REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1596 of 1998

MARGARET NJUNGE.....1ST PLAINTIFF

ESTHER MWAURA.....2ND PLAINTIFF

VERSUS

AGA KHAN HEALTH SERVICES KENYA....1ST DEFENDANT

DR. OUMA OBURRA.....2ND DEFENDANT

JARED MONZ.....3RD DEFENDANT

RULING

Counsel for the 2nd Defendant had moved this Court by way of Notice of Motion dated 22nd August, 2007 and filed on 27th August 2007. It had been brought under the provisions of order X rule 13, 14,16,20 and 23 of the Civil Procedure Act and Section 3a and 63(e) of the Civil Procedure Act. It sought 4 prayers namely:-

(1) That the Honourable Court be pleased to order the 1st defendant to produce to Court the entire file containing the surgeons notes, the anesthetics notes, the nurses notes and the postmortem report relating to the admission, treatment, care and death of Charles Mwaura Njunge, before the commencement of trial in this case.

(2) That upon production of the said file, the 2nd defendant be enabled to authenticate his surgeons notes in the said file and be at liberty to copy the said file.

(3) That in default of producing the said file by the 1st defendant, upon the order being given, the 1st defendant's defence to the plaintiffs claim and its defence to the second defendant's pleading be struck out.

(4) Costs of the application to be provided for.

The said application was heard inter parties and ruled upon by this court vide own ruling delivered on the 28th day of September, 2007. The terms for the disposal of the same are set out at page 14 from line 11 from the bottom upto page 15. For purposes of the record these read:- "*The application dated 22.8.2007 is allowed in terms of prayer 1,2, and 3 of the second defendant's application dated 22nd August 2007.*

(2) In view of the nature of the content of the information contained in the said documents the, Court makes an order that the said contents at all times are to be accessed by the parties to these proceedings and their respective counsels only.

(3) All the Counsels appearing for the parties herein to file an undertaking on their own behalf and that of their clients within 14 days from the date of the receipt of the said documents to the effect that the information accessed will be used solely for the proceedings herein and that care will be taken to ensure that it does not land into the hands of an authorized persons.

(4) Condition no.2 and 3 above will not in any way hinder the adduction of evidence and coss examination on the same during the proceedings in Court.

(5) Item No.1 above (order No. 1) to be complied with within 30 days from the date of the reading of this ruling.

(6) The applicant will have costs of the application paid by the first defendant.

The same second defendant has come to this court vide another notice of motion dated 7th March 2008 and filed on the same date. It is brought under Order X rule 20, Order L rule 1 of the Civil Procedure rules and Section 3A and 63 (e) of the Civil Procedure Act. It seeks an order that the Honourable Court be pleased to strike out the first defendants defence to the plaintiffs claim and the 1st defendant's defence to the second defendants pleadings and that the first defendant do pay the costs of the application.

The grounds are in the body of the application, supporting affidavit and oral submissions in court by Counsel and are to the effect that:-

(1). That under order X rule 11A, it is mandatory for every party to a litigation to do discovery after the close of the pleadings.

(2). That from the 2nd defendants defence or from the defence the surgeons notes were crucial to the just disposal of the case and yet the first defendant never caused them to be discovered.

(3). None discovery mentioned in number 1 above compelled the 2nd defendant to file the application dated 22.8.2007 which was meant to compel the 1st defendant to do discovery.

(4). Prayer 1 of the said application asked the 1st defendant to produce to court the patients file containing the patients notes made by the said 2nd defendant in the course of the operation of the deceased, which file contained detailed notes as well as drawings of what actually transpired.

(ii) Prayer 2 sought an order to enable the 2nd defendant authenticate the said contents of the file sought to be produced and then take copies.

(iii) where as prayer 3 contained a default clause to the effect that in the event of none compliance, the first defendant's defence to the Plaintiffs claim and defence to the 2nd defendants pleadings be struck out.

(5). It is their stand that the 1st defendant was given a time frame within which to comply namely 30 days from the date of the ruling.

(6). That the 1st defendant is in default of the said orders in that the file has never been produced in court for the 2nd defendants perusal and authentication of the content and the photo copying of the same.

(7). That the first defendant's purported filing of the documents in Court in Photo copies form which are not even certified is not in compliance with the said court orders.

(8). There is no application to extend the time within which to comply and so they should be penalized.

(9). That the 1st defendant's complaint that the 2nd and 3rd defendants and the plaintiff have not provided the undertaking required of them by this court, does not hold because the undertaking was to be given after the file had been produced in Court authenticated, and copies thereof taken. In the absence of that, the Plaintiff and the 2nd and 3rd defendants are not in default of that undertaking.

In response the Plaintiffs Counsel supported the application as they are in agreement with the contention that this court's orders have not been complied with.

The 3rd defendant also supported the application on the ground that there has been no compliance with the court order since 28th September, 2007.

(2) There has been no application for extension of time within which to comply.

(3) They also concur with the second defendant's contention that they could only give an undertaking after production of the file, authentication and taking of the copies.

In response Counsel for the first defendant has opposed the application on the grounds set out in the replying affidavit and supplementary replying affidavit and these are that:-

(1) The 1st defendant has complied with the court order because all copies of the required comments have been filed in court.

(2) That the spirit of Order 10 Civil Procedure Rules is to enable parties file documents in court but not to have an advantage over the others pursuing the same claim.

(3) It is their stand that since the 1st defendant have complied with the courts orders, the 2nd defendant's application should be disallowed because allowing it will be tantamount to punishing the first defendant unduly and yet he has complied with the courts orders.

(4) That a party can only be shut out from litigation if he/she has both willfully and unlawfully disregarded the court order which is not the case herein.

(5) The applicant herein is not in default because copies of the surgery notes have been annexed.

(ii) they cannot comply with the production of the postmortem because postmortem was not done at the hospital.

(6) The 2nd and the 3rd defendants and the plaintiffs on the other hand are also in default as they failed to file an undertaking within 14 days to the effect that they will not release the said information to any unauthorized persons.

On case law the first defendant has relied on the decision in the case of **EASTERN RADIO SERVICE VERSUS TINY TOTS[1967] E.A. 392 (CA)** where it was held inter alia that "*a litigant who has failed to comply with an order for discovery should not be precluded from pursuing his claim or setting up his defence unless his failure to comply was due to a willful disregard of the order of the Court*".

The case of husband of **MARCHWOOD LTD VERSUS DRUMMOND WALKER DEVELOPMENTS LTD [1975] 2 A.E.R. 30 (CA)** where it was held inter alia that "*an order under RSC and 24 and 16(1) should not be made to punish a party for failing to comply with an order for discovery within the time limited by the order. If at the hearing of a summons, it appeared that discovery by the defaulting party was imminent the proper order would be that the action be dismissed or the defence be struck out and that there be judgment for the applicant unless the order be complied with within a specified time. Since the order for discovery had in fact already been complied with by the*

defendants before the hearing, the payment of the balance of the claim into court was in appropriate in that it represented an unjustified punishment for the Plaintiffs had already achieved their object in obtaining discovery".

In reply to the 1st defendant's submissions, counsel for the 2nd defendants/applicant reiterated the earlier submissions and then submitted further that:-

(i) Jurisdiction to strike out the defence pleading of the defaulting party exists.

(ii) On the strength of the 1st defendants own authority of EASTERN RADIO SERVICE, there is willful disregard of the court, herein as the first defendant failed to produce the file to court both for perusal, authentication and taking of copies.

(iii) Still reiterated that they are not in default as the undertaking was to be filed after the first defendant had complied with the court order.

(iv) The application is well founded as to date the first defendant has not complied by producing the file to court.

On the courts assessment of the facts herein, it is clear that there is no dispute and or that it is common ground that:-

(1) Indeed the second defendant moved this court by way of Notice of Motion dated 22.08.07 seeking discovery before trial.

(2) Indeed one of the prayers sought was that the patients file containing the surgeon, anesthetics and nurses notes be produced in court for perusal by the 2nd defendant that it be authenticated by him and he be allowed to take copies of the said file.

(3) Indeed at no time has such a file been produced in court, perused, authenticated and photo copied.

(4) Indeed the 1st defendant has filed copies of certain documents purporting them to be those required by the 2nd defendant.

(5) That these documents have been accompanied by a replying affidavit as well as a supplementary replying affidavit.

(6) That the said replying affidavit as well as the supplementary replying affidavit has not responded to the applicants deponement in paragraph 5 of the supporting affidavit to the effect that the bundle of documents exhibited do not contain the detailed notes he made and which were supposed to be contained in the patients file.

(7) There is also no firm averment on the part of the said replying and supplementary replying affidavit as to whether all the documentation produced as the photo copies form the content of the record of the patient's file.

(8) There is also no deponement as to why the original patient's file has not been produced and availed to the Court as ordered by the Court.

In view of the foregoing identified common grounds identified by this court, the question for determination by this court is:-

(1) Whether there is willful disregard of the court order issued on 28th September, 2007 and the defendant has to suffer the penal consequences provided for in law.

(2) Secondly whether the supply of the photocopies exhibited satisfy the requirements of prayer 1, 2 of the 2nd defendant's application dated 22nd day of August, 2007.

In dealing with the above questions this court would like to borrow its own reasoning in the ruling delivered by this court on the 26th day of October 2007 dealing with disobedience to a lawful court order. This was in the case of **NAIROBI LABORATORIES LIMITED VERSUS SAMWEL GICHURU AND 2 OTHERS NAIROBI HCCC NO. 695/2002.** Case law on the subject is discussed at pages 10 – 26 of the said ruling. In summary form the principles derived from the said case law are as follows.

