

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION  
PETITION NO.250 OF 2015

KENYA LEGAL AND ETHICAL ISSUES NETWORK ON HIV&AIDS  
(KELIN).....1<sup>ST</sup> PETITIONER  
CHILDREN OF GOD RELIEF INSTITUTE (NYUMBANI).....2<sup>ND</sup> PETITIONER  
JAMES NJENGA KAMAU.....3<sup>RD</sup> PETITIONER  
MILLICENT KIPSANG.....4<sup>TH</sup> PETITIONER

VERSUS

CABINET SECRETARY, MINISTRY OF HEALTH.....1<sup>ST</sup> RESPONDENT  
THE NATIONAL AIDS CONTROL COUNCIL.....2<sup>ND</sup> RESPONDENT  
CABINET SECRETARY, MINISTRY OF EDUCATION, SCIENCE AND  
TECHNOLOGY.....3<sup>RD</sup> RESPONDENT  
CABINET SECRETARY, MINISTRY OF INTERIOR AND COORDINATION OF  
NATIONAL GOVERNMENT.....4<sup>TH</sup> RESPONDENT  
THE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT

RESPONDENTS WRITTEN SUBMISSIONS

Facts

The petitioner avers that on the 23<sup>rd</sup> of February 2015, the Government of Kenya through the President issued what the petitioners considered an unConstitutional directive directing the Cabinet Secretaries of Health, Education, Interior and Coordination of National Government and the National Aids Control Council, to collect the names of people living with HIV&AIDS in a format that would likely link the names

of the persons and their HIV status and that this was contrary to the provisions of the Constitution and the HIV&AIDS Prevention and Control Act.

#### Primary Goal Of The Presidential Directive

The main purpose of the President was to better the lives of children and mothers living with HIV&AIDS as enshrined in the Constitution under Article 43 (1)(a) which states that; Every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.

That is an important aspect the court should take into account while deciding on the issues in this case. The directive also takes into account Article 53 (1) (c) and Article 53 (2) which state, respectively;

- *Every child has the right to basic nutrition, shelter and healthcare*
- *A child's best interests are of paramount importance in every matter concerning the child.*

The directive only sought information that would:

- i. help the government to take very specific measures and strategies to enable the government cater for the adolescents and youth affected by HIV/AIDS.
- ii. enable the government to respond and provide appropriate service and support to the children living with HIV/AIDS, especially children in schools across the country.

A format vide which the information should be provided was attached to the directive. This provision of a format was necessary for several reasons:

1. The data format provided demanded accountability from the administrators in that they would be compelled to provide concrete details on proof of existence of the persons said to be affected by HIV/AIDS

2. Mere data (numbers) are prone to manipulation or guesswork. There would therefore be meaningful information to cater for the purpose at hand.
3. For follow up purposes enumerated in the Directive, it would therefore be easy to target the exact persons who were originally identified as needing intervention in the matter the President envisaged, and thereby achieve the Global Campaign goals.

The President, without a shadow of doubt had in mind the best interests of the children in thought with the intention of providing healthcare and among other things generally improve their lives.

It has been alleged that the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents failed or ignored to advise the President on all issues raised in the instant petition despite receiving numerous advisory notes from Constitutional Commissions, Network of Persons Living with HIV&AIDS (NEPHAK) and the 1<sup>st</sup> petitioner.

The petitioners' position on the issues raised represents the views of the few who despite participating in the process of implementing the directive, are still intent on imposing them on others.

NEPHAK, which is Kenya's largest network of people living with HIV and which the 3<sup>rd</sup> and 4<sup>th</sup> petitioners are members, does not share the views of the petitioners and decided not to enjoin the case.

There has been active engagement between NEPHAK and the 2<sup>nd</sup> Respondent where NEPHAK has raised concerns over the management of the collected data with a view to ensuring that the rights of the people living with HIV are protected.

The fact that NEPHAK decided not to enjoin the case is testimony that the engagement between the two was fruitful and that NEPHAK had yet to vehemently oppose the directive. Exhibit marked 'NK 7' is a copy of minutes of a meeting held between the 2<sup>nd</sup> Respondent and NEPHAK.

The Respondents nevertheless recognize that all persons are entitled to seek to have the rule of law and their rights and freedoms enforced. The court is only invited to note the above in the context of the issues arising from this petition.

