



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.517 OF 2019

KENYA UNION OF POST PRIMARY EDUCATION TEACHERS..... PETITIONER

VERSUS

CABINET SECRETARY FOR HEALTH.....1ST RESPONDENT

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

KENYA NATIONAL UNION OF TEACHERS..... 3RD RESPONDENT

THE ATTORNEY GENERAL..... 4TH RESPONDENT

JUDGMENT

Introduction

1. The petition dated 20th December 2019 was filed under Rules 3, 4(1), 8(1) and 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 for the alleged contravention of Articles 27 and 47 of the Constitution.
2. The petitioner is challenging the appointment of Wycliffe Omucheyi to the board of the 2nd respondent. It argues that the said appointment contravenes section 4(1) of the National Hospital Insurance Fund Act.

The Petitioner's case

3. The Petition is supported by the affidavit of Moses Nthurima sworn on 20th December, 2019. He avers that under the Act the petitioner and 3rd respondent are to nominate members to sit at the 2nd respondent's board alternately and each should serve a period of three (3) years. His argument is that since the previous term had been held by a member of the 3rd respondent it was only fair to have a member of the petitioner hold the next term of office.
4. The previous term had been held by Mudzo Nzili of the 3rd respondent vide Gazette Notice No.4427 of 2016. When the term ended the Chief Executive Officer did not call for nomination submissions for appointment by the 1st respondent. The Petitioner however forwarded its nominee's name (Wicks Mureithi) to the 2nd respondent. Subsequently the 1st respondent vide Gazette Notice No.4413 appointed Wycliffe Omucheyi with effect from 9th May, 2019.
5. The petitioner vide a letter MN 4 (date not clear) addressed to the 1st respondent protested the decision and demanded a revocation of the appointment. The same was not responded to. In claiming violation of its constitutional rights under Articles 27 and 47 of the Constitution the petitioner seeks the following orders:

a) An order of certiorari quashing the illegal appointment of a representative of the 3rd respondent to the Board of National Hospital Insurance Fund for a second term in a row by the 1st respondent;

b) An order of mandamus compelling the 1st respondent to disclose the criteria used in making the appointment under Section 4(1)(h) of National Hospital Insurance Fund;

c) A declaration that the appointment of Mr. Wycliffe Omucheyi, a member of the 3rd respondent, to the 2nd respondent, for a period of three (3) years is invalid; and

d) An order for costs and any such other further orders as it may deem just and expedient in the circumstances.

The 1st & 4th Respondent's Case

6. The 1st and 4th respondents in opposing the petition filed the following grounds of opposition dated 14th December 2021:

*(i) There is no constitutional issue for interpretation since the petition fails to outline the alleged constitutional violations. Moreover the petition fails to demonstrate how the respondents conduct constituted a violation of their fundamental rights as set out in **Anarita Karimi Njeru vs.R (1976 -1980)KLR1272.***

(ii) The matter ought to have been filed through a judicial review application.

*(iii) No grounds have been established for grant of the sought orders in line with the principle set out in the case of **Pastoli v Kabale District Local Government Council & Others (2008)2 EA 300.***

(iv) The petitioner misinterpreted the provisions of Section 4 of the National Hospital Insurance Fund Act and so by its very nature the petition is based on conjecture.

(v) The petition is premature since the petitioner failed to exhaust the dispute resolution mechanisms under the impugned Act in line with Article 159 of the Constitution.

(vi) The petitioner fails to lay a legal basis for the alternate nature of representation of teachers in the 2nd respondent as between it and the 3rd respondent.

(vii) The petition fails to demonstrate the prejudice suffered or will suffer if the orders are not granted being that the 1st respondent acted in good faith and within the provisions of the law in the appointment.

(viii) The petition is an abuse of the Court process, defective, without merit and for that reason should be dismissed with costs.

