



Gichuki v Glaxosmithkline Pharmaceuticals Kenya (Civil Application E228 of 2021) [2025] KEELRC 347 (KLR) (13 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 347 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CIVIL APPLICATION E228 OF 2021
HS WASILWA, J
FEBRUARY 13, 2025**

BETWEEN

PAULINE WAMBUI GICHUKI APPLICANT

AND

GLAXOSMITHKLINE PHARMACEUTICALS KENYA RESPONDENT

RULING

1. The Applicant through an application dated 28th October 2024, seeks urgent intervention of this Court under Sections 1A, 3, and 3A of the [Civil Procedure Act](#), as well as Order 39 Rule 1 and 2 of the Civil Procedure Rules, 2010. The application is predicated on the apprehension that the Respondent, GlaxoSmithKline Pharmaceuticals Kenya Limited, is winding up its operations in Kenya and transferring its business to a third party. This transition raises critical concerns about the Respondent's ability to satisfy potential cost orders in favour of the Applicant.
2. The Applicant prays for orders compelling the Respondent to furnish security for costs in the sum of Kshs. 150,000,000/= to be deposited in a joint interest-earning account, pending the hearing and determination of ELRC E228 of 2021. The Applicant further seeks an order summoning the Respondent's Managing Director, CEO, or other agents to appear before the Court to justify why such security should not be furnished. In the event of non-compliance, the Applicant requests that this Court compel the Respondent to deposit the said amount directly. The Applicant also urges the Court to expedite the hearing of the main suit to ensure its resolution within six months.
3. The application is grounded on the following reasons:
 - i. That the Applicant, Pauline Gichuki, has a legitimate claim for costs that may arise from the ongoing suit against the Respondent.



- ii. The Respondent, GlaxoSmithKline Pharmaceuticals Kenya Limited, is in the process of winding up its operations within Kenya and transferring its business activities to a third party, which raises concerns regarding its future availability and capacity to settle costs.
 - iii. The Respondent does not possess substantial assets or fixed property within Kenya, which could guarantee the satisfaction of any cost order that may be made in the Applicant's favour.
 - iv. That in the absence of an order directing the Respondent to furnish security for costs, the Applicant faces a substantial risk that any award for costs in her favour may be rendered ineffective due to the Respondent's likely unavailability or inability to settle such costs.
 - v. Unless the Respondent is ordered to furnish security for costs, there is a risk that the Respondent may be unable to meet any cost orders made in the Applicant's favour.
4. In a sworn affidavit dated 28th October 2024, deponed by Pauline Wambui Gichuki, the Applicant avers that the Respondent, GlaxoSmithKline Pharmaceuticals Kenya Limited, is in the final stages of winding up its operations in Kenya and transitioning to a distributorship model. The Applicant highlights that the Respondent has handed over its business operations to Laborex Kenya Limited and appointed Imperial FZE as a distributor, raising concerns about its capacity to satisfy any cost orders issued in the ongoing ELRC Case No. E228 of 2021.
 5. The affidavit is supported by several annexures, including a memorandum of claim, correspondence with the Pharmacy and Poisons Board, and internal documents from the Respondent. These reveal that the Respondent has released employees and ceased its direct operations in Kenya. The Applicant asserts that the Respondent lacks substantial assets or fixed property in the jurisdiction and has failed to clarify its future obligations, despite inquiries and a court directive issued on 7th December 2022.
 6. The Applicant prays for orders directing the Respondent to furnish security for costs in the sum of Ksh. 150,000,000, to be deposited in a joint interest-earning account, pending the hearing and determination of the suit. She contends that without such security, enforcement of any cost orders may be rendered futile, given the Respondent's impending exit from the Kenyan market. The matter is presented as one of extreme urgency, necessitating immediate intervention to protect the Applicant's legitimate interests.

Applicant's Submissions

7. The Applicant filed written submissions dated 16th November, 2024 which arose from the Notice of Motion dated 28th October 2024, seeking orders compelling the Respondent to furnish security for costs in ELRC Case No. E228 of 2021.

