



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO. 7 OF 2015

T O S.....PETITION/APPLICANT

VERSUS

MASENO UNIVERSITY1ST RESPONDENT

PROF. DOMINIC MAKAWITI.....2ND RESPONDENT

DR. VITALIS OUKO3RD RESPONDENT

BEDROCK HOLDINGS LIMITED.....4TH RESPONDENT

J U D G M E N T

1. The petition dated 16th March 2015 citing Several Articles of the Constitution prays for the following reliefs namely:

(a) A declaration that the respondents contravened the petitioner's rights guaranteed under Articles 27(1), 29(d), 31(c) and (d), 43(i)(e), 47(1), 53(1)(d) and 2 and 232(i)(a), (e) and (d) of the Constitution of Kenya 2010.

(b) An order that the respondent do pay damages and compensation for contravening the petitioner's rights and fundamental freedoms secured in the Bill of rights;

(c) An injunction order to prohibit the respondents from disclosing the petitioner's private information;

(d) An order of mandamus to compel the 1st, 2nd and 3rd respondents to release all original records to a medical services provider of the petitioner's choice;

(e) An order of mandamus to compel the 4th respondent to surrender to the petitioner all information in its custody relating to his family.

(f) An order of mandamus to compel the 1st, 2nd and 3rd respondents to release for custody and management the petitioner's medical information to an independent medical service provider of his choice.

(g) An order of mandamus to compel the 1st respondent to permit at its costs the petitioner to seek medical services from an alternative provider;

(h) An order that the respondents do pay the petitioner the costs of this petition plus interest.

(i) An order that the respondent to pay the petitioner interest on (b) and(f) above at the honourable court's rate till payment in full.

2. It is noteworthy at this point to summarise each parties position.

PETITIONER'S CASE

3. The petitioner's wife one E A A works with the 1st respondent. The 1st respondent has a medical scheme in which the said Mrs A is a beneficiary together with her children namely T O and F A. The petitioner is the biological father to T O and a guardian to F A.

4. The petitioner did file suit No.,Kisumu HCC No.25/2014 in which it sued the 4th respondent together with Riley Falcony Security Services Limited and the Public Procurement Oversight Authority (PPOA) over the security tender in respect to the 1st respondent. The petitioner avers that among the documents exhibited by the 4th respondent included the medical records containing the names and photographs of the above stated children and Miss A. He therefore alleges that these documents were private and confidential and they do not have any connection with the suit at all and are only meant to embarrass him and his family. He further contends that the 4th respondent's director's wife William Ololo and Christine Anyango Asake is employed by the 1st respondent, in its finance department yet no such private information were revealed. He therefore contends that by such disclosures he has suffered psychologically and that the safety of his family's confidential documents has been contravened. The affidavit in support of his petition contains all the necessary annexures.

1ST RESPONDENT'S CASE

5. The 1st respondent through one Mathew O. Onyango filed a replying affidavit dated 4th November 2015 in opposing the petition. He argued that what the petitioner exhibited is not a medical record but a declaration by an employee of dependants who would benefit under the medical scheme of the 1st respondent. He further depones that none of the children is mentioned in the suit No. Kisumu HCCC 25/2015. According to the 1st respondent the petitioner has not exhibited anything to show that he has suffered any psychological harm.

2ND RESPONDENT'S CASE

6. The 2nd respondent did file grounds of opposition as well as a replying affidavit dated 2nd April 2014. He argued that he has been wrongly sued in this matter and that the alleged leaked documents were not in his possession but the 1st respondent. He states that the suit against him is brought in bad faith and ought to be dismissed

3RD RESPONDENT'S CASE

7. The 3rd respondent has equally opposed the petition vide his replying affidavit dated 3rd November 2015. He is the chairman of the 1st respondent's health services. He said that the documents annexed are not medical records but personal data information forms from the administration. He said that he has no access to the said documents which are usually kept by the central registry under the care of Registrar Administration and that it is only the copy of the first page of the personal data that is sent to his department. He contends that the document exhibited by the petitioner is quite different from that he has in his department. In any case, the documents exhibited is signed by E A the petitioner's wife and has nothing to do with the health status of the petitioner's children.

4TH RESPONDENT'S CASE

8. WILLIAM OLOLO the 4th respondent's director swore an affidavit dated 14th April, 2015 arguing too that the document exhibited is not a medical record but a medical scheme form and does not in any way

compromise the security of the petitioner's family. He argued that E A's involvement in the tender issue in respect of suit No.54/2014 raises a conflict of interest as she had interest being the petitioner's wife.

ANALYSIS AND DETERMINATION

9. All the parties herein filed their written submissions in support and apposition of the petition. The issues raised therein centres on the legality or otherwise of the alleged medical records of the petitioner's family. The ultimate decision is whether the leaking or disclosure thereof violated the constitutional rights of the petitioner's family and whether he suffered any injury or harm. I have also perused through the further affidavits filed by the petitioner as well as the authorities filed by the parties in support of their cases or the opposition thereof.

