

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 419 OF 2010

PETER CORNELIUS JACOB KRIJGER.....PLAINTIFF/RESPONDENT

- V E R S U S -

DR. FREDRICK OWITI.....DEFENDANT/APPLICANT

RULING

1) Dr. Fredrick Owiti, the defendant herein, took out the motion dated 5th March 2014 in which he sought for the plaintiff's suit to be struck out. The defendant filed an affidavit he swore in support of the motion. When served, Peter Cornelius Jacob Krijger, the plaintiff herein, filed a replying affidavit to oppose the motion. When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have the motion disposed of by written submissions.

2) I have considered the grounds stated on the face of the motion and the facts deponed in both the supporting and the replying affidavits. I have also taken into account the rival written submissions. It is the submission of the defendant that the suit discloses no reasonable cause of action. The defendant further avers that the suit is scandalous, frivolous or vexatious and further that the action is an abuse of the process of court. The defendant argued that this suit cannot amount to defamation nor breach of confidentiality hence there is no reasonable cause of action. It is also argued that since the suit was heard and determined by the Medical Practitioners and Dentist Board, this suit is vexatious and an abuse of the court process.

3) The plaintiff opposed the application arguing that the application was brought in bad faith to delay the determination of the suit. It is pointed out that the plaint discloses a reasonable cause of action therefore it cannot be said to be scandalous, vexatious nor frivolous. The plaintiff also pointed out that he had filed a constitutional petition to challenge the decision of the Medical Practitioners and Dentists Board which had dismissed his complaint. The suit before this court is a claim for damages for defamation and breach of doctor-patient privileged confidentiality.

4) It is not in dispute that the plaintiff had filed a complaint before the Medical Practitioners and Dentist Board. The complaint was heard and dismissed. It is also not in dispute that the plaintiff further filed a constitutional petition seeking for various declaratory orders. In the petition ie. Nairobi High Court P.T 511 of 2013, one of the prayers the plaintiff has sought is compensation under Article 23(3) (e) of the constitution as damages for breach of the constitutional right to privacy. The defendant has strongly contended evidence tendered before a court of competent jurisdiction in this case the children's court can be regarded as defamatory. After a careful consideration of the material placed before this court, it is now apparent that the following issues have emerged for the determination of this court.

5) First, whether this suit *is res subjudice* and or *resjudicata* in view of the decision rendered in Petition no. 511 of 2013. It is the submission of the plaintiff that in the decision in Pt. 511 of 2013, no final findings were made on damages for defamation and breach of doctor and patient privilege or confidentiality. It is also pointed out that there were no prayers for damages for defamation and breach of doctor and patient privilege or confidentiality in the petition. In my view these are issues which cannot be determined at this stage because an indepth interrogation has to be done to establish whether or not the issues put forward in this suit are directly and substantially in issue in petition no. 511 of 2013.

6) Secondly, the other question which will arise is whether or not the Medical Practitioners and Dentists Board determined matters touching on damages and if so whether it has jurisdiction to do so.

7) It is clear in my mind therefore that this suit cannot be said to be frivolous, vexatious and or scandalous. It cannot also be regarded as an abuse of the court process. With respect, I agree with the submissions of the plaintiff that this suit is distinct and separate from petition no. 511 of 2013.

8) In the end, I find no merit in the motion dated 5th March 2014. It is dismissed with costs being given to the plaintiff.

Dated, Signed and Delivered in open court this 24th day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant