Gwer & 17 others v Mediheal Group of Hospitals Ltd & another (Cause E002 of 2024) [2024] KEHC 5274 (KLR) (30 April 2024) (Ruling)

Neutral citation: [2024] KEHC 5274 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CAUSE E002 OF 2024

HM NYAGA, J

APRIL 30, 2024

BETWEEN

DR BENARD GWER ..... 1ST APPLICANT

DR ALKIZIM MUNIRA KHALID ..... 2ND APPLICANT

DR WILSON BETT ..... 3RD APPLICANT

DR MACAI JOHN ..... 4TH APPLICANT

DR CHEBII STEPHEN ..... 5TH APPLICANT

DR GITU ROBERT ..... 6TH APPLICANT

DR MIBEI EMMY ..... 7TH APPLICANT

DR NGOTA WASHINGTON ..... 8TH APPLICANT

DR MORAA GLADYS ..... 9TH APPLICANT

D MUGUKU ENOS ..... 10TH APPLICANT

DR NG'ETICH ISAAC ..... 11TH APPLICANT

DR NJAU JOSPEH ..... 12TH APPLICANT

DR ONDIEKI NAPHTAL ..... 13TH APPLICANT

DR NJAGA RUTH ..... 14TH APPLICANT

DR OKWATTA PATRICK ..... 15TH APPLICANT

DR OKWIRI JOSEPH ..... 16TH APPLICANT

DR KERENGO SYLVIA ..... 17TH APPLICANT

DR YEGO ELPHAS ..... 18TH APPLICANT

AND

MEDIHEAL GROUP OF HOSPITALS LTD ..... 1ST RESPONDENT

MEDIHEAL HOSPITAL (NAKURU) ..... 2ND RESPONDENT

RULING

1. The Applicants moved this Court under Certificate of Urgency vide a Notice of Motion dated 7th February,2024. The Application is brought under Sections 1A, 1B and 3A, 63(A) & (e) of the *Civil Procedure Act*, Orders 51 Rule1, 40 Rule 1 and 10 ,36 Rule (1), (2) (8), 39 Rule (1) and (2) of the Civil Procedure Rules and other enabling provisions of the law. They seek a motley of orders namely: -

    i. Spent

    ii. THAT pending the hearing and determination of this Application, this Honourable Court be pleased to issue a temporary order of injunction restraining the respondents whether by their servants, agents, or employees or advocates or otherwise howsoever from removing, transferring, disposing or charging or in any manner interfering with any of their assets whatsoever, including land, shares and monies deposited in their accounts relating to the operations of the respondents, and held in all and any banks operating in Kenya, from the jurisdiction of this court.

    iii. THAT this Honourable Court be pleased to issue an order summoning the Respondent's Managing Director, CEO and/or Agent to appear in court and show cause why the Respondents should not furnish, ventilate, and or deposit into the court, Kenya Shillings Fifty Three Million, Seven Hundred and Ninety Nine Thousand, Sixty Nine Shillings and Eighty Eight Cents (Ksh.53,799,069.88/=) as security pending the hearing and determination of the suit herein for the decree that may be passed against the Respondents.

    iv. THAT consequential to prayer 3 above, if the respondents fail to attend court and show cause why they should not furnish security, the Honourable Court be pleased to issue an order that the respondents do deposit a sum of Kenya Shillings Fifty-Three Million, Seven Hundred and Ninety-Nine Thousand, Sixty-Nine Shillings and Eighty-Eight Cents (Ksh. 53,799,069.88/=) in court or in a joint interest earning account and the Honourable Court be pleased to fast track the hearing of this case so that the same is heard and concluded within six (6) months.

    v. THAT in the alternative and without prejudice to prayer 4 above, this Honourable Court be pleased to enter summary judgement in favour of the Applicants as against the respondents for the sum of Kenya Shillings Fifty-Three Million, Seven Hundred and Ninety-Nine Thousand, Sixty-Nine Shillings and Eighty-Eight Cents (Ksh. 53,799,069.88/=).

    vi. Any other relief that the court deems fit in the interest of justice.

    vii. THAT costs of the Application be borne by the Respondents.

