REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 513 OF 2003

WENDY MARTIN…….....PLAINTIFF/APPLICANT

VERSUS

IL NGWESI COMPANY LTD…..….....1ST DEFENDANT/RESPONDENT

THE LEWA WILDLIFE CONSERVANCY...2ND DEFENDANT/RESPONDENT

IAN HAMISH CRAIG…….....3RD DEFENDANT/RESPONDENT

RULING

The plaintiff's application was made by Notice of Motion dated 8th September, 2003 and filed on 9th September, 2003. It was brought under Order X rules 11A, 17(2) and 18 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act (Cap. 21). The applicant's prayers were set out as follows:

> (a) that, the 1st, 2nd and 3rd defendants be ordered to make discovery, by filing and serving upon the plaintiff a list of documents relating to any matter in question in the suit herein which are or may have been in their possession and power;
>
> (b) that, the 1st and 2nd defendants be ordered to furnish and/or allow the plaintiff's advocates to inspect and make copies of the Public Indemnity Insurance Policies held by the 1st and 2nd defendants for the years 2000, 2001, 2002 and 2003;
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> (c) that, the 1st and 2nd defendants be ordered to allow the plaintiff to inspect the 1st and 2nd defendants' audited accounts for 1996, 1997, 1998, 1999, 2000, 2001 and 2002;
>
> (d) that costs be provided for.

The general grounds stated in support of the application are, firstly, that the 1st, 2nd and 3rd defendants have failed to make discovery within the stipulated time as required by Order X rule 11A (1) of the Civil Procedure Rules. Secondly it is stated that discovery under Order X rule 11A(1) is a mandatory requirement in all High Court proceedings. And lastly it is stated that the documents in respect of which discovery and inspection is sought are relevant to the matters in question and necessary for the court to dispose fairly of the suit.

Evidence to support the plaintiff's application is filed in the depositions of ***Sheetal Kapila,*** dated 8th September, 2003. The deponent is from the firm of advocates with the conduct of the instant matter on behalf of the plaintiff, and she avers that after the plaintiff filed suit on 29th May, 2003 and the defendants

filed their defences on 20th June, 2003 the pleadings closed on ***4th July,2003.*** On that date the plaintiff filed her list of documents, pursuant to Order X rule 11A of Civil Procedure Rules, serving the same upon the defendants immediately. On that same date, 4th July 2003 the deponent wrote to the defendants' advocates requesting specific discovery and inspection of the audited accounts of the 1st and 2nd defendants for 1996, 1997, 1998, 1999, 2000, 2001 and 2002. The deponent wrote a further letter to the defendants' advocates, on 21st July, 2003 requesting specific discovery and inspection of the Public Insurance Indemnity Policies held by the 1st and 2nd defendants for 2000, 2001, 2002 and 2003. It is averred that the defendants have, to date, not filed their respective lists of documents as required by Order X, rule 11A of the Civil Procedure Rules aforesaid. Furthermore, the defendants have failed to provide the plaintiff with the documents in respect of which specific discovery had been sought. The deponent states that he verily believes the documents the subject of the instant application, to be material to the issue of the second defendant's occupational control of the first defendant, and will enable the Court to properly determine all the issues pertaining to this suit and to dispose of the suit fairly. The deponent expresses his belief that the defendants are, in the circumstances, obliged to make discovery of the documents the subject of the instant application, and the plaintiff is entitled to inspect the same. The deponent believes the said documents to be in the possession and power of the first and second defendants.

The three defendants/respondents responded to the application and the supporting evidence by filing, on 10th November, 2003 a detailed statement of grounds of opposition (dated 6th November, 2003). Among other things, the defendants contend —

> (i) that, there is no reference to the audited accounts or the public indemnity insurance policies of the 1st and 2nd defendants in the pleadings – and so there is no basis for seeking inspection of the same;
>
> (ii) that, the accounts and policies sought are not at all material to the fair and just disposal of the suit which is founded on the Occupier's Liability Act (Cap. 34);
>
> (iii) that discovery as sought is premature or unnecessary, because the defendants are not the proper parties from whom compensation can be claimed for injury caused by a wild animal.

Adjournment for various reasons made it not possible to hear the instant matter on 10th November, 2003, 11th February, 2004, 8th March, 2004 and 31st March, 2004; but it was possible to hear counsel on 17th May, 2004 and 20th January, 2005, on both of which occasions the plaintiff was represented by ***Mr. Shah,*** while the defendants were represented by ***Mr. Mwenesi.***

Mr. Shah stated that the defendants were linked to a community project which incorporated the management of a game ranch and the running of a lodge; and at the said premises, the plaintiff who was a resident had been attacked by an elephant when she went out jogging. Liability for the harm done to the plaintiff was being canvassed within the framework of the Occupiers Liability Act (Cap. 34), and in that behalf, it became relevant how the operations and the premises of the first defendant were managed. Counsel submitted that the defendants had not made discovery of relevant documents within *one month* as required under the rules of civil procedure, after a formal request for the same had been made by the plaintiff. The plaintiff's case is that the second and third defendants were in occupation and control of the first defendant at the time the plaintiff suffered the said injury - a fact which should make the defendants jointly and severally liable.

