



**Jekim Hospital Nkubu Ltd & another v Kenya Medical Practitioners
and Dentists Council & 2 others (Constitutional Petition 12 of 2023)
[2023] KEHC 27205 (KLR) (28 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27205 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CONSTITUTIONAL PETITION 12 OF 2023
EM MURIITHI, J
DECEMBER 28, 2023

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 19, 20 AND 21 OF THE
CONSTITUTION**
AND
**IN THE MATTER OF CONTRAVENTION OF ARTICLE 6 (1) OF THE
INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL
RIGHTS (ICESCR)**
AND
IN THE MATTER OF ARTICLES 2(1), 22(1), 23(1) & 165 OF THE CONSTITUTION
AND
**IN THE MATTER OF THE MEDICAL PRACTITIONERS AND DENTISTS
ACT, CAP.253**

BETWEEN

JEKIM HOSPITAL NKUBU LTD 1ST PETITIONER
**JOHN KIRIMI KIRIMANIA T/A JEKIM MEDICAL CENTRE 2ND
PETITIONER**

AND

**KENYA MEDICAL PRACTITIONERS AND DENTISTS COUNCIL 1ST
RESPONDENT**
CABINET SECRETARY, MINISTRY OF HEALTH 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT



JUDGMENT

1. The Petitioners filed a petition praying for specific reliefs as follows:
 - a. A declaration that the 1st Respondent's suspension of the Petitioners' licences to operate as medical practitioners, *vide* the two letters both dated June 19, 2023 and the 2nd Respondent's directive issued on June 19, 2023 and June 20, 2023, closing down the Petitioners' institutions as medical practitioners, are arbitrary, capricious, uncalled for, irrational, unreasonable, unjustified, unlawful and contravene the petitioners' right to a fair administrative action under article 47, fair hearing under article 50 and economic empowerment under article 19 of the [Constitution of Kenya](#) and the right to the opportunity to gain a living under article 6 (1) of the [International Covenant on Economic, Social and Cultural Rights \(ICESCR\)](#) and are therefore null and void.
 - b. A judicial review order of *certiorari* be issued, calling and quashing the two letters, both dated June 19, 2023, issued by the 1st Respondent, suspending the licences of the Petitioners to operate as medical practitioners.
 - c. A permanent injunction be issued, restraining the 1st and 2nd Respondents and their representatives, servants, agents and anybody else acting at their behest, direction or instructions, from suspending the licences of the petitioners and/or closing down their institutions as medical practitioners, on the basis of the radiology (X-ray) services rendered by the 1st petitioner in September and October, 2022.
 - d. General damages for loss of business proceeds from the date of suspension of the Petitioners' licences and closure of their institutions as medical practitioners on June 19, 2023 until resumption of operations, against the 1st and 2nd Respondents jointly and severally.
 - e. Exemplary and punitive damages for portraying the Petitioners as fraudsters and extortionists, against the 1st and 2nd Respondents jointly and severally.
 - f. Cost of the Petition.
2. The Petition was opposed by the 1st Respondent. The 2nd and 3rd Respondents did not file any responses.

The Petitioners' case

3. The Petitioners aver that through 2 separate letters both dated 19/6/2023, the 1st Respondent, citing section 15 (9) of the [Medical Practitioners and Dentists Act](#), cap. 253, suspended the licences of the petitioners to operate as medical institutions for an indefinite period of time on the basis of the allegations on pages 6 and 7 of the Daily Nation Newspapers of 19/6/2023 to the effect that the petitioners had preyed on the elderly to mint millions and took advantage of the elderly and the vulnerable citizens in need of medical attention with a view to fraudulently claim reimbursement from the National Health Insurance Fund for procedures and/or services not actually offered to them by the Petitioners. NHIF never lodged any concern or complaint against the Petitioners and the afore-said allegations are baseless and without any factual backing.
4. The incidence in the said Daily Nation Newspaper of 19/6/2023 dates back to September and October 2022 when the 1st Petitioner which was, and is to date duly licenced to offer radiology (X-ray) services,



