Republic v National Hospital Insurance Fund Management Board & another; Boya Rural Nursing Home (Exparte) (Judicial Review E002 of 2021) [2022] KEHC 13380 (KLR) (30 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13380 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

JUDICIAL REVIEW E002 OF 2021

JN KAMAU, J

SEPTEMBER 30, 2022

BETWEEN

REPUBLIC ..... APPLICANT

AND

NATIONAL HOSPITAL INSURANCE FUND MANAGEMENT BOARD ..... 1ST RESPONDENT

DOUGLAS OWINO (QUALITY ASSURANCE AND CONTRACTING OFFICER) ..... 2ND RESPONDENT

AND

BOYA RURAL NURSING HOME ..... EXPARTE

RULING

1. In its Notice of Motion dated June 22, 2021 and filed on June 23, 2021, the Ex parte Applicant herein sought an order of certiorari to remove into this court to quash the unilateral and unwritten decision of the 1st and 2nd Respondents purporting to suspend, reject and/or decline to pay the claims payable to it from January 2021 till date of full and total settlement of all pending claims, an order for mandamus compelling the 1st Respondent to pay it the claims for medical services it rendered to holders of National Hospital Insurance Fund (NHIF) cards between the month of January 2021 and the date of full and total settlement of all pending claims, an order for mandamus to compel the Respondents to receive, accept from, process and pay its claims made time to time pursuant to its right under the NHIF Act, an order of prohibition to prohibit the Respondents from refusing to recognise it as an accredited hospital and to further prohibit them from refusing to accept honour and pay claims it submitted to them, an order of prohibition prohibiting the 1st Respondent from refusing to pay the claims it had

already submitted as at the time of filing the application, those it lodged thereafter and those it will lodge from time hereafter and any other relief this court would deem fit in the circumstances.

2. In the Supporting Affidavit of its Director, Dr O Olima that was sworn on June 22, 2022, the Ex parte Applicant averred that patients with NHIF cards made up to seventy (70%) per cent of its in patients and that despite demands, the 1st Respondent had failed to pay its claims exposing it and its patients to dire conditions and was at the verge of grinding to a halt. It was its contention that Section 27 (e) of the NHIF Act enjoined the 1st Respondent to settle claims within a period of thirty (30) days from the date of submission of a claim.

3. It contended that the 2nd Respondent's decision was unwritten and could not thus be attached as provided in Order 53 Rule 7(1) of the Civil Procedure Rules. It, however, averred that the decision could still be subjected to judicial review proceedings as the decision was unreasonable, arbitrary, unlawful, irrational, an abuse of power, oppressive, punitive, grossly unlawful, actuated with malice and vendetta and/or otherwise offended the rules of natural justice, the *Constitution*, the Fair Administrative Actions Act and the NHIF Act.

4. It added that the Respondents' decision was also malicious, illegal, unlawful and null and void as there was no inspection of its facilities and that if there was any purported inspection, then the same was conducted without proper any notice to it. It thus urged this court to allow its present application to obviate a miscarriage of justice and prejudice to it.

5. In its Replying Affidavit that was sworn by the 2nd Respondent, the 1st Respondent confirmed that it entered into a Contract for Provision of Health Services (hereinafter referred to as 'the Contract') with the Ex parte Applicant herein dated October 31, 2018 and that the same contained a Dispute Resolution Mechanism clause. It averred that the present application was therefore premature and bad in law as the court was not seized of jurisdiction.

6. It was its contention that the only letter it received from the Ex parte Applicant was dated February 9, 2021 and the same did not conform with the requirements of Clause 10.2 of the Contract which related to the time for submission of claims and the documents accompanying the claim.

7. It was categorical that it was mandated to make payments of 'clean claims' within ninety (90) days of receipt of the same as was provided in Clause 10.8 of the Contract. It pointed out that the Ex parte Applicant's claims did not meet the threshold of being paid as it did not attach the discharge summary, the Care Plan, Medial Reports, Invoice and Referral documents as was required under the Contract. It therefore urged this court to strike out the present application with costs to it.

8. In his Replying Affidavit that was sworn on August 19, 2021 and filed on August 24, 2021, the 2nd Respondent submitted that the 1st Respondent was a body corporate and was capable of being sued in its own name and that having been its employee, he could not be sued in his individual capacity for acts arising from his ordinary nature of work as an employee or be held responsible for such transactions. He therefore asked this court to dismiss the present application.

9. In the Further Affidavit of Dr O Olima that was sworn and filed on November 2, 2021, the Ex Parte Applicant averred that the Respondent (sic) was trying to avoid its statutory obligation and seeking to benefit from its own wrong doing by purporting that the application was premature because the Contract provided for ADR mechanisms. It averred that the Respondents failed to make the requisite application to transfer the matter to ADR and hence they had subjected themselves to the jurisdiction of this court.

10. It was its contention that the Respondents had not produced any evidence to show that they ever responded to its claims or given it reasons why they would not settle its claim. It added that the 2nd Respondent did not deny that he told him through telephone that the reason why the claims were not being paid was because it needed to receive some 'small discipline'. It averred that such words and conduct ought to attach personally to the 2nd Respondent who carelessly, willfully and blatantly refused to execute the statutory duty that was imposed on him and that such actions and conducted imputed to the 1st Respondent and was subject to judicial review.

11. It further stated that on August 12, 2021, the 1st Respondent deactivated its system/account and it was unable to either admit or discharge patients. It asserted that the mention of ADR was not in good faith, that the same was denying Kenyans their right to medical care as provided in the *Constitution* and that the same was intended to delay payment of its claim in the sum of Kshs 238,000/=.

12. Its Written Submissions and List of Authorities erroneously titled 'Employer/Respondent's List of Authorities' were dated October 28, 2021 and filed on November 2, 2021. Its Supplementary Written Submissions were dated January 31, 2021 and filed on February 1, 2022. The 1st and 2nd Respondents' respective Written Submissions and Bundle of Documents were both dated November 20, 2021 and filed on November 24, 2021.

13. The Ruling herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal analysis

14. Having looked at the respective parties' affidavit evidence and Written Submissions, it appeared to this court that the issues that had been placed before it for determination were:-

    a. Whether this court had jurisdiction to hear and determine this matter;

    b. Whether the 2nd Respondent could be sued in his capacity for acts arising out of his ordinary nature of work as the 1st Respondent's employee; and

    c. Whether or not the Ex parte Applicant had demonstrated that it was entitled to orders of certiorari, mandamus and prohibition.

15. This court therefore dealt with the said issues under the following distinct and separate heads.

I. Jurisdiction of the court

16. The 2nd Respondent did not address himself to this issue. The Ex parte Applicant argued that ADR was not possible because the Respondents chose not to communicate with them and hence they created an environment in which no deliberations could take place.

17. It placed reliance on the case of *Mt Kenya University vs Step Up Holding (K) Limited [2018] eKLR* where the court cited with approval the decision of *Adrec Limited vs Nation Media Group Limited [2017] eKLR* in which it was held that a party who wished to take advantage of an arbitral clause should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration.

18. It added that where there was an irregular decision, the same ought to be quashed at once by the Judicial Review Court and ought not to await internal dispute resolution mechanism as was held in the case of *John Kipkoech Rotich & 29 Others vs Drinks Regulation [2019] eKLR*.

19. On the other hand, the 1st Respondent submitted that Section 10 of the *Arbitration Act* states that courts shall not intervene in matters governed by the said Act unless governed by the said Act.

20. It relied on the case of *Wrigley Company (East Africa) vs Attorney General & 3 Others [2013] eKLR* and *National Bank of Kenya Ltd vs Pipeplastic Sakolit (K) Ltd and Another [2001] eKLR* where the common thread was that courts cannot re-write contracts between parties.

21. It also placed reliance on the said case of Wrigley Company (East Africa) vs Attorney General & 3 Others (Supra), *Kenya Airports Parking Services Limited & Another vs Municipal Council of Mombasa [2010] eKLR*, *Magnate Ventures Limited vs Kenya Railways Golf Club & Another [2019]eKLR* amongst other cases where the holdings were that where there was a dispute resolution mechanism outside the courts, then the same had to be exhausted before the jurisdiction of the court could be invoked.

22. Section 10 of the *Arbitration Act* No 4 of 1995 stipulates as follows:-

> ' Except as provided in this Act, no court shall intervene in matters governed by this Act.'

23. It therefore follows that the court cannot intervene in a matter where there is an arbitration agreement between the parties. Having said so, the court will only enforce the doctrine of exhaustion if a party applies to stay the proceedings in the court under Section 6(1) of the *Arbitration Act* so that the dispute between the parties can be referred to arbitration for hearing and determination.

24. Notably, Section 6(1) (a) and (b) of the *Arbitration Act* states that:-

> ' A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought (emphasis court), stay the proceedings and refer the parties to arbitration unless it finds—
>
> a. That the arbitration agreement is null and void, inoperative or incapable of being performed; or
>
> b. That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.'

25. When the Ex parte Applicant filed the present application, the Respondents ought to have filed an application under Section 6(1) of the *Arbitration Act* seeking to stay the proceedings herein so that the dispute between them and the Ex parte Applicant could be resolved in line with the Clause 35 of the Contract that states that:-

> ' Parties shall use their best efforts to amicably settle any dispute, controversy or claim arising out of or in connection with this agreement by either having good faith negotiation, mediation and arbitration.'

26. Having failed to filed the said application to stay the proceedings, the court therefore became seized of this matter and now proceeds to deal with the other issues. Indeed, filing of the Replying Affidavits in response to the Applicant's present application amounted to an acknowledgment of the proceedings that were lodged in this matter.

II. Party to be sued

27. Both the Ex parte Applicant and the 1st Respondent did not address themselves to this issue. On the other hand, the 2nd Respondent submitted that the 1st Respondent was a body corporate operating as a separate legal entity from its members as was held in the case of *Salomon vs Salomon & Co Ltd (1897) AC 22HL*, *Victor Mabachi & Another vs Nurtun Bates Limited [2013] eKLR* amongst other cases where the common thread was that lifting of the corporate veil would be necessitated if there was evidence of fraud and/or improper conduct.

