



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 226 OF 2010

SHAFINA MAGRE.....1ST PLAINTIFF/RESPONDENT

KHURRUM MAGRE.....2ND PLAINTIFF/RESPONDENT

-VERSUS-

AGA KHAN HEALTH SERVICES (K) LTD

(Trading as AGA KHAN UNIVERSITY HOSPITAL)....1ST DEFENDANT/APPLICANT

DR. MARIA CARVALHO.....2ND DEFENDANT/RESPONDENT

RULING

1. The 1st defendant/applicant took out the Notice of Motion dated 31st October, 2017 which is supported by the grounds set out on the face thereof and the facts deponed in the sworn affidavit of *Valentine Situma Achungo*. The order being sought in the aforesaid Notice of Motion is an admission into evidence of the medical report dated 23rd September, 2009 prepared by Prof. Dr. William Stones without requiring his presence in court.
2. When served, the plaintiffs filed grounds of opposition to resist the Motion. The 2nd defendant filed a replying affidavit he swore to oppose the Motion too.
3. When the Motion came up for interparties hearing, learned counsels appearing in the matter recorded a consent order to have the application disposed of by written submissions.
4. The background of the case in brief is that the plaintiffs instituted a suit against the applicant and the 2nd defendant on 26th April, 2010 seeking for general, aggravated and exemplary damages as well as costs and interest on the suit for alleged medical negligence resulting in the death of the plaintiffs' baby boy soon after delivery sometime on or about the 9th of September, 2009.
5. I have carefully considered the grounds set out on the face of the Motion and the facts deponed in the affidavits filed in support and against the application. I have further considered the grounds of opposition and the rival submissions together with authorities cited.
6. The issue for consideration is whether in the circumstances of this matter, the required threshold for production of the medical report in question without necessitating the attendance of its maker were met. It is the applicant's contention that the reason for urging this court to excuse the attendance of Prof. Dr. William Stones is that he is no longer an employee of the applicant and his whereabouts remain unknown.
7. The applicant further contends that a copy of the said doctor's medical report was disclosed and availed to the respective parties at the pre-trial stage in addition to the fact that the doctor is named as a witness for the applicant's case, adding that the medical report in question is crucial evidence in its case and that the respondents herein do not stand to be prejudiced should the order sought be granted.
8. In response, the plaintiffs have argued inter alia, that it is only in limited instances where a document can be produced without requiring the attendance of the maker in court and that in this instance, the applicant has failed to show that it made any efforts in tracing the good doctor.
9. The plaintiffs also urged this court to keep in mind their constitutional right to a fair hearing under Article 50 of the Constitution. They argued that they can only enjoy this right if given the opportunity to cross-examine the relevant witness on his medical report. In this respect,

the plaintiffs submit that the medical report by Dr. Stones is inconsistent with the respective medical reports being relied upon by themselves and the 2nd defendant, hence the need for cross-examination.

10. In her submissions, the 2nd respondent advanced the argument that the applicant has given no evidence to show that any actual efforts have so far been made to contact the doctor for the purpose of attending court.

11. The 2nd respondent also argued that the remaining circumstances set out under Section 35(1) of the Evidence Act too have not been met and further that the authorities cited by the applicant are irrelevant.

12. As a general rule of evidence, documents are to be produced by their makers as provided for under Section 35 of the Evidence Act.

13. The exception to this rule is stipulated by way of conditions laid down under Section 35(1) (b) of the aforesaid Act and applies in the following scenarios:

a) Where the witness is dead, or

b) Where the witness cannot be found, or

c) Where the witness is incapable of giving evidence, or

d) Where the attendance of the witness cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

14. The applicant relied on the condition that the doctor's whereabouts are unknown since he left its employment and that enquiries as to his recent or current whereabouts have borne no fruit.

15. However, a critical examination of the Motion and supporting affidavit clearly show that the applicant has failed to tender evidence to show the steps it took to trace and secure the attendance in court of Prof. Dr. Stones. It is apparent that the applicant made no attempts to shed light on the process undertaken in making the supposed enquiries despite the expectation that it would satisfy the burden of proof placed on it.

16. In the case of *Jane Wambui Weru v Overseas Private Inv. Corp & 3 others [2012] eKLR* this court expressed itself inter alia as follows:

“...it was incumbent upon the plaintiff to prove that “the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable” ”

17. I have considered the authorities cited by the applicant in its submissions and I find them to be inapplicable since they deal with circumstances distinct from those illustrated by the applicant in terms of the requisite conditions mentioned hereinabove. The cited authorities revolve around the inability to procure the attendance of a witness without unreasonable delay or unnecessary expense, whereas the Motion is premised on the condition that the subject witness' whereabouts are unknown.

18. The respondents have correctly stated that the right to cross-examine the maker on his or her document is a fundamental right which ought not to be denied unless absolutely necessary and for good reason, since to take away such a right would arguably impede one's constitutional right to a fair trial as espoused under Article 50(1) and (4) of the Constitution.

19. It thus follows that a document can only be produced without necessitating the attendance of its maker where either of the abovementioned conditions have been met. Those conditions have not been met in this matter.

20. There is one more issue which I deem it necessary to comment on. The respondents have argued that Prof. Dr. Stones is a factual witness rather than an expert witness. I have perused the file and it shows that a witness statement was prepared in the doctor's name. The same cannot be disregarded since Prof. Dr. Stones is not merely a witness of fact but the maker of a medical report containing his expert opinion on the circumstances surrounding the dispute.

21. He would in essence be giving his evidence in his capacity as a medical doctor and not as an ordinary witness of facts which would therefore make him an expert witness. In the premises, the respondents' arguments may appear erroneous.

22. In the end, I find no merit in the Motion. It is hereby dismissed with costs being in the cause.

Dated, signed and delivered at NAIROBI this 14th day of June, 2019.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiffs/Respondents

.....for the 1st Defendant/Applicant

.....for the 2nd Defendant/Respondent