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

RECEIVED
27 JUL 2015
CONSTITUTIONAL AND HUMAN RIGHTS
DIVISION
1ST PETITIONER
2ND PETITIONER

BETWEEN

DANIEL NG'ETICH.....
PATRICK KIPNG'ETICH KIRUI.....
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 & SANTTATION.....4TH RESPONDENT

RESPONDENTS REPLYING AFFIDAVIT

I, JAMES W. MACHARIA, a resident of Nairobi County and of Post Office Box Number 30016-00100 Nairobi, do hereby make oath and state as follows;

1. THAT I am the Cabinet Secretary in the Ministry of Health (hereinafter referred to as the Ministry) and I am therefore seized of the facts herein and duly competent and authorized to swear this affidavit.
2. THAT I have read and understood the Petition dated 15th February, 2013 and the Supporting Affidavit sworn by Mr. Daniel Ng'etich on the same date and I therefore swear this affidavit in response thereto.
3. THAT the functions of the medical department subject to the provisions of the Public Health Act CAP 242 Laws of Kenya (hereinafter referred to as the Act) is to promote the public health and the prevention, limitation or suppression of infectious, communicable or preventable diseases within Kenya.

4. THAT I have been informed by the Public Health Officer Nandi Central District Tuberculosis defaulting Coordinator which information I verily believe to be correct that the 1st and 2nd petitioners herein were examined by a qualified medical practitioner who certified that they be put on medication for Tuberculosis (hereinafter referred to as TB)
5. THAT further, I have been informed by the 3rd respondent herein that the 1st and 2nd petitioners were taken through proper health education on the need to adhere to treatment before being put on measure number one which involved the petitioners being treated at the hospital and measure number two which involved the petitioner being treated at home and finally they were informed that if they default on the first two the 3rd respondent will use the legal compulsive approach of confinement in a Government of Kenya Prison.
6. THAT despite the 3rd respondent educating the petitioners on the aforementioned treatment options and the dangerous nature of TB the petitioners failed and/or ignored to adhere to the guidelines on treatment and went ahead and defaulted in taking their medication.
7. THAT the 3rd respondent tried in vain to look for the 1st and 2nd petitioners so that they could take their drugs but calls to the said petitioners went unanswered and the many visits to their homes were unfruitful since the 3rd respondent never got hold of them.
8. THAT I am informed by the 3rd respondent that having tried to locate the 1st and 2nd petitioners in vain he proceeded and had the 1st and 2nd petitioners arrested and arraigned in court because they had failed to take the TB medication prescribed for them.
9. THAT the 3rd respondent sought a court order pursuant to Section 27 of the Act to have the 1st and 2nd petitioners detained at the Kapsabet G.K prison because they had defaulted in taking medication and their actions exposed the general public of Kiropket area and their immediate families to the risk of TB infections.
10. THAT I have further been advised by the State Counsel on record which advice I verily believe to be true that Section 27 of the Act gives the trial court powers to order that the 1st and 2nd petitioners be detained until they finish their medication.
11. THAT Article 43 of the constitution states that every person has the right to the highest attainable standard of health, which includes the right to health care services and a such the 3rd respondent had a statutory duty to ensure the 1st and 2nd petitioners did not default again in taking their medication which would in turn put the health of other members of the public in danger.

12. THAT Article 24 of the Constitution recognizes the fact that certain rights are not absolute and that a right or fundamental freedom can be limited if provided for by law putting into consideration factors like the importance of the purpose of limitation, 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 the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
13. THAT the foregoing constitutional provisions allows for limitation of the 1st and 2nd petitioners constitutional rights so long as the limitation serves an important purpose which in the instant case is safeguarding the health of the public.
14. THAT I have been advised by the State Counsel on record which advice I verily believe to be true that the public interest in this case tilts against the interest of the 1st and 2nd petitioners because of the dangerous nature of TB.
15. THAT Section 13 of the Act gives every health authority obligation to take all lawful, necessary and special circumstances, reasonably practical measures for preventing the occurrence or dealing with any outbreak or prevalence of a disease outbreak in order to safeguard and promote the public health.
16. THAT further Section 27 of the Act states that a person who is likely to infect the public with a disease can be removed by an order of a Magistrate to a place of isolation and their detained until he is free from the infection in the opinion of the Medical Officer of Health.
17. THAT the aforementioned sections of the Act do not expressly state that the infected person should not be isolated in a prison.
18. THAT I have been informed by the 3rd respondent that when the 1st and 2nd petitioners failed to adhere to their treatment they returned to the active TB infectious state and they continued to interact, associate and mix with the general public in which they could easily transmit the infection thereby with the health of other people in society.
19. THAT Section 27 of the PHA should have been read together with Section 28 of the same Act and it is clear that a person who exposes himself or themselves without proper precautions against spreading the said disease in any street, public place, shop, inn or public conveyance 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.

20. THAT the 3rd respondent made an application in court that the petitioners be imprisoned because a TB treatment if defaulted is likely to lead to multidrug resistant TB and extra drug resistant TB which are very difficult and expensive to treat and this would create danger to the general population if the 1st and 2nd petitioners were allowed to mix and interact freely with the public.
21. THAT there has been a steady increase in the number of TB patients particularly since early 1990's and this poses a major threat to the health and the economy of this country.
22. THAT I have been informed by the State Counsel on record which information I verily believe to be correct that the petition is 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.
23. THAT what is deponed hereto is true to the best of my knowledge and belief save and except where otherwise expressly stated, all my sources having been disclosed.

SWORN at NAIROBI by the said)
 JAMES W. MACHARIA this.....29th)
 Day of.....July.....2015)


 DEPONENT

BEFORE ME)
 ALICE M. GILARI MWANZIA)
 JUDGE &)
 COMMISSIONER FOR OATHS)
 P.O. Box 7534 - 00300)
 COMMISSIONER FOR OATHS)
 NAIROBI)

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