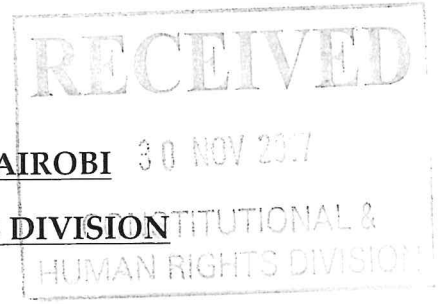


REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 605 OF 2014



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 HIVAND AIDS.....5TH PETITIONER
AFRICAN GENDER & MEDIA
INTIATIVE 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

2ND PETITIONER SUPPLEMENTARY AFFIDAVIT

I **PAK** 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 2nd 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 said replying affidavit is believed to have been admitted.
5. **THAT** in response to paragraph 4, 5 and 6 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** 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 and periodically appraised of recent developments on the Guidelines.
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. 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** the 3rd respondent did not inform me about the full range of family planning options available in a language I understand including their advantage and disadvantages to enable me make an informed choice on the family planning method I preferred. Indeed, when I arrived at the Huruma Lions Clinic to attend the family planning drive organized by the 3rd respondents, the 3rd respondent's agents and/or staff wrote my name down on a piece of paper, I was thereafter called to go to a room I later discovered was the surgery room and the 3rd respondent's agents and/or staff carried out the BTL procedure on me.

9. **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 to make an informed choice about the family planning method I preferred that was best for me.

10. **THAT** the 3rd respondent acknowledges this as its obligation prior to the conduct of any surgical procedure in paragraphs 13 and 14 of the replying affidavit. Only after giving me such counseling and after having provided all the necessary information, and after I indicate I preferred BTL would the 3rd respondent proceed to carry out the procedure. I did not sign any

consent form for BTL with MSF HIV Clinic (Blue House) , with the 3rd respondent or with Huruma Lions Clinic.

11. THAT I am aware that during the pendency of these proceedings, the 3rd respondent requested me and the 4th petitioners to avail ourselves for examination by their designated medical practitioner with a view to ascertain whether BTL had been performed on us. After a considered discussion with our advocate on record, I resolved that a second medical examination was not necessary for reasons that I had already been subjected to two confirmatory tests, the confirmatory process was invasive, emotionally draining and had negative psychological effect which could have been avoided given that we had undertaken the tests previously. Indeed, I recall I was unable to work for a week given the physical effects of the confirmatory procedure. I attach herewith a letter dated 21 September 2015 and marked **PAK 1** informing the 3rd respondent of this position. While aware of my position on its request for an additional, and unnecessary, medical examination, the 3rd respondent did not challenge my refusal to submit myself to the examination or the reasons I provided for my refusal to do so.

12. THAT I further reiterate that my medical report confirming BTL has been filed in this court and forms part of the record. I am advised by my advocate on record, which advise I believe as true, that the authenticity of that report has not been challenged.

13. THAT I am further advised by my advocate on record which advise I take as true that the allegation by the 3rd respondent that my refusal to undergo a third medical examination is proof BTL was not done on me as alleged under paragraph 12 is therefore misleading and false.
14. 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 the risks that related to BTL. I reiterate that I was not given an opportunity to either accept or decline to have the procedure of BTL performed on me.
15. THAT I also state that the 3rd respondent's agents and/or staff did not take any vitals from me as is alleged under paragraph 14 of the replying affidavit. I also did not sign any document giving consent to the procedure. The 3rd respondent has been put in strict proof thereof.
16. THAT after the BTL procedure, the 3rd respondent gave me a card which indicated that I underwent BTL on 8 June 2005 and I was later to attend a review on 15 June 2005, which I did at the 3rd respondent's clinic in Eastleigh. I attach herewith and mark as **PAK 2** the card given to me by the 3rd respondent. 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 an over-the-counter pain reliever; 12 pieces of Panadol.
17. THAT the National Family Planning Guidelines for Service Providers requires that a patient's informed consent is obtained prior to a Medical

Practitioner conducting any surgical procedure on the patient. The 3rd respondent did not obtain my informed consent to perform BTL on me. I am thus advised by my advocate on record, which advise I take as true that in this instance, the 3rd respondent failed to adhere to the National Family Planning Guidelines for Service Providers.

18. **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 3rd respondents had put posters all over the 1st respondent's facility advertising the family planning drive.
19. **THAT** the 3rd respondent's averments that it was not privy to the discussions between me and the nutritionist and/or nurse from Blue House Clinic in these circumstances is indicative of its disregard for my rights and its responsibilities to its patients. When I arrived at the family planning drive, the 3rd respondent's agents and/or staff proceeded to note my name on a list and lead me to the surgical room where I underwent the BLT procedure. I was thereafter given a card by the 3rd respondent and attended a review at its clinic.
20. **THAT** the 3rd respondent failed to provide me with the requisite counselling and information to enable me to give my informed consent to the BLT procedure. That this failure was in circumstances in which the 3rd respondent avers that it was not privy to prior discussions with me that led to my attending the family planning drive, bolsters the claim that the 3rd respondent failed in its obligations as a health service provider.

21. **THAT** I verily believe 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. I refer to exhibit **PAK 2** which is a card issued by the 3rd respondent confirming it is the 3rd respondent which undertook BTL procedure on me.

22. **THAT** I also want to state that I went for review at the 3rd respondent's clinic as directed by the 3rd respondent as is evident with the card it issued to me contrary to the allegation made in paragraph 25 of the replying affidavit.

23. **THAT** I reiterate I did not sign any consent form before the BTL procedure was carried out on me. I was not offered counselling or given any information by the 3rd respondent before undertaking BTL on me that would have enabled me make an informed decision to undergo BTL.

24. **THAT** I wish to state that it is the nutritionist at the 1st respondent's clinic who kept on telling me I should undergo a procedure for '*kufungwa kuzaa*'.

25. **THAT** the fact that I took myself to Huruma Lions Health Clinic where the 3rd respondent performed BTL on me does not signify informed consent. That I agreed to attend the family planning drive aware that BLT is conducted at the facility does not signify my consent to have the procedure undertaken on me on arrival at the facility. 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 and sign the requisite consent form.

26. **THAT** my request for access to my medical records from the 3rd respondent was intended to obtain information about the procedure carried out on me by the agents and/or staff of the 3rd respondent. This includes information about staff members of the 3rd respondent who carried out the BLT procedure on me. As detailed in my affidavit supporting this petition, I received no response from the 3rd respondent to my requests for information. In any event, as is evident from PAK 2 recording the BLT procedure and the review of the operation, it has always been my belief and understanding that the 3rd respondent's duly authorized agents and/or staff carried out the BLT on me, albeit at the Lion Health Centre's physical establishment.

27. **THAT** in response to paragraph 24 of the 3rd respondent's replying affidavit, I was coerced by the 1st respondent's staff one Benta Anyango Owour to attend the family planning drive. Ms Benta Anyango Owuor is the person who informed me about the family planning drive. She also gave me a community health worker who would accompany me for the drive. I reiterate that my agreeing to attend the family planning drive at which BLT was being conducted does not signify my consent to the BLT procedure. The nutritionist did not provide me with information on '*kufungwa kuzaa*'.

28. **THAT** the sole purpose for undergoing the BTL for which I did not give my informed consent was to be provided with milk formula for my babies

for one year and food portions for myself for 6 months, which I would not afford on my own. Due to my HIV status I was desperate to have the food portions. This does not take away the 3rd respondents obligations to ensure that I give my informed consent to the procedure prior to undertaking it on me.

29. **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. Had the 3rd respondent's agents and/or staff enquired of my circumstances, they would have obtained my individual circumstances information regarding coercion from Ms. Benta Anyango Owuor of the 1st respondent.

30. **THAT** there is no evidence on record showing discussions between me and the 3rd respondent's agents and/or staff that would indicate my apprehension to undergo the surgery because the 3rd respondent failed to take steps necessary to obtain my informed consent to the BLT procedure. Had this been done, indeed perhaps the issues emerging in this petition leading to violation of my fundamental rights and freedoms would have been avoided.

31. **THAT** I am a stranger to the averment the 3rd respondent keeps records for about seven years. From the date the acts of sterilization were done on

me, I did not know it was wrong or illegal. I came to learn about it later through the trainings I received from the 6th Petitioner. It is for that reason I applied to have my medical records which contained information relating to BTL procedure performed on me so as to enable me enforce my fundamental rights and freedoms. I attach herewith and mark as **PAK 3** the letter I wrote to 3rd respondent requesting for my medical information.

32. **THAT** I am advised by my advocate on record which advise I verily believe as true that there is no requirement in law that I should have done so within a certain period.

33. **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 **PAK 4** 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 afterthought to defeat my constitutional claim.

34. **THAT** for the reasons aforesaid, the 3rd respondent is liable for undertaking BTL upon me without my informed consent consequently violating my fundamental rights and freedoms as enshrined in the Constitution 2010.

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

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

SWORN at NAIROBI by the said)

PAK)

This ^{27th} day of November 2017)

Pamela

) Deponent

MOSES G. KIBATI
BEFORE ME)
COMMISSIONER FOR OATHS)
P. O. Box 21588 - 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.

This is the exhibit marked... "PAK 1"
referred to in the annexed Affidavit
of... PAK
sworn before me this... 27/8
day of... November 20... at Nairobi
Commissioner for Water

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 psychohological 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/I5

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

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

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:

[Redacted]

B.T.L done on 8/6/05

Review on 15/6/05

This is the exhibit marked.....

referred to in the annexed Affidavit

of Paul.....

sworn before me this.....

day of November 12 2005 at Nairobi.....

Commissioner for Oaths

"Paul 2"

Paul

27th

T. M. M. M. Kivasa
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 "PAK 3"
referred to in the annexed Affidavit
of PAK
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 8 March, 2005 at Lions Clinic in Huruma I took part in a family planning drive organized and carried out by Marie Stopes. On 15 June, 2005 I went for a follow up review at the Marie Stopes Clinic in East leigh.

I am writing to request that I be provided my hospital records relating to my treatment and management during the time I underwent 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,

Pamela

Handwritten: Daniel A. N. N. N.
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.

" REMINDER "

8 September 2014.

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 8 March, 2005 at Lions Clinic in Huruma I took part in a family planning drive organized and carried out by Marie Stopes. On 15 June, 2005 I went for a follow up review at the Marie Stopes Clinic in East leigh.

I am writing to request that I be provided my hospital records relating to my treatment and management during the time I underwent 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,

Handwritten: Pamela

Handwritten: Pamela Anderson



MARIE STOPES
Kenya

1ST DECEMBER 2014

PAMELA ANDEKA KIVASA,
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

"PAK 4"
PAK
27th November, 2014 at 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

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.