REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

JUDICIAL REVIEW AND CONSTITUTIONAL DIVISION

JUDICIAL REVIEW APPLICATION NO. 459 OF 2017

IN THE MATTER OF AN APPLICATION BY MARIAKANI COTTAGE HOSPITAL FOR JUDICIAL REVIEW ORDER OF

MANDAMUS AGAINST INSURANCE REGULATORY AUTHORITY

AND

IN THE MATTER OF INSURANCE ACT, CAP 487 LAWS OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 27, 46 AND 47

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS, ACT NO. 4 OF 2015

IN THE MATTER OF FAILURE/ AND OR INORDINATE DELAY OF THE INSURANCE REGULATORY AUTHORITY TO ACT ON A COMPLAINT LODGED BEFORE THE AUTHORITY.

BETWEEN

MARIAKANI COTTAGE HOSPITAL LIMITED....................APPLICANT

AND

INSURANCE REGULATORY AUTHORITY.......................RESPONDENT

AND

XPLICO INSURANCE COMPANY LIMITED.........INTERESTED PARTY

JUDGEMENT

Introduction

1. By a Notice of Motion dated 2nd August, 2017, the *ex parte* applicants herein, **Mariakani Cottage Hospital Limited**, wrongly described as the applicant, seeks the following orders:

> **1. THAT an order of Mandamus do issue compelling the Respondent, Insurance Regulatory Authority to convene an adjudication forum to hear and determine complaint lodged before it on 24th January, 2017 by the Ex parte Applicant, Mariakani Cottage Hospital against the Interested Party, Xplico Insurance Company Limited.**
>
> **2. THAT an order of Mandamus do issue compelling the Respondent, Insurance Regulatory Authority to direct the Interested Party, Xplico Insurance Company Limited to replace bouncing cheques amounting to Kshs. 1, 954, 574/- it issued to the Exparte applicant, Mariakani Cottage Hospital.**

3. THAT the cost of this application be awarded to the Applicant.

Applicants' Case

2. According to the applicant, on diverse dates in the year 2016, the Interested party sought for and on behalf of its insured clients and was supplied with medical treatment services by the *ex parte* Applicant vide service provision contract and which services the interested party was required to make prompt payment for.

3. The ex parte applicant averred that in fulfilment of the service provision contract and in payment for service so offered, the interested party issued cheques numbers [Particulars withheld] all which were dishonoured on diverse dates upon presentation to the Ex parte applicant's bank for banking. Accordingly, the *ex parte* Applicant instructed its lawyers to demand for the outstanding debt and for all cheques dishonoured on 5th December, 2016 and 10th December, 2017 issued by the interested party to be replaced and that the interested party responded by undertaking to replace all the said dishonoured cheques through a payment plan communicated vide email conversation.

4. However, in breach of the payment plan proposed thereof, the interested party issued cheques numbers [Particulars withheld] to the Ex parte applicant both dated 28th December, 2016 and 5th January, 2017 respectively in replacement of the dishonoured cheques all which were also dishonoured when presented for banking.

5. It was disclosed that the *ex parte* Applicant then lodged a complaint on 24th January, 2017 with the Respondent with regards to the dishonoured cheques issued by the interested party, **Xplico Insurance Limited,** which complaint the Respondent has refused and/or inordinately delayed to act upon nearly six months after it was lodged despite several reminders by the applicant contrary to the procedural framework laid down by the Authority with regards to the period within which it is required to hear and determine such complaints which delay and/ or refusal is illegal and unreasonable in the circumstance.

6. In the ex parte applicant's view, section 3 of the ***Insurance Act***, the intention of the supervisory object of the Respondent upon insurers and reinsurers are *inter alia* to promote maintenance of fair, safe and stable insurance sector, and to protect the interest of the insurance policy holders and beneficiaries which object the Respondent has failed to realize in the instant case.

7. The ex parte applicant contended that the Respondent's refusal and/ or inordinate delay to act on the complaint is unconstitutional, unlawful, arbitrary, malicious, capricious, unreasonable, discriminatory, actuated by bad faith, based on extraneous considerations, against the applicant's lawful, legitimate and rightful expectations and taken in breach of the natural rules of justice.

