



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE NO. 407 OF 2010

PHOEBE ATIENO.....PLAINTIFF

VERSUS

**P.C.E.A KIKUYU ORTHOPAEDIC REHABILITATION CENTRE &
ANO.....DEFENDANTS**

Coram: Mwera J

Mbuthia for plaintiffs

Kiplagat for defendants

Njoroge, court clerk

RULING

In the notice of motion dated 27.10.10 the applicant invoked the powers donated by the old Order XXX V rule 1, Order VI rule 13 (1) (d) of the Civil Procedure Rules and sections 1A, 1B, 3A of Civil Procedure Act. The prayers therein were that:

- i) the defence dated and filed on 24.9.10 be dismissed;
- ii) the defence was an abuse of the court process and meant to delay the ends of justice;
- iii) judgment be entered in favour of plaintiff for sh. 4m.

It was contended in the grounds that although the defendant/respondents had denied being party to the Preliminary Inquiry Committee (PIC) proceedings conducted by the Medical Practitioners and Dentists Board, they were ably represented there and were found to have been negligent in treating Teddy Odhiambo, a minor. The respondents did not challenge the Board's award but instead handed the matter to their insurers, then instructed counsel – all demonstrating that they knew of the existence of the Preliminary Inquiry Committee (PIC) proceedings.

Phoebe Atieno, the mother and next friend of Teddy odhiambo deponed that in November 2008, she complained to the above board that her son had been injured while undergoing corrective surgery at the 1st defendant's hospital. Processes were started towards the Preliminary Inquiry Committee (PIC)

involving the deponent and the 2 defendants. The 2nd defendant, Dr. Kingori, and the deponent were summoned before the Board on 5/2/09 and they appeared. On subsequent dates Dr. Kingori alone or otherwise appeared before the Board which conducted proceedings ending with the award of 11.5.99 (Ann. PA-12). The defendants passed the award to their insurers . C.I.C. Insurance for due action. The defendants instructed their lawyers who on 19/9/09 advised Phoebe to take the minor for a second medical examination. This was done by Dr, Andrew Hicks (Ann. PA 17). And after further contacts and communication the Board's conclusion was that the defendants had been negligent in treating the minor in that incompetent personnel had administered anesthesia or given an overdose of it. When a defence was filed denying all particulars of negligence, that shocked the deponent. It is a sham and intended to delay medical assistance required. Letters and documents involved were exhibited.

In a replying affidavit by Patrick Kimpiatu, the Chief Executive Officer of the 1st defendant, it was stated that the application under review was misconceived, frivolous and defective. The 1st defendant at no time was served with the applicant's complaint addressed to the Medical Board although it was aware of Preliminary Inquiry Committee (PIC) CASE No. 64/08. A letter written by one Daniel Yumbya on 17.5.09 did not constitute an award of the Board. That the 2nd defendant Dr. Kingori had informed the deponent that no agreement was reached at the meetings held at the Board's offices except for submission of information and clarification of issues that the Preliminary Inquiry Committee (PIC) sought. That the applicant was at no time directed to deal with the respondents' insurer and at no time did the Board find the 1st defendant negligent in the whole affair. Preliminary Inquiry Committee (PIC) could not make an award of any sort at all, it being known to the deponent that a Preliminary Inquiry Committee (PIC) has limited area of operation and that the defence was not a sham. The personnel who treated young Teddy acted with due care, diligence and skill. All that is set out in the defence and will form a basis of trial issues. Order XXXV Civil Procedure Rules did not avail the applicant since the prayer to have judgement for sh. 4m was speculative while the claim is based on negligence.

Both sides submitted, each in essence, restating what was in the affidavits, albeit with some elaboration. The applicant filed a supplementary affidavit and each side presented several authorities. The determination of this application will begin with the substantive provision of law under which it is brought – Order XXXV rule 1, Civil Procedure Rules and for this case subrule (a):

“1. (1) In all suits where a plaintiff seeks judgment for –

(a) a liquidated demand with or without interest; or

(b)

where the defendant has appeared the plaintiff may apply for judgement for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.”

It is known all round that a liquidated sum claimed is a specific and certain amount of money. Here the plaintiff applicant prays that this court do dismiss (not strike out?) the defence and enter judgement in her favour for a sum of sh. 4m.

As per the plaint the claim is based on negligence whereupon the minor suffered injuries as he underwent medical treatment at the hands of the defendants. Particulars of negligence were set out and it was averred:

“14. The board after considering all evidence and circumstance of the case found that indeed the 1st

Defendant and 2nd Defendant were jointly and severally liable for the condition in which the plaintiff now finds himself in (sic) AND FURTHER that the defendants should compensate the minor's parents with a reasonable sum of between shs. 3,000,000/= - shs. 4,000,000/=."

The sum of sh. 4m is set out in the prayers including one for general damages for pain and suffering.

It is nowhere stated that this sh. 4m is a liquidated sum arrived at in any way. At most it is speculative because it is pleaded to be a reasonable compensation to the parents' of the minor.

A claim based on the tort of negligence must be proved and the court left to assess general damages and that is what the court will be doing in this cause when it comes to trial. At that point the minor's parents will propose or seek to convince the court that they deserve sh. 4m one way or another. That sum is not a liquidated demand eg a debt and it cannot be litigated by bringing an application under Order XXXV rule 1 of Civil Procedure Rules as has been done here. And with that the court did not resort to the authorities both sides placed before it.

In sum this application is misconceived and therefore dismissed with costs.

Ruling delivered on 6.4.11.

J. W. MWERA

JUDGE