THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS CAUSE NO. 210 OF 2018

HEALTH EQUITY AND POLICY INITIATIVE (HEAPI) ========== APPLICANT

VERSUS

1.HON. DR. JANE RUTH ACENG OCERO, MINISTER OF HEALTH

2.ATTORNEY GENERAL OF UGANDA==========RESPONDENTS

BEFORE: HON. MR. JUSTICE PHILLIP ODOKI

RULING

Introduction

[1] The Applicant filed this application by Notice of Motion, under Article 50 of the Constitution of the Republic of Uganda, 1995; Sections 3, 4 and 13 of the Human Rights (Enforcement) Act, 2019; and Rules 3, 5, 6, 7, 8, 9,10 &11 of the Judicature (Fundamental Rights and other Freedoms)(Enforcement Procedure) Rules, 2019.

[2] The Applicant seeking for;

1. A declaration that the Respondent's omission and failure to standardize levies, rates, and pricing of medical services provided by private health facilities for legitimate purposes of availability, accessibility and affordability threatens and violates the patients right to be free from torture or cruel, inhuman or degrading treatment as well as their right to life, health, human dignity, equality and freedom from discrimination enshrined in Articles 20, 21, 22, 24 and 45 of the Constitution of the Republic of Uganda, 1995 and other relevant international human rights instruments to which Uganda is signatory.
2. An order compelling the Respondents to urgently consult all stakeholders and formulate and introduce fair and affordable payment ceilings for all medical treatments provided by private health facilities and the same be published in places accessible to the general public.
3. An order compelling the Respondents to issue regulations that shall:
    a) Restrain all private hospitals from detaining patients and holding bodies of diseased persons for pecuniary reasons.

b) Provide penalties for exorbitant pricing of life saving medical goods and services.
c) Provide emergency care protocols for the immediate admission and treatment of critically ill patients in private health facilities without subjecting them to conditional payments.
d) Facilitate and create regional grievances redress avenues for patients and relatives of patients to report incidents of maltreatment by private health facilities.

4. An order compelling the Respondents to update this court on the progress and implementation of the granted orders and directions within 1 month after the ruling in this application.

Applicant's case:

[3] The Applicant's case was set out in the Notice of Motion, the affidavit of Odur Anthony - the Executive Director of the Applicant, in support of the application and in rejoinder and a supplementary affidavit of Tamale Taffa - son of Namugenyi Tereza who died from Paramount Hospital, Makerere after suffering from COVID 19 and a heart attack.

[4] The gist of the Applicant's case, as I understand it, is that the Respondents have a constitutional and statutory duty to regulate private health facilities and to protect the general public from unconscionable medical levies by private health facilities in a bid to realize the right to health. According to the Applicant, the Respondents have omitted or failed to perform those constitutional and statutory duties. As a result, the private health facilities are overcharging patients, delaying the treatment of patients at their facilities on condition that they deposit some payment and detaining patients and dead bodies of patient over pending medical bills. The end result has been that patients' rights to, not to be subjected to any form torture or cruel, inhuman or degrading treatment; life; health; equality and freedom from discrimination has been violated.

[5] In his affidavit, Odur Anthony referred to newspaper articles in which it was stated that COVID - 19 patients were allegedly being overcharged in private medical facilities, their treatment being delayed on condition that they deposit some payment and being detained pending payment of unconscionable medical bills. The newspaper reports also indicated that some patients who died from COVID – 19, their dead bodies were being detained pending

payment of the unconscionable medical bills. He also referred to newspaper reports where 4 mothers had been detained by St. Francis Hospital Nagalama, Mukono for unpaid medical bills and the case of an advocate Peter Kibirango who succumbed to head injuries in the Intensive Care Unit (ICU) at Case Hospital following failed attempts by relatives, friends and colleagues to fundraise for his medical bills.

[6] In addition, Tamale Toffa deponed that her mother was admitted in Paramount Hospital, Makerere with COVID - 19 but was discontinued from oxygen in the intensive care unit in favor of another patient who was stated to be more critically ill. Her health condition worsened and eventually died. The hospital demanded to be paid UGX 31,000,000/= before her body could be released for burial.

[7] According to the Applicant, the interventions by the Medical and Dental Practitioner's Council on private health facilities has not been effective because of political interference affecting their independence, understaffing, incapacity to supervise and regulate private health facilities, in addition to its services being centralized at the secretariat limiting accessibility by aggrieved patients. The Applicant contended that the Code of Professional Ethics for Medical and Dental Practitioners does not have punitive measures and the Patients' Rights and Responsibilities Charter, 2009 are mere guidelines that do not have the binding force of law.

The Respondents' case:

[8] The Respondent opposed the application. Dr. Martin Ssendyona - the Acting Commissioner Standards, Compliance Accreditation and Patient Protection in the Ministry of Health and Katumba Sentongo – Registrar Uganda Medical and Dental Practitioners Council swore affidavits in reply.

[9] Dr. Martin Ssendyona deponed that the Applicant was relitigating an issue which was already determined in ***Mulumba Moses and another versus Attorney General and 2 others, High Court Misc. Application No. 198 of 2021*** where this court issued an order of mandamus compelling the Government of Uganda and Uganda Medical and Dental Practitioners' Council to intervene by making regulations on fees chargeable by hospitals managing COVID – 19. According to Dr. Martin Ssendyona, this application is therefore moot.

[10] Furthermore, Dr. Martin Ssendyona deponed that the Government of Uganda has put in place laws and policies such as, the Code of Professional Ethics for Medical and Dental Practitioners; the Patients' Rights and Responsibilities Charter, 2009 and the Medical and Dental Practitioners Act. According to him, Part II of the Code of Professional Ethics for Medical and Dental Practitioners imposes a moral and ethical obligation on the practitioners to, among others, not to violate the human rights of patients, patient's family or their caregivers; not to deny patients access to emergency treatment or health care; and not to discriminate a patient based on their physical, socio -economic or health status. In addition, according to Dr. Martin Ssendyona, Section 1 of the Patients' Rights and Responsibilities Charter, 2009 prohibit discrimination of a patient on any grounds; detention of a dead body of a patient due to pay disputes; and entitles a patient to proper health care based on clinical need. He pointed out that the Charter specifically imposes an obligation on the hospital to be transparent regarding fees/rates for medicines and medical care and to receive an itemized bill. Furthermore, he deponed that Section 42 of the Medical and Dental Practitioners Act requires that registered medical or dental practitioners may demand reasonable charges for treatment offered to patients.

[11] Dr. Martin Ssendyona also deponed that the Hippocratic Oath of Medical Practitioners binds the practitioner to abstain from all intentional wrong doing and harm to patients and according to the Medical and Dental Practitioners Act any person aggrieved with the conduct of a medical and dental practitioner may lodge a complaint to the Medical and Dental Practitioner's Council for redress.

[12] According to Dr. Martin Ssendyona this application against the Minister is misconceived. It should have been made against the hospitals who violated the rights of the patients. In addition, he deponed that the allegations in this application are matters of ethical violations which are already regulated and this application should have been lodged before the Medical and Dental Practitioner's Council against the individual professionals and/ or their hospitals of practice.

Issues:

[13] The issues for the determination of the court are;

1. Whether the 1st Respondent is a proper party to this application.
2. Whether this application is moot.

3. Whether the Applicant had locus standi to file this application.
4. Whether the Respondents have done any act or omitted to do any act which infringes or threatens to infringe the fundamental or other right or freedom of patients.
5. What remedies are available to the parties.

Legal representation:

[14] At the hearing, the Applicant was represented by Mr. Sam Sekawa of M/s Kitimbo Associated Advocates. The Respondents were represented by a State Attorney from the Attorney Generals Chambers, who filed written submissions without disclosing his/her name.

Legal Submissions:

[15] Counsel for the Applicants submitted that the 1st Applicant is a proper party to this application because she failed to exercise her ministerial powers to execute her statutory obligations. In support of his submissions counsel relied on the case of ***Ochieng S. Peter & 5 others v. The president General Democratic Party & 3 others High Court Misc. Cause No. 217 of 2008.***

[16] On whether this application is moot, counsel for the Applicant submitted that in ***Mulumba Moses and another versus Attorney General, High Court Misc. Application No. 198 of 2021*** the matter was a judicial review, primarily seeking orders compelling the Respondents to issue regulations on fees chargeable by hospitals for the management and treatment of COVID – 19 patients. The instant application is for enforcement of human rights and embodies broad prayers regarding general regulation of rates in private health facilities in as far as treatment of all illnesses are concerned.