Key Issues for Determination:

- i. Whether the Applicant has demonstrated sufficient grounds under Order 39 Rules 1 and 2 of the Civil Procedure Rules, 2010.
 - ii. Whether the Application is sub judice.
 - iii. Whether the Respondent will suffer prejudice if the Application is allowed.
8. Grounds Under Order 39 Rules 1 and 2

The Applicant submits that the Respondent's winding-up activities—evidenced by redundancy notices, transfer of operations to Laborex Kenya Limited and Imperial FZE, and plans to manage operations from the UK—pose a significant risk to the enforcement of costs or judgments.



Relying on *Kuria Kanyoko t/a Amigos Bar and Restaurant v Francis Kinuthia Nderu & Others* [1988] 2 KAR 126, the Applicant argues that security for costs is justified where there is a real risk that a party may not satisfy a decree or may dissipate assets to frustrate justice. The Applicant further asserts that the Respondent's claim of being a "going concern" is contradicted by evidence annexed, which highlights the transfer of business operations and redundancies.

9. The Respondent alleges that the Application is sub judice, citing Section 6 of the *Civil Procedure Act*. However, the Applicant submits that:
- i. The issues in the present Application are distinct, based on newly obtained evidence of the Respondent's winding-up activities.
 - ii. The prior Miscellaneous Application No. E024 of 2023 has been withdrawn and dealt with different legal provisions (Order 40) concerning injunctive relief.
 - iii. The current Application invokes Order 39, targeting security for costs under distinct factual circumstances.

Citing *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties)* [2020] eKLR, the Applicant asserts that sub judice does not apply where new facts or issues arise, as is the case here.

10. The Applicant contends that the Respondent will not suffer undue prejudice if the security for costs is ordered, as the funds would remain in Court custody or a joint interest-earning account. Being a global corporation, the Respondent has the financial capacity to comply. Conversely, the Applicant would face irreparable harm if the Application is dismissed, given the Respondent's ongoing withdrawal from the jurisdiction and the risk of inability to enforce a favorable decree.

The Applicant seeks the following orders:

- i. The Respondent to furnish security sufficient to satisfy costs in the main suit.
- ii. Costs of the Application be awarded to the Applicant.

Respondent's Grounds of Opposition

11. The Respondent filed an undated ground of opposition to oppose the Applicant's Notice of Motion dated 28th October 2024, raising the following key grounds:
12. The Respondent argues that the Application is barred under Section 7 of the *Civil Procedure Act*, having been previously determined.
- i. By an application dated 23rd March 2023 in ELRC E228 of 2021, the Applicant sought similar orders for security for costs on identical grounds, alleging that the Respondent was winding up operations.
 - ii. The Court, in a ruling dated 16th November 2023, dismissed the application, finding it unmerited and unjustified.

The Respondent relies on the principle established in *Uhuru Highway Development Ltd v Central Bank of Kenya* [1999] eKLR, where it was held that once an issue has been adjudicated, it cannot be re-litigated.



13. The Respondent asserts that the Application is Frivolous, Vexatious, and an Abuse of Process as the Applicant has filed multiple similar applications, intending to delay proceedings and cause unnecessary anxiety.

This is the fifth application of a similar nature, with previous filings dismissed in:

- i. HCCOM Miscellaneous Application No. E068 of 2023.
- ii. ELRC Miscellaneous Application No. E023 of 2023.
- iii. ELRC E228 of 2021 (Application dated 23rd March 2023).
- iv. ELRC Miscellaneous Application No. E024 of 2023 (yet to be served).

The Respondent argues that this repetitive filing violates Section 6 of the *Civil Procedure Act* on sub judice.

14. The Respondent contends that:
- i. An application for security for costs must be brought under Order 26 of the Civil Procedure Rules, not Order 39 as invoked by the Applicant.
 - ii. Under Order 26 Rule 1, only a defendant or third party can seek such an order. The Applicant, being the claimant, lacks standing. (Shah v Shah [1982] KLR 85 and Clairmont Investments Ltd v China Communications Construction Co Ltd [2020] eKLR).
15. The Respondent challenges the Applicant's failure to substantiate the Kshs. 150,000,000/= sought as security. The amount is speculative, lacks legal basis under the Advocates Remuneration Order, and is unsupported by evidence.
16. The Respondent submits that:
- i. The claim of winding up is unsubstantiated. No notices have been issued as required under the *Companies Act*, 2015.
 - ii. Adjustments to business operations are legitimate for a going concern and do not constitute proof of intent to evade liabilities (Kuria Kanyoko t/a Amigos Bar and Restaurant v Francis Kinuthia Nderu [1988] 2 KAR 126).
17. The Respondent argues that even in a winding-up scenario, creditors, including the Applicant, are protected by statutory safeguards under the *Companies Act*, 2015.
18. The Respondent contends that this is a labor dispute involving compensation based on monthly salary, with no liquidated claims. The speculative claim of KShs. 150,000,000/= is unwarranted.
19. The Respondent asserts that the repeated applications are prejudicial, delaying the part-heard matter set for further hearing on 10th December 2024. It seeks dismissal with indemnity costs assessed and paid before the next hearing date.
20. The Respondent prays for the dismissal of the Application with costs, relying on its submissions, supplementary documents, and prior rulings.

