



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kinoru v Labib Hospital (Petition E512 of 2021)  
[2025] KEHC 209 (KLR) (Civ) (22 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 209 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**PETITION E512 OF 2021**

**LN MUGAMBI, J**

**JANUARY 22, 2025**

**BETWEEN**

**HERMAN KAMAU KINORU ..... PETITIONER**

**AND**

**THE LABIB HOSPITAL ..... RESPONDENT**

**JUDGMENT**

1. The Petition dated 1<sup>st</sup> day of December, 2021 is supported by the affidavit of Herman Kamau Kinoru sworn on the same date.
2. The gist of the Petitioner's grievance against the Respondent is that the Petitioner was unlawfully detained in hospital by the respondent for more than two months from the date he was due for discharge so as to compel him to pay the outstanding medical bill.
3. The Petitioner deponed that he was admitted in the Respondent's hospital on the 24<sup>th</sup> August, 2021 and was treated until 24<sup>th</sup> September, 2021 when he was ready for discharge. He paid Kshs. 764, 200 against a demand of Kshs.3,098,920 as at 15<sup>th</sup> November, 2021 but he was not discharged. Instead, he continued to be detained as the bill went on accumulating on a daily basis.
4. The Petitioner contended his constitutional rights and freedoms, notably, the right to inherent dignity, freedom and security of the person and the right to freedom of movement under Articles 28, 29 and 39 of *the Constitution* were violated by the Respondent's alleged action. He sought the following reliefs:
  - a. A declaration that the actions of the Respondent amount to an infringement of the rights under Articles 27, 28, 29 and 39 of *the Constitution* of Kenya (2010).
  - b. A permanent injunction to restrain the Respondent from continuing or proceeding with the unlawful detention and incarceration of the Petitioner.



- c. An order compelling the Respondent to unconditionally release the Petitioner from the unlawful detention.
- d. An order for award of compensation for the violation of the Petitioner's fundamental human rights.
- e. General damages for false imprisonment and loss of earning capacity during incarceration and unlawful detention.
- f. Exemplary damages for false imprisonment.
- g. Cost be awarded to the Petitioner.

### **Petitioner's Case**

5. The Petitioner stated that on 24<sup>th</sup> August, 2021 he developed breathing complications which prompted him to be taken to the Respondent's Hospital where he was admitted and treated until 24<sup>th</sup> September 2021 when he was due for discharge. He paid Kshs.764,200/- out of total hospital bill of Kshs.3,098,920/- as at 15<sup>th</sup> November, 2021 but the Respondent did not let him go. He continued to detain him against his will in the hospital facility as a way of coercing him to pay the unsettled amount which kept on increasing. The Petitioner faults the Respondent for violating his rights and fundamental freedom in the Bill of Rights from the 24<sup>th</sup> September, 2021 up to the time of filing of this Petition, which was a period of almost two months of illegal detention.
6. He stated that he suffered ridicule and embarrassment from this incident as family members and the society knew he was being detained by the Respondent for his inability to pay the Respondent's hefty but disputed medical bill. He contended that the experience subjected him to psychological torture. Further, that the petitioner is the sole breadwinner of his family and the illegal detention subjected him and his entire family to financial and psychological trauma and torture. Additionally, the act of confining him deprived his freedom of movement against his will.
7. Furthermore, the Petitioner stated that he suffered loss of income due to illegal detention for more than two months as it made it difficult for him to resume his carpentry business that would have enabled him to raise the outstanding bill.

### **Respondent's Case**

8. The Respondent through the C.M.O Advocates filed a Notice of Preliminary Objection dated 15<sup>th</sup> December, 2021.
9. The Preliminary Objection however directed at the Petitioner's Notice of Motion Application dated 1/12/2021 that had been filed together with the Petition. The grounds of the Notice of the Preliminary Objection plainly disclose that was the overriding aim of the Preliminary Objection. They stated thus:
  - i. The Application falls short of the doctrine of res sub-judice under Section 6 of the *Civil Procedure Act* as there is a suit on the same subject matter pending determination under MCCC No. E12645 of 2021
  - ii. The Application is an abuse of the process Court
  - iii. The Petition should be struck out with costs to the Petitioner
10. A preliminary objection such as the one above is defective in substance it for failing to meet the legal threshold required of a preliminary objection as laid down in Mukisa Biscuit Manufacturing Co. Ltd



v West End Distributors Ltd (1969) EA 69 which has received innumerable approvals subsequent authorities including by the Supreme Court in Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others (2014) eKLR where it was held as follows:

31. To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors (1969) EA 696:“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.
11. Highlighting the juridical value of Preliminary Objections, the Supreme Court in Independent Electoral & Boundaries Commission v Cheperenger & 2 others (Civil Application 36 of 2014) [2015] KESC 2 (KLR) (15 December 2015) (Ruling): stated:
    21. The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection— against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits... In the instant matter, we consider the objector to have moved her motion, more as a sword than a shield. Such a course is not to be permitted, as it is apt to occasion an injustice to the applicant, and indeed, to the wider public interest.”
  12. To summarize therefore, a prim preliminary objection must have the following essential elements:
    - a. if argued successfully, a preliminary objection should be capable of disposing of the suit.
    - b. is argued on the assumption that all the facts pleaded by the other side are correct
    - c. It cannot be raised if any fact has to be ascertained
    - d. It cannot be if what is sought is the exercise of judicial discretion.
  13. The P.O by the Respondent was flawed for training its guns on an application instead of the entire suit. Indeed, it possibly the reason why the subsequent events led to its end without any judicial consideration.
  14. On 31/10/2022; when the matter came up before Hon. Lady Justice Ong’udi; Mr. Ligami holding brief for Mr. Wangai for the Petitioner and Mr. Otieno was appearing for the Respondent. Mr. Ligami withdrew the Notice of Motion that was the target of the Preliminary Objection leaving Mr. Otieno with no option but to inform the Judge as follows:

Mr. Otieno:

“The P.O has been overtaken by events. Let it be withdrawn”



And the Court ordered accepted the plea thus:

“The Application dated 2/12/2021 and the P.O. dated 15/12/2021 are both withdrawn by the Parties. Costs to be in the cause.”

15. Thereafter, the Court proceeded gave directions on the main Petition. It allowed the Respondent to file and serve its response within 21 days and submissions were to be exchanged within 40 days.
16. The Respondent neither filed its response nor submissions as directed. This matter was assigned to this Court by Justice Ong’udi, (then Presiding Judge of this Division) on 26/4/2023. It was mentioned before me for the first time on 4/7/2023. The Respondent did not attend Court. I granted 10 days to the Respondent to comply in addition to ordering that it be served with the mention notice for 17/7/2023. None of the parties appeared on the scheduled mention date of 17/7/2023. The matter came up again on 5/10/2023 where Mr. Mbeyo appeared for the Petitioner but there was no appearance for the Respondent. Mr. Mbeyo confirmed that the Petitioner had filed submissions and had served the Respondent and filed an affidavit of service sworn on 4/10/2023. The Court observed that the mention notice served on the Respondent did not indicate the date of mention and ordered a further mention on 22/11/2023. It ordered the Petitioner’s Advocate to serve and file a comprehensive affidavit of service.
17. The matter was eventually mentioned on 8<sup>th</sup> July, 2024 when Mr. Marubu for the Petitioner appeared and indicated that the Respondent had neither bothered to file a response nor submissions despite being served with Petitioner’s submissions.
18. The Court eventually closed the case and fixed this Petition for judgment.
19. The long and short of the above chronicle is that the Respondent, despite never bothered to put any response or file closing submissions to this Petition. Even its earlier halfhearted attempt in filing a Preliminary Objection was a nonstarter.
20. The instant Petition what I would thus aptly describe as a soliloquy.

### **Petitioners Submissions**

21. The Petitioner began his submissions by underscoring the fact that the Petition is not opposed which point he reiterated in his concluding remarks. He asserted that he was detained at the hospital against his will for more than five months. He thus identified two issues for determination:
  - a. Whether the Petitioner was unlawfully detained by the Respondent on account of a contractual debt and;
  - b. Whether the Petitioner is entitled to award of compensation for the unlawful detention
22. He argued that his detention by the Respondent from 24<sup>th</sup> September 2021 amounted to inhuman and degrading treatment because the Respondent was only selfishly interested with the payment of the hospital bill without being mindful of the social and psychological effects the unlawful detention had on the Petitioner. He argued that his right to human dignity under Article 28 of *the Constitution* was violated.
23. He contended that Article 29 of *the Constitution* protects the right to freedom and security of every person and this includes the right not to be deprived of freedom arbitrarily or without just cause or detained without trial, except during a state of emergency, in which case the detention is subject to Article 58 and not to be subjected to any form of torture whether physical or psychological or to be



treated in a cruel or degrading manner yet he was actually treated in a degrading manner that imperiled him to psychological torture.

