



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 63 of 1998

1. LUDINDI VENANT

2. JACKSON DAMIAN MSACHA..... PLAINTIFFS

- Versus -

PANDYA MEMORIAL HOSPITAL..... DEFENDANT

RULING

For the last 65 days, the body of one COSMAS MWASARU (the deceased), a driver aged 52 years, has been lying at PANDYAMEMORIAL HOSPITAL (the Hospital), rotting away and deep freezing. It is not clear what the deceased was suffering from, but he was alive when he was taken to the Hospital on 26.12.1997. He survived for only 16 days before he succumbed to the sickness on 11.1.1998.

The Hospital is said to be owned and managed by a Society which is described as Charitable. That is not to say the Hospital offers charitable services. It offers much needed medical services to all and sundry in this country. They may be rich. They may be poor. The Hospital has highly qualified Doctors who must be paid. They have employed all manner of medical and other staff for the effective dispensation of the services. They have to be paid. They secure and provide drugs to their patients. These have to be paid for. At the end of the day, I suppose it must also make some profit. For all intents and purposes therefore, the Hospital is a Commercial Institution.

And that is why they have drawn a legally binding document for execution by persons who seek admission to the Hospital and in particular the person who will be responsible for payment of the medical services rendered. In this particular case the person who took the deceased to the Hospital was JACKSON MSAGHA (Msagha). He is the second plaintiff in this suit. He gave his particulars and his relationship to the deceased as his cousin and next of kin. He gave his full consent, which was accepted by the hospital, for any operation which may be considered necessary on the deceased. He authorised the hire of any consultant that the hospital may consider necessary and undertook to pay his charges.

Although the agreement is drawn for execution by both the patient and the person who takes him to the hospital as a guarantor, the agreement in this case was only signed by Msagha and ended in these words:-

"I, the undersigned hold myself responsible to settle the hospital account outstanding myself/the above named patient on or before the date of discharge and also confirm the above details to be correct. I also undertake to pay the initial deposit of Shs. 20,000, for General Ward, Shs. 40,000 for special Room and Shs. 70,000 for Intensive Care Unit (ICU) on admission failing which, I agree to be transferred from the Hospital. I also undertake to remit a further deposit of every 3 days in line with the bill incurred".

The hospital must have been satisfied with that agreement and the terms thereof since they admitted the

deceased. In any event they are the drawers of the agreement.

There is no provision in the agreement guaranteeing recovery of the patient. Like Doctors would say, theirs is to provide the treatment and trust the cure on God. Whatever the eventuality the Hospital was entitled to payment.

Msagha went back to the hospital on 12.1.98 to check on his patient only to be given the shocking news that he had passed away the previous day. He asked for the body to be arranged for burial but was presented with a sobering Bill of Shs. 644,410/=. He cried foul and said it was inflated and unrealistic. The hospital refused to release the body until the Bill was paid. The only details given of that Bill were in the Bill itself and the hospital gave no other details despite requests. Items charged for included:

Nursing for 17 days	57,100
Threatre 1. Fees	7,500
2. Materials	15,565
Laboratory	78,675
X-ray	6,255
Physiotherapy	25,600
Drugs	311,165
Admission Fee	250
Resident Doctor's Fees	2,300
Visiting Doctor's Fees	140,000

644,410

The hospital said it had a policy regarding patients who die there in the cause of treatment. Whether that policy is displayed anywhere for all to see before patients are admitted or whether it was communicated to Msagha in anyway before admission of the patient, it is not clear. What is clear is that it was not in the written agreement signed by Msagha. In the words of the Hospital Administrator the policy is this:

"5. That it is the hospital's policy that before a deceased body is released for burial, then all outstanding bills have to be settled to avoid any misunderstanding or in the alternative the family members provide guarantors as sureties for payment. "

Msagha had no ready cash to defray the whole Bill. He managed to pay Shs. 133,540 on 13.1.98. The hospital would not listen to his pleas that he would raise the balance later. So he took the alternative the hospital said was available. He consulted family members who provided as security a parcel of land valued at Shs, 850,000. The Title deed, Certificate of official search and valuation report were forwarded to the Advocates of the Hospital.

A payment plan for payment of the Bill within 6 months was also presented. The documents have not been returned to them. The hospital would still not release the body of the deceased as it felt it needed guarantees on top of the documents provided. A guarantee was drawn up by Msagha's Advocate and presented to the hospital through its Advocates. The hospital said it was an improper guarantee because it was misspelt with a "Q" to read "Guarantee" which is not a word known in the English language and also because it was not properly witnessed, the witness being shown as a Firm of Advocates instead of an individual Advocate. The hospital refused to release the body of the deceased despite all those efforts. In

the meantime the hospital continued to charge fees for storage of the body at the rate of Shs. 700/= per day. Msagha saw malice and ill-motivation in the conduct of the Hospital. He was faced with the spectre of an escalating and indeterminate Bill and a dead body which may remain unburied for a long time.

So he came to this court to break the impasse and sought declaratory orders and a mandatory injunction as follows:

1. An order compelling the defendant to release the body of Cosmas Mwasaru from its mortuary immediately.
2. A declaration that the continued detention of the body of the late Mwasaru is illegal.
3. A declaration that the security presented to the defendant and/or its agents is good and the body be released on its strength.
4. A declaration that the Bill is inflated and on the higher side and the same be amended to a realistic margin.
5. Any other order which this Honourable Court may deem fit to grant."

In seeking those orders, he joined the uncle of the deceased as the 1st plaintiff.

Simultaneously with the main suit, he took out a Chamber Summons under Order 39 Rule 2 and 3 Civil Procedure Rules and Section 3A of the Act seeking a mandatory injunction in the words:

"The defendants by themselves their servants, workmen, Agents or otherwise be restrained from retaining and/or holding the body of the late Cosmus Mwasaru and the same be released to the plaintiffs jointly and severally for burial."

That this court has sought. But it is a discretion which must not only be exercised judicially but one that is only sparingly used. That is because a mandatory injunction unlike a prohibitory injunction has a finality which may not be possible to recall if it turns out that the order was issued erroneously.

As was stated by Bosire J. (as he then was) in Belle Maison Ltd. -Vs- Yaya Towers Ltd. NAI HCCC 2226/92

"As was stated in the Despina Pontikos case (supra) it is a jurisdiction which must be exercised only in special circumstances. Special circumstances however depend on the facts and circumstances of each case and the good sense of the trial Judge."

And by Gicheru JA in summarising the law on mandatory injunctions ⁱⁿ CA NAI 72/94 East African Fine Spinners Ltd. & Others -Vs- Bedi Investments Ltd (UR)

"I may summarise my conclusions as follows. First Lord Cairns statement of principle prima facie applies to Mandatory Injunctions, but it does not apply in its full width. The matter is tempered by a judicial discretion which will be exercised so as to withhold an injunction more readily if it is mandatory than if it is prohibitory. Even a blameless plaintiff cannot as of right claim at the trial to enforce a negative covenant by a Mandatory Injunction.

Secondly, although it may not be possible to state in a comprehensible way the grounds upon which the court will refuse to grant a mandatory injunction in such case at the trial they at least include the triviality of the damage to the plaintiff and the existence of a disproportion between the detriment that the injunction would inflict on the defendant and the benefit that it would confer on the plaintiff. The basic concept is that of producing a "fair result" and this involves the exercise of a judicial discretion. Third, on Motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia feel a high degree of

assurance that at the trial it will appear that the injunction was rightly granted, and this is a higher standard than is required for a prohibitory injunction."

The major assault on the application was from two fronts:-

Firstly that the plaintiffs lack locus standi and secondly that it does not satisfy the standards set out in Giella -Vs- Cassman Brown & Co. Ltd. (1973) 1 EA 358, to wit a prima facie case with a probability of success; one that is compensable in damages, and if there is any doubt on those two, an order that would stand on a balance of convenience.

On the first objection Mr. Ouma, counsel for the hospital contended that the plaintiffs are mere busybodies intermeddling in matters which do not concern them. They have no right to come to court and this court should not listen to them if they do. The only person who is entitled to come to court to represent the estate of the deceased is his personal representative; that is the executor of his will or the Administrator of his estate. None of the two plaintiffs has produced any grant of probate or Letters of Administration and until they do so, they cannot come to court, and the body of the deceased stays put at the hospital. In support of that proposition, he cited the Court of Appeal case of TROUSTI KUNION INTERNATIONAL & ANOTHER -Vs- MBEYU CA 145/90 (Apaloo CJ, Kwach, Cockar, Omolo & Tunoi JJA). There the full Bench of the Court restated the law on representation of the estates of deceased persons and, in the process, overruled an earlier decision of the same court which had permitted persons without Grant of representation, to act on behalf of the estate - Hintz -Vs- Mwakima (1988) 1 KAR 482.

Mr. Odiaga, counsel for the Applicants did not have any quarrel with the authority cited or the principle of law stated therein. He submitted however that the authority is not applicable in this case to deprive the plaintiffs of locus standi. The authority cited was in respect of a claim for damages for the benefit of the estate of the deceased under the Law Reform Act. It was a cause of action which was vested in the deceased in that case before he died. And the only person who can agitate such cause of action is the deceased's personal representative. Not so in the case before us.

The cause of action is on a contract made between the hospital and the 2nd plaintiff. He questions the quantum of the Bill served on him. He questions the validity of the detention of the subject matter of that contract. It has nothing to do with any benefit accruing to the estate of the deceased on his death. The plaintiffs need no grant of representation to pursue the matters pleaded in the main suit. They have sufficient interest and therefore the Locus Standi to urge the case.

I add my voice to the submissions of counsel for the Applicants. The authority cited, though at first deceptively persuasive, has no application in this suit and is distinguishable; and certainly so, as respects the plaintiff Msagha. He is the person who entered into a written contract with the hospital. The hospital could have demanded, as there is provision for it, that the patient (now deceased) sign the contract. In that event the hospital would have had a right against the estate of the deceased on the basis of such contract. But the contract was with Msagha.

He is responsible for payment of the debt however long it takes. He is the one who would have walked home with the patient if he had recovered and had been discharged. It is not clear whether the hospital would have refused to discharge the patient despite his recovery until the Bill was paid. But the issue does not arise because the patient died. Msagha the contracting party would have collected the body if he had paid the outstanding Bill in full on 13.1.98. There is no indication that the hospital would have insisted on production of Letters of Administration on that date. The storage Bill for the body continues to escalate as the body stays in the mortuary. These are part of the expenses Msagha contracted to settle. He says there is no basis for detaining the body and therefore loading such expenses on him. In such circumstances can it be said that Msagha is a busybody and has no sufficient interest and therefore the locus standi to plead and agitate the matter of the contract in court? I do not think so, and I would overrule the objection, at any rate as relates to the plaintiff Jackson Damian Msagha. The 1st plaintiff appears to be a superfluity, but there are provisions for striking out parties to suits.

As for the second objection Mr. Ouma saw no possibility of the main suit succeeding. He relied on the

universal principle of freedom of contract or Laissez Faire, between two consenting and legally qualified persons. Among the terms agreed on by those who seek the services of the hospital is the policy cited verbatim above, that outstanding debts be cleared before bodies of deceased persons are collected. No payment has been made and therefore there is no cause of action. He saw no irreparable harm being caused if the order is not granted and also submitted that the balance of convenience tilted towards the hospital retaining the body until the debt is paid. The plaintiffs should have come to court after paying the debt as failure to do so means coming to court without clean hands and they are not entitled to any equitable remedy. Instead of paying the debt, the plaintiffs have been pressing for release of the body through the press and through their Member of Parliament. The application should not therefore be granted, as it seeks to circumvent the obligations under the contract.

Mr. Odiaga for his part reiterated that the terms of the contract were in issue and will remain so until the matter is decided by the court. The plaintiffs have a prima facie case with a probability of success. The plaintiffs will be bound to pay whatever the court ultimately determines as the valid debt. The detention of the body of the deceased, if it be for 100 years will not amount to payment of the debt. Such detention has no basis in law and should be declared illegal. It is in fact malicious since the hospital has not even issued a certificate to show that the deceased is dead. The bill submitted on 13.1.98 shows instead that he was "discharged" on 12.1.98.

I have considered these submissions. The matter of validity or otherwise of the contract signed between the hospital and Msagha and the terms thereof shall obviously be determined with finality when the matter is fully heard in due course. So will the validity or otherwise of the bill served on Msagha by the hospital on 13.1.98 which he now challenges. Msagha has questioned the quantum but the hospital does not appear to have given him full details of the charges or to justify them in any way. On the face of it they appear phenomenal and it is not unreasonable for him to seek justification. He may well succeed in having them reduced. The charges however continue to escalate daily. That is on account of some policy pleaded by the hospital which does not appear to be part of the contract signed by Msagha. It may or may not be binding on him. If it is not, he should not be burdened indefinitely by such charges. If it is, then the hospital should be able to enforce the contract.

What concerns me at this stage is not so much the respective rights and obligations of the parties, for those shall in good time be determined. It is a matter referred to as "Public Policy" and was adumbrated by the hospital in one paragraph of the Affidavit sworn by the Hospital Administrator, one ANTONY ALEXIS. It was also stressed by their counsel Mr. Ouma with a rider that although public policy is said to be an unruly horse, this one should be considered. It is this:

"12. That should the court find that the body ought to be released to the plaintiffs then such finding should consider the wider interest of the society as not to jeopardise any future cases of impecunious persons being admitted to the hospital."

Simply put, there is a veiled threat by the hospital that if it is forced to release the body of the deceased, it will not in future admit and treat poor persons in this country. As a private Commercial Institution, there is nothing to stop the hospital from making good such threat. And there is no denying that the effect would be devastating since the majority of the citizens of this country live below the poverty line and can hardly afford good medical services although they deserve them no less than the rich. I am not oblivious to such consequences. But my judicial conscience is troubled.

For I think, with utmost respect to the hospital, that on any view it would be equally repugnant to public policy to sanction the use of dead bodies as objects in the game of Commercial ping-pong.

Dead bodies are for interment or cremation or other disposal without delay unless there is a dispute on where to dispose of them or who should do it. The dead ought to "REST IN PEACE" while those who are left alive struggle with the realities of life such as payment of debts.

In this particular case there is no dispute as to who should bury the deceased or where he should be buried. The dispute is on a debt for medical services solicited for by someone who is still alive, not the deceased,

and there are legal ways of binding such person to pay the debt owed. The dead body of the deceased ought not be part of that equation. For it is trite law that there is no property in a dead body. It cannot be offered or held as security for payment of a debt. It cannot be auctioned if there is a default. It cannot be used to earn rental income in a cold-room. In sum, here is no legal basis for detaining it, and it would be callous and sadistic to hold otherwise.

I am persuaded that the order for mandatory injunction should issue. It shall issue as prayed subject to the plaintiffs filing in this court forthwith an undertaking in damages limited to Kshs.600,000/= pending the hearing and determination of this suit.

Costs in the cause.

Dated at Mombasa this 17th day of March 1998.

P.N. WAKI

JUDGE