Respondent's Written Submissions

21. Vide a written submissions dated 3rd December 2024, the respondent opposed the claimant's application dated 8th October 2024, terming it an abuse of court process, res judicata, and sub judice.



The respondent relies on prior rulings, statutory provisions, and case law to advance its position as follows:

22. Abuse of Court Process and Forum Shopping

- i. Persistent Applications: The claimant has filed multiple applications on similar grounds, demonstrating a pattern of persistent litigation. The respondent argues that this conduct amounts to an abuse of court process and forum shopping, as highlighted in prior judicial admonitions against such practices.

Doctrine of Res Judicata

- ii. Statutory Basis: Section 7 of the *Civil Procedure Act* encapsulates the doctrine of res judicata. The respondent submits that the issues raised in the current application have been directly and substantially adjudicated in previous suits, specifically:

- a. HCCOMM Misc. Application No. E068 of 2023: The claimant sought similar orders, alleging the respondent's intention to exit Kenya. This application was dismissed after full adjudication.
- b. ELRC Misc. Application No. E023 of 2023: The Employment and Labour Relations Court dismissed similar allegations, with Justice Mwaure noting they were speculative. [See *Gichuki v Attorney General & another (Cause E023 of 2023)* [2023] KEELRC 1177 (KLR)].
- c. Application Dated 23rd March 2023: Filed in the present proceedings, it sought security for costs of Kshs. 300 million on nearly identical grounds. Justice Mwaure dismissed the application, finding no sufficient evidence to substantiate the claims.

- iii. Judicial Findings: The respondent argues that all elements of res judicata have been satisfied:

- a. The court(s) were competent.
- b. The issues raised were heard and finally determined.
- c. The parties remain the same, litigating under the same title.

The respondent relies on *Haithar Haji Abdi v Dubai Bank (K) Ltd & another* [2013] eKLR and *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport & Infrastructure & others* [2015] eKLR to support its submissions.

- iv. Parallel Determination: Allowing the present application would require this court to make a parallel determination on issues already resolved, undermining judicial consistency and the rule of law.

Doctrine of Sub Judice

- v. Statutory Basis: Section 6 of the *Civil Procedure Act* prohibits the trial of suits or proceedings where the matter in issue is pending in another court.
- vi. Pending Application: At the time of filing the present application, Miscellaneous Application No. E024 of 2023 was still active, and its withdrawal had not been endorsed by a judge. The respondent contends that filing a notice of withdrawal on 6th November 2024, after the present application, was a tactic to circumvent the sub judice rule.



- vii. Absence of New Evidence: The claimant alleges discovery of new evidence but provides no substantive proof. The respondent asserts that if such evidence existed, the appropriate remedy would have been a review of prior rulings, not filing a new application.