- offered radiology (X-ray) outpatient services to patients who visited the facility and was paid Ksh. 128,400 through M-Pesa, and not through NHIF reimbursement as alleged.
5. None of those patients ever lodged any complaint against the 1st Petitioner. In September and October 2022, the 1st Petitioner was qualified and authorized to offer the afore-mentioned radiology (X-ray) services to all its patients and had a licenced officer. The 2nd Petitioner has never offered any services relating to the said incident.
 6. On 19/6/2023 and 20/6/2023, the 2nd Respondent, through the mainstream media including print media ordered immediate closure of the Petitioners' medical institutions, owing to the afore-mentioned allegations in the Daily Nation Newspaper of 19/6/2023. Through the afore-captioned 2 letters of 19/6/2023, the 1st Respondent asked the Petitioners to supply to it comprehensive statements addressing the allegations raised against them, detailed statements by their personnel (medical and administrative), lists of all NHIF claims of above Kshs. 50,000 submitted in the last 1 year and lists of all NHIF claims submitted in the last 3 months and copies of the patient files.
 7. The petitioners promptly complied by supplying the said documents but the Respondents have not rescinded their respective directives to suspend their licences and to close them as medical service-offering institutions. The 1st Petitioner has never claimed payment or reimbursement from NHIF in respect of the radiology (X-ray) services it offered in September and October 2022, as it was paid via M-Pesa.
 8. The Petitioners have never collaborated with, or worked in conjunction with any of the medical institutions mentioned in connection with the allegations of defrauding NHIF.
 9. The afore-captioned actions and conduct of Respondents have occasioned grave loss and damage to the Petitioners by crippling their operations, being unmindful of their financial obligations such as loans due to their financiers, salaries for their employees, payments due to suppliers, electricity and water bills among others, contravening their right to earn a living through offering medical services, causing them to suffer loss of perishable items like food and drinks for in-patients, laboratory re-agents and pre-mature discharge of in-patients including maternity cases without payment to them. They aver that the administrative actions of the Respondents to suspend their licences and close down their medical hospital was unreasonable, uncalled for, unjustified and amount to breach of their right to a fair administrative action and a fair hearing under articles 47 (1) & (2) and 50 of the Constitution. They assert that the actions of the Respondents violate and undermine the national values and principles of governance which bind them by dint of article 10 (1) and (2) (a) and (b) of the Constitution, to wit, the rule of law, equity and social justice. They aver that the Respondents' said actions and conduct above occasioned them profound inconveniences, loss and damage.
 10. The 2nd Petitioner swore a supplementary affidavit on 28/8/2023 averring by 2 correspondences dated 18/8/2023, the 1st Respondent cleared the Petitioners of any wrong-doing. He maintains that the Petitioners were not heard before the decision to suspend their licences and close down their medical institutions was reached.

The Respondents' case

11. The 1st Respondent opposed the petition by way of its grounds of opposition dated 24/8/2023, as follows:

“ ”



12. Having filed no affidavit on the facts, the respondents must be deemed to have accepted the facts of the case as related by the Petitioners. It is not permissible to introduce evidence or statements of facts through submissions as properly held by the Court of Appeal in *Douglas Odhiambo Apel & anor. v Telkom Kenya Limited* [2014] eKLR.
13. The parties then filed written submissions on their respective contentions and highlighted by oral argument in court on 28/8/2023 and Judgment was reserved.

Submissions

14. The petitioners urge that the petition meets the threshold set out in *Anarita Karimi Njeru v Republic* (1979) eKLR and *Mumo Matemo v Trusted Society of Human Rights Alliance* (2013) eKLR. They urge that the 1st Respondent acted ultra vires in suspending their licences since its mandate under section 15 (9) of the *Medical Practitioners and Dentist Act* (henceforth called the Act), is limited to renewal, cancellation, withdrawal or revocation of licences, and cite *Republic v Hitan Majeodia, Nairobi County Executive Committee Member ex-parte Scion Healthcare Limited* (2021) eKLR. They submit that the respondents brazenly violated their rights to fair administrative action to the extent that they never adhered to the constitutional and statutory requirements. They urge that the 2nd respondent had no powers to order closure of their health care facilities, and cite *Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another* (2018) eKLR. They urge that they were not heard by the Respondents before their validly obtained licences were suspended and their health care institutions closed, and cite *Republic v Non-Governmental Organizations Coordination Board Ex-Parte Evans Kidero Foundation* (2017) eKLR. They urge that the Respondents' directives of suspending their licences and ordering the closure of their medical facilities crippled their operations, which culminated in grave infringement of their right to earn a living contrary to article 43 of the *Constitution*, and rely on *Ngong Market Small Traders Enterprises (Acting in the interest of its members to the exclusion of those who may have sought relief in their own right) v Kajiado County Government* (2016) eKLR. They urge that there is no sworn affidavit or correspondence availed to prove that the 2nd Respondent directed the 1st Respondent to suspend their licences. They urge that there is nothing to show that NHIF lodged any complaint or is carrying out any investigations against them, as alleged or at all. They urge that since the 2 correspondences by the 1st Respondent do not state whether the suspension was temporary, the same was indefinite. They urge that the doctrine of ripeness does not apply to this petition because the cause of action against the 1st Respondent had already crystallized, being, suspension of their licences without any complaint from NHIF and without hearing them. They urge that the Respondents' directives were arbitrary, capricious, uncalled for, irrational and unreasonable and cite *Victoria Wanjiku Mahoro v Mary Wambui Gitinji & 3 others* (2021) eKLR, *John Mbaabu & another v Kenya Revenue Authority* (2020) eKLR, *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR and *Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party)* (2018) eKLR.
15. The 1st Respondent urges that it is mandated by section 4 (1) (m) and (p) of the Act to regulate health institutions and take disciplinary act for any form of misconduct therefrom, and cites *Republic v Public Procurement Administrative Review Board; Consortium of GBM Projects Limited and ERG Insaat Ticaret Ve Sanayi A.S (interested party); National Irrigation Board Ex Parte* (2020) eKLR. It urges that the temporary suspension of the Petitioners' licenses for a period of 12 months was in public interest, to ensure safety of all patients. It urges that the issues raised in the Daily Nation were weighty on consideration of the safety concerns as well as within its confines and/or legal ambit to investigate, and cites *Humphrey Makokha Nyongesa & another v Communications Authority of Kenya & 2 others*



(2018) eKLR, *Justice Amraphael Mbogholi Msagha v Chief Justice of the Republic of Kenya & 7 others* (2006) eKLR, *Kenya Revenue Authority v Menginya Salim Murgani* (2010) eKLR and *Re Ali Sele, Benson Wairagu & Joseph Ng'ethe Gitu* (2008) eKLR. It urges that the petition offends the doctrine of ripeness as it is yet to finalize its investigations into the alleged conduct of the Petitioners, and cites *Republic v National Employment Authority & 3 others ex-parte Middle East Consultancy Services Limited* (2018) eKLR, *National Assembly of Kenya & another v the Institute for Social Accountability & 6 others* (2017) eKLR and *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* (2016) eKLR. It accuses the Petitioners of instituting this petition prematurely, because the matter is yet to be heard by the Disciplinary and Ethics Committee. It urges that the Petitioners are not entitled to the reliefs sought, as it was executing its mandate of investigating the allegations against the Petitioners, and cites *Municipal Council of Eldoret v Titus Gatitu Njau* (2020) eKLR and *Godfrey Julius Ndumba Mbogori & another v Nairobi City County* (2018) eKLR.

16. The 2nd Respondent and 3rd Respondents did not file any response or submissions.

Analysis and Determination

17. Having considered the petition and the responses thereto, the only issue for determination is whether the reliefs sought therein should issue in the circumstances of this case.
18. The 1st respondent contends that the reliefs cannot be granted because the respondent acted within its mandate and the final decision in the matter of investigations against the petitioners has not been concluded as follows:

“ 38. Your Lordship, the 1st Respondent submits that the Petitioners are not entitled to the reliefs sought in this Petition.

39. From the foregoing, it is evident that the 1st Respondent is executing its mandate of investigating the allegations against the Petitioners fairly and in accordance with the law.

40. The 1st Respondent submits that there being no final determination made against the Petitioners following its investigations into the allegations against the Petitioners, the Petitioners have no basis to claim that the 1st Respondent's decision is irrational, unreasonable, uncalled for, unjustified, illegal and amounts to breach of the Petitioners' right to a fair administrative action and a fair hearing.”

19. The petitioners urge that they have demonstrated a case for the grant of the reliefs arising out of the act of suspension of their licenses and closure of the institutions with any formal complaint and without being afforded a fair hearing.

Mandate of the 1st Respondent

Statutory power of the 1st Respondent

20. The submission by the petitioner that the 1st respondent has no jurisdiction over the petitioners who are not individual medical practitioners and without a formal complaint by any person is, with respect, misconceived.



21. In accordance with section 4 (1) (m) of the *Medical Practitioners and Dentists Act* the 1st Respondent has mandate to carry out functions among others as follows:

“m, regulate health institutions and take disciplinary action for any form of misconduct by a health institution;”

It has mandate over discipline of health institutions for any misconduct.

22. Moreover, under rule 5 of the *Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules, 1979*, the investigations may be triggered by a complaint or information received, as follows:

“Whenever a complaint or information is received by the Chairman from a body or person and it appears to him that-

- (a) a medical practitioner or dentist has been convicted of an offence under this Act or under the *Penal Code*; or
- (b) that a question arises whether the conduct of a medical practitioner or dentist constitutes serious professional misconduct, The Chairman shall submit the matter to the Preliminary Inquiry Committee and Professional Conduct Committee. ”

23. Section 15 (9) of the *Medical Practitioners and Dentist Act* gives the 1st Respondent specific powers, as follows:

“The Council may decline to renew, cancel, withdraw or revoke any licence issued under this section, if it is satisfied that the health institution is being operated in a manner that contravenes any provisions of the Act or any regulations made under this Act.”

24. The 1st respondent relies on this statutory provision for its action, but there is clearly no express power to suspend a licence as happened in this case. The 1st respondent justified that “the temporary suspension was therefore in the public interest to ensure public safety of all patients”, as follows:

“19. The 1st Respondent submits that the decision to suspend the license of the Petitioners for a period of 12 months, was in the interest of the public interest of the public, the *Constitution* and the observance of the rule of law.

20. The issues raised in The Daily Nation were weighty on consideration of the safety concerns as well as within the confines and or legal ambit of the 1st Respondent to investigate.

