

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 606 OF 2014**

**RECEIVED**  
**11 FEB 2016**  
**JUDICIAL REVIEW DIVISION**

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 22(1) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE ARTICLES 19, 20, 21, 25, 27, 28, 29, 31,33, 35,43, 45 AND 46 OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

**L.A.W.....1<sup>ST</sup> PETITIONER**  
**KENYA LEGAL AND ETHICAL ISSUES NETWORK**  
**ON HIV & AIDS (KELIN).....2<sup>ND</sup> PETITIONER**  
**AFRICAN GENDER AND MEDIA INITIATIVE TRUST (GEM).....3<sup>RD</sup> PETITIONER**

**AND**

**MARURA MATERNITY & NURSING HOME.....1<sup>ST</sup> RESPONDENT**  
**COUNTY EXECUTIVE COMMITTEE MEMBER**  
**IN CHARGE OF HEALTH SERVICES- NAIROBI COUNTY.....2<sup>ND</sup> RESPONDENT**  
**CABINET SECRETARY, MINISTRY OF HEALTH.....3<sup>RD</sup> RESPONDENT**  
**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**AND**

**THE SECRETARIAT OF THE JOINT UNITED NATIONS**  
**PROGRAMME ON HIV/AIDS (UNSAID SECRETARIAT).....AMICUS CURIAE**  
**THE INTERNATIONAL COMMUNITY OF WOMEN**  
**LIVING WITH HIV(ICW).....INTERESTED PARTY**

*Pursuant to Article 22 (1) of the Constitution of Kenya 2010 and The Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice & Procedure Rules*

**1<sup>st</sup> RESPONDENT'S WRITTEN SUBMISSIONS**

**MAY IT PLEASE YOUR LORDSHIP,**

**1. ISSUES**

Whether the Petitioners are entitled to prayers sought

**2. FACTUAL BACKGROUND**

By Petition dated 9<sup>th</sup> December 2014 as amended on 11<sup>th</sup> September 2015, the Petitioners moved this Honorable Court for orders inter alia of violation of rights and

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Name: *Margaret*

fundamental freedoms as set out in the Amended Petition. The Petitioners premised their claim on various grounds set forth in the Petition.

The 1<sup>st</sup> Respondents put in their Replying Affidavit sworn by Sophia Wanjiku on 13<sup>th</sup> April 2015 in which they denied all the allegations of violation of the Petitioner's rights and fundamental freedoms. The 1<sup>st</sup> Respondent's deponed inter alia that:-

- a. It does not run the Kariobangi and Baba Dogo Health Centres and as such cannot independently verify the veracity of the Petitioners' averments in relation thereto
- b. The Petitioner was already living with her 2<sup>nd</sup> husband at the time of admission to the 1<sup>st</sup> Respondents for the procedure of TBL and CS and as such the boy born in 2006 constructively belonged to the 2<sup>nd</sup> husband
- c. The 1<sup>st</sup> Respondents is contracted by PriceWaterHouseCoopers for provision of medical services in the contract run by a German NGO known as OBA-RH
- d. In the said contract, Price Water House Coopers and OBA-RH organize seminars independent of the 1<sup>st</sup> Respondents where they screen and educate patients with HIV with a view of stemming its spread
- e. Upon screening, patients choose the type of medical services they deserve then purchase the vouchers at which point the 1<sup>st</sup> Respondent is not involved
- f. The patients purchase the vouchers and pay the OBA-RH programme choosing the hospital they desire to have the procedure carried out, again the 1<sup>st</sup> Respondents still do not come at this stage
- g. The services in the contract include family planning, caesarean section, tubal ligation among others
- h. The vouchers are bought at Korogocho screening centre and the 1<sup>st</sup> Respondent is based at Mathare North
- i. The 1<sup>st</sup> Petitioner bought the voucher and went to the 1<sup>st</sup> Respondent where the procedure was performed

- j. The informed consent of the Petitioner was given at Korogocho to the OBA-RH and at the 1<sup>st</sup> Respondent
- k. The role of the 1<sup>st</sup> Respondent was limited to execution of the contractual terms hitherto referred to

### **3. THE LAW**

The Constitution of Kenya 2010

### **4. ANALYSIS**

Your Lordship, the Petitioners herein, testing the waters of litigation, are seeking fictitious orders which your humble respondent prays that they should not be given. The crux of this petition revolves around two pertinent issues to wit, liability and consent, which your humble respondent shall endeavor to discuss in gross opposition of the grant of orders sought in this petition.

#### *i. On the issue of liability*

Your Lordship, the Petitioner avers that on or about March 2006 she undertook a HIV test at Kariobangi Health Centre which test was positive. She further deponed that a subsequent test at Baba Dogo Health Centre confirmed that indeed she was HIV positive. At the time the Petitioners deponed that she was pregnant.

Your Lordship, it is the Petitioners averments that in her later visits to Baba Dogo Health Centre, she was advised by the attending nurse against having more children in view of her HIV status. The Petitioner deposed that she was advised further that she should find some money to book space to undergo cesarean section in order to give birth to a healthy baby. The Petitioner deposed further that at eight months into her pregnancy, she was referred by Baba Dogo Health Centre to Korogocho where a community health worker gave her two vouchers worth Kshs 300 one written CS and another TL and she was advised that when she due for delivery, she uses the vouchers to deliver at Marura Nursing Home.

Your Lordship, on their part, the 1<sup>st</sup> Respondent deposes that they had a contractual agreement dated **1<sup>st</sup> August 2006** with Price Water House Coopers for provision of medical services under a programme run by a German NGO known as OBA-RH. Under the said contract, the said Price Water Coopers and the OBA-RH were to organize seminars **independent** of the 1<sup>st</sup> Respondent where they screened and educated patients living with HIV with a view of stemming its spread. Your Lordship, the 1<sup>st</sup> Respondent's understanding of the programme was that upon the said screening and

education, the patients are voluntarily left to choose the type of medical services they deserve then they purchase the vouchers. **The 1<sup>st</sup> Respondent, Your Lordship, is not involved at all at this point; a point which is confirmed by the 1<sup>st</sup> Petitioner in her affidavit as outlined hereinabove.** The 1<sup>st</sup> Respondent **ONLY** comes in at the point of executing the consensual agreement between the patients and the OBA-RH (including Price Water House Coopers). In a nutshell, the 1<sup>st</sup> Respondent is not privy to initial advice and obtaining of consent. **See paragraphs 6-13 of the Petitioner's Affidavit dated 11<sup>th</sup> September 2015.** The deponent avers that all her advice was given at Kariobangi and Baba Dogo Health Centres and at no point was the 1<sup>st</sup> Respondent involved. It, therefore, Your Lordship, arrives at the conclusion that at pre-sterilization stage, the patient ought to have obtained sufficient information to enable her make the decision whether to purchase the vouchers. The 1<sup>st</sup> Respondent's role in the whole transaction is merely executing the agreement between the OBA-RH and the patient.

Your Lordship, it is worth noting that the said Kariobangi and Baba Dogo Health Centres are institutions **WHOLLY** run by the various levels of government obtaining under the Constitution of Kenya 2010. They are **NOT** part of the business contours of the 1<sup>st</sup> Respondent. **See Memorandum and Articles of Association of the 1<sup>st</sup> Respondent.**

Your Lordship, the only conclusion under this head, your humble 1<sup>st</sup> Respondent submits, would be that prior to the determination of the next issue on consent, the 1<sup>st</sup> Respondent is not liable for violation alleged or otherwise, of the 1<sup>st</sup> Petitioner's Constitutional Rights. The Petitioner obtained independent medical advice and consented to the subsequent medical operation without the involvement of the 1<sup>st</sup> Respondent. The **ONLY** interaction between the Petitioner and the 1<sup>st</sup> Respondent was at the time of the operation.

ii. **On the issue of consent**

Your Lordship, the Petitioner avers that operation performed on her was done without her having consented to. As a consequence therefore, her rights to consensual medical care were violated. The operation violated her right to have her dignity respected. On their part Your Lordship, the 1<sup>st</sup> Respondent deponed that the petitioner's consent was obtained upon screening and education by Price Water House Coopers and OBA-RH who had contracted them to offer medical services to patients. Further, the 1<sup>st</sup>



Respondents have attached medical records of the 1<sup>st</sup> Petitioner evidencing that she did and actually signed a consent form for the operation to be performed on her. **See Consent form signed by Petitioner on 10<sup>th</sup> September 2006, Cardex form dated 15<sup>th</sup> September 2006, observation chart dated 23<sup>rd</sup> March 2006, anaesthetic record dated 16<sup>th</sup> September 2006 and drug chart dated 16<sup>th</sup> September 2006.** In the Namibian case of **LM & OTHERS –v- Government of the Republic of Namibia [2012] NAHC 211**, the High Court of Namibia observed that the defendant government could rely on the defence of ***volenti non fit injuria*** if it were able to prove that the Plaintiffs signed consent forms that signified consent to sterilization procedures. The 1<sup>st</sup> Respondent's documents referred to hereinabove indicate that the patient indeed consented to the operations with which she was referred to be performed by the 1<sup>st</sup> Respondent. In **CASTELL v DE GREEF 1994 (4) SA 408 (C)** the court of appeal considered in detail the scope of consent and the extent of disclosure required of the medical practitioner in obtaining the patient's consent to treatment. The 1<sup>st</sup> Respondent herein has stated that the patient was duly and dutifully informed of the medical procedure through the education and screening conducted by the OBA-RH and Price Water House Coopers who contracted the 1<sup>st</sup> Respondent to perform and or offer the said medical services.

Your Lordship, the case against the 1<sup>st</sup> Respondent based on the foregoing submission is therefore unfounded, fictitious and is nothing more than a fishing expedition. The alleged lack of consent, Your Lordship, is arguably an afterthought on the part of the Petitioner. Whereas the 1<sup>st</sup> Respondent appreciates the autonomy of self-determination of a patient to consent to medical operation **Castell [supra], and the public interest of the current case in the province of human rights jurisprudence**, it is also worth noting that the Petitioner and other patients hitherto operated by the 1<sup>st</sup> Respondent are taken through quality reproductive healthcare awareness and screening and then given an option to chose the medical procedure of their choice. The Petitioner must have appreciated the risks involved in the operation. As much as the **Namibian case [supra]**, places the onus of proving informed consent on the part of the pleading ***volenti***, it follows from **Castell [supra]** that where a patient has been given reasonable information and opportunity to decide what treatment should be made on them, then the medical practitioner would not be guilty of aftermath thereof.

**5. CONCLUSION**

Your Honor, in view of the foregoing submissions, and the documents on record, it is your humble 1<sup>st</sup> Respondent's view that the Petition and its consequential prayers in entirety and more specifically as they relate and attribute liability of violation of the Petitioner's constitutional rights and freedoms whatsoever should be quashed and the said Petition dismissed with costs.

We submit and so humbly

**DATED** at **NAIROBI** this

*10th* day of *February*

2016

**OJIENDA & COMPANY**  
**ADVOCATES FOR THE DEFENDANT**

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