



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 64 of 2005**

**ANNE DELORIE.....PLAINTIFF/RESPONDENT**

**VERSUS**

**THE AGA KHAN HEALTH SERVICES LIMITED...DEFENDANT/APPLICANT**

**R U L I N G**

1. The plaintiff herein filed suit on January 21, 2005. She seeks both special and general damages against the defendant arising out of alleged professional negligence. The plaintiff, who was admitted for an operation at the Aga Khan Hospital on November 2, 2003, alleges that both the operation and/or the post operative care were conducted and/or handled by the defendant's agents in a grossly negligent and unprofessional manner resulting in post operative complications and/or injuries, and holds the defendant vicariously liable for the losses resulting from the negligence of its employees, servants and/or agents in the discharge of their duties. The plaintiff particularly pleads that the defendant's employees, servants and or agents failed to handle the plaintiff in a professional manner, or with any due care thereby dropping the plaintiff or causing her to fall down while transferring her from the operating table to the stretcher. The plaintiff was admitted to hospital suffering from a medical fracture of the neck femur and the operation which required an implant/fixation was carried out on the plaintiff on November 3, 2003.

2. While admitting that the plaintiff was admitted into hospital and operated on November 3, 2003, the defendant denied any negligence on its hospital staff and instead attributed any post-operative injuries/complications to circumstances which were wholly unavoidable and/or inevitable and beyond the control of the Defendant or the said hospital or its servants or agents.

3. The instant application dated April 29, 2008 and filed in court on the same day is brought under Order 10 Rule 20 of the Civil Procedure Rules and seeks orders:-

**(i) *that the plaint be struck out***

**(ii) *that the plaintiff's suit be dismissed***

**(iii) *that the plaintiff do pay to the Defendant the costs of the suit and costs and incidental to this application.***

which application is premised on grounds:-

**(a) *THAT the plaintiff has failed to comply or adequately comply with the court's two orders dated the 20<sup>th</sup> February 2008 and 10<sup>th</sup> April 2008 requiring the plaintiff to file and serve upon the***

***Defendant documents disclosed in the Plaintiff's List of Documents dated the 24<sup>th</sup> April 2006 and 22<sup>nd</sup> February 2008.***

***(b) THAT it is in the interest of justice to strike out the Plaintiff for non-compliance with the court's said two very clear and specific orders.***

***(c) THAT the Plaintiff has failed to disclose radiological reports in terms of Order X Rule IIA of the Civil Procedure Rules.***

***(d) THAT the Defendant will not be able to adequately defend itself in absence of full and adequate disclosure.***

4. The application is also supported by the sworn affidavit of **Judith Oduge – Otieno** dated April 29, 2008. The gist of her affidavit is that plaintiff has failed to comply with this court's orders that:-

***(a) On February 20, 2008 this Honourable Court ordered the plaintiff to file and serve upon the defendant all documents disclosed in the plaintiff's List of Documents dated April 24, 2006.***

***(b) On April 10, 2008 this Honourable Court made a further order requiring plaintiff to comply with the said order of February 20, 2008 and also to serve upon the Defendant all documents listed in the Plaintiff's supplementary List of Documents dated February 22, 2008.***

5. The deponent says that the documents yet to be served by the plaintiff are those listed as 8(b) (c) and (d) in the plaintiff's List of Documents dated April 24, 2006 namely hospital invoices for: Dr. Volkersz, Dr. R. Mulamba and Dr. W. Locher. She also says that the plaintiff's List of Documents served on the Defendants on April 21, 2008 was served outside the ten day period allowed for the same and further that the bundle of documents comprised in the said List is not only undated, unnamed, unlabelled and unidentifiable but are also wholly incomprehensible, unintelligible and undecipherable. It is further averred that the documents in the plaintiffs List of Documents supplied on April 21, 2008 to the defendants ought to have been reproduced on transparencies to allow for proper examination done against a light. The deponent also avers that such documents can only make sense if they are accompanied by radiological reports which reports the deponent says ought to be supplied to the defendants.

6. It is thus contended on behalf of the defendants that failure on the part of the plaintiff to comply or adequately comply with the said court orders is sufficient reason to strike out the plaintiff and dismiss the suit and more so because, the defendants argue, the plaintiff is in breach of order 10 Rule 11A of the Civil Procedure Rules. The rule requires every party to a suit, to, within one month after the pleadings are closed, make discovery by filing and serving on the opposite party a list of the documents relating to any matter in question in the suit which are or have been in his possession or power. In the instant case, my view is that the plaintiff duly complied with Rule 11A(1) because there is no dispute that the plaintiff filed her List of Documents and it is out of those lists that the defendant sought verification and it was that request for verification that led to the making of the orders of the court which are now the subject matter of this application. Subrule (3) provides that where a party fails to comply with sub-rule (2) application may be made to the court for the fixing of a time limit within which the party must comply with sub-rule 1. And as stated above, sub-rule (1) deals with the filing of Lists of Documents and serving such lists upon the opposite party.

