



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 407 OF 2012**

**BETWEEN**

**ISAAC NGUGI .....PETITIONER**

**AND**

**THE NAIROBI HOSPITAL.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**THE MINISTER FOR**

**MEDICAL SERVICES.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The germane issue for consideration in this matter is whether the detention of a patient in hospital for non-payment of hospital bills is a violation of the person's fundamental rights and freedoms.

**Background and facts**

2. The petitioner is the son and administrator of the estate of Elizabeth Mary Wamaitha Ngugi ("the deceased"). He has been granted a limited grant of letters of Administration ad Litem to pursue this case on behalf of the deceased. The crux of the petitioner's case is that his late mother's rights and freedoms were violated by Nairobi Hospital("the Hospital") when it refused to

discharge her after she was due to discharge on account of unpaid hospital bills incurred in her treatment.

3. The basic facts are not disputed and are set out in the supporting affidavit of Isaac Ngugi sworn on 22<sup>nd</sup> March 2013 and the Replying Affidavit of Stephen Kahuki, the Credit Control Manager of Nairobi Hospital, sworn on 20<sup>th</sup> September 2013.
4. The deceased was diagnosed with brain disease in the year 2005. She was admitted to Nairobi Hospital on 31<sup>st</sup> December 2011. On or about 25<sup>th</sup> February 2012, her doctor recommended her discharge from hospital.
5. The petitioner's contention is that despite the doctor's recommendation for discharge, the Hospital refused to release the deceased on account of an unpaid hospital bill standing at Kshs. 4,051,426/00. This amount could not be paid by the petitioner or his sister. The petitioner tried to raise funds through well-wishers but this was not possible. The deceased remained in hospital until her demise on 18<sup>th</sup> August 2012.
6. The 1<sup>st</sup> respondent, the Hospital denied that it wrongfully detained the deceased. Its position is that the patient was brought to the hospital by the petitioner who undertook to pay the hospital bills. That the petitioner came to the hospital once to request a transfer of the patient because of escalation of the bills and that he later pleaded with the hospital to continue taking care of the patient while he sought for funds.
7. Mr Kahuki deponed that neither the petitioner nor family members came to see the patient while she was in hospital. While the patient was in hospital she was visited by her house help, Mary Wairumu ("Mary"), who was updated of her condition. Unfortunately Mary could not make decisions regarding the patient's bills or transfer. He further deponed that during this time, the hospital could not reach the petitioner by telephone.
8. The Hospital admitted that on 25<sup>th</sup> February 2012, the patient was considered fit for discharge but she was unable to move and it was necessary that she be wheeled to a bed and transported using a specialised vehicle to facilitate her movement. Mr Kahuki deponed that due to her condition, the patient needed a nurse to accompany her and manage her condition. The only person who could receive the patient at the time, Mary, informed the Hospital that she could not settle the bill nor facilitate the medical care of the deceased.
9. The Hospital made efforts to reach the next of kin, the petitioner, without success. Shortly after 25<sup>th</sup> February 2012, the patient's condition continued to deteriorate and the Hospital resumed medical care despite the fact that bill had not been settled. Her health continued to deteriorate whereupon she was admitted in the intensive care unit and the high dependency unit before her demise. The Hospital states that during this period, the Hospital continued to update the petitioner and Mary of the patient's condition whenever possible.
10. Prior to the patient's death, the petitioner had written to the Hospital a letter dated 2<sup>nd</sup> March 2013 informing it that he had been appointed manager of the patient's estate by an order of the **High Court in Nairobi Misc. Appl. No. 6 of 2012**. The order was intended to secure settlement of the hospital bill. It stated, in part, that; "[5] ... part of the rent payable to ELIZABETH MARY WAMAITHANGUGI in respect of the building standing on LR No. 330/354 Lavington Nairobi be used to pay Nairobi Hospital or any other Hospital facility."

