REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.245 OF 2015

JOSEPHINE NDENYI……..PLAINTIFF

VERSUS

VISHAK BUILDERS LTD ……..…….. DEFENDANT

RULING

Before me for determination is an application dated 7th September 2015 brought under certificate of urgency, pursuant to the provisions of Section 1A. 1B, 3A and BB of the Civil Procedure Act and Order 51 Rule 1 and 3 of the Civil Procedure Rules. The application seeks orders

a. Spent
b. That this suit be heard on priority basis.
c. That costs of the application be provide for

The application is predicated on the grounds that :

i. The applicant's urethra has blocked due to her having been rendered a permanent paraplegia and requires urgent medical intervention.
ii. That the applicant urgently requires finances to undergo further medication hence the need to have this matter disposed off to enable her be compensated.
iii. That unless this matter is heard urgently to pave way for the applicant's compensation, she may suffer irreparably as her urethra has now blocked and is posing great health dangers.
iv. That it is in the interest of justice.
v. That the applicant is out of employment and has no any other source of earnings.

The application is further supported by the affidavit of the plaintiff applicant Josephine Ndenyi sworn on 7th September 2015. The applicant deposes that she was rendered 95% incapacitated and a total paraplegia and her urethra has blocked calling for urgent specialized treatment following an accident.

That she has developed complications requiring urgent medical intervention of about 1 million as shown by hospital letter; and she needs to be compensated so as to enable her settle the escalating medical bills and acquire specialized medial appliances for her well being thus a special bed, special mattress, diapers, catheters and physiotherapy as confirmed by Dr Wangata hence she urges the court to consider her circumstances and hear her case on a priority basis to enable her get compensation since she is in deplorable state of no medicine, food and general upkeep; and that allowing this application will save her and her family from suffering.

The application is opposed by the defendant/respondent who filed grounds of opposition dated 11th September 2015 contending that the application wrongly premises that liability is not an issue and that entry of judgment for the plaintiff is a fait accompli which prejudices the defendant's right to a fair hearing.

The defendant further avers that the filed statement of defence denies liability and the suit could fail if not proved hence it is not right for the plaintiff to presume the suit's outcome and budget for compensation that might never be. Further, that even if judgment was entered for the plaintiff, the defendant could appeal should it be dissatisfied therewith.

The defendant maintains that seeking accelerated hearing allegedly so that the plaintiff can get funds for medical treatment is too presumptions; no good reason has been advanced to justify priority hearing as sought; and urged the court to dismiss the application as it lacks merit.

The application was canvassed by way of oral submissions, with Mr Kulecho submitting on behalf of the applicant, relying on the supporting affidavit and annextures of his client. The plaintiff's counsel submitted adding that the plaintiff was now unemployed and has no income to enable her pay for her medical bills and that in view of the specialized treatment required out of the county, it was only just that the suit be prosecuted expeditiously so that she can be compensated to enable her attend to her medical situation both locally and in India. Further, that the plaintiff's life was in danger and that therefore delayed prosecution of this suit would deny her a chance to receive medical attention.

In response to the plaintiff's application, Mr Mege counsel for the defendant submitted, relying on the grounds of opposition reproduced above, vehemently opposing the application and contending that there was no medical evidence to show that the plaintiff's life was in danger, while admitting that indeed the plaintiff sustained very serious injuries. Mr Mege submitted that there was no evidence of a blocked urethra and that the medical evidence was therefore not consistent with what was being alleged in court. In his view, this application prejudices the defendant's right to a fair hearing hence the court should disregard the quest for priority hearing of the same.

In a brief rejoinder, Mr Kulecho for the plaintiff maintained that no prejudice to the defendant had been demonstrated and that the right to a hearing in defence was unfettered. Further, that the defendant had not sworn any affidavit to counter the plaintiff's depositions. He urged the court to allow the plaintiff's application as prayed.

I have carefully considered the plaintiff's application, grounds thereof, and supporting affidavit sworn by the plaintiff/applicant. I have also considered the grounds of opposition filed by the defendant's counsel, as well as the brief oral rival submissions by both parties' advocates. None of which relied on any decided case(s).

The only issue for determination in this application by the plaintiff is whether the plaintiff has demonstrated the need for a hearing of her case on priority basis.

Before I decide the above sole issue, I must examine the pleadings briefly. By a plaint (fast track) filed in court on 10th July 2015, the plaintiff Josephine Ndenyi instituted suit against the defendant Vishak Builders Ltd, claiming for general damages, special damages, costs of the suit and interest. The claim is premised on the allegation that at all material times to this suit, she was an employee of the defendant and on 19th March 2015 while she was carrying out her normal duties as stipulated by the defendant, she fell from a height at a construction site as a result of which she sustained very serious injuries and holds the defendant liable for breach of the statutory duty of care for :

a. Failing to provide the plaintiff with safe working equipments.
b. Exposing the plaintiff to risky working conditions.

The plaintiff claims that she sustained injuries involving: Spinal injury to the lower spine with paraplegia; urine and stool incontinence.

It is further claimed that at the time of the injury, she was being paid a monthly salary of kshs 9100 which the defendant had since stopped paying her since March 2015 and that she require medication and specialized treatment and equipment for which she claims compensation from the defendant.

The defendant entered an appearance on 22nd July 2015 and filed defence on 5th August 2015, through the firm of Muchui & Company advocates.

The defendant admits in paragraph 3 of the defence that an accident involving the plaintiff did take place on 19th march 2015 while she was carrying out her normal duties but denies the plaintiff's allegations that the defendant was responsible or contributed to the occurrence of the said accident by breach of the statutory duty of care as particularized by the plaintiff.

The defendant also pleaded that the said accident was wholly caused and or substantially contributed by the negligence of the plaintiff in that she

a. Failed to exercise reasonable care and attention while performing her duties.
b. Failed to observe her employer's clear instructions on how to carry out her work.
c. Failed to have any regard for her own safety as she went about her work.
d. Went about her work without due care and attention.

The defendant also denied the allegations that the plaintiff sustained any injuries or suffered loss and damage as alleged. It also denied the earnings pleaded by the plaintiff. It also denied the applicability of the doctrine of res Ipsa Loquitur relied on by the plaintiff.

In support of the plaint, the plaintiff filed her witness statement, copy of National Identity card and copy of medical report by Dr. Theophillus Wangata confirming the injuries sustained by the plaintiff and demand notice of 29th May 2015. She also filed a list of witnesses who are herself and Dr Wangata.

On 12th August 2015 her advocate filed reply to defence joining issues with the defendant and reiterating the contents of her plaint while denying particulars of contributory negligence attributed to her by the defendant.

The plaintiff's counsel also filed a pre trial questionnaire as required under Order 11, Rule 2 of the Civil Procedure Rules. Annexture JA1 to her affidavit is an information letter dated 31st August 2015 to the plaintiff by Dr Viraj Shah of the spinal clinic in Shalby Hospital, Ahmedabad India advising her that she was required to undergo further evaluation of the spinal surgery to relieve pressure from spinal cord on 20th October 2015 ad 16,000 USD to cover hospital expenses and post operative recovery stay other than travel expenses.

The plaintiff now urges this court to expedite the hearing of her suit to enable her get compensation to facilitate her treatment and upkeep since she is unemployed and a total paraplegia .

The plaintiff has invoked the overriding objectives of the Civil Procedure Act and inherent jurisdiction of this court for the ends of justice to be met.

Ordinarily, there is absolutely nothing wrong for a party wishing that his or her suit be heard on priority basis. However, it is not necessary to file a formal application to seek an early hearing date. All that the applicant needs to do is ask for a mention date before the Duty Judge and seek a date on priority basis, and the court, upon being satisfied that pleadings have closed and the parties to the suit have complied with all pre-trial requirements as espoused in Order 11 of the Civil Procedure Rules, or where there has been no full compliance, the court may direct that there be compliance within a specified period, and may order that the suit be heard on priority basis.

On the other hand, it must be appreciated that every litigant who initiates suit in court expects an expeditious trial as espoused in Article 159(2) b that justice shall be administered without undue delay.

Thus, the Constitution acknowledges that delayed justice is denied justice. Nonetheless, it must further be appreciated that some cases have some unusual urgency and therefore deserving a priority hearing. But such early hearing must not disregard the procedure set down by the Civil Procedure Rules that must be complied with before a matter is set down for hearing. Those procedures are necessary for effective hearing of matters and are not mere technicalities capable of being ignored.

Article 159 (2) of the Constitution was enacted with the objective of promoting dispensation or administration of justice to parties, which justice must be administered equally to all parties irrespective of status and provided that it is dispensed in a manner which is not prejudicial to any party to the suit.

This court, like the Court of Appeal in **Japheth Pasi Kilonga & 8 Others V Mombasa Autocare Ltd (2015) e KLR** acknowledges that the single most draw backs in the administration of justice is the delay in the determination of cases, resulting in the overwhelming case backlog, and in most of the delayed cases, they are caused by adjournments.

The learned Court of Appeal Judges in the **Japheth Pasi Kilonga case (supra)** citing with approval Lord Denning, MR in **Fitz Patrick v Batger & Company Ltd (1967) 2 ALL ER 657** stated, warning that:

"public policy demands that the business of the courts should be conducted with expedition."

