



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MUSINGA, GATEMBU & SICHALE, J.J.A.)**

**CIVIL APPEAL NO. 112 OF 2016**

**BETWEEN**

**TOS.....APPELLANT**

**AND**

**MASENO UNIVERSITY.....1ST RESPONDENT**

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

**DR. VITALIS OUKO.....3RD RESPONDENT**

**BEDROCKHOLDINGS LIMITED.....4TH RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Kisumu (Chemitei, J.) on 10th March, 2016*

**in**

**Constitutional Petition No. 7 of 2015)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. This appeal is against the judgment of **Chemitei, J.** where **TO. SEE**, the appellant herein, was the petitioner, and had sought the following orders:

***“(a) A DECLARATION that the Respondents contravened the Petitioner’s rights guaranteed under Article 27(1), 29(d), 31(c) & (d), 43(1)(e), 47(1), 53(1)(d) & (2) and 232 (1) (a), (e) & (f) of the Constitution of Kenya, 2010.***

***(b) AN ORDER THAT the Respondents 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 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 services provider of his choice.***

***(g) AN ORDER OF MANDAMUS to compel the 1st Respondent to permit at its cost 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 in full.**

**(i) AN ORDER that the Respondents do pay the Petitioner interest on 38 and 42 above at the Honourable Court's rate until payment in full."**

2. The brief facts of the appellant's petition before the High Court were that

the appellant filed the petition on behalf of **TO** and **FA** who are children. The appellant is the biological father of T and guardian of F. The children are beneficiaries of the 1st respondent's medical scheme, being dependants of the appellant's wife, **EAO**, who is the 1st respondent's Legal Officer.

3. On 18th July, 2014 the 4th respondent filed a suit, **HCCC No. 25 of 2014**, at Kisumu against the 1st respondent, **Riley Falcon Security Services Ltd** (where the appellant is a director), and the **Public Procurement Oversight Authority**. The suit was about alleged interference with a procurement contract that had been awarded to the 4th respondent by **Maseno University**. Among the documents exhibited by the 4th respondent in the suit are papers containing names and photographs of the said children and the appellant's wife.

4. The appellant contended that the said information is private medical record and is not open to the 4th respondent or the general public and publication of the said information was a violation of various provisions of the Constitution, among them, **Articles 27(1), 29(d), 31(c) and (d), 43 (1) (e), 47(1), 53(1) (d) & 2 and 232(1) (a), (e) & (f)**.

5. The 1st respondent denied the appellant's claim that it violated the said children's right to privacy or violated any of their constitutional rights as alleged. It stated that the documents cited by the appellant are not medical records of the said children, it is a declaration by the appellant's wife of her dependants, who are beneficiaries of the 1st respondent's medical scheme.

6. The 2nd respondent argued that he had been wrongfully sued; that the documents complained of had not been in his possession before their publication; and that the suit against him was in bad faith.

7. The 3rd respondent, the Chairman of the 1st respondent's health services, like the 1st respondent, stated that the documents complained of by the appellant are not medical records but personal data information forms which he had no access to.

The 4th respondent raised the same defence as the 1st respondent.

8. In his judgment, the learned judge held that the documents in question contain photographs, names and details of the appellant's wife and his children; work details of the appellant's wife and their place of residence; the consent of the appellant or his wife was not sought before the documents were exposed to third parties; that there was wrongful invasion of the children's right to privacy by the 4th respondent and therefore the appellant's rights and those of the minors were infringed.

9. That notwithstanding, the learned judge held that the appellant had failed to demonstrate how the 1st, 2nd and 3rd respondents were involved in the leakage of the information complained about and therefore exonerated them of any blame. The learned judge dismissed the petition with costs.

10. Being aggrieved by the said decision, the appellant preferred an appeal to this Court. In his memorandum of appeal, the appellant stated, inter alia, that the learned judge misdirected himself and erred in law: in finding that there was no evidence to establish liability against the respondents; by failing to state whether the 4th respondent was liable; by finding that the 1st, 2nd and 3rd respondents were not vicariously liable; by failing to assign liability after finding the children's right to privacy was violated; and by awarding costs against children.

11. On 26th February 2018, the appellant filed a notice of withdrawal of the appeal against the 1st, 2nd and 3rd respondents.

12. On 24th September 2019 – the appellant filed submissions where he narrowed down the issues for determination into two main ones as follows:

*(a) Whether the learned judge erred in law in dismissing the petition; and*

*(b) Whether the learned judge erred in law by awarding costs to the respondents.*

13. This being a first appeal, our duty is well known. In **ABOK JAMES ODERA t/a A.J. ODERA & ASSOCIATES v JOHN PATRICK MACHIRA t/a MACHIRA & CO. ADVOCATES [2013] eKLR**, the Court held:

***“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”***

Likewise, in **SELLE AND ANOTHER v ASSOCIATED MOTOR BOAT CO. LTD [1968] E.A. 123**, it was held:

***“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its***

*own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mhamed Sholan, (1955) E.A.C.A. 270)".*

14. Guided by the above principles, the grounds of appeal and the submissions on record, we must re-evaluate all the evidence that was tendered before the High Court to determine whether the learned judge erred in dismissing the petition, which was canvassed by way of written submissions, without any oral hearing.

15. The appellant's major complaint in the petition was that in **HCCC No. 25 of 2014** at Kisumu, the 4th respondent exhibited "**medical records**" containing names and photographs of the appellant's wife and their two children.

