



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 388 OF 1999**

**AZRA MUCADAS DARR AND ANOTHER .....PLAINTIFFS**

**VERSUS**

**AGHA KHAN HEALTH SERVICES KENYA LTD.**  
**.....DEFENDANT**

**RULING**

The application by notice of motion dated 3rd and filed in court on 5th July 2000 seeks to produce certain documents listed therein for inspection by the plaintiffs and/or their advocates. They include:-

- (a) The hospital in-patient notes, including but not limited to all notes made by the medical and nursing staff;***
- (b) All medical reports; made by Mr. M.M. Qurashi***
- (c) All medical reports made by Dr. Soniara***
- (d) All medical reports made by any other doctor's who attended the deceased.***

The application prays that the plaintiffs and/or their advocates be permitted to peruse the same and make notes of their contents and be supplied with copies thereof on payment of proper charges.

There was also a prayer for costs of the application.

The grounds upon which the application was based as annexed thereon were that the defendant had refused to produce the deceased medical records for inspection by the plaintiff's though such records were relevant to the suit; and that the defendant's refusal was based on a wrongful claim of privilege.

There is also a supporting affidavit to the application giving the backgrounds thereof and the reasons why the prayers therein have been sought.

Replying affidavits were filed by by Mohamed and Jonathan Bowen Havelock for the defendant and third parties respectively.

While counsel for third parties did not oppose the applicant's prayer in 1(a) of the application, both counsel for defendant and third parties opposed other prayers therein citing privilege.

Counsel for the applicant, respondent and third parties appeared in court on 23rd January 2001 and submitted for or against the application. Counsel for the applicant submitted that he was entitled to an order of inspection because the doctrine of privilege did not apply in the present case as the records being sought for inspection came into existence before the commencement of the case and not in contemplation

of the deceased death.

Counsel for the defendant respondent opposed the application on grounds that proper procedure had not been followed in that the applicant had not in the first place sought inspection of documents.

That the applicant is asking for some documents from the respondent which were made by third parties or that such documents being sought were privileged.

Having heard counsel for both parties submit in this matter, I am of the view the prayers sought in 1(b), (c) and (d) cannot be granted against the defendant. In relation to prayer 1(d) it is vague and based on speculation that there are other doctors who attended the deceased and made reports in her regard. These doctors are not specified and are not parties to this case.

Moreover, even if they had been made parties no claim regarding production and inspection of their reports they are supposed to have made has been sought from them.

As regards the third parties, though properly joined to this suit, the prayer sought for production for inspection supposed medical reports made by them in respect to the deceased is not against them but against the defendant. These reports are not specified and it is not even confirmed if they exist.

Even if they exist, the defendant is not the author thereof and the prayer for production for inspection should and ought not be directed against it, the said defendant. This is why order 10 rule 13 talks of documents in possession and power of the party against whom the production order is sought to be made. I do not see the relevance of order XVIII rule 2 to this application.

As regards prayer 1(a) all hospital in-patient notes including all notes made by the medical and nursing staff, these records are, of necessity, released to the patient if he needs them either for record purpose or any other purpose.

In this case, though deceased died, his representatives are entitled to them and though the defendant would validly claim to own such records such ownership is not good reason for refusing to disclose and hand copies thereof to the applicant.

Consequently, I grant prayer 1(a) of the application and refuse prayers (b) (c) to (d) with ¼ costs of the application to the applicant.

**Delivered and dated this 12th day of February, 2001.**

**D.K.S. AGANYANYA**

**JUDGE**