



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 606 OF 2014

L.A.W.....1ST PETITIONER

KENYA LEGAL & ETHICAL ISSUES NETWORK

ON HIV & AIDS (KELIN).....2ND PETITIONER

AFRICAN GENDER & MEDIA

INITIATIVE TRUST (GEM).....3RD PETITIONER

VERSUS

MARURA MATERNITY NURSING HOME.....1ST RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER IN CHARGE

OF HEALTH SERVICES (NAIROBI COUNTY).....2ND RESPONDENT

CABINET SECRETARY MINISTRY OF HEALTH.....3RD RESPONDENT

RULING

Introduction

1. The petitioners in this matter challenge the constitutionality and lawfulness of sterilization of L.A.W, the 1st petitioner, a woman living with HIV. They allege that L.A.W underwent a procedure medically known as bilateral tubal ligation at Marura Maternity and Nursing Home, the 1st respondent. She alleges that the procedure was done without her informed consent, and that it was therefore unconstitutional and a violation of her reproductive health rights.

2. Two applications were then filed seeking joinder of parties to the proceedings. The first is by the 1st respondent, **Marura Maternity and Nursing Home**, seeking to join **Price Water House Coopers (PWC)** and **OBA-RH** in the proceedings as interested parties on the basis that it would be seeking contribution from them should an order be made against it. The second application is by **Professor Alicia Ely Yamin** who seeks to be enjoined as an *amicus curiae*. This ruling relates to both applications.

Application by Marura Maternity and Nursing Home

3. In its application dated 13th April, 2015, the 1st respondent seeks to have PWC and OBA-RH enjoined in the proceedings as interested parties. Its application is based on the grounds that:

- a. The 1st respondent with respect to the subject matter herein acted as an independent contractor of the intended interested parties.*
- b. The 1st petitioner approached the 1st respondent based on advice and assessment of the intended interested parties.*
- c. The 1st respondent will seek indemnity and/or contribution from the intended interested parties for any monies that may be found to be due from the 1st respondent to the petitioners.*
- d. It is in the interest of justice that the intended interested parties be joined to facilitate the final and effectual determination of the issues arising in the instant petition.*

4. The application is supported by an affidavit sworn on the 1st respondent's behalf by its Director, Sophia Wanjiku. In the said affidavit, Ms Wanjiku avers that the 1st respondent properly claims indemnity and contribution from the intended interested parties, the basis of its claim being that it has been sued as a consequence of its attempt to exercise its obligations under a contract with the intended interested parties. Her contention is that the issues to be resolved between the 1st respondent and the intended interested parties are substantially the same issues arising between the petitioners and the 1st respondent. She therefore urges the court to allow the application and join PWC and OBA-RH as interested parties.

5. PWC filed Grounds of Opposition dated 23rd July, 2015 as follows:

- 1. The petition makes no allegation of any infringement or violation of the petitioners' rights by it.*
- 2. The 1st respondent has not filed any cross-petition or shown precisely what provision of the Constitution has been infringed by it that would in turn violate the 1st respondent's constitutional rights.*
- 3. The 1st respondent has also failed to plead any particulars of such infringement as required for a case to meet the constitutional threshold.*
- 4. The 1st respondent has no basis in law to apply to join a third party in a petition for a party may only be joined as an interested party by filing such an application itself or if the court joins such party on its own motion.*
- 5. It has not been shown that it has an identifiable legal interest or duty in these proceedings.*
- 6. Its presence is not necessary for the court to adjudicate on the constitutional claims as between the petitioners and the respondents or to decide on whether the 1st respondent breached the petitioner's constitutional rights.*
- 7. The respondent's application is therefore bad in law, an abuse of the court process and ought to be dismissed with costs to it.*

6. In his submissions in support of the application, Mr. Ojienda for the applicant submitted that there was an agreement dated 1st August, 2006 between the 1st respondent and PWC, which was also the Project Manager of OBA – RH, which agreement is the foundation of the instant petition. The said agreement has defined roles of each party to it and creates a chain in which the 1st respondent is the last in the chain.

9. It was his submission that if any liability is found against the 1st respondent, it cannot shoulder it alone and would seek contribution of the main parties to the contract, or indemnity from the other parties, hence the current application.

8. In response, Mr Gachuhi, Counsel for PWC and OBA-RH submitted that there is no provision under **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the Mutunga Rules)** for the 1st respondent to seek to join a third party from which it is claiming contribution or indemnity. Counsel argued that there is good reason for this as Article 22 deals with infringement of fundamental rights and not contractual obligations.

9. Accordingly, it was Counsel's argument that the only way that PWC would have been brought in is if it applied to be joined under rule 7(1), or if it was joined by the Court *suo moto* under rule 7(2). As none of these two options were at issue here, Counsel urged that the application be dismissed as no violation of constitutional rights by PWC have been pleaded.

10. Counsel further observed that the 1st respondent has not pleaded violation of its constitutional rights by PWC. If its rights have been violated under the contract, then that is a contractual obligation in respect of which the 1st respondent has a remedy in a civil court.

11. Counsel for the State, Mr. Njoroge, also opposed the application for joinder of PWC and OBA – RH. His submission was that the issue between the 1st respondent and the proposed interested parties can be dealt with in a different forum. In his view for good order and for purpose of expedition the issues should be dealt with separately.

Application by Professor Alicia Ely Yamin

12. Prof. Yamin filed an application dated 22nd October, 2015, supported by her affidavit of the same date, in which she seeks to be joined as a friend of the Court. Prof. Yamin, the Policy Director of the Francois-Xavier Bagnoud Centre for Health and Human Rights, describes herself as a globally-recognized leader in the field of health and human rights in which she has worked since completing a Master of Public Health degree at what is now the Harvard T.H Chan School of Public Health in 1996.

13. She outlines her various qualifications and publications, and avers that she has experience advising courts and other government entities, as well as international bodies and UN agencies, on human rights issues such as those raised in the present case. It is also her averment that she is the only non-Kenyan appointed by the Constitutional Implementation Committee of Kenya on its oversight committee regarding activities to implement health rights. It is her averment that she therefore brings particular expertise to this matter.

14. In written submissions dated 9th November, 2015 filed on her behalf, it is submitted that she meets the requirements outlined in the law regarding the joinder of an amicus curiae, citing in this regard the decision in **Justice Philip K. Tunoi and Another vs Judicial Service Commission and 2 Others, Petition No 244 of 2014**.

15. Learned State Counsel, Mr. Njoroge, opposed the joinder of Ms. Yamin as an amicus curiae. His submission was that an individual should not be joined as an amicus, only institutions should. He also undertook to file written submissions in opposition to the joinder by the 24th of November 2015. However, despite reminders by the Court through its Clerk, no submissions were filed on behalf of the 3rd respondent against the joinder of the amicus.

The Applicable Law

16. The applications before me seek answers to two fairly straight forward issues: whether PWC and OBA – RH should be joined as interested parties for the purpose of the 1st respondent claiming indemnity

from them, based on a contract between them. The second is whether Prof. Yamin should be joined as a friend of the court.

17. **(The Mutunga Rules)** make various provisions with respect to parties to constitutional petitions, and with regard to whom may be joined as an interested party or as a friend of the Court. It also contains definitions at section 2 thereof.

18. A friend of the court is defined as “*an independent and impartial expert on an issue which is the subject matter of proceedings but is not party to the case and serves to benefit the court with their expertise,*” while an interested party is defined as “*a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.*”

19. With respect to joinder of amicus curiae, rule 6 provides that:

a. The Court may allow any person with expertise in a particular issue which is before the Court to appear as a friend of the Court.

b. Leave to appear as a friend of the Court may be granted to any person on application orally or in writing.

c. The Court may on its own motion request a person with expertise to appear as a friend of the Court in proceedings before it.

20. Rule 7 provides as follows with respect to joinder of interested parties:

1. A person, with leave of the Court, may make an oral or written application to be joined as an interested party.

2. A court may on its own motion join any interested party to the proceedings before it.

21. In its decision in **Trusted Society of Human Rights Alliance vs Mumo Matemu and 5 Others, Petition No. 12 of 2013** the Supreme Court addressed the question of who an amicus and an interested party are and their role. The court opined as follows:

[16] ... An amicus ought not to be partisan. This is a ‘neutral’ party admitted into the proceedings so as to aid the Court in reaching an ‘informed’ decision, either way.

[17] Suffice it to say that while an interested party has a ‘stake/interest’ directly in the case, an amicus’s interest is its ‘fidelity’ to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.

[18] Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. On the other hand, an amicus is only interested in the Court making a decision of professional integrity. An amicus has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a ‘friend’ of the Court, his cause is to ensure that a legal and legitimate decision is achieved.”

22. In **Judicial Service Commission vs Speaker of the National Assembly and Another (2013) eKLR**, the Court, referring to the definition of an interested party under **the Mutunga Rules** as defined above stated that:-

“From the foregoing it is clear that an interested party as opposed to an amicus curiae or a friend of the court may not be wholly indifferent to the outcome of the proceedings in question. He is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non-partisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings.”

Amicus curiae on the other hand is defined as “an expert on an issue which is the subject matter of proceedings but is not a party to the case and serves to benefit the court with their expertise.” Amicus curiae is therefore a person who shows that he is possessed of some expertise relevant to the matters for determination before the court. Such a person as is expected of experts is required to be non-partisan and his role is meant to enable the court get a clearer picture of the issues in dispute in order for the court to arrive at an informed and just decision.”

23. With the above definitions and judicial pronouncements in mind, I now turn to consider the two applications before me.

24. The application for joinder of Prof. Alicia Ely Yamin is fairly straight forward and can be easily disposed of. On the submissions before me, there is no dispute about her qualifications and expertise. It is a well settled position of law that an amicus curiae is a friend of the Court who brings his/her expertise on board, who ought to be neutral and non-partisan. The only objection that I heard with respect to the joinder of the applicant was that she is an individual, as opposed to an institution. As observed in her written submissions, however, this is a somewhat lame complaint. The rules allow the joinder of a “person”, and a person includes a natural or juristic person. Further, there is already precedent for joinder of an individual as friend of the court in light of his qualifications.

25. In the case of **Patricia Asero Ochieng and 3 Others vs Attorney General, Petition No 409 of 2009** the Court joined **Mr. Anand Grover**, the then Special Rapporteur on the Right to Health, as a friend of the court in light of his expertise in the area. I have therefore no hesitation, in the present case, in allowing the application for joinder of Professor Alicia Ely Yamin as a friend of the court.

26. With regard to the application for joinder of PWC and OBA – RH, I note that they have not applied for joinder under rule 7 of the Mutunga Rules, nor has the Court deemed their participation necessary and therefore joined them to the petition. The 1st respondent argues that it had a contractual relationship with PWC, which was also the project manager of the programme under which the petitioners allege the violation of the constitutional rights of the 1st petitioner took place. The 1st respondent seeks their joinder primarily because it claims indemnity from PWC for any monies that may be found to be due from it to the petitioners.

27. As I understand it, the 1st respondent seeks to have the Court apply the concept of third-party proceedings against PWC and OBA-RH. Given that this is a constitutional petition in which the petitioners seek vindication of the constitutional rights of the 1st petitioner, which were allegedly violated by the 1st respondent, its application implies that its case would be that if it violated the rights of the petitioner, then such violation can be laid at the feet of the proposed interested parties, which somehow induced it to commit such violation. The question is whether third-party proceedings are possible in constitutional litigation.

28. The concept of third-party proceedings is recognized in the area of civil litigation, and is provided for under Order 1 Rule 15 of the Civil Procedure Rules as follows:

“15 (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)-

a. That he is entitled to contribution or indemnity; or

b. That he is entitled to any relief or remedy relating to or connected with the original

subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

c. That any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and defendant but as between the plaintiff and defendant and the third party or between any or either of them he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.”

29. No authorities were placed before the Court to support the applicability of third party proceedings in constitutional litigation. In the present case, the 1st respondent’s claim is based on a contract between it and the proposed interested party, and on the basis of the material before me, I am unable to see how a claim of constitutional violation can give rise to a claim for indemnity under a contract. At the very least, the applicant should have placed before the Court material on the basis of which it could conclude that a party has been induced, under a contractual relationship, to commit a constitutional violation. I therefore decline to allow the application for joinder of PWC and OBA-RH as interested parties.

30. The upshot is that the application by the 1st respondent is dismissed, and the application of Professor Alicia Elly Yamin to be joined as a friend of the court allowed.

31. Each party shall bear its own costs of the applications.

Dated, Delivered and Signed at Nairobi this 28th day of January 2016

MUMBI NGUGI

JUDGE