The 2nd Respondent's Case

7. The 2nd respondent also filed grounds of opposition dated 7th December 2020 stating that:

i. The petition lacks merit and in essence an abuse of the court process.

ii. The petition is premature as offends the doctrine of exhaustion in line with Article 159 of the Constitution and Section 9(2)(3)and (4) of the Fair Administrative Actions Act.

iii. The 2nd respondent stands to be prejudiced if orders sought specifically regarding Wycliffe Omucheyi's appointment are granted. This is since its operations will be debilitated.

iv. The National Hospital Insurance Fund Act although provides that one person is to be nominated from the petitioner and the 3rd respondent the Act does not mandate an alternate appointment as between the two for each term.

The 3rd Respondent's Case

8. The 3rd respondent vide a replying affidavit sworn by Collins Henry Oyuu, on 30th November 2021, states that according to the dictates of Section 4(1)(h) of the National Hospital Insurance Fund Act, both the petitioner and itself are required to nominate one person to the Board of Management though not alternately. He dismissed the petitioner's assertion as being a miscomprehension of the law.

9. He further avers that Wycliffe Omuchenyi's appointment was in accordance with the law as the 3rd respondent acted in line with its mandate. He continues to state that the 3rd respondent stands to suffer prejudice if the sought orders are granted as its operations will be incapacitated.

10. He depones that despite its assertions, the petitioner has failed to demonstrate with precision the way its constitutional rights were violated by the 3rd respondent, as no evidence has been adduced in support. To this end he avers that the petition lacks merit and is an abuse of the court process, and should be dismissed with costs.

The Petitioner's submissions

11. The firm of Ashitiva Advocates LLP on behalf of the petitioner filed written submissions and a list of authorities' dated 1st July 2021.

Counsel identifies the following as the issues for determination:

- i. The illegality and unconstitutional nature of the respondent's actions; and*
- ii. Who is to bear the costs of the petition.*

12. Counsel on the first issue submits that the 1st respondent acted in total disregard of the law when it overlooked the petitioner's nominee, Wicks Mwethi Njenga, without giving any reason for doing so. It is his argument that statutory appointments ought to be transparent, procedural and fair in a manner that does not discriminate any party.

13. To buttress this argument reliance was placed on the case of **Katiba Institute & another v Attorney General & another; Julius Waweru & 128 others (Interested Parties) (2021) eKLR** where it was emphasized that Article 10 values must be infused in every decision-making process including that of making appointments. Additional reliance was placed on the cases of: **Republic v Attorney General & 3 others Ex parte Tom Odoyo Oloo [2015] eKLR** and **George Omondi v the Cabinet Secretary, Ministry of Water, sanitation and irrigation and 5 others (Petition E012 of 2020)**. He argues that considering this the appointment was unlawful and unconstitutional.

14. On the argument that the petitioner had failed to exhaust the available remedies, Counsel submits that the petitioners attempts to have audience with the 1st Respondent have never been successful. He contends that the only way to gain redress was by invoking this Court's jurisdiction under Article 23.

15. This would enable them seek the judicial review remedy for violation of their rights under Article 47 of the Constitution which is a viable avenue as captured in the case of **Felix Kiprono Matagei v Attorney General - Law Society of Kenya (Amicus Curiae) [2021] eKLR**. Further reliance was placed on the case of **CIS V Directors, Crawford International School & 3 others [2020] eKLR**.

16. On the second issue, Counsel relied on the case of **Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR** while asking for costs for the petitioner.

The 1st & 4th Respondents' submissions

17. The Attorney General on behalf of the 1st and 4th respondents filed written submissions dated 14th December 2021 identifying the issues for determination to be:

- i. Whether there was a violation of the petitioner's rights by the respondents; and*
- ii. Whether the 1st respondent overstepped the assigned mandate.*

While relying on the standard set for constitutional petitions counsel cited on the case of **Anarita Karimi Njeru v the Republic [1976 - 1980] KLR 1272** as reiterated in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**. He then submits that the petitioner has failed to specifically demonstrate how the 1st and 4th respondents violated its constitutional rights.

19. Counsel has submitted that under the National Hospital Insurance Fund Act, the 1st respondent is granted the power to appoint persons to the Board of Management under Section 4, of the Act. This is once they are nominated by various organizations. It is his contention that the appointment of the 3rd respondent's nominee was in accordance with the law.

2nd Respondent's submissions

20. The firm of Robson Harris Advocates LLP filed written submissions and a list of authorities dated 6th December 2021 on behalf of the 2nd respondent. The issues identified for determination are:

- i. Whether the petition discloses any justifiable constitutional issue;*
- ii. Whether this Court has jurisdiction to grant the orders sought herein; and*
- iii. The party to bear the cost of the suit.*

21. Counsel has submitted that the petition does not prove violation of any right under the Constitution and in essence fails the principle established in the **Anarita Karimi Case (Supra)** and followed in the cases of **JWN V LNN [2019] eKLR** and **Kenya Youth Parliament & 2 others v Attorney General & 2 others [2012] eKLR**.

22. He argues that the petitioner has failed to show how nominations to the 2nd respondent should be done regarding the two bodies. It has also not shown that the 1st respondent failed to comply with the procedures set with reference to the impugned appointment.

23. On the second issue, Counsel submits that this Court lacks jurisdiction to grant the orders sought. The reason being that the National Hospital Insurance Fund Act does not prescribe the way the nomination of a person between the petitioner and the 3rd respondent ought to be

conducted. That the petitioner purports to rely on a non-existent provision in law. He further notes that the 2nd respondent's role is only to receive names which he did from the 3rd respondent before that of the petitioner.

24. In light of this it is argued that this Court cannot therefore issue orders on the procedure that should be followed. He argues that jurisdiction to do so must be derived from a statute or the Constitution as held in the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**. He urges the court to dismiss the petition with costs.

25. Lastly, Counsel submits that by virtue of Section 27 of the Civil Procedure Act that states costs follow the event, the 2nd respondent should be awarded costs.

3rd Respondent's submissions

26. The 3rd respondent through the firm of SMS Advocates, LLP filed written submissions dated 2nd December 2021, stating the issues for determination to be as follows:

- i. *Whether the 3rd respondent complied with the provisions of the law to execute its mandate and if appointment of the 3rd respondent's representative was lawful; and*
- ii. *Whether the petitioner is entitled to the prayers sought.*

27. Counsel on the first issue submits that the 3rd respondent in accordance with Section 4(1) (h) of the National Hospital Insurance Fund Act submitted its nomination to the 2nd respondent. To support this point he highlights Section 7(2)(a)(i) and (ii) of the Fair Administrative Action Act which provides that the Court can only review an administrative action if the person was not authorized to do so or acted in excess of the power conferred under law.

28. In addition, he submits that Section 4(1)(h) of the Act neither provides for rules on the appointment nor provides for rotational nomination between the 3rd respondent and the petitioner. He argues that this being the case the 1st respondent is empowered to appoint one nominated person which it did in compliance with the law. He called for the dismissal of the petition with costs.

Analysis and Determination

29. Having considered the petition, affidavits, grounds of opposition, submissions, the issues that arise for determination are:

- i. *The validity of the 3rd respondent's nominee's appointment to the 2nd respondent's Board of Management by the 1st respondent; and*
- ii. *Whether the petitioner's rights under Articles 27 and 47 of the Constitution were violated.*

Issue No. (i) The validity of the 3rd respondent's nominee's appointment to the 2nd respondent's Board of Management by the 1st respondent

30. The basis of the complaint by the petitioner is Section 4(1) (h) of the National Hospital Insurance Fund Act as amended by the Statute Law(Miscellaneous Amendments) Act,2014. In making the specific amendment, the foregoing Act provided as follows:

Section 4(1)

.....

Insert the words "and the Kenya Union of Post Primary Education Teachers in such manner as may be prescribed" immediately after the words "Teachers" appearing in paragraph (h).

.....