[17] On whether the Applicant had the locus standi to file this application, counsel submitted that this application was filed in public interest under Article 50 of the ***Constitution of the Republic of Uganda ,1995*** and Section 3(1) & (2) (c) of the ***Human Rights (Enforcement) Act, 2019***. Counsel relied on the decision in ***Advocates Coalition for Development and Environment versus Attorney General, HCMC No. 0100 of 2004*** where the court expressed the view that Article 50(1) and (2) of the Constitution allows any individual or organization to protect the rights of another even though that individual is not suffering the injury complained of or does not know that he is suffering from the alleged injury.

[18] On the merit of the application, counsel submitted that the Respondents are mandated under the constitution to give the highest priority to the enactment of legislation to ensure all Ugandans enjoy rights and access to health services including in private medical facilities. In support of his argument, counsel relied on relied on objective XI(i), XIV, XX the ***National Objectives and Directive Principles of State Policy of the Constitution***; Article 8A (1), 20 and 45 of the ***Constitution of the Republic of Uganda, 1995;*** and Sections 29(k) and 138 of the ***Public Health Act, Cap 281***. According to counsel, the Respondents have an obligation under the above stated legal provisions to standardize levies, rates and prices of medical services provided by private health facilities that are not only affordable but equitable.

[19] In addition, counsel submitted that the Respondents are enjoined under International Instruments, to which Uganda is a signatory, to protect the right to health. Counsel relied on the ***African Charter on Human and People's Rights***; ***the International Covenant on Economic, Social and Cultural Rights***; and ***the UN General Comment 14 and 27***. Counsel submitted that the failure by the Respondents to regulate private health facilities has created an environment where private health facilities overcharge patients, delay their treatment until they deposit some payment and detain patients and cadavers over pending medical bill, thereby subjecting them to torture or cruel, inhuman or degrading treatment and violating their right to life, health, human dignity, equality and freedom from discrimination. Counsel further submitted that the right to life and dignity cannot be separated from the enjoyment of good health and the state has a duty to protect peoples right to life by making policies and laws in that regard. In support of his argument, counsel relied on two case. ***Centre for Health, Human Rights and Development (CEHURD) and 4 others versus Attorney General, Constitutional Petition No. 16 of 2011*** and ***British American Tobacco Limited versus Attorney General and another, Constitutional Petition No. 46 of 2016.***

[20] In reply, counsel for the Respondents submitted that the Applicant did not plead or adduce any evidence of any act done by the 1st Respondent in her personal capacity to warrant her being added in this application. Counsel invited the court to strike off the name of the 1st Respondent from this application.

[21] In addition, counsel submitted that the orders being sought in this application are prerogative orders which should have been sought by way of judicial review. Furthermore, counsel submitted that the orders being sought in this application are materially similar to those

in ***Mulumba Moses and another versus Attorney General and 2 others, High Court Misc. Application No. 198 of 2021***. According to counsel, there is no need for this court to again pronounce itself on the same issues, considering that the parties are essentially the same.

[22] Counsel further submitted that the Applicant had no locus standi to file this application. According to counsel, Section 3(2)(a) of the ***Human Rights (Enforcement) Act, 2019*** only allows a person to bring an application on behalf of another if the aggrieved persons are incapable of doing so by themselves. Counsel submitted that this is not a technicality which can be ignored pursuant to Section 6(5) of the ***Human Rights (Enforcement) Act, 2019***, but goes to the jurisdiction of the court.

[23] Furthermore, counsel submitted that Odur Anthony relied on newspaper articles and internet website links which amount to hearsay, not admissible in evidence and should be rejected by court. In support of his submission, counsel relied on the Section 59 of the ***Evidence Act, Cap 6***; Order 19 rule 3 of the ***Civil Procedure Rules, SI 71 -1***, the decision in the case of ***Muhindo Rehema versus Winfred Kiiza and another Election Petition Appeal No. 29 of 2011*** and the decision in the case of ***Editors Guild Uganda Limited and another versus Attorney General High Court Misc. Cause No. 400 of 2020***.

[24] On the merit of the application, counsel submitted that this application does not disclose any proper cause of action for enforcement of human rights against the Respondents. Counsel pointed out that the Applicants have not demonstrated that the Respondents did not do any act or omitted to do any act for which liability would arise to warrant any orders for human rights enforcement. According to counsel, the Government of Uganda has discharged its obligation by putting in place policies to regulate the conduct of private hospitals. Counsel invited the court to take judicial notice of the fact that The Patient's Rights & Responsibilities Bill was already tabled before Parliament awaiting to be passed into law.

[25] In rejoinder, counsel for the Applicant submitted that there is no legal bar to rely on newspaper articles in an application of this nature. According to counsel the rules of evidence are not applicable to affidavits. Counsel submitted that Section 1 of the ***Evidence Act, Cap 6*** expressly provides that it does not apply to affidavits presented to the court. Counsel also relied on the case of ***Life Insurance Corporation of India versus Panesar [1967] EA 615*** where, according to him, the court expressly stated that unless otherwise provided for in written law,

the rules of evidence do not apply to affidavits. In the alternative, counsel submitted that even if the newspaper articles were not admissible, they should be admitted as res gestae. For that proposition of the law, counsel relied on ***The Modern Law of Evidence by Keane &Mc Keown, 9th Edition***.

Consideration and determination of the Court:

Issue 1: Whether the 1st Respondent is a proper party to this application.

[26] Section 10 of the ***Human Rights (Enforcement) Act, 2019*** makes public officers individually liable if they individually or in association with others violate or participate in the violation of a person's right. It is immaterial that the violation was done in official capacity or in a private capacity. The Section reads:

> *"**10. Personal liability for infringement of rights and freedoms***
> *(1) A public officer who, individually or in association with others, violates or participates in the violation of a person's rights or freedoms shall be held personally liable for the violation notwithstanding the State being vicariously liable for his or her actions."*

[27] In this case, the Applicant alleged that the 1st Respondent's omitted or failed to perform her statutory duty to regulate levies, rates and prices of medical services in private health facilities thereby causing private medical facilities to violate the rights of patients. The Applicant's case against the 1st Respondent is that she was complicit or in association with private medical facilities, violated the rights of patients. I find that she is a proper party to this application.

Issue 2: Whether this application is moot.

[28] The doctrinal basis of mootness is that courts do not decide cases for academic purposes because court orders must have a practical effect and be capable of enforcement. In ***Maganda versus National Resistance Movement HCMA No. 154 of 2010,*** Musota J., as he then was, held that:

> *"Courts of law do not decide cases where no live disputes between the parties are in existence. Courts do not decide cases or issue orders for academic purposes only. Court orders must have practical effects. They cannot issue orders where the issue in dispute have been removed or merely no longer exist."*

[29] Similarly, in the Canadian case of ***Joseph Borowski Vs Attorney General of Canada (1989) 1 S.C.R*** the court held that:

> *"The doctrine of mootness is part of a general policy that a court may decline to decide a case which raises merely a hypothetical or abstract question. An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. Accordingly, if subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot."*

[30] There are three reasons for the doctrine of mootness. The first is that a Court's competence to resolve legal disputes is rooted in the adversarial system and in a full adversarial context, both parties must have a full stake in the outcome of a suit. The second is based on the concern for judicial economy which requires that the court examines the circumstances of a case to determine if it is worthwhile to allocate scarce judicial resources to resolve its issue. The third is the need for Courts to be sensitive to the effectiveness or efficacy of judicial intervention. It follows therefore that the test as to whether a suit is moot is whether or not there exists a live controversy between parties.

[31] I have carefully considered the facts in ***Mulumba Moses and another versus Attorney General and 2 others, High Court Misc. Application No. 198 of 2021***. By consent of the parties, an order of mandamus was issued by this Court against the Attorney General, the Medical and Dental Practitioners Council and the Minister of Health to make Regulations on fees chargeable by hospitals for the management and treatment of patients suffering from COVID -19 and an order of mandamus was issued to compel the Medical and Dental Practitioners Council to make recommendations to the Minister of Health on reasonable fees chargeable for the persons seeking and accessing COVID – 19 treatment in hospitals.

