

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 318 OF 2010

BONAVENTURE ANDREW OMUSE.....PLAINTIFF

- V E R S U S -

DR. DAN KIAGE.....1ST DEFENDANT

THE AGA KHAN UNIVERSITY

HOSPITAL.....2ND DEFENDANT

RULING

1. The suit herein was commenced by way of plaint dated 22.06.2010, wherein the plaintiff prayed for judgement against the defendants for special damages of ksh.128,163/- and general damages for pain and suffering due to professional negligence.

2. The history behind this dispute is short and straightforward. In the plaint, the plaintiff avers that on 21st February 2007, the plaintiff underwent a cataract surgery on his left eye by Dr. Dan Kiage, the 1st defendant, at the Aga Khan University Hospital, the 2nd defendant herein. The plaintiff has alleged that thereafter he developed complications to his left eye while the 1st defendant was out of the country forcing his medicare provider M/s AAR Insurance to have the plaintiff referred to one Prof. H. S. Adala for post-operative review on 13.07.2007. In his report dated 18.07.2010, Dr. Prof. H. S. Adala advised the plaintiff to seek for examination and treatment by Dr. Chris Van Niekerk, a renowned consultant surgical ophthalmologist based in South Africa. It is the plaintiff's submission that Dr. Niekerk examined him and prepared a comprehensive medical report dated 30.7.2007 outlining the extent of damage that had been occasioned before he embarked on performing corrective surgery.

3. The plaintiff avers that the progressive deterioration of his vision is a direct and proximate result of the 1st defendant's negligence and that the 2nd defendant is vicariously liable.

4. The defendants advocate raised a preliminary objection arguing that the plaintiff's suit was time barred. The defendants aver that the suit was filed on 22.06.2010, a period that is more than 3 years from the date the cause of action arose. It is the submission of defendants that the cause of action crystallised on 13.02.2007 and not on 18.07.2007 since what is material is the date when the operation was undertaken.

5. The plaintiff on the other hand submits that his claim crystallised on 18.07.2007 when the expert opinion stated that his cornea had been destroyed by the initial operation, which had been performed by the 1st defendant. That despite the earlier operation having been conducted on 13.02.2007 and developing some complication, the 1st defendant failed to manage and monitor the healing process of the plaintiff's eye after the operation because he had left the country for Canada prompting the plaintiff to seek for medical opinion and treatment elsewhere. Thus the cause of action arose when he was informed of his cornea having been damaged irreversibly during the initial surgery. This information was made known to the plaintiff on the 18.07.2007 by Dr. Prof. H.S. Adala.

6. Having considered the rival submissions, I am convinced that the cause of action arose on 18.07.2007 and therefore this suit was filed within the 3 years statutory time frame for the institution of suits based on

the tort of negligence. It is apparent that the plaintiff came to know of what was affecting his eye vide the medical report of Dr. Prof. H. S. Adala on 18.07.2007. In sum the date when the cause of action arose is when the plaintiff came to know of what caused the damage of his cornea. Consequently, the defendant's preliminary objection is rejected with each party bearing its own cost.

Dated, Signed and Delivered in open court this 22nd day of January, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant