



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.341 OF 2012

EVERLYNE MARTHA MUMO PLAINTIFF

VERSUS

DR. EUNICE CHESEREM

THE NAIROBI HOSPITAL

DEFENDANTS

RULING

By a notice of motion dated 10th April 2013 expressly brought under the provisions of Order 2 Rule 10 of the Civil Procedure Rules, the second defendant, the Nairobi Hospital represented by Hamilton Harrison & Mathews Advocates seeks an order that the plaintiff Everlyne Maitha Mumo be compelled to supply and provide particulars in terms of the request for particulars as attached to the application within 14 days and that in default the plaint be struck out; with costs of the application in any event.

The application is supported by the affidavit of Kiragu Kimani Advocate.

According to the deponent's deposition, the 2nd defendant's advocates did on 28th January 2013 serve upon Prof. Kiama Wangai & Co Advocates for the plaintiff the 2nd defendant's request for particulars dated 25th January 2013.

The request notice was served in duplicate and the plaintiff's advocate was required to file in court together with their answers to the request for particulars. The 2nd defendant's advocates followed up with a letter on 28th February 2013 when they failed to get a response to their request and another reminder dated 19th March 2013 requesting the plaintiff's advocates for the particulars sought within 14 days failing which an application would be made to court.

It is further deposed that the plaintiff's advocates in response to the letter dated 19th March 2013 wrote an email on the same date stating that he had supplied them all that he had. It is further deposed that to date no particulars have been provided as requested and that the said particulars are necessary for the proper conduct and preparation of the case for hearing.

In opposition to the said application, the plaintiff filed grounds of opposition dated 25th September 2013 which grounds assert as follows:-

1. That the plaintiff has already annexed all the documents in her possession, in particular medical report by Dr. Warua dated 19th June 2012, medical report by Dr. C.N. Wamanda dated 21st June, 2012, medical report by Dr. Warua dated 22nd June 2013, plaintiff's complaint/meeting with the defendants dated 22nd June 2012, plaintiff's demand for a medical report to the 1st defendant, plaintiff's demand for a medical report from the 2nd defendant and medical report for Dr. Cheserem dated 20th June 2012 and which documents the plaintiff intends to rely on wholly to prove misrepresentation.
2. That Order 2 Rule 10 of the Civil Procedure Rules does not provide for striking out of pleadings.
3. That grounds for striking out of pleadings are set out in Order 2 Rule 15 and the plaint offends none of them.
4. That the aforesaid application lacks merit, is misconceived, frivolous and an abuse of the court process.

In the prosecution of the application, Mr Thugee advocate for the 2nd defendant/applicant submitted that paragraph 19 (b) of the plaint claims that the 2nd defendant misrepresented facts to the plaintiff, as a particular of negligence and that in their view, those particulars are not sufficient for which reasons they sought delivery but the same have not been supplied by the plaintiff and that the law requires that failure to supply would result in their pleadings being struck out. He relied on the affidavit sworn in support of the application and attached authorities which included the Supreme Court Practice, 1999, paragraph 18/12 that the requirement to give particulars reflects the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly, without surprises, and, as far as possible, so as to minimize costs. The paragraph cited above goes ahead to prescribe the 6 functions of particulars thus

- 1) To inform the other party of the nature of the case that they have to meet as distinguished from the mode in which that case is to be proved.
- 2) To prevent the other side from being taken by surprise at the trial
- 3) To enable the other side to know with what evidence they ought to be prepared and to prepare for trial.
- 4) To limit the generality of the pleading
- 5) To limit and define the issues to be tried, and as to which discovery is required
- 6) To tie the hands of the party so that he cannot without leave of court go into any matters not included.

Paragraph 18/12/27 gives an example of misrepresentation to which particulars must be contained in the pleading and that the statement of claim must show the nature and extend of each alleged misrepresentation, by whom and to whom it was made, and whether verbally or in writing – in the latter case, indentifying the document. He also relied on **Mulla** on the **Code of Civil Procedure 13th Edition, pgs 708 – 711** on the object of particulars – that although pleadings must now be concise, they must also be precise and that when more than one of the items mentioned in this rule is relied upon each must be pleaded separately. For this purpose, it continues – all necessary particulars must be embodied in the pleadings. Further, that if the particulars stated in the pleadings are not sufficiently specific, the other party may apply for further and better particulars.

