



**REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS**

Petition 282 of 2012

**NATHAN MUHANGANI SHIMWENYI.....PETITIONER/
APPLICANT**

VERSUS

**THE HON ATTORNEY GENERAL.....1ST
RESPONDENT**

**DIRECTOR OF KENYATTA NATIONAL HOSPITAL.....2ND
RESPONDENT**

**MINISTER OF MEDICAL SERVICES.....3RD
RESPONDENT**

RULING

1. This application was filed under certificate of urgency on the 4th of July, 2012 when I directed the petitioner to serve for hearing on the 5th of July 2012. When the matter came up before the court on 5th of July 2012, Ms. Gicheru for the 2nd respondent and Ms. Mumasaba for the Attorney General indicated that they were not in a position to proceed as they had been served late on the 4th of July 2012 and had not had an opportunity to file responses. They requested for 14 days within which to file their respective responses. Given the nature of the application, however, and the health status of the petitioner as set out in the affidavits in support of the application, I directed that the petitioner should proceed with the application for conservatory orders.

2. In the application dated the 4th of July 2012, the petitioner seeks, among others, the following orders:

- i. That pending the hearing and determination of this application inter partes, this Honourable Court be pleased to grant orders directing the 1st respondent to immediately release and fully discharge the Petitioner to allow him to seek emergency medical treatment in an alternative facility.**
- ii. That pending the hearing and determination of this application inter partes, this Honourable Court be pleased to issue an order directing the 1st respondent to immediately release and/ or avail to the petitioner his file and medical report.**

3. The 1st respondent in this case is the Attorney General, so I believe the prayers sought should properly have been sought against the Kenyatta National Hospital, whose director is the 2nd respondent.
4. This application is illustrative of the sorry situation in our public health care system. On the one hand is the petitioner who, according to his Counsel, Ms. Mburugu, sustained serious injuries in one of those road accidents that is so common on our roads, and who sought and obtained medical treatment from Kenyatta National Hospital. The cost of the treatment reaches Kshs1.4million and the petitioner is unable to pay, even though he still requires further, extensive treatment.
5. On the other hand is the Kenyatta National Hospital, whose director is the 2nd respondent. The hospital is a public health referral facility on which many citizens requiring specialised medical treatment depend. It gives the petitioner initial treatment, including surgery and treatment in its Intensive Care Unit, but thereafter discontinues treatment as the petitioner cannot meet his health care bill. The hospital has to provide health services, not just to the petitioner, but to very many others, and such treatment comes at a cost.
6. According to the petitioner, he has been detained in the hospital in violation of his constitutional rights under Article 29 and 43 for more than a month. He had sustained a broken pelvic bone, broken left leg and injuries to his stomach, has lost the use of his right foot due to damage to a major nerve and his health continues to deteriorate.
7. He states that there is a doctor willing to treat him once he is released from the hospital as he has out-patient cover from his employer but not in-patient cover; that he has been informed that he cannot leave the hospital until his bill has been paid, but he has not been given his bill; his offer to pay Ksh250,000 to the hospital has been spurned, as has his offer to deposit a title to property as security or to come up with a payment plan on the basis of which he can pay the bill by instalments. He also alleges that he has been denied access to his medical records.
8. On its part, the hospital denies violating any of the petitioner's rights. It denies that it has detained him, that it has not received any indication from him that he wishes to leave and seek treatment elsewhere. Ms. Gicheru for the 2nd respondent submitted that the petitioner was admitted on the 13th of April 2012 and had received and was still receiving medical treatment from qualified doctors; that he had opted to be admitted to the private wing and signed a contract to pay all his bills, that such treatment includes physiotherapy; that he has had the use of crutches and wheelchairs; that the petitioner had not expressed the desire to leave the hospital; that the hospital has provision for accepting appropriate security and payment plans but had received none from the petitioner.
9. Ms. Barasa and Ms. Mumasaba argue that the orders should not be granted as the Constitution allows limitation of certain rights; that a person can be detained for non-payment of a medical bill; that if parties are allowed to seek medical treatment and then leave the medical institution without paying, the rights of others will be jeopardised as the hospital will collapse.
10. The issues raised by the parties in this matter are critical and will require determination by the court after hearing the substantive petition and due after consideration of all the matters raised. I am alive to the fact also that the respondents have not had an opportunity to file their replies to the application and the petition and to controvert the averments of fact made by the petitioner. I will therefore confine myself to making a ruling only on the immediate issue before the court and on the facts of this particular case.
11. The petitioner says that he wishes to leave the hospital so that he can get proper treatment, including an operation of his pelvic bone, which the hospital is not able, or willing, to give him without payment of its bill. He says that he has offered payment of some money, deposit of a title and making a plan to pay by instalments. This is commendable and a recognition by the petitioner of his obligation to meet his medical expenses.
12. The hospital has not been able or willing to offer the further surgical treatment required without payment of the outstanding bill and the amount required for the surgery. It argues that it has not received

any indication that the petitioner wished to leave the hospital. That is rather hard to believe, given the situation the matter has reached, but in any event, that desire has been very eloquently expressed in this application, and the hospital must heed it.

13. Sustaining the operations of the hospital, however, requires that the petitioner and all others who seek treatment there pay their bills. A situation in which parties seek medical care without a corresponding obligation on them to meet the cost of such treatment would lead to a collapse of the institution, and would do great damage to the rights of those dependent on this and other public health institutions. Whether or not a public health institution such as Kenyatta National Hospital, or indeed any institution, can detain a patient for non-payment or inability to pay a bill otherwise than as provided by law in respect of civil debts is a matter that will be determined upon the hearing of this petition substantively.

14. For now, in the circumstances of this particular case and taking into account the situation of the petitioner who still needs further and urgent treatment, and doing the best I can to balance the competing interests of the parties at this interlocutory stage, I direct as follows:

- 1. That the 2nd respondent shall immediately furnish the petitioner with a detailed account of the amount due from him as at 6th July 2012;**
- 2. That the petitioner shall pay to the hospital the sum of Kshs. 250,000 as earlier offered in part payment of the amount due from him;**
- 3. That the petitioner shall also furnish security and a payment plan in respect of the balance of the amount due from him to the 2nd respondent;**
- 4. That upon fulfilment of the above conditions the 2nd respondent shall release the petitioner from the hospital and furnish him with copies of his medical records to enable him seek treatment elsewhere.**
- 5. That this matter shall be mentioned on the 10th of July, 2012 to confirm compliance with these directions.**

15. This petition raises substantial questions of law relating to the right to health of impecunious citizens and the constitutional obligations of the state to ensure access to this right under Article 43(1) (a) and (2) of the Constitution. It has major financial and policy implications for the entire public health system which require consideration; it is a matter that I believe falls within the provisions of Article 165(4) of the Constitution. I therefore refer it to the Chief Justice with a request that he constitutes a bench of an uneven number of judges to hear and determine the issues raised as a matter of urgency.

Dated Delivered and Signed at Nairobi this 6th day of July 2012.

**MUMBI NGUGI
JUDGE**