7. Mr. Mohamed, duly instructed by M/s Mohamed a Samnakay Advocates canvassed the application on behalf of the defendant. He reiterated the averments of the affidavit in support and urged the court to find that:-

***(a) the plaintiff is in breach of the mandatory requirements of the court's orders dated February 20, and April 10, 2008.***

***(b) The plaintiff is in breach of the mandatory provisions of Order 10 Rule 11A of the Civil Procedure Act.***

8. I have already stated that Order 10 Rule 11A requires the plaintiff to file and serve the List of Documents, which in this case was done. The problem arose when the plaintiff failed to provide copies of some of the listed documents for the defendant's verification in accordance with Order 10 Rule 11A (2) of the Civil Procedure Rules. Mr. Mohamed also took issue with the plaintiff's Replying Affidavit by which the Plaintiff contended that this court has no jurisdiction to hear the instant application and that the plaintiff is not bound by the orders of this honourable court. Mr. Mohamed also contended that the plaintiff has said nothing about the X-rays and that overall, the plaintiff's failure to submit the documents has not been explained by the plaintiff.

9. The application was opposed. The plaintiff swore a Replying Affidavit dated May 16, 2008 in which she says that according to advice received from her counsel, this court has no jurisdiction to hear the instant application for reasons that:-

***a. No Interrogations have been delivered to the Plaintiff by leave of court as required under Order X Rules 1 and 2 of the Civil Procedure Rules.***

***b. The Defendant has not requested for any discovery under oath of any documents as required under Order X Rule 11(1) of the Civil Procedure Rules and no application has been made to the court under Order X Rule 11(2) of the Civil Procedure Rules.***

***c. The Plaintiff has made 'Discovery' as defined under Order X Rule 11A of the Civil Procedure Rules by filing and serving its List of Documents dated 24<sup>th</sup> April 2006 and Supplementary Affidavit dated 22<sup>nd</sup> February 2008.***

***d. The Defendant has not served the Plaintiff with any notice requiring verification of the documents as required under Order X Rule 11A (2) no application has been filed under Order X Rule 11A (3) of the Civil Procedure Rules. The Defendant only has a right to request for verification of documents by way of affidavit which has not been done. It does not give the Defendant a right to ask for copies of documents not in the possession or power of the Plaintiff.***

***e. The Defendant has failed, ignored and refused to inspect the Documents notwithstanding being served with a Notice to Inspect documents on 31<sup>st</sup> March 2008 as provided for under Order X Rule 16 of the Civil Procedure Rules. A copy of the duly served notice is annexed hereto and marked 'AD-1'.***

***f. No order has been made under the provisions of Order X Rule 17 of the Civil Procedure Rules.***

10. I hasten to state here that the jurisdiction of this Honourable Court cannot be ousted simply because the application/matter before it may have been brought under the wrong of the law or on the ground that a party has not complied with a previous order of the court. The court has unlimited power under Section 3A of the Civil Procedure Act to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. If this application is found wanting in any respect, the court can either dismiss it or strike it out. Mr. Imende appeared for the plaintiff on this application and submitted that the plaintiff was not questioning the jurisdiction of the court but only saying that the application ought to have been made under Section 3A of the Civil Procedure Act. Mr. Imende further contended that the plaintiff has duly complied with the provisions of Order 10 Rule 11A and that the fact alone that some of the documents supplied by the plaintiff to the defendant are indecipherable does not mean that the plaintiff has willfully disregarded this court's orders. He also contended that the plaintiff served a notice upon the defendant to inspect documents at the plaintiff's advocates' offices and that it was the defendant and his counsel who did not comply with the notice to inspect. Mr. Imende submitted that at the very worst, failure by the plaintiff to provide documents, which he says is not the case here would be to lower the probative value of the plaintiff's evidence and that such an issue is one for the trial court. He said that all that is required of the plaintiff is to produce the best evidence before court and not the perfect evidence. He cited the case of **Eastern Radio Service -vs- Tiny Tots** [1967] EA 392 in which the appellant was required to prove the value of the goods detained. An application was made for inspection of documents and a consent order was made requiring the appellant to give "**inspection of the documents in his possession in chronological order within thirty days of the date of this order**". Nothing was done

to comply with the said order and the respondent thus applied under Order 10 Rule 20 and Section 97 of the Civil Procedure Act for the dismissal of the suit. The appellant filed an affidavit asking for extension of time within which to put the documents in chronological order and was granted the extension and agreed to give inspection on November 24, 1965. On inspection, the documents were found not to be in chronological order, though they were found to be in chronological order according to individual suppliers of goods which the appellant was advised by his advocate, was sufficient compliance with the order. Several attempts were made to obtain inspection as ordered and on June 22, 1966, the respondent applied for the dismissal of the appellant's suit on the ground that the appellant had not complied with the order of court made in November 1965 and the High Court dismissed the whole suit. On appeal, the court held

***(i) (per curiam) 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; (emphasis mine)***

11. Mr. Imende invited the court to carefully consider the prerequisites that must be fulfilled by the defendant before it makes an order dismissing/striking out the plaintiff's suit. He urged the court to disallow the application and to allow the plaintiff to prosecute her claim either with or without conditions as to discovery. In reply, Mr. Mohamed submitted that though the plaintiff purported to supply the documents, what was submitted was utterly useless and that this clearly shows that the plaintiff is in willful disregard of this court's orders made on February 20 and April 10, 2008.