21. The main concern and/or overriding principle when suspending the Petitioners' license was public safety, safeguarding the interests of the public at large. The suspension would serve the purpose of providing an enabling environment for conducting further investigations into the matter through making inquiries into the complaint. This could have been realized before the Petitioners instituted these proceedings.

22. From an objective point of view, the 1st Respondent's letter dated 19th June 2023 referred to herein above, raises serious issues and safety concerns which if not looked at and addressed by the 1st Respondent, would amount to a serious



failure of duty and/ or the common law tort of public misfeasance by the pt Respondent.

23. The pt Respondent therefore submits that the temporary suspension of the Petitioners' licenses was necessary to ensure public safety and ensure every citizen's Constitutional right to the highest attainable standard of health, pending investigations and a final determination of the allegations against the Petitioners.

24. The 1st Respondent further submits that the question of public safety cannot be compromised under any circumstances whatsoever. The Petitioners ought to have allowed the 1st Respondent to complete their investigations. There is a possibility that the Petitioners would have been cleared and the suspension lifted.”

25. The Court agrees that there are situations where for reasons of good administration a licencing body with power to withdraw or cancel a licence may suspend such licence pending any necessary investigations in related matter. I respectfully note the reliance on the good administration principle and that administrative judicial making bodies have power to regulate their own procedures in the decisions cited by the respondent of *Humprey Makhoba & another v Communication Authority of Kenya & 2 others* [2018] eKLR citing *Lewis v Heffer & others* and *Justice Amraphael Mbogholi Msagha v Chief Justice of the Republic of Kenya & 7 others* (2006) eKLR.

26. But in my respectful view it cannot be validly argued that the such administrative decision making bodies may disregard the rules of fair hearing which is a requirement of the constitutional rights to fair hearing and fair administrative action. All the administrative right to regulate its own procedure is that it makes such rules as it would adopt to get the material facts necessary for its decision and there is no need for a court-like hearing with cross-examination of witnesses at a court-like forum. As held in *Kenya Revenue Authority v Menginya Salim Murgani* [2010] eKLR it does not always require an oral hearing:

“The thrust of Dr Kuria’s submissions was that the internal disciplinary procedures of the appellant should have involved an oral hearing of the respondent either by the Staff Committee or the Board being the appellate body or both.

However, in our view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the matter before us and we are satisfied that it was a fair hearing.

In the case of *Local Government Board v Arlidge* [1915] A.C. 120, 132-133, *Selvarajan v Race Relations Board* [1975] I WLR 1686, 1694, and in *R v Immigration Appeal Tribunal Ex-parte Jones* [1988] I WLR 477, 481 it was held:-

“the hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing.”

.....



Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made ...”

27. But the person to be affected by the decision of the administrative body must be heard before the decision is taken against him. That is the clear requirement of the right to fair administrative action under article 47 (1) and (2) of the Constitution providing as follows:

“ 47. Fair administrative action

1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

28. By its letter of 19/6/2023, in similar terms to the two petitioner institutions the 1st respondent was in the following words:

“Ref. No: KMPDC/DEC/2023/GFL/J1 Date: 19th June, 2023

Jekim Medical Centre

PO Box 118-60200

NKUBU

Email: estherkiri9@gmail.com

RE: Inquiry Into The Allegations Of Raudulent Claims To The National Health Insurance Fund

The attention of the Council has been drawn to an article by Daily Nation published on 19th

June, 2023 on page 6 and 7 dubbed "NHIF heist: How rogue health facilities preyed on elderly to mint millions". [https://nation.africa/kenya/news/nhifN-heist-how-rogue-health-facilities-preyed-](https://nation.africa/kenya/news/nhifN-heist-how-rogue-health-facilities-preyed-on-elderly-to-mint-millions--4275130)

[on-elderly-to-mint-millions--4275130.](https://nation.africa/kenya/news/nhifN-heist-how-rogue-health-facilities-preyed-on-elderly-to-mint-millions--4275130)

The article alleges that your facility took advantage of elderly and vulnerable citizens in need of medical attention with a view of fraudulently claiming reimbursement from the National Health Insurance Fund for procedures and/ or services not actually offered.

In the premise of the above and to aid in investigation of these allegations, you are directed to submit the following documents to the Council, on or before close of business 20th June, 2023:

- (i) Comprehensive statement addressing the allegations raised against your institution by the medical director/administrator/proprietor (as applicable);
- (ii) Detailed statements by all personnel (medical and administrative) who managed the patient(s) in the expose;



- (iii) List of all NHIF claims (inclusive of patient's particulars) of above Kshs. 50,000 submitted in the last 1 year;
- (iv) List of all NHIF claims submitted in the last 3 months and their respective certified copies of the corresponding patient files;

Take note that a team from the Council shall visit your facility within the next 24 hours to carry out further inquiry into this matter.

In addition to the above and in line with our mandate of ensuring patient safety, your license to operate a facility is hereby suspended pending determination of this matter as per the provision of section 15(9) of the Medical Practitioners and Dentist Act, Cap 253 Laws of Kenya.

