



REPUBLIC OF KENYA



**Kyalo v Aga Khan University Hospital (Petition E551 of 2022) [2023] KEHC 17493 (KLR)
(Constitutional and Human Rights) (19 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17493 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E551 OF 2022

M THANDE, J

MAY 19, 2023

BETWEEN

RHODAH NDANU KYALO PETITIONER

AND

AGA KHAN UNIVERSITY HOSPITAL RESPONDENT

JUDGMENT

1. In her Petition dated December 15, 2022, the Petitioner seeks the following reliefs: -
 1. A declaration that the Petitioner is entitled to documentary evidence of the death of Peter Masoa Muindi from the Respondent.
 2. The Respondent to provide/supply to the Petitioner documentary evidence of death of Peter Masoa Muindi.
 3. Costs of the Petition.
 4. This Honourable Court be pleased to issue such other or other orders as it may deem just and expedient for the ends of justice.
2. In her affidavit sworn on even date, the Petitioner states that the Respondent has refused and failed to provide documentary proof of the death of Peter Masoa Muindi (the late Peter), who died while undergoing treatment at the Respondent's facility. The Petitioner states that the late Peter was the husband of her late mother Rose Mbithe Mwanthi, who was an employee of Teachers Service Commission (TSC). When she attempted to process her mother's gratuity with the TSC, she was informed that they required evidence of the demise of the late Peter. She approached the late Peter's other wife one Sophia Masoa who declined to give her copies of his death certificate and burial permit. Efforts to get the intervention of the local chief of the location where the late Peter was buried bore



no fruit. Despite demanding the release of documentary evidence of the demise of the late Peter at the Respondent's hospital, the Respondent has refused and or neglected to furnish the same, insisting on a court order. The Petitioner thus claims that her right of access to information under Article 35(1)(b) of the Constitution has been violated.

3. Valentine Achungo, the Respondent's Legal Counsel and the Head of the Legal Department swore a replying affidavit on January 18, 2023 in opposition to the Petition. He deposed that he did receive a letter dated September 21, 2022 from the Petitioner's advocates, demanding release of release of the late Peter's records showing that he died at the hospital. In a letter dated December 7, 2022, the Respondent informed the said advocates that it only releases information to the person named as 'next of kin' in its records and only with the signed consent of the patient or if dead, the next of kin. Where a patient is deceased and in the absence of the authorization of the next of kin, such information is only released to the administrator of the deceased's estate or upon being served with a court order to that effect. It was further deposed that the Petitioner had other options and avenues of obtaining the information relating to the death of the deceased, which she has not exhausted, to wit, petitioning the Registrar of Births and Deaths, to issue her with a copy of the death certificate of the late Peter. She could also have filed proceedings against one Sophia Masoa seeking orders to compel her to supply her with a copy of the deceased burial permit or death certificate. Further the Petitioner's request can only be sanctioned by court.
4. It was also averred that the information demanded can only be availed by the Respondent by way of provision of a document known as a death notice, which contains the name of the deceased, registration number, date of admission, age, sex, religion, date of death, time of death, diagnosis, details of who certifies the death, the name, contact and ID number of the next of kin and relationship to the deceased with the next of kin, the name and signature of the person who notified the next of kin about the death and the names of those who were present during the notification. This is all sensitive data within the meaning under the Data Protection Act, 2019 (DPA). The records of patients remain confidential even after death and must be protected so as not to embarrass, offend or stigmatize them or their families. Disclosure of sensitive information even upon death to unauthorized third parties and breach of confidentiality would deter patients from seeking medical intervention or treatment from the Respondent.
5. It is the Respondent's case that while the Petitioner has the right of access to information under Article 35(1) of the Constitution, such right may only be exercised within the purview of enacted laws such as the DPA and the Health Act, 2017. In the prevailing circumstances where the next of kin has declined to provide the Petitioner with the deceased's death notice and or burial permit, the documents sought may only be released by the Respondent pursuant to a court order.
6. The right of access to information is a fundamental right that is guaranteed under Article 35 of the Constitution of Kenya, 2010 as follows:
 1. Every citizen has the right of access to—
 - a. Information held by the State; and
 - b. Information held by another person and required for the exercise or protection of any right or fundamental freedom.
 2. Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
 3. The State shall publish and publicise any important information affecting the nation.



7. It is the Petitioner's case that she is a citizen seeking information from a private person for the exercise or protection of her right to process the gratuity payments of her mother. The Petitioner produced correspondence showing that payment cannot be processed without evidence of the demise of the late Peter. Citing the case of *Muchiri v Eldoret Hospital Limited (Constitutional Petition 024 of 2021) [2022] KEHC 13365 (KLR) (4 October 2022) (Judgment)* she asserted that she had demonstrated a legitimate interest and the request for medical records for purposes of processing the computation of her late mother's death gratuity, is justifiable.
8. The Respondent contended that the right of access to information must be actualized in consonance with other provisions of the *Constitution*, in particular the right to privacy and other laws passed by Parliament. The right to privacy is important in the medical field for the reasons that without the assurances of confidentiality and privacy, those in need of medical assistance may be deterred from revealing personal and intimate information as may be necessary in order to receive appropriate treatment, thereby endangering their own health and that of the community. The right to privacy extends to everyone including those who are deceased. As such, disclosure of any documents that may reveal private and sensitive personal data may only be done with their consent or that of their next of kin or personal representatives. It was further submitted that in actualizing the right to privacy and the right of access to information as envisaged in the *Constitution*, Parliament enacted the *Access to Information Act*, 2016, the Health Act, 2017 and the DPA and the regulations thereunder, which outline the framework and guidelines regarding the collecting, processing, storing and or accessing information stored by both public and private bodies.
9. A citizen is entitled to access information held by the State or by another person, where such information is required for the exercise or protection of any right or fundamental freedom. The right of access to information is however not absolute and may be limited by law. Limitation of rights and fundamental freedoms is provided for under Article 24 of the *Constitution*. Clause (1) provides as follows:
 - (1) A right or 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--
 - a. The nature of the right or fundamental freedom;
 - b. The importance of the purpose of the limitation;
 - c. The nature and extent of the limitation;
 - d. 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
 - e. The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
10. Any limitation of a right including the right of access to information must be by law, and must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
11. The *Access to Information Act* was enacted to give effect to Article 35 of the *Constitution*. Section 6 of the Act stipulates the instances in which the right of access to information may be limited as follows:



- (1) Pursuant to Article 24 of the Constitution, the right of access to information under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to—
- f. Undermine the national security of Kenya;
 - g. Impede the due process of law;
 - h. Endanger the safety, health or life of any person;
 - i. Involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;
 - j. Substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;
 - k. Cause substantial harm to the ability/y of the Government to manage the economy of Kenya;
 - l. Significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;
 - m. Significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;
 - n. Infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.
12. As can be seen from the foregoing, Section 6(1)(d) limits access to information, the disclosure of which would result in the unwarranted invasion of the privacy of an individual. Also limited under Subsection (1)(i), is disclosure of information that compromises professional confidentiality as recognized in law or by the rules of a registered association of a profession.
13. The right to privacy is guaranteed to every person, under Article 31 of the Constitution as follows:
- Every person has the right to privacy, which includes the right not to have—
- a. Their person, home or property searched;
 - b. Their possessions seized;
 - c. Information relating to their family or private affairs unnecessarily required or revealed; or
 - d. The privacy of their communications infringed.
14. Parliament enacted the DPA to give effect to Article 31(c) and (d) of the Constitution. Section 2 of the DPA, outlines the various guidelines for collecting, processing and storing personal data, the definition of key terms and the rights and obligations of data subjects and data controllers. The information sought by the Petitioner in respect of the late Peter, is sensitive personal data within the meaning of Section 2 of the DPA which provides:
- ' Sensitive personal data' means data revealing the natural person's race, health status, ethnic social origin, conscience, belief, genetic data, biometric data, property details, marital status,



family details including names of the person's children, parents, spouse or spouses, sex or the sexual orientation of the data subject;

15. The *Health Act* requires health facilities to protect and maintain confidentiality of information concerning users. Section 11 provides:
 1. Information concerning a user, including information relating to his or her health status, treatment or stay in a health facility is confidential except where such information is disclosed under order of court or informed consent for health research and policy planning purposes.
 2. Subject to the *Constitution* and this Act, no person may disclose any information contemplated in subsection (1) unless—
 - o. the user consents to such disclosure in writing in the prescribed form;
 - p. a court order or any applicable law requires such disclosure; or
 - q. non-disclosure of the information represents a serious threat to public health.
16. The information sought by the Petitioner from the Respondent is the kind that under Section 11 of the *Health Act*, is termed confidential and may only be disclosed under a court order or informed consent of the user.
17. I have considered the case of *Muchiri v Eldoret Hospital* cited by the Petitioner. I note that the petitioner therein sought medical information relating to the cause of death of her husband who had died at the respondent hospital. The court found that the petitioner was the widow of the deceased therein and compelled the respondent hospital to provide the information sought by the petitioner. In the present case, however, the Petitioner is not the widow of the late Peter, nor was she registered as his next of kin at the Respondent's facility. Additionally, the Petitioner is not a holder of a grant of representation in respect of the estate of the late Peter, issued under the *Law of Succession Act*. She therefore has no locus to seek from the Respondent, sensitive personal data or information relating to the late Peter. According to the Petitioner, the nexus between her and the late Peter is that he was the husband to her late mother. She has not told the Court that the late Peter was her father. This connection in my view is remote and not sufficient to justify disclosure by the Respondent, of the kind of information the Petitioner seeks.
18. The Respondent has argued that the Petitioner had other available options of obtaining the information sought and ought not to have come to this Court.
19. It is well settled that where there exists another legal course which can give a party the relief sought, other than a constitutional petition, such course should be pursued. This is the doctrine of constitutional avoidance. While I am aware that the doctrine does not divest this Court of the jurisdiction to hear and determine this matter, it restrains itself from hearing the same because there exists another appropriate forum that can hear and determine the matter effectively.
20. The doctrine of constitutional avoidance was expounded by the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR*. The Court held as follows: -
 - (256) The appellants in this case are seeking to invoke the 'principle of avoidance', also known as 'constitutional avoidance'. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa,



in *S v Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

' I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.'

- (257) Similarly the U.S Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v Tennessee Valley Authority*, 297 U.S 288, 347 (1936)).
- (258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.
21. And in the case of *KKB v SCM & 5 others (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling)*, Mativo, J. (as he then was) had this to say about the doctrine:
- 'In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant's cause.
22. It can be discerned from the foregoing that where another legal course is available, through which a matter can be properly decided and which can give an applicant the relief sought, such course should be pursued and the constitutional court should decline to determine a constitutional issue in such matter.
23. In the case of *Uhuru Muigai Kenyatta v Nairobi Star Publications Limited [2013] eKLR*, Lenaola, J (as he then was) stated:
- 'I need say no more. Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in *Haco Industries* (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in *AG vs SK Dutambala Cr Appeal No 37 of 1991* (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.
- The complaint in this case is not so serious as to attract Constitutional sanction.
24. The record shows that the Petitioner did try to get the information from the late Peter's wife, Sophia Masoa, who however declined to provide the same. Having failed to obtain the documents, the available option was for the Petitioner to seek orders in a civil suit compelling Sophia Masoa to provide the information sought, as opposed to filing a constitutional petition.
25. The prayers sought by the Petitioner in the Petition are civil in nature with civil remedies and could have readily been redressed in a civil court. The Petitioner ought to have filed a civil suit as opposed to bypassing the same and coming to the constitutional court. There is also the option of seeking a copy of



the death certificate of the late Peter from the Registrar of Births and Deaths. This Court must refuse to be bogged down by a matter which has recourse in civil law and other processes. In this regard, I associate myself with the sentiments expressed by Mativo, J (as he then was) in Mombasa Petition No. E002 of 2022, Jean Bosco Mubayimana & Another v Jimmy Irengi aka Jimmy Mwachughu & Others. (unreported). The Learned Judge stated:

'The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In Kenya, the Supreme Court stated in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis. In the South African case of *S v Mhlungu* (supra) Ketrledge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. And in *Ashwander v Tennessee Valley Authority* the U.S. Supreme Court held that it would not decide a constitutional question which was properly before it if there was also some other basis upon which the case could have been disposed of. Currie and de Waal opine that the principle of constitutional avoidance is of crucial importance in the application of the Bill of Rights. The author's state: -

'When applying the Bill of Rights in a legal dispute, the principle of avoidance is of crucial importance. As we have seen, the Bill of Rights always applies in a legal dispute. It is usually capable of direct or indirect application and, in a limited number of cases, of indirect application only. The availability of direct application is qualified by the principle that the Bill of Rights should not be applied directly in a legal dispute unless it is necessary to do so.'

26. Having considered the foregoing, I find and hold that the Petition is not properly laid before this Court as a constitutional issue. As such, this Court invokes the doctrine of avoidance and declines jurisdiction. Accordingly, the Petition dated December 15, 2022 which lacks merit is hereby dismissed with costs.

DATED AND DELIVERED IN NAIROBI ON 19TH DAY OF MAY 2023

M. THANDE

JUDGE

In the presence of: -

..... for the Petitioner

..... for the Respondent

..... Court Assistant