11. The petitioner's advocates thereafter approached the Hospital to discuss the patient's condition. At the meeting held on 14<sup>th</sup> March 2012, the advocates requested the Hospital not to transfer the patient until instructions were received from the petitioner. The advocates informed Hospital efforts were being made to clear the Hospital bills and that the same would be secured by a property of the deceased in Lavington. The proposal to liquidate the debt was confirmed by the petitioner's advocates' letter dated 27<sup>th</sup> March 2012 which indicated that efforts would be made to clear the outstanding medical bill in monthly instalments of Kshs 150,000/= and that the title to the deceased's property would be delivered to the hospital as security pending full payment.
12. Nothing came of the initial proposal leading to correspondence between the petitioner's advocates and the respondent's advocates. By the time the patient died on 18<sup>th</sup> August 2013, no settlement had been reached despite proposal and counter proposals.
13. Together with the suit, the petitioners filed a chamber summons dated 14<sup>th</sup> September 2012 in which he sought an order that the cadaver of the deceased be released pending the hearing and determination of the matter. After hearing the application, I delivered a ruling on 20<sup>th</sup> September 2012, where I ordered as follows;
  1. *A prohibitory order be and is hereby issued by this court in respect of LR No. 330/354 in the name of Elizabeth Mary Wamaitha Ngugi to secure the sum of Kshs.6,700,000/= due to the NAIROBI HOSPITAL and the said order shall take priority over any other encumbrances on the suit property and any dealings of the property shall be subject to the orders /directions of this court.*
  2. *The petitioners or any of his agents shall pay to the Nairobi Hospital a sum of Kshs.2,000,000/= within the next four days whereupon the Hospital shall release the body of Elizabeth Mary Wamaitha Ngugi to the petitioners or his appointed representatives.*
  3. *Either party shall have liberty to apply for further and other orders.*
  4. *The parties shall agree on the final sum due to the hospital within the next 21 days.*
  5. *There shall be a mention on 26<sup>th</sup> October 2012 for further orders, directions or record a settlement.*
14. The body was subsequently released to the petitioner for interment on the terms set out in the ruling. What remains for determination is whether the deceased's rights under the Constitution were violated.
15. The Amended Petition dated 22<sup>nd</sup> March 2013 now seeks several orders including declarations that the detention of the petitioner's mother by the Hospital from the 25<sup>th</sup> February 2012 to the time of her demise and the Hospital's refusal, neglect and or failure to release her and her cadaver upon her death violated the deceased's constitutional rights including the right to security of the person under **Article 29**, equality and or freedom from discrimination under **Article 27**, right of freedom of movement under **Article 39**, right to fair hearing under **Article 50**, right to human dignity under **Article 28** and right to freedom of association. In addition, the petition sought to have any hospital bills claimed by the Hospital after the date of discharge until the demise of the petitioner's mother rendered unconstitutional hence null and void. The petitioner also sought compensation from the hospital for the loss, injury and violation of the deceased's constitutional rights.
16. The petitioner also sought a declaration that the State and the Minister for Medical Services violated the **Article 54** for failing to take steps to take care of elderly persons such as his late mother.

17. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents (“the respondents”) deny responsibility of the petitioner’s predicament contending that the matter at hand was a contract issue between the Hospital and the petitioner and his mother hence the doctrine of privity of contract applied and that therefore they could not be dragged into the dispute. The respondents contended that the petitioner had not tendered evidence to show that the deceased’s condition was brought to the State’s attention and that it declined to assist. It was submitted that there was no evidence that the respondents had knowledge or information that the petitioner’s mother was old and was in the Hospital and needed care and assistance from the respondents and therefore the provisions of **Article 57** could not be invoked.

