



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL SUIT NO. 407 OF 2010

T O

(Minor suing by his Next Friend P A).....PLAINTIFF

VERSUS

1. PCEA KIKUYU ORTHOPAEDIC REHABILITATION CENTRE

(aka PCEA KIKUYU HOSPITAL)

2. DR JOHN KINGORIDEFENDANTS

RULING

1. This suit is by a minor, **T O**, suing through his next friend and mother, **P A**. His claim is for special and general damages on account of medical negligence while he was undergoing treatment at the 1st Defendant's hospital under the care and management, as pleaded, of the 1st Defendant's servants and agents who included the 2nd Defendant.

2. The thrust of the Plaintiff's case is that he suffered injury and damage immediately after anaesthetists administered certain drugs on him in theatre in preparation for surgery. Particulars of negligence and damage have been set out in the plaint.

3. It is the Plaintiff's further case that a complaint was lodged on his behalf before the **Medical Practitioners and Dentists Board** (the Board); that the Board found the Defendants jointly and severally liable for the Plaintiff's condition, and that they should compensate his parents "with a reasonable sum of between KShs 3,000,000/00 to KShs 4,000,000/00"; and that despite agreeing with that decision the Defendants have refused or neglected to pay the compensation, which the Plaintiff claims.

4. The Defendants filed a joint statement of defence dated 24th September 2010. They denied the negligence alleged against them and other servants or agents of the 1st Defendant.

5. The Defendants also pleaded, without prejudice and in the alternative that the Plaintiff had delayed milestones and an underlying condition of **hypoxic-ischemic encephalopathy** which was previously unknown to the Defendants and which the Plaintiff's mother did not disclose to them.

6. The Defendants denied that any complaint was lodged with the Board, or that the Board found them liable as alleged. In the alternative they pleaded that if indeed a complaint was lodged, the same had

not been determined. They averred, in the alternative and without prejudice, that any recommendations for compensation made by a Preliminary Inquiry Committee constituted under the **Medical Practitioners and Dentists Act, Cap 253** was made without jurisdiction and unenforceable in law.

7. The Plaintiff subsequently filed **chamber summons dated 9th October 2012** which is the subject of this ruling. The application seeks three main orders –

- (i) That the Defendants be compelled to produce the Plaintiff's entire medical and treatment record/report from the time of his admission into the 1st Defendant's hospital to the time of his discharge.
- (ii) That the Defendants be compelled to divulge the name of the **Clinical Officer Anaesthetist** who administered anesthesia upon the Plaintiff prior to surgery "for purposes of including (him) in (this) suit as 3rd Defendant".
- (iii) That the Plaintiff be granted leave to amend the plaint to include the Clinical Officer Anaesthetist as the 3rd Defendant.

8. The application is stated to be brought under **Articles 35(1) (b) and 43(1) (a) of the Constitution of Kenya, 2010; sections 1A and 3A of the Civil Procedure Act, Cap 21; and Order 1, rule 10(2) and Order 8, rule 5 of the Civil Procedure Rules, 2010 (the Rules).**

9. Prayer 1 of the application appears to have been compromised and was not urged. The grounds for the application germane to prayers 2 and 3 as disclosed by the supporting affidavit sworn by the Next Friend are to the effect that a Clinical Officer Anaesthetist administered the anesthetic that harmed the Plaintiff; that the Board recommended that the anaesthetist's conduct be referred to the **Clinical Officers Council** which had disciplinary jurisdiction over him; that the anaesthetist is thus a necessary party in these proceedings who should be joined; and that for some reason the Defendants are "shielding" the anaesthetist by refusing to disclose his/her name.

10. The Defendants opposed the application by **grounds of opposition dated 29th May 2013**. Those grounds include –

- (i) That the application has been brought after undue delay which has not been explained.
- (ii) That the application "is unnecessary in light of the elaborate procedure set out in **Order 11** of the Rules and amounts to an abuse of the court process.
- (iii) That there is no draft amended plaint annexed to the application to show what reliefs will be sought against the intended 3rd Defendant.

No replying affidavit was filed.

11. I have considered the submissions of the learned counsels appearing.

12. I cannot understand the Defendants' reluctance to disclose the name of the Clinical Officer Anaesthetist. As already seen, the thrust of the Plaintiff's case is that he was harmed by anaesthetics administered to him before surgery. The Defendants themselves in the documents laid before the court have acknowledged that the Plaintiff went into cardiac arrest immediately after administration of the anaesthetics. Even without the anaesthetist being a party, he/she would most likely be one of the most important witnesses in the trial who, if not called by the Defendants, may be summoned by the court. But as it is, the Plaintiff wishes to join him in the suit, and for good reason, given the thrust of this case.

13. The anaesthetist was certainly one of the most important medics to attend the Plaintiff. The

Defendants would have his/her full name and details. Disclosing his name cannot occasion them any prejudice at all.

14. The learned counsel for the Plaintiff submitted in part, that the documents filed by the Defendants have the names of doctors who treated the Plaintiff but that where the anaesthetist joins the team his or her name is not given. At some other pages some kind of name is given but it is not decipherable.

15. In this regard the response of the learned counsel for the Defendants was interesting. He submitted in part –

“There has been no scheme to hide the identity of the anaesthetist. The Defendants have provided documents as they are. In fact the name has been shown in the documents. It is just that doctors and hospitals do not write legibly and their handwriting cannot be deciphered by persons outside the profession. There is no attempt to hide the identity....”

16. Well, the Plaintiff’s Next Friend is a person outside the medical profession, as are his advocates! So, the Defendants do not expect her or the advocates to be able to decipher the writing in the documents they have supplied in order to get the anaesthetist’s name! The Defendants on the other hand are “doctors and hospitals”. Let them decipher the writings in the documents they have supplied to the Plaintiff and provide the anaesthetist’s name! Surely that cannot occasion them any prejudice at all. Nor is it against our adversarial system of justice. In fact it is eminently in the interests of justice.

17. I am satisfied that prayers 2 and 3 of the application are meritorious. In the circumstances of this case the application has not been brought with any undue delay and there is no intention on the Plaintiff’s part to delay trial of the suit. Why would he want to delay the trial yet he is the injured party?

18. In the event I will allow prayers 2 and 3 of the application and direct as follows –

(a) The Defendants shall within fourteen (14) days of delivery of this ruling supply to the Plaintiff the **full name of the Clinical Officer Anaesthetist who administered to the Plaintiff the anaesthetist complained of in the plaint.** In default the Defendants’ statement of defence dated 24th September 2010 shall stand struck out.

(b) Upon supply of the Anaesthetist’s full name he shall be joined in this suit as the 3rd Defendant.

(c) The Plaintiff shall, within fourteen (14) days of receipt from the Defendants of the full name of the Anaesthetist, file an amended plaint.

(d) The 3rd Defendant shall then be served with summons to enter appearance and a copy of the amended plaint in the usual way.

(e) The amended plaint shall be served upon the present defendants within fourteen (14) days of filing of the same, and they shall be at liberty to file an amended defence within fourteen (14) days of service.

(f) Costs of the application shall be in the cause.

Those will be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF DECEMBER 2013

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER 2013