8. The ex parte applicant was apprehensive that the Interested Party was likely to file an insolvency suit which would render this review nugatory. It was therefore the ex parte applicant's case that it is in the interest of justice and expeditious dealing that this matter is heard instantly and determined expeditiously.

The Interested Party's Case

9. On its part the Interested Party in opposing the application averred that the ex parte applicant and the interested party had and still has contractual relationship pursuant to Service Provision Contract duly executed between the parties on 19th March, 2015.

10. It was the Interested Party's case that the ex parte applicant's reliefs against the Respondent are incapable of being implemented because the applicant's claim is founded on a contractual relationship between the two parties hence the Respondent cannot validly convene an adjudication forum as this was not provided as one of the dispute resolution mechanisms under the contract. It was therefore averred that the Respondent cannot validly direct the interested party to fulfil a contractual obligation. Further the Respondent has no powers to act or give direction on criminal acts of its subjects hence the complaint founded on such a ground is incapable of any valid action by the Respondent.

11. It was averred that the ex parte applicant by this application was inviting the Court to exercise jurisdiction over private rights of parties and in so doing, hear evidence on the merits which is not within the jurisdiction of this Court. Further the decision would force the Respondent to act outside the scope of its mandate as set out under the law.

12. The Interested Party's view was that the ex parte applicant should, if indeed aggrieved by the actions of the interested party, have lawfully exercised its options and remedies within the civil or criminal jurisdictions.

13. Therefore the interested party prayed that the application be dismissed with costs.

Determinations

14. The application was not opposed by the Respondent.

15. Having considered the application, the affidavit in support of and in opposition to the Motion, this is the view I form of the matter.

16. The parameters of judicial review orders of *mandamus* were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

> **"The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein**

specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done..."

17. It is not in doubt that the Respondent in exercising the powers conferred upon it under section 3A(2) of the ***Insurance Act,*** Cap 487 Laws of Kenya is exercising discretionary powers. In such circumstances the Court is only entitled to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323.**

18. However when it comes to orders of *mandamus*, on the authority of **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra) where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.

19. In this application, the *ex parte* applicant relied on section 3A(2) of the ***Insurance Act,*** Cap 487 Laws of Kenya which provides that:

For better clarity, the objects of the supervision of insurers and reinsurers by the Authority under this Act shall be—

(a) to promote the maintenance of a fair, safe and stable insurance sector;

(b) to protect the interest of the insurance policyholders and beneficiaries; and

(c) generally to promote the development of the insurance sector

20. In particular the ex parte applicant contends that pursuant to its mandate to protect the interest of the insurance policy holders and beneficiaries, the Respondent is under obligation to consider its complaint against the interested party herein. In **Anismnic Ltd -vs- Foreign Compensation Commission [1969] 2 AC 147** **Lord Reid** at pages 213-214 *inter alia* rendered the Courts decision as follows;

"... It cannot be for the commission to determine the limits of their powers. Of course if one party submits to a tribunal that its powers are wider than in fact they are, then the tribunal must deal with that submission. But if they reach a wrong conclusion as to the width of their powers, the court must be able to correct that- not because the tribunal has made an error of law but because as a result of making an error of law they have dealt with and based their decision on a matter with which, on a true construction of their powers, they had no rights to deal. If they base their decision on some matter which is not prescribed for their adjudication, they are doing something which they have no right to and, if the view which is expressed earlier is right, their decision is a nullity. It cannot be for the commission to determine the limits of its powers. Of course if a party submits to a tribunal that its powers are wider than in fact they are, the tribunal must deal with that submission."

21. According to page 288 of the 7th Edition of ***Administrative Law*** by **Sir William Wade** and **Christopher Forsyth**:

"Where a jurisdictional issue is disputed before a tribunal, the tribunal must necessarily decide it. If it refuses to do so, it is wrongfully declining jurisdiction and the court will order it to act properly. Otherwise the tribunal or other authority would be able to wield an absolutely despotic power, which the legislature never intended that it should exercise. It follows that the question is within the tribunal's own jurisdiction, but with this difference, that the tribunal's decision about it cannot be conclusive."