## **Preliminary matters**

### ***Horizontal and vertical application of the Constitution***

18. Before I proceed to the substantive issues, I would like to deal with the issues raised by the 1<sup>st</sup> respondent. That a constitutional petition cannot be lodged between two private persons. The respondent relied on the fact that **Article 21(1)** of the Constitution provides that the fundamental duty of the State and every state organ is to observe, protect, promote and fulfil the rights and fundamental freedoms in the bill of rights. It was contended that the obligation is vested in the State and its organs. The respondent also relied on certain dicta in the case of **Kenya Bus Service Limited and 2 Others v Attorney General and 2 Others [2005]eKLR** where Nyamu J., remarked that, *“fundamental rights are contained in the Constitution and are principally against the State because the Constitution’s function is to define what constitutes Government and it regulates the relationship between the Government and the governed on the other hand the rights of individual interests are taken care of in the province of private law and are invariably addressed as such.”*
19. Counsel for the respondent argued that the case does not raise constitutional issues and should be determined as a contractual matter through the usual procedure for determining such matters.
20. The petitioner on the hand argued that he is on sound footing as the case is about breaches of the Bill of Rights and as such he is entitled to move the court under **Article 22** which provides that any party whose fundamental rights and freedoms are threatened or violated may move the court for appropriate relief.
21. The approach adopted in the **Kenya Bus Case(supra)** cannot survive the Constitution. The supremacy clause of our Constitution recognises that the Constitution is the supreme law and binds all persons and all State organs at both levels of government. **Article 3(1)** states that every person has an obligation to respect, uphold and defend the Constitution while **Article 19(1)** provides that, *“The Bill of Rights applies to all law and binds all State organs and all persons.”* The term ‘person’ includes a company, association or other body of persons whether incorporated or not such as the hospital, in accordance with **Article 260**. (See also **Sonia Kwamboka Rasugu v Sandalwood Hotel and Resort Limited and Others Nairobi Petition No. 156 of 2011 [2013] eKLR** at para. 30).
22. The issue whether the Bill of Rights applies horizontally or vertically is beyond peradventure. (See **Satrose Ayuma and 11 Others v Registered Trustees of Kenya Railway Staff Retirement Benefits Scheme Nairobi Petition No. 65 of 2010 [2013]eKLR**). The real issue is whether and to what extent the Bill of Rights is to apply to private relationships. The question as to whether it is to be applied horizontally or just vertically against the State depends on the nature

of the right and fundamental freedom and the circumstances of the case. In the case of **Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi, Petition Number 625 of 2009 [2011] eKLR** Gacheche J., observed that, “...*the rigid position that human rights apply vertically is being overtaken by the emerging trends in the development of human rights litigation...We can no longer afford to bury our heads in the sand for we must appreciate the realities which is that private individuals and bodies such as clubs and companies wield great power over individual citizenry who should as of necessity, be protected from such non-state bodies who may for instance discriminate unfairly or cause other constitutional breaches...The major challenge to horizontal application of human rights is the fact that it (is) a novel area and courts bear great responsibility of examining individual cases so as to decide each case on its own merits as a horizontal application does not and should not cut across the board...I find that fundamental rights are applicable both vertically and horizontally save that horizontal application would not apply as a rule but it would only be an exception which would obviously demand that the court do treat (it) on a case by case basis by examining the circumstances of each case before it is legitimized.*”

23. For instance, the court will be reluctant to apply the Constitution directly to horizontal relationships where specific legislation exists to regulate the private relations in question. In other cases, the mechanisms provided for enforcement are simply inadequate to effectuate the constitutional guarantee even though there exists private law regulating a matter within the scope of application of the constitutional right or fundamental freedoms. In such cases the court may proceed to apply the provisions of the Constitution directly.
24. A number of jurisdictions around the world recognise the horizontality of the bill of rights while others have confined themselves to the vertical application. Some Constitutions expressly specify whether the human rights provisions are enforceable against private individuals and bodies or only against the State. All in all, the doctrine of horizontal application has been likened to ‘a gifted but neglected child with huge potential that is seeking to be released.’ Nyamu J., in the **Richard Nduati Kariuki v Leonard Nduati Kariuki and Another [2006] Misc App. No. 7 of 2006 [2006]eKLR** cites a quote by J. Balkan, **The Corporation: The Pathological Pursuit of Profit and Power (New York, Free Press, 2004)** where it is stated, “*The diffusion of political authority in the context of the global economy has led to concerns about the ability of constitutionalism to operate as a check on political power if it speaks only to the state. Moreover, there is growing awareness-perhaps fuelled by recent examples of corporate corruption and wrong doing-that private power as much as public power has the capacity to oppress.*”
25. I take the positions that the from the history of country and the events leading up to the promulgation of the Constitution leave no doubt that it was intended to be a transformative document. I would be hesitant to adopt a hard and fast position that would prevent the principles and values of the Constitution being infused into the lives of ordinary Kenyans through application of the Bill of Rights to private relationships where necessary.

