



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CASE 996 OF 1998

M. P. SHAH HOSPITALPLAINTIFF

V E R S U S

- 1. ROSE KASEMA**
- 2. LAWRENCE M. MAITHYA**
- 3. JOHN J. MAITHYADEFENDANTS**

J U D G M E N T

The Plaintiff herein sought judgment against the Defendants, jointly and severally, for KShs. 3,140,014/00 pleaded as

“the amount due and owing by the Defendants to the Plaintiff for medical services rendered to NICOLAS M. KASEMA, particulars whereof are well-within the knowledge of the Defendants”.

It is further pleaded that the 1st Defendant,

“as the mother had in writing guaranteed and undertaken to bear the medical expenses in relation to the treatment (of) the said NICHOLAS M. KASEMA”.

Finally, it is pleaded that the 2nd and 3rd Defendants

“subsequently undertook and agreed to bear the charges relating (to) the treatment aforesaid.....”

The Defendants filed a joint defence and counterclaim. They pleaded that the Plaintiff was professionally negligent for failure to exercise reasonable care and skill in the treatment of the patient, and that therefore it should not recover the sum claimed. In the alternative the Defendants pleaded that the sum claimed is exaggerated.

The counterclaim was against the Plaintiff and one **C. D. PATEL**, the consultant neurosurgeon who treated the patient. The Defendants have pleaded in the counterclaim that the Plaintiff and the said doctor were negligent in the way they operated on, treated and attended to the patient, as a consequence of which he sustained severe injuries and suffered loss and damage. Particulars of negligence and special damage, injuries and illness of the patient are pleaded.

It is not clear from the court record if C. D. PATEL was served with process. In any event, he appears not to have entered appearance in the counterclaim or filed defence to the same. The Defendants do not appear to have taken any action against him on account of this default.

The Plaintiff filed defence to the counterclaim and denied liability.

The case came up for hearing on 2nd December, 2009. The Plaintiff called only one witness, **STEPHEN NDETI NDOME** (PW1). The Defendants, who did not personally attend the hearing, did not lead or call any evidence.

I have considered the testimony of PW1 and the written submissions filed on behalf of the parties. PW1 testified that he was working in the credit control department of the Plaintiff, and has so worked there since 3rd August, 2009. He produced in evidence invoices that he retrieved from the archives of the Plaintiff, which invoices had been prepared many years before by other employees of the Plaintiff working in its accounts department.

More crucially, the Plaintiff's claim against the 1st Defendant is founded upon a **written guarantee and undertaking** by her for payment of the medical expenses in relation to the patient, NICOLAS M. KASEMA. No such **written guarantee and undertaking** was produced in evidence.

The Plaintiff's claim against the 2nd and 3rd Defendants was based upon an **undertaking and agreement** by them to "bear" the charges relating to treatment of the said patient. There was no evidence tendered of this **undertaking and agreement**.

A party must be bound by his pleadings. A party who asserts must prove the assertion to the required standard (that standard being on a balance of probabilities in civil cases) unless the assertion is admitted by the opposite party. There was no admission in the present case.

I am not satisfied that the Plaintiff has proved its case against the Defendants on a balance of probabilities. The Plaintiff's suit is hereby dismissed.

The Defendants led no evidence at all in support of their counterclaim. The same is unproven and is also hereby dismissed.

Both sides having failed, the just order regarding costs is that each party bears its/hers/his costs of the suit. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT

THIS 12TH DAY OF FEBRUARY, 2010

H. P. G. WAWERU

J U D G E