2. The Application is premised on grounds on its face and supported by an affidavit of the 1st Applicant, Dr. Gwer, sworn on his behalf and on behalf of the other co-applicants on 7th February,2024.

3. It is the Applicants' case that they had been engaged by the Respondents as professional Consultant Doctors carrying on and executing such services to patients admitted in and within the respondents' facility, on an express and/or implied mutual contractual understanding of a reciprocal pay-out consultancy fee per every year.

4. That they have been diligently and meticulously executing their services and duties to the levels of satisfaction required but despite the same, the respondents have deliberately failed to pay in lieu their professional medical services rendered to patients attended to in their facility.

5. Consequently, through their advocates they wrote demand notices to the Respondents demanding their outstanding dues and several correspondences and entreaties to the respondents in an attempt to have an amicable settlement but despite the respondents' acknowledgement of the same and request for more time to liquidate the arrears, they have deliberately failed to make good the claimed sum.

6. They have had long protracted negotiations until when they threaten to boycott provisions of their consultancy services that the respondents initiated mediation session which was conducted on the 11th November,2023 that resulted in the following agreement;

   A. That the cumulative undisputed principal debt and/or consultancy fees was Ksh. 40,000,000/= while the amount of Ksh. 13,799,000.88/=(interest) was disputed and deferred for further discussion.

   B. That the principal debt and/or consultancy fees of Ksh. 40,000,000/= to be paid in five monthly instalments with the first instalment of Ksh. 10,000,000/= being paid on or before 5th December,2023 and three subsequent instalments of Ksh. 7,000,000/= each, together with the final instalment of Ksh. 9,000,000/= being paid on 5th of every succeeding month (after payment of the first instalment)

7. It is their case that the respondents have failed to pay the claimed arrears and resultantly they have suffered and continue to suffer stress, immense mental and emotional anguish and have in essence incurred colossal loss and damages.

8. They aver that while the substratum of the suit herein is still pending hearing and subsequent determination before the honourable court, it has been publicized both in print and social media about the respondent's financial liquidity which is drastically depreciating thusly facing and on the verge of an eminent closure that would culminate disposing off its assets, which action will fundamentally and technically extinguish the gist and substratum of their claim.

9. The Applicants are coy and apprehensive that unless this Honourable Court promptly and diligently intervenes at this earliest opportunity by immediately issuing the said orders, or in the alternative thereof providing security equivalent to the aforesaid sum pending the hearing and determination of the suit, the respondents' financial woes will render the suit nugatory and merely miniature effort in futility and they shall stand to suffer immense loss and damages in recovering the claimed sum.

10. The Applicants aver that unless the respondents are restrained by this Honourable Court, they shall definitely endeavour to relocate ,move out and or dispose of their assets , which action will be a pellucid intention to obstruct or delay and/or extinguish the execution of any decree that may be passed against them in this matter and as such, it is only prudent and justiciable for this Honourable Court to see through such smoke screen tactic aimed to defeat the ends of justice and decline any invitation to condone it by allowing this application.

11. The Application is opposed. Swarup Ranjan Mishra, the director of the Respondents swore a replying affidavit on 3rd April,2024. He avers that the application is full of outright untruths and assumptions meant to purely mislead this Honourable Court into granting the orders sought.

12. He avers that the allegations that there is a probability that the respondents might be unable to settle decretal sum when and if issued against it is false and totally based on assumptions with no evidence, and that it will be premature and unfair for the respondents to be condemned to pay the sum as sought in the application before it is heard and its defence considered as against the applicants' allegations.

13. He contends that there is no evidence adduced before this Honourable Court to confirm that the respondents are in financial crisis and unlikely to satisfy terms of judgement of the main suit if issued against it.