### **Procedure**

26. It was argued that a petition is an improper mode of litigating matters that would be litigated in the normal way through an ordinary civil suit. I adopt what I stated in the case of **Sonia Kwamboka Rasugu v Sandalwood Hotel and Resort Limited and Others (supra)**, “[26] *When the court, is faced with such contradictory assertions and evidence, the court will seek to establish where the truth lies and this is by placing the evidence of the contesting parties and determine the likelihood of one version over the other. It does not matter whether the matter is an ordinary civil suit or a petition filed under Article 22 to enforce fundamental rights and freedoms. In each case,*

*the duty of the court is to weigh the facts and evidence on either side, whether it is presented orally or by affidavit and make a finding. The respondents' submission that the contested evidence can only be solved in a civil court is mistaken and lacks merit."*

27. The procedure for the enforcement of fundamental rights and freedoms is intended to be flexible yet rigorous enough to ensure that a proper forensic examination of the facts takes place.
28. In the circumstances, I find and hold that the court may consider this petition and make a finding thereof and I decline to strike it out.

### **Determination**

29. I now turn to the core issues in this case. I have considered the depositions and the written submissions filed by the parties. In essence the petitioner has two claims; the first one concerns the holding of the deceased's body pending payment of hospital bills and the second claim is one for detention for non-payment of hospital bills after discharge.

### ***Detention of the body of the deceased***

30. There is not property right in a corpse and a claim for the body of the deceased cannot be sustained by the estate of the deceased. The withholding of the deceased's body is not a cause of action that could be maintained by the deceased herself but one that can be sustained by the person affected or injured in his own right, in this case the petitioner. In this respect I agree with the sentiments of Waki J., in ***Ludindi Venant and Another v Pandya Memorial Hospital Msa HCCC No. 63 of 1998 [1998] eKLR*** where he stated that, *"For I think, with utmost respect to the hospital, that on any view it would be equally repugnant to public policy to sanction the use of dead bodies as objects in the game of commercial ping-pong. Dead bodies are for interment or cremation or other disposal without delay ... The dispute is on a debt for medical services solicited for by someone who is still alive, not the deceased, and there are legal ways of binding such person to pay the debt owed. The dead body of the deceased ought not be part of that equation. .... [I]t is trite law that there is no property in a dead body. It cannot be offered or held as security for payment of a debt. It cannot be auctioned if there is default. It cannot be used to earn rental income in a cold-room. In sum, there is no legal basis for detaining it, and it would be callous and sadistic to hold otherwise."*
31. This first issue was however resolved upon the orders I issued on 20<sup>th</sup> September 2013 when the body of the deceased was released upon terms of payment by the petitioner. It is not in dispute that the petitioner was responsible for the petitioner's bill and undertaking and security is now in place to deal with the issue. As I stated in my ruling, the relief granted was in accordance with **Article 23** which empowers the court to grant appropriate relief to deal with any violations and in my view, the relief I issued settled the matter.

### ***Detention of deceased in hospital for non-payment of bills***

32. The second issue deals with the alleged detention of the deceased for non-payment of the hospital bills. The petitioner's case is the doctor recommended her discharge on 25<sup>th</sup> February 2012 and the Hospital refused, failed and or neglected to release her.
33. This is a cause of action that would be sustained by the deceased had she been alive and the petitioner as the administrator of the estate of the deceased is capable of maintaining such a

course of action under the **Law Reform Act (Chapter 26 of the Laws of Kenya)** (see also **Trouistik Union International and Another v Jane Mbeyu and Another [1993]eKLR**).

