



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 16 OF 2019**

**IN THE MATTER OF ARTICLE 23 (3)(f) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT**

**AND**

**IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**NATIONAL HOSPITAL INSURANCE**

**FUND MANAGEMENT BOARD.....RESPONDENT**

**EX-PARTE APPLICANT: PATANISHO MATERNITY AND NURSING HOME**

**RULING**

**The Application**

1. The Applicant, Patanasho Maternity and Nursing Home is a company registered in Kenya that has been providing health care services. In 2008, the Applicant entered into a contract with the National Hospital Insurance Fund Management Board, which is the Respondent herein and is a statutory body, for the provision of comprehensive medical care and treatment to civil servants and disciplined forces. The Applicant has now brought proceedings against the Respondent with respect to its suspension of the Applicant from offering services to the Respondent's members, which was contained in a letter dated 9<sup>th</sup> January 2019.

2. The Applicant consequently filed a Chamber Summons application dated 21<sup>st</sup> January 2019, and sought the following orders therein:

**1. That leave be granted for the applicant to apply for the following judicial review orders;**

**a) An order of Certiorari to remove into this Honourable Court and quash the decisions of the Respondent contained in the letters dated 9<sup>th</sup> January 2019**

**b) An order of prohibition prohibiting the Respondent from relying on and or effecting the decision contained in the letters dated 9<sup>th</sup> January 2019**

**2. That the leave granted does operate as a stay of the decision of the Respondent contained in the letters of 9<sup>th</sup> January 2019**

### 3. That cost of the application be borne by the Respondent contained in the letters of 9<sup>th</sup> January 2019

3. The application was supported by the grounds on its face, and by the verifying affidavit sworn on the 21<sup>st</sup> January 2019 by Donald Opiyo Obare, a director of the Applicant. The said statement and verifying affidavit detailed the proceedings leading to the said decisions, and the grounds for the orders sought.

4. In summary the grounds for the application are that the Respondent acted *ultra vires* its statutory mandate in purporting to regulate and penalize the Applicant; that the Respondent through its officers visited the Applicant's hospital on 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 29<sup>th</sup>, 30<sup>th</sup> and 31<sup>st</sup> October 2018 and again on 5<sup>th</sup>, 7<sup>th</sup> and 19<sup>th</sup> November 2018, which visits were disguised as routine and neither did the Respondent indicate their purpose and intent; that the Applicant was not informed of any pending inquiry or audit in order to provide the necessary and relevant documentation where necessary and it's only after the said visits that the Respondent informed the Applicant that what they had undertaken was an audit, and that the Applicant's attempt to be given a hearing opportunity to rebut the wanton allegations went unanswered.

5. The Applicant averred that the Respondent purported to give a fourteen days' notice within which it was to do a reconciliation of all pending claims and forward them to the Respondent's Buru Buru branch, and to discharge all patients at the Applicant's facility that are under the Respondent's cover. It was further averred that the Respondents conduct will not only cause untold financial losses to the Applicant, but also expose the patients admitted and those who receive health services at the Applicant's facility to harm, as they will be left destitute, hopeless and without any alternative access to healthcare, contrary to the dictates of Article 42 of the Constitutions as well as the Governments big four agenda policy.

6. The Respondent filed grounds of opposition against the application dated 21st January 2019 as follows:

**a) The Application is an abuse of the Court's process**

**b) This Honourable court does not have jurisdiction to stay the Respondent's decision contained in the letter dated 9<sup>th</sup> January 2019 as it does not form the subject of judicial Review proceedings owing to the fact that it arises from a contractual dispute and does not fall within the provisions of article 47 of the Constitution and the fair administrative Act.**

**c) Prayer No. 3 of the Application seeking for stay of the decision of the Respondent Contained in the letter dated 9<sup>th</sup> January 2019 is incapable of being effected since the decision to terminate the contract has already been executed and therefore cannot be overturned**

**d) If prayer No 3 of the Applicant's Application is granted, the same shall cause the Respondents great loss as the Applicant will unfairly and unjustly bill them for services rendered when the contract was already terminated, which sums continue to accrue on a daily basis. In addition, the Respondent's will be held accountable for misappropriation of funds contrary to the public Finance Management act 2012**

**e) The Applicants application dated 21<sup>st</sup> January 2019 therefore lacks merit and should be dismissed with costs to the Respondent.**

7. This Court at a hearing held on 24<sup>th</sup> January 2019 granted the Applicant leave to apply for the orders sought of certiorari and prohibition, and directed that the substantive Notice of Motion be filed and served within 14 days. The Court further directed that the question whether the said leave shall operate as a stay was to be determined after an *inter partes* hearing, and parties were directed to file written submissions on the issue. The *inter partes* hearing on the prayer that leave operates as a stay of the Respondent's decision was subsequently held on 31<sup>st</sup> January 2019, by way of oral submissions.

