

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO.329 OF 2014

RECEIVED
8 JUN 2015
CONSTITUTIONAL AND HUMAN RIGHTS
DIVISION

BETWEEN

DANIEL NG'ETICH.....1ST PETITIONER
PATRICK KIPNG'ETICH KIRUI.....2ND PETITIONER
KENYA LEGAL & ETHICAL ISSUES
NETWORK ON HIV & AIDS (KELIN).....3RD PETITIONER

-VERSUS -

THE HON.ATTORNEY GENERAL.....1ST RESPONDENT
THE PRINCIPLES MAGISTRATE'S
COURT AT KAPSABET.....2ND RESPONDENT
PUBLIC HEALTH OFFICER, NANDI CENTRAL
DISTRICT TUBERCULOSIS DEFAULTER TRACING
CO-ORDINATOR.....3RD RESPONDENT
THE MINISTER FOR PUBLIC HEALTH & SANITATION.....4TH RESPONDENT

GROUND OF OPPOSITION

TAKE NOTICE That the Honourable Attorney General shall at the hearing of the Amended Petition dated 15th February, 2013 oppose the same on the following GROUNDS:

1. THAT one of the core functions of the medical department in the 4th Respondent's office is to promote the public health and the prevention, limitation or suppression of infectious, communicable or preventable diseases in Kenya subject to the provisions of the Public Health Act, CAP 242 Laws of Kenya.
2. THAT Article 24(1)(d) of the Constitution is clear that certain rights or fundamental freedoms in the Bill of Rights may be limited if there is need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.

3. THAT the failure by the petitioners to adhere to treatment meant that they returned to the active Tuberculosis infectious state noting that they continued to interact, associate and mix with the general public in which case they could easily transmit the infection thereby interfering with the right of other members of society to enjoy the highest attainable standards of health.
4. THAT Section 27 of the Public Health Act CAP 242 L.O.K should be read together with Section 28 which states that persons who expose themselves without proper precautions against spreading the said disease in any street, public place, shop, inn or public conveyance, or enters any public conveyance without previously notifying the owner, conductor or driver thereof that he is so suffering is guilty of an offence and liable to a fine not exceeding thirty thousand shillings or to imprisonment for a term not exceeding three years or both.
5. THAT the respondents do not dispute that there were indeed less restrictive means to prevent the 1st and 2nd petitioners from spreading the disease but the said means never worked since the 1st and 2nd petitioners failed to report to hospital everyday as instructed for the purposes of taking their medication and that they also failed to be available at their homes when they were scheduled to take their medication.
6. THAT the 1st and 2nd petitioners were taken through proper health education on the need to adhere strictly to the treatment before being put on measure number one which was treatment in hospital and measure number two which is home based treatment and they failed to adhere to the guidelines given to them by the 3rd respondent thereby failing to take medication and that necessitated using the last legal compulsive approach of confinement in a Government of Kenya prison.
7. THAT the 3rd respondent settled on the option of treating the 1st and 2nd petitioners while in lawful confinement due to the fact that tuberculosis treatment if defaulted is likely to lead to a multidrug resistant Tuberculosis and Extra Multi Drug Resistant Tuberculosis which are very difficult and expensive to treat and if this is allowed to happen it would create a danger to the general population if the individuals were allowed to mix and interact freely with the public.
8. THAT the country has witnessed a steady increase in the number of tuberculosis patients which situation poses a major threat to the health and economy of the country and this state of affairs must be remedied through strict compliance with the provisions of the Public Health Act CAP 242 L.O.K
9. THAT the petition is otherwise incompetent, misconceived, misplaced and is an abuse of the process of this Honourable Court as the Petitioners rights and fundamental freedoms have not been breached in any manner as alleged or at all and the same ought to be dismissed with costs.

REASONS WHEREFORE the Respondents pray that this petition be dismissed with costs.

DATED at NAIROBI this16th.....day ofJune.....2015

E. Obura
Litigation Counsel
FOR: THE HON. ATTORNEY GENERAL

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