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CONSTITUTIONAL AND  
HUMAN RIGHTS DIVISION

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

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 ALEGED CONTRAVENTION OF ARTICLES 19, 20, 21, 25, 27,  
28, 29, 31, 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

THE SUBMISSIONS OF THE 3<sup>RD</sup> AND 4<sup>TH</sup> RESPONDENTS

The 3<sup>rd</sup> and 4<sup>th</sup> Respondents oppose the petition and have filed the following grounds against the petitioner's petition.

1. That the 3<sup>rd</sup> and 4<sup>th</sup> Respondents were not parties to the actions complained of by the petitioners and hence the 3<sup>rd</sup> and 4<sup>th</sup> respondents should not be party to this suit.
2. That the petition does not therefore disclose any Constitutional violation by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents against the 1<sup>st</sup>-3<sup>rd</sup> Petitioners.
3. That the Petitioners have not demonstrated and the manner in which their rights have been violated by the 3<sup>rd</sup> and 4<sup>th</sup> Respondent.
4. That the petition is misconceived, incompetent, and bad in law and the orders sought by the petitioner are not tenable against the 3<sup>rd</sup> and 4<sup>th</sup> Respondents and are not justified and hence cannot be granted by this Honourable Court.
5. That the petition is vexatious and an abuse of the court process.

The actions that the 1<sup>st</sup> petitioner claims affected her are outlined in **paragraphs 6-13** of the petition. Nowhere does the petitioner allege any actions on the part of the 3<sup>rd</sup> and 4<sup>th</sup> respondents or their agents and the 1<sup>st</sup> petitioner has therefore failed to demonstrate what cause of action she has against the 3<sup>rd</sup> and 4<sup>th</sup> respondents and her petition should therefore fail.

The allegation at paragraph 24 that:-

*“the petitioner’s accounts of her experience at the hands of health care workers demonstrates that the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> respondents failed in their obligation to respect protect and fulfil the fundamental rights of the 1<sup>st</sup> petitioner”*

is insufficient to support her claim against the 3<sup>rd</sup> and 4<sup>th</sup> respondents as it is trite law that the claimant can only secure orders against the perpetrator.

The respondents submit that the petitioner has not pleaded any material that would support **prayers (c) to (l)** in the petition.

The petitioners at **paragraph 36** aver that there is no specific legislation in force in Kenya that addresses the issue of informed consent. Legislation, the respondents must submit before this court is the mandate of the Parliament, and is achieved usually after a long process of consultation with stakeholders in any sector to ensure maximum possible public participation as befits the particular circumstances.

Absence of legislation does not give the petitioners any cause of action. However it must be stressed that the petitioners have demonstrated at **paragraph 37** of their petition that there are guidelines that adequately cater for the “fully informed choice” issue that they bring forward in this petition and this further waters down the case by the petitioners against the 3<sup>rd</sup> and 4<sup>th</sup> respondents. If these Guidelines are there is no reason at all as to why the petitioner should seek prayer number (j).

In addition, broad matters of policy are normally left to the Executive to deal as it seems fit in accordance with the particular situations obtaining on the ground and after consultation with stakeholders. These are the kind of matters that would be affected by orders sought in prayers (c) to (l) in the petition. In other words, policy creation is a mandate of the Executive,

which the judicial arm of Government eschews, in accordance with the doctrine of separation of powers. The Judiciary is left to interpret the actions of the executive, as to whether they meet the standards set in the constitution. On the issue of Separation of Powers doctrine, the Court Of Appeal stated as follows in the *Mumo Matemu* case:


*(49) It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Court's dicta in the petition the subject of this appeal that:*

*"[Separation of powers] 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, as the Respondents also concede, the Courts have an interpretive role - including the last word in determining the constitutionality of all governmental actions..."*

It is clear from the above submissions that the petitioner has not set out any viable claim against the 3<sup>rd</sup> and 4<sup>th</sup> respondents.

The petitioners' petition therefore should be dismissed with costs to the 3<sup>rd</sup> and 4<sup>th</sup> respondents on the above grounds.

**DATED at NAIROBI this 22<sup>nd</sup> day of April 2016.**

  
**MWANGI NJOROGE**  
**CHIEF STATE COUNSEL**  
**FOR: ATTORNEY GENERAL**

**DRAWN AND FILED BY:**

The Honourable Attorney General, Attorney General's Chambers, Sheria House, P.O BOX 40112, NAIROBI

**TO BE SERVED UPON:**

1. Allan Achesa Maleche, Kenya Legal and Ethical Issues Network on HIV & AIDS (KELIN), Kindaruma Road off Ngong' Road, PO BOX 112-00200 KNH NAIROBI.
2. Manegene & Partners Advocates, Bruce House, 10<sup>th</sup> Floor, Room 1001 Standard Street, PO BOX 7183-00200 NAIROBI.
3. Rachier & Amollo Advocates, Mayfair Centre 5<sup>th</sup> Floor, Ralph Bunche Road, PO BOX 55645-00200 NAIROBI.
4. Nungo, Oduor & Waigwa Advocates, Maissonette No. 1, Court 30 (Next to Riley Group Security), Mombasa Road, off Bunyala Road, PO BOX 70678-00400 NAIROBI.
5. National Gender and Equality Commission, 3<sup>rd</sup> Floor, Solution Tech Place, Longonot Road, Upper Hill, PO BOX 27512-00506 NAIROBI.

6. County Executive Committee Member in Charge of Health Services, Nairobi  
County Government, NAIROBI