REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW CONSTITUTIONAL & HUMAN RIGHTS DIVISION

MISC. APPLICATION NO. 89 OF 2018

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR

JUDICIAL REVIEW ORDERS OF PROHIBITION

AND CERTIORARI

AND

IN THE MATTER OF: ORDER 53 RULE 1 OF THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF: SECTIONS 8 & 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF: ARTICLE 40 AND 47(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE HIV & AIDS PREVENTION AND CONTROL ACT NO. 14 OF 2006

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

IN THE MATTER OF:

RESOLUTION INSURANCE LTD.....APPLICANT

VERSUS

THE HIV & AIDS TRIBUNAL.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

E.M.A. (name withheld for legal reasons).....1ST NTERESTED PARTY

THE NAIROBI WOMENS HOSPITAL.....2ND INTERESTED PARTY

R U L I N G O N LEAVE & STAY

1. Vide a chamber summons dated 1st March, 2018 under certificate of urgency and brought pursuant to the provisions of Sections 8, 9 of the Law Reform Act Cap 26 Laws of Kenya, Order 53 Rules 1, 2, 4 of the Civil Procedure Rules, Sections 3, 4, 5, 7, 8 and 12 of the Fair Administrative Action Act; Article 47(1) of the Constitution and the HIV & AIDS PREVENTION AND CONTROL ACT, 2006 the ex-

parte applicant **Resolution Insurance Limited s**eeks from this court leave to institute Judicial Review proceedings for orders of:

a) Prohibition, prohibiting the 1st Respondent –**The HIV & AIDS Tribunal (H.A.T)** from further hearing or in any other way entertaining proceedings in the complaint before it being **H.A.T No. 007 of 2015** and making any further or other adverse orders against the applicant.

b) Certiorari to remove into this court for quashing the decision of HAT given on 12th January, 2018 entering judgment against the applicant and the 2nd interested party (**The Nairobi Women's Hospital**) on the grounds that the Tribunal lacked jurisdiction to enter judgment based on violation of Section 22 of the HIV & AIDS Prevention and Control Act;

c) Certiorari to remove into this court for purposes of quashing the claim and proceedings in HAT No. 007 of 2015 as filed before the Tribunal as the Tribunal lacks jurisdiction to entertain it under the law;

d) That such leave do operate as stay of execution of the judgment and all proceedings in H.A.T No. 007/2015 between the 1st interested party (name withheld for legal reasons) as claimant and the applicant and the 2nd interested party as Respondents therein pending the filing, hearing and determination of the substantive motion.

e) Costs be provided for

2. The application for leave is supported by statutory statement and verifying affidavit sworn by **Alice Mwai** and filed in court on 2nd March, 2018 with letter of authority from the applicant's Managing Director and Secretary.

3. The applicant's case is that in 2015, one E.M.A., the 1st interested party herein, lodged a complaint No. 007/2015 before H.A.T claiming that on 14th October, 2010 she was admitted at the Nairobi Women's Hospital for bacterial meningitis owing to the HIV sero status and was discharged on 18th October, 2010.

4. That the claimant had claimed that the applicant herein who had insured the said 1st interested party for medical on realizing her H.I.V sero – status declined to honour the hospital bill and as a result, her employer paid the bill with a condition that the money was expended as though it was a loan to be repaid back to the employer by the 1st interested party employee.

5. That the claimant 1st interested party agreed and repaid the money Kshs.49,133 within 12 months to her employer.

6. That on 25th February, 2011 the claimant signed a consent form by the applicant herein that she discloses her status to the employer. That on 7th February, 2011 the claimant was admitted at M.P. Shah Hospital for Jaundice, an ailment covered by the applicant herein and discharged on 14th October, 2011 with a bill of over 138,740 but the applicant herein again refused to settle.

7. That the claimant further alleged that when she resumed her duties at work, she was excluded and stigmatized by her employer and boss who rejected that the claimant makes his tea and she was declared redundant but another staff was hired to replace her.

8. That the claimant claimed that she was discriminated, her rights to human dignity were violated and that the applicant and her employer's actions were unlawful and gross injustices and violation of Articles 27(4) 28 of the constitution. She also claimed for general and exemplary damages.

9. It was further alleged that the claimant's employer and the applicant herein filed defences denying the claim and that the H.A.T after hearing the claim rendered a judgment on 12th January, 2018 and found the applicant liable and awarded the claimant damages of Kshs.1.5million together with costs for and Shs.1.5million for violation of her privacy and confidentiality.

