

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 605 OF 2014

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS
UNDER ARTICLE 19,20,21 AND 23 OF THE CONSTITUTION O KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 26,
27,28,29,31,33,35,43,45 AND 46 OF THE CONSTITUTION OF KENYA

BETWEEN

- SWK.....1ST PETITIONER
- PAK.....2ND PETITIONER
- GWK.....3RD PETITIONER
- AMM.....4TH PETITIONER
- KENYA LEGAL & ETHICAL ISSUES NETWORK
ON HIV AND AIDS.....5TH PETITIONER
- AFRICAN GENDER & MEDIA
INITIATIVE TRUST (GEM).....6TH PETITIONER

AND

- MEDECINS SANS FRONTIERE-FRANCE.....1ST RESPONDENT
- PUMWANI MATERNITY HOSPITAL.....2ND RESPONDENT
- MARIE STOPES INTERNATIONAL.....3RD RESPONDENT
- COUNTY EXECUTIVE MEMBER INCHARGE OF

HEALTH SERVICES (NAIROBI CITY COUNTY).....4TH RESPONDENT
CABINET SECRETARY MINISTRY OF HEALTH.....5TH RESPONDENT
THE HON. ATTORNEY GENERAL.....6TH RESPONDENT

AND

SECRETARIAT OF THE UNITED NATIONS PROGRAMME ON HIV/AIDS
(UNAIDS) SECRETARIAT.....1ST AMICUS CURIAE
PROF. ALICIA ELY YAMIN.....2ND AMICUS CURIAE
NATIONAL GENDER AND
EQUALITY COMMISSION.....3RD AMICUS CURIAE

AND

INTERNATIONAL COMMUNITY OF WOMEN
LIVING WITH HIV (ICW).....1ST INTERESTED PARTY
INTERNATIONAL COMMUNITY OF WOMEN
LIVING WITH HIV – (ICW-KENYA).....2ND INTERESTED PARTY

4th PETITIONER SUPPLEMENTARY AFFIDAVIT

I AMM an adult female Kenyan of sound mind, residing and working for a gain in Nairobi City County within the Republic of Kenya, whose address for purposes of these proceedings is care of Allan Achesa Maleche of P.O Box 112-00202, do make oath and state as follows;

1. **THAT** I am the 4th Petitioner in this petition. I am conversant with the matters that relate to the subject of the Amended Petition before this Honourable Court and I am therefore competent to swear this affidavit.

2. THAT my advocate on record has shown, read and explained to me the contents of the replying affidavit sworn by Dr. Mark Ayallo on 28 December 2016 on behalf of the 3rd respondent.
3. THAT I swear this affidavit in opposition to Dr. Mark Ayallo's replying affidavit and I wish to state as follows.
4. THAT anything not expressly denied in the replying affidavit is believed to have been admitted.
5. THAT in response to paragraph 4 of the replying affidavit the 3rd respondents has failed to produce as evidence its strategic plan that would outline Marie Stopes International core values as enumerated in paragraph 4.
6. THAT in response to paragraph 5 and 6 of the replying affidavit, the 3rd respondent has also failed to produce in evidence any internal documents that outline its policies on training of its staff on the highest standards contained in the National Family Planning Guidelines for Service Providers. It has also failed to produce reports of such training to demonstrate that indeed its staff are well trained on the requirements set out in the National Family Planning Guidelines for Service Providers and client's fundamental rights and freedoms.
7. THAT I wish to state that the 3rd respondent did not provide me with any counseling either as a group or individually by a qualified staff at the point the 3rd respondent undertook bilateral tubal ligation (BTL) on me on

4 May 2005. I was also not given an opportunity to choose a suitable family planning option by the 3rd respondent contrary to the averments made in paragraph 6 of the replying affidavit.

8. **THAT** when I arrived at Huruma Lions Health Center to attend the family planning drive organized by the 3rd respondent, the 3rd respondent did not inform me about the full range of family planning options available in a language I understand including their pros and cons to enable me make an informed choice on the family planning method I preferred.
9. **THAT** at Huruma Lions Health Center, I found a group of women and I was asked to sign a form whose content I did not know and no one explained the contents to me. I am advised by my advocate on record, which information I verily believe to be true, that the mere act of signing a form does not indicate informed consent contrary to averments made in paragraph 26 of the 3rd respondent's replying affidavit.
10. **THAT** my advocate on record has advised me which advise I verily believe to be true that even if I was on referral to the 3rd respondent by any health facility, which is denied, the agents and/or staff of the 3rd respondent had an obligation to provide me with further counseling and information that would have enabled me make an informed choice about the family planning method I preferred.

medical examination is proof BTL was not done on me as alleged under paragraph 12 is therefore misleading and false.

17. **THAT** I reiterate the 3rd respondent prior to the conduct of the surgical procedure of BTL on me, did not inform me about the procedure I was to be involved in and all the potential risks that related to BTL.
18. **THAT** I reiterate that I was not given an opportunity to either accept or decline to have the procedure of BTL performed on me. I also state that the 3rd respondent's agents and or employees did not take any vitals from me as is alleged under paragraph 14 of the replying affidavit.
19. **THAT** after the surgical procedure, the 3rd respondent gave me a card which indicated that I underwent BTL on 4 May 2005. That card is already on record in these proceedings. I re-attach the same herewith and mark it as **AMM 2**.
20. **THAT** on the said card it was indicated that I was later to attend a review on 11 May 2005, which I did at the 3rd respondent's clinic in Eastleigh.
21. **THAT** Contrary to the averments made in paragraph 15 of the replying affidavit, I was neither given a discharge summary nor a prescription for any medication. The 3rd respondent gave me painkillers.
22. **THAT** I wish to clarify that even if the family planning drive was conducted at the Huruma Lions Health Center, it was organized by the 3rd respondents. The nurse at 2nd respondent's facility had informed me of the family planning drive to be carried out by the 3rd respondent. I verily

believe therefore that the records regarding the medical procedure carried out on me were kept by the 3rd respondent contrary to the averment that the same were kept by Huruma Lions Health Center.

23. **THAT** the card issued to me by the 3rd respondent confirms the 3rd respondent is responsible for conducting BTL on me. I also want to state that I went for review at the 3rd respondent's clinic as the 3rd respondent had directed me..

24. **THAT** I did not allude in my affidavit anything to do with a procedure known as '*kufungwa kuzaa*'. To my mind, on 4 May 2005, I set out to attend the 3rd respondent's family planning drive being held at Huruma Lions Health Center.

25. **THAT** I wish to state that the fact that I took myself to Lions Health Clinic where the 3rd respondent performed BTL on me does not signify consent as alleged by the 3rd respondent.

26. **THAT** I am advised my advocate which advise I verily believe to be true that the 3rd respondent had an obligation to ensure I was counseled before and after the procedure. It also had a duty to ensure I understood the nature of the procedure to be performed including the pros and cons so that I would be able to give informed consent.

27. **THAT** in response to paragraph 24 of the 3rd respondent's replying affidavit, I was coerced by the 2nd respondent's nurse to undergo BTL who threatened to withhold baby formula if I did not undergo BTL. As an HIV

positive mother, I was desperate to have the milk formula so as to prevent the risk of infecting my child with HIV.

28. **THAT** even if the 3rd respondent was not a participant in any form of coercion as stated in my petition, I am advised by my advocate on record which advise I verily believe to be true that the 3rd respondent had an obligation to ensure it undertakes the procedure of BTL on me after offering me counseling and all the necessary information that would make me give informed consent to the procedure irrespective of whether the 1st respondent had given me that information.
29. **THAT** I am a stranger to the averment the 3rd respondent keeps records for about seven years.
30. **THAT** I applied to have my records which contained information relating to BTL procedure performed on me so as to enable me enforce my fundamental rights and freedoms. I came to know of the need to enforce my fundamental rights and freedoms after the training I received from the 6th petitioner. I attach herewith and mark as **AMM 2** the letter I wrote to 3rd respondent requesting for my medical information.
31. **THAT** I am advised by my advocate on record, which evidence I verily believe to be true that there is no requirement in law that stipulates I should have applied for my medical records within a certain period of time as alleged by the 3rd respondent.

32. THAT in any event the 3rd respondent by a letter dated 1 December 2014, indicated it was in receipt of my letter requesting for information and were searching their records. I produce now and mark as AMM 3 the letter from the 3rd respondent's director of corporate services confirming that position. I am advised by my advocate on record which advise I believe to be correct that the allegation about keeping records for seven years is now being raised as an after thought to defeat my constitutional claim.

33. THAT I swear this affidavit in further support of the amended Petition and in response to the 3rd respondents replying affidavit.

34. THAT what is deponed to herein is true to the best of my knowledge, information and belief.

SWORN at NAIROBI by the said)

AMM)

)

This 27th day of November 2017) AMM

) Deponent

BEFORE ME)

MOSES C. KIBATH
ADVOCATE &
COMMISSIONER FOR OATHS
P. O. Box 21833 - 00100.
NAIROBI

COMMISSIONER FOR OATHS)

DRAWN AND FILED BY:

ALLAN ACHESA MALECHE

Advocates for the Petitioners

Kenya Legal And Ethical Issues Network on HIV & AIDS (KELIN)

Mombasa Road, Somak Building (Next To Airtel), 4th Floor

P.O Box 112-00200, KNH

Email: amaleche@kelinkenya.org

NAIROBI.



Your Ref: Misc/233/APA/014

Our Ref: C/KELIN/15

Date: 21 September, 2015

Mr. Mwangi Kibicho (Adv),
J.K. Kibicho & Co. Advocates,
A.C.K Garden House, 2nd Floor, Wing 'A',
1st Ngong Avenue, Off Bishops Road,
P.O. Box 73137-00200,
Nairobi.

"Annex 1"
This is the exhibit marked...
referred to in the annexed Affidavit
of... MM
sworn before me this...
November 17, 2015 at... Nairobi
day of...
Commissioner for Courts

Dear Mr. Kibicho,

**RE: NAIROBI HIGH COURT PETITION NO. 605 OF 2014
SWK & OTHERS -v- MÉDECINS SANS FRONTIÈRES – FRANCE & OTHERS**

Thank you for your letter dated 27 August 2015.

We sincerely apologise for delayed response which has been occasioned by a number of factors beyond our control.

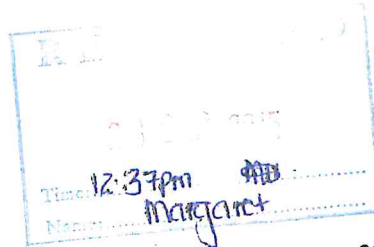
We have had deep and lengthy discussions with our clients and we shall not be availing them for the medical examination. This decision is occasioned by the following reasons:

- (i) The women have already been subjected to two confirmatory tests, including a HSG, the medical records have been availed to you and we are equally willing to avail a video of the procedures.
- (ii) The process is invasive, emotionally draining and will have negative psychosocial effect to our clients based on their previous experience undergoing similar medical procedures.
- (iii) The only thing that would be confirmed by an HSG is that the women have had a BTL. It would not confirm whether there was informed consent or whether the women were informed of other family planning options, which is what is in contention before the court.

Misc/233/APA/014

Our Ref:
C/KELIN/15

Your Ref:



23/9/2015

Date:

**J.K. KIBICHO
& CO.**
*Advocates, Notaries Public and
Commissioners For Oaths*

Reply to Nairobi Office

✓
Kelin
Somak Building
Mombasa Road
NAIROBI

Attention: Allan Maleche

Dear Sir,

**RE: NAIROBI HIGH COURT PETITION NO. 605 OF
2014; SWK & OTHERS -VERSUS- MEDECINS
SANS FRONTIERES - FRANCE & OTHERS**

The above matter refers.

We are in receipt of your letter dated 21st September 2015 contents of which we have noted. While we do not agree with the reasons you advance, we nevertheless appreciate that your clients are within their rights in refusing to undergo the re-examination.

Be that as it may we now put your clients on notice that we shall apply to cross-examine them on the respective affidavits prior to hearing of the Petition.

Yours faithfully,
J.K. KIBICHO & CO. ADVOCATES

MWANGI KIBICHO

mwangi@kibicho.co.ke

/dao

CC. **Attention: Paul Kariba**
Legal Officer
APA Insurance Limited
Apollo Centre, 07 Ring Road Parklands
Westlands
NAIROBI (Y/Ref.: AA510/0003536)

ACK Garden House
2nd Floor, Wing "C"
Off Bishop Road
P.O. Box 73137 - 00200
Tel: 2737100 / 2712929,
Mobile: 0717-297146
Email: info@kibicho.co.ke
Nairobi

Kirinyaga Co-operative Union House
1st Floor, Room 24
P.O. Box 217
Tel: 060-21148
Mobile: 0710 718587
Email: kibichoadvo@gmail.com
Kerugoya

Dropping Zone No.211
Revlon Professional Plaza
Tubman Road
Nairobi

ADVOCATES

D.M. Kibicho
C.M. Kariuki
R.W. Mwai
P.N. Karomo
A. M. Miti



MARIE STOPES K E N Y A

FOLLOW UP CARD

Name:

No:

6/15

11/15/05

BTL done on 4/5/05

Review on 11.5.06

This is the exhibit marked "Amma"
referred to in the annexed Affidavit
of NM
sworn before me this 27th
day of November 17 at Nairobi
County of Kenya

C/o Maisonette No. 4 on LR No. 1/714, Kilimani
Kindaruma Road off Ngong Road,
Next to Commodore Office Suites ,
P.O. Box 112- 00202,
Nairobi.

8 September 2014.

The In charge,
Marie Stopes Nursing Home- East Leigh,
P.O. Box 59328- 00200,
Nairobi.

This is the exhibit marked "Ann 3"
referred to in the annexed Affidavit
of Mm
sworn before me this 27th
day of November 2014 at Nairobi
Commissioner for Oaths

Dear Sir / Madam,

RE: REQUEST FOR MY HOSPITAL AND MEDICAL RECORDS

On 4 May, 2005 I took part in a family planning exercise at Lions Clinic in Huruma organized by Marie Stopes and three months later went for review at Marie Stopes East Leigh.

I am writing to request that I be provided my hospital records relating to my treatment and management during the time I attended a procedure at Lions Clinic in Huruma. These records should include but not limited to all the doctors notes, nurses notes, nursing cardex, signed consent forms and theatre operation notes.

I look forward to hearing from you in this regard.

Yours faithfully,

ANNAT

A. P. M. M. M.
C/o Maisonette No. 4 on LR No. 1/714, Kilimani
Kindaruma Road off Ngong Road,
Next to Commodore Office Suites ,
P.O. Box 112- 00202,
Nairobi.

8 September 2014.

" REMINDER "

The In charge,
Marie Stopes Nursing Home- East Leigh,
P.O. Box 59328- 00200,
Nairobi.

Dear Sir / Madam,

RE: REQUEST FOR MY HOSPITAL AND MEDICAL RECORDS

On 4 May, 2005 I took part in a family planning exercise at Lions Clinic in Huruma organized by Marie Stopes and three months later went for review at Marie Stopes East Leigh.

I am writing to request that I be provided my hospital records relating to my treatment and management during the time I attended a procedure at Lions Clinic in Huruma. These records should include but not limited to all the doctors notes, nurses notes, nursing cardex, signed consent forms and theatre operation notes.

I look forward to hearing from you in this regard.

Yours faithfully,

AWNA

A. P. M. M. M.



MARIE STOPES
Kenya

1ST DECEMBER 2014

ANNA MULINDA MULI,

C / O MAISONETTE NO. 4 LR NO. 1/174 KILIMANI

KINDARUMA ROAD OFF NGONG ROAD,

NEXT TO COMMODORE OFFICE SUITES,

P.O. BOX 112 – 00202,

NAIROBI

Dear Madam,

RE: HOSPITAL AND MEDICAL RECORDS

We are in receipt of your letter dated 8th September 2014, and wish to indicate that this is the first letter we have received even though it is marked as " REMINDER " by hand

Given the number of clients we see and the period of time it has taken since the procedure was carried out which is 2005, we will check our records and revert to you as soon as possible,

Thanks,

Dennis Radak,

Director Corporate Services

This is the exhibit marked...
referred to in the annexed Affidavit
of...
sworn before me this...
day of... 20... at...
"Mmuf"
27th
Nairobi
Commissioner for Ombuds

Providing Choices in Reproductive Healthcare

Nairobi Support Office

Kindaruma Road - off Ngong Road

P.O. Box 59328—00200 - Nairobi, Kenya

T: +254 (0)57 252 3218 - F: +254 (0)57 252 3219

M: +254 (721) 488 607

info@mariestopes.or.ke

Information & Booking

0800 720 005 (toll free)

MSK Board Members

Claire Morris - Michael Holscher-Grethe Petersen - Dr. Oscar Ambani - Dr Carol Odula-Obonyo.