

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 484 OF 2017

In the matter of a Petition under Articles 22 and 23 of the constitution of Kenya
and

In the matter of infringement of Fundamental Freedoms and Rights of the Petitioner as enshrined
under Articles 24, 27, 28, 29, 39 and 50 of the Constitution of Kenya

BETWEEN

Stephen Wannjau Karanja..... Petitioner

versus

The Nairobi Women's Hospital Limited..... Respondent

JUDGMENT

The petitioners case

1. The Petitioners son the late Jeff Karanja (herein after referred to as the deceased) died in June 2017 at the Respondents Hospital. At the time of his death the Medical Bill had accumulated to **Ksh. 4,828, 722.12**. The Petitioner avers that a fund raising only raised **Ksh. 50,000/=** which he paid on 5th August 2017.

2. The Petitioner avers that the Respondent has refused to release the deceased's remains in violation of his rights under Articles **24, 27, 28** and **29** of the Constitution. He prays that the Court declares the refusal as unconstitutional; that he is not liable to pay further mortuary fees as a result of the detention; and a mandatory injunction compelling the Respondent to release the deceased's remains.

Respondents Reply to the Petition

3. The Respondents' response is contained in the Replying Affidavit of Reuben Waweru, the Respondents Chief Finance Officer. He avers that the Petitioner's son was critically ill at the time of admission at their facility and was in need of ICU services; that at the time of admission, the applicant executed an undertaking; the hospital policy is not to turn away any patient on account of lack of admission fees and in emergency cases requiring ICU services as was the case at hand, no fees is demanded before admission as alleged by the Petitioner and that the only amount paid to the hospital was **Ksh. 50,000/=** paid on 5th August 2017.

4. He further avers that during the treatment period, the Hospital constantly updated the Petitioner on all clinical management of the deceased and the status of the bills and in return the Petitioner continued to assure the Hospital that the Bill would be paid in full. Further, upon the demise of the deceased, meetings were held with a view of finding a way of settling the bill and sought for a payment proposal. In return, the Petitioner made commitments including stating that fundraisings were being conducted and a pay bill

number had been created but no payments were made as promised.

5. Further, instead of coming up with a repayment proposal, the applicant served them with a demand letter from his advocates. He also avers that the Petitioner declined a proposal to transfer the patient to another hospital to save on the costs promising to pay the bill.

6. He further avers that the Respondent has incurred substantial costs on medicine, laboratory, imaging, doctors time, nursing only to mention but some amounting to **Ksh. 4,828,722.12** and that at no point did the applicant contest the bill.

Submissions

7. In his submissions, the Petitioner's counsel cited several authorities in support of the proposition that there is no property in a dead body and that the same cannot be used as a collateral pay a debt^[1] and that the Respondent is not entitled to detain the deceased's body over a debt.

8. The Respondents counsel submitted that Article 22 does not confer rights to dead persons and in any event, if such rights existed, the Petitioner would require letters of administration which he lacks and that the Petitioner has declined to take out letters of administration to avoid paying the debt; that the outstanding bill was incurred in good faith and urged the court to balance the Rights of the Respondent the petitioner.

Analysis of the authorities cited

9. *I have carefully read all the authorities by the Petitioners' Counsel. With respect, all of them are irrelevant and of no help to the Petitioners case. This will be evident upon examining each decision, which I proceed to do below.*

10. *Counsel cited two Court of Appeal decisions, namely Sakina Sote Kaitanny vs Mary Wamaitha and Apeli vs Buluku^[2] and the High Court decision of Jacob Blasto Okumu & Others vs Claris Auma.^[3] All these cases involved burial disputes between feuding family members, fighting who should bury the deceased, hence they have no relevance to the present case.*

11. Also cited is the case of *Ruth Wanjiru Njoroge vs Jemimah Njeri Njoroge & Another.^[4]* This was a ruling in a burial dispute between family members. The ruling prevented the respondents in the case from claiming the body. It is also irrelevant to the case before me.

12. The only relevant case is the decision by Waki J (as he then was) in *Ludidi Venant & Another vs Pandya Memorial Hospital^[5]* in which Waki J issued a mandatory injunction subject to the Plaintiffs filing an undertaking to pay damages limited to **Ksh. 600,000/=**. The order was conditional upon an amount equivalent to the bill being deposited. No undertaking has been offered in the present case. To me, the learned judge was conscious of the nature of the case before him and he balanced the interests of both parties. This case is of no help to the Petitioners case.