10. It is that judgment which the applicant herein **Resolution Insurance Ltd** wishes to challenge before this court.

11. According to the applicant, the H.A.T had no jurisdiction to hear and determine the claim because provisions on non disclosure of information on HIV & AIDS only came into force on 1st December, 2010 yet the alleged cause of action arose between 14 – 17th October, 2010. Further, that the claim before the Tribunal was one of disclosure under Section 22 and for discrimination for failure to pay accrued medical expenses, not one for discrimination on the basis of medical insurance product made available by the applicant.

12. It was also averred that the decision by H.A.T offends Articles 40 and 47 of the constitution and the Fair Administrative Action Act, 2015.

13. Only the 1st interested party (claimant) filed grounds of opposition on 6th March, 2018 contending that the application for leave is defective, lacks merit and is based on misconception of the law.

14. Further, that the orders of H.A.T made on 12th January, 2018 can only be set aside or reviewed or on appeal which the applicant has not exhausted.

15. That the applicant has not exhausted the appeal/alternative remedies available as stipulated in Section 9(2) (3) of the Fair Administrative Action Act.

16. That the application is disguised as Judicial Review yet it is an appeal and that the applicant seeks this court to substitute its views with those of the H.A.T.

17. That Article 163(2) of the constitution has no relevance to Judicial Review and that except Order 53 of CPR, the provisions of FAA Act and the constitutional Articles cited do not apply to these proceedings.

18. The Respondents and 2nd interested party did not file any responses.

19. The application was argued orally with Miss Wanjiku Nduati urging the application on behalf of her client the applicant whereas Mr. Osiemo argued on behalf of the 1st interested party.

20. According to the applicant, the Tribunal acted without jurisdiction because it relied on the law which was not in force at the time when the cause of action arose. Further, that in the judgment, the Tribunal introduced new issues of medical insurance products introduced by the applicant in 2008 which issues were different from what was contained in the complaint hence the applicant was not accorded an opportunity to be heard before introducing new matters of law in the judgment.

21. That the Tribunal made errors of law which must be corrected.

22. On alternative remedies of appeal, it was submitted that it was not available as the issue of jurisdiction was not raised at the hearing and that as the case was as a result of an earlier review, no review could be sought before the same tribunal. Reliance was placed on the case of **Motor Vessel "Joey vs. owners of Masters of the motor tugs 'Barbara & Steve B.'**

23. It was submitted that Judicial Review Remedy is elevated as a constitutional remedy under Article 47 of the Constitution and that there is a public interest aspect of the H.A.T applying a law that never existed when the cause of action arose hence the errors of law must be corrected by this court. It was urged that this matter is not ***functus officio*** and that there are exceptional circumstances hence this court should exercise its discretion to grant the orders sought.

24. On the part of the 2nd interested party, it was submitted by Mr. Osiemo, her Counsel reiterating the grounds of opposition filed and maintaining that the application is a disguised appeal, that it challenges the merits of the judgment of H.A.T of 12th August, 2017 not the process. Reliance was placed on the **Cortec Mining (k) Ltd vs. C.S Ministry of Mining & others [2015] eKLR** where it was held that Judicial Review is concerned with decision making process not merits of the decision.

25. The interested party maintained that the applicant has a remedy in an appeal to the High Court because the Tribunal had jurisdiction to entertain a claim based on discrimination and disclosure of a person's H.I.V. status. Counsel maintained that to hear this matter and grand leave to apply would be offensive to Section 9(2) and (3) of the FAA Act on alternative remedy.

26. Further, that the applicant did not raise the issue of jurisdiction at the trial hence it cannot raise it here on appeal. The cases of **R vs. DPP ex-parte Chamanlala Urajlal Kamani & 2 others and speaker of the National Assembly vs. James Njenga Karume CA 92/92** were cited among other cases.

27. On the principle that alternative dispute resolution must be exhausted before resorting to Judicial Review in a rejoinder, Miss Nduati submitted that albeit there are other available remedies but that those remedies are not effective and that parties cannot confer jurisdiction to a court. Further, that as jurisdiction was not an issue before H.A.T, it cannot be raised on appeal but that this court has power to hear and determine issues of jurisdiction of the H.A.T She maintained that the Tribunal could not apply the law which was non-existent at the time when the cause of action arose. She urged the court to grant leave.

DETERMINATION

28. I have considered the ex-parte applicant's application for leave and stay, the grounds in support, the grounds of opposition filed by the 1ST interested party who was the claimant before the H.A.T and the parties' Counsels oral submissions on the merits and demerits of the application.

