



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 318 OF 2010**

**BONAVENTURE ANDREW OMUSE.....PLAINTIFF/APPLICANT**

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

**DR. DAN KIAGE.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**THE AGA KHAN UNIVERSITY HOSPITAL.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The subject matter of this ruling is the motion dated 1.8.16 taken out by the plaintiff/applicant in which he sought for the following orders:

**1. THAT this honourable court be pleased to admit into evidence the medical report dated 30<sup>th</sup> July 2007 by Dr. Chris Van Niekerk without requiring the said Dr. Chris Van Niekerk's appearance in court.**

**2. THAT the costs of this application be in the cause.**

2. The plaintiff filed an affidavit he swore in support of the motion.

The defendant/respondent vehemently opposed the motion by filing the replying affidavit of S. J. Saenyi. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions.

3. I have considered the grounds stated on the face of the motion and the facts deponed in affidavits filed in support and against the application. I have also taken into account the rival submissions. It is the submission of the plaintiff/applicant that he travelled to South Africa where he received medical attention from Dr. Chris Van Niekerk who in the end prepared a medical report dated 30.7.2007 outlining the condition of the plaintiff's left eye before performing the cornea transplant. The plaintiff now avers that on numerous occasions he contacted Dr. Chris Van Niekerk requesting him to appear in court to testify and produce the medical report he prepared dated 30<sup>th</sup> July 2007 as an exhibit in evidence but the aforesaid indicated that it was difficult for him to travel to Kenya due to his busy schedule as a consultant surgical ophthalmologist. It is also stated by the plaintiff that it has now become almost impossible for him to secure the attendance in court of Dr. Chris Van Niekerk to testify without incurring unreasonable expense and delay. This court was therefore urged to admit in evidence the medical report prepared Dr. Chris Van Niekerk without the necessity of calling the maker pursuant to the provisions of Section 33 of the Evidence Act.

4. The defendant/respondent urged this court to reject the plaintiffs/applicant's request in view of the fact

that the plaintiff had the means to travel to South Africa to seek for specialised treatment and therefore the issue of expenses should not arise. The respondent also pointed out that this being a medical negligence case whose success or failure will depend on the authenticity and veracity of the expert evidence adduced, it is prejudicial to the respondent to submit such an opinion without testing the veracity, expertise and authenticity of the maker. The defendant pointed out that it is incumbent upon the plaintiff to prove all allegations of negligence levelled against the defendant as pleaded in the plaint. It is further argued by the defendant that the right to a fair trial under Article 50(1) of the Constitution of Kenya 2010, entitles the defendant to cross-examine the plaintiff's witnesses and ascertain the veracity of the documents relied upon.

5. The history behind this dispute is short and straightforward. In the plaint, the plaintiff avers that on 21<sup>st</sup> February 2007, the plaintiff underwent a cataract surgery on his left eye by Dr. Dan Kiage, the 1<sup>st</sup> defendant at the Aga Khan University Hospital, the 2<sup>nd</sup> defendant herein. The plaintiff has alleged that he developed complications to his left eye while the 1<sup>st</sup> defendant was out of the country forcing the plaintiff's medicare provider M/s AAR Insurance to have the plaintiff referred to one Prof. H. S. Adala for post-operative review who in turn recommended to the plaintiff to seek for the advice of Dr. Chris Van Niekerk, a reknown 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. The question which has been left to this court to determine is whether or not it should admit the medical report dated 30.7.2007 prepared by Dr. Kiekerk without calling the maker to attend court to testify and tender the same in evidence. The law envisaged that in some cases it may become extremely difficult to secure the attendance of certain witness who authored some documents to be produced in court as exhibits in evidence. In such cases the law set the parameters to be considered before admitting the same as exhibits in evidence by other witnesses other than the makers. Section 33 of the Law of Evidence Act provides *inter alia*:

**“statements, written or oral or electronically recorded of admissible facts made by a person ..... whose attendance cannot be procure without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible ..... when the statement was made by such person in the ordinary course of business ..... or in the discharge of professional duty.”**

6. It has been expressly stated by the plaintiff that he has made several attempts in vain to procure the attendance of Dr. Chris Van Niekerk to travel to Kenya to testify and produce the medical report he prepared. It is said that if the court was to wait to have the medical report dated 30.7.2007 produced by Dr. Niekerk, it is likely to cause an unreasonable delay and a huge expense. The defendant has contested the assertion by the plaintiff that the expense may be a hindrance. However, the defendant has not controverted the submission that due to the busy schedule of Dr. Chris Niekerk it may be impossible to secure his attendance to court in Kenya from South Africa. I am convinced by the plaintiff's submissions that in the circumstances of this case, that this is one of those rare cases where this court should exercise its discretion in favour of admitting in evidence the medical reports dated 30.7.2007 without calling the maker. Consequently I allow the motion dated 1.8.2016 as prayed. Each party to bear its own costs of the motion.

**Dated, Signed and Delivered in open court this 25<sup>th</sup> day of May, 2017.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant