REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT 1304 OF 2001

HUMPREY KIRIUNGI NJAGI……...……...….PLAINTIFF

-VERSUS

AGA KHAN HEALTH SEVICES LTD. ……..……..….DEFENDANT

RULING

1. BACKGROUND

Before the Court is a suit filed by plaint on 2nd August, 2001. The defendant entered appearance on 23rd August, 2001 and filed its defence on 4th September, 2001.

The defendant at paragraph 2 of its defence, pleaded incompetence of the suit, and declared its intention to raise a preliminary objection at the hearing. Notwithstanding the specific pleading that a preliminary objection would be raised, a pleading which I will take to have put the plaintiff on notice and given the plaintiff adequate opportunity to prepare to meet the challenge during trial, the defendant still, on 28th June, 2005 filed an application by Chamber Summons dated 27th June, 2005. The main prayer in the said application was:

“THAT this action be dismissed for having been filed after expiry of the limitation period.” It then became a contested point whether what was due for hearing was the application, or the main suit. From the submissions of counsel, it was apparent to me that what had come before me for hearing on 19th of September, 2005 was the main suit and not the application, because the application was made after the hearing date had already been fixed. So I gave my ruling, on 19th September, 2005 as follows:

“There has been a difference between counsel on whether the main suit should have been listed for today and tomorrow. Learned counsel for the defendant submits that only the Chamber Summons of 27th June, 2005 should have been heard — and on 17th October, 2005. I have looked at that Chamber Summons, and it is clear that it did not deserve a separate date from that for the main suit — because the relevant point already appears in the statement of defence.

“As counsel are in agreement, the main suit shall be listed for hearing tomorrow, 20th September, 2005; and on that occasion the defendant’s preliminary objection in para.2 of the statement of defence shall be canvassed at the very beginning.

“The date 17th October, 2005 which had been set for the Chamber Summons of 27th June, 2005 is hereby cancelled; and that application is hereby struck out, with costs to the plaintiff.”

It is necessary to state the point of law which emerges from the foregoing background. There was, in my opinion, no need — indeed it was unnecessarily timeconsuming and was improper — to formulate a preliminary objection to a suit as a separate application. It was unnecessary, firstly, because the defendant had pleaded that it had a preliminary objection which would be brought before the Court at the trial of the suit.

Secondly and more importantly, a preliminary objection to a suit is an intrinsic point of law to be raised and argued within the suit itself. Such an objection should, of course, be raised as early as possible within the trial — as the trial itself proceeds. It is a waste of the Court's precious time to formulate such an objection as a separate application; for the objection, being in respect of the merits of the case, is one of radical effect such as can lead to the termination of the case in limine; such an objection is part and parcel of the suit, and ought to be brought only within the framework of the trial process.

B. THE PRELIMINARY OBJECTION

Learned counsel for the defendant, Mr. Ojuro, presented his preliminary objection on 20th September, 2005 whereupon learned counsel, Prof. Muigai responded on behalf of the plaintiff.

On the basis of S.4(2) of the Limitation of Actions Act (Cap.22) Mr. Ojuro submitted that the plaintiff's suit was filed out of time, after the expiry of three years since the cause of action had arisen. The cause of action, learned counsel contended, had arisen on 2nd July,1998: and he relied on para.4 of the plaint which reads:

"On or about 26th June, 1998 the plaintiff was admitted to the Hospital following an appendicectomy performed at Guru Nanak Hospital. An abdominal examination revealed that the plaintiff had a discharging faecal fistula at a wound at the light iliac fossa. Further investigations at the Hospital revealed, among other things, multiple liver abscesses."

Counsel also relied on the content of para. 5 of the plaint, which reads:

"For six days after the plaintiff's admission, various registrars at the Hospital attended to him. They decided he required surgery and requested a Mr. S.C. Patel, a consultant at the Hospital, to perform it.

Surgery was performed on 2nd July, 1998. The plaintiff was discharged on 1st August, 1998." Mr. Ojuro submitted that the plaintiff's complaint relates to the date of admission, given as 26th June, 1998 and the date of surgery, given as 2nd July, 1998; and that there was no complaint in respect of the period after surgery. On the basis of those statements of fact, learned counsel submitted that since the complaint was in respect of the manner of conducting surgery, the suit should have been filed on or before 1st July, 2001 — but the date of filing was 2nd of August, 2001.

Learned counsel submitted that the gravamen in the suit had its foundation in paragraph 6 of the plaint, which reads:

"The plaintiff avers that the manner in which the Hospital treated him subsequent to his admission thereto, the decision to preform surgery and the manner in which surgery was performed were negligent…"

He urges that the tenor and effect of para.6 of the plaint is that the wrong alleged is of a tortious nature, and therefore, by virtue of the Limitation of Actions Act (Cap.22), S.4(2) the suit is untenable unless brought within a period of three years following the emergence of the cause of action. Counsel contends that the suit was brought out of time and without an order of the Court granting extension of time. He submitted that the plaintiff's action was time-barred and was incompetent. A suit of this kind, it was urged, stood not to be placed before the Court, for want of jurisdiction.

On the point of jurisdiction, learned counsel relied on a decision of the Court of Appeal, Thuranira Karauri v. Agnes Ncheche, Civil Appeal No. 192 of 1996. The Court there held:

“As the issue of limitation goes to jurisdiction, we shall deal with it first. The plaintiff’s answer to the defendant’s plea that the claim was time-barred was that she had obtained the necessary extension from the superior court. She did not produce any such order and none was shown either to the Judge or to the counsel for the defence.

We do not understand how the Judge could proceed with the trial without finally determining such an important point of jurisdiction.

The order for extension, if indeed obtained, as alleged, should have been served on the defendant with the plaint. And since it was not, the plaintiff’s advocate was under a duty to prove its existence as part of the plaintiff’s case at the trial. Since this was not done, the defence of limitation raised by the defendant in his defence stood, and the plaintiff should have been nonsuited for ever. In view of this failure, the plaintiff’s suit was incompetent and should have been struck out.”

Mr. Ojuro submitted that the plaintiff’s suit made no mention of any cause of action but tort, the tort of negligence; and since contract was not relied on, the longer limitation period for contract (six years) should be held not to be applicable in this instance. Learned counsel, for that proposition, called in aid the Court of Appeal judgement in Divecon Ltd v. Shirinkhanu Sadrudin Samani, Civil Appeal No. 142 of 1997. In that case the learned Judges stated:

“This Court in Kenya Cargo Handling Service upheld the ruling of Bhandari, J that in the circumstances of that case, the plaintiff’s suit was based both on contract and on tort. If the plaint of the respondent had also contained similar averments, we might have agreed with the learned Judge of the superior court in his holding that the respondent’s action was founded both on tort and on contract. We are, however, unable to do so as the respondent’s plaint by which she is bound, leaves no doubt at all that the basis of her plaint was the alleged tortious negligence of the appellant and not a breach of any contractual relationship between Captain Samani and the appellant.”

Mr. Ojuro, while restating the point that only a tort had been pleaded by the plaintiff, submitted on the basis of Order VI of the Civil Procedure Rules, that suitors were bound by their pleadings and their claims must stand or fall on that basis. C. TO WHAT EXTENT ARE MEDICAL-CARE TORTS TIME-BOUND? — SUBMISSIONS FOR THE PLAINTIFF

Learned counsel, Prof. Muigai, contended that mode of surgery was not the sole basis of the plaintiff’s claim. This argument drew on the full content of para. 6 of the plaint, which thus reads:

“The plaintiff avers that the manner in which the Hospital treated him subsequent to his admission thereto, the decision to perform surgery and the manner in which surgery was performed was negligent. The plaintiff holds the Hospital was primarily liable for failing to provide good administration and a safe system of work in the care of patients in general and the plaintiff in particular. The plaintiff further holds the Hospital vicariously liable for the acts of its staff, including professional staff, and those of the consultant surgeon, in the treatment and management of the plaintiff and avers that the Hospital and its staff were in breach of the duty of care incumbent upon them to exercise reasonable care and skill in the treatment of the plaintiff.”

Learned counsel disputed the claim made on behalf of the defendant, that only one date was crucial in the patient-management accorded the plaintiff at the hospital — and that it was specifically from that date that the limitation period, for the purpose of this suit, is to be determined: 26th June, 1998 was, admittedly, the date of admission; 2nd July, 1998 was, admittedly, the date of operation by Dr. Patel; 1st August, 1998 was, admittedly, the date of discharge of the patient. However, counsel remarked, the patient continued to be seen by doctors upto and including 16th December, 1998. Paragraph 11 of the statement of defence avers:

“The plaintiff was last seen at the Hospital in the out-patient clinic on 16th September, 1998. On the said date his abdominal wound was found to have healed well. He was asymptomatic and a repeat liver ultrasound revealed that the previous abscess cavity in the right lobe of the liver had reduced considerably

and was closing down in a natural way." On the basis of the admission in the statement of defence that the plaintiff was still a patient as at 16th September, 1998 learned counsel contested the defendant's claim that 2nd July, 1998 was the date of accrual of the tortious cause of action and the date, therefore, from which the three-year limitation period was to be counted. Counsel disputed the claim for the defendant, that the medical negligence alleged in this suit rested in but one single act; there had been, it was submitted, continuity in the process of negligent conduct by the defendant.

For this proposition Prof. Muigai cited R.A. Percy's work, Charlesworth & Percy on Negligence, 8th ed., at part 3 – 136, on the reckoning of time in respect of claims in negligence:

"In negligence actions the period of limitation starts to run from the date on which the cause of action accrued. Today, however, there are two broad exceptions, viz: (i) those cases involving either personal injury or a fatal accident, where circumstances have arisen that may permit an alternative commencement date; and (ii) those cases involving neither personal injuries nor death but where facts, relevant to the cause of action, are not known to the complainant at the date of accrual which, also, may permit an alternative commencement date. Generally in negligence actions, the cause of action accrues at the time when the plaintiff actually suffers the damage, even though its consequences may not become apparent until later, and not at the date of the negligent act or omission… [Because] negligence does not become actionable without proof of damage, it is only after damage has been suffered that the cause of action becomes complete and time begins to run. Thus, where a person is injured by a chattel that has been manufactured negligently, he may sue the manufacturer within the prescribed limitation period, which only starts running against him as from the date of injury. This is so even though more than three years may have elapsed since the chattel in question had been produced, dispatched from the maker's factory premises and supplied to another." The tenor and effect of counsel's submission is that s.4(2) of the Limitation of Actions Act (Cap.22) does not in plain and absolute terms, ordain three years as the period from what may appear as the accrual of the cause of action, within which a tort claim must be made. The facts of each case are always to be taken into account. It is to be noted, moreover, that time does not begin to run for the purpose of lodging a tort claim, in certain circumstances. This is stated in Charlesworth & Percy on Negligence, 8th ed. (at part 3 – 138):

"Time does not begin to run unless: (i) the parties, who are capable of suing and being sued, are in existence; (ii) the person to whom a right of action accrues is not under a disability; and (iii) the person's right of action has not been concealed from him by fraud."

Learned counsel submitted that the question, on what date was the damage suffered?, for the purpose of determining the accrual of a cause of action in negligence, was much more crucial than simply the ascertainment of the date on which a certain single act did take place.

This position seems to be well supported by the works of scholarship that were brought before the Court. It is, too, in my view, an inherently logical position, given the extended, process-type character of health complaints, which rarely can be attributed to a single causation sprung up from a particular date.

Learned counsel submitted that the claim in the instant suit was alleged to have arisen from a negligent surgical operation, the material damage from which manifested itself only after discharge, and after follow-up medical care had already taken place. In these circumstances, it was argued, it was improper to start counting the limitation period from the day when surgical intervention itself took place. This scenario, it was submitted, was consistent with that in Gatune v. The Headmaster, Nairobi Technical High School & Another [1988] KLR 561, in which the plaintiff, after a laboratory incident, started losing his sight, and later became completely blind. The negotiation of his claim with the office of the Attorney-General took much time, during which the limitation period was said to have expired before suit was filed. The question considered by the Court in that case was, when did he become aware that he was going to become blind? It was held that the relevant point was, when it was confirmed to him that he would go blind, and not when the acid matter exploded in his face, in the laboratory.

Now in the instant case, learned counsel urged that the cause of action had arisen for the plaintiff only after confirmation and follow-up, on 16th September, 1998 when he left the care of the defendant's

hospital.

D. FURTHER ANALYSIS, AND DIRECTIONS

An important question of law has emerged in this objection, which will need to be settled in the course of time. Are the Courts to take at face value the provisions of section 4(2) of the Limitation of Actions Act (Cap.22), and indiscriminately require that tort cases must be filed within three years of the occurrence of a particular incident? The answer must be no, because identifying the cause of action and determining its nature, may be a judicial task, performed after taking into account the facts of each case. The cause of action may not be obvious, or may be so extended or so dynamic that it cannot be marked as elapsed over one single day. The cause of action in health-care matters, for instance, cannot realistically be assigned to one single act occurring on a particular day, and for which one individual takes the blame. The reference-point in such a situation must be when the harm was sustained by the claimant; and the relevant date may be somewhat removed from the date when a particular act of medical care took place. From the pleadings it is clear to me that the plaintiff has not averred that the harm to his health was restricted in time to 2nd July 1998. I am, thus, not persuaded that the threeyear limitation period runs from that date and that the suit ought to have been filed by 1st July, 2001 as contended by the defendant. The suit was filed on 2nd August, 2001; and this, in my view, falls well within three years since the date when the plaintiff last received medical care from the defendant, namely 16th December, 1998.

I therefore hereby dismiss the defendant's preliminary objection with costs to the plaintiff, in any event.

The parties shall take a date at the Registry, to be given on the basis of priority, for trial of the suit dated 1st August, 2001 and filed on 2nd August, 2001. Orders accordingly.

DATED and DELIVERED at Nairobi this 28th day of October, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiff: Prof. Muigai, instructed by M/s. Mohammed & Muigai Advocates

For the Defendant: Mr. Ojuro, instructed by M/s. Mohammed & Samnakay Advocates