



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**MISC APPLICATION NO E010 OF 2020**

**IN THE MATTER OF ARTICLES 2(1), 3(1), 10, 19, 20, 21, 22, 23, 27, 28, 43(1)(a) and (2) (f), 159(2)(a), (b), (c), (e) OF THE  
CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF KENYA HEALTH SECTOR REFERRAL STRATEGY 2014 – 2018**

**AND**

**IN THE MATTER OF KENYA HEALTH SECTOR REFERRAL IMPLEMENTATION GUIDELINE 2014**

**AND**

**IN THE MATTER OF TRANSFER OR REFERRAL OF JACKLINE NELIMA MUTAKI**

**THE KAREN HOSPITAL.....APPLICANT**

**VERSUS**

**MICHAEL OMUSULA (being sued as next of Kin,**

**Representative and Husband/Spouse of**

**JACKYLINE NELIMAMUTAKI).....RESPONDENT**

**RULING**

1. The Applicant by way of an Amended Notice of Motion Application dated 16<sup>th</sup> September 2020 seeks for Orders:-

*i. THAT the application be certified as urgent and be heard ex-parte in the circumstances.*

*ii. THAT the Honourable Court be pleased to and hereby grants leave for this application to be heard and determined by the duty Judge during the court vacation period in August 2020 Recess on account of its urgency.*

*iii. THAT the Honourable Court be and is hereby pleased to grant an order allowing the Applicant to discharge the Respondent from its hospital in order for her to continue being attended to through Home Based Care.*

*iv. THAT in alternative to prayer (iii) above, the Honourable Court be and is hereby pleased to grant consent to the Applicant to refer the Respondent to Kenyatta Hospital for further health care and management.*

*v. THAT the Honourable Court do issue any other relevant order in the circumstances.*

2. The Application is supported by the affidavit of Juliet Wamaitha Gikonyo sworn on the 16<sup>th</sup> September 2020.

### APPLICANT'S CASE

3. The Applicant's case is that the Respondent's wife ('the Patient') was admitted on 16<sup>th</sup> February 2019 at the Applicant's Hospital. That after some complications during the Patient's elective caesarean section, she was taken to the High Dependency Unit for post-operative management and has since been undergoing airway maintenance, physiotherapy and occupational therapy which have caused her hospital bill to shoot up to a tune of Kshs 23,700,549.00 which the Patient and her family are unable to pay.

4. The Applicant suggests that it would be more cost-effective for the patient to be placed under Home Based Care with the consultation of the family. It is further suggested that the services being given to the Patient can be rendered by public health institutions at a more subsidized cost to the benefit of the Patient and her family.

5. According to the Applicant, the Respondent held a meeting with the Applicant's representatives on 12<sup>th</sup> September 2020 in order to resolve the issue amicably and to secure consent for referral of the patient to a public hospital as provided for under Guideline 3.3 of the Kenya Health Sector Referral Implementation Guidelines. The Respondent agreed to have another meeting on 15<sup>th</sup> September 2020 with the Applicant's advocates but he did not turn up for the meeting.

6. The Applicant asserts that it is in the interest of justice that this Honourable Court does allow this application as prayed.

### RESPONDENT'S CASE

7. The Respondent filed a Replying Affidavit sworn by Michael Omusula on 6<sup>th</sup> October 2020. The Deponent is opposed to the application on the grounds that as the next of kin of the Patient he was not informed by the Hospital of the application. The Deponent complains that his wife has been in the Applicant's Hospital for more than one and a half years due to a brain injury attributable to the doctor's negligence and not recurrent infections as indicated in the Applicant's affidavit. It is argued that the Hospital owes a duty of care to the Patient as it was negligent and acted in bad faith in its conduct.

8. In reliance on guideline **2.3 of the Kenya Health Sector Referral Implementation Guidelines**, the Respondent argues that there is no reason of having his wife transferred from the Applicant's facility when the hospital can call on expertise to assist in managing his wife's condition if need be.

9. The Deponent avers that in order for a referral to be initiated as per guideline **3.3 of the Kenya Health Sector Referral Implementation Guidelines**, his consent as next of kin was to be sought by the Applicant which it did not. Moreover, the Applicant Hospital has not succinctly explained the reason for referral, the choice of doctor or facility, the expected costs or the referral and the possible outcome of the referral.

10. The Respondent contends that the Applicant is not being truthful and thus abusing the process of the Court. He prays that the application BE dismissed with costs.

### RESPONDENT'S PRELIMINARY OBJECTION

11. The Respondent raised a Preliminary Objection dated 14<sup>th</sup>, December, 2020, on grounds that the reliefs sought in the application are substantive and as such cannot be granted by way of a miscellaneous application.

### APPLICANT'S SUBMISSIONS

12. The Applicant filed Written submission dated 24<sup>th</sup>, November, 2020, submitting that there is no obligation on private hospitals to guarantee the right to health, as they are commercial institutions. This proposition is buttressed by the case of **Ludindi Venant & another v Pandya Memorial Hospital [1998] eKLR**.

13. The Applicant contended that the Respondent has not addressed the matter of the hospital bill and how they intend to clear the bill which has accumulated to Kshs 23,700,549.00.

14. It is submitted that **Clause 2.4 of Kenya Health Sector Referral Implementation Guideline 2014**, lists lack of financial capacity as one of the grounds for referral of patients. The Applicant contends that the referral process in this case is, in line with the Hospital's duty of care to the Respondent and the Applicant intend to preserve her right to dignity. Reliance is placed on the cases of **MAO & another v Attorney General & 4 others [2015] eKLR; and Laxman Balkrishna Joshi v Trimbak Babu Godbole and Anr 1969 AIR 128, 1969 SCR (1) 206**.

15. The Applicant further submitted that there exist two conflicting interests; thus, the Patient's right to health and the Hospital's right to property, and the Court is called upon to arbitrate between the two. Reliance is placed in the decision in **Gideon Kilundo & Daniel Kilundo Mwenga v Nairobi Women's Hospital [2018] eKLR**.

### RESPONDENT'S WRITTEN SUBMISSIONS

16. The Respondent vide his Submissions dated 14<sup>th</sup> January 2021, averred that the first issue to be determined is whether the Applicant can get substantive orders through a miscellaneous application. The Respondent submitted that prayers 3 and 4 in the Amended Application seek substantive orders, which cannot be issued through a miscellaneous application. Reliance is placed on the decisions in **Witmore Investment Limited v County Government of Kirinyaga & 3 other [2016] eKLR; Nairobi West Hospital Limited v Joseph Kariha & another [2018] eKLR; Anastacia Wagiciengo v Ezekiel Wafula [2018] eKLR**. Further, the Respondent relies on **Order 3 rule 1 of the Civil Procedure**

**Rules** on how a suit may be commenced.

17. The second issue identified by the Respondent is whether the Applicant has followed the law in seeking to discharge the Patient from its facility. The Respondent submitted that the Applicant had not demonstrated by way of evidence, specifically correspondences, by way of a letter or email, that it has ever raised the issue of arrears owed by the Respondent.

### **ANALYSIS AND DETERMINATION**

18. Upon consideration of the miscellaneous application, the Respondent's response, parties rival submissions, the following issues arise for consideration:-

- a) Whether the Applicant can get substantive orders through a miscellaneous application.*
- b) Whether the Applicant has followed the law in seeking to discharge the patient from its facility and whether Applicant has a right and/or should be allowed to transfer the patient to Kenyatta National Hospital or Home Based Care.*

#### **A. WHETHER THE APPLICANT CAN GET SUBSTANTIVE ORDERS THROUGH A MISCELLANEOUS APPLICATION.**

19. The Respondent in his preliminary objection dated 11<sup>th</sup> December 2020 has raised four (4) grounds of preliminary objection being thus:-

- a) That the application herein is incurably defective, incompetent and bad in law.*
- b) The applicants seek substantive orders in a Miscellaneous application which is not founded upon by any substantive pleading, whether, judicial review, constitution petition, and if any special jurisdiction of the court is being sought, it is not specified.*
- c) The reliefs sought in the application are substantive in nature and as such cannot be granted by way of a miscellaneous application.*
- d) The application be accordingly dismissed with costs.*