34. In **Sonia Kwamboka Rasugu v Sandalwood Hotel and Resort Limited and Others (supra)** the court held that the detaining a person for non-payment or failure to pay a contractual debt was a violation of **Article 29(a)** of the Constitution which provides that, “*Every person has the right to freedom and security of the person, which includes the right not to be – (a) deprived of freedom arbitrarily or without just cause.*” The court further held that such detention was a violation of the right to dignity contrary to **Article 28** of the Constitution. By similar reasoning, I have no difficulty in holding that the detention of a patient for non-payment of a hospital bill violates **Articles 28** and **29(a)** of the Constitution.
35. The court in that case observed that; “[30] *The right to personal liberty is one of the most fundamental human rights as it affects the vital elements of an individual’s physical freedom. Article 9 of the Universal Declaration of Human Rights provides that; no one shall be subjected to arbitrary arrest, detention or exile.*” Similarly, **Article 9(1)** of the **International Covenant on Civil and Political Rights (ICCPR)** secures the right to liberty and security of the person in the following terms; “*Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*” **Article 11** of the **ICCPR** further states that, “*No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.*” The provisions of the **Article 2(5)** and **2(6)** of the Constitution incorporate the provisions of the Convention into Kenyan Law. The detention of a patient in hospital for non-payment of a hospital bill is a violation of the patient’s fundamental rights and freedoms.
36. Ultimately, each case must be determined on its facts and the issue for consideration is whether the deceased was detained in hospital for non-payment of the hospital bill which the petitioner undertook to pay. The facts I have outlined earlier in this judgment are largely undisputed and the issue to be resolved is whether on the date of discharge, the hospital declined to release the petitioner’s late mother thereby violating her rights.
37. The petitioner bears the burden of proving, on the balance of probabilities, that the deceased’s rights were violated. At all material times, the petitioner was not resident in Kenya as he was residing in the United Kingdom. He had left his mother entirely in the hands of the Hospital and Mary who, according to the depositions, was the closest person to take care of her but who did not have the authority or capacity to make legally binding decisions as regarding modes of payment of bills or her movement from hospital. It is also not disputed that on 25<sup>th</sup> February 2012, Dr Kasyoka recommended that the patient be discharged for home nursing care.
38. The Hospital has justified the failure to discharge the patient on two grounds. The first was that although her condition had improved and she was fit for discharge, she was unable to move and it was necessary she be wheeled on a bed and transported in a specialized vehicle, to facilitate her movement. Further that Mary, who was the person closest to the patient, was not in a position to facilitate her movement or medical care as recommended by the Doctor.
39. The second reason for failure to release the patient are clearly stated in paragraphs 12, 13 and 14 of the affidavit of Stephen Kahuki where he deposes as follows:

[12]Quite apart from this, part of the Hospital’s discharge process required that the patient pay all

*outstanding medical costs before being approved for discharge.*

[13] *The patient's outstanding bill as at 25<sup>th</sup> February 2012 was Kshs. 4,051,426/-. A copy of the bill has been produced and as exhibit "IN-3" of the exhibits to the petitioner's affidavit sworn on 14<sup>th</sup> September 2012.*

[14] *The patient was not approved for discharge on 25<sup>th</sup> February 2012 for the reason that she was not able to make payment of the outstanding bill of Ksh. 4,051,426."*