29. In my view, the main issue for determination is whether this court is seized of jurisdiction to hear and determine the complaint placed before it by the applicant and if so, what orders should the court make? The applicant claims that the parties submitted to the jurisdiction of H.A.T but that in its decision, the Tribunal relied on the provision of the law which were not operational when the cause of action arose.

30. Secondly, that the decision was based on interpretation of the law which issue was not raised at the hearing for the applicant to raise thereto. It is also claimed that the issue of jurisdiction cannot be raised on appeal hence only this court has power to check on jurisdiction of the Tribunal, which jurisdiction parties could not confer on it, even if they submitted to its jurisdiction. The applicant also claims that the alternative remedy of appeal is not effective as they are challenging the process and not the merits of the decision of H.A.T.

31. Of importance to this court and to the parties for noting is that at the leave stage, this court is not concerned with the merits of the intended application. It is concerned with whether the applicant has demonstrated that it has an arguable prima facie case for in-depth investigation at the substantive stage.

32. However, where, from the onset the court's jurisdiction to hear and determine the matter is challenged, then the court must first determine the issue of jurisdiction. The basis upon which this court's jurisdiction is challenged is that there is an appeal or internal review mechanisms available to the ex-parte applicant if it was dissatisfied with the decision of the Tribunal. As a result, it was contended by Mr.

Osiemo Counsel for the 1st interested party that this court's jurisdiction is ousted by Section 9(2) and 3 of the Fair Administrative Action Act, 2015 which stipulates in Section 9(2) that the High Court or a subordinate court under sub section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. 9(3) The High Court or a subordinate court shall if it is not satisfied that the remedies referred to in sub section (2) have been exhausted, direct that the applicant shall first exhaust such remedy before instituting proceedings under sub section (1).

33. It is true that the law as stipulated above mandates parties to a dispute to first exhaust alternative available remedies before resorting to court to invoke judicial review discretionary remedies. This is so because judicial review is mostly concerned with the process of decision making and not the correctness of the decision itself (**see Commissioner of Lands vs. Kunste Hotel [1977 eKLR**. The above principle of exhaustion of alternative remedies is exemplified in Article 159 (2) (c) of the Constitution that obliges courts in the exercise of judicial authority to encourage parties to endeavor to resolve their disputes through ADR.

34. In R vs Secretary of state for Home Affairs ex-parte Swath [1986] ALL ER 717, it was held:

> ***"However, the matter does not stop them because it is well established that in giving or refusing leave to apply for judicial review, account must be taken of alternative remedies available to the applicant. This aspect was considered by this court very recently in R vs Chief constable of Mensey side Police ex-parte Calveley (1986) All ER 257 and it was held that jurisdiction would not be exercised where there was an alternative remedy by way of appeal, save in exceptional circumstances. By definition, exceptional circumstances defy definition but where parliament provides an appeal procedure, Judicial Review will have no place unless the applicant can distinguish his case from the type of case for which the procedure was provided. In R vs Birmingham city council ex-parte Ferreno Ltd [1993] ALL ER 530 the Court of Appeal (Civil Division) held;***
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> ***"Where an alternative remedy and especially where parliament had provided a statutory appeal procedure it was only exceptionally that Judicial Review would be granted. It is therefore necessary where the exception is invoked to look carefully at the suitability of the statutory right of appeal in the context of the particular case."***

35. Wendoh J in **R vs National Environmental Authority (NEMA) ex-parte Equipment HC Misc App 7/2009** added her voice to this conversation of alternative remedies and stated:

> ***"The applicant never made any effort to demonstrate that Judicial Review was better a mode of redress than an appeal to the Tribunal …Failure by the applicant to disclose the existence of an alternative remedy and failure to demonstrate at permission stage, why judicial review was more convenient or effective entitles the applicant to the exercise of this court's discretion to grant the orders sought herein."***

36. The Court of Appeal upheld the above decision on appeal in **CA 84/2010** between the same parties where the Court of Appeal held that in determining whether an exception should be made and judicial review granted where there is an alternative remedy provided, it was necessary for the court to carefully look at the suitability of the statutory appeal procedure in the context of the particular case and determine the issue to be determined and whether the statutory appeal procedure was suitable to determine the issue. In case the appeal procedure would be suitable to determine the matter in contention, Judicial Review will not be granted.

