



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO 345 OF 2013**

**MERIDIAN MEDICAL CENTRE.....PLAINTIFF**

VERSUS

**NATIONAL HOSPITAL INSURANCE FUND.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Defendant's Notice of Motion dated and filed on 27<sup>th</sup> January 2015 was brought under the provisions of Section 3A of the Civil Procedure Act Cap 21, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. It sought the following orders **THAT:-**

1. **This Honourable Court do order a stay of these proceedings pending the hearing and determination of Anti-Corruption Case Number 12 of 2013 Republic Langat Kerich, Marwa Fadhili Chacha, David Kipruto Chingi, Peter Ngunjiri Wambugu, Ndiba Wairioko and Meridian Medical Centre Limited.**
2. **THAT the costs of this application be provided for.**

2. A brief background of this case is that on or about 8<sup>th</sup> November 2009, the Plaintiff entered into a Contract with the Defendant in which the Plaintiff was to provide outpatient medical care and treatment services to the Defendant's Beneficiaries under a Pilot Project using the capitation method (hereinafter referred to as "the Pilot Project Contract"). Several clinics that would provide the said services were gazetted.

3. Subsequently, on 1<sup>st</sup> January 2012, the Plaintiff and Defendant entered into a Contract in which the Plaintiff was to provide primary health care and treatment services to all civil servants and disciplined services (Premium cover) (hereinafter referred to as "the Contract"). However, the Plaintiff was said to have been setting up and equipping clinics during this period contrary to what it had represented to the Defendant.

4. When the Defendant became aware of this anomaly, it terminated the said Contract vide its letter of 14<sup>th</sup> June 2013. The Plaintiff, however, denied that the Defendant had given it the three (3) months' notice required to terminate the said Contract.

5. It was after the termination of the said Contract that the Plaintiff amongst other co-accused were arraigned in court to answer to anti-corruption charges in **Anti-Corruption Case Number 12 of 2013 Republic Langat Kerich, Marwa Fadhili Chacha, David Kipruto Chingi, Peter Ngunjiri Wambugu, Ndiba Wairioko and Meridian Medical Centre Limited** (hereinafter referred to as “the Anti-Corruption case”).

6. The present application seeking to stay the proceedings herein was thus informed by the existence of the said Anti-Corruption case that is pending hearing and determination.

#### **THE DEFENDANT’S CASE**

7. The Defendant’s application was supported by the Affidavit of Simeon Ole Kirgotty that was sworn on 27<sup>th</sup> January 2015. Its Written Submissions were dated and filed on 1<sup>st</sup> April 2015.

8. The Defendant contended that it was only fair and just and a saving of judicial time and resources if the proceedings herein were stayed pending the hearing and determination of the Anti- Corruption case that directly related to the issues in dispute in the matter herein.

9. The hearing of the said Anti- Corruption case was scheduled for 2<sup>nd</sup> and 3<sup>rd</sup> March 2015. It was the Defendant’s averment that the findings in the Anti-Corruption case on whether or not there was a conspiracy to defraud it, the basis upon which it terminated the contract, were directly related and relevant to the present proceedings. It added that the witnesses called to testify in both cases would be the same.

10. It therefore urged the court to grant it the orders it had sought in its present application.

#### **THE PLAINTIFF’S CASE**

11. In response to the said Application, on 23<sup>rd</sup> July 2014, the Plaintiff filed its Grounds of Opposition dated 16<sup>th</sup> February 2015 and filed on 20<sup>th</sup> February 2015. The Plaintiff’s Written Submissions dated 10<sup>th</sup> April 2015 were filed on 14<sup>th</sup> April 2015.

12. The Plaintiff’s Grounds of Opposition could generally be summarised as follows **THAT:-**

1. **The application was fatally defective, vexatious, a breach of the overriding objections of the Civil Procedure Act and an abuse of the court process intended to clog the proceedings herein, the matter herein having been certified as ready for hearing on 19<sup>th</sup> February 2014.**
2. **The application was an afterthought as the suit herein had been fixed for hearing on 18<sup>th</sup> September 2014 when the court file went missing and further the same had been brought to frustrate the hearing of the main suit that was scheduled for hearing on 25<sup>th</sup> March 2015.**
3. **The reliefs sought in the application were not supported by any law.**
4. **The present suit was related to a claim for breach of contract while the issues in the Anti-Corruption case were very distinct so as not to warrant the granting of the Defendant’s application.**

13. The Plaintiff therefore asked the court to dismiss the Defendant’s present application.

#### **LEGAL ANALYSIS**

14. At the time the court reserved its Ruling herein on 28<sup>th</sup> April 2015, none of the parties gave an indication of what had transpired on 2<sup>nd</sup> and 3<sup>rd</sup> March 2015 when the Anti- Corruption case was scheduled for hearing. The court could therefore only assume that the same was not concluded as parties still wished to have the Ruling herein delivered.

15. Although the Defendant did not cite the provisions of Section 6 of the Civil Procedure Act but rather relied upon the provisions of Section 3A of the Civil Procedure Act, the Plaintiff contended that the purpose of a court staying a suit under Section 6 of the Civil Procedure Act is normally to avoid parallel proceedings touching on the same issue and parties. It was categorical that the evidence to be adduced by witnesses in both the criminal and civil cases herein would be different.

16. The Plaintiff submitted that the reason there was no such provision between criminal and civil proceedings was because it was not possible for the parties in the criminal and civil cases to litigate under the same title. It stated that in fact, criminal procedure provided for concurrent proceedings and that the standard of proof was different, being proof beyond reasonable doubt in criminal cases and proof on a balance of probabilities, in civil cases.

17. It referred the court to the provisions of Section 193A of the Criminal Procedure Code Cap 75 (Laws of Kenya) that provides as follows:-

**“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”**

18. In response to the Plaintiff’s assertions that there was no provision of the law under which the court can stay proceedings, the Defendant referred court to the case of **BM Logistics Ltd vs Kenya National Bureau of Statistics & Another [2013] eKLR** in which Ogola J held that the staying of the proceedings is at the discretion of the court.

19. It argued that it had met the threshold of being granted the discretionary order for the reason that the parties in both cases were the same, the contracts in question were executed by the same persons and that the same witnesses would testify in both cases.

20. It was its contention that if the Anti-Corruption Court eventually convicted the Plaintiff and its co-accused, then it would mean that the Defendant was right in terminating the said Contract. It added that if the Plaintiff was paid the sum of Kshs 818,830,341/= that it was claiming, it would not be able to recover the colossal amount that would come from the taxpayers’ kitty.

21. It was also its submission that the Plaintiff stood to suffer no prejudice that could not be compensated by way of damages if the application was allowed and that in any event, it would be good usage of judicial time as this would aid this court in arriving at a just decision and avoid two (2) different courts arriving at conflicting positions.

22. The court carefully considered the matters in question and found that although as Section 193 A of the Criminal Procedure Act provides that there can be no stay of proceedings in a criminal court where there are proceedings in a civil court, there was no provision for the staying of civil proceedings to await the outcome of a criminal proceedings.

23. Hypothetically, if the Defendant’s arguments were valid, it would therefore mean that the Anti-Corruption Court would be obligated to stay any proceedings before it because the High Court is higher in hierarchy. In view of the hierarchical nature of courts, it does seem improper for the High Court to stay its proceedings for a lower court to proceed with its own.

24. Further, if for instance, the Deputy Public Prosecutor (DPP) opted to withdraw the charges against the Plaintiff and his co-accused under Section 87A of the Criminal Procedure Act, the question that arises is what would be the fate of proceedings in the civil court. Would it mean that the civil court would have to await the DPP to reinstate the charges before the civil court could proceed? Similarly, if a party in a civil matter opted to withdraw its cause of action or a party failed to tender sufficient evidence, would that leave the criminal proceedings in limbo? Appreciably, the failure by either party to prove its case to the required standard in any particular case would compromise the parallel case purely because each case

should be decided on its own merits.

25. The absurdity of such a scenario is what would lead this court to find conclusively that the civil and criminal proceedings ought to proceed separately and at their own pace. Appreciably, Langat Kerich, Marwa Fadhili Chacha, David Kipruto Chingi, Peter Ngunjiri Wambugu and Ndibu Wairioko who are the Plaintiff's co-accused in the Anti-Corruption case are not parties to the proceedings herein.

26. Accordingly, having considered the pleadings, the affidavit evidence, the written submissions and the case law that was relied upon by the respective parties, the court came to the very firm conclusion that if any of its action would have the effect of negating the very essence of the overriding principles, then it should be extremely slow and in fact, reluctant not to grant such an order.

27. Section 6 of the Civil Procedure Act is clear that the matter ought to be stayed where the parties are the same or are litigating under the same title in a similar matter that is directly or substantially in issue in any case before another court that is competent to hear and determine a matter. Though the matters in this court and the Anti-Corruption Court touched on similar issues, the court was not satisfied that either of the cases in the respective courts would have an impact on each other. Each court would be required to determine the case depending on the evidence that would be placed before it.

28. There was no doubt in the mind of this court that awaiting the hearing and determination of the Anti-Corruption case that involves many other unrelated parties would only embarrass the fair trial of this matter which would be contrary to the provisions of Sections 1A and 1B of the Civil Procedure Act that stipulate that the overriding objectives of courts, parties and their advocates is to facilitate the expeditious disposal of all disputes before the court.

29. The court was thus not satisfied that this was a suitable case in which it could have exercised its wide and unfettered discretionary powers under the provisions of Section 63 (e) of the Civil Procedure Rules to make such interlocutory order as would have appeared just and convenient to grant to prevent the ends of justice being defeated bearing in mind the provisions of Section 1B (c) of the Civil Procedure Act that mandate the court, in furthering the overriding objectives, to efficiently use the available judicial resources.

30. This matter has since been certified as ready for hearing and indeed a hearing date taken but the matter did not proceed for hearing. It is time that this matter proceeded to trial and be determined on its own merits without fearing that its outcome herein would have any relevance or impact on the criminal proceedings and vice versa.

### **DISPOSITION**

31. In the circumstances foregoing, the upshot of this court's ruling was that the Defendant's Notice of Motion dated and filed on 27<sup>th</sup> January 2015 was not merited and the same is hereby dismissed with costs to the Plaintiff.

32. It is so ordered.

**DATED and DELIVERED at NAIROBI this 25<sup>th</sup> day of June 2015**

**J. KAMAU**

**JUDGE**