20. The Respondent's contention is that substantive orders cannot be issued in a miscellaneous applications as is sought in this matter. Reliance was placed on **Order 3 Rule 1 of the Civil Procedure** which sets out how a suit shall be instituted. It provides under **Order 3 Rule 1 of the Civil Procedure** as follows:-

*[Order 3, rule 1.]*

#### **1. Commencement of suit and case track allocation**

- (1) Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.*
- (2) The claim shall indicate at the heading the choice of track; namely "small claims", "fast track" or "multi-track".*
- (3) For purposes of this rule—*
  - a) "small claim" refers to a simple claim whose monetary value does not exceed two hundred thousand shillings.*
  - b) "Fast track" refers to a case with undisputed facts and legal issues; relatively few parties; and would likely be concluded within one hundred and eighty days after the pre-trial directions under Order 11.*
  - c) "Multi-track" refers to a case with complex facts and legal issues; or several parties and which would likely be concluded within two hundred and forty days from the date of the pre-trial directions under Order 11*
- (4) In choosing a case track, the plaintiff shall have regard to all relevant considerations including the following-*
  - a) the complexity of the issues of fact, law or evidence;*
  - b) the financial value of the claim;*
  - c) the likely expense to the parties;*
  - d) the importance of issues of law or fact to the public;*
  - e) the nature of the remedy sought;*
  - f) the number of parties or prospective parties; and*

*g) the time required for pre-trial disclosures and for preparation for trial or hearing;”*

21. In support of the proposition reliance was placed in *Nairobi West Hospital Limited v Joseph Kariha & another [2018] eKLR* where it was held thus:-

*“8. A perusal of Order 3 rule 1 of the Civil Procedure Rules will reveal that suits may be commenced by way of a plaint, a petition and or originating summons which is not the case here. The miscellaneous application may not offer the parties the opportunity to be heard. The order for discharge of a patient who is suffering from a rare condition stated to be ametrophyic lateral scleroses and still admitted in the Intensive Care Unit of the applicant’s hospital is strenuously opposed.*

*9. With respect, I agree with the 1<sup>st</sup> respondent’s submission that the application raises constitutional issues which relate to the right to life and healthcare which form part of the Social Economic Rights under Articles 26 and 46 of the Constitution of Kenya, 2010. It is apparent from the arguments of the 1<sup>st</sup> respondent that one of the issues which cannot be determined summarily is whether the order sought is to the best interest of the patient. It has been argued that the grant of the order of discharge is tantamount to condemning the patient to death.*

*10. In the end, I find the preliminary objection to be meritorious. I have purposely avoided to determine the application on its merits because I do not intend to prejudice the applicant’s right to pursue its rights and have the same substantively determined.”*

22. Further reliance was placed in *Witmore Investment Limited v County Government of Kirinyaga & 3 others [2016] eKLR* where Hon Justice Limo held that:-

*“20. [...] The term interlocutory according to BLACK’S LAW DICTIONARY 9<sup>th</sup> Edition means “an interim or temporary order, not constituting a final resolution of the whole controversy.” An interim or interlocutory order is normally issued on a basis of an interlocutory application which is defined under the same Black’s Law Dictionary as “a motion for equitable or legal relief sought before a final decision.” So where a party such as an applicant herein seeks an order that in effect appears to resolve with finality an issue in controversy or a contested issue, the application ceases to be interlocutory and it is a misconception to describe it as such. If the Applicant wanted to move this Court for a final resolution of the issues in controversy raised in the application, it should have moved this Court properly in the manner provided by law.*

*[...] So while I agree with the Applicant Article 23 establishes judicial review order as a relief available in a constitutional petition, the remedy in my view is only available when a court is determining a petition brought under Article 22 and finds basis that a judicial review order is the appropriate relief. On the other hand if a party is desirous of obtaining a prerogative order of mandamus and specific performance at an interlocutory stage, the legal avenue provided is the route prescribed under Order 53 Rule 1 of the Civil Procedure Rules and the Law Reform Act. The same cannot be circumvented as that would amount to an abuse of court process. It is true that a statute is subject to a constitution and not vice versa but the context of this application is different because it has sought a judicial remedy at an interlocutory stage claiming denial of a right under the Bill of Rights when the same is yet to be determined. Determination of such a right at this stage in my view would have determined the petition if the violations had been cited in the petition pending before this Court.”*

23. Looking at the Amended Miscellaneous Application by the Applicant dated 16<sup>th</sup> September 2020 and more specifically prayer 3 and prayer 4 it is pleaded thus:-

*“ 3.THAT the Honourable Court be and is hereby pleased to grant an order allowing the Applicant to discharge the Respondent from its hospital in order for her to continue being attended to through Home Based Care.*

*4. THAT in alternative to prayer (iii) above, the Honourable Court be and is hereby pleased to grant consent to the Applicant to refer the Respondent to Kenyatta Hospital for further health care and management.”*

24. It is clear from the application, that the orders sought amongst others, is an order of discharge against the Respondent’s wife. This is urged is a substantive order, which the Respondent aver cannot be sought and be issued through pleadings which have not been instituted by either presenting a plaint, or a Petition or an originally summons or in a manner as prescribed under **Order 3 rule 1 of Civil Procedure Rules**.

25. It is noted that the Miscellaneous Application as drawn and filed raises serious constitutional issues relating to right to life and healthcare which form part of the **Social Economics Rights** under **Article 26 and 46 of the Constitution**. **Article 26 of the Constitution** provides that;

*“26. Right to life*

*(1) Every person has the right to life.*

*(2) The life of a person begins at conception.*

*(3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.*

*(4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.”*

Whereas *Article 46 of the Constitution* provides that: -

**“46. Consumer rights**

**(1) Consumers have the right—**

- a) to goods and services of reasonable quality;**
- b) to the information necessary for them to gain full benefit from goods and services;**
- c) to the protection of their health, safety, and economic interests; and**
- d) to compensation for loss or injury arising from defects in goods or services.**

**(2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.**

**(3) This Article applies to goods and services offered by public entities or private persons.”**

26. *Article 23 of the Constitution* and *Article 165 of the Constitution* clearly provides that the High Court has jurisdiction to hear and determine application for redress of a denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights. I am alive of the fact that, this miscellaneous application is raising serious constitutional issues, relating to right to life and health which form part of *Social Economic Rights* under the *Constitution of Kenya 2010*. This is not a pure civil claim which can be said to be solely governed by the provisions of *Civil Procedure Act* or *Civil Procedure Rules* and more specifically *Order 3 Rule 1*. The practice and procedure generally in regard to institution and prosecution of Constitutional matters is clearly guided by the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013*, otherwise referred to as (*Mutunga Rules*).

27. *Rule 4(1) of the Mutunga Rules* states that where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person affected or likely to be affected may make an application to the High Court in accordance to these rules. It is further provided under *Rule 10 (1)* on form of the Petition. That an application under *Rule 4* shall be made by way of a Petition as set out in *Form A in the Schedule* with such alterations as may be necessary. That notwithstanding, *Rule 10(3) of the Mutunga Rules*, provides, that subject to *Rule 9 and 10*, the Court may accept an oral application, a letter or any other informal document which discloses denial, violation, infringement or threat to right or fundamental freedom.

28. In view of the nature of patients fundamental rights herein and the nature of the application, pending before me, I find that though Constitutional Petition is required to be instituted by way of a Petition, the *Mutunga Rules*, are drawn in such a matter that allows accommodation of an application that is not brought to Court by way of a Petition and the Court is under an obligation to accept even an oral application, a letter or any other informal documentation, which discloses a denial, violation, infringement or threat to a right or fundamental freedom. I therefore find, that further, to demand that the Applicant should have commenced these proceedings by way of a plaint, Petition or originating summons and not by miscellaneous application, is not supported by the *Mutunga Rules* governing Constitutional Petitions and applications. I find the Applicant Miscellaneous application is not fatal as the Applicant’s Miscellaneous application deals with Constitutional violation as already noted herein above.

29. *Article 159 (2) (d) of the Constitution* provides that:- **“In exercising judicial authority, the courts and tribunals shall be guided by the following principles...justice shall be administered without undue regard to procedural technicalities.”** It should be noted that, this Court is guided by *Article 159 of the Constitution* which cautions Court not to pay undue regard to procedural technicalities, as the more the patient herein remains in the hospital, the higher the medical bills and therefore this matter need to be determined as quickly as possible. In addition matters before Court require to be disposed without delay so as to avoid congestion of the Court with several matters resulting to enormous case backlog when matters can be disposed off. Accordingly I find no merits in the Respondents’ preliminary objection and I dismiss the same.