40. The petitioner has argued that from 25<sup>th</sup> February 2012, the Hospital continued to detain the patient with a view to extracting further payment through medical expenses. He further argued that the Hospital should have mitigated its loss by discharging the patient as advised by the doctor in order to prevent escalation of the bill. He contended that the Hospital was the author of its own misfortune and that it cannot seek to recover the full amount of Kshs. 9,410,629.00. The petitioner's case is that the Hospital is only entitled to the amount due as at 25<sup>th</sup> February 2012 duly adjusted to take into account what has been paid.
41. I find that the Hospital was placed in a delicate position. The circumstances were such that it could not discharge the patient without having regard to her overall welfare. The petitioner, who had been appointed Manager of the patient's estate by an order of the High Court on dated 20<sup>th</sup> January 2012, had not informed the Hospital of this fact on the date recommended for discharge. His supporting affidavit sworn on 22<sup>nd</sup> March 2013 is silent on the events of 25<sup>th</sup> February 2012. Apart from relying on the doctor's discharge summary to show that the patient was due for discharge. He does not state whether he knew that his mother would be discharged on that date and what instructions he had given the Hospital for her discharge, if at all he knew of this fact. The Hospital's evidence is uncontested in this regard. Would the Hospital have mitigated its loss by leaving the patient at the hospital gate as the petitioner's argument seems to suggest?
42. Despite being appointed manager of his mother's estate on 20<sup>th</sup> January 2012, the petitioner only informed the Hospital of the appointment by a letter dated 2<sup>nd</sup> March 2012. In that letter, he stated that his advocates *Messrs Kibanya and Kamau Advocates* had authority to negotiate with the hospital. He stated, *"I confirm that the said Advocates have my authority and consent to engage with the hospital with a view to having this matter sorted out. This Authority shall remain in force until this matter is settled or until otherwise advised in writing."*
43. At this stage, no instructions as to the release of the patient were issued. The subsequent correspondence between the petitioner's advocates and the Hospital advocates was concentrated towards making efforts to settle the hospital bill. Mr Kahuki referred to a meeting held on 14<sup>th</sup> March 2012 at the Hospital where the petitioner's advocates, Mr Kibanya and Mr Kamau, requested the Hospital not to transfer the patient until they get further instructions from the petitioner. This averment remains uncontroverted in the subsequent affidavit. Further correspondence between the petitioner's advocates and the Hospital's advocates shows that the parties were trying to negotiate how to settle the bill. For instance, in their letter of 27<sup>th</sup> March 2012 written by the petitioner's advocate, *Messrs Kibanya and Kamau Advocates* to the Chief Executive Officer, Nairobi Hospital, states, in part, as follows; *"Since Elizabeth was admitted the family has deposited the sum of Kshs 970,000/= but as at 25.2.2012 the hospital bill stood at Kshs, 4,051,426/= The family has been unable to keep pace with the ever rising hospital bill which has been going up every day she spends at the hospital. Doctor Kasyoka who has been attending to her had recommended that she be discharged and be placed on home nursing care in the Discharge Summary dated 25.2.2012. She has however not been released on account of*



*the outstanding hospital bill. In the circumstances and given the fact that Elizabeth owns some prime property in Lavington (LR Number 330/354, Nairobi) that brings in some good rental income we have been instructed by the said Isaac Ngugi to kindly request you to authorize her release from the hospital upon **deposit of the original title document** in respect of the property aforesaid as security to be released back to him upon full payment of the outstanding bill. (We enclose herewith a true copy of the document of title aforesaid). Isaac Ngugi has also offered to pay the sum of Ksh. 150,000/= per month towards liquidation of the outstanding bill and is also making frantic efforts to raise lump payments(s) with a view to clearing the outstanding hospital bill in the shortest time possible. (We attach herewith a copy of the registered caveat as well as the application for removal thereof which we are currently working on)."*