14. It is his deposition that the respondents own vast number of assets within the Republic of Kenya and at no point has insolvency proceedings against it been commenced, thus financially stable and they should not be condemned based on assumptions without concrete evidence.

15. He posits that the respondent is a medical facility and funds is critical in sustaining its operations and that the amount claimed by the applicants is colossal and likely to cripple the operations of the respondents if the orders sought are granted.

16. He asserts that the sustainability of the respondents is dependent on the funds in circulation by the respondents and thus depositing the funds in a different account from the one operated by the respondents will impact negatively on its operations and sustainability.

17. He contends that the amount sought as security is totally disproportionate to the subject matter in dispute and urges the court to dismiss the Application.

18. The 1st Applicant swore a further affidavit in response to the aforestated Replying Affidavit on 5th April,2024.

19. He prayed that the Respondents' Replying Affidavit be expunged from the record for having been filed outside this Court's strict timelines issued on 20th March,2023.

20. He avers that there exists a litany of court's proceedings against the respondents herein and as such, the respondents' financial liquidity cannot be purported to be afloat. For instance, Nakuru ELRC No. E042/2023 TANAY UPENDRA SHOLAPURKAR & 33 OTHERS VS MEDIHEAL GROUP LIMITED & 3 OTHERS & NAKURU ELRC NO. E006/2024 PAWAN KUMAR SONAWANE VS MEDIHEAL GROUP LIMITED & 16 OTHERS.

21. He deposes that the respondents have not placed before the Honourable Court any document conferring existence of any assets registered in its name to buttress the fact that its facility is fully operational and able to pay out salaries and any other outstanding dues.

22. He urged this court to take judicial notice of the fact that government has through NHIF suspended the respondent's contract and as such, patients have been advised to choose new outpatient facilities. He assets that this clearly shows that the operations of the respondents are drastically going down the drain and as such, if the orders herein sought are not granted or at least preservatory orders issued, their claim will remain a mere academic exercise.

23. He deposes that their claim is a liquidated claim as buttressed by the annexed agreements and correspondences duly executed between them and the respondents and as such, the only viable issue for determination is how and when the claimed sum shall be paid since there already exist an admission of the amount owed to them.

24. He reiterated that the respondents have not annexed any financial statements, bank accounts or even an inventory of assets to prove that they are indeed capable of settling any decree issued.

25. Parties agreed to proceed by way of written submissions. Only the Applicants filed their submissions on 17th April,2024.

Applicants' Submissions

26. Citing the entire provision of Order 39 of the Civil Procedure Rules, the Applicants submitted that the court on an application by a party may order a party to show such cause or furnish the required security for due performance of the decree to be made in the proceedings upon being satisfied that there exists a possibility that the defendant is likely to perpetrate a scheme tantamount to defeating and/or obstructing a judicial process.

27. The applicants submitted that in order to protect their rights to access justice and ensure that the suit is not overtaken by events, it is necessary to order the respondents to deposit security for the sum claimed herein pending the determination of the suit and that it is necessary that the orders sought be granted to enable the court to effectually and completely adjudicate upon all questions involved in this suit including the future of the suit in case the respondents ceases to exist.

28. To buttress their submissions, the applicants relied on the cases of Kuria Kanyoko t/a Amigos Bar and Restaurant Vs Francis Kinuthia Nderu & others (1988) 2KAR 126; Samuel Karuga Koinange v Bullion Bank Limited [2010] eKLR; Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli versus Orient Commercial Bank Limited Civil Application No. Nai 302 of 2008 (UR.199/2008); FTG Holland V Afapack Enterprises Limited & Another [2013] eKLR.

Analysis & Determination

29. I have carefully considered the Application, affidavits in support and in opposition to the Application plus the submissions on record.

30. The issues for determination are;

    a. Whether the Respondents' Replying affidavit should be expunged from the record and

    b. Whether the applicants have made out a case for the issuing of the orders sought.

