



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 105 OF 2012

SAMUEL GATHUNGU MUGAMBI.....PLAINTIFF

VERSUS

LOISE NJERI KIBICHO.....DEFENDANT

RULING

1. This ruling concerns the notice of motion dated 31st August 2012. It is an application brought by the Defendant under **Order 10, Rule 11** of the **Civil Procedure Rules, 2010** (the **Rules**). It seeks the following main orders -

(i) That interlocutory judgment entered against her on 28th August 2012 and all consequential orders be set aside.

(ii) That the Defendant be granted leave to file defence within such time as the Court may direct.

2. The grounds for the application appearing on the face thereof include –

(i) That delay in filing defence was caused by delay in obtaining a second medical report.

(ii) That the delay in obtaining the second medical report was caused by the Plaintiff's failure to undergo a second medical examination "promptly", and his failure to inform the Defendant when he was finally examined.

(iii) That the interlocutory judgment was thus sought and obtained in bad faith.

(iv) That the Defendant has a good defence to the claim which raises triable issues.

(v) That the Plaintiff will not suffer prejudice by the suit going to trial.

3. There is a supporting affidavit annexed to the application. It gives the factual background to the application. A draft statement of defence is annexed to the affidavit.

4. The Plaintiff has opposed the application by his **replying affidavit** filed on 29th November 2012. Grounds of opposition emerging therefore include –

(i) That the second medical report was delivered to the Defendant's advocates on 17th July 2012.

(ii) That the witness statement of an expert need not accompany the statement of defence at the filing stage.

5. At the hearing of the application on 25th July 2013 learned counsels for the parties merely relied upon the respective affidavits of the parties without more. I have read those affidavits.

6. The Plaintiff does not deny in his replying affidavit the failure alleged against him to “promptly” undergo the second medical examination, and the delay in informing the Defendant’s learned counsel when he was finally examined.

7. As to whether or not it was necessary for the Defendant to wait for the second medical report before filing defence, Order 7, rule 5 of the Rules provides as follows –

“5. The defence and counterclaim filed under rules 1 and 2 shall be accompanied by –

- a. **an affidavit under Order 4, Rule 1 (2) where there is a counterclaim;**
- b. **a list of witnesses to be called at the trial;**
- c. **written statements signed by the witnesses except expert witnesses; and**
- d. **copies of documents to be relied on at the trial.**

Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.”

8. It is thus apparent that the Defendant needed to see the second medical report before filing his defence. If he decided to rely upon it at the trial, a copy of the report had to accompany his statement of defence when filing it.

9. I also note that what the Plaintiff now has is an interlocutory judgment. His claim for special damages of KShs 2, 567,973/00 would still need to be strictly proved at “formal proof”. The Defendant would be entitled to participate in the “formal proof” as she entered appearance. She would be entitled to cross-examine the Plaintiff upon his claim for special damages. The final decree for the special damages issued on 26th April 2013 thus appears to be irregular.

10. In all these circumstances, I hold that the just thing to do is to have a proper trial of the action. The Plaintiff cannot be prejudiced by such trial. In the circumstances, I will allow the application. The interlocutory judgment entered on 28th August 2012 is hereby set aside and the decree issued on 26th April 2013 vacated. The Defendant shall file defence within fourteen (14) days of delivery of this ruling. Costs of the application shall be in the cause. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF OCTOBER 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER 2013