



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CONSTITUTIONAL HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 22 OF 2019

**IN THE MATTER OF ARTICLES 2, 19, 20, 21, 22, 23, 24, 27, 28, 29, 36,
43, 46, 159, 165, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED VIOLATION AND/OR THREATENED VIOLATION OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUAL AS ENSHRINED
UNDER ARTICLES 36, 40 AND 47 OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE NATIONAL HOSPITAL INSURANCE ACT CAP 255 LAWS OF
KENYA**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF THE MEDICAL PRACTITIONERS AND DENTIST BOARD
(DISCIPLINARY PROCEEDINGS) (PROCEDURE) RULES UNDER THE
MEDICAL PRACTITIONERS AND DENTISTS ACT CAP 253 LAWS OF KENYA**

AND

**IN THE MATTER OF THE PRINCIPLE OF DOCTOR-PATIENT CONFIDENTIALITY
BETWEEN**

COLLINS OKUMU OTIENO.....PETITIONER

VERSUS

NATIONAL HOSPITAL INSURANCE FUND (NHIF).....1ST RESPONDENT

PORT FLORENCE COMMUNITY HOSPITAL.....2ND RESPONDENT

ANDREW ROTICH.....3RD RESPONDENT

RULING

The application dated 24th October 2019 is for an Injunction to restrain the Respondents from demanding, publishing or sharing private and confidential medical information of the Petitioner, which is in the hands of the 2nd Respondent.

1. The Petitioner also asked that the Respondents be restrained from intimidating him in any way.
2. The Petitioner, **COLLINS OKUMU OTIENO** is a registered Contributor at the **NATIONAL HOSPITAL INSURANCE FUND (N.H.I.F.)**.
3. At all material times the Petitioner was accorded medical treatment at the **PORT FLORENCE COMMUNITY HOSPITAL**, which is the 2nd Respondent herein.
4. It was the Petitioner's case that in June 2019, the 3rd Respondent, (**ANDREW ROTICH**) phoned the Petitioner, seeking confidential information about the Petitioner. Apparently, Rotich identified himself as an employee of **N.H.I.F.** 5. It is the Petitioner's further case that on 23rd September 2019 the Petitioner demanded an apology and an end to the calls from **N.H.I.F.** and the Hospital. Instead of getting the apology, the Hospital moved to formally ask the Petitioner for his consent to share the Petitioner's medical records with **N.H.I.F.**
6. The Petitioner has exhibited a letter from the Hospital seeking the express authority of the Petitioner, to enable the Hospital divulge the Petitioner's medical records to **N.H.I.F.**: that letter is dated 24th October 2019.
7. The Petitioner has also exhibited a letter from **N.H.I.F.** dated 23rd September 2019, asking Port Florence Community Hospital ("*the hospital*") for certified copies of;
 1. *Certified theatre register as from December 2016 to date, for Port Florence Community Hospital, Otonglo; and*
 2. *Certified list of students treated under Edu Afya Scheme per school and service point under Port Florence Group of Hospitals in Kisumu County as from May 2018.*
8. The other letter which the Petitioner exhibited was from **N.H.I.F.** dated 26th September 2019, asking the Port Florence Community Hospital – Group for certified copies of the Patient Files for the Port Florence Community Hospital Otonglo, for the following;

1. 2314/18

2. 1960/17

3. 2242/14

4. 839/18

5. 1558/17

6. 2284/17

7. 4621/16

8. 4425/16

9. The Petitioner believes that the access to his medical records contravenes his fundamental constitutional rights to Privacy and to Dignity.

10. Therefore, pending the hearing of his Petition, he asked the Court to grant the injunctive reliefs sought.

11. By an Affidavit sworn by **PAUL MAHER**, the Hospital disclosed that the Petitioner's File Number, when he was treated at the Hospital in April 2018, was 5826/17.

12. Although the Hospital received letters from **N.H.I.F.**, asking it to provide the Theatre Register and certified copies of specified patient files. The hospital has denied releasing any confidential medical information about the Petitioner, without his express consent.

13. Meanwhile, the Branch Manager of **N.H.I.F.**, Mr. **HENRY MUSINDI MUGALLA**, deponed in his Replying Affidavit that it was the Petitioner who first went to his offices, carrying the following documents;

(a) Copy of discharge summary;

(b) Medical Report;

(c) Ultra Sound Report; and

(d) Pre-Authorization request Form for surgical benefits Access Sick Sheet.

14. At that point, the **N.H.I.F.** Branch Manager advised the Petitioner that he and the said manager ought to visit the Hospital for verification of the authenticity of the documents.

15. When the two of them reached the hospital, the Petitioner is said to have given his consent to the Branch Manager to access his medical records.

16. Furthermore, **N.H.I.F.** stated that the verification and authentication exercise was conducted in the presence of the Petitioner.

17. During the said exercise, the Hospital did not photocopy or remove or surrender any of the records to **N.H.I.F.**

18. Meanwhile, **N.H.I.F.** confirmed having asked the Hospital for information which were required for purposes of System and Compliance Audit. The said information did not have any relation to the Petitioner.

19. Secondly, the **N.H.I.F.** sought more specific information concerning 8 patients. However, the said request did not have any relation to the Petitioner.

20. The Petitioner does not agree with the view espoused by the Respondents. As far as he is concerned, the request for copies of the "*Certified Theatre Register*", would include a request for his medical records.

21. I find that, on a prima facie basis, the generalized request for a register maintained by the Hospital does not appear to be within the more specific allegation which the Petitioner had set out in the Petition.

22. I further find that the Petitioner would have to prove that although he expressly gave consent to the Hospital Administrator to release some of his treatment notes to **N.H.I.F.**; (as stated in paragraph 8 of his affidavit), the Respondents have either divulged or exchanged more documents than he had authorized. At this stage, the Court is unable to make out a prima facie case which has a probability of success.

23. Another interesting aspect of the case is that all the parties appear to agree that the medical reports of the patient are supposed to be confidential. Therefore, I am beginning to ask myself what exactly will be the issues in contention when the substantive Petition comes up for hearing.

24. I mean, when a person says that he is not doing what he is said to be doing; and he adds that if he has to do the said thing then he would have to obtain the consent of the

person suing him, why would the court be required to make a determination about whether or not to give an order to stop the Respondent from doing this thing?

25. But I do also remind myself that the Petitioner has every right to have his day in court, when he will canvass his Petition. It is only then that the court will have the benefit of receiving evidence and submissions from the parties, and then evaluate the same comprehensively, in order to come up with an appropriate resolution.

26. In conclusion, I find no merit in the application dated 24th October 2019. It is therefore dismissed.

27. However, I order that the costs of the application shall be in the cause in the substantive Petition; so that whoever is successful in the Petition shall also get the costs of the interlocutory application herein.

28. Meanwhile, notwithstanding the dismissal of the application dated 24th October 2019, I wish to make it clear that that fact does not give a licence to the Respondents or to any of them, to violate the constitutional rights of the Petitioner.

DATED, SIGNED and DELIVERED at KISUMU this 4th day of March 2021

FRED A. OCHIENG

JUDGE