Dr. David G. Kariuki

Chief Executive Officer

Kenya Medical Practitioners And Dentists Council

Copy to: Prof. Stanley O. Khainga

Chair, Kenya Medical Practitioners and Dentists Council”

- 29. The petitioners ought to have been given a fair hearing through the call for the documents required in the letter of 19/6/2023 before the decision to close or suspend any licences was reached. The authorities on right to fair hearing cited by the Petitioners herein above support this proposition.
- 30. A suspension of a licence for a medical health institution for a period of one year (12 months) as urged by the 1st Respondent to allow for investigations into alleged fraud in National Insurance Insurance Fund (NHIF) claims use cannot be said to be required by necessities of good administration. Article 24 (1) (e) of the *Constitution* in allowing that a right or fundamental freedom may be limited permits such restriction of rights, among others, do not apply where “there are less restrictive means to achieve the purpose”. As discussed elsewhere, there was a lesser intrusive way of achieving the same result in this matter by suspending, withdrawing or withholding the National Insurance Fund payments for the petitioner institutions, rather than the total closure of the health facilities which served all persons including those paying for the service directly without reliance of the NHIF cover payments.

Investigations pending

- 31. The 1st respondent’s letter dated 18/8/2023 to Chief executive Officer Jekim Medical Centre Mr. John Kirimi Kirimania reinstated the licence Jekim Hospital – Nkubu to operate as a medical institution as follows:

“ 18th August 2023

Mr John Kirimi Kirimania

Chief Executive Officer

Jekim Medical Centre

O. Box: 118-60202

NKUBU

Email: jekimkirimi@gmail.com



RE: Inquiry Into Allegations Of Fraudulent Claims To The National Hosital Insurance Fund

We refer to the above matter.

We wish to advise that following the inspection of the facility conducted on June 21, 2023, the Council considered and adopted the findings made by the inspection team as enumerated here below:

Key Findings

1. The facility is registered and licensed as a level 4 by the Kenya Medical Practitioners and Dentists Council.
2. The facility was found clean at the tiime of the inspection, with adequate infrastructure for the level granted.
3. Services offered are aligned to the level.
4. The NHIF systems were closed. thus making it difficult to verify the information.
5. The facility was not operational a the time of the inspection.

Determination

In view of the above findings, the Council directed that:

1. The licence to operate as a medical institution for Jekim Hospital - Nkubu Licence No 60XXX5/2023 be and is hereby reinstated.
2. Jekim Hospital Nkubu is directed to submit a monthly report of conditions managed at the facility.
3. Jekim Hospital Nkubu be reinspected within three months from the date hereof.

Take Notice that the Council's Disciplinary and Ethics Committee shall continue its investigations into the allegation.

[signed]

Dr. David Kariuki

Chief executive Officer/Registrar

Kenya Medical Practitioners and Dentists Council.”

32. With regard to the Jekim Medical Centre the letter to the director Nancy Muiya Addam of 18/8/2023 was in similar terms as follows:

“ August 18, 2023

Ms Nancy Muiya Adam

Director

Jekim Medical Centre

Box 118 -60200



NKUBU.

Email: estherkiri9@gmail.com

RE: Inquiry Into Allegations Of Fraudulentclaims To The National Hospital Insurance Fund

We refer to the above matter.

We wish to advise that following the inspection of the facility conducted on 21st June 2023, the Council considered and adopted the findings by the Inspection team as enumerated here below.

Key Findings

1. The facility is registered and licensed as a Level 2 by KMPDC.
2. The workload is very high viz-a-viz the staffing levels.
3. The National Hospital Insurance Fund Systems were closed: therefore, verifying information from he system was difficult.

Determination

In view of the above findings. The Council directed that : :

1. Jekimn Medical Centre to continue operating as a Level 2 private medical institution.
2. The management of the facility to ensure that a service areas are adequately staffed.
3. The license to operate as a private medical institution be reinstated.

Consequently, the licence to operate as a private medical institution Licence No 696991 for Jekim Medical Centre, is hereby reinstated.

Take Notice that the Council's Disciplinary and Ethics Committee shall continue its investigations into the allegation.

[signed]

Dr. David Kariuki

Chief executive Officer/Registrar

Kenya Medical Practitioners and Dentists Council.”

33. There was clearly no final determination of the question and allegations of fraudulent claims to the National Hospital Insurance Find. It cannot be said that the petitioners have finally been cleared of the allegations, and when established there may be cause for the withdrawal of the licence. Consequently, claims in the petition based on imputations on the character of the petitioners on the basis of the closure and investigations are not well founded at this stage of investigations. Although, the petitioners objection to the submission of pendency of investigations, their own exhibit in the form of the letters set out hereinabove, clearly warn that “Take Notice that the Council's Disciplinary and Ethics Committee shall continue its investigations into the allegation.”