This basis of liability applied to the instant case was reinforced with a reference to ***Street on Torts***, 10th ed. by ***Margaret Brazier*** and ***John Murphy.*** Who is an occupier? This point is discussed by the learned authors at page 304 of their work:

> "**The first precondition of a defendant's liability under the Occupiers' Liability Act, 1957 is that he be an occupier of the premises on which the plaintiff's loss occurs. The 1957 Act**

supplies no statutory definition of occupier but instead states that those who would be treated as occupiers at *common law* should be treated likewise for the purposes of the Act."

This leads the learned authors directly to the common law notion of the "*occupier"*. And they draw (p.304) from the House of Lords decision in ***Wheat v. E. Lacon & Co. Ltd*** [1966] A.C. 552:

"**The defendants owned a public house of which Mr. R was their manager. Mr. R and his wife were allowed by agreement to live in the upper floor, access to which was by a door separate from the licensed premises. Mrs. R was allowed to take paying guests on the upper floor. An accident was sustained by a paying guest on the staircase leading to the upper floor. It was held that although the plaintiff was injured in the private area of the premises, the defendants (along with Mr. And Mrs. R) were still liable. They had *retained enough residuary control over that part of the premises to be treated as occupiers."***

The relevance of the common law principle to the plaintiff's situation in the instant case, quite obviously, is that the plaintiff and her lawyers would like to ascertain whether, at the ***locus in cuo*** where the plaintiff was injured by the elephant, the defendants had "retained enough residuary control," so that they may be treated as occupiers. This purpose of the plaintiff cannot but be, as learned counsel contends, entirely legitimate in the professional canvassing of the case in hand. Now such a conclusion for the purpose of the instant application, must lead to the inference that *if the plaintiff requests discovery of documents which shed light on the vital question alluded to in this paragraph, the relevance of such documents cannot very well be doubted.*

Learned counsel, ***Mr. Shah*** submitted that the plaintiff quite properly required documentation on the defendants' accounts and their insurance practices - because these will establish that the second and third defendants were in fact in *occupation and control* of the first defendant's premises at all material times.

On the importance of discovery and inspection for all material documents, counsel referred the Court to another learned work, Mulla's ***Code of Civil Procedure***, 16th edition by ***Solil Paul*** and ***Anupam Srivastava***. The learned authors thus state (p.2136):

"**The documents sought to be discovered need not be admissible in evidence in the inquiry or the proceedings. It is sufficient if the documents would be relevant for the purpose of throwing light on the matter in controversy. Every document which will throw light on the case is a document relating to a matter in dispute in the proceedings. In other words, a document may be inadmissible in evidence yet it may contain information which may directly or indirectly enable the party seeking discovery either to advance his case or damage his adversary's case or which may lead to a trial [or] inquiry which may have either of these two consequences."**

Mr. Shah submitted that, as it was being contended by the plaintiff that the second and third defendants were in occupation and control of the first defendant, financial documents would be one way of establishing the true position, and hence the need for by the plaintiff to see the relevant documents of accounts.

On the contention in the defendants' grounds of opposition, that the documents sought by the plaintiff were not relevant, learned counsel submitted that the relevance of the documents cannot be determined *until they have been disclosed to and inspected by the plaintiff*. Counsel further submitted, and I believe, correctly, that whether the said documents would be *admissible,* had no relevance at this stage of discovery and inspection.

On the objection raised by the defendants, that the plaintiff had not given notice regarding documents for inspection, in accordance with Order X, rule 15, counsel submitted that the said rule deals only with documents referred to in pleadings or affidavits, which is not the case with the documents the subject of the instant application. To support this contention, counsel invoked the High Court's decision in ***Dr. Lubna Khawanja v. Dr. Hizar J. Versee***. In that case the ***Honourable Mr. Justice Waki*** (as he then was)

remarked as follows:

> "**It seems to me that the defendant is not resisting the inspection of documents on substantive grounds but on technical ones. That is the failure on the plaintiff's part to serve notice… Reliance for the … objection is that Rule 15 was not complied with but the Rule refers to production of 'documents referred to in pleadings or affidavits'. For those documents there is a prescribed form of Notice. There is no reference to documents other than those referred to in the pleadings or affidavits. The rule would thus be irrelevant in the matter.**
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> "**The only Rule that refers to documents other than those referred to in pleadings, particulars of affidavits is Rule 17(2) which has been invoked in this matter. For inspection of such documents, it would appear, no prescribed notice is provided for. It is admitted that a request was made for such inspection and in my finding, that was sufficient in the absence of any invitation by the defendant to the plaintiff to carry out such inspection."**

Learned counsel relied on the ***Lubna Khawanja*** case to support his submission that "this is a clear and straightforward case for ordering inspection of the documents sought." He further remarked: "There is evidence that these documents will be material in determining the issues in the proceedings, especially the question of occupational control."

For the defendants, learned counsel, ***Mr. Mwenesi*** contended that there is no absolute time limit within which parties are required to file documents. He promised: "We will put in our documents; we will make discovery. We haven't refused." He considered, in the circumstances, that the first prayer in the application was premature, unnecessary and should be dismissed.

Counsel, however, went on to dispute ***Mr. Shah's*** perception of "occupation and control" in relation to the plaintiff's position. He disputed the claim that the plaintiff had been a lawful visitor at the said lodge, such as to place any occupational obligations at all upon the defendants, in relation to her. Counsel maintained that it would be important for the plaintiff's counsel to show in detail how the 2nd and 3rd defendants could possibly have been in occupation and control of the first defendant — and that in the absence of this, the plaintiff would not be entitled to inspect the documents the subject of the instant application. Counsel contended that "the Court cannot order inspection unless it knows how this will help in the trial process."

Mr. Mwenesi submitted that the plaintiff had not shown that the documents in question were in the possession and power of the defendants, nor shown how such documents would save on costs, nor indicated how these documents would be necessary for the disposal of the case.

Learned counsel disputed the applicability to the instant application of the High Court decision in ***Lubna Khawanja***: because that ruling points out that "the order for inspection was made because the defendant had referred to the documents in his own list of documents." Counsel contended that such was not the case here, though I have not, with respect, seen any emphasis by the learned Judge, in that case, on the fact of the documents there having been listed in the defendant's list of documents. I think the learned Judge was making a more general point of law, and I am also, with respect, in agreement with the principle which he enunciated.

Since learned counsel had already made the promise that the defendants would give discovery of documents as sought by the plaintiff, I was unable, with respect, to see the purpose of his submissions on substantive matters in issue - such as whether or not the 2nd and 3rd defendants were in control of the 1st defendant; whether the plaintiff was entitled to inspect the documents sought; whether the plaintiff must seek redress only against the governmental wildlife authorities, and not against those with occupation and control at the ***locus in cuo***; etc.

In his reply learned counsel**, *Mr. Shah*** recalled the tenor and effect of Order X, rule 11A (i): that, notwithstanding the content of Order XI, *within one month after suit closes, every party is to make discovery of documents*. He submitted that the defendants had been in breach of that provision, as it was

already one-and-a-half years since pleadings closed, and yet the defendants had not given discovery and notwithstanding express requests by the plaintiff. The consequence has been, counsel submitted, that the trial process has been unduly delayed.

Mr. Shah submitted that the documents the subject of the instant application were relevant to the fair determination of the matters in contention. He submitted that the question of occupation and control of the premises of the first defendant had been pleaded, and the documents sought to be inspected were relevant to the process of establishing occupation and control – and this would assist in a fair determination of the case.

From the content of the plaintiff's application, from the grounds whereupon it is premised, from the depositions, and from the submissions of counsel, I have formed the clear impression that the applicant has a claim of merit. For the proof of her case which is quite legitimately founded on occupier's liability, she needs to establish *occupation and control* of the premises where the injury did take place. Therefore all documentation which goes to show occupation and control is eminently relevant. This should have been listed and availed to the plaintiff, upon request; and the non-rendering of discovery, which, with respect, offended the law of procedure, has had the effect of causing inordinate delay in the hearing of the main suit. This has been harmful to the plaintiff, as well as to the judicial process which, as a result, could not dispose of the matter with dispatch.

I will, therefore, make the following orders:

1. Within 21 days from the date hereof, the first, second and third defendants shall make discovery by filing and serving upon the plaintiff a list of documents relating to any matter in question in the suit herein which are or may have been in their possession or power.

2. Within 21 days of the date hereof, the 1st and 2nd defendants shall allow the plaintiff to inspect the 1st and 2nd defendants' audited accounts for the years 1996, 1997, 1998, 1999, 2000, 2001 and 2002.

3. Within 21 days from the date hereof, the 1st and 2nd defendants shall furnish and/or allow the plaintiff's advocates to inspect and make copies of the public indemnity insurance policies held by the 1st and 2nd defendants for the years 2000, 2001, 2002 and 2003.

4. The costs of this application shall be borne by the defendants in any event.

Orders accordingly.

DATED and DELIVERED at Nairobi this 25th day of February, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiff/Applicant: Mr. Shah, instructed by M/s. Kapila Anjarwalla & Khanna Advocates

For the Defendants/Respondents: Mr. Mwenesi, instructed by M/s. S. Musalia Mwenesi Advocates.