22. Similarly, in **Bunbury vs. Fuller** to the effect that;-

"If a certain state of facts has to exist before an inferior tribunal have jurisdiction, they can enquire into the facts in order to decide whether or not they have jurisdiction, but cannot give themselves jurisdiction by a wrong decision upon them; this court may, by means of proceedings for certiorari, inquire into the correctness of the decision. The decision has to these facts is regarded as collateral because, though the existence of jurisdiction depends on it, it is not the main question which the tribunal have to decide."

23. In my view where a complaint is lodged with the Respondent, it has an obligation to consider whether it has jurisdiction or not and in so

doing it ought to hear the parties on the issue. However to just ignore the complaint on the ground that it has no jurisdiction amounts to failure to perform its statutory obligation. A decision as to whether or not it has jurisdiction in a complaint lodged before it is one of the functions of the Respondent. Where however an objection is properly raised before the Court or judicial Tribunal and the objector is ready to prosecute the same, the Court or Tribunal ought to hear and determine the same whether as a preliminary issue or within the main cause itself. What is objectionable is the complete refusal to entertain an objection which has been placed before the Court or Tribunal *bona fide*. This was the position adopted by **Madan, J** (as he then was) in **Official Receiver vs. Sukhdev Nairobi HCCC No. 423 of 1966 [1970] EA 243** where he expressed himself as follows:

> **"In a court of justice parties are entitled to be heard and to insist upon every possible objection. It would be wrong for this or any other court to refuse to hear an objection even if it appears meritless and tedious. Woe be to the day when this will be allowed to happen. It would be honourable to abdicate from the seat of justice than to allow such a performance of denial to take place. The court may disallow an objection, reject a motion or refuse a plea but it must never refuse to hear it. A court of law is for the preservation not usurpation of rights of the parties."**

24. However this Court cannot compel the Respondent to direct the interested party herein to replace the bouncing cheques issued to the applicant as to do so would amount to compelling the Respondent to make a specific decision. In other words the Court can only compel the Respondent to consider the complaint and make a decision thereon one way or the other but not in a particular manner.

25. However the Respondent is obliged under Article 47(2) of the Constitution to furnish the applicant with written reasons after considering the complaint where the decision is likely to adversely affect the applicants. The said Article provides 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.***
>
> ***(3) Parliament shall enact legislation to give effect to the rights n clause (1) and that legislation shall—***
>
> > ***(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and***
> >
> > ***(b) promote efficient administration.***

26. Pursuant to the said Article, Parliament enacted the ***Fair Administrative Action Act, 2015*** and section 4 thereof provides:

> ***(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) Every person has the right to be given written reasons for any administrative action that is taken against him.***
>
> ***(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.***
>
> ***(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal***

representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

27. The thread that runs across both the Constitutional decree and the statutory mandate is that the reasons for the adverse decision must be in writing. In this case, it is clear that the constitutional obligation placed on the Respondent to expeditiously afford the applicant a hearing was not complied with by the Respondent.

28. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** and held:

> **"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."**

29. Under section 5 of the ***Fair Administrative Action Act***, some of the grounds for seeking and granting judicial review orders are that there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law.

30. However, according to ***Judicial Review Handbook***, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.

31. Under the current Constitution, this Court is empowered to invoke its judicial review jurisdiction in the proceedings of this nature in order to grant appropriate orders including the orders sought herein. In other words judicial review jurisdiction has now been fused with the remedies under the Constitution and this is clearly discernible from the remedies crafted under section 11 of the ***Fair Administrative Action, Act***.

32. Like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review has been said to stem from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of ***Donoghue vs. Stephenson*** in the last century. See **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK).**

33. Therefore the failure to adhere to the letter and spirit of the Constitution constitute a ground for the grant of orders of judicial review. In this case there is no evidence that the provisions of Article 47 of the Constitution were complied with by the Respondent.

Order

34. Accordingly the order which commends itself to me and which I hereby grant is an order of *mandamus* compelling the Respondent to consider the applicants' complaint made on 24th January, 2017 against the interested party and furnish the applicant with reasons thereof in the event that the said decision is adverse to the interests of the applicants within 30 days from the date of service of this order on the Respondent.

35. As the merits of this dispute remain unresolved and as the application was wrongly intituled in the name of the ex parte applicant rather than the Republic, there will be no order as to costs.

36. It is so ordered.

Dated at Nairobi this 16th day of February, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mumbo for the ex parte applicant

Mr Githinji for the interested party

CA Ooko