



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 431 OF 2010

1. PATRICK KIGERA MATHIA KIMANI

**2. FAITH NJERI MATHIA (Suing as administrator and personal representative
of the estate of Jesse Mucheru Mathia).....PLAINTIFFS**

VERSUS

1. DR. PETER MUNGAI NGUGI

2. DR. F.K. MWONGELA

3. THE NAIROBI HOSPITAL.....DEFENDANTS

RULING

1. The 3rd Defendant herein filed a request of particulars dated 12th September, 2010. The said request was served upon Kiama Wangai & Company the firm of Advocates appearing for the Plaintiffs on 14th September, 2012. The 3rd Defendant has now filed the chamber summons dated 21st November, 2012 under Order 2 Rule 10 of the Civil Procedure Rules seeking that the Plaintiffs do within 14 days deliver to the third party particulars of the plaint in terms of the request for particulars attached to the application and that in default, the plaint be struck out.

2. The application was premised on the grounds set out on the body of the application and the supporting affidavit of Mr. Kiragu Kimani sworn on 21st November, 2012. Mr. Kiragu averred that despite the Plaintiffs' advocates being served with the request for particulars, the same has not been provided. He expressed the view that the particulars are necessary for proper preparation for the hearing of this suit.

3. In response thereto the Plaintiff filed grounds of opposition dated 21st January, 2013. The grounds were to the effect that all the facts sought by the 3rd Defendant are contained in the Plaintiffs' list of documents served upon the 3rd Defendant on 22nd December, 2010, in particular pages 1-14 & 22-25 and that the 3rd Defendant's application is therefore scandalous frivolous, vexatious. baseless and a waste of judicial time.

4. In submissions, Kashindi, learned counsel for the 3rd Defendant referred court to paragraph 9 (d) of the Plaint and submitted that the 3rd Defendant needs the particulars to be set out in terms of Order 2 of the Civil Procedure Rules. Counsel cited **Everlyne Martha Mumo v. Eunice Cheserem & Another [2014] eKLR**. He further relied on the averments in the supporting affidavit.

5. Prof. Kiama Wangai, learned Counsel for the Plaintiff, in opposition to the application submitted that there are five particulars of negligence set out in paragraph 9 of the plaint. That the pleadings cannot be struck out just because of failure to supply particulars in respect of misrepresentation. He stated that this being a case of medical negligence, particulars may not be obtained since most issues will arise after facts. He further stated that the particulars of misrepresentation are contained in the plaintiff's witness statements and that particulars are in the list of documents. He referred court to page 2 of the bundle of documents which he stated contained facts that show the way the kidney transplant was managed. He stated that on page 6, the relatives were told by the 3rd Defendant that the sugar levels were uncontrolled. That the person who gave the misleading information is named therein. Counsel acknowledged the provisions of Order 2 Rule 10 but referred this court to Order 2 Rule 15 of the Civil Procedure Rules which enumerates the conditions that ought to be satisfied for a pleading to be struck out.

6. Mr. Muchiri, learned counsel for the 1st and 2nd Defendants made no submissions. In response to Kiama's submissions, Kashindi submitted that the court has power to make any order that is just under Order 2 Rule 10 (2) of the Civil Procedure Rules.

7. I have considered the rival submissions together with the authorities supplied. The plaintiffs do not deny receiving the 3rd Defendants request for particulars dated 25th January 2013. The Plaintiffs do not also deny the allegation that they did not supply the particulars requested. The plaintiffs are of the view that the particulars requested have already been supplied to the 3rd Defendant as shown in the Plaintiffs' bundle of documents. A careful consideration of the Plaintiffs argument will reveal that the plaintiff is not denying the fact that there is need to supply the particulars requested but they are of the view that they had sufficiently supplied the same prior to the making of the request. In essence the Plaintiffs is saying they complied with the request of particulars for particulars was made.

8. The requirement to give particulars reflects the overriding principle that litigation between the parties, and particularly the trial, should be conducted fairly openly without surprises and, as far as possible, so as to minimise costs. In **the Supreme Court Practice, of England 1999 Vol. 1** at page 327, the function of particulars were stated to include inter alia:

- i. To inform the other side of the nature of the case that they have to meet as distinguished from the mode in which the case is to be prove.
- ii. To prevent the other side from being taken by surprise at the trial.
- iii. To enable the other side to know with what evidence they ought to be prepared and to prepare for trial.
- iv. To limit the generality of the pleadings of the claim or the evidence.
- v. To limit and define the issues to be tried and as to which discovery is required.
- vi. To tie the hands of the party so that he cannot without leave go into any matters not include. But if the opponent omits to ask for particulars, evidence may be given which supports any material allegation in the pleadings.

9. There is one caution which must born in mind that is to say that particulars will be ordered of the material facts on which the party pleading relies for has claim or defence, but not of the evidence by which those facts are to be proved. In this case the 3rd Defendant requested for the following particulars:

- a. ***What facts were misrepresented to the Plaintiff?***
- b. ***Identify the person who made the misrepresented facts.***
- c. ***When and where was the misrepresentation of facts made?***

d. Was the misrepresentation verbal or written?

e. If verbal, identify the person(s) who misrepresented the facts and the person to whom the misrepresentation was made.

f. If written, identify and give particulars of the document?

g. Furnish the particulars/details of the alleged negligent management of the deceased.

10. There is a dispute that in their plaint, the Plaintiff accused the 3rd Defendant of misrepresenting facts to the relatives of the deceased on his health status. **In Mulla on the Code of Civil Procedure, 13th Edition at page 709, it was stated inter alia that where the allegation of misrepresentation is made, it should be stated whether the representation was verbal or in writing. When a plea of misrepresentation was raised, but no particulars were given in spite of objection taken in the written statement that averment cannot be considered.**

11. In the motion before this court, the plaintiffs are saying they have supplied the particulars which sufficiently satisfy's the 3rd Defendant's request. It is clear in my mind that the plaintiffs cannot be to have totally refused to provide the particulars.

12. What the plaintiffs appear to be saying is that they will supply the same information which is in the court record thus making no logic. I have also carefully perused what the Plaintiffs filed in court and I am convinced those particulars answer the 3rd Defendants request. May be what is remaining is the question as to whether that is sufficient or not which is a matter for another forum and time.

13. In my view, even if I were convinced that the 3rd Defendant's, motion has merit I do not think this would dispose of the whole suit. For the above reasons I find the 3rd Defendant's motion to be without merit. It is dismissed with costs abiding the outcome of the suit.

Dated, Signed and Delivered in open court this 22nd May 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Respondent

..... for the Defendant