31. The National Hospital Insurance Fund Act, (No.9 of 1998) as such provides under Section 4 as follows:

Establishment of Board

(1) There shall be established a Board to be known as the National Hospital Insurance Fund Board of Management which shall consist of—

(a) a chairman to be appointed by the President by virtue of his knowledge and experience in matters relating to insurance, financial management, economics, health or business administration?

(b) the Principal Secretary in the Ministry for the time being responsible for matters relating to Health or his representative?

(c) the Principal Secretary to the Treasury or his representative?

(d) the Principal Secretary/Director of Personnel Management or his representative?

(e) the Director of Medical Services or his or her representative?

(f) one person nominated by the Federation of Kenya Employers?

(g) one person nominated by the Central Organisation of Trade Unions?

(h) one person nominated by the Kenya National Union of Teachers and the Kenya Union of Post Primary Education Teachers in such manner as may be prescribed;

(i) one person nominated by the Kenya Medical Association?

(j) one person nominated by faith based healthcare organisations in such a manner as may be prescribed.

32. It is clear from reading the Act that the two bodies mentioned under section 4(1) (h) should nominate the one person. This person's tenure according to the Second Schedule of the Act is prescribed as follows:

1. Tenure of office

(1) A member of the Board other than an ex officio member shall, subject to the provisions of this Schedule, hold office for a period not exceeding three years, on such terms and conditions as may be specified in the instrument of appointment but shall be eligible for reappointment for one more term of a period not exceeding three years.

(2) The members of the Board shall be appointed at different times so that the respective expiry dates of the members' terms shall fall at different times.

33. With these provisions in mind, this Court will now turn to consider the contentious issues in this matter. The petition challenges the appointment of the 3rd respondent's nominee whilst maintaining that the position is available to both on an alternate basis. In rebuttal, it was argued by the respondents that the 3rd respondent's nominee was lawfully appointed by the 1st respondent.

34. It is clear from the cited provisions that the petitioner and the 3rd respondent are fittingly entitled to both nominate one person to the 2nd respondent's Board of Management. This constitutes the key theme of Section 4(1) (h) of the Act. On this issue this Court is guided by the Court of Appeal holding in the case of **County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR** where it opined thus:

“The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context...”

35. It is apparent however that the section does not provide the criteria or process of selecting this nominee as between the two parties. There is no express provision for sharing the position alternately as argued by the Petitioner. The Act however makes it clear that the drafters' intent was not to create an ambiguous situation marred by uncertainty. It was their intent having regard to the process of selection of the nominee that the same would be undoubtedly prescribed.

36. There is no evidence that of any manner of prescription for the nomination by either the two infighting bodies or the rest of the respondents. It would be injudicious to conclude that the 3rd respondent's nominee was unlawfully appointed when there is a clear legal provision for the nomination. In the face of all these ambiguities the 1st respondent cannot be faulted for appointing Wycliffe Omucheyi since it received his nomination.

Issue no.(ii) Whether the petitioner's rights under Articles 27 and 47 of the Constitution were violated

37. The petitioner faults the respondents for violating its constitutional rights under Article 27 and 47 of the Constitution. In opposition the respondents argued that the petition did not raise any constitutional issues neither did it demonstrate precisely how the rights were violated. The critical issue for determination is whether the decision made by the respondents was in line with constitutional principles and whether there was a demonstration of violation of these rights.

38. The right to equality and freedom from discrimination is envisaged in Article 27 of the Constitution which reads as follows:

1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3)

(4)

(5).....

(6)

(7)

(8)

39. The Court in the case of **Federation Of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another [2011] eKLR** on the right to equality and discrimination opined as follows:

“At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in the society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding, the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim...”

40. The right to equality affirms that all persons have the same rights and deserve the same level of respect and should accordingly be treated equally. This means that laws, policies and programs should not be discriminatory and that public authorities should not apply or enforce laws, policies and programs in a discriminatory or arbitrary manner. Article 47 of the Constitution of Kenya provides as follows:

(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.