**B. WHETHER THE APPLICANT HAS FOLLOWED THE LAW IN SEEKING TO DISCHARGE THE PATIENT FROM ITS FACILITY AND WHETHER APPLICANT HAS A RIGHT AND/OR SHOULD BE ALLOWED OT TRANSFER THE PATIENT TO KENYATTA NATIONAL HOSPITAL OR HOME BASED CARE.**

30. The Respondent contention is that as per guideline 2.3 of the *Kenya Health Sector Referral Implementation Guideline*, there are four elements for consideration in referring a patient, with the key one being *expertise movement* and *client parameter movement* which states respectively “services that might not otherwise be available are offered to communities that need them, as they need them. **Rather than moving clients to different levels of facilities, specialised service providers come to the client.** It is contended that services can be provided in a number of ways, such as directly to clients, as out-reach, screening in a medical camp, or surgeries in remote areas. It is further averred that can be achieved by the movement of expert professionals from higher levels to lower levels. It is urged that it can also be applied to client parameter movement which provides **“client information can be sent to appropriate levels of the health system for supportive diagnosis or management guidance.”**

31. It is Respondent’s case, that there is no reason of transferring the patient herein, from the Applicant facility, when the hospital is able to call on; experts to assist them manage the patient’s condition (if need be). It is further averred that for referral **to be initiated as per guideline 3.3 of the Kenya Health Referral Implementation Guidelines**, the Respondent’s consent as the next of kin was to be sought by the Applicant, which it did not instead it went behind his back, seeking a short cut by misleading the court that the Respondent had abandoned his wife. It is urged that it is worth to note that **guideline 3.4** strictly mandates a referral health worker to know what, whom and where to refer a patient. The Respondent contended that in the contrary the Applicant from the orders sought, it appears it does not know whether the patient should be referred to home based care or to the Kenyatta Teaching and Referral Hospital. Accordinging to the Respondent the

Applicant basically in a maliciously fishing expedition to discharge his wife.

32. It is further contended by the Respondent that in view of the aforesaid guidelines, it is clearly stipulated, that the Applicant Hospital, is required to explain succinctly the reason for referral, the choice of doctor or facility, the expected costs of the referral and the possible outcome of the referral. In addition it is urged by the Respondent that this has never been done despite, the Respondent being ever present, at the Applicant's hospital every time, he visited his wife.

33. As I consider this matter I am alive of the provision of **Article 2 (4)(2) of the Constitution** which provides:-

**“21. Implementation of rights and fundamental freedoms**

**(1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.**

**(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43.”**

34. Further **Article 27(1)(2) (3) and (5) (6) and (7) and (8) of the Constitution** provides:-

**“27. Equality and freedom from discrimination**

**(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.**

**(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.**

**(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.**

**(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.**

**(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).**

**(6) To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.**

**(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.**

**(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.”**

35. Further to the above it is provided under **Article 28 of the Constitution** that:-

**“28. Human dignity**

**Every person has inherent dignity and the right to have that dignity respected and protected.”**

36. **Article 43 (1) (a) and (2) of the Constitution** states:-

**“43. Economic and social rights**

**(1) Every person has the right—**

**(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;**

**(2) A person shall not be denied emergency medical treatment.”**

37. In dealing with the issue of referral of the patient herein, the Court is required to seek guidance from the following; Kenya Health Sector Referral Strategy 2014 – 2018;

Kenya Health Sector Referral Implementation Guideline 2014; and

Clause 2.4 indications for Referral

**The following is a list of some primary reasons for referring clients who seek emergency or routine care:**

- i. To seek expert opinion and report on the client's condition or specimen***
- ii. To procure additional or different services for the client***
- iii. To seek admission and management of the client***
- iv. To request use of diagnostic and therapeutic tools***
- v. To respond to mass incidents and disaster situations***
- vi. To send specimens for external quality assurance***
- vii. To address security issues***
- viii. To account for a lack of resources (financial, human, material)***
- ix. To meet a client's request***

38. The responsibilities of the client are also clearly provided under Clause 3.3. which provides:-

***The client or the client's next of kin should be responsible for the following actions: -***

- i. Provide consent for referral. Clients or next of kin who refuse consent for a referral or transfer should sign a form indicating that they are acting against medical advice.***
- ii. Facilitate the referral.***
- iii. Assume responsibility for the security of the client's belongings.***
- iv. Consent to be transferred back to the initiating facility after treatment.***

39. Similarly Clause 3.5 the roles and responsibilities of the referring facility are set out as follows:-

***The referring health worker should meet the following responsibilities:***

- i. Know what, whom, when, and where to refer as guided by the Clinical Management and Referral Guidelines, Health Sector Referral Guidelines and the directory of health services.***
- ii. Complete the standard referral form (refer to annex) with all the necessary information and attach relevant documentation.***
- iii. Explain to the client the need for referral, reasons for choice of doctor or facility, preparation, expected cost, and possible outcome of referral.***
- iv. Answer queries from the referral coordinator or receiving facility about the referral, if necessary.***
- v. Ensure counselling of the clients on the need for referral and maintenance of confidentiality.***
- vi. Obtain informed consent from the client being referred.***

40. The Kenya Constitution 2010 is the most progressive document in the world and has set elaborate Bill of Rights which are guaranteed by recognizing them as inherent in every person. One such right is right to health as provided for under **Article 43 of the Constitution**, in which it is stated that every person is entitled to the highest attainable standard of health. It also ensures one is entitled not to be denied emergency medical treatment.

41. It is contended by the Applicant herein; that when the patient herein presented herself to the hospital, she sought for routine antenatal services. She was attended to and later booked for an elective caesarean section. It is Applicants case that after the preparation, she developed some complications that extended her stay in Hospital. The hospital afforded the Patient accommodation for 21 months now for management at a cost. The Applicant averred that right to health is inter-linked with right to life. Reliance thereto is placed in the case of **Luco Njagi & 21 Others v. Ministry of Health & 2 Others [2015] eKLR**.

***“It cannot be disputed that the right to health is intrinsically connected with the right to life, as the Petitioners submit, and***

*violation of the right to health would therefore impact negatively on the right to life. It is recognized, however, that the right to health can only be achieved progressively, and that its realization is subject to the availability of resources.*

*...It is thus undisputed that the state has the primary obligation to ensure that the Petitioners and other citizens enjoy the highest attainable standard of health. The state has a duty to make the necessary budgetary allocation, as well as to take the necessary legislative and policy measures, to ensure that the right to health is realized.”*

42. The Applicant further assert that there is no obligation on the part of private hospitals to guarantee right to health, contending that the obligation is on the state but not private hospitals, which are commercial institutions. It is urged that even as the private hospitals advance access to health, they make profit in the process, and that when a person opts to seek services to a private health facility, he/she verily know that services will be subject to payment of resulting Hospital Bill. Reliance on this proposition is placed in the case of **Ludindi Venant & another v Pandya Memorial Hospital [1998] eKLR** where it was held:-

*“The Hospital is said to be owned and managed by a Society which is described as Charitable. That is not to say the Hospital offers charitable services. It offers much needed medical services to all and sundry in this country. They may be rich. They may be poor. The Hospital has highly qualified Doctors who must be paid. They have employed all manner of medical and other staff for the effective dispensation of the services. They have to be paid. They secure and provide drugs to their patients. These have to be paid for. At the end of the day, I suppose it must also make some profit. For all intents and purposes therefore, the Hospital is a Commercial Institution.*

*And that is why they have drawn a legally binding document for execution by persons who seek admission to the Hospital and in particular the person who will be responsible for payment of the medical services rendered...”*

43. In view of the above, it is contended by the Applicant that the patient herein has been at the Hospital for over twenty-one (21) months now. That the patient has been treated, managed and given a world class services as it is the norm and stature of the Hospital. It is averred that the patient or her husband or her family has never requested the Hospital to transfer her to a more affordable health facility of their choice. Reliance is placed in the case of **Isaac Ngugi v. Nairobi Hospital & 3 others [2013] eKLR** where it was stated that:-

*“In my view and I so find, the negotiations of the hospital bill which the Petitioner, as manager of the patient’s estate had authority to pay, were on the understanding that the Hospital would continue to take care of the patient. As the meeting of 14<sup>th</sup> March 2013, it was clear that the Hospital was to continue treatment of the patient until such time as instructions were issued to the contrary. No such instructions were forthcoming. I am afraid that given the circumstances of this case, it cannot be said that the patient was being detained in violation of her rights. The petitioner and his legal advisors, who had authority to demand that the patient be discharged or transferred to another facility, were aware that the hospital would continue to take care of the patient as long as she remained in Hospital.”*

44. The Applicant further stated that at the time of filing this case, the patient had an accumulated hospital bill of Kshs.23,700,549.00 as evidenced by annexure JWG 2 of the Applicant’s Affidavit. In his replying affidavit, the Respondent, the patient’s husband, who is also the next of kin, as per Admission Form marked JWG, has avoided the issue of hospital bill since the admission of his wife. In his Replying Affidavit he does not, even by implication, address how he intends to clear the bill. It is further contended by the Applicant that the hospital is a world class health institution with highly specialized services. The Hospital is also worldwide accredited and revered specialists in their respective fields. The quality of services it offers is urged mirror the nature of costs involved in providing those services. The Hospital owes the patient herein a duty of care; that duty extends even on transfer. It is averred that the patient’s physical condition is compromised and as regards to which hospital she is transferred to; a family member must be aware of the institution.

45. According to the Applicant after emergency services, the patient is supposed to be referred to a health facility within their financial capacity. The Applicant places reliance on **Clause 2.4 of Kenya Health Sector Referral Implementation Guideline 2014** which list lack of financial capacity as one of the grounds for referral of patients as stated in Applicant’s (Annexure JWG 4). It is further asserted that **Clause 3.3** makes it mandatory for a client or next of kin to give consent for any transfer. According to the Applicant this consent has been withheld by the Respondent as the patient is incapacitated. The Applicant contend the Hospital has legal duties and obligations one being to exercise due care in referral process as demanded by **Clause 4.2.2 of Kenya Health Sector Referral Strategy 2014 – 2018** (Annexure JWG 5). The Applicant states that the referral process cannot begin without consent hence the case herein.

46. I find in this case, that there is no dispute that the patient is incapacitated and that do not in any way take away her right to dignity. She is a human being like any able bodied human being. Her referral process should be conducted in accordance with the relevant clauses of **Kenya Health Sector Referral Implementation Guidelines 2014** and ensure the referral process ensures her dignity is preserved.

47. There is no doubt or dispute in this matter, that the Applicant Hospital has a higher duty of care of the patient herein. I understand the purpose of this case is to safeguard that duty to minimize exposure on Applicant’s end. It should be understood by all that Applicant’s failure to observe duty of care may expose the Hospital to malpractice suit as was held by India Supreme Court in the case of **Laxman Balkrishna Joshi vs. Trimbak Babu Godbole And another 1969 AIR 1128, 1969 SCR (1) 206**: where it was stated:-

*“The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties, viz..., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those, duties gives a right of action for negligence to, the patient. The practitioner must bring to his task reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law require: (cf. Halsbury’s Laws of England 3<sup>rd</sup> ed. Vol. 26 p.17). The doctor no doubt has a discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively*

*ampler in cases of emergency.”*

48. It is of paramount importance for the Applicant herein to be reminded that the patient herein has a right of health while the Applicant (Hospital) has the right to property. There are two conflicting interests which this Court is alive to, and which, it's called upon to arbitrate between the two conflicting rights. In support of this proposition I refer to the case of **Gedion Kilundo & Daniel Kilundo Mwenga v Nairobi Women's Hospital [2018] eKLR** where it was stated should be weighed and balanced so that no side is casued injury.

***“The Constitution of Kenya provides for a wide array of rights under the Bill of Rights. Article 29 of the constitution provides for the freedom and security of the person which includes the right not to be deprived of freedom arbitrarily or without a just cause. Article 28 provides that every person has inherent dignity and the right to have the dignity respected and protected.”***

49. The Applicant hospital contention is that it has tried its best to offer best services to the patient but the costs of the services has rocketed beyond proportions. According to the Applicant it is stated that it is time for the patient to be transferred to a facility where she can afford the services. The Applicant (Hospital) contend that it will close its doors if patients who cannot afford its services are allowed to enter its doors only to refuse to pay for services rendered. It is therefore urged that the patient and Respondent cannot be allowed to insist that the patient be allowed on staying and enjoying the best services without paying for them. It has been urged and not challengeed by the patient or Respondent those services are offered by the best professionals who need payment. Further it is contended that the medicine used and equipment being applied have been procured, and, are maintained at a high cost.

50. The Applicant averred that the Respondent has claimed that the Hospital has not disclosed the actual medical condition of the patient herein, the Applicant in regard of that allegation, state that the allegation is false, as Applicant's records reflect otherwise. Further it is stated that the Respondent has also claimed at paragraph 27 of the Replying Affidavit, that the Hospital has not met four elements in referring a patient to another hospital or Home Care. In response the Applicant urge is that the Hospital is well aware of the processes of patient's transfer and is ready to observe all the guidelines to the letter.

51. In the Instant Petition it has been urged that a patient after emergency is supposed to be referred to a health facility within their financial capacity. This contention has not been controverted. Under **Clause 2.4 of Kenya Health Sector Referral Implementation Condition 2014**, listslack of financial capacity as a ground for referral of patients, whereas **Clause 3.3** makes it mandatory for a patient or next of kin to give consent for any transfer. In the instant Petition, the patient is incapacitated and cannot give consent save the next of kin herein, the Respondent, her husband. The patient herein has an outstanding Hospital bill of Kshs.23,700,549.00 which the applicant contended the Respondent has avoided to pay nor indicated how he intends to clear the same. This has not been challengeed by the Respondent.

52. The Respondent on his part, claims that the Hospital has not approached him to provide his consent, as the patient herein cannot give her informed consent for being incapacitated. He further claims the hospital has not explained succinctly the reason for intended referral, the choice of the doctor or facility, the expected costs of referral and possible outcome of the referral.

53. I have carefully considered the pleadings and rival submissions and I find the applicant has demonstrated that it is aware of the process of patient's transfer and is ready to observe all guidelines to the letter. On the otherhand, I find that the Respondent has failed to demonstrate or give sufficient reasons why the Applicant (Hospital) cannot continue to treat the patient within their premises and using expertise as they have the facilities necessary to treat the patient till her recovery. However the Applicant, Hospital, has demonstrated in its application that it is undergoing financial constraint and cannot sustain the Respondent's wife in its facility, due to non-payment of expenses incurred in treating the Respondent's wife; being Kshs.23,700,549/= as of the time of filing this case.

54. I note that there is no dispute from both parties that under **Clause 2.4 of Kenya Health Sector Referral Implementation Guideline 2014** lack of financial capacity is listed as one of the grounds that can be applied for referral of a patient. The Respondent has not responded to the allegation, that the patient's family including the Respondent is unable to meet the medical bills of the patient which stands at Kshs.23,700,549/=. I find it would not be unreasonable to believe that the Respondent will have difficulty in paying the medical bill and, that it would be, in the best interest for the Respondent to seek more affordable medical services if, he cannot promptly reach amicable settlement with the Applicant, on how to settle the outstanding medical bill or pay the outstanding bill to enable the patient continue to be managed and treated at the Applicant's Hospital.

55. The upshot is that the Applicant's, Hospital application is meritorious and is allowed in the following terms:-

***a) An Order be and is hereby ISSUED allowing the Applicant to discharge the Patient/Respondent from its Hospital in order for her to continue being attended to through Home based care or at any facility that the Patient's husband, the Respondent, may request or indicate and such transfer should be strictly carried out in accordance with provisions of Kenya Health Sector Referral Implementation Guidelines 2014.***

***b) In the alternative to (a) above an Order be and is HEREBY issued granting consent to the Applicant to refer the Patient/Respondent, herein to Kenyatta National Hospital for further health care and management and such transfer should be carried out strictly in accordance with the provisions of Kenya Health Sector Referral Implementation 2014.***

***c) In view of the nature of the Petition and upon considering the circumstances surrounding this matter, I direct each party to bear its own costs.***

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3RD DAY OF JUNE, 2021.**

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**J. A. MAKAU**

**JUDGE**