REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 894 OF 2001

ABDULHALIM MOHAMED SHALLO ..... PLAINTIFF

VERSUS

LENARD HEFFNER ……1ST DEFENDANT

THE AGA KHAN HEALTH SERVICE

KENYA LTD ……..…….. 2ND DEFENDANT

KALAMKA THE PEOPLE LTD ….....…..…… 3RD DEFENDANT

R U L I N G

Before me is a notice of motion brought under the provisions of Section 3A of the Civil Procedure Ac and Order 51 Rule 1 of the Civil Procedure Rules. The application is dated 4th June 2014.

The application is initiated by the 2nd defendant the Aga Khan Health Service Kenya Ltd and it seeks from this court orders that:-

1) This Honourable Court do direct that there be no further hearings of this case

2) That costs of this application be provided for.

The said application is premised on the annexed sworn affidavit of Judith Oduge Otieno, the legal officer of the 2nd defendant in her sworn affidavit, the deponent contends that this suit was determined on 18th December 2003 when this court delivered a judgment in favour of the plaintiff, awarding him general damages for Sh. 1,000,000 against the 3rd defendant Kalamka The People Limited.

Further, that there has been no appeal against the said judgment. In addition, that the plaintiff has fully recovered the full amount of the judgment form the 3rd defendant hence, this court cannot go into the merits of the plaintiff's case against the 2nd defendant since the judgment has already been satisfied.

The application is opposed by the plaintiff who deposes in his affidavit sworn on 24th June 2014 and filed in court on the same day. The plaintiff deposes that he obtained judgment against the 3rd defendant after the latter admitted the claim and that the said judgment did not dispose of his claim against the 1st and 2nd

defendants who denied liability. He maintains that he still has a valid pending claim against the 1st and 2nd defendants since no judgment has been pronounced touching on his claim against them, in as much as he got judgment against the 3rd defendant.

He urged this court to strike out the 2nd defendant's application with costs as it is an abuse of the court process, scandalous, frivolous and vexatious.

In their oral submissions made in court on 27th November 2014, the 2nd defendant/applicant's advocate Mr. Shiraz Magan relied on the affidavit sworn by Judith Oduge Otieno to advance the arguments that this suit ought to be marked as concluded since the plaintiff was awarded damages by the court vide the judgment of 18th December 2008 and that he cannot expect anymore from the rest of the defendants as there was nothing else to be heard.

The plaintiff in response maintained that his claim against the defendants was jointly and severally and that since the judgment as obtained was only against the 3rd defendant, and as the defamatory material was originated by the 1st defendant on behalf of the 2nd defendant as the latter's chief executive officer, the suit is still pending against the two and that it should be allowed to proceed to hearing and as the said suit is part heard as was commenced by **Hon. Ali Aroni J.** He charged that the application is an afterthought as there was no such application made before the trial commenced.

Mr. Shiraz maintained that albeit the suit was part heard, it must have been an error to commence a hearing when there was judgment on record. None of the parties relied on any decided authority.

I have carefully considered the application as presented and argued by both parties. Section 3A of the Civil Procedure Act provides that:-

> ***"Nothing in this Act shall limit or otherwise affect the inherent power of court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court."***

The issue for determination in this application, therefore, is whether there is an attempt by the plaintiff to abuse the process of the court to warrant this court invoke Section 3A of the Civil Procedure Act, to prevent that attempt.

The beginning point is the judgment of **Hon. Lenaola J** delivered on 18th December 2003. **Hon. Lenaola J** was very specific in that judgment that the 1st and 2nd defendants were unaffected by the said judgment. The Hon. Judge further acknowledged that there was, on record, an application by the plaintiff to have the 1st and 2nd defendants defences struck out, which application had been dismissed but reinstated on 23rd October 2013 by consent.

In addition, the record is clear that the judgment entered against the 3rd defendant was a formal proof after the 3rd defendant's defence was struck out on account that it was an admission of the plaintiff's claim.

It is an undisputed fact that there is no judgment against the 1st and 2nd defendants, as the case against them is part heard before **Hon. Justice Abida Aroni** and when the file was placed before **Hon. Rawal J** (as she then was) on 18th January 2010, both parties – 2nd defendant's counsel and plaintiff agreed to have the matter continue from where it stood subject to the typing of the proceedings. When this suit came up for further mention on 19th April 2012, the plaintiff informed the court that he had testified before **Hon. Justice Aroni** and that he intended to call other witnesses but that proceedings had not been typed and a further order for the typing of proceedings was made.

When the matter came up for mention on 27th May 2014 is when counsel for the 2nd defendant signified their intention to apply to the effect that the settlement of the case as against the 3rd defendant had exhausted the case against the 1st and 2nd defendants hence the application dated 4th June 2014, the

subject of this ruling.

The plaintiff maintains that his claim is still sustainable as against the 1st and 2nd defendants whereas the 2nd defendant states otherwise and urges this court to find that it was an error to have allowed the case against the 1st and 2nd defendants to commence to hearing when the 3rd defendant had already settled the claim.

I have carefully considered the application by the 2nd defendant, the objections thereto and rival submissions counsel.

The sole issue for determination I n this application is whether the applicant is entitled to the orders sought. I note that from the judgment of **Hon. Lenaola J**, delivered on 18th December 2003, His Lordship was clear that the 1st and 2nd defendants were unaffected by the said judgment. In addition, the record shows that there is pending an application to strike out the 1st and 2nd defendants' defences which was still pending after being reinstated on 23rd October 2003 by consent, when the matter came up for hearing before **Hon. Lenaola J** as against the 3rd defendant whose defence had been struck out.

Indeed, on record there is no judgment or final orders against the 1st and 2nd defendants herein, and the suit as against them is part heard.

In my view, the 2nd defendant is urging this court to dismiss the plaintiff's suit as against it as there is no cause of action against it since he has already been compensated by the 3rd defendant.

In my humble view, that prayer is incapable of being granted as the plaintiff sought reliefs against all the defendants jointly and severally. The plaint no doubt discloses separate causes of action against the defendant in respect to the tort of defamation, which was not alleged to have been committed by the defendants in joint capacity.

I am fortified by the provisions of Order 1 rule 3, 4 and 5 of the Civil Procedure Rules under Rule 3, all persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly or severally on in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.

Under Rule 4 (in material part)

> ***"Judgment may be given without amendment***
>
> ***a) …***
>
> ***b) Against such one or more of the defendants as may be found to be liable according to their respective liabilities under Rule 5, it shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him."***

In addition, Rule 7 of the same order provides as follows:-

> ***"Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties."***

From the above provision, the court will not deny reliefs merely because they have been sought jointly and severally.

A plaintiff's case will be considered as against each defendant sued. I f the plaintiff's case is proved against one and not the other defendant the court will so hold. The court will then decide which defendant the plaintiff has succeeded against and give judgment accordingly. In other words, the plaintiff's case will not necessarily terminate merely because he has succeeded against one and not the other defendants sued jointly and severally.

This same issue was canvassed by **Hon. Waweru J** in **Charity Kaluki Ngilu – Vs – Head Link Publishers Ltd & 4 Others [2011] eKLR**, where the plaintiff had sought orders for striking out of the defendant's defences under Order VI rule 13 (1), (b) and (d) of the Civil Procedure Rules.

The 1st defendants in the above case opposed the plaintiff's application and raised a preliminary objection stating among others, preliminary objection stating, among others, that the court could not jointly condemn co-defendants in damages for torts alleged to have been committed solely by a co-defendant.

In my view, in the absence of any evidence of any accord or satisfaction between the plaintiff and the 2nd defendants, they were not released from liability and the plaintiff has reserved rights against the other joint or several tortfeasors (see **Cutler & Another – Vs Mc Phail [1962] 2 All ER 474.**

In **Halsbury's Laws 3rd Edition, page 137 paragraph 246**, it is stated as follows:-

> ***"246: Effect of judgment against, or release of joint tortfeasor.***
>
> ***The common law rule that judgment against any one of joint tortfeasor barred future actions against the others in respect of the same charge has been abolished by statute; in consequence of which such a judgment is no longer a bar to an action against any other person who would, if sued, have been liable as a joint tortfoeasor in respect of the same damage."***

The above provisions though persuasive, are no doubt good law and have the backing of our own Order 1 Rules 3, 4, 5 and 7 of the Civil Procedure Rules referred to above.

In ***Republic – Vs – Permanent Secretary in charge of Internal Security exparte Joshua Mutua Paul [2013] eKLR*** where the issues for determination was whether the respondents had been released from paying the whole of the decretal sum by the payment of Sh. 176,877.50 instead of Sh. 338,002.40. The court in determining the issue first set out the meaning and effect of a *"joint and several"* judgment on liability. Citing **Dubai Electronics – Vs – Total (K) Ltd & 2 Others HCC NRB Civil 870/98**, the same court had stated,

> ***"Clearly therefore, where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability, each tortfeasor is only liable to settle the sum due to the time of his liability. Where, however, the liability is joint and/or several, the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability.***
>
> ***Either way, he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them."***

The **Hon. G.V. Odunga** in the above decision also referred to the decision by **Ringera J** (as he then was) in the case of **Kenya Airways Ltd – Vs – Mwaniki Gichohi** (no citation) where **Hon. Ringera J** stated:-

> ***"The concept of joint and several liability comprehends one judgment and decree against two or more persons who are liable collectively and individually to the full extent o such decree; however, double compensation is not allowed and accordingly, whatever portion of the decree is recovered against one of such defendant cannot be recovered from the other defendants."***

What I gather from the above decisions is that whereas a plaintiff cannot be allowed to benefit twice from the same judgment, nevertheless in this case, in the absence of evidence discharging the 2nd defendant from liability, the plaintiff cannot be barred from proceeding against it to prove its liability. In other words, there is no accord and or satisfaction of the plaintiff's claim against the joint and several tortfeasors (defendants) herein to find that this case cannot and or should not be heard as against the remaining defendants would be tantamount to impeding his right to ventilate his grievance against them and or accessing to justice contrary to the letter and spirit of Article 48 of the Constitution.

Furthermore, this court cannot invoke Section 3A of the Civil Procedure Act to bar the hearing of this suit as it has not been demonstrated that it is an abuse of the court process.

Had the 2nd defendant proved that the claim against it had been compromised either wholly or in part, necessitating a judgment, then the provisions of Order 25 Rule 5 of the Civil Procedure Rules would have been applicable in the circumstances of this case.

For the above reasons, I decline to grant the prayers sought in the 2nd defendant/applicant's notice of motion dated 4th June 2014, regrettably, was not grounded on sound law and direct that this case be set down for further hearing as appropriate.

Costs of this application shall be in the cause.

Dated, signed and delivered at Nairobi this 11th day of February , 2015.

R.E. ABURILI

JUDGE