



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

Civil Case 600 of 2004

**KAMOTHO WAIGANJO (Suing as the Liquidator/Trustee of
DAWA PHARMACEUTICALS STAFF RETIREMENT BENEFITS
SCHEME (in Liquidation).....
.....PLAINTIFF**

VERSUS

**DAWA PHARMACEUTICALS LIMITED
(In Receivership).....DEFENDANT**

AND

**ENGINEER GAKURU KANYANJA
ENGINEER GEORGE NYAGISERE (both applying as joint
Receivers – Managers of DAWA PHARMACEUTICALS
LIMITED (In Receivership).....INTERESTED
PARTIES**

RULING

By an application dated 17.08.2004 brought by way of an Originating Summons pursuant to the provisions of Section 95 (c) & SS. 228, 311(7) of the Companies Act (as amended by Act No. 8 of 2003) (Cap. 486, Laws of Kenya), Order XXVI Rules 1 & 5 of the Civil Procedure Rules and all enabling provisions of the law, the Applicant seeks orders **inter alia**, of a declaration that the amount payable to workers under a retirement benefits scheme are preferred debts payable in priority to other debts including those of secured creditors.

This application is essentially predicated upon the provisions of Order XXXVI rules 8A, 8B and 12 which require that any party to a suit by originating summons may apply to a judge in Chambers for directions. Rule 9 thereof enables the Court to give directions as it may think just for the trial of any issues arising thereupon. The Court or judge may also make any amendments necessary to make the summons accord with existing facts and to raise the matters in issue between the parties.

I have perused the application dated 17.08.2004 (the Originating Summons). The issues that would arise herein are the matters set out in paragraphs 2 to 4 inclusive in the Originating Summons. I therefore direct that parties formulate specific issues in relation to those matters.

The Replying Affidavit of Engineer Gakuru Kanyanja sworn on 23.09.2004, and filed on 27.09.2004 suggests in paragraph 3 of the Affidavit that the sum of Ksh. 22,877,000/= is not admitted as due from the Receivers on the grounds **inter alia** that the sum is not a benefit envisaged to be preferred debt under S. 311(1)(c) of the Companies Act – that is to say “**retirement benefits contributions and vested benefits of any clerk or servant of the Company**” and that the Receiver would be liable only for “**all amounts due in respect of contributions payable during the period of twelve months immediately preceding their appointment as Receivers, as employers under the Retirement Benefits Act**” (para 7)

These too are issues which need to be framed and canvassed at the hearing of the Originating Summons.

The applicants also need to establish the status of H.C.C.C. 1667 of 2001, (referred to in paragraph 13 of the Replying Affidavit), and determine whether the orders (if any) made in that case would affect the determination of the Originating Summons herein.

I therefore direct in summary that the issues herein (as outlined in the Originating Summons and Replying Affidavit thereto) be framed and filed in Court within thirty (30) days of the orders herein, and that after filing those issues, the matter be fixed for hearing on a priority basis.

Dated and Delivered at Nairobi this 2nd day of March 2005.

ANYARA EMUKULE

JUDGE