[32] In this application the Applicant is seeking a declaration that Respondents omitted or failed to perform their constitutional and statutory duty to regulate levies, rates and prices of medical services in private health facilities thereby violating the rights of patients. In addition, the Applicant seeks the orders of this court to compel the Respondents to consult all stakeholders, on fair and affordable payment ceilings for all medical treatments provided by private health facilities. Furthermore, the Applicant seeks to orders of this court to compel the Respondents to issue regulations that shall restrain all private hospitals from detaining patients and holding bodies of diseased persons for pecuniary reasons, provide penalties for exorbitant pricing of life saving medical goods and services, provide emergency care protocols for the immediate admission and treatment of critically ill patients in private health facilities without subjecting them to conditional payments and facilitate and create regional grievances redress avenues for patients and relatives of patients to report incidents of maltreatment by private health facilities.

[33] I therefore agree with counsel for the Applicant that this application covers a broad array of issues than those determined in the Mulumba case. However, I find that aspects of this application which seeks the orders of this court to compel the Respondents to make Regulations on fees chargeable by hospitals for the management and treatment of patients suffering from COVID -19, is now moot. The other parts of this application are not moot.

Issue 3: Whether the Applicant had locus standi to file this application.

[34] The term "Locus standi" signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in court. In ***Dima Enterprises Poro versus Inyani Godfrey, High Court Civil Appeal No. 17 of 2016***, Mubiru J., stated that:

> *"The terms locus standi literally means a place of standing. It means a right to appear in court and conversely to say that a person has no locus standi means that he has no right to appear or be heard in a specified proceeding"*

[35] In Uganda, the locus standi of any person or organization to bring an action against the violation of another person or group of persons has been settled by Article 50 (1) & 2 of the Constitution which provides that:

*"**50. Enforcement of rights and freedoms by courts.***

(1) Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.

(2) Any person or organisation may bring an action against the violation of another person's or group's human rights."

[36] In addition, Section 3 of the ***Human Rights (Enforcement) Act, 2019*** provides that:

*"**3. Enforcement of human rights and freedoms***
(1) In accordance with article 50 of the Constitution, a person or organisation who claims that a fundamental or other right or freedom guaranteed under the Constitution has been infringed or threatened may, without prejudice to any other action with respect to the same matter that is lawfully available, apply for redress to a competent court in accordance with this Act.
(2) Court proceedings under subsection (1) may be instituted by—
(a) a person acting on behalf of another person, who cannot act in their own name;
(b) a person acting as a member of, or in the interest of a group or class of persons;
(c) a person acting in public interest; or
(d) an association acting in the interest of one or more of its members." Underlined for emphasis.

[37] In this case, Odur Anthony clearly stated in his affidavit in rejoinder that this application is brought in public interest. I therefore find the argument of counsel for the Respondent that the Applicant has no locus standi without any legal merit.

Issue 4: Whether the Respondents have done any act or omitted to do any act which infringes or threatens to infringe the fundamental or other right or freedom of patients.

[38] Central to this application is the right to health. I shall therefore first address the relevant provision of the law that provide for the right to health and finally determine whether the evidence presented by the Applicant proves any violation or threatened violation of the right to health and other related rights.

The right to health:

[39] The right to health is not one of the human rights specifically mentioned in Chapter 4 of the Constitution. However, Article 45 of the Constitution provides that rights, duties, declarations and guarantees relating to fundamental and other human rights and freedoms specifically mentioned in Chapter 4 shall not be regarded as excluding others not specifically mentioned.

[40] Firstly, the above-mentioned additional rights, are provided for in the National Objectives and Directive Principles of State Policy of the Constitution. The right to health is specifically provided for in Objectives XIV and XX. Under Objective XIV, the State is under the duty to ensure that all Ugandans access health services. It reads:

> *"**XIV. General social and economic objectives.***
>
> *The State shall endeavour to fulfill the fundamental rights of all Ugandans to social justice and economic development and shall, in particular, ensure that—*
>
> *(a) all developmental efforts are directed at ensuring the maximum social and cultural well-being of the people; and*
>
> *(b) all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits."* Underlined for emphasis.

[41] Under Objective XX, the state is under obligation to ensure the provision of basic medical services to all Ugandans. It reads:

> *"**XX. Medical services.***
>
> *The State shall take all practical measures to ensure the provision of basic medical services to the population."* Underlined for emphasis.

