



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 364 OF 2007

PETER MULE MUTHUNGU (suing as administrator and

Personal representative of thereafter Estate of JANE MUENINGUI.....PLAINTIFF

VERSUS

KENYATTA NATIONAL HOSPITAL.....DEFENDANT.

RULING

The application for determination before me is the notice of motion dated 16/2/2012 brought under Order 51 of the Civil Procedure Rules 2010 and section 1A, 1B, 3A and 22 of the Civil Procedure Act

Seeking for orders that :-

1. That this honourable Court be pleased to order the defendant herein to produce, file and serve all the hospital records relating to the deceased treatment and management at the defendant hospital (these includes but not limited to all the doctors notes, nurses notes, nursing cardex and theater operation notes; for the period 14th January 2009 up to 14th May 2009).
2. That cost of this application be provided for.

The application is based on the grounds that the said documents are absolutely critical and fundamental to the dispute now before this honourable court. That the said documents relate to the treatment and management of the disease suffered by the deceased immediately before death. That the said documents contain events from the basis of the medical negligence claim by the administrator of the deceased estate and that the said documents are the property of the deceased and therefore the property of the administrator of her estate.

That the defendant has no interest in the said documents other than to have them in safe custody of the deceased. Therefore the administrator of the estate of the deceased require those documents to enable them pursue the interest of the deceased as relates to her management by the defendant.

This application is supported by the affidavit of Peter Mule Muthungu who is the personal representative of the Estate of Jane Mueni Ngui appointed by letters granted by the court on 14th September 2009. He avers that he had been advised by his counsel that the hospital records relating to the deceased's treatment and management are necessary and mandatory for the fair and just conduct of this matter before this honourable court. He therefore waives the confidentiality rights of the deceased and gives authority that the said documents be produced, filed and served upon his advocates. He further avers that the said

documents are critical and fundamental to the dispute before court which document refer to the immediate disease suffered by the deceased before death. He states that the document contains the events that form the basis of the medical negligence claim by the applicant as the administrator of the estate of the deceased and that the documents are the property of the deceased. He concludes that the he had no interest in the said documents other than to have them in safe custody of the deceased's estate.

The application is opposed. The Respondent has filed a Replying affidavit through its legal officer Wilkister Morara dated 9th May 2012. She avers that even before the plaintiff brought his suit, he was convinced that the evidence he had in his possession was sufficient to canvass it as per the content of the plaint referred to in paragraph 3 above. It is her averment that the defendant filed its defence in response to the plaintiff's claim and pleadings. She states that discoveries have been done and the parties have exchanged their respective documents as per their list of documents. That the defendant has served the plaintiff with its bundle of documents as per its list of documents filed and that the defendant has complied with the requirements of discoveries as contemplated by law therefore entitled to a fair hearing and trial in this case and that includes a fair chance to adduce and ventilate its defence herein.

The Respondent believes that the burden of proof of the plaintiff's case lies securely upon him. That the documents referred to herein are confidential documents of the defendant and the doctor – patient confidentiality extended to immortality and does not terminate upon the demise of Jane Mueni Ngui (deceased) noting that the doctor patient confidentiality is personal and not transferable therefore the plaintiff cannot purport to waive it at paragraph 5 of the supporting affidavit. She further stated that the case of Jane Mueni Ngui (deceased) relates to a novel condition called placenta accrete/percreta which is a medical phenomenon that doctors are spending sleepless nights in undertaking research and developing better and new ways of containing the same.

That indeed it is because of the sacred nature of the doctor- patient confidentiality that patients open up to their doctors and it is because of the same confidentiality that doctors record each and every treatment administered honestly to ensure better and accurate management of the sick in hospitals. She further noted that the doctor patient relationship is paramount and cannot be broken as to do so would jeopardize future management of patients as doctors would be reluctant to record the true treatment administered and would throw future management of patients into jeopardy.

The respondent added that the plaintiff herein is free to articulate his claim as per the documents already exchanged which in any event are sufficient to canvass his claim and that to require the defendant to supply further documents is tantamount to shifting the burden of proof to the defendant, who has registered its opposition to the plaintiff's claim and the two positions are unconscionable. Since the orders sought herein are unavailable granting them will be tantamount to the court descending from the neutral umpire/ex cathedra position and instead advancing the plaintiff's claim as against the defendant herein.

That the defendant herein is entitled to a fair hearing and equal treatment before the law and they urge the Honourable court to uphold the equal treatment and fair trial.

Parties appeared before Khaminwa J on 10th May 2012, and reiterated the contents of their pleadings.

I have gone through the pleadings and the submissions made in court. I am alive to the fact that medical documents are governed in the doctor patient confidentiality rule. A duty of care arises once a doctor or health care professional agrees to diagnose or treat a patient. The plaintiff through its pleadings has tried to show to this court that the defendant owed him a duty of care that the duty of care was breached.

I have seen some of the medical documents that were produced by the defendant in this case however the applicant feels that for him to advance his case he needs that document held by the defendant indeed medical documents provide vital evidence of what went wrong. It is therefore imperative of the defendant to disclose to the plaintiff any document that relates to the plaintiffs claim.

Article 35 1(b) of the Constitution states that *“Every citizen has the right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom”*.

I therefore make an order that the defendant produce and make available the documents sought by the applicant within fourteen days from the date of this ruling. Since the defendant had refused to hand over the records earlier to the applicant forcing him to seek an order from the court, they will pay costs to this application.

Dated, signed and delivered this 13th Day of May 2013.

R. OUGO

JUDGE

In the Presence of:-

.....**Plaintiff/Applicant**

.....**Defendants/Respondents**

.....**Court clerk**