Doctrine of ripeness

34. As I understand it, the doctrine of ripeness prohibits actions before the court when certain antecedents relevant to the maturity of the claim or cause of action have not occurred. I respectfully, agree with the court in the decision cited by the 1st Respondent, where it was held:

“ 34. The Court in *Republic v National Employment Authority & 3 others ex-parte Middle East Consultancy Services Limited* [2018] eKLR held as follows:

“Ripeness refers to the readiness of a case for litigation; “a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all. ”

(38) The final decision was yet to be made, hence, there is no decision to be quashed. The goal of ripeness' is to prevent premature adjudication; if a dispute is insufficiently developed, any potential injury or stake is too speculative to warrant judicial action.”

35. The 1st Respondent submits that this Petition offends the doctrine of ripeness as it seeks for orders of certiorari in a matter where a final decision has not been reached by the 1st Respondent. With respect, however, the petition before the court is a challenge on the suspension and closure of the petitioner institutions which action was final and complete when it was imposed. The Petition does not seek to challenge any finding based on any investigation which is yet to be concluded.

36. The cause of action on the question of the validity and consequences of suspension of licences and closure of the petitioners is complete and petition is properly before the Court.

Exhaustion of internal remedies

37. This principle of judicial review under Section 9 of the Fair Administration Act applies to application for for judicial review of any administrative action to the High Court but cannot exempt a constitutional petition as here to the High Court for violation of rights. That the petitioners have sought as remedy an order of judicial review does not make this suit a judicial review application. It is just that a remedy permissible under article 23 (3) of the Constitution has been prayed as a relief.

38. Moreover, as urged by the Petitioners, an appeal to a committee of the 2nd Respondent from the action of the respondent cannot be taken as an effective remedy. The court does not consider that the petition herein is in any way affected by any alleged failure to exhaust internal remedies.

The 2nd respondent

39. The second active player in this matter, the second respondent must accept te facts as set out by the petitioners and in her action, through the mainstream media including print media of ordering the immediate closure of the Petitioners' medical institutions, owing to the afore-mentioned allegations in the Daily Nation Newspaper of 19/6/2023, was an exercise of pretended powers by the cabinet secretary.

40. The Cabinet minister has no powers to order the closure of any facility. The powers of section 15 of the Act are the preserve of the licensing body, the 1st respondent herein. The order for the closure of the petitioners' facilities violated their rights to the property in the hospital fees generated by the two facilities in the course of their active operations for they were licenced by the 1st respondent.



41. It is reported in The Daily Nation newspapers of 20/6/2023 in relevant parts that –

“Daily Nation, Tuesday June 20, 2023.

NHIF officials suspended probe into scam ordered Health cabinet secretary Susan Nakhumicha has suspended NHIF branch managers in certain areas a day after the nation exposed how rogue hospitals stole millions of shillings through suspect medical camps targeting elderly patients “I hereby direct that all nhif branch managers in their affected areas be immediately suspended pending investigations. Facilities suspected to such dealings must not continue to siphon resources from patients and government said Ms. Nakhumicha.

To speed up the investigation process, Ms. Nakhumicha directed the Kenya Medical Practitioners and Dentists Council (KMPDC) and the Pharmacy and Poisons Board to commence investigations into the scandal and give the ministry an interim report within 48 hours.

The facilities to be investigated include Jekim Medical Centre in Meru, Jekim Hospital in Meru

“With immediate effect these facilities have been instructed to transfer their patients and evacuate the premises,” she said.

This move, according to Ms. Nakhumicha, will facilitate KMPDCs inspection process. “Our teams will enforce the directives for closure should they inspect and find them culpable and they will remain closed until investigations are concluded,” she said.”

42. The order for closure, like the suspension of the operations ordered by the 1st respondent’s letters of 19/6/2023, also violative of the petitioners right to fair administrative action which requires a fair hearing before adverse action is taken against them.

Requirement of article 24 of the Constitution on any restriction of rights and fundamental freedoms

43. The 1st Respondent’s and the Minister’s suspension and closure orders were in extravagant breach of the rights of the petitioners. If the Minister sought to address the question of alleged fraudulent NHIF claims by hospitals around the country, she ought only have closed the hospitals out of the NHIF system, leaving them to operate and earn due income from patients who made their payments directly without using the state fund of NHIF. This would be consistent with article 24 of the Constitution of Kenya which requires the least intrusion on rights as follows:

“24. Limitation of rights and fundamental freedoms

1. A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
 - a. the nature of the right or fundamental freedom;
 - b. the importance of the purpose of the limitation;
 - c. the nature and extent of the limitation;



- d. 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
- e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”

44. Indeed, by a letter dated 20/6/2023, the CEO of the National Health Insurance Fund (exhibit JKK 22 in the supporting Affidavit of the 2nd petitioner) suspended the applicability of the Fund for payment of the petitioners’ services as follows:

“ 20th June 2023

Hospital Administrator

JEKIM Medical Centre-66XXX60

Thro’

Branch Manager

Meru

Dear Sir/Madam,

RE: Suspension of Contract for the Provision of Healthcare Services to The Beneficiaries of The National Health Insurance fund (NHIF)(2022-2024)

The NHIF Management has suspended your facility Jekim Medical Centre (Code66XXX60) from offering services to the NHIF Members and their dependents effective 21st June 2023 effect in line with Clause 16.2 of the above referenced contract and NHIF Act of 1998.

