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18 APR 2018  
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

THE REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CONSTITUTIONAL & HUMAN RIGHTS DIVISION  
PETITION NO. 605 OF 2014

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

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES  
19,20,21,25,26,27,28,29, 31,33,35,43,45 AND 46 OF THE CONSTITUTION OF KENYA

BETWEEN

- SWK ..... FIRST PETITIONER
- PAK..... SECOND PETITIONER
- GWK ..... THIRD PETITIONER
- AMM ..... FOURTH PETITIONER
- KENYA LEGAL AND ETHICAL ISSUES
- NETWORK ON HIV & AIDS (KELIN) ..... FIFTH PETITIONER
- AFRICAN GENDER AND MEDIA
- INITIATIVE TRUST (GEM) ..... SIXTH PETITIONER

AND

- MEDECINS SANS FRONTIERED – FRANCE ..... FIRST RESPONDENT
- PUMWANI MATERNITY HOSPITAL ..... SECOND RESPONDENT
- MARIE STOPES INTERNATIONAL ..... THIRD RESPONDENT
- COUNTY EXECUTIVE COMMITTEE
- MEMBER IN CHARGE OF THE HEALTH
- SERVICES NAIROBI COUNTY ..... FOURTH RESPONDENT
- CABINET SECRETARY,
- MINISTRY OF HEALTH ..... FIFTH RESPONDENT
- THE HON. ATTORNEY GENERAL ..... SIXTH RESPONDENT

THRID RESPONDENT’S REPLYING AFFIDAVIT

I, DR. FRED OYOMBE AKONDE of Post Office Box Number 4726 - 00506 Nairobi and a resident of Nairobi within the Republic of Kenya do swear on oath and state as follows:

1. THAT I am an Obstetrician - Gynaecologist by profession, a trainer in reproductive health and a consultant with the Third Respondent. I was also the resident consultant Obstetrician - Gynaecologist of the Third Respondent from 1990 to 2016 thus I am conversant with the facts touching on the Amended Petition herein and I am competent and duly authorised by the Third Respondent to swear this Affidavit.
2. THAT the Third Respondent had on 12<sup>th</sup> January 2017 filed an affidavit deposed by Dr. Mark Ayallo on 28<sup>th</sup> December 2016 in response to the Amended Petition herein.
3. THAT Dr. Mark Ayallo has since retired from employment with the Third Respondent and is not available to continue participating in this matter on behalf of the Third Respondent.
4. THAT I have seen, read and understood the Amended Petition which was amended on 10<sup>th</sup> September 2015 and the averments set out in the Affidavits separately sworn by the First, Second, Third, Fourth and Sixth Petitioners on 10<sup>th</sup> September 2015 in support of their Amended Petition and in response to that I wish to swear this Affidavit in opposition and I hereby state as follows:
5. THAT the Third Respondent is an outfit present in 42 countries around the world and it believes in and abides by the principles of voluntarism, informed choice and informed consent which are fundamental to its values, policies and practice in all the countries it works in around the world.
6. THAT the Third Respondent undertakes on-going training and monitoring to ensure that its trainee and staff adhere to the highest standards contained in the National Family Guidelines For Service Providers at all times as the leader in the sector in its respect and protection of its clients' rights.
7. THAT the Third Respondent's policies ensure that all women who are considering whether to undergo tubal ligation are subjected to counselling by a qualified staff of Marie Stopes. The counselling sessions are taken universally as a group and then individually and a person then chooses to undertake any of the various family planning options.
8. THAT the Third Respondent informs its clients about the full range of family planning options in a language that its clients will understand. The method of application of each option and the pros and cons of each option is explained to the clients for them to make an informed choice about the method that they feel is right for them and which they ultimately choose.

9. THAT even in instances where a referral is made from another medical institution, then, the prospective client is taken through counselling and the client having all the information, if agreeable to taking up a family planning option will then sign the consent and receive the planning method opted for. That is, notwithstanding, that counselling had already been done at the referral facility and a consent obtained at the referring facility.
10. THAT the Third Respondent has provided family planning services to more than one million men and women in Kenya. The Third Respondent is committed to a policy of provision of non – discriminatory access to high quality, voluntary family planning services to clients whose status is seropositive and seronegative.
11. THAT I have read through the Affidavits sworn by the First and Third Petitioners. I am a stranger to the contents thereof. I do not admit the contents thereof although they do not mention the involvement of the Third Respondent in their respective cases.
12. THAT I have read the Affidavits sworn by the Second and Fourth Petitioners and in response to the entire contents thereof which are not true and are denied I wish to state as follows:
13. THAT the Third Respondent did during the pendency of these proceedings request the Second and Fourth Petitioners to avail themselves for examination by the Third Respondent's designated medical practitioner with a view to ascertain the veracity of the claim that the alleged bilateral tubal ligation procedure was conducted upon the said Second and Fourth Petitioners and they blatantly refused to be examined. I wish to add that the refusal of the Second and Fourth Petitioners to have the procedure carried out to verify their allegations lends credence to the inference that the Court ought to make and that is that the Second and Fourth Petitioners have not undergone any bilateral tubal ligation.
14. THAT as a medical practitioner, I am aware that prior to the conduct of any surgical procedure it is important and mandatory for the patient to be informed about the procedure involved and all the potential risks that relate to the procedure after which the patient is then given the opportunity to either accept or decline to have the procedure performed upon them.
15. THAT if the patient instructs the medical practitioner to proceed with any surgical intervention; whether minor or major, the medical practitioner then obtains an informed consent from the patient after which vitals are taken and the attendant preparation for the undertaking of the procedure follows.

16. THAT where the surgical intervention takes place the patient is given a card from the facility that they attend, a discharge summary and a prescription for any medication that may need to be taken to facilitate a full recovery at least until the next appointment when a check up on the progress of the patient will take place.
17. THAT in the event that the patient does not give their consent, the medical practitioner will not conduct any surgical procedure upon the patient. The Third Respondent adheres to the National Family Planning Guidelines for Service Providers.
18. THAT I am a stranger and no admission is made of paragraphs I – 33 of the Second Petitioner’s affidavit in support of the petition.
19. THAT I am a stranger and no admission is made of paragraphs I – 3I of the Fourth Petitioner’s affidavit in support of the Petition.
20. THAT I wish to state that the Third Respondent was not privy to the discussions between the Second and Fourth Petitioners and their respective nutritionist and or nurse either from Blue House Clinic or from Pumwani Maternity Hospital.
21. THAT I wish to add that if at all any family planning drive was conducted at the Huruma Lions Health Centre by the Third Defendant (which is denied) then the facility Huruma Lions Health Centre kept the records relating to the medical procedure carried out on the Second and Fourth Petitioners.
22. THAT the Second and Fourth Petitioners both confirm that they deliberately set out to Huruma Lions Health Centre while they were clear in their minds that they were scheduled to undergo a Bilateral Tubal Ligation which they understood to be “*kufungwa kuzaa*” and that before the procedure took place they found a group of other women at Huruma Lions Health Centre and they signed a consent form before the procedure was conducted.
23. THAT I wish to add that it has also not been confirmed which staff members of the Third Respondent carried out the tubal ligation procedure complained about, which was carried out at the facility Lions Health Centre at Huruma.
24. THAT while the Second and Fourth Petitioners suggest that the procedure was carried out at the facility Lions Health Centre at Huruma, it is surprising that neither the Second nor the Fourth Petitioner have requested for any records for any procedure they allege to have undergone at the facility.

25. **THAT** the Third Respondent contends that the Second and Fourth Petitioners had the right to decline to give in to the suggestions of the nutritionist and the nurse to attend the alleged family planning drive at Lions Health Centre at Huruma the purpose of which attendance was to undergo the bilateral tubal ligation known as '*kufungwa kuzaa*'. If at all the Second and Fourth Petitioners agreed to give in to the suggestions of their nutritionist and nurse, it was well within their right to do so or to decline. Therefore, it can be inferred that the Second and Fourth Petitioners went to the family planning drive with the sole purpose of undergoing the bilateral tubal ligation for which they signed the consent.
26. **THAT** the Second Respondent avers that it was only after the procedure had been conducted and in particular on 15<sup>th</sup> June 2005 that she visited the Third Respondent's clinic in Eastleigh for a review after the surgical procedure conducted at Lions Clinic at Huruma.
27. **THAT** the Fourth Respondent confirms that she visited Lions Health Clinic in Huruma for the purpose of undergoing a tubal ligation. She avers that she signed a form of consent for the procedure and after the procedure was conducted, she subsequently attended the Third Respondent's clinic at Eastleigh for review.
28. **THAT** the averment that the Second and Fourth Petitioners did not give the Third Respondent an informed consent to conduct the procedure is therefore true only to the extent that the consent was to be given to Lions health clinic Huruma. The consents were actually given to Lions Clinic Huruma. From their affidavits the Second and Fourth Petitioners confirm that they only availed themselves for the procedure which they understood was "*kufungwa kuzaa*" after having discussed the same; and their reason for the attendance was in any event not any other reason.
29. **THAT** the Third Respondent was not a participant in any form of the alleged coerced and or forced sterilization as the Second and Fourth Petitioners would wish the court to believe.
30. **THAT** as it appears from the Second and Fourth Petitioners' affidavits, if at all there was room for any coercion or application of undue influence, then the same was done without the knowledge of the Third Respondent and well before the Third Respondent interacted with the Second and Fourth Petitioners.
31. **THAT** further, there is no evidence on record showing that the Second and Fourth Petitioners had informed the Third Respondent or any of the personnel conducting the tubal ligation, even if one were to assume that they were deputed from the Third

