



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, KOOME & MARAGA, JJ.A.)**

**CIVIL APPEAL (APPLICATION) NO. 28 OF 2012**

**BETWEEN**

**J P S.....APPLICANT**

**VERSUS**

**AGA KHAN HEALTH SERVICE KENYA**

**T/A THE AGA KHAN HOSPITAL .....1<sup>ST</sup> RESPONDENT**

**DR. OSUR ODUOR.....2<sup>ND</sup> RESPONDENT**

**J W S.....3<sup>RD</sup> RESPONDENT**

***(An Application to adduce further evidence in the appeal from the Judgment and decree of the High Court of Kenya at Nairobi (Mary Ang'awa, J.) delivered 6<sup>th</sup> April, 2006***

**in**

***H.C.C.C. NO. 807 OF 2003)***

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**RULING OF THE COURT**

This is an application under **Rule 29(1) (b)** of the Court of Appeal Rules for directions as to taking of additional evidence as regards the claim for future medical expenses arising from the negligence of the respondents as found in the judgment of the High Court.

By a further Amended Plaintiff filed in the High Court on 2<sup>nd</sup> December 2005, the applicant, a minor suing through his father as a next friend, claimed special and general damages against the two respondents as a result of injuries sustained during birth, allegedly due to the respondents' negligence. The plaintiff alleged, among other things, that the respondent was negligent by favouring spontaneous vaginal delivery without considering the option of Cesarean section, and as a result the applicant's right shoulder was held at the pelvis of his mother causing the doctor to pull him out and as a consequence the plaintiff sustained Elbs Palsy Brachial Plexus severely deforming his right hand.

The High Court (**Ang'awa, J.**) found the two respondents wholly liable in negligence and awarded

the plaintiff Shs. 800,000/- general damages for pain suffering and loss of amenities, special damages of Shs. 70,000/- and Rupees 115,825 and nominal damages of Shs.50,000 for future medical costs.

The applicant has filed Civil Appeal No. 28 of 2012 against the quantum of damages including the award of Shs.50,000 for future medical expenses. The present application is filed within the appeal.

The application is supported by the affidavit of **P S** the father and next friend of the applicant who deposes, among other things, that he did not lead evidence of the cost of future medical expenses because he, and local doctors did not know that the condition could be reversible through surgery; that subsequent to the judgment, and after the improvement of his financial position, he consulted various surgeons in India and was advised that substantial, if not full utility, of the applicant's right hand could be restored by certain procedures and surgeries; that the applicant has since undergone surgeries in India at a cost of Rupees 379,726.42, USD 1930.00 and Kshs. 796,995.00 as at 19<sup>th</sup> March, 2012; that the evidence was not available and could not have been reasonably obtained at the trial and that the additional evidence is material, weighty and credible.

The respondents have filed a replying affidavit sworn by **Judith Oduge-Otieno** the 1<sup>st</sup> respondent's legal officer opposing the application. The respondent contends, among other things, that the applicant particularised in the plaint the purported future medical expenses but never proved them; that the applicant did not in the body of the plaint claim future medical expenses; that the applicant is trying to fill the gaps in his case; and that the applicant has not shown that the additional evidence he seeks to adduce could not have been obtained by reasonable diligence.

By **Rule 29(1) (b)** of the Court of Appeal Rules, the Court has power in its discretion and for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner. The principles upon which the Court exercises its discretion are settled. The applicant must at least show that:

1. the additional evidence could not have been obtained by reasonable diligence before and during the trial;
2. the additional evidence is of such weight that it would have been likely to have affected the result of the suit;
3. the additional evidence is *ex facie* credible.

(See **Mzee Wanjie v A. K. Saikwa [1982-88] 1 KAR 462.**

We have considered the respective affidavits and the submissions of both **Mr. Imende**, learned counsel for the applicant, and **Mr. Zul Mohammed**, learned counsel for the respondents.

By this application the applicant is pursuing damages for pecuniary loss in the form of future medical expenses. The plaintiff is entitled to recover all expenses reasonably incurred in the treatment of his injuries. The future medical expenses are a form of general damages because they are not capable of precise quantification. The common law principle that damages that result from one and the same cause of action must be assessed and recovered once and for all is a relevant consideration in an application for leave for admission of additional evidence relating to future medical expenses.

In this case, the applicant pleaded that he would incur future medical costs and gave particulars of the medical expenses but apparently he did not tender evidence to establish the claim. Further, the applicant included a prayer for future medical costs in the plaint.

The applicant's next friend now claims that since the date of judgment, he has expended a lot of money for treatment of the applicant both locally and abroad. He has annexed documents to his affidavit to support the expenses. That affidavit evidence has not been questioned. His explanation that he could not have adduced that evidence of future medical expenses at the trial because he and the local doctors had no knowledge that the applicant's condition would be reversible by surgery, is reasonable and credible. The respondents have not shown otherwise. Thus, we are satisfied that the additional evidence could not have

been obtained by reasonable diligence at the trial.

Further, the evidence is directly relevant to the applicant's claim for future medical expenses and it is likely that a substantial award could have been made if such evidence was available.

In the final analysis we are satisfied that this is a proper case for exercise of judicial discretion in favour of the applicant. In the result, we allow the application and direct that additional oral and documentary evidence relating to future medical expenses be taken by the High Court on priority basis and that the High Court do certify such evidence to this Court. The respondents are entitled to cross-examine the witnesses and to be heard.

The costs of the application to be costs in the appeal.

***DATED and DELIVERED at Nairobi this 22<sup>nd</sup> day of March, 2013.***

***E. M. GITHINJI***

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***JUDGE OF APPEAL***

***M. K. KOOME***

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***JUDGE OF APPEAL***

***D. K. MARAGA***

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***JUDGE OF APPEAL***

*I certify that this is a true copy of the original*

**DEPUTY REGISTRAR**