



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 455 OF 2016

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI & PROHIBITION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF THE NATIONAL HOSPITAL INSURANCE FUND ACT, CAP 255 OF
THE LAWS OF KENYA.**

AND

**IN THE MATTER OF THE CRIMINAL PROCEDURE CODE, CAP 75 OF THE LAWS OF
KENYA**

BETWEEN

PAUL MWANIKI.....APPLICANT

VERSUS

THE NATIONAL HOSPITAL INSURANCE FUND

BOARD OF MANAGEMENT.....RESPONDENT

JUDGMENT

1. This matter proceeded to hearing on 21st March 2017 interpartes after being adjourned severally at the instant of the respondent and all along, all parties assumed that leave to institute Judicial Review proceedings was granted.
2. However, as I read this file with a view to writing the judgment, I discovered that despite the applicant pushing for a hearing of the notice of motion dated 3rd October 2016, there is no order granting leave.
3. Section 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya and Order 53 of the Civil Procedure Rules are emphatic that no order of certiorari, prohibition and mandamus shall be granted unless the court grants leave to institute proceedings.

4. In the present case, the applicant did file an application for leave dated 27th September 2016 which application was considered on 28th September 2016 under certificate of urgency and the court directed the applicant to serve the respondent for interpartes consideration for directions on 4th October 2016.

5. The court also directed the applicant to file future pleadings in reader friendly pleadings. However, the court never granted any leave or stay on that day and on 4th October 2016 when the matter came up for interpartes consideration of the application for leave, the court notes that the exparte applicant had instead filed a substantive notice of motion albeit counsel for the applicant, Mr Akusala intimated to court that he had not managed to serve the respondent because he had only received some documents the previous day and that he had succeeded getting a deferral of the plea taking for the exparte applicant in the criminal case preferred against him to 12th October 2016.

6. At that moment, the court was made to believe that leave had been granted so the applicant's counsel was directed that the substantive motion which had been filed that morning to be heard on 10th October 2016 and the applicant was to serve the respondent by close of business.

7. Suffice to say that it was the exparte applicant's duty to ensure that before filing the substantive motion, he obtains leave first and even extracts the order for leave which would accompany the notice of motion to be served upon the respondent.

8. I reiterate that there is no order for leave and despite the exparte applicant making the court believe that there was such leave hence the long process of writing rulings on stay to allow the fast tracking of the hearing of this matter, the court is unable to find any order for leave.

9. It was incumbent upon the applicant to ensure that he obtains leave of court before instituting the notice of motion dated 3rd October 2016 on 4th October, 2016.

10. There being no leave to institute these proceedings, the court's precious judicial time was wasted and the parties too wasted their time arguing on the merits of the Judicial Review application.

11. For that reason alone, I find that the court is unable to render a judgment based on merits of an application that was filed prematurely and without leave of court as required by law.

12. Accordingly, I proceed to strike out the notice of motion dated 3rd October 2016 as being incompetently filed.

13. As the chamber summons dated 27th September 2016 was never canvassed, I would not strike out that application which remains unprosecuted and it is now upon the applicant to move the court if he still desires, to consider that application on its merits. I make no orders as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 16th May 2017.

R.E. ABURILI

JUDGE

In the presence of:

Miss Maitai for Respondent

N/A for applicant

CA: George