



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CONSTITUTIONAL PETITION NO. 9 OF 2021

(ORIGINATING FROM KISUMU CONST. PETITION NO. 22/2021)

KENNEDY OMOLO ANJEJO.....PETITIONER

VERSUS

THE CEO, NATIONAL HOSPITAL INSURANCE FUND BOARD.....1ST RESPONDENT

NATIONAL HOSPITAL INSURANCE FUND MANAGEMENT BOARD....2ND RESPONDENT

CABINET SECRETARY FOR HEALTH.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. The Petitioner/applicant herein Kennedy Omollo Anjejo by his petition dated 21/12/2021 seeks for a declaration that the Respondents have violated his rights under the Constitution by reducing the dialysis benefit cover in view of the increase in the cost of treatment for cancer and that, that action is contrary to the appellant/petitioner's legitimate expectations to affordable and quality healthcare that is sustainable. He also seeks for a declaration that the respondent's comprehensive contract for the provision of the Healthcare Services to beneficiaries of NHIF 2022-2024 is unconstitutional.

2. Lastly, he seeks for a conservatory order restraining/prohibiting the respondents from implementing the reduced dialysis capitation for renal care patients under the said comprehensive contract which he claims is a threat to the life of the petitioner and the over 5000 renal care patients in Kenya and their right to the highest attainable standard of health protected under **Article 43 of the Constitution**.

3. Simultaneous with the filing of the petition, the Petitioner also filed an application under certificate of urgency seeking for conservatory orders.

4. This court upon being presented with the application under Certificate of urgency on 22/12/2021 directed the applicant to serve the Respondents for *inter partes* directions today.

5. All the Respondents are duly served and have appeared through their respective counsel. The 1st and 2nd Respondents have filed grounds of opposition. The 3rd and 4th Respondents seek for 10 days to enable them file and serve their responses to the application and the petition.

6. The Petitioner however seeks for a conservatory order pending *inter partes* consideration of the application.

7. The Respondents are opposed to any conservatory orders at this stage. Mr. Ogejo submitted and Mr. Kobimbo concurred that if the conservatory orders are issued now, yet the service providers are simply implementing a contract entered into with NHIF, then all the over 10 million Kenyans under the said cover will be affected negatively.

8. In addition, that there is no evidence of any threat to the life of the Petitioner or him being denied the dialysis services or being asked to pay the extra 3,500/= to make up for Kshs. 9,000/= capitation previously paid by NHIF and that any loss can be compensated by damages or by reimbursement.

9. I have considered the application for conservatory orders pending *inter partes* merit consideration of the application. I am alive to the fact that this is a serious petition touching on health care of citizens with renal care issues.

10. The question is whether at this stage there is any real danger that the petitioner will suffer prejudice as a result of the violation of or

threatened violation of the Constitution or his rights under the Constitution. That danger must be imminent and evident, true and actual and not fictitious, requiring or deserving immediate remedial attention for redress by this Court.

11. In my humble view, and without delving into the merits of the application, I find no immediate real threat or prejudice that the applicant will suffer if a conservatory order is not granted at this stage, pending *inter partes* consideration of the application as he has not been denied the renal care services and neither has he been asked to pay the extra money Shs. 3,500/= to top up to Kshs. 9,000/= capitation previously paid by the NHIF for renal care patients.

12. I am aware that conservatory orders in constitutional petitions, are remedies in *rem* and not remedies in *personam* and that to grant such orders at this stage when there is a dispute on the status quo regarding an already signed comprehensive contract between the Respondents and the service providers will adversely affect many other renal health care seekers who will demand for enhanced payments to health service providers contrary to the contract signed.

13. For the above reasons, I decline to grant any conservatory orders at this stage and direct that the application be considered on its merits *inter partes*. The Respondents have seven days of today to file and serve their responses to the application. The applicant shall have 5 days of date of service to file and serve a further affidavit if any. The matter shall be mentioned before the trial court at Kisumu on 27/1/2022 for directions on disposal of the applications and the petition, as the court and parties may agree.

14. These proceedings to be typed and remitted to Kisumu High Court forthwith.

15. I so order.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 5TH DAY OF JANUARY, 2022

R.E. ABURILI

JUDGE