8. On the issue of whether the leave granted to the Applicant should act as stay of the Respondents decision contained in the letter Dated 9<sup>th</sup> January 2019, Mr. Muniya, the Applicant's counsel, submitted that that it was in the discretion of the court and relied on the provisions of order 53 Rule 1(4) of the Civil Procedure Rules. Further, that the purpose of judicial review is to preserve the *status quo* and ensure that the judicial review proceedings are not rendered nugatory, and relied on the decisions in **Munir Sheik Ahmed vs Capital Markets Authority, (2018) eKLR** for this proposition.

9. Therefore, that if the stay is not granted, the current proceedings shall be rendered nugatory as the decision of 9<sup>th</sup> January 2019 will be fully implemented, and shall have profound effect on third parties who don't have any alternative modes of accessing healthcare services. Further, that the decision merely suspended its contract, and is thus capable of being stayed.

10. Ms Mutua for the Respondent on the other hand submitted that the decision to terminate the contract as contained in the letter dated 9 January 2019 has been implemented, which is the current *status quo* that ought to be maintained. On the prejudice that will be suffered, the Respondent submitted that it is a public body responsible for the management of the National Hospital Insurance Fund and obligated to adhere to the provisions of the Public Finance Management Act, and that it conducted the audit as part of its mandate to protect public funds .

11. It was her submission that should the court grant stay to the Applicant, the Respondent will suffer prejudice as it will be held accountable to the National Government for the misappropriation of funds and liable for any loss thereof. Ms Mutua submitted in this respect that the Public Finance Management Act provides in section 96 that if a national government entity is in breach of its financial obligations, its funds may be immediately stopped, and further that under section 74 a public officer found to be in breach shall be subject to disciplinary measures. Therefore, that these are serious repercussions that the Respondent may face once it is established that the contract is still in force despite having the knowledge of an incriminating report against the Applicant.

12. Lastly, it was the Respondent's submission that the Applicant is alleged to have committed serious offences, and if stay is granted the Applicant will continue to claim reimbursement for services rendered under the scheme and will put the Respondent under scrutiny.

### **The Determination**

13. The applicable law on whether the leave so granted should operate as a stay is Order 53 Rule 1(4) of the Civil Procedure Rules, which provides as follows:

**“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”**

The decision whether or not to grant a stay pursuant to leave is thus an exercise of judicial discretion, and that discretion must be exercised judiciously.

14. In **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision and in various decisions by Kenyan Courts.

15. The main factor is whether or not the decision or action sought to be stayed has been fully implemented. It was thus held in **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995** that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded. Similarly, Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** expressed himself on this factor as follows:

**“As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction... In judicial review applications the Court should always ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act... A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted.”**

16. This factor was also discussed in **R (H). vs Ashworth Special Hospital Authority (supra)** where Dyson L.J. held as follows:

**“As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made. If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and any decision taken will cease to have effect: it is suspended for the time being.**

**I now turn to the third situation, which occurs where the decision has not only been made, but it has been carried out in full. At first sight, it seems nonsensical to speak of making an order that such a decision should be suspended. How can one say of a decision that has been fully implemented that it should cease to have effect? Once the decision has been implemented, it is a past event, and it is impossible to suspend a piece of history. At first sight, this argument seems irresistible, but I think it is wrong. It overlooks the fact that a successful judicial review challenge does in a very real sense rewrite history. ..It is, therefore, difficult to see why the court should not in principle have jurisdiction to say that the order shall temporarily cease to have effect, with the same result for the time being as will be the permanent outcome if it is ultimately held to be unlawful and is quashed. I would hold that the court has jurisdiction to stay the decision of a tribunal which is subject to a judicial review challenge, even where the decision has been fully implemented ... . But the jurisdiction should be exercised sparingly, and where it is exercised, the court should decide the judicial review application, if at all possible, within days of the order of stay”**

17. A similar position has been taken by Odunga J. in **Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (2014) e KLR** and in **James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR**, where the learned judge held that it is only where the decision in question is complete that the Court cannot stay the same. However where what ought to be stayed is a continuing process, the same may be stayed at any stage of the proceedings.

