



**Gichiki v Claxosmithline Pharmaceutical Kenya Ltd (Employment and Labour Relations Cause E228 of 2021) [2023] KEELRC 2979 (KLR) (16 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2979 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E228 OF 2021  
AN MWAURE, J  
NOVEMBER 16, 2023**

**BETWEEN**

**PAULINE WAMBUI GICHIKI ..... CLAIMANT**

**AND**

**CLAXOSMITHLINE PHARMACEUTICAL KENYA LTD ..... RESPONDENT**

**RULING**

1. The claimant/applicant filed a notice of motion dated 23<sup>rd</sup> March 2023. She has made the following prayers:
  1. That this application be certified urgent and the same be heard ex parte in the first instance hence service be dispensed with.
  2. That pending the hearing and determination of this suit, the respondent be compelled to furnish security of cost at the sum of kshs 300,000,000 or in the alternative such other sums as the court may assess as fair and reasonable taking into consideration the circumstances of this case and the nature of the suit.
  3. That pending the hearing and determination of this suit, the respondent deposits the aforementioned amount into a joint interest earning account of the parties advocates within fourteen (14) days from the date of such order until hearing and determination of the main suit.
  4. That the costs of this application be provided for and
  5. That this honourable court be pleased to make any such other order that it deems just and fit in the circumstances.
2. She avers that the respondent is about to wind up its operations in Kenya and hand over to its agents.



3. She says the respondent also is about to lay off its staff and operations by May 2023.
4. She says the suit was instituted in 2021 before the winding up processes began.
5. She says if the winding up takes place the respondent will be left destitute and without any compensation.
6. The applicant says in her sworn affidavit that she got information from the respondent's employees that the respondent was making effort to wind up the company.
7. She says she will require her compensation to be secured since she had a contract with the respondent of employment.
8. She says the shareholders of the respondent are overseas. She therefore prays for compensation and hence the prayers for security of kshs 300,000,000 or such sums as the court would deem fit to grant.
9. Her prayers are as follows:
  - a. General damages for termination 2 months equivalent
  - b. Loss of expected earnings for remaining 28 years
  - c. Three months' salary in lieu of notice.
  - d. Costs of the suit and interest on the above.

#### **Grounds of opposition by the respondent**

10. The respondent filed their grounds of opposition dated 13<sup>th</sup> April 2023 where they outlined several applications filed by the claimant. They state that on 13<sup>th</sup> February 2023 claimant filed an application ERLC Misc 023/2023 seeking orders directed at the Attorney General.
11. On 27<sup>th</sup> February 2023 she made an application HCCC 068/2023 seeking for injunction orders for respondent to deposit kshs 300,000,000/- they say the said application has not been disclosed to this court.
12. The respondent says this application should have been brought under order 26 of the Civil Procedure Rules. He says the application is incompetent.
13. The respondent further says there are no liquidated claims set out in the statement of claim. They say there is no justification for asking for 300M from the respondent's business.
14. They say the application lacks merit and should be dismissed.

#### **Analysis and determination**

15. The issue for determination is whether the claimant/applicant application for securing security for costs of kshs 300 million is merited.
16. This is a pending suit herein dated 11<sup>th</sup> April 2021 praying for reasonable damages and compensation and costs. The prayers are generalised prayers and there is no liquidated amount referred therein.
17. The prayers are under order 1A, 3 and 3(a) and order 40 rule 1, 2 and order 63 of the civil procedure rules. Order 40 refers to instances when temporary injunctions may be granted or where defendant threatens to intends or disposes of his property in circumstances affording reasonable probability that the plaintiff may or will be obstructed or delayed in execution of decree that may be passed against



the defendant in the suit. Section 63 of the Civil Procedure Act provided the court with jurisdiction to provide security of costs from the defendant.

18. The respondent says under order 26 rule 1 security of costs should be applied by a respondent or a third party but not a claimant. Order 26(1) of the civil procedure rules provides as follows:

“in any suit the court may order that security for the whole or any part of the costs of any defendant or third party or subsequent party be given by any other party.

19. The above proviso notwithstanding order 40 rule 1 and 3 provide that the court can order a defendant to provide security of costs if he threatens or intends or is disposing the property and where there is danger of the plaintiff being obstructed or delaying in execution of any decree that may be passed against him.
20. However, this provision is clearly in suit where a property is in dispute.
21. In this case the claimant is praying for damages in an unheard employment dispute. In the first instance the case has not been heard and there is no indication what will be the outcome of the case. There is no indication whether damages will be awarded and if so how much will be awarded. The court tends to agree with the respondent in his grounds of opposition that the claimant is raising vague and general allegations that the respondent intends to cease its operations in the country. There is no sufficient evidence or evidence at all that the respondent intends to sell its operations and move out of the country.
22. There is a copy of a newspaper cutting annexed to the application that a Drug giant GSK is to exit Kenya in 2023. The court finds this newspaper cutting in itself is not sufficient to establish the company is exiting Kenya and is also not clarified if it so wishes when does it intend to do so.
23. Order 20 rule 2 provides situations where a temporary injunction may be granted where property is in danger of being wasted, damages of alienated by any party to a suit or wrongfully sold in execution of a decree. However, the said section provides that this is only when the same refers to property dispute. This case is not of course related to a property dispute but is a claim related to employment dispute. But as earlier said this is a case where the case has not even been set down for hearing and is not related to property dispute.
24. The claimant had earlier on filed an application ELRC 023/2023 and had prayed that the respondent be restrained from clearing Glaxosmithkline pharmaceuticals Kenya limited. The respondent there was Hon the Attorney general and registrar of companies. This honourable court was provided with an affidavit from the Deputy Registrar of companies who deponed the company was not winding up and had not made application to strike off the company to wind up.
25. The court therefore ruled that there was not enough evidence that the company was being wound up or ceasing operations in the country in that ruling.
26. The court similarly finds claimant has not tendered sufficient evidence to prove that she is entitled to security of costs equivalent to kshs 300,000,000 for a suit that was filed on 11<sup>th</sup> March 2021 and up to date the parties have not set it down for hearing. The outcome of the suit is yet to be determined and would be greatly presumptuous to order costs in such a scenario.



27. In the Supreme court Judgment *Westmond Holdings SDN Limited vs Central Bank of Kenya & Others* Petition No 16 of 2021 the court observed:

” we have shown that it is the duty of the court to balance injustice to the plaintiff pursuing a proper claim. We state that the final result in such a balance must be reasonable and modest. An order for additional security must neither impede justice nor stifle genuine claims and most definitely must not be oppressive. A court is not bound to make an order of a substantial amount. It is paramount that the order be just and not impede access to justice.

28. The court is reluctant to order for security to be paid by an organisation of kshs 300,000,000 for a case which is yet to be heard. The court in the earlier referred ruling had advised the parties to set the matter for hearing at the earliest. Instead the claimant keeps making numerous applications instead of going for the real thing and this keeps delaying the determination of the main suit.

29. Anyhow the court finds no justification to give the orders for security of kshs 300,000,000 at this point. Once again, the court recommends to the parties to first proceed with the main hearing.

30. In conclusion the application dated 23<sup>rd</sup> March 2023 is found unmerited and is dismissed accordingly.

31. The claimant will pay costs of this application.

32. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

