

HJ 19/01/2021

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTION AND HUMAN RIGHTS DIVISION

PETITION NO. 218 OF 2020

**IN THE MATTER OF ARTICLES 1, 2, 3,10, 19, 20 (1) (4), 21, 22, 24, 25, 26(1), 28
29, 35, 47, 165, 232(1), 258 AND 259 OF THE CONSTITUTION OF KENYA, 2020**

-AND-

**IN THE MATTER OF SECTION 4, 9, 20, 25 AND 28 OF THE ACCESS TO
INFORMATION ACT 2016**

-AND-

IN THE MATTER OF SECTION 5, 6, AND 10 OF THE HEALTH ACT. 2017

-AND-

**IN THE MATTER OF SECTION 3 AND 4 OF THE FAIR ADMINISTRATIVE
ACTION ACT, 2015**

-BETWEEN-

ERICK OKIOMA.....	1ST PETITIONER
ESTHER NELIMA.....	2ND PETITIONER
CHRIS OWALLA.....	3RD PETITIONER
CM.....	4TH PETITIONER
FA	5TH PETITIONER
KB.....	6TH PETITIONER
MO.....	7TH PETITIONER
EL.....	8TH PETITIONER
KATIBA INSTITUTE.....	9TH PETITIONER
KENYA LEGAL AND ETHECAL ISSUES NETWORK ON HIV/AIDS (KELIN).....	10TH PETITIONER
THE KENYA SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ KENYA).....	11TH PETITIONER
TRANSPARENCY INTERNATIONAL KENYA.....	12TH PETITIONER
ACHIENG ORERO.....	13TH PETITIONER
(9th to 13th Petitioners suing on behalf of health and human rights civil society and non-government organisation)	

-VERSUS-

MUTAHI KAGWE, CABINET SECRETARY FOR

HEALTH	1 ST RESPONDENT
PATRICK AMOTH, AG. DIRECTOR GENERAL, MINISTRY OF HEALTH.....	2 ND RESPONDENT
CORNEL RASANGA, GOVERNOR OF SIAYA COUNTY.....	3 RD RESPONDENT
COUNCIL OF GOVERNORS.....	4 TH RESPONDENT
FRED OKENGO MATIANGI, CS INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT	5 TH RESPONDENT
HIRARY NZIOKA MUTYAMBAL, INSPECTOR GENERAL OF THE POLICE, KENYA.....	6 TH RESPONDENT
JOSEPH WAKABA MUCHERU, CABINET SECRETARY FOR INFORMATION AND COMMUNICATIONS	7 TH RESPONDENT
THE COMMISSION ON ADMINISTRATIVE JUSTICE	8 TH RESPONDENT
DANIEL YUMBYA, CHIEF EXECUTIVE OFFICER, KENYA MEDICAL PRACTITIONER AND DENTISTS COUNCIL.....	9 TH RESPONDENT

-AND-

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS (KNCHR).....	1 ST INTERESTED PARTY
---	----------------------------------

9TH RESPONDENT’S REPLYING AFFIDAVIT

(Notice of Motion Application dated 1st July, 2020 and Petition)

I, **DANIEL YUMBYA**, of Post Office Box Number 44839-00100 Nairobi and a resident of Nairobi in the Republic of Kenya do solemnly state:

1. I am the 9th Respondent herein and the Chief Executive Officer of the Medical Practitioners and Dentists Council, hereinafter referred to as “*the Medical Council*” and hence competent to swear this Replying Affidavit.
2. I am the Registrar of the Medical Council and an ex officio member and also the secretary to the Medical Council by virtue of Section 3A (e) of the Medical Practitioners and Dentists Act.

3. I am conversant with the facts of this matter from my personal knowledge and from information gleaned from the records within the Medical Council, to which I have unlimited access to.
4. I have read and understood the Notice of Motion application dated 1st July, 2020, together with the Supporting Affidavits and the annexures thereto. I have also read and understood the Petition and the Affidavits in support together with the annexures thereto and the contents have been explained to me by my Advocate on record, Mr. Peter Munge, and I do humbly wish to respond to the issues pleaded and deponed therein.
5. The Medical Council is a statutory body established by virtue of the provisions of Section 3A of the Medical Practitioners and Dentists Act, Chapter 253 of the Laws of Kenya, hereinafter referred to as "*the Act*" and it carries out some of its statutory duties through Committees which consist of Council members, with the guidance of the Secretariat, and the Council has the powers to incorporate other members guided by the required expertise or specialties.
6. The Medical Council has many functions, as set out in the Act, which includes the licensing and registration of medical and dental practitioners and community oral health officers, licensing medical institutions, and conducting disciplinary proceedings on complaints lodged against practitioners or medical institutions in Kenya, as set out in section 20 of the Act and the applicable Rules, amongst other functions.
7. I am aware that the application herein seeks to have the Honourable Court compel the Respondents to supply the Petitioners with information sought in letters annexed to Affidavits in Support of the Notice of Motion Application and the Petition.
8. I have perused the letters attached and note that the information sought from me is in relation to:

- a) *Information on the criteria that was used to select hotels and facilities as quarantine centres;*
- b) *The check list used in selection and approval of the facilities;*
- c) *The list of all places certified as quarantine facilities both at the national and county level as from 23rd March to date;*
- d) *The approved standard operating procedures of the quarantine facilities, and*
- e) *The designated medical personnel responsible for oversight at each quarantine centres.”*

9. I am aware that apart from the Ministry of Health and the Government of Kenya, the Medical Council provided timeous and accurate information on its role and the actions taken on its part in relation to the Covid-19 Pandemic and all the information has been accessible at all times to the general public, including the Petitioners, on the Kenya Medical Practitioners and Dentist Council’s website at <https://kmpdc.go.ke/>. *Annexed hereto and marked “DY 1”* is a screenshot of the information available on its website which includes the information sought by the Petitioners from the Medical Council.

10. I am aware that the Kenya Health Professions Oversight Authority developed a checklist for Inspection of quarantine units for Covid-19 preparedness and response and the requirements for a quarantine unit so as to ensure quality and ethical care as borne out in the *annexed copy of the checklist marked “DY-2”*.

11. I am also aware that the list of quarantine facilities which had been selected in Nairobi and Mombasa where operational at a time when there was an increase in the numbers of reported cases of Covid-19 as provided in the *Annexure marked “DY-3”*. Further, the said list contained details of the officer in charge for each of the centres.

12. I am aware that during the material times the Ministry of Health had also provided the Covid-19 Protocols for the centres which were situated in schools and those with shared accommodation as set out in the annexed copy marked *“DY-4”*.

13. I am well aware that since March 2020 to-date the management of Covid-19 patients has changed drastically and all the quarantine facilities, which existed previously, have been closed.
14. I am aware from my personal knowledge that health facilities which are treating and managing Covid-19 patients have isolation facilities which are managed by the respective Hospitals using existing protocols.
15. I am also aware that the use of quarantine facilities at the initial stage was intended to mitigate the spread of Covid-19 during that formative period but with the spread of the disease to the communities across the country the practicability of having the quarantine facilities was no tenable.
16. I am advised by my above-stated Advocates on record, which advise I verily believe to be true, that the Petitioners have not exhausted their rights to alternative remedies available under the Access to Information Act No. 31 of 2016, Laws of Kenya which gives the Commission on Administrative Justice the mandate of oversight and enforcement of the Access to Information Act.
17. I do verily believe that, notwithstanding the change of circumstances in the management of Covid-19 patients since March 2020, the Petitioners ought to have exhausted the mechanism provided under the Access to Information Act before resorting to filing the present Petition before this Honourable Court.
18. I am aware that all the information requested by the Petitioners is in the public domain and the Petition is thus unnecessary as the Medical Council has neither withheld nor denied the Petitioners or any person the information it holds.
19. I do believe that I have not violated any of the Constitutional provisions pleaded in the Petition, specifically Articles 35, 10, 232, 33(1)(a) of the Constitution, nor the provisions of Sections 28(4)(b) of the Access to Information Act.
20. I verily believe that the application and the Petition filed herein lacks merit and should therefore be dismissed with costs.

ATTORNEY GENERAL
SHERIA HOUSE
HARAMBEE AVENUE
P.O. BOX 40112-00100
NAIROBI

THE COMMISSION ON ADMINISTRATIVE JUSTICE
2ND FLOOR, WEST END TOWERS
WAIYAKI WAY
P.O. BOX 20414-00200
NAIROBI

COUNCIL OF GOVERNORS
DELTA CORNER, 2ND FLOOR,
WAIYAKI WAY
P.O. BOX 40401-00100
NAIROBI

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS
1ST FLOOR, CVS PLAZA
LENANA ROAD
P.O. BOX 74359-00200
NAIROBI