18. From the above decisions, it follows that where the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature then it is still possible to suspend the implementation. However, once implementation is complete then such discretion to stay should be exercised sparingly, and even then when the Court is sure that the judicial review application can be disposed of in the shortest of time possible.

19. In the present application the decision made by the Respondent in its letter dated 9<sup>th</sup> January 2019 was as follows:

**Re: Termination Of All Contracted Services**

**The NHIF Board of Management has resolved to suspend your facility from offering all services to the NHIF Members and their dependants with immediate effect in line with the provision of NHIF ACT 9 of 1998 Section 25 (clause 4).**

**This has been occasioned by the fraudulent undertaking that have been brought to the attention of the management. These are:**

- **Fictitious and unwarranted admissions coupled with lack of patient's medical records and other support documents.**
- **Extended bed days for in patients solely to attract more benefits from the fund.**
- **Conspiracy to defraud NHIF in contrary to Section 317 of the Penal Code.**
- **Attempting to obtain money by false pretence contrary to Section 313 as read with Section 389 of the Penal Code.**

**You are therefore required to do reconciliation of all pending claims and forward them to the Manager Buruburu Branch Office within 14 days for consideration and ensure that all NHIF patients are discharged within next 14 days. Note that, you are required to disclose the termination of the contracted services to all your actual and potential patients prior to rendering any medical services.**

**Thank You “**

20. The decision was clearly referenced termination of contracted services, and the suspension was of the Applicant's facility from offering services and not of the contract. It was indicated as being of immediate effect and on which no further positive steps were needed to be taken by the Respondent in its implementation. It is therefore fully implemented, and is not of a continuing nature as no further acts need to be taken by any of the parties as regards the implementation of the sanction, save for these proceedings.

21. In addition, even if this Court has jurisdiction and the discretion to suspend the Respondent's decision, a number of factors militate against the exercise of that discretion. Firstly, as noted above, this discretion should be exercised sparingly where a decision has been fully implemented. Secondly, there is a public interest element involved, as there is an allegation of misappropriation of public funds on the part of the Applicant.

22. To allow the Applicant to continue providing services and incurring further costs before the legality of the Respondent's actions is determined is in my view not desirable, especially in light of the prejudice that may be suffered by the public in the prudent management of public funds, and maintenance of the rule of law and good governance. In addition, the Applicant's patients are not parties in this application and have not brought any averments as to the prejudice they are likely to suffer if a stay is not granted. In any event, it is also in the public interest to protect members of the public from any financial uncertainty arising from the Respondent's decision, pending the determination of this application.

23. The public interest as an overriding factor when determining whether or not to grant stay orders was explained by Majanja J. in **R vs Capital Markets Authority ex parte Joseph Mumo Kivai & Another (2012) e KLR**, where the learned judge held that judicial review proceedings are public law proceedings for vindication of private rights, and for this reason public interest is a relevant consideration in the granting of stay orders.

24. The public interest element in the grant of a stay was also the subject of the decision in **R (H). vs Ashworth Special Hospital Authority (supra)**, where Dyson L.J held that where there is a public interest element involved, the Court strike a balance between the rights of an individual and the public interest, and in striking that balance, the court should usually refuse to grant a stay unless satisfied that there is a strong, and not merely an arguable, case that a tribunal's decision was unlawful.

25. Lastly, the public interest as a relevant factor was also considered by Nyamu J. (as he then was) in **Re Bivac International SA (Bureau Veritas) (2005) 2 EA 42**, wherein the learned Judge cited the decision in **R VS Monopolies and Mergers Commission ex parte Argyll Group PLC (1986) 1 WLR 763** that the Court can refuse to order that leave granted for orders of judicial review does operate as a stay where such a stay would violate the needs of good administration. There is thus need to preserve the current *status quo* until the legality of the Respondent's proceedings and decision is established.

26. In the premises, the prayer for stay in the Applicant's Chamber Summons dated 21<sup>st</sup> January 2019 is declined. The costs of the said Chamber Summons shall be in the cause.

27. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 27<sup>TH</sup> DAY OF FEBRUARY 2019**

**P. NYAMWEYA**

**JUDGE**