The overriding objectives of Section 1A and 1B of the Civil Procedure Act were also enacted requiring the courts to facilitate the just, efficient, expeditions, proportionate and affordable resolution of disputes.

Further, Order 17 Rule 1 of the Civil Procedure Rules require, as a general rule, that hearing of suits once commenced continue from day to day. The said provision stipulates:

1. ***"Once the suit is set down for hearing, it shall not be adjourned unless a party applying for adjournment satisfies the court that it is just to grant the adjournment.***
2. ***When the court grants an adjournment it shall give a date for further hearing or directions."***

The intention of the above rule in my view, was to expedite justice for the parties that knock on the doors of justice.

Access to justice, as stipulated in Article 48 of the Constitution, can only be realized if parties are granted an enabling environment to ventilate their grievances in court without any hindrance.

In the Tanzanian Court of Appeal decision of **Ndyanabo v Attorney General (2001) IEA 485** the court stated:

"Access to courts is, undoubtedly, a cardinal safeguard against violation of one's rights, whether those are fundamental or not. Without that right, there can be no rule of law, and no democracy. A court of law is the last resort of the oppressed and the bewildered. Anyone seeking a remedy should be able to knock on the doors of justice and be heard."

The plaintiff in this case is the aggrieved party. There is no denial that she was injured while in the defendant's employment which injuries are debilitating.

The defendant has denied liability and that is within his right. However, it is a misconception for the defendant to allege that expeditious hearing of the suit herein will rob it of its right to a fair hearing and that the applicant wants the court to presume that the defendant is liable without proof.

I do not agree with those submissions by counsel for the defendant. It is the desire of this court to hear all disputes filed before it expeditiously, for that is what public policy demands. It is expected that a party whose rights have been violated, whether fundamental or not, is the one who approaches the seat of

justice first, seeking to ventilate their grievances. Their legitimate expectation is that the doors of justice shall be open to them and their opponents and be heard fairly, justify and expeditiously. It would be a worrying trend for the court to imagine that defendants have the propensity to delay cases simply because an expeditious hearing would prejudice them and deny them the right to a fair trial.

The right to a fair hearing is a guaranteed right under our 2010 Constitution – Article 50(1) thereof and that right cannot be limited, as espoused in Article 25 of the Constitution.

And this court is not about to limit any party's right to a fair hearing. If a party or parties are confident that their matter is ready for trial or that it is just and expedient to have their case heard on priority basis, they must be assured and this court assures them without reservations that its doors are open to administer expeditious justice to them and in their circumstances without fear or favour or regard to status. That expedition, nonetheless, must be balanced with due process of law, at whose nucleus are the rules of natural justice that no party shall be condemned unheard (right to a fair trial) which is a Constitutional imperative.

The court must also balance between the need for efficiency and expediency on the one hand and the need to accord all parties before it, a fair hearing. The scales of justice must balance just like a trial balance. Both parties must be given equal share of opportunities to present their respective positions or have their fair day in court.

In this case, I note that the plaintiff has not even indicted whether she has complied with all the pre-trial requirements. She has not sought for pre-trial directions. The defendant has not even filed witness statements and or a list of or bundle of documents. To order that this case be heard on priority basis in the absence of evidence of compliance with pre-trial requirements under Order 11 is to jump the gun and cross the bridge before reaching it. Whoever demands for expedition in the disposal of their cases must also ensure that they comply or have complied with the mandatory procedural requirements of the law and go further to demand that the adverse party too complies. It is only when it is apparent that the adverse party is not willing to comply or is procrastinating that the court will give pre-trial directions and certify the suit as ready for trial.

It is not disputed that the plaintiff sustained very serious injuries and this court empathizes with her condition. However, due process of law is the landmark and hall mark of our legal system, requiring that the courts ensure both parties have their day in court.

In the end, I find that the application by the plaintiff though commendably intended to expedite justice, was premature as there is no compliance with pre-trial requirements to prompt this court to certify the suit herein to be heard on priority basis. The application is rejected on those grounds with no orders as to costs.

Dated, signed and delivered at Nairobi this 16th day of September 2015.

R.E. ABURILI

JUDGE

16/9/2015

Coram R.E. Aburili J

C.A. Adline

Mr Kulecho for plaintiff/applicant

Mr Mege for defendant/respondent

Court -Ruling read and delivered in open court as scheduled.

R.E. ABURILI

JUDGE

Mr Kulecho- We pray for a mention date for pre-trial compliance

Mr Mege- We require a second medical examination and report on the plaintiff. We also require time to file statements.

Court- the matter to be mentioned on 26th October 2015. The plaintiff to be re examined by the defendant's doctor for a second medical report. The defendant to file and serve documents and witness statements within 30 days from to date.

R.E. ABURILI

JUDGE

16.9.2015