REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO.256 OF 2013

HELLEN NJENGA……………………………………………...………PLAINTIFF

VERSUS

DR WACHIRA MURAGE……………………………………......1ST DEFENDANT

THE MATTER HOSPITAL…………………………………......2ND DEFENDANT

R U L I N G

The application before the court is the 2nd defendant's Notice of motion dated 8th April 2014 seeking the striking out of the suit against the 2nd defendant on the ground that the claim has been fully settled out of court. The application is supported by the affidavit of Stephen Kihara Muchui, an advocate for the 2nd defendant. He avers that the plaintiff brought the suit against the 1st and 2nd defendants' jointly and severally for negligence in surgical operation performed by the 1st defendant in the 2nd defendant's physical facilities. The 2nd defendant denied the claim stating that its role was to enable the 1st defendant attend and manage his clients by providing a physical facility. Subsequent to filling the suit, the plaintiff and the 1st defendant through their advocates entered into negotiations without involving the 2nd defendant. The negotiations were successful and the 1st defendant agreed to pay the plaintiff Ksh 2,800,000 as general damages on condition that the suit is withdrawn. The parties filed a consent in court on 24th October 2013 thereafter the advocates of the defendants wrote to the plaintiff to inquire about the withdrawal of the case but the plaintiff has never responded to date.

The 2nd defendant claims that the consent on record is a judgment in favour of the plaintiff against 1st defendant which compromised the claim against the 1st defendant and the 2nd defendant too. The 2nd defendant argues that failure to involve the 2nd defendant in the settlement negotiations of the plaintiff claim was a clear admission by both the plaintiff and the 1st defendant that the claim against the 2nd defendant was ill-advised and without any basis.

The application is opposed. The plaintiff filed a replying affidavit sworn by Prof Kiama Wangai, counsel for the plaintiff. He states that both defendants are held professionally liable in the manner they managed the plaintiff. He further stated that the plaintiff engaged the 1st defendant on a without prejudice basis for an out court settlement where the sum agreed for general damages was Ksh 5,000,000. He claims that the 2nd defendant refused to participate. The 1st defendant paid his part but the 2nd defendant refused to settle its part. He further stated that his client is yet to be paid Ksh 4.1 million which is the agreed general damages and special damages hence the application lacks merit.

In response, the 2nd defendant filed a further affidavit dated 31st October 2014 maintaining that the 2nd defendant merely provided the physical facility to the 1st defendant and his patient. They denied the claim that they entered any negotiations or discussions on settlement of the plaintiffs claim. The 2nd defendant argues that the consent filed in court between the plaintiff and the 1st defendant is clearly what is known in law as an accord and satisfaction resulting in release of the 1st defendant and is used as a joint tortfeasor with the 2nd defendant. The 2nd defendant contends that the release of a joint tortfeasor operates as a release to all the other joint tortfeasor hence the consent filed applies to it. They argued that the 2nd defendant liability in this matter can only be vicarious liability while the primary liability can only be borne by the 1st defendant who is the actual tortfeasor.

During the hearing, Mr. Mege counsel for the 2nd defendant submitted the court that the consent filed in court settled the general damages at Ksh 2.8million. That the consent also compromised the question of special damages by establishing how it was going to be resolved between the plaintiff and 1st defendant. Counsel submitted that the consent is an accord as described in the case of **CULTER AND ANOTHER VS MCPHAIL (1962) 2ALL E.R 474.** Counsel also relied on **Halsbbury's law of England 3rd Edition pg 137** and **REPUBLIC VS PERMANENT SECRETARY IN CHARGE OF INTERNAL SECURITY-OFFICE OF THE PRESIDENT & ANOTHER EX PARTE JOSHUA MUTUA PAUL. (2013) eKLR.**

Mr. Mege submitted that there is nothing that can go to trial although the plaintiff contends that the issue of special damages is unresolved. He stated that the consent stated how the special damages will be resolved. He further stated that the 1st defendant has not sought for indemnity and would not involve the plaintiff at all. He argued that the 1st defendant has admitted liability.

