



**Omari v Kenyatta University, Teaching Referral and Research Hospital
& another (Petition E198 of 2025) [2025] KEHC 4809 (KLR)
(Constitutional and Human Rights) (23 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4809 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E198 OF 2025
LN MUGAMBI, J
APRIL 23, 2025**

BETWEEN

CATHERINE JUMA OMARI PETITIONER

AND

**KENYATTA UNIVERSITY, TEACHING REFERRAL AND RESEARCH
HOSPITAL 1ST RESPONDENT**

KENYATTA HOSPITAL FUNERAL HOME 2ND RESPONDENT

RULING

Introduction

1. By a Notice of Motion application dated 14th April, 2025 the Applicant challenges the decision of the Respondents herein to withhold the body of the deceased Roselyn Mukoko Aura due to non-payment of outstanding hospital bill an act she says has caused the family psychologically distress and bruised their dignity.
2. The Applicant seeks the following reliefs that:
 - i. Spent.
 - ii. Spent.
 - iii. Spent.
 - iv. That pending the hearing and determination of the Petition this honourable court be pleased to issue a mandatory injunction compelling the Respondent to immediately and



unconditionally release the body of the deceased, Roselyn Mukoko Aura, to the Petitioner and/or her family for burial and final rites.

- v. That Costs of this application be provided.

Applicant's case

3. The application is premised on the grounds set out in the application and the supporting affidavit of Catherine Omari Juma sworn on 11th April, 2025.
4. In a nutshell, Applicant depones that she is the niece to the deceased Roselyn Mukoko Aura who was admitted to the 1st Respondent Medical facility on 22nd February, 2025 but unfortunately passed on 11th March, 2025 while undergoing a surgical procedure.
5. She avowed that at the time the deceased had accumulated a medical bill to the tune of Kshs. 1, 533, 502. The body was moved to the mortuary operated by the 1st Respondent, (the 2nd Respondent) where the bill continued and continues to accumulate. That so far, the Social Health Insurance Fund has paid Kshs. 952, 000/-; the family managed to raise Kshs. 20,000/- and as at the time of filing this Petition the balance stood at Kshs. 561,502/-.
6. The deponent averred that the family was not in a position to raise the balance and has thus made various pleas to the 1st Respondent to release the body without any success. There was a letter from the Assistant Chief Marura Sub-location dated 25th March, 2025 confirming the inability of the family to raise the money due to its poor background (COJ 2); the letter from Kenya Medical Practitioners and Dentist Council dated 28th March, 2025 and also a letter from the area Member of Parliament Hon. James Mwangi Gakuya dated 26th March, 2025 which did not bear any fruits.
7. As a result, the Applicant argues that withholding the body to enforce payment of the outstanding medical bill is not only illegal but has also affected the petitioner and deceased family psychological, social and spiritual well-being which has injured its human dignity.

Respondent's Case

8. The Respondents filed a notice of preliminary objection dated 14th April, 2025. In the directions issued by the Court on 15th April, 2025; the Court directed that the P.O and the Application shall be determined together.
9. The sole ground relied upon in the P.O is that the Petitioner had instituted the Petition without obtaining the letters of administration as provided for under Section 82 (a) of the [Law of Succession Act](#). This ground is expounded in the submissions of counsel which I will be alluding to shortly.
10. Responding to the Application for the release of the body; Counsel for the Respondents pointed out that the existence of the hospital bill is not in contest yet the Petitioner or the next of kin aware of their inability to raise the money did not approach the Credit Control Department of the 1st Respondent in line with the 1st Respondent existing policy for assessment of means for the payment arrangement to be made or waiver to be granted. Instead, they chose to write letters which the respondent is doubted that they were even received at the facility. As such, the Respondents faulted the Petitioner for offending the doctrine of exhaustion of remedies.

Applicant's Submissions

11. In opposition to the Respondents Preliminary Objection, the Petitioner's counsel relied on Article 22 (2) (a) and Article 258 (2) (a) to counter the argument that letters of administration ought to have



been obtained. Counsel for the Petitioner argued that Section 82 (2) (a) of the *Law of Succession Act* does not apply in constitutional petitions as the issue in question does not involve the administration of deceased estate. He relied on the case of *Ototo Margret Kanini & 16 others v The Attorney General and 4 others* (2022) eKLR to support this contention.

12. The Petitioner was categorical that courts have held that detention of a body to enforce payment of outstanding hospital bill is indefensible in law and cited the case *Akoth Ajuang v Michael Owour Osodo Chief Ukwala Location & 3 others*; LSK (2020) KEHC (KLR) in that regard.
13. Further, the Petitioner/Applicant argued that she has satisfied the conditions necessary for grant of mandatory injunction at an interlocutory stage as she has not only established a prima facie case with a probability of success but that indeed, there exists special circumstances for granting the orders sought.

Respondents' Submissions

14. The Respondents started by demonstrating that the Preliminary Objection they had raised satisfies the condition for a preliminary objection since it was made on the assumption that the facts relied upon by the Petitioner were not contested.
15. The Respondents submitted that the Petitioner had no legal capacity to bring this Petition on behalf of a dead person or the deceased family without first obtaining the letters of administration intestate. That the Petition is thus bad in law for offending Section 82 (a) of the *Law of Succession Act*.
16. Counsel reiterated that the fact that the deceased next of kin failure to approach the Credit Control Department of the 1st Respondent before instituting this Petition offends the doctrine of exhaustion of remedies and therefore the Court ought to strike out this petition.

Analysis and Determination

17. Arising from the pleadings and submissions of the Parties Advocates, I discern the following to be the issues for determination in this Application:
 - a. Whether the Petitioner has locus standi to bring this Petition in view of Section 82 (a) of the *Law of Succession Act*.
 - b. Whether the instant Petition offends the doctrine of exhaustion of remedies.
 - c. Whether the Applicant is entitled to the orders sought.

Whether the Petitioner has locus standi to institute this Petition in view of Section 82 (a) of the *Law of Succession Act*.

18. On this issue, I will not belabour the point. Locus standi in Constitutional matters is not regulated by the Statute but *the Constitution* itself and is very liberal in this regard. Under Article 22 (2) (a) of *the Constitution*; a person can file court proceedings on behalf another person who cannot act in their name claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. This is equally reiterated by Rule 4 (2) (i) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which provides as follows:

“In addition to a person acting in their own interest, court proceedings under sub rule 1 may be instituted by-

- i. a person acting on behalf of another person who cannot act in their own name’



19. As was held in the case of *Ototo Margret Kanini & 16 Others vs Attorney General (2022)* eKLR a Constitutional Petition whose aim is to vindicate violation of rights of another does not relate to the administration of the estate of the deceased and cannot thus be subjected to the requirements of Section 82 (2) (a) of the *Law of Succession Act*. I find this the ground of preliminary objection untenable and dismiss it accordingly.

Whether the instant Petition offends the doctrine of exhaustion of remedies

20. It is trite law that where there exists a dispute settlement mechanism provided for in legislation or regulation, that procedure ought to be followed first before recourse to the Court. This doctrine has been upheld by Courts even in Constitutional litigations.

21. In *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016]* eKLR; the Court observed thus:

“... Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation...”

22. The Respondents contended that there existed a dispute settlement mechanism within the Respondents policy but there was no policy document provided to back up those allegations of fact. Moreover, even assuming that one existed, the respondents did not demonstrate that there was any effort made to bring it to the attention of the deceased’s next of kin despite the many letters that had been written to the Respondents on this issue. I thus find that the claim the Petitioner instituted this case without exhausting the dispute settlement process is indefensible.

Whether the Applicant is entitled to the orders sought.

23. The Applicant seeks the release of the aunt’s body which is being withheld by the Respondents to enforce the payment of the outstanding medical bill.

24. A dead body is not a merchantable product and other than causing psychological distress to the family and being a health hazard, the Respondents stand to gain nothing from its continued detention. Further, the release of the body of the deceased will not extinguish respondents pursuit of any other legal remedies that may be available including the payment of the outstanding bill arising from deceased’s hospitalization.

25. In the overall analysis, I find no reason whatsoever that may legally justify the continued detention of the body of the deceased Rosalyn Mukoko Aura in the circumstances of this case.

26. I thus order that pending the hearing and determination of the Petition a mandatory injunction is hereby issued compelling the Respondents to immediately and unconditionally release the body of the deceased, Roselyn Mukoko Aura to the family for burial and final rites.

27. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF APRIL, 2025.

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L N MUGAMBI



JUDGE