This decision has been occasioned by the fraudulent undertakings at your facility which include;

- Conspiracy to defraud NHIF in contrary to section 317 of the Penal Code,
- Attempt to obtain money by false pretence contrary to section 313 as read with section 389 of the Penal Code.

You are required to:

1. Reconcile all pending claims and forward to the Branch Manager
2. Disclose your suspension status to ALL NHIF Beneficiaries who may elect to seek for Outpatient or inpatient services from your facility.

Yours faithfully,

Dr. Samson Kuhora

Ag. Chief Executiveofficer.”

45. The closure of NHIF payments facility to the petitioners’ medical institutions would have been sufficient to address the concerns of the alleged fraud until the completion of the investigations. Anything else was an unjustified violation of the rights of the petitioners, and the respondents are liable.



Conclusion

46. From the foregoing analysis, this court finds that the suspension of the Petitioners' licences and their subsequent temporary closure was made without jurisdiction. The 2nd Petitioner has averred in his supplementary affidavit that by its correspondences dated 18/8/2023, the 1st Respondent cleared the Petitioners of any wrong doing.
47. That clearance as shown in the terms of the letters set out herein was clearly not final as regards the allegations of fraud on National Health Insurance Fund and they cannot be used to found an action for damages sought with regard to "Exemplary and punitive damages for portraying the Petitioners as fraudsters and extortionists, against the 1st and 2nd Respondents jointly and severally", which are in the nature of defamation, which the court will consistently with the doctrine of constitutional avoidance leave to the civil process of a defamation suit.
48. Moreover, the nature of a claim based under article 6(1) of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* which stipulates that "1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right", although, being in my respectful view part of law of Kenya under article 2 (6) of the *Constitution* providing that "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution", for loss of ability to earn by reason of closure of the health institution as a business is in the nature of a special damage which should have been specifically pleaded and proved before any award may be made thereunder.
49. In addition, the petitioners cannot mount a claim for damages for alleged breach of right to property or to earn a living when the allegations of fraudulent NHIF claims has not been conclusively discharged by a final report.
50. The petitioner has clearly proved a case of violation of their right to be heard under article 50 (1) and fair administrative action under article 47 of the *Constitution*. For such breach, the petitioners are, independently of the finding of the court on the ripeness of the claim for damages for loss consequential to the suspension or closure of their health establishments, entitled to damages for breach of the constitutional right to fair hearing and fair administrative action.
51. In assessing the award of damages, the court notes that the breach of the petitioners' rights by suspension and closure of their business, although imposed for a period of 12 months by the suspension letter of 19/6/2023, was in fact for a period of under five days because by its order issued on 23/6/2023 and possibly implemented the following day the court granted a conservatory order, in terms that "pending inter-partes hearing of the application, a conservatory order be and is hereby issued for seven (7)days only, suspending the two letters, both dated 19.06.2023, issued by the 1st Respondent, suspending the Petitioners' licences and the directive issued by the 2nd Respondent on 19th and 20th June, 2023, closing down the Petitioners' medical service-offering institutions", initially for seven days and thereafter extended pending hearing and determination of the suit. The Court will for such breach of the right of fair administrative action and fair hearing award a modest award, having regard to the nature of the operations of the petitioners, of Ksh.1,000,000/- for each petitioner.



Punitive Damages

52. As this court said in Meru HCCC No 33 of 2017, *Priscila Kajuju Matero v Attorney General* (2023) eKLR:

“As in *Donoghue v Stevenson* (1932) AC 562, the categories of negligence are not closed and they must include reckless and careless execution of policy, statutory stipulation or other lawful plan of the government with the result that it causes injury or death of innocent people, and or damage, destruction or loss of property, and the victims are entitled to damages.”

53. As admirably put by Zimbabwean judge (Mafusire, J.) in *Grandwell Holdings (Pvt) Ltd* (HH 193 of 2016, HC 1977 of 2016)¹, the Court’s general posture towards government dealings is to check government power against the law:

“No one stops government from governing. No one stops government functionaries from crafting and implementing government policy. But in all this, the rule of law must be observed. This is paramount. It is a tenet the courts will defend to the last judge standing. The alternative is anarchy. Law and order are indispensable elements of civilised society. This must sound like a broken record. But unless the need for it falls away, the principle may continue to be re-stated. CHIDYAUSIKU CJ, in *Minister of Lands & Ors v Commercial Farmers Union*² put it this way:

“... [T]he law is supreme over decisions and actions of government and private persons. There is ... one law for all. ... [T]he exercise of all public power must find its ultimate source in a legal rule. [T]he relationship between the State and the subject must be regulated by law. So must the relationship between subjects in order to prevent resort to self-help. The rule against self-help is necessary for the protection of the individual against arbitrary and subjective decisions and conduct of an adversary....”