Mulla further states that the object of particulars is to prevent surprise at the trial by informing the

adverse party what case he has to meet, to define and narrow the issues to be tried and to save unnecessary expense. In addition, that particulars supplement pleadings which would otherwise be too vague and general, and ensure a fair trial by giving notice of the case intended to be set up. At pg 709, it is provided that where it is alleged in the plaint that the defendants represented to the plaintiff, it should be stated whether the representation was verbal or in writing.

Counsel further submitted that in **Mamucha & Co Advocates – Vs – City Council of Nairobi (2006) eKLR and Kashisha – Vs – Sempagana (1967) EA 16**, the court held that particulars are intended to prevent trial by ambush or surprise and to narrow and define the issues. In their view, the particulars as filed are not adequate response to their request notice as they do not answer why, when and where the said misrepresentation were made, by who, to whom and whether they were made orally or in writing. In their view, pleadings must be concise and precise and not mere allegations that cannot be substantiated. He also submitted that misrepresentation must be pleaded separately, not as a particular of negligence as pleaded in paragraph 19. He urged the court to exercise its powers to order the plaintiff to supply better particulars for the ends of justice to be met. He maintained that the court should compel the plaintiff to provide the requested particulars within a time frame failure to which the plaint should be struck out.

Professor Wangai for the plaintiff opposed the application, relying on the grounds of opposition referred to above arguing that paragraph 19 of the plaint bases the plaintiff's claim on medical negligence by the doctor who represented the hospital. He maintained that the pleading is in order and that this court cannot strike out the suit on that basis alone as there are other pleadings of particulars of negligence and other documents accompanying the plaint which are within the knowledge and possession of the 2nd defendant hence it cannot be ambushed. He maintained that the particulars supplied as requested are adequate and that it is incumbent upon the plaintiff to prove her case not the defendant to seek to assist her prove her claim and that all the matters complained of have been complied with as parties seek to prepare the suit herein for hearing as required under 11 of the Civil Procedure Rules.

He urged the court to dismiss the application by the 2nd defendant with costs as it lacks merit.

I have carefully considered the application herein, the rival submissions by both counsels for the plaintiff and defendant and the cited authorities.

The law governing the grant of the orders sought is as per the provisions of Order 2 Rule 10 of the Civil Procedure Rules which provides that:

Every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies.

And as supported by the authorities supplied by the defendants' advocates which clearly sets out the purposes, functions and objects of particulars in pleadings, while it is widely acknowledged that pleadings are inherently required to be brief and summarized, not containing details of facts, it is recognized that facts and particulars may be called for to be provided where they are based on positive averments in pleadings, to avoid situations where parties are ambushed either in the prosecution or defence of their claims.

In **Bhupal Corporation – Vs - SOS Kinderdorf International HC NRB CC 792**, it was held that the overriding principle that the litigation between the parties and particularly the trial, should be conducted fairly openly without surprise and as far as possible to minimize costs.

Looking at the particulars sought, I have to determine whether the defendant as alleged, is likely to be ambushed or disadvantaged if the said particulars are not supplied, I shall also be required to determine whether the arguments in favour of the application herein negates the plaintiff's argument that the request is frivolous and that the particulars sought, besides being in the plaint as pleaded, are also contained in the witnesses statements as filed and the documents filed and supplied to the defendants.

The principles underlying the orders sought herein were set out in the case of Joshi – Vs – Uganda Sugar Factory Ltd [1968] EA 570 Spry JA (as he then was) citing the case of Weinberger – Vs – Inglis [1916-17] ALL ER at 844, where it was stated:-

“Rules 3, 3A, 7 and 9 of Order 6 of the Civil Procedure Rules provide for the ordering of further and better particulars; that an allegation of fact in any pleading if not specifically denied, is to be taken to be admitted; that every allegation of fact must be dealt with specifically by a defendant; that a denial must not be evasive ... As a general rule, the court never orders a defendant to give particulars of facts and matters which the plaintiff has to prove in order to succeed, and this is especially the case where defendants has confined himself to putting the plaintiff to the proof of allegations in the statement of claim, the onus of establishing which lies upon him ...”

Looking at the matter on the simplest footing, the appellant has made certain allegations which he must prove to succeed. The respondent company has made his task somewhat easier by admitting certain of those allegations but the onus remains on the appellant to prove those that are not admitted. The court will, however, order a defendant to furnish particulars where he is making positive averments and will also exercise its discretion to order particulars where it believes that by doing so, it will narrow the issues and avoid surprise, and so reduce expense. The question is not whether a denial could have been expressed in a positive way but whether the defendant’s intention is merely to deny or to set up a positive case in contradiction. A defendant is perfectly entitled, if he wishes to adopt an entirely negative attitude, putting, the plaintiff to proof of his allegations and if he does so, the plaintiff cannot, by asking for particulars, compel him to make positive assertions. On the other hand, of course, when a defendant adopts a purely defensive attitude in his pleadings, he will not be allowed to conduct his case on a different footing or at least only on terms.”

In the case of Salmin Mbarak & 2 Others – Vs – Hadi Karama & 2 Others CA 97/989 the Court of Appeal held that whereas a dismissal of an action for failure to supply particulars imposes a drastic penalty and further the dismissal of any action at interlocutory stage is a very serious matter and may well work serious injustice, an arrogant party who does not comply with court orders does not deserve the court’s indulgence. A similar view was taken by the Court of Appeal in Bhandari Construction Company – Vs – Standard Joney & Building Company [1983] KLR III.

In Mahinda – Vs – Khetani CA 32/1975 [1975] EA 306, Trevelyan J sitting in the EACA stated that:

“Particulars will never be ordered of an allegation, as to which the burden of proof lies on the applicant. However, in this case, this is not what the plaintiff was seeking to obtain, he was not looking for information to support that the plaintiff’s assignor had lent money to the defendant. Exactly why he wanted the particulars is open to question, but it may be that with them before him, he would re-appraise his case and if that were so, the particulars were, of course, not for ordering. On the other hand, the particulars were not for withholding on the ground that what the plaintiff wanted was evidence by which the defendant was proposing to prove his case, for that is what he wanted.

Assuming that he wanted information to help him prove his case, that is not the same as saying that he wanted to know how the defendant was going to prove his, and, in any event, the defendant has no case to prove ... The particulars should then not be ordered. In relation to the plaint, the additional pleading set up no answer to the claim made and is not, and is not intended to be, a defence to it. It is as conceded immaterial to the defence as pleaded, and particulars will never be ordered in respect of immaterial allegations.”

From the foregoing decision, it is clear that in order to decide whether or not to grant the orders sought in this application, the court must first examine the nature of the orders sought in the plaint and the defence filed.

The plaintiff’s case in brief is that she was primigavida with an expected date of delivery as 30th May

2012 and was followed for ante natal care by the 1st defendant. She was admitted to the 2nd defendant's hospital by the 1st defendant consultant when the pregnancy was 41 weeks, normal and uneventful save for post datism. She was then induced into labour which was lengthy, unnecessary and agonizing consequent to which the foetus suffered severe distress thus diminishing the possibility of survival. The plaintiff was then rushed to theatre for a caesarean section and in the process the baby got trapped, and was extracted in a state described as flat, pale, with no heart beat and not breathing. The plaintiff blames the defendants for failure to exercise all reasonable skills and care ascribed to them to ensure the safety and care of the plaintiff thereby occasioning to the plaintiff unnecessary pain and suffering from an extremely lengthy induction period, an undiagnosed cephalopelvis disproportion and an obstructed labour; less of all the effort to conceive and carry a pregnancy to term and loss of the most precious first child. She claims for general and aggravated damages interest and costs of the suit and any other relief this court may deem just to grant.

The 2nd defendant, the Nairobi Hospital filed their defence on 14th August 2012 admitting that they admitted the plaintiff in their hospital on instructions of the 1st defendant who is a consultant and independent contractor in her capacity as a consultant obstetrician and gynaecologist appointed by the plaintiff.

The 2nd defendant however denied any knowledge of alleged negligence. At paragraph 18 of the defence which responds to paragraph 19 of the plaint, the subject matter of this application for particulars, the 2nd defendant averred that:

“Paragraph 19 of the plaint is denied. Each and every allegation and particular of negligence against the second defendant is denied and the plaintiff is put to strict proof. In particular, the second defendant denies that it had incompetent and negligent doctors that subjects patients to unnecessary pain and suffering. The second defendant has no knowledge of the alleged incompetence and misrepresentation of facts and makes no admission thereof.”

This paragraph of the defence by the 2nd defendant was in response to the allegation in paragraph 19 of the plaint which to my mind and from the face of it, particularizes the negligence of the 2nd defendant pleaded in paragraphs 15, 16 and 17 of the plaint. Paragraph 19 states

19. PARTICULARS OF NEGLIGENCE ON THE 2ND DEFENDANT

- a. **Having in the panel incompetent and/or negligent doctors and in particular the 1st defendant that subjects patients to unnecessary pain and suffering.**
- b. **Misrepresenting facts to the plaintiff.**

Paragraph 17 of the plaint which is also denied by the 2nd defendant states that:

“further and without prejudice to the foregoing, the plaintiff aver that the hospital employees, servants, and in particular the 1st defendant that if at all managed and if at all treated the plaintiff and who were at all material times acting under the direction and supervision of the 2nd defendant were negligent and failed to use reasonable care and skills in the treatment, management and care to the plaintiff for which negligence the plaintiff hold the defendants liable.”

From the foregoing, one can certainly gather that the 2nd defendants' defence is made up of two parts, one part denying the claims while the other part acknowledging certain facts leading to the cause of action herein, which is a purely tortious action arising from alleged hospital negligence in the management of an expectant patient leading to loss of the baby and pain and suffering of the patient.

And whereas the plaintiff's claim appears to be concise and brief, the 2nd defendant's defence is quite elaborate, detailed and quite lengthy.

The significance of precise and concise pleadings cannot be overemphasized. The overriding objective of Section 1A of the Civil Procedure Act, is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes cannot in my view, be achieved unless the parties' pleadings are specific. Not only does it put the other party on notice but it narrows the issues to be tried and assists the court in setting its timetable as required under Order 11 and this is critical as it enables the court to identify contested and uncontested issues; explore methods to resolve the contested issues; where possible, secure parties agreement on a specific schedule of events in the proceedings, narrow or resolve outstanding issues or change the track of a case.

Parties and their advocates are then expected by the court to further that overriding objective of the Act, and to that effect participate in the processes of the court and comply with the directions and orders of the court. When a party drafts pleadings in such a manner that it is impossible to decipher the exact case that the court is required to resolve, that party is definitely not interested in achieving the overriding objective as stipulated in Section 1A of the Civil Procedure Act.

From the brief summary above, and glancing at the plaintiff's plaint, one is capable of seeing precise and clear details of facts giving rise to the cause of action herein.

And albeit the pleading in paragraph 19 (b) on misrepresentation of facts has provoked the 2nd defendant to seek for better particulars, having perused the particulars sought and those supplied, which the 2nd defendant alleges are not sufficient, I am persuaded, upon reading the plaintiff's plaint as a whole, that most, if not all the particulars sought can be answered if the parties comply with the provisions of Order 11 of the Civil Procedure rules 2010 with respect to witness statements and list and copies of documents they intent to rely on. In addition, no issue was raised in paragraph 18 of defence in response to paragraph 19 (b) of the plaint, to suggest ambiguity or surprise.

Further, it is my view that the plaintiff having filed the particulars of misrepresentation dated 7th April 2014 as requested in the request of 25th January 2013, albeit the said particulars filed and served did not specifically address the limb (c) of the request on where and when the misrepresentations were made, it is clear that the plaintiff's plaint and more particularly paragraphs 6 and 15, provide specific dates with regard to the plaintiff's admission at the 2nd defendant's facility wherein the acts of negligence complained of in paragraphs 16, 17 and 19 were allegedly committed/omitted giving rise to the alleged loss and damage.

Albeit counsel for the 2nd defendant complains that the misrepresentation complained of ought to have been pleaded separately and particulars thereof provided as required under Order 10 (b) and which submission I agree with, from the pleadings filed by both the plaintiff and defendant, and appreciation of the documents filed together with the pleadings, it is clear that the claim is grounded on medical negligence and not misrepresentation of facts. To find otherwise would be tantamount to compelling the plaintiff to amend the pleadings which she has not sought. In my view, no prejudice or injustice will be suffered by the 2nd defendant if the orders sought are not granted.

On whether striking out of the suit is available in the event that I order for delivery of better particulars and the same is not complied with, as I have stated, the parties are expected to assist the court to further the achievement of the overriding objectives as stipulated in Sections 1A and 1B of the Civil Procedure Act and to obey court orders. The consequences for disobedience of court orders are clearly provided for under the law, unless, as was held in the case of **Salmin Barak (Supra)**, the party who demonstrates arrogance and failure to comply may well work serious injustice to the adverse party. Striking out of the suit on that ground of disobedience of court order is not one of the options under Order 2 Rule 10, noting that the wordings under Order 2 Rule 10 are that:

“The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading ...”

The above provision is not couched in mandatory but persuasive terms.

In my view, looking at the persuasive authorities supplied by the 2nd defendant wherein the court in Mamicha & Co Advocates Case – Vs – City Council of Nairobi (Supra) decided on October 13th 2006 by **Kasango J** held that the party as ordered to supply the particulars with a specified period and failure to do so would lead to the defence (or pleading) struck out automatically is a case that was decided before the enactment of Section 1A of the Civil Procedure Act and Order 11 of the Civil Procedure Rules.

In addition, this case can be distinguished from the **Kashubai – Vs – Sempangama case** in the latter case, the application was for striking out of the plaint on account that the plaint is bad in law, it does not disclose cause of action and brought out of time and therefore the plaintiff sought for particulars.

The application before me does not seek to have the suit struck out. The striking out is seen as a consequence of non compliance with an order for delivery of particulars sought by the 2nd defendant. In any event, I do not see any basis upon which I would be called upon to strike out the entire suit for the plaintiff if the paragraph complained of in the application is not the foundational pleading without which the suit cannot stand. Courts as a principle, must strive to do substantive justice to the parties before it and avoid ousting the parties from the judgment seat at the interlocutory stage unless the striking out is an absolute necessity and unless it is proven that no amount of amendment to a pleading can breathe any life into it. This is the spirit espoused in Article 159 (2) (d) of the Constitution of Kenya 2010.

I concur with the laid down principles that litigation by ambush is now frowned upon by the courts in order to accord each party to a suit an opportunity to be aware of what to expect at the hearing, but as I have stated earlier, with the advent of Order 11 of the Civil Procedure Rules, discovery has been made easier and a court must therefore guard against being embroiled in a full blown trial of a suit at an interlocutory stage in the name of seeking for sufficient particulars.

And as I have stated, the orders sought are discretionary in nature. In my view, having perused the 2nd defendant's own list of documents filed in support of its defence, I find that there are sufficient material to answer questions which are being sought at this stage from the plaintiff, noting that the substratum of the suit herein is not on misrepresentation per se.

This court will therefore not permit parties to embark on unnecessary fishing expedition outstretching pleadings to unimaginable levels for information which is readily available in the pleadings and supporting documents.

In conclusion, I find that the 2nd defendant already has the particulars with regard to the plaintiff's claim sufficient for it to confront the case at hand and since the paragraph 19 of the plaint is denied, in paragraph 18 of the defence by the 2nd defendant, I find their incessant request for particulars tantamount to demanding that the plaintiff proves her case at this stage – which should await the main trial.

I therefore find the application for particulars not warranted and disallow it. Costs shall be in the main suit. I further direct that the parties do expedite the process of complying with the pre-trial requirements within the next 45 days from the date of this ruling to facilitate an expeditious disposal of this matter.

Dated, signed and delivered at Nairobi this 26th Day of November, 2014.

R.E. ABURILI

JUDGE