44. In response to the letter, the Hospital in its letter of 4<sup>th</sup> April 2012 complained that the petitioner had not shown commitment or interest in clearance of the outstanding bill. It also demanded payment of accrued amounts for the months of February and March as per the Court Order of 23<sup>rd</sup> January 2012 before any proposals made in the letter of 27<sup>th</sup> could be considered.
45. There was also the letter of 18<sup>th</sup> July, 2012 addressed to one of the hospital's advocates Mr Katiku which read in part: *"...your client's continued retention of ELIZABETH will in the meantime continue to escalate the said Bill. In the circumstances and as possible way forward, our clients hereby seek your client's kind indulgence to permit them to pay Kshs 2 Million in full and final settlement of the said Bill so that your client may thereafter unconditionally release ELIZABETH MARY WAMAITHANGUGI to our clients for their care of her. We thus look forward to your client's favourable consideration of our clients' proposal herein, especially as the continued retention of ELIZABETH MARY WAMAITHANGUGI will not be in her and/or your client's best interest herein."*
46. An email dated 18<sup>th</sup> June 2012 from the petitioner's advocate addressed to the Hospital confirmed that the petitioner had agreed to deposit the original title to the property: *"Our client has agreed to have the original title deposited as request[ed]. We would however like to have a clarification as to whether Elizabeth will be released upon deposit of the said title document so that our client can have her transferred to another hospital and or taken for home nursing care as the family looks for funds to clear the outstanding hospital bill."* These negotiations continued until after the demise of the deceased.
47. The letter of 4<sup>th</sup> September 2012 by the Hospital's advocates went further to inform the petitioner's advocates demanding payment in the amounts of Kshs 6,719,629 excluding mortuary fees which were to be paid *'prior to collection of the body.'* The petitioner's advocate wrote a letter dated 5<sup>th</sup> September 2012 protesting about this amount. It accused the hospital of shifting goal posts by arbitrarily increasing the settlement figure and termed any charges by the hospital from 25<sup>th</sup> February 2012 after the deceased's discharge as unjust enrichment.
48. Several conclusions can be drawn from the evidence. The fact is that the patient would not have been released on 25<sup>th</sup> February 2013 on account of non-payment of the hospital bill. Paragraphs 12, 13 and 14 of Mr Kahuki's deposition are clear on this point. Although, there was a clear intention not to release the patient without payment of the Hospital bill, can it be said that the deceased was held in hospital in violation of her fundamental rights and freedoms?
49. The issue of detention of the patient was raised for the first time by the petitioner's advocate in correspondence. In my view and I so find, the negotiations of the hospital bill which the petitioner, as manager of the patient's estate had authority to pay, were on the understanding that the

Hospital would continue to take care of the patient. As the meeting of 14<sup>th</sup> March 2013, it was clear that the Hospital was to continue treatment of the patient until such time as instructions were issued to the contrary. No such instructions were forthcoming. I am afraid that given the circumstances of this case, it cannot be said that the patient was being detained in violation of her rights. The petitioner and his legal advisors, who had authority to demand that the patient be discharged or transferred to another facility, were aware that the Hospital would continue to take care of the patient as long as she remained in Hospital.

### **Allegations against the State**

50. The final issue is that the State violated its constitutional duty to the petitioner to ensure that she lived in dignity. The petitioner called in aid the provisions of **Articles 54** and **57** of the Constitution. **Article 54** elaborates the rights of persons with disabilities while **Article 57** obligates the State to take measures to ensure that older members of society, *inter alia*, live in dignity and respect and be free from abuse and to receive reasonable care and assistance from the family and State.
51. I decline to deal with the case against the Minister for Medical Services as it is clear the case at hand is between the petitioner and the Hospital. The State was also not called upon to intervene in the matter throughout the period of the dispute between the parties. Furthermore, the issue of detention of patients by health institutions is a serious issue and it involves broader public interest that would not be appropriately addressed in a case such as this. This case was not instituted in the public interest and concerned the violation of the specific rights of a specific person.

### **Disposition**

52. On the issues identified for determination in the matter, I find as follows;
- a. As regards the holding of the deceased body, the issue was settled by orders issued on 20<sup>th</sup> September 2012.
  - b. As to whether the deceased rights and fundamental freedoms were violated by the failure, neglect and or refusal of the Hospital to release her when she was recommended for discharge on 25<sup>th</sup> February 2012, the petitioner has not proved that the deceased's rights and fundamental freedoms were violated.
53. In view of what I have stated I dismiss the amended petition dated 22<sup>nd</sup> March 2013.
54. Each party shall bear their costs.

**DATED and DELIVERED at NAIROBI** this 30<sup>th</sup> day of September 2013.

**D.S. MAJANJA**

**JUDGE**

Mr Kibanya and Mr Kamau instructed by Kibanya and Kamau Associates Advocates for the petitioner.

Mr Kiragu instructed by Hamilton Harrison and Mathews Advocates for the 1<sup>st</sup> respondent.

Mr Wamotsa, Litigation Counsel, by the State Law Office for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.



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