54. The Cabinet Minister for Health may robustly pursue government policy to reform the National Health Insurance Fund, but it must be done within and in accordance with the applicable law on fair hearing and fair administrative action.
55. The 1st Respondents usefully cites the decision of the Court of Appeal in *Godfrey Julius Ndumba Mbogori & anor. Nairobi City Council* [2018] eKLR as a guide to where and when punitive damages may be considered as follows:

“32. The appellants claimed for exemplary and punitive damages. Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are:

¹ [2016] ZWHHC 193 (16 March 2016)

² 2001 [2] ZLR 457 [S], at pp 479 - 480



- i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government,
- ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and
- iii) where exemplary damages are expressly authorized by statute.

Lord Devlin also gave expression to 3 considerations which must be borne in mind in any case in which an award of exemplary damages is being claimed. The first category is that the plaintiff himself must be the victim of the punishable behaviour; the second category is that the power to award exemplary damages must be used with restraint for it constitutes a weapon and can be used either in defence of liberty or against liberty and thirdly, the means of the defendant, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages.”

56. While the Court might have considered punitive damages to be justified in this respect with regard of the order of closure by the 2nd Respondent Cabinet Secretary for health, the fact that the closure which she had order for one year was cut short after only four (4) days by the conservatory order of this court and the court being mindful that the punitive damages shall be met from proceeds of revenue from tax on the public, dissuades the court from making any order therefor.
57. However, as the petitioners' complicity in any fraud has not been established or ruled out, the Court considers it an appropriate relief within the meaning of article 23 (3) of the Constitution, and is content in this regard to issue a public reprimand of the 2nd Respondent against over-zealous show of authority in pretended exercise of power and a warning against action that may amount abuse of office and abuse of power within the meaning of chapter Six of the Constitution.
58. The court issues the reprimand as appropriate relief in exercise of its full authority as the judicial organ of the Kenya state under article 1 (3) (c) of the Constitution.

Orders

59. Accordingly, for the reasons set out above, this court finds that the petition is partially merited and the court makes the following orders with regard to the prayers of the Petition:
1. A declaration that the 1st respondent's suspension of the petitioners' licences to operate as medical practitioners, *vide* the two letters both dated 19.06.2023 and the 2nd Respondent's directive issued on June 19, 2023 and June 20, 2023, closing down the Petitioners' institutions as medical practitioners, contravene the petitioners' right to a fair administrative action under article 47, fair hearing under Article 50 and economic empowerment under article 19 of the Constitution of Kenya and the right to the opportunity to gain a living under article 6 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and are therefore null and void.
 2. The judicial review order of *certiorari* sought to be issued, calling and quashing the two letters, both dated June 19, 2023, issued by the 1st Respondent, suspending the licences of the Petitioners to operate as medical practitioners is redundant in view of the declaration granted herein.



3. A permanent injunction is issued, restraining the 1st and 2nd Respondents and their representatives, servants, agents and anybody else acting at their behest, direction or instructions, from suspending the licences of the Petitioners and/or closing down their institutions as medical practitioners, on the basis of the radiology (X-ray) services rendered by the 1st Petitioner in September and October, 2022 on the basis of the facts of this petition.
 4. General damages for loss of business proceeds from the date of suspension of the Petitioners' licences and closure of their institutions as medical practitioners on 19.06.2023 until resumption of operations, against the 1st and 2nd Respondents jointly and severally, which is in the nature of special damages unpleaded and unproved is declined.
 5. Exemplary and punitive damages for portraying the petitioners as fraudsters and extortionists, against the 1st and 2nd Respondents jointly and severally, which is in the nature of defamatory claim are declined on the principle of constitutional avoidance.
 6. The Court awards each petitioner the sum of Ksh.1,000,000/-general damages against the 1st and 2nd Respondents for suspending and closing the petitioners' licences without affording the petitioners a prior fair hearing in violation of the fair administrative action and fair hearing under Article 47 and 50 (1) of the Constitution and Article 6(1) of the ICESCR.
 7. The total amount of general damages in he sum of Ksh.2,000,000/- shall attract interest at court rates from the date of judgment until payment in full.
 8. In exercise of its sovereign judicial authority under article 1 (3) (c) of the Constitution, the Court further reprimands the 2nd respondent and warns her against acts of highhandedness and exercise of pretended powers which may be adjudged abuse of office and abuse of power in accordance with the law.
60. There shall be an order for costs to the petitioners as the petition was only necessitated by the wrongful acts of the 1st and 2nd respondents.

Order accordingly.

DATED AND DELIVERED THIS 28TH DAY OF DECEMBER, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Carlpeters Mbaabu & Co. for the Petitioner

M/S Kounah & Co. for the 1st Respondent

N/A for the 2nd and 3rd Respondents.

