

Hg 14/8/15



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 250 OF 2015**

KENYA LEGAL AND ETHICAL ISSUES NETWORK ON HIV & AIDS  
(KELIN).....1<sup>ST</sup> PETITIONER  
CHILDREN OF GOD RELIEF INSTITUTE (NYUMBANI).....2<sup>ND</sup> PETITIONER  
JAMES NJENGA KAMAU.....3<sup>RD</sup> PETITIONER  
MILLICENT KIPSANG .....4<sup>TH</sup> PETITIONER

**-VERSUS-**

CABINET SECRETARY, MINISTRY OF HEALTH.....1<sup>ST</sup> RESPONDENT  
THE NATIONAL AIDS CONTROL COUNCIL.....2<sup>ND</sup> RESPONDENT  
CABINET SECRETARY, MINISTRY OF EDUCATION,  
SCIENCE AND TECHNOLOGY.....3<sup>RD</sup> RESPONDENT  
CABINET SECRETARY, MINISTRY OF INTERIOR AND  
COORDINATION OF NATIONAL GOVERNMENT.....4<sup>TH</sup> RESPONDENT  
THE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT

**THE RESPONDENTS' REPLYING AFFIDAVIT**

I DR. NDUKU KILONZO of care of Post Office Box number 61307-00200, Nairobi in the Republic of Kenya and resident at Nairobi in the aforesaid Republic do hereby make oath and state as follows:-

1. THAT I am the Director of the National AIDS Control Council the 2nd respondent in the Petition dated 15th June, 2015 and have full knowledge and information concerning this matter and in my capacity aforesaid, I am

competent and duly authorized to swear this affidavit on behalf of the Respondents.

2. THAT I have also been authorised by all the other respondents namely the Cabinet Secretary, Ministry of Health, Cabinet Secretary, Ministry of Education Science and Technology, Cabinet Secretary, Ministry of Interior and Coordination Government and the Attorney General to swear this affidavit on their behalf.
3. THAT I have read and understood and where necessary I have been explained to by the State Counsel on the record for the respondents the contents of the petition filed by the petitioners herein and the supporting affidavits and the annexures thereto and that I make this affidavit in response to the petition and also in support of the petition dated 15<sup>th</sup> June, 2015.
4. THAT HIV and AIDS was declared a national disaster in 1999.
5. THAT an estimated 1.6 million people are living with HIV in Kenya and 16% of the 1.6 million people living with HIV are adolescents and youth.
6. THAT HIV/AIDS is a leading cause of adolescent death in Africa and 30% of new HIV infections in Kenya are in the adolescent age group.
7. THAT AIDS is the highest cause of death among adolescents in Africa and that adolescents are the only age group where deaths due to AIDS are not decreasing.
8. THAT approximately 9,720 Kenyan adolescents and young persons of below the age of 24 died of AIDS related deaths in 2013.
9. THAT Kenya recorded approximately 88,000 new HIV infections among adults of above 15 years and that 30% of these were below 24 years of age.
10. THAT the number of children born with HIV in Kenya in 2013 was approximately 13,000 and that this figure, although high is a 44% reduction from 2008.

11. THAT an estimated 38% of Children living with HIV are on ARV treatment and an estimated 11,000 children of 0 – 14 years of age, living with HIV in Kenya die each year due to poor access to life saving Antiretroviral Therapy.
12. THAT the Ministry of Health, the Ministry of Education and the National AIDS Control Council have implemented programmes to address the underlying challenges that have resulted in these statistics; including but not limited to limited information and education on HIV, limited access to ARVs for school going children and other adolescents and young people and experience of stigma and discrimination against young people living with HIV.
13. THAT H.E the President of the Republic of Kenya, in an effort to accelerate the already on-going interventions by the different Ministries and Agencies, on 17<sup>th</sup> February 2015 launched the 'All-In Campaign' whose aim was to fast-track the HIV response in Kenya to change the quality of life of adolescents and young people and thereby also change the statistics provided above.
14. THAT the global launch of the "All-in" campaign served to provide the political will necessary to engage multiple stakeholders including development partners, persons living with HIV, multilateral and the private sector to make commitments towards results for children, adolescent and young persons by 2020.
15. THAT following the global launch of the 'All In' campaign, in an effort to mobilize all resources of Government towards addressing the challenges noted above, H.E the President of the Republic of Kenya issued a directive dated 23<sup>rd</sup> February, 2015 to all County Commissioners to collect data on school going children living with HIV.
16. THAT I have also been advised by the state counsel on the record which advice I verily believe to be true, and which I have observed to accord with the state of affairs on the HIV & AIDS control sector, that the Presidential directive *ipso facto* did not breach any constitutional rights, and that possible misinterpretation or implementation resulting in a breach of the petitioner's constitutional right cannot render the said directive unconstitutional.

- 17. THAT further to the above, the intent of H.E. the President in issuance of the said directive was to ensure that the welfare of every Kenyan child living with HIV particularly, in respect to access/availability of ARVs. The Presidential directive was also apt in the existing socio economic milieu that prevails in Kenya, an emerging economy with myriad social and economic challenges that are bound to, if care is not taken, adversely affect the Government's fight against HIV and AIDS, stigma and spread, and therefore negate advances in amelioration of the living standards of all citizens.
  
- 18. THAT a sensitization workshop for all County Commissioners was held to sensitize all County Commissioners on privacy and confidentiality guidelines and requirements of the HIV Prevention and Control Act. (Annexed hereto and marked "NK 1" is a copy of an invitation letter and programme of the sensitization workshop)
  
- 19. THAT following the launch of the "All In" Campaign, the following initiatives were put in place by the respondents as outlined below, and prior to the institution of this petition:
  - a) The 1st respondent, Cabinet Secretary Health, through the National AIDS and STI Control Programme (NAS COP) in the Ministry of Health set up an adolescents and children HIV treatment acceleration working group in March 2015. The multi-stakeholder team, whose objectives include scaling up HIV testing and counselling to identify 90% of HIV infected children and adolescents, enrolling and retaining 90% of these on treatment, has held monthly meetings. The stakeholders include Government, development partners, key implementing NGOs and persons living with HIV.
  
  - b) The 2nd Respondent, the National AIDS Control Council (NACC) set up multi-stakeholder committee to develop a campaign to end stigma and discrimination among children and adolescents in May 2015 and that the committee has representation of the government, development partners, key communication NGOs and persons living with HIV; that the committee had met prior to the institution of the petition. (annexed



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hereto and marked "NK 2" is a bundle of documents comprising requests for budgetary approval to facilitate a communication strategy among other things)

- c) The 2nd respondent had set up a multi-sectoral committee in November 2014 to develop an operational plan to accelerate and fast-track action across different sectors that have a bearing on children and adolescents including Education, Labour and Social Security.
20. THAT the 3rd petitioner is well aware and an active participant in the ongoing process of conducting public awareness on HIV and AIDS. (Annexed hereto and marked "NK 3" is a copy of participation and attendance list of a meeting on the development of a communication strategy for a campaign on Anti-Stigma and acceleration of treatment and care for children and adolescent in Kenya)
21. THAT the 1st respondent, recognizing the need to harmonize these initiatives, ensure that they are undertaken within the confines of the law and facilitate synergy and coordination, established a National Steering Committee (NSC) to fast-track the HIV response among adolescents on June 8th 2015 prior to the institution of this petition. (Annexed hereto and marked NK 4 is a copy of a letter in support of this statement)
22. THAT pursuant to this action on the part of the 1<sup>st</sup> respondent as described in the immediately preceding paragraph, the Terms of Reference of the National Steering Committee were developed. (Annexed hereto and marked NK 5 is a copy the said Terms Of Reference in support of this statement)
23. THAT further to the above, there are already several developed guidelines that provide privacy and confidentiality guidelines in the implementation of services, in research and data collection and in varied settings (Annexed hereto and marked NK 6 are copies of several developed guidelines)