Regarding the injury caused by that publication, the appellant stated:

*"29. The Respondents tortured the petitioner psychologically.*

*30. The Respondents contravened the petitioner's right to privacy by unnecessarily revealing information relating to his family.*

*31. By compromising the safety of his family's confidential data, the Respondents contravened his right to social security.*

*32. By unnecessarily disclosing the medical records of the children and wife, the Respondents subjected the petitioner to unlawful and unreasonable administrative action.*

*33. The disclosure and use of the children's private information in litigation in which they are not interested was not in their best interest."*

16. In HCCC No. 25 of 2014, the 4th respondent had alleged that the 1st respondent had threatened to unlawfully terminate a contract for provision of security services that had been awarded to him. The 4th respondent had alleged that the attempted termination of the contract was due to a contrived advice given by the 1st respondent's Legal Officer, who is the appellant's wife.

17. The 4th respondent stated in its plaint:

*"6. That the plaintiff thereafter proceeded to sign an agreement with the 1st Defendant on or about 19th May 214 and thereafter took over on or about 1st June 2014 without any problem and deployed 250 security guards on all installations of the 1st Defendant and in addition has signed contract with them.*

*7. 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 contract 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 the 2nd Defendant is actuated by malice."*

18. In the particulars of malice, the 4th respondent stated, *inter alia*:

*"(b) Allowing the 2nd Defendant to manipulate the process by the virtue of the 2nd Director Mr. Tobias See having his wife as the Chief Legal Officer to take away the contract from the plaintiff unprocedurally.*

*(c) The acts of the Chief Legal Officer of the 1st Defendant are against the Leadership and Interest Act (sic), the Public Officer and Ethics Act and amounts to conflict of interest."*

19. Among the documents that were annexed to the 4th respondent's statement is a photocopy of the 1st respondent's Medical Scheme Beneficiaries Form revealing the name and pictures of the appellant's wife, Elizabeth Atieno Ayoo and the two children. The Medical Scheme Beneficiaries Form shows that Elizabeth A. Ayoo is married to Tobias Otieno, the appellant.

20. Did the exhibition of the aforesaid documents amount to violation of the appellant and the children's constitutional rights, particularly **Articles 31(c) and (d), 53 (1) (d) and (2)?**

21. **Articles 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.”*

22. **Article 53(1) (d)** stipulates that every child has the right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour. Sub-article

(2) provides that a child’s best interests are of paramount importance in every matter concerning the child. We do not think that the appellant demonstrated any violation of the said provisions of the Constitution.

23. The learned judge rightly stated that the right to privacy is not absolute, it can legitimately be limited by interests of others as well as public interest. But having so stated, the learned judge rejected the 4th respondent’s argument that the documents complained of did not constitute medical records but was personal data form that was already in the public domain. He held that irrespective of how the documents were obtained, the consent of the appellant and his wife was not sought before they were exposed to third parties; that there was wrongful invasion of the appellant’s and the minors’ right to privacy.

24. That notwithstanding the learned judge held that the appellant had failed to establish how the 1st, 2nd and 3rd respondents could have been liable for the publication of the documents complained about.

25. Although the 4th respondent did not prefer any cross appeal against the aforesaid findings; as the first appellate court we are duty bound to reconsider all the material that was before the trial court, evaluate it and arrive at our own independent conclusion. In our view, the material complained about by the appellant are **not “medical records”** as was alleged in the petition. We agree with the 4th respondent’s submissions that **Dictionary.Com** defines medical records as **“a chronological written account of a patient’s examination and treatment that includes the patient’s medical history and complaints, the physician’s physical findings, the results of diagnostic tests and procedures, and medications and therapeutic procedures.”**

26. What was exhibited was a medical scheme beneficiary form that revealed the relationship between the appellant and the 1st respondent’s Legal Officer.

Below the name of the appellant’s wife were the names of their two children, who were also named as beneficiaries of the 1st respondent’s medical scheme, courtesy of their relationship with the appellant’s wife, which was factually correct. The 4th respondent’s objective in annexing that document to his statement in HCCC No. 25 of 2014 was to prove that the legal officer who had advised the 1st respondent to terminate the security contract that had been awarded to the 4th respondent was the wife of the appellant, a director of a rival company that had earlier been awarded a similar contract, and was competing against the 4th respondent for renewal of the lucrative contract. That relationship was not denied by the appellant.

27. **Article 31(c)** of the **Constitution** provides that a person’s right to privacy includes the right not have information relating to their family or private affairs **unnecessarily** required or revealed. Was it necessary to annex the said document to the 4th respondent’s statement in support of the suit that it had filed? We think in the circumstances aforesaid it was necessary, as long as it was correct and truthful. There are certain constitutional rights that are not absolute and may be limited in certain instances. **Article 24(1)** of the **Constitution** provides:

**“24. (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.”**

28. In the context of the matter that was before the trial court, what **Article 31 (c)** prohibits is unnecessary revelation of information relating to one’s family or private affairs. In our view, accurate and truthful documents that are filed by parties in court for purposes of proving issues or questions in dispute in order to enable a court reach a fair determination cannot be said to amount to violation of **Articles 31(c)** of the **Constitution**.

29. In view of the foregoing, we think the learned judge erred in finding that the exhibition of the medical scheme beneficiary form amounted to wrongful invasion of the appellant’s right to privacy as well as that of the two minors.

30. Although the learned judge dismissed the petition for different reasons, on our part, for reasons aforesaid, would equally dismiss the

petition as well as the appeal.

31. As regards the order on costs, it is trite law that costs follow the event, except where for good reasons the trial court orders otherwise. The appellant had filed the petition for the benefit of both himself and the two children. It was not demonstrated that the learned judge in ordering the appellant to bear the costs of the suit exercised his discretion injudiciously. That ground must also fail.

32. In conclusion, we hereby dismiss the appeal with costs to the 4th respondent.

**Dated and delivered at Nairobi this 7th day of August, 2020.**

**D.K. MUSINGA**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KARIU, FCIArb**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**