Security for Costs

- viii. Legal Threshold: The respondent relies on *Clairmont Investments Limited v China Communications Construction Company Limited* [2020] eKLR, emphasizing that applications for security for costs are ordinarily made by defendants or third parties, not plaintiffs.
- ix. Speculative Allegations: The respondent submits that the claimant's allegations regarding the winding-up of operations lack sufficient evidence. Previous rulings by Justice Mwaure confirmed no evidence of such intentions or regulatory applications to wind up operations.
23. The respondent reiterates that an application for security for costs by the claimant is misconceived. Relying on *Sakafu Limited v Flowcrete East Africa Limited* [2019] eKLR, the court emphasized that such an application by a plaintiff risks dismissal of their suit under Order 26 Rule 5 of the Civil Procedure Rules, effectively benefiting the defendant unfairly.
24. Security for costs aims to protect a defendant or respondent from the risk of unenforceable cost orders due to a plaintiff's financial incapacity. The Court of Appeal in *Harit Sheth Advocate v Shamas Charania Nairobi Court of Appeal, Civil Appeal 68 of 2008* [2010] eKLR underscored the need for balancing the petitioner's right to access justice and the respondent's right to secure costs to prevent vexatious litigation.
25. The claimant cannot demand that the respondent deposit security for costs or an unquantified decree, as doing so would unfairly inhibit the respondent's defense of the suit. The claimant has failed to meet the test for the grant of security for costs, as outlined in *Westmont Holdings SON BHD v Central Bank of Kenya & 2 Others (Petition 16 (E023) of 2021)* [2023] KESC 11 (KLR), as her application appears oppressive and was brought at a late stage in the proceedings.
26. The respondent submits that the claimant has not satisfied the conditions of Order 39 Rule 1 of the Civil Procedure Rules, which require evidence that the defendant is:
- i. Absconding or likely to leave the jurisdiction;
 - ii. Disposing of property to obstruct execution; or
 - iii. Acting to delay court processes.
27. The claimant's allegations of the respondent ceasing operations are speculative and unsupported. The court in *Kuria Kanyokota Amigos Bar and Restaurant v Francis Kinuthia Nderu & Others (1988) 2 KAR 126* emphasized that attachment orders must be issued only on clear proof of intent to frustrate a decree. Similarly, *Savings & Loans Kenya Limited v Erustus Mwangi Mungai, Nairobi High Court Civil Case No. 775 of 2000* held that mere apprehension does not suffice for attachment orders.
28. The Respondent asserts that the claimant's evidence, including a letter from the Pharmacy and Poisons Board and a PowerPoint presentation on the respondent's business model, fails to demonstrate intent to obstruct or delay execution. These materials confirm a change in business model but do not support the allegation of ceasing operations. The claimant's submissions lack corroborating evidence, such as an application for winding up filed with the Registrar of Companies.



29. The respondent highlights that the court previously dismissed similar claims based on speculative allegations. In *James Omwoyo Nyang'au v The Heritage Insurance Company Limited* [2014] eKLR, the court dismissed attempts to claim future salaries as speculative and unfounded.
30. The respondent asserts that its ongoing business adjustments are legitimate and do not imply an intent to frustrate a potential decree. As stated in Mulla, *The Code of Civil Procedure*, 18th Edition, Vol. 3, dealing with property during litigation is not inherently suspect unless evidence of malintent exists.
31. The respondent argues that the claimant's claims lack merit and are speculative. Efforts to settle the matter indicate the respondent's willingness to resolve the dispute. The application should be dismissed with costs on a full indemnity basis to deter further frivolous litigation.
32. I have considered the averments and submission of the parties herein under order 39 rule 1 and 2 of the civil procedure rule:
1. Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of section 12 of the Act, the court is satisfied by affidavit or otherwise.
 - (a) that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him—
 - (i) has absconded or left the local limits of the jurisdiction of the court; or
 - (ii) is about to abscond or leave the local limits of the jurisdiction of the court; or
 - (iii) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or
 - (b) that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance:

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court.

[Order 39, rule 2.] Security.

2. (1) Where the defendant fails to show such cause the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to rule 1.
 - (2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.
33. The ruling relate to attachment before judgment in this case. It is the contention of the applicant that the respondents are about to abscond or leave the local limits of the jurisdiction of the court and the respondents are ceasing to operate their business in Kenya which may obstruct or delay the claimant from executing any decree that may be paved by this court against the respondent.



34. The applicants have averred that the respondents are about to cease operating in Kenya and are transferring their assets to a 3rd party.
35. The respondents have denied this position and have opposed the application arguing that it is res judicata having been filed before by the applicant and being dismissed by this court on 23/3/2023 in this court.
36. The respondents further aver that there is no winding cause filed by them and neither is there proof that of the security of 150 million claimed by the applicant is warranted.
37. From the record before court, it is indeed true that a similar application has been filed by the applicant herein seeking similar orders which was dismissed. There is no evidence that the situation has since changed since 2023 when the last application was dismissed.
38. For this reason alone, I find the application is res judicata and is dismissed accordingly. Costs in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2025.

HELLEN WASILWA

JUDGE

