deposit of her financial ability should her case not turn out successful and whereas the Plaintiff is a natural person, an order for security cannot be made solely on the fact that she failed to promptly settle adjournment costs, but upon the laid down considerations and principles enunciated by the superior courts as stated above, I am of the reasoned view that an order for security for costs is warranted in the circumstance, albeit differently, as urged at prayer 2 of

the Defendant's motion. I further decline to accept the Plaintiff's submission that such an order for provision for security for costs is merely an attempt to delay and or forestall the hearing of the suit.

26. To the foregoing end, the Plaintiff is ordered to give security for the Defendant's costs of the suit in the sum of Kshs. 1,000,000/=, by depositing the said sum in court within a period of 60 days of this ruling, and in any event, on or before the first hearing date of the suit.

Who ought to bear the costs of instant motion?

27. In light of the above order at Par. 26 above, and applying my mind to the provisions of Section 27 of the *Civil Procedure Act* (CPA) and my discretion, I direct that each party to bear own costs of the instant motion.

Orders Accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF APRIL 2026.

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JANET MULWA.

JUDGE