10. There are 2 sets of important documents as presented by the petitioner which is dated 20.1.2006 and that presented by the 3rd respondent dated 10.6.2006. The one of 20.1.2006 has F A aged 7 years and T aged 8 months as dependents. While the one dated 10.6.2006 has F A.

11. All the documents emanate from the petitioner and were allegedly submitted to the 1st respondent. It is imperative at this juncture to determine what the law states concerning the issue of privacy and the attendants rights. Article 31 of the Constitution states as follows

31. 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.

12. The Consultative Assembly of the Council of Europe has defined Article 8(2) of the European Convention on Human Rights, which provides for the right to privacy of an individual as follows;

“The right to privacy consists essentially in the right to live one’s own life with a minimum interference. It concerns private family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorized publication of private photographs, protection from disclosure of information given or received by the individual confidentially.”

13. The court in J W I & another v Standard Group Limited & another [2015] eKLR while dealing with the question of the scope of the right to privacy had this to state:

"In the final conclusions of the Nordic Conference on the Right to Respect for Privacy of 1967, the following additional elements of the right to privacy are listed; the prohibition to use a person’s name, identity or photograph without his or her consent, the prohibition to spy on a person, respect for correspondence and the prohibition to disclose official information."

14. The court stated further thus:

"...Secondly, in *Mistry v Interim National Medical and Dental Council of South Africa (1998) (4) SA 1127 (CC)*, the Constitutional Court of South Africa considered the factors to be considered when determining whether right to privacy was violated in line with the information in question. The Court stated that one ought to consider; whether the information was obtained in an intrusive manner; whether it was about intimate aspects of the applicants’ personal life; whether it involved data provided by the applicant for one

purpose which was then used for another; whether it was disseminated to the press or the general public or persons from whom the applicant could reasonably expect such private information would be withheld."

15. From the above reasoning and expositions of the law it is clear that publication or use of the images of an individual without his consent violates that person's right to privacy. I say so because a person's life is a restricted realm in which only that individual has the power of determining whether another may enter, and if so, when and for how long and under what conditions.

16. However, the right to privacy is not absolute. As a common law right of personality it is necessarily limited by the legitimate interests of others and the public interest. To my mind such a situation would arise where it becomes important to expose an individual's criminality or misconduct in order to protect the public.

17. Going back to our present case, it is the respondents' case that the use of the minors' information as evidence in HCCC No. 25 of 2014 did not amount to breach of privacy. Their reasoning being; the document used did not constitute medical records as alleged by the petitioner but that it was just a personal data form that included information that was already in the public domain. To my mind the right question would not be what sought of document it was that was used but rather whether the document contained private information and whether its use as evidence in a case amounted to invasion of privacy of the petitioner and the minors and if so whether the use was wrongful and intentional.

18. The document in question contains photographs, names and details of the petitioner's wife and his children. It also contains work details of the petitioner's wife and their place of residence. It is not clear how the 4th respondent got hold of the document but what is clear is that the consent of the respondent or his wife was not sought before the document was exposed to third parties.

19. Based therefore on the evidence placed before this court, it is clear in my mind and I am satisfied that there was wrongful invasion of the minors' right to privacy. The 4th Respondent went ahead to expose photographs, names, place of residence and personal details of minors who were not parties to the suit without consent. This was in clear violation of Section 19 of the Children Act which guarantees a child's right to privacy. It is also clear in my mind that the exposure of the document was intentional. I say so because, it is clear from the pleadings in HCCC No. 25 OF 2014 that the 4th respondent intended to demonstrate the petitioner's involvement in termination of its security services contract with the 1st respondent through his wife who was a legal officer of the 1st respondent. The 4th respondent averred as follows in its plaint:

"The plaintiff was therefore surprised when on or about 16th July 2014 they were summoned by the Chief Security Officer that they will stop the plaintiff's operations because the University Council has directed that the contracts be terminated or suspended on the advice of the University Legal Officer who herself has an interest in the contract being the spouse of the Director of the 2nd Defendant and that the move of the 1st defendant and 2nd defendant is actuated by malice."

20. For the above reason it is my finding that the petitioner's rights and those of the minors were infringed upon.

21. The other question that arises is who is liable for the infringement? The 1st, 2nd and 3rd Respondents have vehemently denied responsibility for the leakage of the document in question. Though the petitioner avers that they are responsible for the leakage of the material document, he has failed to demonstrate how they were involved in the leakage. It is possible that the document originated from the offices of the 1st respondent but there is no evidence to demonstrate that. The 4th respondent has also not stated where he obtained the document from. It could have obtained the document from anywhere even from the petitioner's wife's personal folder at her work place. For the above reason I hold that the petitioner has not proved the involvement of the 1st, 2nd and 3rd respondents in the leakage of the information and they can therefore not be held liable.

22. In light of the above findings it would be difficult to grant the petitioner the prayer sought for in the petition. The petition is hereby dismissed with costs.

Dated, signed and delivered this 10th day of March, 2016

H. K. CHEMITEI

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