[42] Article 8A of the Constitution provides that Uganda shall be to be governed based on principles of national interest and common good enshrined in the national objective and directive principles of state policy and Parliament is mandated to make relevant laws for the purpose of giving full effect of the objectives.

[43] Secondly, other additional rights are found in human rights treaties, agreements and conventions to which Uganda is party. By Article 287 of the Constitution, Uganda expressly recognized that treaties, agreements and conventions which were still in force at the coming into force of the Constitution would not be affected by the coming into force of the constitution. The human rights treaties, agreements and conventions which were saved by article 287 of the constitution include, ***The African Charter on Human and People's Rights*** (Ratified on the 10th May, 1986) and the ***International Covenant on Economic, Social and Cultural Rights*** (Ratified on the 21st January, 1987).

[44] Commenting on the state obligations under those treaties, agreements and conventions, Katureebe J.S.C. (as he then was) in ***Uganda versus Thomas Kwoyelo, Constitutional Appeal No. 1 of 2012*** at page 35 stated that;

> *"In discussing these obligations and laws, I must express the view that when a country commits itself to international obligations, one must assume that it does so deliberately, lawfully and in its national interest. By the time the State goes through all the procedures of ratification and domestication, it must have seriously considered its overall national interest in the context of its role as a member of the United Nations. Therefore, a State should not easily shun its obligations as and when it wishes to. This must particularly hold true when the issue at hand is the massive violations of the human rights of its own people, whether by state actors or individuals or groups of individuals."*

[45] Article 16 of the ***African Charter on Human and People's Rights*** provides that;

> *"**ARTICLE 16***
>
> *1.Every individual shall have the right to enjoy the best attainable state of physical and mental health.*
>
> *2. State Parties to the present Chapter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."* Underlined for emphasis.

[46] Article 12 of the ***International Covenant on Economic, Social and Cultural Rights*** provides that;

*"**Article 12***

1. *The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*
2. *The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:*

   (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

   (b) The improvement of all aspects of environmental and industrial hygiene;

   (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

   (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness." Underlined for emphasis.

[47] The United Nations General Comment No. 14 (2000) interpreted the right to health as defined in Article 12.1 of the ***International Covenant on Economic, Social and Cultural Rights*** to include accessibility of health services to everyone without discrimination within the jurisdiction of the state. The General comments state at par. 12 that:

> *"Economic accessibility (affordability): health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households;"* Underlined for emphasis.

[48] At Paragraph 42 it states that:

> *"42. While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society - individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector - have responsibilities regarding the realization of the right to health. States parties should therefore provide*

an environment which facilitates the discharge of these responsibilities." Underlined for emphasis.

[49] In the Kenyan case of ***Patricia Asero Ochieng and 2 others versus the Attorney General and Another, High Court Petition No. 409 of 2009***, which was cited with approval in the ***CEHURD*** case (supra), Mumbi Ngugi J., at page 34 held that;

> *"The state's obligation with regard to the right to health therefore encompasses not only the positive duty to ensure that its citizens have access to health care services and medication but must also encompass the negative duty not to do anything that would in any way affect access to such health care services and essential medicines."*

[50] The above provisions of the law clearly show that the state is under a duty to ensure that every Ugandan can access health services and is provided with basic medical services. The state is also under additional duty not to do anything that would in any way affect access to health services and the provision of basic medical services. Differently put, all Ugandans have the right to access health services and to be provided with basic medical services by the state.

Evidence of violation or threatened violation of the right to health.

[51] According to Article 50 of the Constitution, an application for enforcement of rights and freedoms can only be made to the court if, a fundamental or other right or freedom, guaranteed under the Constitution, has been infringed or threatened. For the court to find that there was infringement of the right to health, the applicant is under a duty to adduce evidence of actual violation and not assumed violation. On the other hand, for the court find that there is threatened violation of the right to health, the applicant is under duty to prove sets of facts which shows, with reasonable probability, that the right to health is more likely than not going to be violated in the foreseeable future unless the cause to the threatened violation is averted.

[52] In this case, the Applicant's contention is, first, that the Respondents failed or omitted their constitution and statutory duty to regulate private medical facilities. The specific regulation that the Applicant contend that the Respondents failed or omitted make are those to provide for, fair and affordable payment ceiling for all private medical facilities; to restrain private medical facilities from detaining patients and holding bodies to dead patients because of non-payment of medical bills; penalties for exorbitant pricing of life saving medical goods

and services; emergency care protocols for the immediate admission and treatment of critically ill patients in private health facilities without subjecting them to conditional payments; and regional grievances redress avenues for patients and relatives of patients to report incidents of maltreatment by private health facilities. Secondly, the Applicant contends that as a result of the failure or omission, the private medical facilities are violating the right to health of patients and other related rights. In effect therefore, the Applicant contend that the Respondents are complicit in the violation of the rights of patients by the failure or omission to regulate the private medical facilities. The Respondents on the other hand contend that the Government of Uganda has discharged its obligation by putting in place policies to regulate the conduct of private hospitals.

[53] The Respondent challenged the evidence of Odur Anthony as hearsay because he relied on newspaper articles and internet website links. The law on the admissibility of newspaper articles to prove the truth of any matter stated in any newspaper article was settled by the Supreme Court of Uganda in ***Attorney General versus Major Genral David Tinyefunza, Constitutional Appeal No. 1 of 2007***. Karokora J.S.C held that;

> *"Therefore the newspaper reports before the court would not be described as either primary or secondary evidence under Sections 60 and 61 respectively. They are in the category of evidence known as hearsay evidence, because they are copies of statements by persons who were not parties to the case and were not called as witnesses to testify before the court. If such newspapers reports fall in the category of hearsay, as I have found, then the general rule of evidence is that such evidence is inadmissible when they are brought for purposes of proving the truth of the matters stated therein."*

[54] In my view, counsel for the Applicant cited the case of ***Life Insurance Corporation of India versus Panesar [1967] EA 615*** out of context. At page 62 Sir Charles Newbold P., stated that:

> *"It is said because s.2 of the Evidence Act, 1963, states that the Act shall not apply "to affidavits presented to any court or officer nor to proceedings before an arbitrator", therefore there are no rules of evidence relating to what can be set out in affidavits, other than the rules contained in O.18 r.3(1), which confines affidavits "to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted, providing that the grounds thereof are stated.", or relating to what can be placed before an arbitrator. I*

reject such a proposition completely; and I say that it is not only wrong but manifestly wrong. Affidavits are intended to be probative of the facts which the party filing the affidavit seeks to prove before the court in the particular proceedings in which the affidavit are filed. The accumulated wisdom of the courts over the ages has laid down that any attempt to prove facts save in accordance with such rules as the experience of the courts has shown to be essential is worthless. I cannot accept that because the provision of the Evidence Act do not apply to affidavits or to arbitration proceedings therefore there exist no rules as to what may be set out in affidavits, other than r.3 of O.18, or to what evidence may be led before an arbitrator. To accept that would be to substitute chaos for order and to permit of any sort of evidence being placed before a court or an arbitrator as probative of the fact sought to be proved. Such an astounding position would require the highest authority before I would accept it, but no single authority is quoted in favor of it. I confess that I have been unable to find any decision of a court specifically on the point; but that is because the proposition is so manifestly wrong that no one has had the temerity in the past to advance it. The very provision of O.18 r.3(1) which permit in certain applications statements in affidavits to be based on belief thus relaxing in those circumstances the hearsay rule, shows that r.3 is based upon the assumption that the normal rules of evidence apply to affidavits. Were it otherwise r.3 would be a classic example of straining at a gnat but swallowing a camel."

[55] Sir Charles Newbold P., further held that:

"It is true that what this court has to decide is the law of Kenya and it is that the Evidence Act does not apply to affidavits tendered to the court but it is also true, as is shown by the judgments in the cases to which I have referred, that the basic rules of evidence nevertheless apply to evidence tendered by affidavits and if those basic rules are not complied with then the evidence is of no probative value whatsoever and should be rejected."

[56] I equally do not agree with the submissions of counsel for the Applicant that newspaper articles can be admitted under the res gestae rule. Res gestae means act, circumstances, declarations and statements that are incidental to or which explain facts in issue. In this case, the newspaper articles are opinions of persons who were never produced in court to give evidence.

