



REPUBLIC OF KENYA



**KENYA LAW**

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**National Hospital Insurance Fund v RAA (Suing on behalf of GEA, a Minor) & another  
(Appeal E099 of 2021) [2022] KEHC 13324 (KLR) (Family) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13324 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
APPEAL E099 OF 2021  
MA ODERO, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**NATIONAL HOSPITAL INSURANCE FUND ..... APPELLANT**

**AND**

**RAA (SUING ON BEHALF OF GEA, A MINOR) ..... 1<sup>ST</sup> RESPONDENT**

**KIKUYU CHILDREN OFFICER ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal against the ruling, judgement and/or directions by Hon C Mburu  
(SRM) in Childrens Case No E051 of 2021 August 19, 2021 and August 30, 2021.)*

**RULING**

1. Before this court for determination is the notice of motion application dated September 9, 2021 by which the National Hospital Insurance Fund ('the applicant') seeks the following orders:-
  1. Spent
  2. Spent
  3. That pending the hearing and determination of the appeal, the honourable court be pleased to order a stay of execution of the ruling, judgement and/or directions by Hon C Mburu (SRM) in Childrens Case No August 19, 2021 and August 30, 2021.
  4. That this honourable court to grant further other/or consequential orders that this honourable court deems fit and just to grant so as to ensure that the applicants appeal is not rendered nugatory.
  5. That costs of this application be provided for.'



2. The application which was premised upon section 1A, 1B 3A and 63 (e) of the *Civil Procedure Act*, order 42 (b)(1) of the *Civil Procedure Rules 2010*, was supported by the affidavit of even date sworn by LCK an employee of the applicant.
3. The respondent RAA opposed the application through the replying affidavit dated September 25, 2021. The application was canvassed by way of written submissions. The applicant filed written submissions dated October 26, 2021 whilst the respondent relied upon her written submissions dated November 5, 2021.

## **Background**

4. The appeal emanates from Kikuyu Childrens Case No E051 of 2021 in which the Kikuyu childrens officer filed an application seeking that the minor be included in the 1<sup>st</sup> respondents NHIF Policy as a beneficiary. On August 19, 2021 Hon C Mburu, Senior Resident Magistrate delivered a ruling directing the applicant (NHIF) to include the minor EA as a beneficiary of the policy held by his maternal grandmother (the respondent herein), to ensure that the child was accorded the necessary medical attention.
5. The applicant failed to comply with the above order and were summoned to appear before the Kikuyu Children's Court on August 26, 2021. Following the failure of any officer from NHIF to attend court, the court on August 30, 2021 ordered that the officers of NHIF be arrested for failing to comply with the court orders of August 19, 2021. The applicant being aggrieved by both orders filed the memorandum of appeal dated September 9, 2021. Contemporaneously with that memorandum of appeal the applicants filed this present application seeking a stay of both the orders issued on August 19, 2021 and on August 30, 2021 pending the hearing and determination of their appeal.
6. The applicants aver that they only became aware of the courts orders requiring them to attend court on August 26, 2021 on August 24, 2021. That the officer concerned was at the time away in Mombasa on official duty.
7. The applicant further alleges that the relevant court documents/orders were not forwarded to their offices by the Kikuyu Sub-County Childrens Officer. For this reason, no officer from NHIF appeared in court. The applicant submit that their officers stand to suffer irreparable harm if the orders of stay are not granted. That the orders granted by the court on August 19, 2021 are contrary to the provisions of the *NHIF Act* and are likely to defeat the purpose of the *NHIF Act*.
8. The applicant submit that they have an arguable appeal, which is likely to succeed. That the same may be rendered nugatory unless the stay sought is granted.
9. As stated earlier the application for stay is opposed. The respondents avers that the applicants have not come to court with clean hands as they were fully aware of the courts orders but failed to attend court. That the applicant has failed to give any cogent reason for failing to comply with the orders issued on August 19, 2021. The respondent urges the court to dismiss this application for stay.

## **Analysis and determination**

10. I have carefully considered the application before this court, the affidavit filed in reply as well as the written submissions filed by both counsel.
11. Order 42 rule 6(2) of the *Civil Procedure Rules 2010* provide for the conditions to be met in considering an application for stay of execution. The court must satisfy itself that-
  - (a) The application has been brought without undue delay.



- (b) The applicant stands to suffer substantial loss if the stay is not granted.
- (c) The applicant has provided security for the due performance of the decree.
12. In this case the rulings were delivered on August 19, 2021 and August 30, 2021. The present application was filed on September 9, 2021 a few weeks after delivery of said rulings. Accordingly, I find that the application was filed in timely manner.
13. The impugned orders were made in relation to provision of medical care for a minor. It is trite law that in matters concerning the welfare of children courts are required to give priority to the best interest of the child.
14. The Constitution of Kenya 2010 provides at article 53 (2) that:
- (2) A child's best interests are of paramount importance in every matter concerning the child.'
15. Likewise Children Act at section 4(2) provides as follows:-
- ' In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. (own emphasis)
16. In the case of Bhutt Vs Bhutt- Mombasa HCCC No 8 of 2014, the court held as follows:-
- ' In determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution order 42 rule 6 of the civil Procedure Rules, must be complemented by overriding consideration of the best interest of the child in accordance with 'article 53(2) of the Constitution.' (Own emphasis)
17. I have perused the memorandum of appeal dated September 9, 2021. Whilst at this point the court is not required to render itself on the issues raised in the main appeal, I am persuaded that there is an arguable appeal which raises pertinent issues.
18. I am fully mindful of the fact that the matter in issue concerns the health and welfare of a child. Article 53(1)(c) of the Constitution of Kenya 2010 provides that every child has the right to 'basic nutrition, shelter and health care'. The court must therefore weigh the constitutional rights guaranteed to all Kenyan children as against any loss or harm that may be occasioned to the applicant. In this regard, I find that the rights of the child take precedence. Issues concerning the health care of a minor cannot be compensated by way of costs.
19. On the other hand, I am of the opinion that the order of August 26, 2021 directing the arrest of NHIF officials ought to be stayed pending the determination of the appeal. This is because an arrest would involve the loss of an individual's personal liberty, which in my view does amount to irreparable harm.
20. Finally this application for stay is partially successful and I do make the following orders:-
- (1) Pending the hearing and determination of their appeal the ruling/judgment and/or direction made by Hon Mburu SRM in Kikuyu children's Case No E051 of 2021 on August 29, 2021 be and is hereby stayed.
- (2) The prayer seeking stay of the orders made on August 19, 2021 is declined.
- (3) Each party to meet its own costs.

**DATED IN NAIROBI THIS 30TH DAY OF SEPTEMBER, 2022.**



.....  
**MAUREEN A ODERO**  
**JUDGE**