31. Regarding the first issue, the Applicants have asked this court to expunge the Replying affidavit as it was filed outside the strict timelines issued by this court.

32. It is true that on 20th March,2024, I directed the Respondents to file their response within 7 days. The Replying affidavit therefore ought to have been filed on or before 29th March,2024 but the same was filed on 4th April,2024.

33. Article 159(2)(d) of *the constitution* accords precedence to substance over form. It is also in the interest of justice that procedural lapses should not be invoked to defeat applications unless the lapse caused substantial injustice or prejudice to the Applicants.

34. There is no substantial injustice or prejudice that may have been suffered by the Applicants as they have responded to the entire averments raised by the Respondents in their replying affidavit. Justice therefore demands that I decline to expunge the Replying affidavit as prayed.

35. I will now determine the second issue. In regards to prayer no.2 of the Application, I note that the same is framed in the interim "pending the hearing and determination of the Application". The Application was placed before me on 26th February,2024 and I did not grant this order. Now the entire application has already been dispensed with via submissions and in my view, as regards the said prayer, there is nothing pending for determination. As such I find that Prayer No. 2 of the Application has been rendered moot.

36. I will now deal with the rest of the prayers.

37. Order 40 Rule (1)(a) of the Civil Procedure Rules states: -

> " (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or y g wrongfully sold in execution of a decree."

38. Order 40, Rule 10 Is on Detention, preservation, inspection of property. It states as follows: -

> " 10.
>
> (1) The court may, on the application of any party to a suit, and on such terms as it thinks fit—

(a) make an order for the detention, preservation, or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein;

(b) for all or any of the purposes aforesaid authorise any person to enter upon or into any land or building in the possession of any other party to such suit; or

(c) for all or any of the purposes aforesaid authorise any samples to be taken, or any observation to be made, or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

(2) The provisions as to execution of process shall apply mutatis mutandis to persons authorised to enter under this rule."

39. In my opinion this order only applies to suits where the property in question is the subject matter. This is not the case here as the suit is for recovery of money allegedly owed to the applicants by the respondent. The applicants have no stake or claim in the property belonging to the respondent.

40. Therefore, no orders can issue under Order 40 of the Civil Procedure Rules. I will then proceed to examine the other prayers sought.

41. Order 39 Rules 1, 2 and 5 states as follows: -

> " 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—
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> (i) has absconded or left the local limits of the jurisdiction of the court; or
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> (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
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> (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.

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.

5. Where defendant may be called upon to furnish security for production of property.

(1) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—

(a) is about to dispose of the whole or any part of his property;

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security. (2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified."

42. In the instant case, it is not disputed that respondents engaged the Applicants as professional consultant doctors to render their services to the patients admitted in and within their facility. It is also uncontested that the respondents have not paid the Applicants for services they rendered to it and in particular the respondents did not honour the agreement that was reached between it and the Applicants on 11th November, 2023.

43. The applicants are apprehensive that the Respondents will dispose of its assets before determination of the substratum of the suit against them and thus their suit will be rendered nugatory and they stand to suffer immense loss and damages.

44. The respondents on its part contend that the Applicants' apprehension that it might be unable to settle decretal sum as and when required to do so is false, assumptious and unsupported by concrete evidence.

45. The Respondents posit that they own vast number of assets and thus are capable of settling the decree of this court, if issued against them. The Respondent, however did not attach any proof of ownership of properties they purportedly own, or financial statements to buttress their averments.

46. In countering the Respondents' assertion that at no point has insolvency proceedings commenced against it, the applicants referred the court to two cases filed against the 1st Respondent and others, namely Nakuru ELRC No. E042/2023 & Nakuru ELRC No. E006/2023. The Applicants annexed bundles of auctioneer's proclamations and warrants of sale against the Mediheal Sourcing Limited who is not a party to this proceeding.

47. Without specific information, this court cannot definitively find that there is proof of any insolvency proceedings filed against the Respondents herein. There is a possibility that the decrees referred to may have been satisfied.

48. The Applicants believe the substratum of this suit will be rendered nugatory if orders sought are not issued. To them, from publication both in print and social media, the respondent's financial liquidity is drastically depreciating and on the verge of imminent closure that would culminate in disposing off its assets or transfer of its assets outside the jurisdiction of this court.

49. The Applicants have also urged this court to take judicial notice of the fact that the Government has through NHIF suspended the Respondent's contract and as such patients have been advised to choose new outpatient facilities.

50. Judicial Notice is defined in Black's Law Dictionary Tenth Edition on page 975 as follows: -

> " Judicial notice: A court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact; the court's power to accept such a fact the trial court took judicial notice of the fact water freezes at 32 degrees."

51. It is further defined by Oxford Dictionary of Law (ed. Jonathan Law and Elizabeth A. Martin) 7th Ed. (Oxford University Press) at page 306 as: -

> " The means by which the court may take as had proven certain facts without hearing evidence. Notorious facts may be judiciary noticed without inquiry."

52. It would be noted under section 60 of the *Evidence Act* (Cap 80) Laws of Kenya it provides thus: -

> " The courts shall take judicial notice of the following facts: -
>
> a. All matters of general or local notoriety (things that everyone knows)."

53. In Commonwealth Shipping Representative - v- P. & O. Branch Service [1923] A.C. 191 at p. 210, Lord Sumner in the English House of Lords thus observed:

> " Judicial notice refers to facts which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer."

54. In Gupta vs Continental Builders Ltd (1976-80) 1 KLR 809, Madan, JA, (as he then was) stated as follows on judicial notice:

> " The party who asks that judicial notice be taken of a fact has the burden of convincing the judge (a) that the matter is so notorious as not to be the subject of dispute among reasonable men, or (b) that the matter is capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy."

55. The court has been asked to take judicial notice that it has been published in print that the 1st Respondent is on the verge of collapse due to financial. In my view, unverified news publications do not fall under the ambit of matters that the court ought to take judicial notice of.

56. Regarding the submissions on suspension of the Respondents contracts by several Government Agencies, there is a letter dated 22nd August 2023 by itself acknowledging the same.

57. A look at the material before me indicates that there is correspondence from the respondent, dated 31st October 2023, which is not on without prejudice, that it was in talks with their international investment banker in order to boost their financial liquidity.

58. There is also an undisputed mediation agreement in which the respondent acknowledges indebtedness in the sum of Ksh.40,000,000/-. The balance of Ksh. 13,979,602/- is disputed. The proposal was to pay the said Ksh. 40,000,000/- in instalments of Ksh. 10,000,000/- on or before the 5th day of December 2023 and thereafter ksh. 7,000,000/- for the subsequent three (3) months, followed by a final instalment of Ksh. 9,000,000/-.

59. The respondent filed an affidavit in response on 3rd April 2024, by which time it was supposed to have paid a substantial amount of the sum it admitted as owing. It does not mention any payment as having been made as agreed between the parties. Nothing would have been easier than to display their ability to meet their obligation that to show proof of such payments.

60. In invoking Order 39 of the Civil Procedure Rules, the Applicants are fearful that unless the respondents are ordered to provide security they may relocate and or dispose of their assets which action will obstruct or delay and/or extinguish the execution of a decree that may be passed against them herein.

61. In view of the fact that an agreed sum is yet to be paid five months down the line, and there is a clear intention of engagement with an international financial banker then there is sufficient ground upon which the applicants feel that any decree ultimately passed in their favour may not be satisfied. It is also a high possibility that the unnamed international baker may require security in the form of assets belonging to the respondent, thus making them out of reach of the applicants.

62. The Court of Appeal in the case of Kuria Kanyoko t/a Amigos Bar and Restaurant vs Francis Kinuthia Nderu & others (Supra) considered the said provisions and rendered itself thus,

> " The power to attach before Judgment must not be exercised lightly and only upon clear proof of mischief aimed at by order 38 rule 5, namely that the Defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him".

63. In International Air Transport Association & Another vs Akarim Agencies Company Limited & 2 Others (2014) eKLR the court held: -

> " Order 39 rule 1 and 5 of the CPR is about giving security for appearance or satisfaction of a decree which may be passed against the Respondent. The Respondent may be called upon to show-cause why he should not give security for satisfaction of the decree which may be passed against him. Rule 1 is more draconian and may result into the arrest of the Respondent....Rule 5 on the other hand is milder and deals with situations where the Respondent is about to dispose of or remove property from the jurisdiction of the court .....both of these rules share two common things, namely: 1) both serve the purpose of preventing the Respondent from doing any act that will obstruct or delay execution of the decree that may be issued against the Respondent; and 2) the standard of proof is that set out in the case of GIELLA v CASSMAN i.e. establish prima facie case of the conditions set out in the particular rule."

64. In the Ugandan case of Makubuya vs Songdoh Films (U) Ltd & Another (Miscellaneous Application – 321 of 2018 (2018) UGHCCD 93 Justice Musa SSekaana observed as follows on the issue of arrest and attachments before judgment: -

> " Therefore such supplemental proceedings are taken recourse to in aid of an ultimate decision of the suit and are initiated with a view of preventing the ends of justice being defeated. It is a sort of a guarantee against a decree becoming infructuous for want of property available from which the plaintiff can satisfy the decree."

65. Applying the principles set out above I this case, I am of the view that the applicants have surmounted the hurdle required of them to invoke Order 39(5) of the Civil Procedure Rules. I will give final orders shortly.

66. As I stated earlier the applicants several orders in one application. The Applicants also prayed in the alternative, for entry of summary judgement against the Respondents for a sum of Ksh. 53,799,069.88/ =.

67. Having found that the applicants are deserving of the orders for furnishing of security, I think that it is a mere academic exercise to deal with the prayer for summary judgment. Nevertheless, I am enjoined to deal with the same.

68. Order 36 Rule 1(1) (a) of the Civil Procedure Rules provides;

> "
>
> " (1) In all suits where a plaintiff seeks judgment for—
>
> (a) a liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

(2) The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.

(3) Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days.

2. Defendant may show cause [Order 36, rule 2.]
The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit."

69. The Court of Appeal in Momanyi vs Hatimy. {2003} 2 E.A. 600 held that the purpose of summary procedure is to expedite determination of cases but it is an inappropriate procedure where the court is being invited to decide difficult questions of law which call for detailed argument and mature considerations and which would best be left to evidence at the trial.

70. A defendant who can show by affidavit that there is a bona fide triable issue is to be allowed to defend that issue without condition. (See the case of Jacobs vs. Booth's Distillery Co. (1901) L.T. 262 H.L)

71. The applicant's plaint was filed on 9th February, 2024 and the instant application was filed on 12th February, 2024. The respondent had not entered appearance by then. Their first response was in respect to the present application.

72. In my view, it was premature to pray for summary judgement as prayed at the stage the applicants did. They should have waited for the respondent to enter appearance before an application for summary judgment was made. That prayer is thus declined.

73. In conclusion, I find that the respondent has not shown cause why it should not furnish security for the admitted sum of ksh. 40,000,000/-.

74. I therefore grant the following orders;

a. The respondent is to provide security for the admitted sum of Ksh. 40,000,000/- in cash or other acceptable form, within the next 30 days, failing which the applicants are at liberty to proceed to levy attachment on the respondent's assets for the said amount.

b. The balance of the amount in dispute, Kshs. 13,799,069/- is to await determination by the court.

c. Costs of this application shall be in the cause.

75. It is so ordered.

Dated, Signed and Delivered at Nakuru this 30th day of April, 2024.

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H. M. NYAGA,

JUDGE.

In the presence of;

Court Assistant Kipsugut

No appearance for parties