WHETHER the actions of the Respondents violates the fundamental rights and freedoms of the petitioners or other persons under Articles 10(1),a), b) and c) and (2) a) and b), 20,21,24, 27(1), 27(4), 28, 29 (1), 31, 43, 46(c) 47(2) and 53(2).

#### Violation of Article 10

The petitioners argue that the Respondents violated Article 10 of the Constitution, in particular the principle of public participation, in the implementation of the directive.

The Respondent's replying affidavit sworn by Dr. Nduku Kilonzo shows that the Respondents conducted elaborate public involvement in the implementation of the President's directive.

In particular, paragraph 14, 18, 19, 20, 29, 30, 31 and 32. The directive launched the "All-in" campaign served to provide the political will necessary to engage multiple stakeholders including development partners, persons living with HIV, multilateral and the private sector to make commitments towards results for children, adolescent and young persons by 2020.

Indeed, the intention to engage stakeholders was effected. A sensitization workshop was held for all County Commissioners on privacy and confidentiality guidelines and requirements of the HIV Prevention and Control Act. Annexure "NK 1" is a copy of an invitation letter and programme of the said sensitization workshop.

Furthermore, the 1<sup>st</sup> Respondent through the National AIDS and STI Control Programme (NASCOP) set up an adolescents and children HIV treatment acceleration working group in March 2015. The multi-stakeholder team has held monthly meetings. The stakeholders

include Government, development partners, key implementing NGOs and persons living with HIV.

In May 2015, the 2<sup>nd</sup> Respondent has set up a multi-stakeholder committee to develop a campaign to end stigma and discrimination among children and adolescents. The committee has representation of the government, development partners, key communication NGOs and persons living with HIV.

Another multi-sectoral committee was set up by the 2<sup>nd</sup> Respondent in November 2014 to develop an operational plan to accelerate and fast-track action across different sectors that have a bearing on children and adolescents including Education, Labour and Social Security.

In fact, it is deponed in paragraph 20 of Dr. Nduku Kilonzo's affidavit that the 3<sup>rd</sup> petitioner herein is an active participant in the ongoing public participation process as evidenced by Annexure "NK 3" which shows his attendance at one of the meetings.

Equally, the biggest non-state stakeholder NEPHAK has also been involved in this inclusive process of public involvement. The 3<sup>rd</sup> and 4<sup>th</sup> petitioners are members of NEPHAK as deponed in paragraph 32 of the affidavit.

It is noteworthy that NEPHAK, the biggest stakeholder with a national presence, made a conscious decision not to join these proceedings as it has been fully aware of the Respondents' deliberate and satisfactory efforts in lawfully implementing the President's directive.

Finally, the 2<sup>nd</sup> Respondent met with NEPHAK when the 2<sup>nd</sup> Respondent outlined the actions taken to address the concerns raised by people living with HIV in Kenya (see the minutes thereof; annexure NK 7).

We submit that the multiple stakeholder engagements met the requirements of public participation. The law as relates to public involvement or public participation is clear. For public participation/ involvement to be achieved, the law is that the public and



interested parties must be afforded a reasonable opportunity to be informed about the issues and have a chance to contribute views.

In the case of Kenya Small Scale Farmers Forum & 6 Others vs Republic Of Kenya & 2 Others [2013] eKLR the Court held as follows with respect to public involvement and participation:

*"One of the golden threads running through the current Constitutional regime is public participation in governance and the conduct of public affairs. The Preamble to the Constitution recognizes, "the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law." It also acknowledges the people's 'sovereign and inalienable right to determine the form of governance of our country...' Article 1 bestows all the sovereign power on the people to be exercised only in accordance with the Constitution. One of the national values and principles of governance is that of 'inclusiveness' and 'participation of the people.'"*

In the case of Doctors for Life International vs Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 CC, the Constitutional Court of South Africa held that:

*"The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and the importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say. In addition, in evaluating the reasonableness of the conduct of the provincial legislatures, the Court will have regard to what the legislatures themselves considered to be*

*appropriate in fulfilling the obligation to facilitate public participation in the light of the content, importance and urgency of the legislation.”*

Kenyan courts have also examined what level of public participation is sufficient. In a determining whether a county government had carried out sufficient public participation while enacting a law, the court in the case of Robert N. Gakuru and Others vs The Governor Kiambu County and 3 Others, Petition No 532 of 2013 Consolidated with Petitions Nos.12, 35, 36, 42 and 72 of 2014 and Judicial Review Miscellaneous Application No 61 of 2014, the held that:

*“[75] In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it.” “The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation...”*

In Nairobi Metropolitan PSV Saccos Union Limited & 25 Others vs County of Nairobi Government and 3 others, Petition No 486 of 2013 the High Court stated;

*“[47] Further, it does not matter how the public participation was effected. What is needed, in my view, is that the public was accorded some reasonable level of participation and I must therefore agree with the sentiments of Sachs J in Minister of Health v New Clicks South Africa (PTY) Ltd (supra) where he expressed himself as follows;*

*“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity*

*is offered to members of the public and all interested parties to know about the issue and to have an adequate say. ””*

### Violation of Articles 27 and 28

The petitioners allege that the format in which the directive requires the information about children, guardians, expectant mothers and breastfeeding mothers affected by HIV to be collected violates these persons' freedom from discrimination and their right to human dignity contrary to the provisions of **Articles 27 and 28**.

The petitioners argue that people living with or affected by HIV in Kenya already face stigmatization and that implementing the directive would amount to further singling people living with HIV out and subjecting them to more discrimination.

My Lord, it should be understood that the aim of the directive, as stated in the second paragraph thereof, is “To enable the Government respond and provide appropriate service and support to the children living with HIV/AIDS...”

Discrimination was defined in the case of Peter K. Waweru V Republic [2006] Eklr thus;

Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by...sex whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description...Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

It is submitted that no credible evidence of unfair discrimination has been presented to this honourable court. It is trite that in order for a court to find that unfair discrimination has been visited on a person, that person must prove the allegation by way of real



evidence. It was found in Baby 'A' (Suing Through The Mother E A) & Another V Attorney General & 6 Others [2014] EKLR that;

As to the question whether Baby A was in fact discriminated against in any way, sadly, the Petitioners failed to bring any evidence in that regard. Discrimination is not an *academic* matter. It should be based on real facts and tangible evidence – see the case of Rukunga vs Rukunga [2011] eKLR where evidence of actual discrimination against the right of married daughters to inherit their parents was produced and was found to be credible.

The petitioners argue appear to rely on evidence discussed in paragraph 12 of Mr. James Njenga Kamau's affidavit. Although this evidence is referred to as medical evidence, it is clear that that evidence is actual statistical evidence indicative of the level of stigma faced by people living with HIV. In any case, this statistical evidence relates to stigma occasioned by the society in general and not the Respondents herein, for which the Respondents may not therefore be held liable and which the Respondents are actively fighting against. It also does not relate to the directive complained of in these proceedings. It is irrelevant as far as the alleged unfair discrimination by the Respondents is concerned.

Judicial interpretation of "discrimination" implies that one must show that the impact of the act/thing he complains of amounts to unfair treatment. Thus, courts distinctly refer to a breach of a person's equality and freedom from discrimination as "unfair discrimination", as opposed to just "discrimination." This is the position in international jurisdictions as well as in Kenya. The South African case of Hoffmann V South African Airways 2000 (2) SA 628; 2001 (10) BHRC 571; (2000) 3 CHRLD 146, relied on by the petitioners. Paragraph 27 of the judgment states:

*At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the*

discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim. {emphasis ours}

As seen from the above excerpt, courts must further determine the impact of unfair discrimination on the person discriminated against. To achieve this the court considers (i) the persons status/position in society, (ii) the intended purpose of the discrimination, (iii) the extent to which the persons rights/interests have been affected, and (iv) if the discrimination has impaired the persons dignity.

It is submitted that for purposes of the instant petition, the petitioners have failed to prove that the directive amounts to unfair discrimination. Whereas it is not contested that people living with HIV face stigmatization from society, it has not been *proved* that the purpose sought to be achieved by the directive is to further subject them to *more* stigma or suffering.

In fact, we submit that the Respondents have shown that intention for issuing the directive was so that the government would be in a better and more informed position to provide appropriate services and support to the target group. Moreover, it is submitted that by providing better services and alleviating stigma and suffering for this target group, the government is actually protecting and **promoting** their right to human dignity.

In addition, courts have established a test in considering whether a statutory provision and government conduct (and by extension government directives) have infringed the right to equality. Paragraph 24 of Hoffmann V South African Airways (above) states;

*This Court has previously dealt with challenges to statutory provisions and government conduct alleged to infringe the right to equality. Its approach to such matters involves three basic enquiries: first, whether the provision under attack*

*makes a differentiation that bears a rational connection to a legitimate government purpose. If the differentiation bears no such rational connection, there is a violation of section 9(1). If it bears such a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of section 9(3). If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application.*

It is submitted that the directive would be found not to have infringed Articles 27 and 28 of our Constitution if subjected to this test. The directive makes a differentiation bearing a rational connection to the government's legitimate purpose of *inter alia*, provision of health care services to all citizens and protecting the interests of vulnerable groups. As submitted elsewhere above, we have shown that the directive does not amount to unfair discrimination.

Finally, the petitioners argue that the directive is unfairly discriminative as it fails to specify that the intended collection of information should be conducted in accordance with the affected person's entitlement to give their consent vide Section 22 (1) of the HIV and AIDS Prevention and Control Act, 2006.

The mere fact that the directive did not mention that consent ought to be sought does not mean that it should not be sought. Of importance is that the directive does not expressly require its implementing agents to collect the data in complete violation of any law, including the HIV and AIDS Prevention and Control Act, 2006.

It is noteworthy that County Commissioners who were to implement the directive were properly trained *inter alia*, on the lawful collection of the information. This is deponed in paragraph 18 of Dr. Nduku Kilonzo's affidavit. The programme of the said workshop held on 19<sup>th</sup> March 2015 at Nakuru is marked as "NK 1". Your Lordship's attention is

drawn to Session 3 of the programme titled "*Ethical, Legal Concerns*" where the County Commissioners were trained on the confidentiality and legal implications, ethical issues and stigma and discrimination. These sessions were conducted by competent bodies in the relevant fields namely the NACC, NASCOP and HIV Tribunal.

We therefore submit that the directive did not in any way violate or threaten the petitioners' or other persons' rights under Articles 27 and 28.

#### Violation of Articles 29 (f) and 31

The petitioners' argument on the issue of the directive violating Article 29 (f) is that the target groups, especially the school-going children, are likely to be subjected to certain forms of cruel, inhuman or degrading treatment by virtue of disclosure of their status.

With respect to the right to privacy, it is being argued that by requiring data on HIV status to be collected, the directive offends Article 31 (c).

These two arguments are therefore obviously premised on the misguided assumption that (1):the HIV status/information of the target groups will be forcibly extracted from individuals and (2): published for public consumption.

It should be noted that the directive does not expressly or impliedly require the forcible collection of information or HIV statuses from individuals or publication of the information sought. As restated, its genuine intention is to enable the government provide better services and support to the affected vulnerable persons. Making such information public or forcefully collecting it would obviously negate this intention.

In any case, the Respondents are bound by the provisions of the Constitution and the HIV and AIDS Prevention and Control Act, 2006. The Respondents are fully aware of their duty to uphold the letter and spirit of the Constitution and more specifically, to ensure the interests of marginalized and vulnerable groups (such as people living with HIV) are protected.

The HIV and AIDS Prevention and Control Act, 2006 was enacted to "...provide for measures for the prevention, management and control of HIV and AIDS, to provide for the protection and promotion of public health and for the appropriate treatment, counseling, support and care of persons infected or at risk of HIV and AIDS infection, and for connected purposes" (Preamble). Part V of the Act provides for Confidentiality. Of interest are sections 14, 21 and 22 which regulate consent and the control of records and information of persons living with HIV. These provisions are clear and the petitioners have not demonstrated that the Respondents are intent on violating the same in the implementation of the directive.

Section 19 (2) provides that;

*The Government shall, to the maximum of its available resources, take the steps necessary to ensure the access to essential healthcare services, including the access to essential medicines at affordable prices by persons with HIV or AIDS and those exposed to the risk of HIV infection.*

It is partly in the desire to fulfill this statutory obligation that the directive dated 23<sup>rd</sup> February 2015 was issued. To a reasonable man's mind, it is not possible to ensure provision of essential healthcare services and medicines without first having accurate data on who requires such services and their location. Only then would the government be well-positioned to provide and distribute the appropriate healthcare services, medicines and support to the target groups in the right portions and frequency for each group/individual.