13. Also cited is the case of *Mary Nyang'anyi Nyaigero & Ano vs The Karen Hosp Lt & Another.^[6]* This was a ruling on an interlocutory application not a final judgment after determination of merits. No judgment has been exhibited to show what happened thereafter, especially whether the bill was paid. In any case the ruling is not binding to this court.

14. The Petitioners counsel also cited *Christine Kidha vs NBI Womens' Hospital.^[7]* This case involved detention of a patient not a dead body. Another decision cited is *Isaac Nguji vs Nairobi Hospital & 3 Others.^[8]* In this case, the deceased's body was released upon terms of payment and orders were made to that effect and a claim for damages for detention before death was dismissed. Hence, its of no help to the Petitioner's case.

15. Clearly, all the cited cases have no precedential value to this case. In any event, it is settled law that a

case is only an authority for what it decides. This was correctly observed in *State of Orissa vs. Sudhansu Sekhar Misra* where it was held:-[9]

*"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury, LC said in *Quinn vs. Leatham*, [10] that "Now before discussing the case of *Allen vs. Flood* [11] and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides..." (Emphasis added)*

16. The ratio of any decision must be understood in the background of the facts of the particular case.[12] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.[13] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[14]

17. I have in several decisions stated that each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[15] In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[16] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[17] My plea is to keep the path of justice clear of obstructions which could impede it.

Whether this Petition raises constitutional questions

18. The Petitioner has submitted authorities which are all in agreement that there are no rights in a dead body. In my view, this dispute ought to have been filed in the Civil division. There are no constitutional issues at all in this Petition.

19. A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.[18] I am not satisfied that the issues herein raise a constitutional question at all. As stated above, there is an outstanding bill. It is not disputed that the services were rendered. The Petitioner has annexed a detailed bill in the Petition. He has refused to make a proposal to pay. He wants an unconditional release of the body. He seeks a mandatory injunction. At the time of admission he signed an undertaking to pay.

20. When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values.[19]

21. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others* [20] in which Justice O'Regan recalling the Constitutional Court's observations in *S vs. Boesak* [21] notes that:-

"The Constitution provides no definition of "constitutional matter." What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions ofthe Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport

and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.” [22]

22. Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation. [23] At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Therefore the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organize an analysis of the nature of constitutional matters arising from the cases before the Court.

23. The Petition before me does not raise any constitutional questions at all. This court abhors the practice of parties converting every issue in to a constitutional question and filing suits disguised as constitutional Petitions when in fact they do not fall anywhere close to violation to constitutional Rights.

Whether the Petitioner is entitled to the reliefs sought

24. The Petitioner seeks a declaration that refusing to release the remains of the deceased on account of the unpaid bill is unconstitutional. I have already held above that this Petition does not raise Constitutional issues at all. That alone disposes the issue of violation of alleged Rights.

25. It is trite law that a party alleging violation of Constitutional Rights must particularize the rights alleged to have been violated with sufficient clarity. This has not been done in this Petition. The provisions of the Constitution alleged to have been violated are Article 27 on Equality of Freedom from Discrimination, Article 28 of Human Dignity and 29 on freedom and security of the person.

26. There is nothing in this Petition to link even remotely, the issues raised in this Petition with the above Articles. Article 27 of the Constitution guarantees Equality and Freedom from discrimination. Failure to pay a lawfully incurred hospital Bill and a request that the Bill be paid or an acceptable proposal be submitted cannot by any stretch of imagination amount to an act of discrimination.

27. In *Willis vs The United Kingdom* [24] the European Court of Human Rights observed that discrimination means treating differently, without any objective and reasonable justification, persons in similar situations.

“...a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society”. (See *Andrews vs Law Society of British Columbia* [1989] 1 SCR 143, as per McIntyre J.)

28. From the above definition, it is safe to state that the Constitution prohibits unfair discrimination. In my view, unfair discrimination is differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization.

29. Articles 28 and 29 have also been invoked. These deal with Human Dignity and Freedom of Security of the Person. The provisions of Articles 28 & 29 (a) to (f) of the Constitution refer to the living not the dead and have no relevancy to this case. The Petitioner has not shown how his Dignity and Freedom and Security has been violated nor can he invoke such provisions to evade a lawful debt.

30. The Petitioner also seeks a Mandatory injunction. A **Mandatory injunction** is an **injunction** which orders a party or requires a party to do an affirmative act or mandates a specified course of conduct. It is

an extraordinary remedial process which is granted not as a matter of right, but in the exercise of sound **judicial** discretion.

31. The grant of the orders of injunction is discretionary. The court is entitled to take into account the nature of the case, the facts of the case and the conduct of the party. On record is a letter by the Petitioners Advocate asking for a breakdown of the Bill yet before the said letter the same Petitioner has exhibited a detailed tabulated Bill suggesting that he has in his custody the entire Bill.

32. Courts of law exist to administer justice and in so doing they must balance between competing rights and interests of different parties but within the confines of law, to ensure the ends of justice are met. [25]

33. Granting the orders sought in this Petition on the strength of the material and circumstances disclosed in this Petition, would, in my view amount to *being obsessed with the protection of a person who has lawfully incurred a Bill by allowing sympathy to shut our eyes in total disregard of the position of the Respondent who professionally and in good faith rendered services to a patient and in the process incurred an enormous cost which the Petitioner himself undertook to pay at the time the patient was admitted. This would amount to flirting with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion.*

34. *The Petitioner has invoked public interest arguing that it is in public interest that the dead be buried. Since time immemorial, it has been said over and over again that public interest is an unruly horse. When you ride it, you never know where it will take you. It can take you to the sea or desert or on fertile land. Public interest changes with time and circumstances, it is always in flux and largely depends on who defines it. It is debatable whether it is objective or subjective. It can never be precisely defined, visibly identified or vividly noticeable.* [26]

35. Public policy remains likened to an "unruly horse" which may lead us from sound law. In 1824, in *Richardson vs Mellish*, [27] an English Judge (Burrough J) expressed the metaphor often since repeated, when counseling against reliance of public police, that:-

"...it is a very unruly horse, and when you astride it you never know where it will carry you...it is never argued at all but when other points fail."

36. Public policy concerns the body of principles that underpin the operation of legal systems in each state. This addresses the social, moral and economic values that tie a society together: values that vary in different cultures and change over time. Law regulates behaviour either to reinforce existing social expectations or to encourage constructive change, and laws are most likely to be effective when they are consistent with the most generally accepted societal norms and reflect the collective morality of the society.

37. There can never be public policy in using court processes to abet breach of a person's obligations to pay lawfully incurred debts. I can only emphasize that nothing would serve public interest better than ensuring that all citizens adhere to the law and in particular only approach the court when they have justiciable claims but not to use court processes to evade their legal obligations.

38. It is clear from the Respondents response that they have severally invited the Petitioner to offer a payment proposal, but instead they were served with a demand letter from the Petitioners Advocates followed by this Petition.

39. *In view of my analysis herein above, the conclusion becomes irresistible, that this Petition has no merits and that the same is an attempt to misuse this court to evade a lawfully incurred debt which to me is a gross abuse of court process. Consequently, I dismiss this Petition with no orders as to costs.*

Orders accordingly

Signed, Dated and Delivered at Nairobi this 29th day of November

2017

John M. Mativo

Judge

[1] Counsel cited Sakina Sote Kaitany & Another vs Mary Wamaitha {1995}eKLR, Apeli vs Buluku, Kisumu Civil Appeal N. 12 of 1979 {1980}eKLR, Ludindi Venant & Another vs Pandya Memorial Hospital {1998} eKLR, Mary Nyang'anyi Nyaigero & Another vs Karen Hospital Limited & Another {2016}eKLR & Jacob Blasto Okumu & 4 Others vs Claris Auma {2014}eKLR

[2] Ibid

[3] Supra Note 1

[4] {2004}eKLR

[5] Supra note 1

[6] Supra Note 1

[7] {2016}eKLR

[8]{2013}eKLR

[9] MANU/SC/0047/1967

[10] {1901} AC 495

[11] {1898} AC 1

[12] Ambica Quarry Works vs. State of Gujarat and Ors. MANU/SC/0049/1986

[13] Ibid

[14] Bhavnagar University v. Palitana Sugar Mills Pvt Ltd (2003) 2 SC 111 (vide para 59)

[15] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, Prashant Vats Versus University of Delhi & Anr. (Citing Lord Denning).

[16] Ibid

[17] Ibid

[18]<http://www.yourdictionary.com/constitutional-question>

[19]Justice Langa in Minister of Safety & Security v Luiters, {2007} 28 ILJ 133 (CC)

[20] {2002} 23 ILJ 81 (CC)

[21] {2001} (1) SA 912 (CC)

[22] 2001 (1) SA 912 (CC)

[23] Supra note 5 at paragraph 23

[\[24\]](#) **No. 36042/97, ECHR 2002 – IV**

[\[25\]](#) **Musinga JA** in Equity Bank vs West Link MBO Limited, Civil App No. 78 of 2011

[\[26\]](#) Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others [2017] eKLR

[\[27\]](#) {1824} 2 Bing 229, 252 (Dixon J), {1824–1834} All ER 258, 266.