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24. THAT in any event, noncompliance with statutory provisions does not render a cause of action that would otherwise arise under that Act to be a constitutional issue.
25. THAT though there was no preconceived, systematic method of collecting the data prescribed by the respondents, if there were any cases of violation of the rights to privacy then the same may have occurred in only a few isolated incidents which the respondents are not able to respond to owing to lack of specific information.
26. THAT having been so advised by the state counsel which advice I verily believe to be true, I am aware that under the Constitution of Kenya the only rights which cannot be limited are listed in Article 25 of the Constitution as follows:
- a) Freedom from torture and cruel, inhuman or degrading treatment or punishment
  - b) Freedom from slavery or servitude
  - c) The right to a fair trial; and
  - d) The right to an order of habeas corpus
27. THAT though privacy of the person has been provided for in Article 31 it is not an illimitable right.
28. THAT availability of names of people with chronic care conditions including HIV in a register *ipso facto* does not breach any law or amount to profiling of persons infected by HIV or propagate stigma and discrimination, such as currently available in manual and electronic registers and names of persons living with HIV in hospitals and HIV care clinics, institutions offering HIV care services for the purposes of follow up, care and improved quality of life and ARV treatment.
29. THAT in any event, I am aware that the petitioner's views do not represent the view of the Kenya's largest network of People Living with HIV (NEPHAK); it is instructive to note that NEPHAK which has country wide representation including leadership across all Counties and membership of other networks of

persons living with HIV is not party to the petitioners views, and that further, NEPHAK made a deliberate decision as a network not to enjoin the case.

30. THAT following the Presidential Directive, the NEPHAK wrote to the 2nd respondent, and during a subsequent meeting, the 2nd respondent outlined the actions taken to the concerns raised, by people living with HIV in Kenya. (Annexed hereto and marked NK 7 is a copy of Minutes of a meeting held between the 2<sup>nd</sup> Respondent and NEPHAK).
31. THAT further to the above, there is active engagement between the 2nd respondent and NEPHAK, on management of the collected data with a view to ensuring that the rights of the PLHIV are protected.
32. THAT the 3<sup>rd</sup> and 4<sup>th</sup> Petitioners are members of the Network of People Living with HIV.
33. THAT this court should note that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents identified the challenges with access to HIV testing and counselling, care and treatment for children and sought to engage relevant stakeholders and leverage the goodwill of H.E. the President of the Republic of Kenya.
34. THAT it is quite evident from the above statements that prior to this petition, the 1<sup>st</sup> respondent had already taken on some of the prayers sought recognizing these as part of the Ministry of Health service delivery to Kenya.
35. THAT it is also clear from the petition and the statements made in this affidavit that the petitioners were aware that their sought prayers were already being addressed and that the network of people living with HIV in Kenya made a deliberate decision not to enjoin the case, being aware of the actions on the part of the respondents.
36. THAT I am aware that though the petitioners do on the face of it seem to be actively fighting stigma arising from HIV/AIDS, any decision that the court makes in this case that seems to uphold HIV/AIDS as a shameful scourge that ought to be concealed would only add to the already existing stigma that the respondents are so much attempting to eliminate; this Court should not

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therefore allow the litigation process to be used for the purpose of increasing fear of stigmatization by persons living with HIV .

- 37. THAT the involvement of various personalities affected by HIV/AIDS in the campaigns against stigmatization and the campaigns for the promotion of the sustained use of anti-retroviral therapy is proof that the fight against stigma can bear fruit.
- 38. THAT what is deponed to hereinabove is true to the best of my knowledge save wherein I have received information and or stated my belief and the sources of such information and the grounds of such belief are provided.

SWORN at Nairobi by the said  
DR. NDUKU KILONZO

this 11<sup>th</sup> of August 2015

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Deponent

BEFORE ME:  
COMMISSIONER OF OATHS

**ALICE WANGARI MWANZIA**  
ADVOCATE &  
COMMISSIONER FOR OATHS  
P.O. Box 531-00300  
NAIROBI

DRAWN AND FILED BY Hon Attorney General, Attorney General's Chambers, P.O. Box 40112-00100, NAIROBI.

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