37. In the instant case, the 1st interested party maintains, relying on cases such as **Speaker of the National Assembly vs The Hon. James Njenga Karume (supra) Peter Oduor Ngoge vs. Francis Ole Kaparo Sc. Pet. 2/2012 and Yusuf Gitau Abdalla vs Building Center (K) Ltd (2014) eKLR** that there is an alternative remedy of appeal to the High Court or for review of the decision hence this court's judicial review jurisdiction should not be invoked. Counsel for the 1st interested party did not however, cite the specific provisions of the Act that stipulate the appeal or review process.

38. I have also perused the parent Act being the HIV and AIDS prevention and Control Act Cap 246(a) of the laws of Kenya but I have not found any specific provision expressly providing for an appeal process. Nonetheless, the court can only infer from Section 29 of the Act which stipulates:

> ***" 29(1) where the Tribunal awards damages or costs in any matter before it, it shall on application by the person in whose favour the damages or costs are awarded issue to him a certificate stating the amount of the damages or costs.***
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> 2) ***Every certificate issued under sub section (1) may be filed in the High Court by the person in whose favour the damages on costs have been awarded and upon being so filed, shall be deemed to be a decree of the High Court and may be executed as such."***

39. As was held by Odunga J in **R vs H.I.V & Aids Tribunal & Another Ex-parte Dyncorp International [2015] eKLR 27,**

> ***"Once such a decision is deemed to be the decision of the High Court, it is my view that consequential provisions relating to High Court decisions would be applicable to the decision including to provision relating to appeals.*** See ***Commissioner of Income Tax vs Menon [1985] KLR 104 [1976 – 1985] EA 67.***
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> ***It is therefore my view that the applicant had an opportunity of appealing against the decision of the Respondent. The law is that Judicial Review Proceedings, though elevated to constitutional remedies, are special proceedings and ought not to be resorted to as an alternative to ordinary civil litigation or an appellate process."***

40. There is no doubt from a plethora of authorities including **John Fitzerald Kennedy Omanga vs The Post master General, Postal Corporation of Kenya & 2 others NRB HCMA 997/2003** that Judicial Review remedy is a remedy of last resort and that unless the other procedure is less convenient or less appropriate, parties ought not to resort to Judicial Review.

41. The applicant further claims that albeit the applicant could have appealed against the merits of the decision of the Tribunal but that that remedy is not available because the applicant did not object to jurisdiction of the Tribunal hence it cannot raise it on appeal.

42. Further, that what is being challenged is the process and failure to be accorded an opportunity to be heard by the Tribunal on the interpretation of the law hence only judicial review is an appropriate remedy.

43. However, I have perused the ex-parte applicant's statement of Response to the claim No. H.AT 007/2015 annexed to the application for leave. It is document marked as exhibit No. AM 3 to the affidavit verifying the facts sworn by Alice Mwai on 1st March, 2018. At paragraph 18 of the said response, the applicant who was the 2nd Respondent stated; "***18 <u>THE</u> Jurisdiction of this Honorable Tribunal is not admitted"*** Having so stated in black and white that the jurisdiction of the Tribunal was not admitted, it was incumbent upon the applicant herein to pursue that response and place before the Tribunal material that would assist the Tribunal make a determination on whether or not it had jurisdiction to hear and determine the claim.

44. It is not enough for parties to merely deny jurisdiction. They must give reasons why such jurisdiction is divested and in which manner.

45. The issue of jurisdiction was therefore before the HAT Tribunal and therefore the applicant's claim that having submitted to the jurisdiction of the Tribunal, it cannot raise it on appeal is not well founded.

46. In **C.A 38/2014 – Albeit Chaurembo Mumbia & 7 others vs Maurice Munyao & 148 others [2016] eKLR** where the Respondents before the Court of Appeal contended that the issue of jurisdiction had been raised too late in the day and for the first time on appeal, the Court of Appeal stated:

> ***"43 --- we disagree. Jurisdiction was pleaded and made an issue on 11th January, 2007 when the defence was filed. Even if jurisdiction ware raised for the first time in this appeal, this court has stated in Kenindia Assurance Company Limited vs Otiende [1982] 2 KAR 162 that it has power to entertain a point raised for the first time on the appeal if such point goes to jurisdiction"***

47. The Supreme Court in **Samuel Kamau Macharia & Another vs KCB Ltd & 2 others SC App. No. 2/2012 [2012] eKLR** held that the assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution, Statute Law and judicial precedent; that a court's jurisdiction flows from either the Constitution or legislation or both and that a court may not arrogate to itself jurisdiction through the craft of interpretation.

48. What this court is considering at this stage is whether it is the right forum to ventilate the complaint by the applicant by way of Judicial Review and not whether the Tribunal had the jurisdiction to hear and determine the dispute before the parties. This is so because the latter issue goes into the merits of the dispute herein.

49. However, if in the process of rendering its decision after hearing the complaint, the Tribunal committed errors of law by going beyond its jurisdiction in the interpretation of the statute, in my humble view, that is a point of attack on appeal. This is because the Tribunal cannot be restricted in its interpretation and application of the law. It is how it interprets and applies that law that matters and if it makes errors of law, that error of law or misapprehension of the law can be challenged by way of an appeal to the relevant forum. Regrettably, a court exercising judicial review jurisdiction cannot exercise powers of an appellate court in judicial review proceedings..

50. In **Narok County Council vs Transmara County Council [2001] EA 157** the court held that the Constitution did not clothe the High Court with jurisdiction to deal with matters that a statute had directed should be done by another body.

51. In **Ndiara Enterprises Ltd v Nairobi City County Government [2018] eKLR** the Court of Appeal in upholding this court's decision between the same parties on the question of exhaustion of alternative remedies held:

> ***"We see no reason to warrant interference with those findings as in our view they are based on sound law and evidence. The record does not reflect any attempt by the appellant to first resolve its grievances against the respondent under the procedure provided for redress under PPA or FAA. There is no evidence that the appellant made any complaints in the nature of the respondent's refusal to approve its plans for construction of a perimeter wall to the liaison committee under section 13 of the Physical planning Act[PPA]. It's clear that the appellant could only approach the High Court on appeal against the decision of the National Liaison Committee. Though the High Court can exempt a party from following such clear laid procedures for redress of grievances before approaching it in the noble interests of justice, the learned Judge rightly found that the appellant had failed to prove there were exceptional circumstances in its case to warrant such exemption. Indeed, there are no apparent exceptional circumstances to justify such exception and which exception was also not sought. The High Court's power to exercise its jurisdiction under Article 165 of the Constitution was therefore limited or restricted by statute in this instance as found by the Judge…."***

52. The applicant's Counsel submitted that there are exceptional circumstances and that the appeal process would not be effective. The legal position prevailing currently is that where there are exceptional circumstances warranting invoking of Judicial Review jurisdiction where there is an alternative remedy, then the court would exercise its jurisdiction of judicial review but subject to the following provisions of the law. Under Section 9(4) of the Fair Administrative Action Act, 2015:

> ***"Notwithstanding subsection (3), the High Court or a subordinate court <u>may in exceptional circumstances and on application</u> by***

the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice."

53. What the above provision stipulate is that it is upon the applicant to demonstrate to this court that there are exceptional circumstances warranting exemption from the obligation to exhaust any other remedy available to it under the law and there must be an application for such exemption for this court to consider on its merits.

54. In the chamber summons subject of this ruling, there was no such prayer for exemption from resorting to appeal mechanisms available under section 29 of the parent Act which in my humble view, would have been considered on its own merits after the Respondents are given an opportunity to respond thereto.

55. It is not sufficient for the applicant's Counsel to submit from the bar that there are exceptional circumstances. Nonetheless, the so-called exceptional circumstances have not been disclosed to this court. I have already pronounced myself on the question of jurisdiction to the extent that interpreting a statute wrongly cannot form the basis of a jurisdictional issue in as much as it may amount to an error of law. It follows that indeed, what the applicant seeks before this court is to challenge the merits of the decision by the H.A.T Tribunal made on 12th January, 2018, and not the process.

56. For all the above reasons, I have no hesitation in finding that the applicant has not demonstrated to this court that this court is the only avenue by which it can challenge the decisions of the H.A.T It has not been demonstrated that the appeal mechanisms available to deal with merit issues is not effective or that there are exceptional circumstances for this court to exempt the applicant from the obligation of exhausting the available mechanisms.

57. Accordingly, I find and hold that this court's judicial review jurisdiction is not available to the ex-parte applicant. The application is accordingly struck out with an order that each party shall bear their own costs of this application for leave and stay.

Dated, Signed and Delivered in open court at Nairobi this 9th day of March, 2018.

R.E. ABURILI

JUDGE

In the Presence of:

Mr. Osiemo for the 1st interested party

Ms. Wanjiku Nduati for the applicant

No appearance for Respondent

No appearance for the 2nd interested party

Mohamed Kombo – Court Assistant