Furthermore as evidenced by Annexure "NK 5", a National Steering Committee on Fast-Tracking a High Impact HIV Response Among Adolescents and Young People was set up on 1<sup>st</sup> July 2015. This Committee operationalizes the directive. The Committee "will provide advisory and guidance on policy, legal and operational matters to the Ministry (of Health) and oversee the execution of the fast-track plan." Additionally, item number 5 under the Committee's scope of work reads "Advice the Cabinet Secretary on

confidentiality guidelines in relation to management of data for children and adolescents as needed.”

It is clear that the government is keen on lawfully implementing the directive even in relation to the legal consent and confidentiality requirements of the HIV and AIDS Prevention and Control Act, 2006.

It is therefore submitted that the allegations of violation of Articles 29 (f) and 31 (c) have not been proved. The petitioners have equally failed to prove that there is any reasonable threat of violation of Articles 29 (f) and 31 (c) on the part of the Respondents.

#### Violation of Article 43 (1) (a)

The petitioners allege a violation of the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care. According to the petitioners, this violation is tied with other violations, notably the right to privacy, life and human dignity, which have been addressed elsewhere above in these submissions.

It should be remembered that the right to health under Article 43 is, like any other economic and social right, subject to progressive realization under Article 21 (2). The affidavit of Dr. Nduku Kilonzo highlights the state’s numerous initiatives in the prevention and control of HIV/AIDS, including the enactment of the HIV and AIDS Prevention and Control Act, 2006.

The state has received quite a bit of positive criticism from the courts regarding its defence of progressive implementation when one claims a violation of the rights under Article 43. An instance is the case of Mitubell Welfare Society v The Attorney General & 2 Others Petition No. 164 of 2011 where Mumbi Ngugi, J. said;



*The argument that socio-economic rights cannot be claimed at this point two years after the promulgation of the Constitution ignores the fact that no provisions of the Constitution is intended to wait until the state feels it is ready to meet its Constitutional obligations. Article 21 and 43 require that there should be "progressive realization" of socio- economic rights, implying that the state must be seen to be taking steps, and I must add be seen to take steps towards realization of these rights.....Granted also that these rights are progressive in nature, but there is a Constitutional obligation on the state, when confronted with a matter such as this, to go beyond the standard objection....Its obligation requires that it assists the court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of the socio-economic rights, and what policies, if any it has put in place to ensure that the rights are realized progressively and how the Petitioners in this case fit into its policies and plans."*

However in the present case, the Respondents submit that they have been able to show the court what *initiatives and policies* it has been implementing in the realization of the *right to health*. Indeed, the impugned directive is an instance of such progressive realization.

Therefore, the petitioners should, and Your Lordship is particularly invited to, commend the state's efforts in realizing this economic and social right with regard to one of the most vulnerable segment of the society without prompting from the courts.

It is submitted that the impugned directive serves to promote and protect the right to the highest attainable standard of health of people living with HIV. As stated elsewhere, the purpose of the directive is to enable the government better provide health care services and support for the stated target groups. This is in realization of the right to health.

It is therefore submitted that the petitioners have failed to demonstrate any violation of the right to health as per the Constitution by the Respondents and the Respondents have successfully proved that the state is **commendably and progressively** implementing it.

### Violation of Article 47

The petitioners allege that Article 47 will be violated if the directive is implemented since it fails to meet the principles of legality, public participation and infringes the rights to privacy, freedom from cruel, inhumane and degrading punishment, human dignity and health of persons living with HIV.

In response, it is submitted that Article 47 was not violated by the Respondents for reasons enumerated elsewhere above. The petitioners have failed to show how this right was violated or is threatened.

### Violation of Article 53 (2)

The allegation that the directive violates a child's best interests is premised on the ground that the directive does not take in to consideration the different societal contexts of individual circumstances.

It is submitted that a *child's best interest in any matter especially the instant one is the child's health*. Without good health, the child is not able to enjoy any other rights or entitlements. Indeed, the court has found that without the right to health, a human being's right to life and human dignity are impaired. Mumbi Ngugi, J. stated in P.A.O & 2 Others V Attorney General [2012] eKLR that;

*"In my view, the right to health, life and human dignity are inextricably bound. There can be no argument that without health, the right to life is in jeopardy, and where one has an illness that is as debilitating as HIV/AIDS is now generally recognised as being, one's inherent dignity as a human being with the sense of self-worth and ability to take care of oneself is compromised."*

It is submitted that the same applies to children. It should not be lost that the intent of the directive is to ensure better health services and support to children living with HIV.

We reiterate the petitioner's submissions (at page 20 thereof) on the comments of the Committee on Economic, Social and Cultural Rights in General Comment No. 14 to underscore the importance of health of every human being. The Committee declared the right to health close and dependent upon most of the other rights in the international Bill of Rights.

The petitioners could have at the least stated what other interest would be best to a child living with disability if not health, but they have not. The Respondents' contention that health is the paramount best interest of the children living with HIV stands uncontroverted.

WHETHER the 1<sup>st</sup> and 4<sup>th</sup> Respondent should be compelled by the court to destroy all the data in their possession collected as a result of the directive dated 23<sup>rd</sup> February 2015

It is submitted that having failed to show any unlawfulness with the directive, the issue of destroying data does not arise.

Further, it is submitted that the availability of names of people with chronic care conditions including HIV in a register *ipso facto* does not breach any law or amount to profiling of persons infected by HIV or propagate stigma and discrimination, such as currently available in manual and electronic registers and names of persons living with HIV in hospitals and HIV care clinics, institutions offering HIV care services for the purposes of follow up, care and improved quality of life and ARV treatment. The petitioners' fear of the data stored is unfounded as there is no law breached and that the information was to be used benevolently.

Without prejudice to the foregoing, the court is not seized of the records containing the information to authoritatively and effectively order for its destruction. It is submitted that it would be quite difficult for a court to order for the destruction of something that it has not had the privilege of examining. We also do not know how many school-going children, guardians/care-givers and breast-feeding mothers affected by HIV have been

entered in to record if any, their places or counties of residence, name of schools and so on. If the petitioners had provided this information to the court, then it would be easy to make the order and implement the same. The very fact that the petitioners can not access it means that it is safely out of public reach.

**WHETHER:**

- (i) the Cabinet Secretary for Ministry of Health should be compelled to publish privacy guidelines in form of regulations relating to the collection and storage of HIV related data

The petition argues that the 1<sup>st</sup> Respondent ought to be compelled by the court to develop privacy guidelines in the form of regulations as prescribed by Section 20 of the HIV and AIDS Prevention and Control Act.

As shown in the affidavit of Dr. Nduku Kilonzo, measures have been taken to ensure the confidentiality of those living with the virus. At paragraph 23 thereof, several developed guidelines that provide privacy and confidentiality guidelines in the implementation of services, in research and data collection and in varied settings are in use. Some of these guidelines are exhibited as annexture "NK 6".

Whereas these policy guidelines are not in the form of regulations, it is submitted that non-compliance with non-statutory provisions does not render a cause of action that would otherwise arise under that Act to be a Constitutional issue.

In any case, the Respondents only wish to state the position of the law regarding the court's power and limits in making mandatory orders compelling the executive to develop policies and regulations. In addition to seeking such an order, the petitioners herein purport to ask the court to direct the executive on what should be included in the regulations.

The courts have repeatedly declined to make such orders for reason that they would be dangerously stepping in to the executive's exclusive mandate. It was so held in the case of Kenya Society For The Mentally Handicapped (Ksmh) V Attorney General & 7 Others [2012]EKLR that;

*"I think the petitioner's have brought this case to address the whole spectrum of issues concerning persons with disabilities.... In a nutshell, what the petitioner requires is for the Court to direct the State to take steps to adopt its proposals for reform and promotion of persons with disabilities. The Court's purpose is not to prescribe certain policies but to ensure that policies followed by the State meet Constitutional standards and that the State meets its responsibilities to take measures to observe, respect, promote, protect and fulfil fundamental rights and freedoms and a party who comes before the Court."*

It is submitted that the formulation and implementation of policies and regulations is an administrative function of the executive. This function is exclusive and it is rooted in the principle of separation of powers. The Court of Appeal acknowledged as much when it stated in Trusted Society Of Human Right Alliance V Attorney General Nairobi Petition No. 299 Of 2012;

*"The Constitution consciously delegates the sovereign power under it to the three branches of government and expects that each will carry out those functions assigned to it without interference from the other two....this must mean that the Courts must show deference to the independence of the Legislature as an important institution in the maintenance of our Constitutional democracy as well as accord the Executive sufficient latitude to implement legislative intent. Yet...the courts have an interpretive role-including the last word in determining the Constitutionality of all governmental actions. That, too, is an incidence of the doctrine of separation of powers."*

The court's role as aptly put by Majanja, J. in Commission For The Implementation Of The Constitution V Parliament Of Kenya & 5 Others [2013] Eklr while relying on the case

of Kenya Youth Parliament & 2 Others V Attorney General & Another, Nairobi Petition No. 101 Of 2011 (Unreported) is;

*"The role of the Judiciary within the framework is to state what the law is and to ensure that every authority conforms to the dictates of the Constitution when called upon to do so. In Kenya Youth Parliament & 2 others v Attorney General & another, Nairobi Petition No. 101 of 2011 (Unreported) the court observed that,*

*"We state here, with certain affirmation, that in an appropriate case, each case depending on its own peculiar circumstances, facts, and evidence, this Court clothed with jurisdiction as earlier stated, would not hesitate to nullify and revoke an appointment that violates the spirit and the letter of the Constitution but the Court would hesitate to enter into the arena of merit review of a Constitutionally mandated function by another organ of State that has proceeded with due regard to procedure.""*

In light of the supremacy of the Constitution, courts are therefore empowered to intrude the executive's domain, but within certain parameters. Majanja, J. properly elucidated the bounds within which the court can intrude in the executive's mandate in Commission For The Implementation Of The Constitution V Parliament Of Kenya & 5 Others (above) thus;

*"Under the doctrine of separation of powers, public bodies have a wide latitude in developing and implementing policy and the Court is neither expected nor required to micro-manage these processes. However, when policies violate the Constitution or the law, the Court is expected to speak loudly and clearly to settle the boundaries of legality. In Minister of Health v Treatment Action Campaign (Supra at para. 99), the Constitutional Court of South Africa emphasised that the primary duty of courts is to the Constitution and the law and where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its Constitutional obligations. If it should hold in any given case that the state has*



*failed to do so, it is obliged by the Constitution to say so and in so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself."*

The distinction should be made that whereas the court is empowered by the Constitution to ensure that the executive performs its functions within the bounds of the Constitution, the same Constitution prohibits the court from directing the particular manner in which the executive performs its functions. That is to say, for our purposes, the court cannot impose specific provisions to be included in the privacy guidelines/regulations as sought in the petition. The much the petitioners can do is to challenge provisions of the regulations in court once they are made.

- (ii) The Court can issue an order directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to conduct public awareness campaigns to educate citizen's persons living with and affected by HIV about their rights, stigma and discrimination and other matters relating to HIV about their rights, stigma and discrimination and other matters relating to HIV in line with Sections 4 – 8 of the HIV & AIDS Prevention and Control Act, 2006

It is submitted that the nature of this order is equally as specific as the one discussed herein in the preceding section. Therefore, the Respondents' argument discussed above applies for this order.

However, it should be appreciated that the petitioners have not proved that the Respondents are/have not conducted civil education on all matters regarding HIV and AIDS including stigma, so as to justify asking for this order.

The affidavit of Dr. Nduku Kilonzo clearly enumerates numerous initiatives that include public awareness campaigns. In addition to the Ministry of Health, there are also many state agencies concerned with prevention and control of HIV and AIDS in the country. It has not been shown that these agencies or initiatives are not working, or are inefficient.


There is no basis to warrant issuance of this order.

**Conclusion**

The Respondents have demonstrated that in the face of the rule of law and protection and promotion of the rights and freedoms of persons living with HIV, especially the more vulnerable target groups in the directive, the directive should be certified as being above board.

In totality, it is submitted that the petition lacks merit and should be dismissed with costs to the respondents.

DATED at NAIROBI this 12<sup>th</sup> day of MAY 2016

  
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