



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 299 of 2003

SALIM ALI AL-ASAD.....PLAINTIFF

VERSUS

NAIROBI HOSPITAL LTD.....DEFENDANT

RULING

I have before me an application expressed to be brought under Order X Rules 11 and 13 of the Civil Procedure Rules. The application is by the plaintiff and seeks the following orders:-

- 1) That the defendant do make discovery by filing and serving upon the plaintiff a list of documents verified by an affidavit within 14 days from the date hereof.
- 2) That the defendant do provide verified medical notes and reports pertaining to the deceased within 14 days from the date hereof.
- 3) That in default of (1) or (2) above the defence be struck out.

The application is made on the ground that the defendant has failed to comply with a Notice of discovery. The application is supported by an affidavit sworn by Syed Kassim Shah the plaintiff's advocate. In the affidavit it is deponed that a Notice of discovery was served upon the defendant's advocates but the same has elicited no response from them to date prompting the filing of this application.

The defendant opposes the application on the basis of Grounds of Objection filed by its advocates. The grounds are that the discovery is sought of documents which do not relate to definite existing and relevant circumstances in this suit but they are evidence for the defendant and contain nothing tending to impeach the defendant's case.

The application was canvassed before me on 28th April 2008. Counsel for the plaintiff relied entirely on the supporting affidavit and counsel for the defendant substantiated the grounds of opposition contending that the plaintiff is on a fishing expedition especially as the plaintiff himself has not given discovery.

Having perused the application and the supporting affidavit together with the Grounds of Objection and further having heard counsel's submissions, I take the following view of this matter. I have perused the notice served upon the defendant dated 23rd February 2007. It is clear to me that the plaintiff is seeking proof of the defendant's case under the guise of seeking discovery. That to my mind is not the function of discovery and inspection. I suspect that the plaintiff by this application may be fishing for material to support his allegations of negligence against the defendant pleaded in paragraph 7 of his amended plaint.

In any event, the affidavit in support does not specify the reasons for seeking discovery of the documents in question. It also does not allege that the documents for which discovery is sought relate to any matter in question in the suit. The plaintiff has therefore not brought himself within the ambit of Order X Rule 11 (1) of the Civil Procedure Rules.

In the premises, I decline to order the discovery sought. The plaintiff's application is without merit. It is dismissed with costs.

Order accordingly.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF MAY 2008.

F. AZANGALALA

JUDGE

Read in the absence of the parties and their representatives.

F. AZANGALALA

JUDGE

21ST MAY 2008