28. According to Section 2 of the Fair Administrative Act No 4 of 2015 'administrative action' includes the powers, functions and duties exercised by authorities or quasi-judicial tribunals (emphasis court).'

29. Further, Section 3 of the Fair Administrative Action provides that:-

    This Act applies to all state and non-state agencies, including any person (emphasis court)–

    a. Exercising administrative authority;

    b. Performing a judicial or quasi-judicial function under the *Constitution* or any written law; or

    c. Whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.

30. The decision must have been made pursuant to powers, functions and duties exercised by authorities or quasi-judicial tribunals. As orders of certiorari, mandamus or prohibition could be issued against state and non-state agencies, including any person, this court was persuaded to find and hold that the 2nd Respondent could be sued in his own capacity as a person. This court associated itself with the holding in the case of *Republic vs Cabinet Secretary Ministry of Education & Another Ex parte Thadayo Obanda [2018] eKLR* where it was held that there was nothing that barred from holding an officer of a government individually liable where the conduct of such officer was unjust and oppressive.

31. The question of whether or not his decision was arbitrary was a different matter altogether and has been dealt with hereinbelow.

III. Proof of the ex parte applicant's case

32. The Ex parte Applicant urged this court to quash the unwritten decision as was held in the case of John Kipkoech Rotich & 29 Others vs Drinks Regulation (Supra). It also referred this court to the cases of *Kenya National Examination Council vs Republic Ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR* where the court addressed itself to the issuance of orders of mandamus and prohibition where a person or body of persons had failed to perform the duty to the detriment of a party who had a legal right to expect the duty to be performed.

33. On its part, the 1st Respondent was emphatic that the Ex parte Applicant's claims were not clean and thus not payable. It referred this court to the Clause 2.7 of the Contract which gave it authority to inspect and review the Health facility quality standards and that following a Claims Committee, a task force comprising of three (3) people observed that the invoices were overstated, that the mobile numbers therein were not going through and that the telephone number that was recorded belonged to the Ex parte Applicant's Director.

34. It relied on the case of *Alfred S Mdeizi t/a Memicare Nursing & Maternity Home vs National Hospital Insurance Fund (NHIF) [2016] eKLR* wherein the plaintiff's claim was dismissed for failure to prove its case on a balance of probabilities.

35. Section 4(1) and 4(2) of the *Fair Administrative Action Act* 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.

36. In addition, Section 4 (3) and (4) of the *Fair Administrative Action Act* lays down the procedure to be adopted by decision makers as follows:-

3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

a. Prior and adequate notice of the nature and reasons for the proposed administrative action;

b. An opportunity to be heard and to make representations in that regard;

c. Notice of a right to a review or internal appeal against an administrative decision, where applicable;

d. A statement of reasons pursuant to section 6;

e. Notice of the right to legal representation, where applicable;

f. Notice of the right to cross-examine or where applicable; or

g. Information, materials and evidence to be relied upon in making the decision or taking the administrative action.

4. The administrator shall accord the person against whom administrative action is taken an opportunity to-

a. Attend proceedings, in person or in the company of an expert of his choice;

b. Be heard;

c. Cross-examine persons who give adverse evidence against him; and

d. Request for an adjournment of the proceedings, where necessary to ensure a fair hearing.'

37. Going further, Article 47 of the *Constitution* of Kenya stipulates that:-

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.

38. The parameters of Judicial Review were set out in the case of *Republic vs Kenya Revenue Authority Ex Parte Yaya Towers Limited [2008] eKLR* where it was held that Judicial Review is concerned with the decision-making process and not with the merits of the decision.

39. The importance of fair hearing was emphasised by the Court of Appeal in the case of *David Oloo Onyango vs Attorney General [1987] eKLR* when it observed as follows:

> ' There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore that in applying the material sub-section the Commissioner is required to act fairly and so to apply the principle of natural justice.'

40. This court noted that the accusations and counter-accusations between the parties herein were not of the nature to be resolved by way of affidavit evidence. Rather, the dispute was best suited to be determined based on evidence that would be subjected to strict proof.

41. This court also took the view that it was not possible to grant an order of certiorari as it was not clear when the decision the 2nd Respondent was said to have been issued. The importance of the date of the decision cannot be gainsaid.

42. Indeed, Order 53 Rule 2 of the *Civil Procedure Rules, 2010* states that:-

Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding (emphasis court) or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

43. In the absence of proof of the date when the 2nd Respondent's decision was made, this court found and held that the Ex parte Applicant did not demonstrate that he had met the threshold envisaged in the Fair Administration Act necessitating the granting of the orders of certiorari, mandamus and prohibition.

Disposition

44. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated June 22, 2021 and filed on June 23, 2021 was not merited and the same be and is hereby dismissed. In view of the fact that the 1st Respondent is a government institution and the 2nd Respondent is its employee, it would be punitive to award costs against a citizen. Consequently, each party will bear its own costs of this application.

45. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF SEPTEMBER 2022

J. KAMAU

JUDGE