41. Discussing the effect of Article 47 of the Constitution, the Court in the case of **Tata Chemicals Magadi Limited v Commissioner of Domestic Taxes (Large Taxpayers) [2014] eKLR** observed that:

“The purpose of Article 47 is to uplift the standards of administrative action by providing constitutional standards..... In regard to processing of VAT refund claims, Ojwang’ J., (as he then was) in the case of Republic v Kenya Revenue Authority ex-parte L.A.B International Kenya Limited (Supra) observed that, “In practical terms, Government has a public duty to effect change to any unprogressive arrangements, such as those that may characterize the operational linkage of the respondent to slothful structures, so as to render the respondent, as well as such structures, capable of responding to the overriding demands of the Constitution; and in this regard, ordinary statutory arrangements cannot qualify the constitutional provisions.”

42. When all is said and done the reality is made manifest in the demand to see the national values and principles under Article 10 of the Constitution, enjoyed by the people.

43. Borrowing from the cited provisions in the previous issue, what is apparent from the reading is that the drafters’ intent was to have one person nominated by the petitioner and 3rd respondent. In line with Section 4(1)(h) of the National Hospital Insurance Act, both bodies nominated a person for consideration. This is evidenced by the petitioner’s correspondence to the 1st respondent dated 2nd May 2019.

44. It is only reasonable to suppose that each party had an expectation that it would be considered and being that it was codified in law the expectation was indeed legitimate. This was aptly captured in the case of **Republic v Kenya National Examinations Council Ex-Parte Charles Maina Wanjihia & another [2016] eKLR** as follows:

“...De Smith, Woolf & Jowell, in “Judicial Review of Administrative Action” 6th Edn. Sweet & Maxwell page 609 states that:

“A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government’s dealings with the public.”

45. The 1st respondent is bound by the dictates of the Constitution, in this case the principles of leadership and integrity which come into sharp focus in this case. Article 73(2) of the Constitution highlights the principles as follows:

(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;

(b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;

(c) selfless service based solely on the public interest, demonstrated by--

(i) honesty in the execution of public duties; and

(ii) the declaration of any personal interest that may conflict with public duties;

(d) accountability to the public for decisions and actions; and

(e) discipline and commitment in service to the people.

Had the above principles been adhered to and proper direction given by the 1st respondent the petitioner and 3rd respondent would not have found themselves in this awkward scenario.

46. Be it as it may, who wronged the petitioner? First and foremost section 4(1) (h) of the Act talks of a prescription. Who was to do this prescription? Was it the petitioner or the respondents or all of them? This prescription is what would have assisted all these parties in order to allow both the petitioner and 3rd respondent to have equal opportunities to the nomination. What happened in this case is very unfortunate.

47. Another angle to this is the action taken by the petitioner. This was an administrative action and a decision was made. The Petitioner should have challenged the decision by way of Judicial Review in the High Court for the respondents to explain how they arrived at the said decision. This court would have easily made a prescription in terms of section 4(1) (h) of the National Hospital Insurance Fund in order to ensure equal opportunities by the two bodies in the nominations.

48. It is however not possible to do so because on 14th January, 2022 several amendments were made to the National Hospital Insurance Fund Act. Among the amendments is section 4(1). The new section 4(1) provides for a new set of members to the Board of the Fund. The petitioner and the 3rd respondent happen not to be among the members of the Fund's Board.

49. The new section 4(1A) and (1B) gives the qualifications for the nominees or appointees and the categories to be considered while nominating and/or appointing. I believe this prescription brings more clarity into the process compared to the previous section 4(1) (h).

50. Whatever happened to the petitioner and as a result of which the 3rd respondents benefitted is unfortunate. The Law itself had a lacuna and somebody somewhere took advantage of it. Had the petitioner filed a Judicial Review to question the decision making process the matter may have been sorted out earlier. The term of Wycliffe Omucheyi comes to an end on 9th May, 2022 (two months away) and this court cannot interfere with it as it was done in accordance with the law.

51. The upshot is that the petition lacks merit and is dismissed. Each party to bear its own costs.

Orders accordingly.

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 28TH DAY OF MARCH, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT