



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 47 OF 2011

SAMSON NJUGUNA MUNYUA PLAINTIFF

V E R S U S –

DR. MAURICE AMBANI.....1ST DEFENDANT

THE NAIROBI HOSPITAL..... 2ND DEFENDANT

AAR HEALTH SERVICES..... 3RD DEFENDANT

RULING

1. The substantive suit is expressed in the plaint dated 11th July 2011 in which Samson Njuguna Munyua is seeking for damages for medical negligence against Dr. Maurice Wambani, the Nairobi Hospital and AAR Health Services, the 1st, 2nd and 3rd Defendants respectively. Parties filed and exchanged witness statements and documents. When the matter came up for hearing parties agreed to have the documents including the medical documents produced as exhibits in evidence without calling the makers to testify. The Plaintiff testified in person and upon the conclusion of his evidence, Prof. Wangai learned advocate for the Plaintiff applied to this court to issue an order summoning one Dr. Wambugu to be cross-examined on a medical report he prepared on the Plaintiff which was produced by the Plaintiff as PExh 10. Mr. Mbigi, learned advocate for the 1st Defendant strenuously opposed the application.

2. It is the submission of Mr. Mbigi that the Plaintiff's application should not be allowed because at the trial conference learned counsels had identified the medical report prepared by Dr. Wambugu as one of those documents to be produced without summoning him to testify and produce the same as the maker. Mr. Mbigi further pointed out that in fact the aforesaid medical report has already been produced as PExh. 10 by the Plaintiff personally. It was argued that since the evidence has been produced with no objection the necessity of cross-examination is rendered superfluous. The learned advocate further argued that there will be no probative value to cross-examine Dr. Wambugu on evidence already admitted. He pointed out that the Plaintiff is seeking to cross-examine Dr. Wambugu as a fishing expedition exercise which is not permissible in law.

3. The 1st Defendant's advocate also argued that the 1st Defendant's defence will be prejudiced if the application is allowed. Mr. Mbigi further argued that the 1st Defendant's right to a fair hearing may be imperilled because the 1st Defendant is precluded from cross-examining his witness and in any case he cannot be called upon to prove the Plaintiff's case.

4. Miss Chege, learned advocate for the 3rd Defendant also opposed the Plaintiff's application on the basis that the Plaintiff's case cannot be hinged on the 1st Defendant's witness or documents. The learned

advocate pointed out that since the evidence were produced by consent the Plaintiff cannot turn around to interrogate the evidence by cross-examination. It is said that the oral application was made in bad faith. She concurred with the submissions of Mr. Mbigi that the Plaintiff was on a fishing expedition.

5. Prof. Wangai, learned advocate for the Plaintiff denied the allegation made by the Defendants that the Plaintiff was on a fishing expedition since the Plaintiff has not closed his case. Prof. Wangai pointed out that Dr. Wambugu was an expert whose evidence will be to the benefit of both sides and the court. The learned advocate pointed out that the Defendants will not be prejudiced because the Defendants will get an opportunity to cross-examine.

6. I have considered the rival submissions over the question as to whether or not Dr. Wambugu whose medical report has been produced by consent should be summoned to be cross-examined. The Defendants have raised two main grounds to oppose the application. First, it is argued that the Plaintiff is on a fishing expedition to get more evidence to prove his case. Secondly, it is submitted that the Defendants will be prejudiced in that they will not get a chance to cross-examine the witness and that the evidence of their witness will be used to prove the Plaintiff's case. I have already pointed out that the Plaintiff is of the view that he is not in a fishing expedition and that the Plaintiff is of the view that the Defendants will not be prejudiced.

7. At the conclusion of the evidence of the Plaintiff, Prof. Wangai has not indicated that he was closing the Plaintiff's case. I am in agreement with the assertion by Mr. Mbigi that the Plaintiff's case has not closed. I have perused at the list of witnesses the 1st and 3rd Defendant's intend to summon. I have not seen the name of Dr. Wambugu to be one of those witnesses who will be summoned to testify. The name of Dr. Wambugu featured prominently when the Plaintiff testified in chief and in cross-examination. In fact his medical report was produced by the Plaintiff as PExh 10. The Plaintiff has been accused of being in a fishing expedition. There is no doubt that the Plaintiff was sent to Dr. Wambugu by the 1st Defendant to be examined. He prepared a report based on the examination he did on the Plaintiff.

8. It is clear to me that the Plaintiff is basically seeking for the presence of Dr. Wambugu to be asked questions on his report. The fact that the medical report was produced by consent did not mean that parties were barred from making an application to have the makers of such documents or reports summoned for cross-examination to interrogate the veracity of such documentary evidence. With great respect, I do not think the Plaintiff is in a fishing expedition. The evidence sought to be interrogated is already on record hence it cannot be said it is being sought from elsewhere.

9. It has also being argued that if Dr. Wambugu is summoned, the Defendants' case will be prejudiced in that the Defendants will not have a chance to cross-examine him. With respect, I do not think the Defendants will be prejudiced. If this court allows the application, parties will be given an equal opportunity to cross-examine the witness. This court finds Dr. Wambugu to be a very important witness for both sides and to this court.

10. In the end and for the above reasons I allow the oral Plaintiff's application and direct that witness summons be issued to be served upon Dr. Wambugu to appear before this court to testify on a date to be fixed. Costs of the application to be in the cause.

Dated, Signed and Delivered in open court this 16th day of August, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent