



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL SUIT NO. 617 OF 2007

JOSEPH NJIRU KAUGI and
CATHERINE MARIGU NJUIRU
(suing as personal representatives of the estate of
MARTIN MURITHI NJIRU – DECEASED)

.....**PLAINTIFFS**

VERSUS

KENYATTA NATIONAL

HOSPITAL.....

.....**DEFENDANT**

RULING

1. The application before court is the Plaintiff’s Chamber Summons dated 21/10/2008 brought under Order 11 Rule 11(2) of the Civil Procedure Rules seeking orders that the Defendant delivers up for inspection and retention to the Plaintiff, copies of the deceased’s medical records in the possession of the Defendant. The Plaintiff also prays that the Defendant be condemned with the costs of this application.
2. The application is premised on the supporting affidavit sworn by Kelvin Mogeni dated 21/10/2008 and on the grounds that the Defendant herein has failed to comply with the Notice to produce dated 23/09/2008. Further the Plaintiff says that the documents required by this application are vital for the proper prosecution of the Plaintiff’s case.
3. The application is opposed vide the Replying Affidavit sworn by Wilkister Morara the Acting Chief Legal Officer of the Defendant herein. While admitting that the Defendant was served with Notice to produce dated 23/09/2008, the deponent says the Defendant is unable to find the documents called for by the Plaintiff’s counsel.
4. The application was canvassed before me by way of written submissions. Counsel for the Plaintiff, Mr. Kelvin Mogeni, in the submissions filed on 11/03/2010 on behalf of the Plaintiff, submitted that the Defendant does not deny that the Plaintiff was admitted, treated and diagnosed at its hospital and that that being the case, there is no reason why the Defendant cannot produce the documents sought by the Plaintiff.
5. Submissions on behalf of the Defendant were filed by the firm of Kale Maina & Bundotich Advocates on the 08/03/2010. Counsel for Defendants submitted that since the Notice to produce served upon the Defendant did not specify the documents to be inspected, the Plaintiff was in contravention of Order X Rule 17 of the Civil Procedure Rules. In this regard, counsel also relied on the case of **National Social Security Fund Board of Trustees –vs- Dr. Sally Kosgei & Another – HCCC No. 714 of 2003** in which the court cited with approval the case of **Motor Mart & Exchange Limited –vs- The Standard Insurance Co. Ltd. [1960] EA 616** in which the court held, *inter alia*, that “*to justify an application for discovery of documents, the party making the application must in his affidavit name and specify the particular documents of which he desires discovery and that it is not sufficient to make general affidavit*”

based on a prior reasoning that certain classes of documents must be in his opponent's possession or power". Counsel for the Defendant submitted that the Plaintiff's supporting affidavit does not meet these thresholds.

6. I have now carefully considered the application and the affidavits for and against the application and the annexures thereto. I have in particular examined the supporting affidavit sworn by Kelvin Mogeni Advocate and annexure "KM 1" annexed thereto. This annexure is the "*Notice to Produce Verified Copies*" issued under Order 10 Rule 18 of the Civil Procedure Rules. I note that neither the supporting affidavit nor the Notice to produce gives specifics of the documents required to be inspected. The rules are clear that details be given. The decided cases are also clear that such details be given.

7. In the instant case, the details are not given. The Plaintiff only talks of medical records in the custody and/or control of the Defendant. It is my view therefore that the details given in both the Notice to Produce and the supporting affidavit are inadequate for purposes of Order 10 rule 17 of the Civil Procedure Rules.

8. In the premises, I find that the Plaintiff's application dated 21/10/2008 lacks merit. The same is hereby dismissed with costs to the Defendant.

It is so ordered.

Dated and delivered at Nairobi this 03 day of November, 2010.

R.N. SITATI
JUDGE

In the presence of:-

Mr. Onyango for Mogeni (present) For the Plaintiffs.

Mr. Cherono for Bundotich (present) For the Defendant

Jane Omasaba - court clerk