REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

PETITION NO. E295 OF 2020

JMK.....1ST PETITIONER

AJ.....2ND PETITIONER

KENYA LEGAL AND ETHICAL

ISSUES NETWORK ON HIV/AIDS (KELIN).....3RD PETITIONER

KATIBA INSTITUTE.....4TH PETITIONER

-VERSUS-

KENYATTA UNIVERSITY TEACHING, REFERRAL &

RESEARCH HOSPITAL (KUTRRH).....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

MUTAHI KAGWE CABINET SECRETARY FOR HEALTH.....3RD RESPONDENT

PATRICK AMOTH, AG DIRECTOR GENERAL OF HEALTH.....4TH RESPONDENT

RULING

1. By a notice of motion dated 22nd September, 2020 and supported by the affidavits of JMK, AJ and Allan Maleche of even date, JMK, AJ, Kenya Legal and Ethical Network on HIV/AIDS (KELIN), and Katiba Institute being the respective 1st to 4th petitioners seek orders as follows:

a) Spent

b) Pending hearing and determination of this application, this Court order that the 1st and 2nd applicants/petitioners be granted leave to prosecute the application and the Petition using their initials instead of their full names as prescribed in rule 10(2)(a) of the Constitution of Kenya (protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

c) During these proceedings, the identities of the 1st and 2nd petitioners be concealed in all pleadings, rulings, judgments, court processes, notices as well as in open Court.

d) The identities will only be revealed to the respondents on them entering a signed undertaking to protect the petitioners, which will be filed in Court.

e) Pending hearing and determination of this application and the Petition, the Court issues orders of prohibition restraining the 1st, 3rd and 4th respondents from unlawfully detaining individuals because they are unable to pay the costs of testing, isolation and treatment of COVID-19 incurred in public health facilities.

f) Further to the prayers above, the Court issue such further directions and orders as may be necessary to give effect to its orders.

g) The costs of the application be provided for.

2. The application is grounded on the fact that the 1st Respondent, Kenyatta University Teaching, Referral & Research Hospital (KUTRRH) being designated for isolation and treatment for persons who have tested positive for Covid-19 disease, has unlawfully detained patients who were unable to meet the costs of isolation and treatment.

3. It is additionally averred that the 3rd Respondent, Mutahi Kagwe, Cabinet Secretary for Health and the 4th Respondent, Patrick Amoth, Acting Director General of Health have also placed people in the 1st Respondent's facility even though they have not tested positive for the virus putting their lives at risk.

4. It is the 1st and 2nd petitioners' case that they were taken into the designated government quarantine facility after arriving at the Jomo Kenyatta International Airport on 25th March, 2020 and 20th April, 2020 respectively and they both tested positive for corona virus while in the facility. Thereafter, they were informed by the public health officials that if they chose to be isolated and treated at the 1st Respondent's facility, they would not be required to pay for services there only for the 1st Respondent to act otherwise.

5. The 1st and 2nd petitioners' case is that as a result of their forced detention they have faced extraordinary stigma, firstly from the personnel of the 1st Respondent who did not want to attend to them, and secondly from the public in general and they continue to face victimization. It is therefore their case that if their identity is disclosed, it will lead to further stigma and will result in unnecessary infringement of their constitutional rights.

6. The 2nd Respondent, the Attorney General, who represents all the respondents objected to the application through grounds of opposition dated 12th October, 2020 and a replying affidavit sworn by Dr. Anthony Kamau on 26th October, 2020.

7. The respondents' case is that the applicants have misapprehended the provisions of Rule 10(2)(a) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 ("the Mutunga Rules") and that the prayers sought in the application are permanent in nature and therefore not capable of being granted at an interlocutory stage. Furthermore, they contended that the applicants have failed to prove the requirements for the grant of the equitable remedy of injunction.

8. It was averred by the respondents that no cogent evidence had been placed before the Court to warrant the interference of Court with the right of the 1st Respondent to receive remuneration for services rendered to the public. Further, that withholding the names of the 1st and 2nd petitioners compromise the quality of the respondents' defence. They therefore sought to have the application dismissed with costs to them.

9. The questions for the determination of the Court is whether the 1st and 2nd petitioners should be allowed to conceal their identities and whether an injunction barring the 1st Respondent from detaining Covid-19 patients for non-payment of isolation and treatment expenses should be allowed.

10. The applicants through their joint submissions dated 23rd October, 2020 submit that the main reason they seek the protection of the identities of the 1st and 2nd petitioners in the court documents and the entire proceedings is to protect their rights to privacy regarding their health status and to prevent the continued stigmatization relating to persons who have contracted or are presumed to have contracted the Covid-19 virus. To that end, counsel cited the case of **Joan Akoth Ajuang & another v Michael Owuor Osodo, The Chief Ukwala location & 3 Others; Law Society of Kenya & another [2020] eKLR** as recognizing the stigma attaching to persons infected with the Covid-19 virus.

11. Counsel went on to rely on reports by the World Health Organization, IFRC and UNICEF which detail the social stigma of persons who have recovered from Covid-19 or are presumed to be infected with the virus. The Court was urged to take judicial notice of the fact that the 3rd and 4th respondents have categorically stated that they will not reveal identities of Kenyans who have tested positive for the virus in a bid to protect their privacy. Furthermore, it was submitted that the information relates to medical data which is personal and which information must be protected as was held in **Kenya Legal and Ethical Network on HIV/AIDS (KELIN) & 3 others v Cabinet Secretary, Ministry of Health & 4 others [2016] eKLR.**

12. Counsel further submitted that the courts have allowed petitioners to prosecute petitions under Article 22 of the Constitution using initials in cases involving the right to health. To buttress their arguments, counsel cited the cases of **J.O.O (also known as JM) v Attorney General & 6 others [2018] eKLR; M.A.O & another v Attorney General & 4 others [2015] eKLR; E.M. & others v Attorney General & another, Petition No. 447 of 2018** and **C.M. suing on behalf of P.M (minor) & Katiba Institute v Office of the Attorney General & others** (citation not provided). According to the advocates of the petitioners, the respondents will not be prejudiced in any way if the Court allows the concealment of the identities of the 1st and 2nd petitioners.

13. Through submissions dated 30th October, 2020, the respondents on the other hand submitted that pursuant to Rule 10(2)(a) of the Mutunga Rules, it is a requirement for a petitioner seeking reliefs from this Court to identify themselves appropriately, which according to the respondents, the 1st and 2nd petitioners failed to do in this case. Furthermore, counsel contended that the right to privacy which the 1st and 2nd petitioners seek to protect is already spent as those whom they seek to keep the information from are already aware of their status and the petition herein is not an inquiry of their medical records but rather an inquiry into whether or not their rights have been violated by the respondents. Accordingly, counsel for the respondents submitted that the 1st and 2nd petitioners' affidavits are improperly before this Court and ought to be struck out.

14. One of the requirement of Rule 10(2) of the Mutunga Rules is that a petition should disclose the petitioner's name and address. The question is whether this requirement violates the 1st and 2nd petitioners' right to privacy.

15. I have looked at the petitioners' supporting affidavits. In his affidavit the 2nd Petitioner specifically avers at paragraph 12 that he has already been discharged from the 1st Respondent's facility and is only apprehensive of further stigmatization should his name be disclosed in the petition. I agree with the respondents that this petition is not an inquiry into the medical records of the 1st and 2nd petitioners but an inquiry as to whether or not their rights were violated by the respondents.

16. It is additionally observed that Government has taken noticeable steps to deal with the stigma surrounding patients who have suffered from the deadly virus and in my view Covid-19 no longer carries the stigma it did when the first infection was reported in Kenya. In fact, Kenyans have learnt to live with it and the Government is even encouraging home-based care for asymptomatic patients.

17. It is important to appreciate that even though the 1st and 2nd petitioners are indeed entitled to a protection of privacy, that right is counterbalanced by the respondents' right as litigants to know the "enemy" they are confronting. In other words, the identity of a litigant is very crucial to the other party as it will assist the opposite party to file an adequate defence. There are instances when the identity of the petitioner should indeed be concealed but that should be the exception rather than the norm. For instance, the law provides for the concealment of the identity of children in conflict with the law. This is indeed necessary because of the vulnerability of children.

18. Indeed, the alleged stigma for those infected with Covid-19 disease or suspected to have been infected with the disease is not a sufficient reason for concealing the identity of the 1st and 2nd petitioners. Infection with corona virus disease cannot be equated with infection with HIV/AIDS which is mainly contracted through sexual activity hence the stigma surrounding the disease. I therefore find and hold that the disclosure of the names of the 1st and 2nd petitioners is not likely to prejudice them. If anything, the disclosure of the names of the 1st and 2nd petitioners will assist the respondents to adequately respond to the allegations.

19. Furthermore, the petitioners have not revealed any impending dangers associated with revealing their identities or any prejudice that they are likely to face if their names were known to this Court and the respondents. However, for the avoidance of doubt, that is not to say that the petition is fatally defective and the same can be cured under Article 159(2)(d) of the Constitution.

20. In respect of the prayer for an injunction pending the hearing and determination of the petition, counsel for the applicants submitted that Article 23(3)(c) of the Constitution provides that the Court may grant appropriate reliefs including an injunction for proceedings brought under Article 22 of the Constitution. To that end she cited the case of **Co-operative Bank of Kenya Limited v Government of Nairobi City County [2019] eKLR** which cited with approval the case of **Kenleb Cons. Ltd v New Gatitu Service Station Ltd & another [1990] KLR 557** where Bosire, J (as he then was) stated that to succeed in an application for injunction, an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right which requires protection by injunction.

21. Counsel for the applicants also cited the case of **Abdi Sheikh Idriss v County Government of Garissa & 2 others [2020] eKLR** where the Court highlighted the principles to be considered before issuing a temporary injunction, and further submitted that the petitioners had established a *prima facie* case with a probability of success.

22. On whether there will be irreparable harm which cannot be compensated by way of damages, counsel submitted that if the Court does not issue temporary orders against the 1st, 3rd and 4th respondents, members of the public will continue to face violation of their rights to dignity, health and security especially considering the national rise in numbers of persons testing positive for the virus.

23. On the third limb, counsel submitted that the balance of convenience tilts in favor of the 3rd and 4th petitioners who have brought this suit on behalf of the public who stand to suffer should this Court not find in their favour.

24. The respondents on their part contended that the injunctive orders sought by the applicants are final in nature which ought not to be granted at this juncture. To that end, counsel relied on the case of **Kenya Power & Lightning Company v Samuel Mandere Ogeto [2017] eKLR,** which cited with approval the case of **Kenya Breweries Limited & another v Washington O. Okeya [2002] eKLR** where the Court of Appeal held that a mandatory injunction ought not to be granted in an interlocutory application in the absence of special circumstances. He also cited the case of **Nation Media Group & 2 others v John Harun Mwau [2014] eKLR** where the Court was of a similar view.

25. It was counsel's submission that the 1st and 2nd petitioners failed to clearly identify themselves and their inability to pay their medical bills with regard to Covid-19. Furthermore, the grant of orders sought by the petitioners would have the effect of discriminating against the general public who have paid and continue to pay for services in public health facilities. Accordingly, it was submitted that the petitioners have not demonstrated any special circumstances for the grant of the orders sought. Further, that in any event the 1st Respondent has demonstrated that all persons visiting their institution for medical attention have payment options available to them and are not at risk of detention for failure to pay their bills at the point of discharge.

26. It was additionally submitted that a cursory look at the pleadings indicate that the orders sought in the application are the same as those sought in the petition and granting of the orders sought in the application will have the effect of determining the entire petition. Further, that the application does not meet the threshold for grant of interlocutory relief as established in the cases of **East Africa Industries Ltd v Trufoods [1972] EA 420** and **Giella v Cassman Brown & Co. Ltd [1973] EA 358** and ought to be dismissed with costs.

27. Article 23 as read with the Article 165 of the Constitution and Rule 23 of the Mutunga Rules, 2013, clearly grants this Court powers to hear and determine an application for conservatory orders or interim orders in order to secure the subject matter in dispute.

28. The principles in regard to the granting of interim or conservatory orders were outlined by the Supreme Court in the case of ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, Supreme Court Application No. 5 of 2014 (2014) eKLR*** as follows:

> **"[86] "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."**

29. The principles guiding the grant of conservatory orders were restated in the case of **Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae) [2019] eKLR** where the Court observed that:

> **"In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether, to grant or deny a conservatory order.**
>
> **We are also guided by the principle that in determining whether or not to grant conservatory orders, the Court must bear in mind that it is not required to enter into a detailed analysis of the facts and the law."**

30. Applying the above principles and considering the facts of the subject matter, it is apparently clear that the orders sought in the application are similar to those sought in the petition. At this stage I am alive to the fact that this Court is not supposed to examine the merits of the petition but need only consider if the petitioners have established a *prima facie* case to warrant interim orders in order to secure the substratum of the suit so as not to render the petition nugatory and its determination a mere academic exercise.

31. In my view, the orders sought are final in nature and it is only fair and just that the parties' arguments be heard before such orders can be issued. It is also observed that apart from the 1st and 2nd petitioners, no list of names or even a name of patient detained by the 1st Respondent has been exhibited. Conservatory orders, in my view, should be issued to take care of an identifiable risk to constitutional rights and fundamental freedoms. The claim that the 1st Respondent is detaining those unable to pay bills in respect of isolation and treatment for the Covid-19 disease is therefore not backed by sufficient evidence that would spur this Court to reach into its quiver and withdraw an arrow to shoot down a violation of rights. That is not to say that the petition does not raise arguable issues. I am only saying that the issuance of orders as sought by the petitioners is not proportionate to the financial damage that will result if public health facilities are told not to collect isolation and treatment fees from Covid-19 patients.

32. For the stated reasons, I find the application dated 22nd September, 2020 without merit in its entirety and the same is dismissed. The issue of costs shall abide the outcome of the petition.

Dated, signed and delivered virtually at Nairobi this 17th December, 2020.

W. Korir,

Judge of the High Court