REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.61 OF 2015

BETWEEN

TRADE UNION CONGRESS OF KENYA……………………..…………..PETITIONER

AND

NATIONAL HOSPITAL INSURANCE FUND…………..…………...……..RESPONDENT

RULING

1. Before me is an Application dated 20th February, 2015. It is supported by the Affidavits of Tom Mboya Odege, the National Chairman of the Petitioner, the Trade Union Congress of Kenya, a public workers umbrella union and Dr. Charles Mukhwaya its Deputy secretary General. The Applicant seeks an order staying the implementation of National Hospital Insurance Fund (NHIF) rates contained in Legal Notice No.14 of 2015 and published in Kenya Gazette Supplement No.12 on 6th February, 2015, pending the hearing and determination of the Petition. The new NHIF became effective on 1st April 2015 although the Application was filed earlier than that date.

The Petitioner's case

2. In his Affidavit, Mr. Mboya deponed that the Respondent has publicly threatened, through its officials, to implement the new rates without fail and that Legal Notice No.14 of 2015 was made and gazetted contrary to the law as it was not laid before Parliament before its coming into force. He claimed that the decision to increase NHIF rates was made without proper consultation with the Respondent who represents workers in Kenya and therefore if implemented, some of the Petitioner's members would be exposed to double contributions since they belong to other existing health schemes.

3. He further claimed that the new rates as gazetted, are silent on the Government's contribution towards the universal health of its citizens and that the Respondent, in levying the new rates, has shifted the Government's obligation of providing universal healthcare to the citizenry. That in the end, the workers would be subjected to double taxation since workers already pay exorbitant taxes

to fund Government programmes.

4. On his part, Dr. Charles Mukhwaya, the Deputy Secretary General of the Petitioner, in his Affidavit sworn on 13th March 2015 contended that Legal Notice No.14 of 2015 does not indicate that it was issued by the Board of NHIF. He further claimed that the Legal Notice is invalid for having been signed by the Chairman of NHIF and not the Chairman and the Secretary of the NHIF Board of Management. He also stated that Legal Notice No.14 of 2015 did not therefore draw a clear line between the Board and the Fund and that is why the Petitioner in the event chose to sue the body that issued Legal Notice No.14 of 2015.

5. On the claim as to whether the Petitioner should have joined earlier suits filed by other Parties, he stated that the Petitioner was registered on 6th November 2012, after the suits had been filed and litigated. That it could not therefore have been properly enjoined in them and in any case, the Petition is challenging the constitutionality of Legal Notice No.16 of 2015 and not Legal Notices No.107 and 108 of 2010, the latter being the subject of the prior suits.

6. Mr. Arwa, learned Counsel for the Petitioner in addition submitted that the concept of democracy entails the protection of the people's right to get involved in the affairs of the State and not just during elective processes. On that point, he relied on the cases of ***Doctors for Life International v The Speaker of the National Assembly and Others CCT 12/05*** where Sachs J had observed that the principle of consultation and participation had become a distinctive part of the national ethos. He also relied on the case of ***Rev Timothy Njoya v Attorney General and Another (2004) e KLR*** where it was held that the Constitution 2010 recognizes the right of the people to exercise sovereignty directly through public participation and it was therefore his position that sovereign power belongs to the people and the power to make law, either directly or through delegated power, involves an exercise of the sovereign power of the people. That as such, the Respondent must demonstrate that it gave the people a real and meaningful opportunity to contribute to the passage of the impugned Legal Notice. Also that their contributions were not in vain but were indeed taken into account in reaching a decision to publish and enforce the Legal Notice. He further contended that the above duty is higher where it involves a financial burden. On that point he relied on the provisions of **International Covenant on Civil and Political Rights (ICCPR),** and **The African Charter on People's and Human Rights** on the issue of public participation of citizens in the making of decisions that affect them.

7. Mr. Arwa further submitted that **Section 5** of the **Statutory Instruments Act No.23 of 2013** provides for the manner in which consultation in the making of statutory instruments shall be carried out which include *inter alia* notification, either directly or by advertisement, to bodies or organisations which are representative of persons who are likely to be affected by the proposed instrument. He also relied on **Section 6** of the said **Act** which provides that when an instrument is to impose significant costs on the community, the regulation-making authority shall prepare a regulatory impact statement which statement was not prepared in the instant case thus violating the said **Section 6** of the **Act** and **Article 47** of the **Constitution**. It was his case therefore that where a public decision is made without public participation, such a decision lacks quality of content and cannot stand.

8. In addition, it was Mr. Arwa's contention that the Respondent did not give the people a real opportunity to be heard on a matter affecting them adversely because members of the public were not invited to make their representations and contributions before the impugned Legal Notice was published and that even if the Respondent had invited the Petitioner on behalf of the public, it did not give it a real opportunity to submit its views and contributions. That in fact when the Petitioner was invited to make its contribution on 27th to 28th January 2015, it requested for more time to consult with its members generally but rather than grant the Petitioner any accommodation, the Respondent on 6th February 2015, published the Gazette Notice. According to Mr. Arwa therefore the Respondent acted contrary to the Constitution and with disrespect to the Petitioners' members who are directly and substantially affected by the Legal Notice.

9. Mr. Arwa also submitted that the Respondent violated **Article 10** of the **Constitution** as it failed to observe public participation and transparency in making its decision and also failed to provide members of the public with a forum within which they would participate in the making of a decision that would adversely affect them.

10. He also contended that the Respondent had grossly mismanaged the funds and resources at its hands and instead of accounting for those funds, it had instead raised the rates payable by its members without accounting for or explaining and justifying what the new sums would be used for or even publishing the commensurate increase in the level of services to be offered.

11. He added that the implementation of the new rates violated the principle of social and distributive justice and that social justice exists when all people share a common humanity and therefore have a right to equitable treatment, support for their human rights and a fair allocation of community resources. He argued that the rates as proposed reveals that low income earners pay more on their income as statutory contribution and thereby shifting the Government's responsibility to provide universal health care to poor Kenyans by taking away significant proportions of their incomes in the guise of improved health benefits.

12. It was also Mr. Arwa's position that the implementation of the new rates violates the Petitioner's right to fair administrative action and that procedural fairness would involve granting the affected persons an opportunity to respond to a proposed course of action by an administrative body. He claimed that to the extent that the Respondent had revised the rates without giving the Petitioner or any contributor the right to be heard, acted in violation of the right to fair administrative action.

13. On the decision to implement the new rates, he submitted that the said decision violates the Petitioner's right to health and that an important aspect of the right to health is the participation of the population in all health-related decision making processes at the community, national and international levels. That the health care system to which the Petitioner and its members are being subjected to, fails materially to take into account all the aspects of a good healthcare system as defined by the World Health Organization (WHO). It was therefore his contention that the Petitioner's members have been turned away from health facilities on the ground that the Respondent has failed to put in place appropriate mechanisms which makes accessibility to a health care system impossible. Further, that the Respondent lacks the capacity to administer the health scheme to many people and hospitals that the Petitioner's members often suffer lack of drugs.

14. Lastly, Mr. Arwa submitted that the implementation of the new rates violates the Petitioner members' consumer rights as provided for under **Article 46** of the **Constitution** and that although the Petitioner and its members have written to the Respondent complaining about the sorry state of affairs with regard to the health scheme and requesting for information on what the Respondent is doing, it has failed to make a reply. In addition, that the Petitioner's members are being coerced to contribute to a scheme which gives poor quality of service and violates the Petitioner's rights to choose products of the right quality as guaranteed by the Constitution, 2010. Further, that the Respondent pays no heed to the fact that there exists other health schemes and therefore some contributors make double contributions and the result is that by choosing to contribute only to the Respondent the health sector is strangled and competition is suffocated.

15. For the above reasons the Petitioner now seeks the following specific orders;

i. **…..**

ii. ***That this Honourable Court be pleased to issue an order staying the implementation of the increased NHIF rates.***

iii. ***That the Honourable Court be pleased to issue an order of injunction restraining the Respondent, its officers, employees and/or agents from implementing the new rates or in any***

other way violating the Petitioner members' rights pending the hearing and determination of the Petition.

iv. ***That this Honourable Court be pleased to issue such further or other order(s) as it may deem just and expedient for the ends of justice.***

v. ***That the costs of this application be awarded to the Applicant/Petitioner.***

The Respondent's case

16. The Application was opposed through the Replying Affidavit of Simeon Ole Kirgotty, the Respondent's Chief Executive Officer, sworn on 2nd March 2014.

17. He stated that NHIF is a fund managed by the NHIF Board of Management which is the only body that has the capacity to sue and be sued and therefore NHIF cannot sue or be sued as such. That the Board is empowered under the **NHIF Act No.9 of 1998** to discharge the function of regulating the contributions payable to the Fund and the benefits and other payments to be made out of the Fund. That the NHIF Board has a broad membership that includes representatives of the Federation of Kenya Employers (FKE), the Central Organization of Trade Unions (COTU) and the Kenya National Union of Teachers (KNUT) among other organizations and that it is a public health insurance scheme that seeks to ensure that all Kenyans have the best possible but affordable healthcare, at all levels.