[57] Be that as it may, the Applicants adduced Tamale Taffa who gave direct evidence that her mother was admitted in Paramount Hospital, Makerere with COVID - 19 but was discontinued from oxygen in the intensive care unit in favor of another patient who was stated to be more critically ill. Her health condition worsened and she eventually died. The hospital demanded to be paid UGX 31,000,000/= before her body could be released for burial. In addition, this court takes judicial notice of the matters being complained about by the Applicant. Section 55 of the Evidence Act provides that no fact of which the court will take judicial notice of needs to be proved. In ***Arim Felix Clive versus Stanbi Bank (U) Ltd, SCCA No. 3 of 2015*** Prof. Lilian Tibatemwa -Ekirikubinza JSC stated that:

> *"I note that Judicial Notice is a doctrine and/or the process by which courts take cognizance of a matter which is so notorious or clearly established that there is no need for a party seeking for its recognition by court, to adduce formal evidence for its proof."*

[58] The learned J.S.C adopted the definition in ***Black's Law Dictionary, 9th Edition, page 670*** of a matter or practice is said to be notorious if it is:

> *"generally known and talked of, well or widely known, forming a part of common knowledge, universally recognized".*

[59] In this case, the escalating costs of medical services offered by private medical facilities and the huge disparities in medical charges by private hospitals in Uganda are facts which are so notoriously known that any ordinary Ugandan may be reasonably presumed to be aware of. Similarly, this court also takes judicial notice of the fact that in 2007 there was the Private Health Units (Regulations) Bill, 2007 and in 2019 there was the Patient's Rights & Responsibilities Bill, 2019 all tabled before Parliament clearly to address the very mischief which is the subject of this application but since then no law to that effect has been made. I therefore find that there is sufficient evidence to support the contention of the Applicant that private medical facilities charge varying amounts, sometimes detain patients and bodies of dead patients because of non-payment of medical bills.

[60] In my view, the duty which is placed on the state to ensure that every Ugandan can access health services cannot be achieved when private health facilities are left to charge for medical

services as they please, without any guide by the state. This is against the backdrop that private medical facilities constitute more than 40% of the health service providers in Uganda, as per the official website of Ministry of Health which was deponed to by Odur Anthony. The Constitution mandates Parliament to make a law to cure such mischief as rightly pointed out by the Applicant. I do agree with the Applicant that the Code of Professional Ethics for Medical and Dental Practitioners does not have punitive measures and the Patients' Rights and Responsibilities Charter, 2009 are mere guidelines that do not have the binding force of law. They cannot be a substitute to a law which has to be enacted by Parliament. Furthermore, Section 42 of the Medical and Dental Practitioners Act which was relied upon by the Respondent only provides for the right of a registered medical or dental practitioner to demand reasonable charges. The term reasonable is a relative term, subject to abuse.

[61] I am therefore in agreement with the Applicant that in failing to make the necessary laws to regulate private medical facilities in as far as medical levies, charges and other related matters are concerned, the Respondents are complicit in the violation of the right of health of patients in Ugandan. This trend of violation is more likely to continue unless the Respondents take corrective measures to avert the threatened future violation.

Orders:

[62] In the end, after carefully considering this application, the following orders are hereby made;

1. A declaration that the Respondent's omission and failure to regulate and standardize levies, rates, and pricing of medical services provided by private health facilities so that they are accessible and affordable violates and threatens to further violate the right to health of patients in Uganda.
2. The Minister of Health is to ensure that all essential stakeholders are consulted on fair and affordable payment ceilings for all medical treatments provided by private health facilities.
3. The Minister of Health and the 2nd Respondent are directed to ensure that the necessary legislation is put in place within a period of 2 years to among others;
    (a) regulate and standardize levies, rates, and pricing of medical services provided by private health facilities.
    (b) Restrain all private hospitals from detaining patients and holding bodies of diseased patients for pecuniary reasons.

(c) Provide penalties for exorbitant pricing of life saving medical goods and services.

4. The 2nd Respondent to report to the court at the end of the 2 years on whether the orders in 2 and 3 above have been fully complied with.
5. Each party to bear their own costs of this application since this application was filed in public interest.

I so order.

Dated and delivered by email this 16 day of January, 2024.

Phillip Odoki

JUDGE