



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 1766 OF 2002**

**CYRUS KANYI .....PLAINTIFF**

**- V E R S U S -**

**THE REGISTERED TRUSTEES OF THE ARCHDIOCESS OF NYERI *sued as the***

***proprietors and administrators of CONSOLATA HOSPITAL..... 1<sup>ST</sup> RESPONDENT***

**DR. JOHN MAGANGA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. On 6<sup>th</sup> October 2017 this court pronounced judgment in favour of the plaintiff and against the defendants in the sum of ksh.4,810,000/=. The plaintiff has now taken out the motion dated 3.11.2017 in which he sought for leave to have the decree executed before costs are taxed pursuant to the provisions of Section 94 of the Civil Procedure Act. The motion is supported by the affidavit sworn by the plaintiff. The defendants filed grounds of opposition and the replying affidavit of David Mutahi to oppose the motion. When the motion came up for interpartes hearing, learned counsels made oral submissions.

2. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application plus the grounds of opposition. I have also considered the rival oral submission. It is the submission of the plaintiff that it will take long for the costs to be taxed and since he is in need of finances to undergo urgent surgical operation it is only fair to grant him leave to execute the decree. It is stated that the defendants have neglected and or ignored to settle the decree despite demand having been given.

3. The defendant vehemently opposed the application. It was first pointed out by the 1<sup>st</sup> defendant that they were not aware as to when the judgment in this suit was delivered until when they received the letter dated 13.10.2017. The 1<sup>st</sup> defendant has now filed an application for leave to appeal against this court's judgment out of time. The 1<sup>st</sup> defendant further argued that the plaintiff has failed to extract the decree for their approval.

4. The 1<sup>st</sup> defendant further averred that the medical report relied upon by the plaintiff was issued on 16.8.2016 to support the argument that there is need for the plaintiff to undergo an urgent surgical procedure to avoid the risk of amputation of his leg. In other words the 1<sup>st</sup> defendant stated that the medical report is outdated and cannot be used to support the plaintiff's application. This court was beseeched not to allow the motion because it may render the appeal nugatory.

5. Having considered the material placed before this court and the oral submissions of learned counsels, it is apparent that the defendants intend to file an appeal to have the judgment of this court impugned.

6. The defendants' appeal may be rendered nugatory if the plaintiff's motion is allowed since the plaintiff may not be in a position to refund the decretal sum should the appeal turn successful.

7. It has already been pointed out that the medical report relied upon by the plaintiff in attempt to show that the plaintiff requires to undergo an urgent surgical procedures is a report prepared more than a year ago. In view of this revelation it is apparent that the urgency has dissipated and cannot now be used to

support the plaintiff's motion. The plaintiff has in my view failed to convince this court to exercise its discretion in his favour.

8. In the end, the motion dated 3.11.2017 is found to be without merit. It is dismissed with each party bearing its own costs.

**Dated, Signed and Delivered in open court this 8<sup>th</sup> day of December, 2017.**

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Applicant

.....for the Respondent