12. There is no doubt here that the orders now in dispute were made by this honourable court. For this application to succeed, the defendant must demonstrate that the plaintiff willfully disregarded the said orders. By the consent order of February 20, 2008, the plaintiff was required to file and serve the bundle of documents within 7 days, while the Defendant was to file and serve its bundle within 15 days from the date of service of the Plaintiff's bundle. In my ruling of April 10, 2008 I found that both the plaintiff and defendant had not complied with the orders of the court made on February 20, 2008, and neither party applied for extension of time within which to comply. This means that the plaintiff herein is not wholly to blame for the fact that the order of February 20, 2008 was not complied with. The Defendant also failed to comply with its portion of the ruling. On April 10, 2008 the court ordered the plaintiff to comply with the order of February 20, 2008 within seven days. There are several contentions regarding what the plaintiff says was compliance with the said order:-

***(i) that the bundle was served on April 21, 2008 instead of the April 17, 2008***

***(ii) that the documents supplied were not clear for examination, particularly the X-rays which were photocopied on ordinary copying papers.***

***(iii) That the radiological reports were not supplied along with the bundle served upon the defendant on April 21, 2008.***

13. I have considered the two contending views in light of the authority cited – to me and also considered against the provisions of Order 10 Rule 20 of the Civil Procedure Rules. The question that arises is whether against this background, it can be said that the plaintiff is guilty of willful disregard of the court order? In my judgment, I think that the defendant has not proved that this is so. I have already stated that non-compliance with the court orders of February 20, 2008 was by both parties. That was the finding I made on April 10, 2008. My findings were not appealed against and therefore they still stand. However, the order made on April 10, 2008 was to be complied with by the plaintiff. What has come out from the submissions is that though the plaintiff served the documents she was ordered to serve, the documents are so unclear that the defendant cannot make sense out of them. Secondly it alleged that some of the documents namely the radiological reports to accompany the X-rays were not supplied. I think that if the plaintiff fails to supply the same, her case is at risk. The plaintiff did comply with the order though not according to the standards of photocopying expected of her by the Defendant, hence the charge against the plaintiff that she supplied documents that cannot be read. As for the defendant, I do find and hold that it was given a time to carry out the inspection but failed to do so and accordingly, I

cannot hold that the plaintiff is liable to have her suit dismissed on this basis. It is also my finding that the defendant has not complied with Order 10 rules 1, 2, 11(1) and 11(2), 11A, 16 and 17 of the Civil Procedure Rules.

14. It is also to be noted that on April 10, 2008, defendant's counsel informed the court that the plaintiff, pursuant to the order by Nambuye J of February 20, 2008, supplied the defendant with a bundle of documents in time but that the documents that had been attached thereto did not tally with those listed in numbers 1-14. It was on that basis that Mr. Mohamed submitted that the order by Nambuye J had not been complied with. Mr. Issa for the plaintiff then told the court that he had in fact on March 26, 2008, filed a Notice to inspect both Lists of Documents and that the plaintiff duly complied with the rules by serving defendant's counsel with the Notice to Inspect on March 31, 2008, which Mr. Issa said was within the seven days requested for by Counsel for the defendant. That though the plaintiff's counsel gave notice of a specific time for the inspection on April 2, 2008 between 12.00 p.m. and 4.00 p.m., Mr. Mohamed never showed up and that he never wrote to say why he did not attend and whether he would rather carry out the inspection at another time.

15. I have considered all these earlier submissions for the sake of consistency and still find and hold that it cannot be said that the plaintiff was in flagrant disregard of the court orders. The plaintiff supplied copies of documents that were of low quality unlike in the **Eastern Radio Service** case (above) in which the first order was totally ignored by the appellant. In the instant case, the defendant was given the opportunity to inspect, but failed to do so, and though Mr. Mohamed has argued that there is a distinction between '*producing*' and '*inspecting*' documents I think that the conduct of the defendant regarding the order of February 20, 2008 and the Notice to inspect go some way to show that the defendant is not as clean as it wants this court to believe.

17. In the result, I refuse the application. The same is dismissed with no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 4<sup>th</sup> day of July 2008.

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:-