



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL DIVISION**  
**HIGH COURT CIVIL CASE NO.172 OF 2017**

**MT SINANI HOSPITAL LIMITED.....APPLICANT**

**VERSUS**

**NATIONAL HOSPITAL INSURANCE FUND (NHIF) .....RESPONDENT**

**RULING**

1. The application dated 5<sup>th</sup> September, 2017 seeks order that, the Applicant/Plaintiff be granted leave to file and serve a further affidavit in response to the Respondent/Defendant's replying affidavit dated and filed in court on 4<sup>th</sup> September, 2017 alongside written submissions within 7 days from the date of being granted the orders as prayed.
2. It is stated in the affidavit in supports sworn by the Applicant's counsel that the grounds of opposition and the replying affidavit were served on the hearing date on 5<sup>th</sup> September, 2017. That upon perusing the replying affidavit and obtaining instructions from the client, it has become necessary to file a further affidavit to rebut the averments made in the replying affidavit.
3. The application is opposed. It is deposed in the replying affidavit that the application is a delaying tactic and an afterthought. That the Applicant's counsel was given a chance in court to respond to the replying affidavit and the grounds of opposition but failed to do so and opted to proceed with the application and is now estopped from changing that position.
4. The Applicant filed a further affidavit in response to the aforesaid replying affidavit. Delay is denied and the chronology of events herein given. The court was urged to give the applicant the opportunity to file the affidavit in question and present it's case exhaustively to the court. It was further stated that some paragraphs of the replying affidavit herein ought to be struck out on the basis of being sworn by a person without the personal knowledge of the same and that other paragraphs be struck out for being irrelevant. It is further stated that the doctrine of estoppel is not applicable and that the Respondent has not demonstrated what prejudice it will suffer if the application is allowed.
5. I have considered their application, the reply to the same and the submissions made by the respective counsels for the parties.
6. The filing of supplementary/further affidavit is provided for under Order 51 rule 14(3) Civil Procedure Rules which provides for the filing of the same with the leave of the court.

7. A perusal of the court record reflects that when the application came up for hearing on 5<sup>th</sup> September, 2017 both parties referred to the filing and serving of grounds of opposition. There is no mention of the replying affidavit in the proceedings of the said date. Although the Applicant has indicated readiness to proceed with the hearing of the application dated 7<sup>th</sup> August, 2017, it is noted that they now want to respond to the contents of the replying affidavit. The record clearly shows that the said replying affidavit was served on the hearing date. The Applicant's counsel was not therefore accorded the opportunity to digest the contents therein and obtain the clients instructions. There is no prejudice shown that will be occasioned to the Respondent.

8. The Supreme Court of Kenya in its exposition in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others 2014 eKLR** while quoting the case of **Serah Njeri Mwobi v John Kimani Njoroge CA 314 of 2009** stated as follows:

**“The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.”**

The Supreme Court of Kenya further expressed itself thus:

**“Estoppel by record relates to a judgment delivered by a court determining the rights and issues between parties. Withdrawal of an application by a party does not constitute estoppels by record since no court of competent jurisdiction has determined the rights or the issue between the rights or the issue between the parties. It is our considered view that in the instant case, no estoppel arose by the withdrawal of the application for security for costs by the applicant in the lower court. This is in view of the fact that no representation was made expressly or impliedly that the applicant would not pursue enhancement of security for costs.”**

9. The doctrine of Estoppel is not applicable to the circumstances of this case. Consequently, I exercise discretion and allow the filing of the further affidavit. Costs in cause.

Dated, signed and delivered at Nairobi this 31<sup>st</sup> day of Jan., 2018

**B. THURANIRA JADEN**

**JUDGE**