Pro Wangai, counsel for the plaintiff submitted that the plaintiff's claim is in two parts. The first claim is that the 1st defendant conducted a surgery negligently and the second part is that after the surgery the plaintiff was managed by the 2nd defendant's staff. He argued that those were two separate particulars of negligence for each party therefore the role of the 1st defendant is not similar to that of the 2nd defendant. He stated that the suit has not been heard and the question of liability determined and neither has it been withdrawn. Prof Wangai argued that the consent filed is not an order of the court. He contended that the consent letter was an intention between the parties and not an order of the court. He submitted that liability in this case against the 2nd defendant must be established. He further submitted that the 2nd defendant was unwilling to participate in the negotiations because it believes that the 1st defendant was wholly liable to the plaintiff. Prof Wangai concluded that the 1st defendant paid Ksh 2.8 million which did not cover the 2nd defendant.

Mr. Ngila counsel of the 1st defendant submitted that the application is brought under order 25 (5) of the civil procedure which deals with withdrawal, discontinuance and adjustment of the suit not dismissal of suit. He stated that rule 5 only applies where a party urges for judgment in accordance with the compromise. He argued that the rule does not give a party a right to apply for dismissal of suit. He stated that the 2nd defendant in this case had not compromised or entered an agreement with the plaintiff. He further argued that each defendant filed separate defence battling separate particulars of negligence and also hired different advocates.

Counsel for the 1st defendant submitted that the issue of liability between all parties must be determined. He stated that the amount paid was part of what would be sufficient compensation to cover part of the blame. He further stated that the issue of special damages has not been settled and the same needs to be determined in court.

Having set out the respective parties' positions and having considered all the eminent points of view of all the parties' advocates, I hold the view that the only issue for determination given the circumstances of this case is ***whether to grant the orders sought.***

The 2nd defendant's application is brought under order 25 rule 5 of the Civil Procedure Rules contending that the suit herein had been compromised by the consent dated 12th September 2013 and signed by the parties' advocates and filed in court on 24th October, 2013.

Order 25 Rule 5 of the Civil Procedure Rules upon which the 2nd defendant's application is predicated provides:

> ***5.(1) Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.***
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> ***(2) The Court, on the application of any party, may make any further order necessary for the implementation and execution of the terms of the decree***

The decision in **Kenya Anti-Corruption Commission v Esther Nyabate Ngare & Another E & L CASE NO. 122 OF 2008 [2013] eKLR is relevant** where the court observed:

> ***"The court has power under this rule to direct that a suit has been adjusted wholly or in part by a lawful agreement or compromise upon receipt of satisfactory proof to that effect, and, to enter judgment, on application of any party in accordance with the said agreement or compromise. The lawful agreement or compromise envisaged under this rule must be that between the parties to the suit. See, Mulla, The Code of Civil Procedure, 18th edition, Reprint 2012, where the authors while commenting on Order 23 rule 3 of the Indian Code of Civil Procedure which is similar to our Order 25 rule 5 save for minor variations stated as follows at page 2916;***
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> *"**Unless it is clearly established that such accord or compromise has been entered into between the parties, the powers under Order 23 rule 3 could not be exercised**."*

In this case, the 2nd defendant relies on the letter dated 12th September 2013 addressed to the deputy registrar civil division requesting him to record the order by consent. The said order was signed by the plaintiff and the 1st defendant.

It is not disputed that the 2nd respondent did not participate in the negotiations through which the consent emerged. In my view, the consent, assuming it was endorsed by the court as an order of the court is only binding between the parties to it who in this case are the plaintiff and the 1st defendant and it can only be discharged if it was procured by fraud. The Court of Appeal in **Samuel Wambugu Mwangi v Othaya Boys' High School Civil Appeal no. 7 OF 2014 [2014] Eklr held:**

> ***"Circumstances under which a consent judgment may be interfered with were considered in the case of Brooke Bond Liebig (T) Limited – vs.- Maliya (1975) E.A. 266. It was stated that prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient material facts or in misapprehension or ignorance of material facts or in general for a reason which would enable the court to set aside an agreement."***

In other words, the consent is a contract which can only be set aside where there are reasons as a contract may be voided.

In **Halsbbury's Laws of England 4th Edition paragraph 329 it is stated that:**

"The doctrine of privity of Contract is that, as a general rule, a contract cannot confer rights or impose obligations on strangers to it, that is, parties who are not parties to it. The parties to a contract are those persons who reach agreement…" **See also chitty on contracts Paragraph 18-014**

"the doctrines of privity off contract means and means only, that a person cannot acquire rights to, or be subject to liabilities arising under contract to which he is not a party."

In my view, the claim against the 2nd defendant has not been settled. The two defendants filed separate defenses to defending the different particulars of negligence attributed to them separately as stated in the plaint dated 2nd July 2013 in accordance with Order 1 rule 3 of the Civil Procedure Rules which provides that:

> ***"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise."***

In the instant case since the claim is centered on is on liability of the joint and several tortfeasors, judgment can only be entered jointly and severally against the defendants where the court finds them liable. If that happens, individual liability also attaches and execution could as well be directed to all or either of the defendants depending on the findings of the court.

In this case, since liability has been seriously contested, it is only fair and just that the court allows all parties to present their case at a full trial, to avoid shutting the parties out of the judgment seat. I hasten to add that it has not been claimed or demonstrated that the 1st defendant is the agent of the 2nd defendant and or that the 2nd defendant is the principal of the 1st defendant such that the liability of the 1st defendant would as a matter of course, bind the 2nd defendant. Further, the claim is not that of vicarious liability, for it is the existence of the relationship of the master and servant between parties which gives rise to vicarious liability. In the case of **TABITHA NDUHI KINYUA V FRANCIS MUTUA MBUVI &** ANOTHER**CIVIL APPEAL NO. 186 OF 2009**[2014] EKLR the court stated:

> ***The principle of vicarious liability is an anomaly in our law because it imposes strict liability on an employer for the delict of its employee in circumstances in which the employer is not itself at fault. An employer will be held to be vicariously liable if its employee was acting within the course and scope of employment at the time the delict was committed…"***

From the pleadings on record, there is not suggestion that the 1st defendant was or could have been a servant or agent of the 2nd defendant in course of his employment with the latter when the alleged acts of negligence was committed. This is evidenced by the 2nd defendant pleading that the 1st defendant was an independent contractor in its premises or facilities and that he is therefore personally liable for any acts of negligence attributed to him touching on how he managed his patients at the 2nd defendant's facility.

And with the 1st defendant alleging that while his patient was at the 2nd defendant's facility, she was mismanaged by the employees of the 2nd defendant, the question that begs answers is whether the 2nd defendant would be a necessary party to the suit herein. In **Football Kenya Federation vs. Kenyan Premier League Limited & 3 others Civil suit no.69 OF 2015 ,** this court while determining the issue of necessary party cited with approval the decision in **AMON VS RAPHAEL TUCK & SONS LTD (1956) 1 ALL ER 273**, where the court held that:-

> ***"The party to be joined must be someone whose presence before the court is necessary as a party. What makes a person a necessary party?.....the only reason which makes a***

person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectively and completely settled unless he is a party. It is not enough that the intervener should be commercially or indirectly interested in the answer. The person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally. That is by curtailing his legal rights. That will not be the case unless an order may be made in the action which he is legally interest."

The plaint no doubt discloses separate causes of action against both defendants in respect of torts allegedly not committed by the defendants in joint capacity. That therefore, in my view, makes the 2nd defendant a necessary party whose presence before the court will enable the court fully and effectually settle all issues involved in the dispute, which issues have not been settled or at all.

In this courts' decision of **Abdulhalim Mohamed Shalio Vs Lenard Heffner and the Agakhan Health Services (K) Ltd and Kalamka the People Ltd, HCC 894/2001** where the 2nd defendant Aga Khan Health Services (K) Ltd applicants sought orders directing that there be no further proceedings in the case because judgment had been entered against the 3rd defendant, with the applicant arguing that the case had been compromised and that therefore the court could not go into the merits of the plaintiff's case against the 2nd Defendant/Applicant since judgment had already been satisfied, the court observed that the prayer sought was incapable of being granted as the plaintiff sought reliefs against all the defendants jointly and severally. Further, that the plaint no doubt disclosed separate causes of action against the individual defendants in respect of the tort of defamation which was not alleged to have been committed by the defendants in joint capacity.

Order1 Rule 3 of the Civil Procedure Rules provides that all persons may be joined as defendant against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly or severally or in the alternative, where if separate suit were brought against such persons any common question of law or fact would arise.

Under Rule 4 (in material part)

"Judgment may be given without amendment.

a. **…..**
b. ***Against such one or more of the defendants as may be found to be liable according to their respective liabilities under Rule 5, it shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him."***

Again in Rule 7, of Order 3:

"***where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties."***

The 2nd Defendants case, in my view, will be considered as against each defendant's sued if the plaintiff's case is proved against one and not the other defendant, if the court will so hold. The court will then decide which defendant the plaintiff has succeeded against and give judgment accordingly. The plaintiff's case will not terminate merely because he has succeeded against one and not the other defendant who was sued jointly and severally. It would in my view, be unjust to deny the plaintiff the right to be heard to ventilate his grievances against the 2nd Defendant and further it would be unjust to condemn a co- defendant in damages for torts allegedly committed solely and independently by a co-defendant in the absence of evidence of accord or compromise or settlement or satisfaction between the plaintiff and the 2nd Defendant, where the latter were not released from liability. The plaintiff has reserved rights against the other tortfeasor. See **Lutler & Another Vs Mc Phail (1962) 2 ALL ER 474.**

In Halsbbury's Laws of England 3rd edition, page 137 Para 246, it is stated thus:-

> "*246: Effect of judgment against or release of joint tort feasor.*
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> ***The common law rule that judgment against any one of the joint tort feasor barred future actions against the others in respect of the same charge has been abolished by statute; in consequence of which such a judgment is no longer a bar to an action against any other person who would, if sued, have been liable as a joint tort feasor in respect of the same damage."***

Though persuasive, the above provisions and decisions are backed by Order 1 Rules 3,4,5 and 7 of the Civil Procedure Rules referred to above.

The position relied on by Mr. Mege as espoused in the Halsbbury's Laws of England is the earlier position in England, which, unfortunately, had been abolished by statute and hence, paragraph 246 above as cited to distinguish it from the earlier position.

Even in the cited cases of **Republic Vs PS In charge of Internal Security Exparte Joshua Mutua Paul (2013)eKLR** the court GV Odunga J in setting out the meaning and effect of a "**joint and several"** judgment on liability citing **Dubai Electronics Vs Total (K) Ltd & 2 Others HCC NRB CC 870/98** stated:

> ***"Clearly, therefore, where you have joint liability all the tortfeasor are and each one of them is liable to settle the full liability, each tortfeasor is only liable to settle the sum due to the time of his liability. Where, however, the liability is joint and /or several, the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasor according to their individual liability."***
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> ***Either way, he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them".***

The Hon. Odunga J in the above decision was in essence recalling what Ringera J in the **Kenya Airways Ltd Vs Mwaniki Gichohi** stated:

> ***The concept of joint and several liability comprehends one judgment and decree against two or more persons who are liable collectively and individually to the full extent if such decree; However, double compensation is not allowed and accordingly, whatever portion of the decree is recovered against one of such defendant cannot be recovered from the other defendants."***

In the above decision, it was held that in a joint and several liability claims, the plaintiff cannot be allowed to benefit twice from the same judgment. Nevertheless, in this case, the 2nd Defendant in his defence filed in court on 21/8/2013 and dated 20/8/2013 elaborately pleaded that the 1st Defendant was not its employee, servant or agent but an independent contractor who was among a list of doctors qualified to admit their patients into the 2nd Defendant Hospital but that the management of those patients is the sole responsibility of the 1st Defendant. As a consequence, that the 2nd Defendant not being a principal or master of the 1st Defendant cannot be vicariously held liable for the alleged negligence of the 1st Defendant in the operation, treatment and management of the plaintiff. The 2nd defendant maintained that its duty of care to the plaintiff is only peripheral, restricted to the provision of the required physical facilities.