18. He further stated that sometime in 2010, the Board, after holding several consultations with the Minister then in charge of health and other stakeholders in the heath sector, gazetted The NHIF (Standard & Special Contributions) Amendment Regulations, 2010 and the NHIF (Voluntary Contributions) Amendment Regulations, 2010 amending the 2003 Regulations so as to increase the contributions payable to the Fund by its contributors vide Legal Notice Nos.107 and 108 of 2nd July 2010. Following the publication of the said regulations, COTU moved to the Industrial Court in **Cause No.887 of 2010** seeking orders to restrain the Fund from enforcing the revised contributions. The Industrial Court rendered its decision on 27th September 2010 and dismissed the claim. COTU had also filed a judicial review application being **Judicial Review Misc. Applic No.306 of 2010** and in a judgment delivered on 28th March 2010, the Court dismissed the application. Subsequently, COTU lodged another application being **Civil Application No. NAI. 113 of 2012** at the Court of Appeal against the decision of the High Court. The Application in the Court of Appeal has not been heard and an appeal has also not been filed. He also stated that there is still pending a suit filed by the Kenya Union of Domestic Hotels Educational Institutions Hospitals and Allied Workers (KUDHEHIA) being **H.C. Petition No.16 of 2012** seeking orders to stop the Respondent from implementing the new NHIF rates. In addition, that there is also a suit filed by two private citizens, Kiriro Wa Ngugi and Diana Patel i.e. **Misc. Case No.262 of 2010** against the Respondent seeking orders to nullify the implementation of the new rates.

19. In that context, he conteded that the issue surrounding the adjustment of contributions to the NHIF has been in the public domain for years and any person or institution was at liberty to join in the various suits that had been filed regarding the subject matter. That the issue of adjusting NHIF rates has also received wide media coverage and the Applicant has all along been aware of the cases that were going on in Court in respect of the NHIF rates and should have joined any of those cases if it had a genuine grievance.

20. He added that prior to the presentation of the proposed revised contributions to the Minister of Labour for approval, the Board had held various consultative meetings with the Petitioner and COTU and the position taken by the Petitioner, if upheld, would harm the interests of the majority of Kenyans who are seeking an affordable health care system. He also contends that the Petitioner is being used to re-litigate matters which have already been litigated to finality and that while Legal Notices No.107 and 108 of 2010 revised the contributions to the NHIF, Legal Notice No.14 of 2015, they only amended Legal Notices No. 107 and 108 and it in fact revised some of the contributions downwards. He thus claims that Legal Notice No. 14 of 2015 can only be

invalidated by first invalidating Legal Notice No.107 and 108 of 2010.

21. It was also his position that the Petitioner's members have been making and continue to make contributions to the Fund notwithstanding their membership of other medical schemes and in any event, the making of contributions to the Fund is mandatory under the law and cannot be subordinate to other medical schemes which a contributor belongs to.

22. On the argument that the burden of shouldering the costs of provision for health care in Kenya has been shifted from the Government to the Petitioner members', Mr. Kirgoty deponed that the Government has invested heavily in the health sector and in any case, it is not a party in these proceedings so as to put forth its position on that issue.

23. Mr. Otieno, Counsel for the Respondent in submissions added that the Petitioner is abusing the Court process in the name of agitating a constitutional cause and that in all the previous cases challenging Legal Notices No.107 and 108 of 2010, the Court has held that the said legal notices are lawful. That it is not possible to invalidate Legal Notice No.14 of 2015 without invalidating the former.

24. He submitted further that there were various consultations held as between the Petitioner and the Respondent and that the Petitioner was given reasons for the decision to raise the rates payable. That it is untrue therefore that the proposals made by the Petitioner were ignored.

25. As to whether the Petitioner was consulted before the publication of Legal Notice No.14 of 2015, Mr. Otieno submitted that the Petitioner was indeed consulted but its problem with the Respondent's actions is that some of the proposals it had given the Respondent were not taken into account while others were ignored and that the Petitioner was attempting to micro-manage and direct the Respondent in so far as the issue of raising the rates is concerned. He thus stated that the Petition has been brought in bad faith and for ulterior motives and so as to blackmail the Respondent into acceding to unreasonable and irrelevant demands by the Petitioner.

26. As regards the claim that **Article 47** of the **Constitution** has been violated, the Respondent claimed that the Petitioner has taken a literal interpretation of **Article 47** and that it was not the intention of the drafters of the Constitution that every person affected by a decision would be entitled to written reasons in all cases. According to Mr. Otieno the proper and reasonable interpretation of **Article 47** of the **Constitution** would be that any person who claims that he does not know the reasons behind a decision, would request for the said reasons to be given to him. In that regard, Mr. Otieno claimed that the Petitioner has never requested for the reasons for the decision to increase NHIF rates and added that the Petitioner was aware at all times of the reasons for the increment of rates.

27. On the issue raised that the proposed rates amounted to double taxation, Mr. Otieno submitted that the NHIF contributions were anchored on a provision of law and it is mandatory and compulsory for persons earning an income in Kenya to contribute to NHIF. In that context, **Article 206** of the **Constitution** empowers the government to raise revenue through the collection of taxes and NHIF is a system of law through which tax is levied by the Government. He thus submitted that the payment of money into the NHIF by contributors does not amount to double taxation.

28. It was his further submission that the mandatory NHIF contributions do not in any way violate the rights of consumers and that the Respondent is a public health insurance scheme that meets in part the medical expenses of its contributors as and when they are offered services in public and other accredited hospitals. That it does not therefore participate in provision of health care in any way.

29. On the issue of social justice, Mr. Otieno claimed that the higher the income one earns, the more likely he is to get a private medical insurance scheme thus leaving low income earners without a scheme. He submitted therefore that NHIF was therefore mostly beneficial to low income earners who cannot afford the high rates charged by private medical insurance service providers.

30. It was Mr. Otieno's further submission that it was the responsibility of the Cabinet Secretary-in-charge of health matters to present Legal Notice No.14 of 2015 to Parliament and that the Respondent's obligation was to ensure that the Legal Notice was published and it cannot be blamed if the Cabinet Secretary had not transmitted it to the Clerk of Parliament who would then table it before Parliament. That in any event, the Cabinet Secretary is not a party in this proceedings and orders against him cannot issue.

31. In conclusion and from the foregoing, Mr. Otieno urged the Court to dismiss the application as it lacked merit.

Determination

32. I have considered the submissions and pleadings of the parties and what is before me is an application for conservatory orders as to whether, at this interlocutory stage, the Court should stop the implementation of the new NHIF rates pending the determination of the Petition. However, it seems to me that the Parties largely addressed me on the merits of the Petition rather than the single straightforward issue whether conservatory orders should be granted at this stage and what considerations should be taken into account in making that decision. At this interlocutory stage, I cannot and must not make any definitive findings of fact or law as regards the constitutionality of Legal Notice No.14 of 2015. I only need to be satisfied that the circumstances before me would warrant the issuance of a conservatory order. To do otherwise would pre-determine the entirety of a hotly contested Petition.

33. In that regard, the circumstances under which a Court will grant conservatory orders were laid out in the case of ***Gatirau Peter Munya v Dickson Mwaura Kithinji & 2 Others [2014]e KLR*** where the Supreme Court (Ojwang & Wanjala JJSC) observed, at para 86, that;

> ***"Conservatory Orders" bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions linked to such private-party issues on the "prospects of irreparable harm occurring during the pendency of a case; or "high probability of success" in the applicants case for orders of stay. Conservatory orders consequently, <u>should be granted on the inherent merit of the case bearing in mind the public interest, the Constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes</u>". (Emphasis added)***

34. I am duly guided and I am also aware that for the Petitioner to be entitled to a conservatory order at this stage, it must prove that there is need for an interim protection against alleged continued violation of the Constitution before the hearing of the Petition. That is why in the case of ***Centre for Human Rights and Democracy & 2 Others v Judges and Magistrates Vetting Board & 2 Others Petition No. 11 of 2012***, the High Court observed that in deciding whether to grant conservatory orders, the following factors were to be given considerations, namely;

a. The credentials of the Petitioner;

b. The *prima facie* correctness or nature of information available to the Court;

c. Whether the grievances expressed in applying for conservatory orders were genuine, legitimate, deserving and or appropriate;

d. Whether the Applicant had shown and demonstrated the gravity and seriousness of the dispute, and whether the Petitioner had engaged in wild, vague, indefinite or reckless allegations against the Respondent.

35. I adopt the above criteria and any Court in similar circumstances ought to apply it in determining

whether denial of a conservatory relief will negate the constitutional values and objects of the Constitution.

36. Having said so, the Petitioner contended *inter alia* that the implementation of the new rates would be a violation of the Constitution because it was not consulted before Legal Notice No.14 of 2015 was published and that the implementation of the new rates violates the Petitioner's members' rights to fair administrative action, consumer rights and right to health. Further, that the implementation of the new NHIF rates would amount to double taxation and lastly, that Legal Notice No.14 of 2015 was not tabled before Parliament in accordance with the provisions of the **Statutory Instruments Act** and as a result is null and void.

37. In response, the Respondent contended that the Petitioner was consulted and participated in the entire process that led to the increment of NHIF contributions and as a result the Petitioner's members' right to fair administrative action cannot be violated simply because the Petitioner's views were not adopted or were ignored. That there has not also been a violation of the consumer rights of the Petitioner's members and that it is the responsibility of the Cabinet Secretary in-charge of health to transmit the Legal Notice to the Clerk of Parliament who would in return table it before Parliament. It also submitted that the NHIF deductions were a statutory deduction in the form of a tax and as such there cannot be double taxation in its imposition. On the issue of violation of the right to health, the Respondent submitted that its role is limited to providing a medical insurance scheme and it does not in any way provide healthcare system. It also raised the issue that the Respondent was not a proper party in these proceedings and the Petitioner ought to have sued the NHIF Board of Management.

38. I have taken into account all the above submissions and I have also carefully perused the documents availed by the Parties and at this interlocutory stage, I must say that both parties have raised weighty issues which need to be determined conclusively but not at this stage. *Prima facie* however, given the factors that a Court ought to consider in granting a conservatory order as stated elsewhere above and juxtaposing the same with the matters raised in the application before me, I opine as follows;

39. From the documents availed by the Respondent there is a clear indication that there was some public participation in one way or the another in the process leading to the participation of Legal Notice No.14 of 2015. As to whether the Petitioner's members were consulted in that process is an issue that cannot be determined at this stage. There is also the issue whether the said public participation met the Constitutional threshold laid out in the cases of ***Nairobi Metropolitan PSV Saccos Union Limited & 25 Others v County of Nairobi Government and 3 others, Petition No.486 of 2013, Moses Munyendo and 908 Others v Attorney General and Another, Petition No.16 of 2013*** and more recently, ***Coalition for Reform and Democracy & 2 Others vs The Republic of Kenya & Another (No.2) [2015] eKLR***. That issue cannot similarly be determined at this stage.

40. The Petitioner also made allegations of violation of the right to fair administrative action as provided for under **Article 47**, consumer rights under **Article 46** and right to health under **Article 43** of the **Constitution**. In my view, all these allegations would have to be reviewed and looked at in the context of the whole process and with the benefit of evidence tendered. The same would also apply to all other allegations of breach made out against the Respondent as regards alleged violation of the Statutory Instruments Act and double taxation. I am unable to make any determinate findings on those matters for obvious reasons.

41. In addition, I am aware that certain orders have been made by the Industrial Court suspending the payment of the new NHIF rates but I am not privy to the context in which those orders were made. I am also not aware of the parties to that Cause although the orders issued were alluded to by Mr. Arwa during submissions. I have also asked myself the questions, since the NHIF is a nation-wide medical scheme and its Board of Management has representatives from a number of member organisations including KNUT and COTU, what was their role in the passage of the new

rates and why is the Petitioner who was allegedly consulted prior to the publication of the impugned Legal Notice now raising doubts, alone, as to the legality of both the process and the Legal Notice?

42. In addition, in **Gatirau Peter Munya (supra),** the Supreme Court stated that the public interest principle ought to guide the grant or denial of conservatory orders in constitutional litigation. In that context, there are millions out in the public domain who are paying the new rates and it is unclear what their position is. Perhaps they are or are not happy with it. How can I suspend payment of the new rates without their input?

43. All the above questions and issues looked at in the context of the law as I understand it, would lead me to the conclusion that important as those issues are, I am not inclined to grant orders to suspend the payment of the NHIF rates which have in any event been implemented from 1st April, 2015.

44. I will therefore dismiss the Application dated 20th February 2015 but will also order that the Petition be heard expeditiously and judgment rendered as soon as possible.

45. The costs of both the Notice of Motion dated 20th February 2015, shall abide the Petition.

46. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JUNE, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Miron – Court clerk

Mr. Arwa for Petitioner

No appearance for Respondent

By Court

Ruling was slated for 12/6/2015 but no party appeared. It is now duly delivered.

ISAAC LENAOLA

JUDGE

Further Order

Respondent to file a response to the Petition within 7 days and Submissions to be filed thereafter for hearing on 24/7/2015 at 11.00 a.m. Notice to issue.

ISAAC LENAOLA

JUDGE

15/6/2015