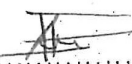
Respondent (which is denied) that the Second and Fourth Petitioners were apprehensive that if they did not undergo the procedure they would suffer any prejudice.

32. THAT indeed, had the said Petitioners disclosed to the relevant persons, particularly the officers in charge of the exercise at that time, of their motivation to undergo a tubal ligation, then the issues emerging in this Amended Petition would have been addressed at that point.
33. THAT from the foregoing, the Third Respondent cannot be held responsible for the effect of the Second and Fourth Petitioners' choices flowing from their interaction with third parties who are not parties to this Petition for what they chose to believe or what undisclosed impressions informed their decision to consent. Further, the First Respondent in the affidavit of Benta Awuor Onyango which is on record states that she never insisted that the Second Petitioner or anyone else undergo BTL.
34. THAT the refusal by the Petitioners to avail themselves for medical examination at the request of the Third Respondent irresistibly leads to the inference that the Second and Fourth Petitioners have not undergone the bilateral tubal ligation.
35. THAT further to the above I wish to state that all records maintained by the Third Respondent are kept for a period of about 7 years. The Second and Fourth Petitioners wrote to request for records which were clearly in the custody of Lions Health Centre at Huruma. Secondly, there was no request made by the Second and Fourth Petitioners between the years of 2005 and 2012.
36. THAT the Third Respondent can no longer trace its records with respect to the Second and Fourth Respondents for the reviews conducted in 2005. The Second Petitioner only made the request for records on 8<sup>th</sup> September 2014 and a reminder of even date while the Fourth Petitioner only requested for the records on the same date of 8<sup>th</sup> September 2014 as well as a reminder of even date. The requests and the reminders do not appear to have been delivered upon the Third Respondent as they would have been stamp received on the respective dates of delivery.
37. THAT I am advised by our advocates herein on record and which advice I verily believe to be sound that the advocate Mr. Allan Achesa Maleche who is the advocate for the Fifth Petitioner has sworn an affidavit in this matter on behalf of the Fifth Petitioner and he may in the course of proceedings be called upon to testify to avail himself for cross examination and as a consequence thereof, he cannot continue to appear for the Petitioners herein.

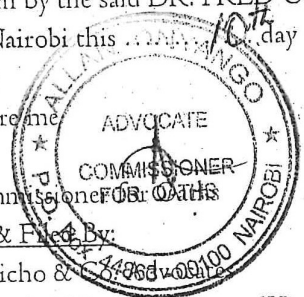


38. THAT the entire contents of the affidavit sworn by the Fifth and Sixth Petitioners are not admitted. The contents thereof are not based on first-hand evidence. They are assumptions and deductions that are not premised on any factual basis. I am aware that in so far as the Petitioners gave their formal consent to the undertaking of the BTL procedure as stipulated in the National Family Planning Guidelines then there was no derogation of any second and fourth petitioners' constitutional rights. There is therefore no basis for the Fifth and Sixth Petitioners to level any allegations against the Third Respondent.
39. THAT it is noteworthy that the Second and Fourth Petitioners took themselves to Lions Health Clinic at Huruma and unequivocally signified their consent after being informed and undertook the BTL procedure.
40. THAT the Second and Fourth Petitioners were not robbed of any choice and no sterilization took place, at least with respect to the Second and Fourth petitioners, while they were undergoing any emergency caesarian section and no consent for the sterilization was obtained while they were undergoing labor.
41. THAT from the foregoing the Third Respondent cannot be held responsible for the effect of the Petitioners' choice of interaction, on their choice of belief that informed their decision to consent.
42. THAT for the reasons forestated, the amended petition that is before the court deserves to be dismissed with costs to the Third Respondent.
43. THAT all what I have stated above is true to the best of my knowledge, belief and information, sources of which have been disclosed.

Sworn by the said DR. FRED OYOMBE AKONDE )  
 At Nairobi this 10<sup>th</sup> day of APRIL 2018 )

  
 Deponent

Before me )  
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