On the other hand, the 1st Defendant denied the plaintiff's claim as well and at paragraphs 11 and 12 of his defence dated 7th August 2013 pleaded that nursing staff at the 2nd Defendant's hospital were owned by the 2nd Defendant whose services were independent of those offered by him and therefore he could not be held liable for the incompetence or otherwise of the 2nd Defendant's staff.

The 1st Defendant also pleaded at paragraph 12 that *"**if the alleged injuries existed, which is denied, then the same were aggravated by the negligence of the 2nd Defendant's staff, agents or servants.**"* He then proceeded to particularize the facts of the negligence attributed to the 2nd Defendant, its staff, agents and or servants.

In simple terms the 1st Defendant is shifting the blame to the 2nd Defendant while the latter defendant is blaming the former, meaning, the two defendants have adverse not common interests.

Thus, whereas the plaintiff may not be allowed to benefit twice from the same cause of action, but in this case, it is clear that the defendants besides denying the plaintiff's claim of negligence have nevertheless blamed each other for any negative consequences that befell the plaintiff. Under such circumstances, in the absence of evidence that the 1st & 2nd Defendants have agreed to resolve their differences in favour of the plaintiff, there is no way settlement by the 1st defendant can discharge the 2nd defendant from liability.

Consequently, the plaintiff is entitled to proceed and prove her claim against the 2nd Defendant as she has no accord with the 2nd Defendant and neither is there any satisfaction of the claim by the 1st defendant and or compromise of the claim.

For the above reasons, Order 25 of the Civil Procedure Rules is not available to the 2nd Defendant. Neither has the 2nd Defendant proved that the case against it by the plaintiff is an abuse of the court process to invite this court to dismiss it under Section 3A of the Civil Procedure Act.

To dismiss this suit would be a premature act, tantamount to impeding the plaintiff's right to access to justice. It would also impede the 1st Defendant's right of entitlement to recover or seek for reimbursement from the co-defendants in the event that the plaintiff only opts to recover from the 1st defendant.

Furthermore, the issue of liability has not been determined and neither has the consent letter filed in court dated 12/9/2013 been adopted by the court since 21/10/2013 when it was filed. In addition, the issue of aggravated damages has not been determined.

In my view, therefore, this is not the kind of case that the court can conclusively, at this stage, determine on affidavit evidence, that the claim against the defendants by the plaintiff is inseparable.

In HCC 1202/2005 **HON CHARITY KALUKI NGILU VS HEADLINK PUBLISHERS LTD, CAROLINE MUTOKO & CAROL RADUL** where one of the defendants sought the striking out of the plaint on the grounds, among others, that the court has no jurisdiction to jointly condemn co-defendants in damages for torts alleged to have been solely committed by a co-defendant, and that the court could not condemn a defendant for a cause of action attributed to in law entirely to a co-defendant, the court, in dismissing the application cited with approval **D.T. Dobie & Co Ltd Vs Joseph Muchina (1982) KLR** where the court of Appeal settled that as

*"**The power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence; it should be exercised sparingly and cautiously". "it should be exercised only after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge.". …. "The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out".***

Thus, the power to strike out a suit should be exercised in clear, plain and obvious cases. It is a summary procedure. An order to strike out is a radical remedy which the court ought to be slow in resorting to. The plaintiff claims that after the surgical operation was conducted on her by the 1st defendant, the 2nd defendant's employees managed and treated the plaintiff. Therefore, without the 2nd defendant's

participation, the issues raised herein will not be settled effectively if the 2nd defendant is struck out of the pleadings.

The upshot of all the above expositions is that I hold the view that 2nd respondent in this case is a necessary party, and that as the suit has not been compromised either against it or even as against the 1st defendant, the 2nd defendant cannot claim that the matter is settled as against it.

In the end I find the application lacks merit and proceed to dismiss it with costs to the plaintiff.

Dated, signed and delivered at Nairobi this 15th day of May, 2015

R.E.ABURILI

JUDGE