*(1) In **HADKINSON VERSUS HADKINSON (1952) 2AER 567** the principle is that it is the duty of every one in respect of whom a court order is made to obey such an order, unless and until it is discharged and disobeying it being in contempt and in an application to the court by the offending party not being entertained until he purges the contempt".*

(2) In the case of **RAMESH POPATLAL & SUREKHA SHOBHAG CHANDRA SHAH** suing in their capacity as the administrators of the estate of the late **SHOBHAG CHARA RATLAL SHAH T/A LENTO AGENCIES VERSUS NATIONAL INDUSTRIAL CREDIT BANK MILIMANI COMMERCIAL COURT HCCC NO. 515 OF 2003** where Njagi J. set out the following principles on disobedience of a court order.

(a) unless and until a court order is discharged, it ought to be obeyed.

(b) As long as the orders are not discharged they are valid.

(c) Since they are valid they should be obeyed in observance and not in breach.

(d) The only way in which a reprieve from obeying a court order before it is discharged is by applying for and obtaining a temporary stay.

(e) As long as the order is not stayed and it is not yet discharged then a litigant who disobeys it does so at the pain of committing a contempt of court.

(f) A litigant might also have a reprieve where he demonstrates that the orders alleged to have been disobeyed should not have been made as the court had no jurisdiction to do so.

Applying the aforementioned principles of case law to the facts demonstrated herein it is clear that:-

1. The competence of this court to make the orders complained of is not in dispute.

2. The orders were clear and there is no mention of any ambiguity in them and that the first defendant did not understand any aspect of them.

3. There is no dispute that the said orders are still in place and as such they are supposed to be obeyed in obedience and not in breach.

4. There is no mention on the part of the 1st defendant that they were not bound to obey them. Their plea is that they were obeyed by supplying photo copies of certain documents.

These findings when considered in the light of the arguments presented by all parties here in and in the light of the orders made on 28.09.07, this court rules that what was requested for was not the supply of photocopies of the hospital documents but production of the patient's file, perusal of the same, authentication and then taking of copies. In the absence of a deponent of any difficulty to retrieve the patient's file, there is no justification for non compliance with the court order except for purposes of willful disregard of the same. This being the case, the 1st defendant has to face the penal consequences provided for by law namely to suffer the pain of having its pleadings filed herein either in response to the

plaintiffs claim, or either of the other defendants struck out. As shown by case law, and the rules, a party can only escape the fall of the axe in the manner explained as this court has both the jurisdiction and the power to wield it.

Before the final order is made, this court, would like to take note of the fact that the application subject of this ruling suffers from the plague of misdescription. The heading appears as it is in the pleadings when in fact it should have indicated which party is applying in the application and which party is responding to it. In this courts opinion the correct heading should have read **MARGARET NJUNGE – ESTHER MWAURA – PLAINTIFFS**

VERSUS

AGA KAHAN HEALTH SERVICES::::1ST DEFENDANT/RESPONDENT.

2). DR. OUMA OBURA ……ND DEFENDANT/APPLICANT

JARED MUNIZ J. ::::::::::::3RD DEFENDANT

As ruled by this Court in its own ruling delivered on 15th February, 2008 in the case of MURIITHI KAMAU AND 3 OTHERS VERSUS STANELY GATHOGO GIKOYO NAIROBI C.A. 81 OF 2003, an application is a plea to the Court for a specific relief hence the need for a clear description as to which party is seeking that relief and against whom, especially in instances where there are multiple parties like in the instant case. Likewise Counsels also should describe themselves properly so that the court has no difficulty in making out as to which counsel is for the applicant and which one is for the respondent, and which one is a by stander, at a glance. Herein Counsel for the 2nd defendant should have described themselves in the application as **MAINA WACHIRA & CO. ADVOCATES FOR THE SECOND DEFENANT/APPLICANT.**

In the said own decision cited above, this Court, found the misdescription of the parties and Counsel to be fatal to the application. The same was ordered to be struck out with leave to file a properly described application. For purposes of consistency this court should have taken the same stand. However in view of the special circumstances displayed herein, namely the age of the case in the first instance, and the fact that it is the plaintiffs who have been put on hold in the pursuance of their right, by the default of the defendants, justice demands that the error of misdiscription of the parties be excused especially when neither party alleges that they were misled by the said misdiscription of the parties.

The Court therefore makes a finding that the misdiscription notwithstanding, the application has rightly been disposed off on merit and it can anchor a sound relief to a deserving party in its apparent form. This relief which is so anchored, on it, is none other than the prayers for in prayer 1 and 2 of the application dated 7th March 2008 and filed in Court the same date.

The application is therefore allowed as prayed for in both prayer 1 and 2 with costs to the applicant and the Plaintiff and 2nd defendant who also participated in the proceedings.

DATE, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF JULY 2008.

R. N. NAMBUYE

JUDGE