24. It was submitted that every person has the right to freedom of movement under Article 39 of *the Constitution* which right should not be arbitrarily interfered with yet the Respondent unjustifiably confined him by holding him against his will at the hospital.
25. The Petitioner relied on decided cases to buttress his submissions; Gideon Kilundo & Daniel Kilundo Mwenga v Nairobi Women’s Hospital [2018] eKLR where the Court found that Articles 27, 28, 29 and 39 of *the Constitution*, as well as Article 9(1) of the International Convention on Civil and Political Rights (ICCPR) on human dignity, freedom and respect were violated in addition to Article 11 of ICCPR for detaining the patient for failure to pay the hospital bill.
26. The case of Emmah Muthoni Njeri v Nairobi Women’s Hospital [2021] eKLR the court observed that the Petitioner’s outstanding bill by 14<sup>th</sup> May, 2018 when she was discharged stood at Kshs.3,136,144.39 hence any other charges after her official discharge were unfairly and unlawfully levied upon her and that holding her in the Respondent’s premises for over six months after her official discharge was unlawful.
27. On whether the Petitioner is entitled to award of compensation for the unlawful detention, the Petitioner relied on Emmah Muthoni Njeri v Nairobi Women’s Hospital (supra) for Respondent’s unlawful detention of the Petitioner for non-payment of her medical bills the Court awarded a sum of Kshs.3 million as general damages.

### **Analysis and Determination**

28. There are only two issues for determination:
  - a. Whether the Petitioner’s rights and fundamental freedoms under Article 28, 29 and 39 of *the Constitution* were violated by the Respondents
  - b. Whether the Petitioner is entitled to reliefs sought in this Petition.

Whether the Petitioner’s rights and fundamental freedoms under Article 28, 29 and 39 of *the Constitution* were violated by the Respondents
29. On the above issue, this Court cannot reinvent the wheel. The issue of whether it is unlawful and unconstitutional to detain a person in hospital to compel payment of medical bill or indeed any contractual debt is an already trodden path by courts in this Country. In Sonia Kwamboka Rasugu v Sandalwood Hotel & Resort Limited T/A Paradise Beach Resort & Leon Muriithi Ndubai 2013] eKLR the Court observed thus:

“28 ...Any form of detention not sanctioned by the law that seeks to procure performance of contractual debt is a violation of the right to liberty...”
30. In Gideon Kilundo & Daniel Mwenga v Nairobi Women’s Hospital (2018) eKLR alluded to the diametrical considerations it is faced with when resolving such an issue where someone had incurred the debt but then retreats to seek Constitutional protection when the rubber meets the road. The Court observed:

“... In this case, the court is undeniably faced with 2 competing interests, which are the 2<sup>nd</sup> petitioner’s right under Article 29 and 39 of *the Constitution* which are clear on the person’s liberty and freedom of movement and Article 40 on the respondent right to property.



My take is that in as much as the 2<sup>nd</sup> petitioner is entitled to his liberty and freedom of movement the respondent is equally entitled to its right to property and under these circumstances, the court is under a duty to balance both rights so as to dispense justice for both parties but at the same time bearing in mind the fact the rights and freedoms under Articles 29 and 39 of *the Constitution* are not absolute and cannot under Article 24(1) (b) be enjoyed at the expense of the fundamental freedoms of others.

Article 24(1) of *the Constitution* stipulates as follows:

“ A right of fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and ...”

In the instant case, the 1<sup>st</sup> petitioner admitted the 2<sup>nd</sup> petitioner to the respondent’s hospital with the full knowledge that the respondent is a private hospital where he will be required to settle the hospital bills. The respondent performed its part of the bargaining by treating the 2<sup>nd</sup> petitioner until he attained full recovery.

.... While it is true that the relationship between the petitioners and the respondent was a contractual one for which the respondent should pursue other lawful means of recovering the debt other than detaining their former patient, this court is of the view that it does not augur well for the dispensation of justice for persons to walk into private hospitals for treatment and expect to walk out without paying a single cent under the guise of the constitutional protection of liberty and freedom of movement. My take is that it amounts to gross abuse of the process of court and a misinterpretation of *the constitution* for parties to wrong for the respondent to detain the 2<sup>nd</sup> petitioner... I am not convinced that an illegal detention of a patient is one of the avenues for the recovery of a debt within our legal system, because the question which will arise is for how long the hospital will be expected to hold the patient. My take is that this is a classic example of a scenario where two wrongs will not make a right. In as much as the respondent is aggrieved by the failure by the petitioners to settle their debt. I find holding the patient is not one of the acceptable avenues or the debt recovery. Perhaps the respondents should relook at its debt recovery policy and admission of patients so as to avoid outcomes such as the one before the court...”

31. The dilemma that the court faces in deciding such cases is thus self-evident but at least there is jurisprudential unanimity that it is unlawful to detain any person without the authority of the law so as to compel the payment of a debt. The legal process has to be followed fully when one’s liberty or limitation of one’s rights is at stake as this must comply with Article 24 of *the Constitution*.
32. The act of the Respondent of detaining the Petitioner to compel him to pay the outstanding medical bill exposed him to scorn and derision from his social circles and relatives and heavily impacted on his esteem thereby puncturing his inherent dignity. Further the confinement subjected him to psychological torture and restriction on his movement. There was thus violation of Articles 28, 29 (d) and 39 of *the Constitution*.
33. Although the Petitioner submitted that the illegal detention lasted for five months before he was released, there was no evidence of when he actually left the hospital. I will thus go by what he stated in



his affidavit at time of filing the Petition because that was not controverted. The Petitioner had spent two months from the date he was due for discharge. I so find.

34. Having thus reached this conclusion; the next question would be the reliefs that this Court should grant.
35. I am of the view that granting declaratory relief is in order but that alone is not sufficient to vindicate the Petitioner for the distressful experience he underwent. Holding a person who has been treated and fully recovered in hospital for over two (2) months to compel him to pay the hospital bill is punitive, unfair, unreasonable and thus unlawful. Although the debt was legally incurred the means adopted by the Respondent to enforce the payment was callous and has no place in a civilized society. It runs afoul our Bill of Rights.
36. For the distressful experience that the Petitioner was subjected to, during the over two months of unlawful confinement in hospital, I find that he is entitled to some compensation pursuant to Article 23 (3) (e) of *the Constitution*. I shall thus proceed to determine the quantum.
37. I shall be guided by principles applicable in determining damages in Constitutional Petitions. The following dicta from the Supreme Court in the case of Charles Muturi Macharia & 6 Others v Standard-Group & 4 Others (SC Petition No.13 (E015) of 2022) is relevant. The Court observed:

94. To answer directly the question posed by this issue, under common law principles, it is settled that an injured party is entitled to damages for the loss and injury suffered under private law causes of action, like in tortious claims. In situations like those, compensation for personal loss depends on proof of such loss or damage. However, arising out of the violation of constitutional rights and fundamental freedoms of an individual under public law, the nature of the damages awardable are broadly compensatory or vindicatory, as should be apparent from the list of examples of reliefs in Article 23. While it is not necessary to prove loss or damage in cases of constitutional rights violations, the court may consider the extent, nature, gravity and immensity of harm suffered by the aggrieved party when determining the appropriate remedy. In deserving cases, the redress may be in the form of an award of damages to compensate the victim. In some cases, a suitable declaration, an injunctive or conservatory order, or an order of judicial review will suffice to vindicate the right.

95. In assessing the appropriate sum to be awarded as compensation, the court must feel satisfied that the sum will afford the victim adequate redress to vindicate the victim's constitutional right. Assessment of the right quantum for compensation will take into account all the relevant facts and circumstances of the violation and the victim in the particular case, bearing in mind any aggravating features. We stress that the purpose of constitutional relief of an award of compensation is not necessarily intended to punish the violator, but only to vindicate the right of the victim.

....

Therefore, once a petitioner has presented proof on a balance of probabilities that his or her rights were violated, the court must vindicate and affirm the significance of the violated rights, even though the petitioner may not present evidence of any loss or damage suffered as a result of the violation. For these reasons, it can be said that the approach in awarding damages or compensation in constitutional rights violation cases is different from that in tortious claims....”

38. For being held in a hotel in order to enforce payment, the Court in Sonia Kwamboka Rasugu v Sandalwood Hotel & Resort Limited T/A Paradise Beach Resort and another (*supra*) awarded general damages of Kshs.1,000,000/-.



- 39. The Petitioner was held in the hospital set up where he had been treated before and healed. I presume therefore that the living conditions were not bad. In any case, there was no evidence that the living condition was deplorable. It is also fact that he had actually incurred the medical bill of which he was unable to pay.
- 40. Having regard to the foregoing, I grant the following reliefs:
  - a. A declaration that the petitioner was unlawfully detained at the respondent’s hospital in violation of Articles 28, 29 (a) and 39 of *the Constitution*.
  - b. The Petitioner is awarded eight hundred thousand shillings (Kshs. 800,000.00).
  - c. Costs of this Petition.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 22ND DAY OF JANUARY, 2025.**

.....

**L N MUGAMBI**  
**JUDGE**

