



James Finlay Kenya Limited v Anganga & 1043 others; John Khaminwa t/a Khaminwa & Company Advocates & another (Applicant) (Petition E133 of 2022 & Miscellaneous Application E167 & E087 of 2023 (Consolidated)) [2024] KEELRC 1446 (KLR) (14 June 2024) (Ruling)

Neutral citation: [2024] KEELRC 1446 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E133 OF 2022 & MISCELLANEOUS
APPLICATION E167 & E087 OF 2023 (CONSOLIDATED)**

J RIKA, J

JUNE 14, 2024

BETWEEN

JAMES FINLAY KENYA LIMITED PETITIONER

AND

ALICE BOSIBORI ANGANGA & 1043 OTHERS RESPONDENT

AND

**JOHN KHAMINWA T/A KHAMINWA & COMPANY
ADVOCATES APPLICANT**

**RONALD K. ONYANGO T/A RONALD K. ONYANGO ADVOCATES
LLP APPLICANT**

RULING

1. The Applicants are, Advocates of the High Court of Kenya, who represent the 1044 Respondents in the Petition.
2. They filed separate Miscellaneous Applications, asking for orders of security for costs, against the Petitioner.
3. Orders of security for costs are sought, in the amount of Kshs. 1 million, “and or sufficient security to meet the Applicants’ costs, pending taxation of the Applicants’ Party to Party Costs.”
4. The Applicants also seek an order of temporary injunction, restraining the Petitioner from transferring ownership of any of its assets “ pending the hearing and determination of the Applicants’ Intended Party to Party Bill of Costs.”



5. Senior Counsel Dr. John Khaminwa swore an Affidavit in support of the Applications, on 8th August 2023.
6. The Court directed that the Applications are dealt with, within the Petition.
7. The Applicants state that they have learnt that the Petitioner is in the process of selling its assets in Kenya, to another company in Sri Lanka, while the Petition is pending.
8. They submit that under order 26 of the [Civil Procedure Rules](#), 2010, where a Defendant is apprehensive that its costs will not be paid in event the Plaintiff is unsuccessful, it is entitled to grant of security for costs.
9. The Petitioner opposes the Applications. It states that a Court of first instance in Scotland, where a similar dispute between the Parties was presented by the Respondents, had ruled that its proceedings would go on, notwithstanding the subsistence of the Petition in Kenya. The Petitioner submits that its Scottish sister filed an Appeal in Scotland against this decision by the Court of first instance in Scotland. The Appellate Court ordered that proceedings in Scotland are stayed, and the dispute is exhausted in accordance with the [Work Injury Benefits Act](#), 2007. This decision by the Appellate Court, negates an order for security of costs.
10. Parties agreed to have the Applications considered and determined on the strength of their Affidavits and Submissions. They confirmed filing and exchange of Submissions at the last appearance before the Court on 26th January 2024.

The Court Finds: -

11. The matter before the Court is a Constitutional Petition, presented under The [Constitution](#) of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules, 2013. The applicable procedural law in this Petition, is the Rules, colloquially called ‘Mutunga Rules.’
12. It is not clear to the Court why the Applicants have presented their Applications under Order 5 Rules 21, 22, 25, 26 & 27, Order 40 Rules 1 [b], 4[1] and 8 and Order 51 Rules 1 and 3 of the [Civil Procedure Rules](#), 2010 and Section 3A and 63 [e] of the [Civil Procedure Act](#). Before the Court is not a Civil Suit.
13. Costs in Constitutional Petitions are regulated by Rule 26 of The [Constitution](#) of Kenya [Protection of Rights & Fundamental Freedoms] Practice and Procedure Rules, 2013.
14. The Rule is that award of costs, is at the discretion of the Court; and in exercising its discretion, the Court shall take appropriate measures to ensure that every person has access to the Court, to determine their rights and fundamental freedoms.
15. The Constitution emphasizes the right of access to justice. In considering security for costs in constitutional litigation, the principle of access to justice is primary. Parties ought not to be discouraged from petitioning the Court, and accessing the Court, through pre-emptive, and sometimes disabling orders of costs, issued against them, such as are sought by the Applicants.
16. The Applicants present their Applications as Advocates, and quote the [Advocates \[Remuneration\] \[Amendment\] Order](#) 2014. It is not clear whether they are seeking security for costs to the Respondents, or security for their legal fees. They anchor their Applications on taxation of ‘Intended Party to Party Bill of Costs.’ Party to Party Bills of Costs are presented in the names of the Parties. Advocate to Client Bills of Costs are presented in the names of the Advocates and their Clients. The 1,044 Respondents are not named as Applicants. Why are the Applications concerning ‘Intended Party



to Party Bill of Costs,' made in the names of the Advocates? They are not Parties, and it is doubtful that orders of security for costs and injunction, can be granted in their names, as sought.

17. Assuming that they have correctly invoked the civil jurisdiction, the Applicants have not met the legal standards, laid down in the Supreme Court of Kenya decision in *Westmont Holdings SDN BHD v. Central Bank of Kenya & 2 Others* [Petition No. 16 [E023] of [2021] [2023 KESC 11 [KLR] [17th February 2023] [Judgment] on security for costs. The decision underscored the primacy of the principle of access to justice, in considering whether to grant an order of security for costs. The Petitioner has presented a genuine and arguable Petition; the proceedings involve matters of public importance, cutting across national jurisdictions; there is no proof that the Petitioner will not honour any final orders on costs; the Petitioner is not an impecunious company; and an order for security of costs, would impede, or discourage unhindered access to justice.
18. Lastly, there is no evidence that the Petitioner is closing down its business and completely divesting in Kenya. It is not shown to be in the process of placing itself, beyond the jurisdiction of the Court.
19. A document exhibited by the 1st Applicant, Dr. John Khaminwa, marked 'DJKM' -4, titled 'Finlay Agrees sale of James Finlay Kenya to Browns Investments PLC,' does not establish that the Petitioner, is relocating from Kenya, in a way that would defeat an order for costs made in favour of the Respondents, if the Petition is thrown out.
20. The document indicates, that the Petitioner will retain its Saosa tea extraction facility. It states that the Petitioner has a long heritage in Kenya, and is continuing to invest in the country. The Petitioner retains packing operations at Mombasa. The document also specifically refers to litigation presented by the Respondents on work injury, which is under consideration in Scotland and Kenya. It states that sale of the business in Kenya, will not affect the pending litigation, and the Petitioner will continue to defend its position.
21. The Applications filed by the Advocates for the Respondents, have no merit.
22. It is ordered:-
 - a. The Applications are declined.
 - b. Costs in the Petition.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER PRACTICE DIRECTION 6 [2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 14TH DAY OF JUNE 2024.

JAMES RIKA

JUDGE

