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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 ALLEGED CONTRAVENTION OF 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.....*P. A. B. I. E. T. 1ST PETITIONER*

KENYA LEGAL AND ETHICAL ISSUES NETWORK
ON HIV & AIDS (KELIN)2ND PETITIONER

AFRICAN GENDER AND MEDIA INITIATIVE TRUST (GEM)3RD PETITIONER

AND

MARURA MATERNITY & NURSING HOME.....1ST RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER
IN CHARGE OF HEALTH SERVICES - NAIROBI COUNTY.....2ND RESPONDENT

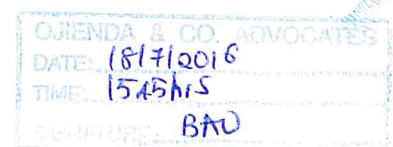
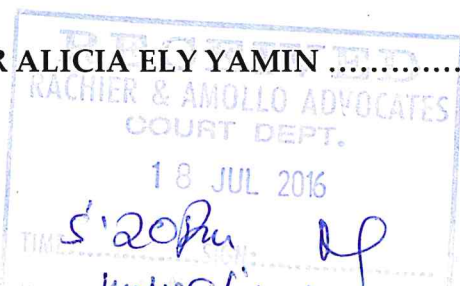
CABINET SECRETARY, MINISTRY OF HEALTH.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

AND

THE SECRETARIAT OF THE JOINT UNITED NATIONS
PROGRAMME ON HIV/AIDS (UNAIDS Secretariat)1ST AMICUS CURIAE

PROFESSOR ALICIA ELY YAMIN2ND AMICUS CURIAE



NATIONAL GENDER AND EQUALITY
COMMISSION (NGEC)3RD 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 and fundamental freedoms) Practice and Procedure Rules, 2013.

FURTHER AFFIDAVIT

I, **ALLAN ACHESA MALECHE**, of P.O. Box 112 – 00202 Nairobi a male adult Kenyan of sound mind residing and working for gain in Nairobi County within the Republic of Kenya, do hereby make a solemn oath and swear as follows:

1. **THAT**, I am an advocate of the High Court of Kenya and the Executive Director of Kenya Legal and Ethical Issues Network of HIV and AIDS (KELIN) who has the joint conduct of this matter on behalf of the petitioners and thus competent to swear this affidavit.
2. **THAT**, I have the authority of the Board of Directors to swear this affidavit on behalf of the 2nd Petitioner herein.
3. **THAT**, this affidavit is in reply to grounds of opposition of the 3rd and 4th respondents dated 22 April, 2016 and filed on their behalf by the 4th respondent.
4. **THAT**, we reiterate the averment that the 2nd Respondent as the County Executive Committee Member in charge of Health Services in Nairobi County is Constitutionally responsible for provision of health services and policy

formulation at the county level. The 1st Respondent Hospital is located in Nairobi County, and within the leadership of the 2nd Respondent.

5. **THAT**, we aver that the County Executive Committee is constitutionally mandated under Article 183, to among other functions, *manage and co-ordinate the functions of the county administration and its department*. Further, the responsibility is also statutory as provided under section 36(1) of the County Government Act which mandates the County Executive to *supervise the administration and delivery of services in the county and all decentralised units and agencies in the county*. The 2nd Respondent, as a County Executive Committee Member in Charge of Health Services, is thus charged with the above responsibilities in relation to health service delivery and policy in the county.

6. **THAT**, we reiterate our averment that the 3rd Respondent as the Cabinet Secretary, Ministry of Health in the National Government is mandated to deal with all health policy matters including those related to reproductive health, family planning and HIV control, prevention and treatment, among others at the national level.

7. **THAT**, we aver that the responsibility to the 3rd respondent is both statutory and constitutional. Section 9(3) of the National Government Co-ordination Act (2013) provides that a cabinet secretary is responsible for policy formulation and guidance and, where required, implementation of the policy in respect of the respective Ministry, State departments or agencies under him or her. And under section 10(1) of the same Act, it is provided that each Cabinet Secretary is responsible for the functions assigned to him or her by the President, the Constitution, the Act, or any other written law.

8. **THAT**, the 1st Respondent Hospital is located in Nairobi County, in the Republic of Kenya, and thus within the leadership of the 3rd Respondent.
9. **THAT** based on the provision of Article 21 of the Constitution the 1st and 2nd respondents had a constitutional responsibility to ensure that health services provided by health facilities within their leadership, whether private or public facilities, do not violate human and constitutional rights.
10. **THAT**, we further aver that the 2nd and 3rd respondents have constitutional and statutory obligation to regulate and supervise the provision of health services within their respective areas of jurisdiction.
11. **THAT**, the 2nd and 3rd Respondents are party to this suit since they failed in their supervisory duties and constitutional responsibilities to ensure that the public receive health services in a manner that does not infringe on their constitutional rights as required by Article 21 of the Constitution .
12. **THAT**, we further aver that the failure by the 2nd and 3rd Respondents to strictly enforce the National Family Planning Guidelines for Service Providers in relation to informed consent contributed to the violation of the rights of the 1st petitioner.
13. **THAT**, we aver that the 2nd and 3rd Respondents must ensure that health services provided by health facilities adhere to the Constitution, legislative and policy guidelines, in addition to respecting human rights and meeting international standards.

DRAWN & FILED BY: -

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TO BE SERVED UPON:-

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