REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

J.R. MISC. APPLICATION NO. 363 OF 2013

IN THE MATTER OF: AN APPLICATINO BY DR. WAMBUGU, DR. WAIRIOKO NDIBA AND MERIDIAN MEDICAL CENTRE, FOR LEAVE TO APPLY FOR LEAVE TO APPLY, FOR ORDERS OF PROHIBTION AND CERTIORARI

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ETHICS AND ANTI-CORRUPTION COMMISSION ACT, 2011

AND

IN THE MATTER OF THE PENAL CODE, CHAPTER 63 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE OFFICE OF THE DIRECTOR FO PUBLIC PROSECUTION ACT, 2013

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT, NO.3 OF 2005

AND

IN THE MATTER OF THE NATIONAL HOSPITAL INSURANCE FUND ACT, NO. 9 OF 1998

AND

IN THE MATTER OF ACC. NO.12 OF 2013,

REPUBLIC – VS – RICHARD LANGAT KERICH, MARWA FADHILI CHACHA, DAVID KIPRUTO CHINGI, PETER NGUNJIRI WAMBUGU, NDIBA WAIRIOKO AND MERIDIAN MEDICAL CENTRE LIMITED

RULING

INTRODUCTION

1. By a Notice of Motion dated 15th October 2013, the applicant herein, **Dr. Wambugu, Dr. Wairioko Ndiba and Meridian Medical Centre**, sought leave of the Court to commence various Judicial Review orders of certiorari and prohibition. They also sought an order that the grant of the said leave do operate as a stay of the decision by the Director of Public Prosecution to charge the Applicants for a criminal offence for their actions and conduct in the contract between Meridian Medical Centre Limited and National Hospital Insurance Fund Board of Management and specifically do operate as a stay of all criminal proceedings against the applicants on charges of conspiracy to defraud contrary to section 317 of the ***Penal Code***, Chapter 63 of the Laws of Kenya, and obtaining money by false pretences contrary to section 313 of the ***Penal Code***, Chapter 63 of the Laws of Kenya, in ACC. No. 12 of 2013, **Republic vs. Richard Langat Kerich, Marwa Fadhili Chacha, David Kipruto Chingi, Peter Ngunjiri Wambugu, Ndiba Wairioko and Median Medical Centre Limited.**

APPLICANTS' CASE

2. The application was supported by a verifying affidavit sworn on 15th October 2013 by **Dr Peter Ngunjiri Wambugu**, a director at Meridian Medical Centre Limited.
3. According to the deponent, on 2nd October 2013 he was charged together with his co-director, **Dr. Ndiba Wairioko**, and **Meridian Medical Centre Limited** and others, by the Director of Public Prosecution in the Chief Magistrate's Court Anti-Corruption Court in Nairobi, in ACC. No. 12 of 2013, **Republic –Vs- Richard Langat Kerich, Marwa Fadhili Chacha, David Kipruto Chingi, Peter Ngungiri Wambugu, Ndiba Wairioko and Meridian Medical Centre Limited** with conspiracy to defraud contrary to Section 317 of the ***Penal Code***, Chapter 63 of the Laws of Kenya and obtaining money by false pretences contrary to section 313 of the ***Penal Code***, chapter 63 of the Laws of Kenya.
4. According to him, the Government of Kenya, through the then Ministry of State for Public Service, and the then Office of the Prime Minister, initiated a scheme for provision of comprehensive medical insurance and medical care for public servants, the disciplined services and Teachers Services and Teachers Service secretariat staff within the Country. The Government's proposal and/or intention was to cover 216,789 principal members and it was also intended to benefit the principal member, the spouse and four (4) dependent Children under 18 years and up to a minimum of twenty five (25) years of age, if still in school. Pursuant thereto, the Government through the then Ministry of state for Public Service initially advertised and thereafter re-advertised again tenders for the provision of the medical insurance cover for public servants, the disciplined service and Teachers service Commission secretariat staff by inviting consortiums of insurance companies but at the material times the bidders thereof were found to be unresponsive, wherein one of the private insurance consortium quoted a sum of Kshs. 12.32 billion per year and the lowest was for Kshs. 3.8 billion per year but it had inhibitive exclusions and also failed to meet the parameter of technical capacity. Consequently, and for the interest and general good of the civil servants in Kenya and National Hospital Insurance Fund (hereinafter referred to as the Fund) beneficiaries, the Government requested and directed the Fund to submit a technical and financial proposal for provision of the proposed scheme after which the Government of Kenya ultimately made a decision to procure the medical insurance cover for its staff through the Fund and the said parties and through the them ministry of State for Public service, and the Board of Management of the Fund, negotiated a contract which was approved by the Board of the Fund under which contract the Fund was obligated to, among others, contract medical facilities to offer the services. The Fund thereafter executed a contract with the Government of Kenya, through the then Ministry of State for Public service, for provision of medical cover to civil servants and disciplined services. During the said period, the Fund's Board of Management and several of its Senior Management Staff visited nine (9) countries in Europe, Asia and Latin America to learn on health care systems with a focus on out-patient cover during which observations were made that all countries with successful out-patient cover finance them through capitation system, with a focus on primary health care and coverage. The Fund also commissioned an actuarial study through the Firm of Alexander Forbes Consultants & Actuaries to establish the

feasibility and sustainability of introduction of out-patient cover in Kenya and in the eventual report the consultants recommended that the Fund offers both in-patient and out-patient covers. On 21st July 2008 the Fund placed an advertisement in the Daily Newspapers calling on all interested healthcare providers to express an interest to provide outpatient healthcare services on a pilot basis to the Fund's members and beneficiaries through capitation payment system vide Tender No NHIF/014/2008-2009 under which system the health care provider is paid a certain amount per patient by the health insurer during a prescribed period of time on terms that the healthcare provider would provide an agreed quality of healthcare services to the beneficiaries of the scheme within that period of time using the amounts paid to him.

5. That system, according to the deponent, essentially transfers the risk from the healthcare insurer to the provider of medical services wherein in instances where fewer beneficiaries fall sick during the prescribed period and consequently less money is spent by the healthcare provider in giving the required healthcare services, then the healthcare provider makes a profit. If on the other hand many beneficiaries fall sick during a specified period and as a consequent thereof more money is spent on them than previously allocated sum of money, then the healthcare provider suffers a loss. It was as a result of this that **Meridian Medical Centre Limited** expressed an interest to participate in the tender No. HIF/014/2008-2009 by NHIF and was subsequently shortlisted together with three (3) other healthcare providers, being **Clinix Healthcare Limited**, **Thika Road Health Services** and **Nairobi West Hospital**, in a competitive process that according to the deponent they did not interfere or intermeddle in any way. The four (4) bidders aforesaid were then requested to submit their technical and financial proposals which were also evaluated by the seven (7) member Tender Evaluation committee of the Fund in consultation with the management tender committee of the Fund . As none of the other interested parties or bidders challenged the outcome of the evaluation process by the Fund before the Review Board as required under the ***Public Procurement and Disposal Act***, **Meridian Medical Centre** together with **Clinix Healthcare Limited** and **Thika Road Health Services Limited** were awarded the contract to provide health care to Civil Servants and members of Disciplined Services through capitation payment system on a (6) month pilot phase and contracts were signed between the Fund and each of the other successful bidders aforesaid and the contract between the Fund and **Meridian Medical Centre Limited** provided clearly that after completion of the six month pilot phase, there would be a nationwide roll-out of the scheme and each of the successful bidders aforesaid would be given a three (3) years contract to provide services in that regard.

6. Sometime in 2010 the Fund advertised for accreditation of out-patient service providers and Meridian presented a proposal and was shortlisted together with many other healthcare providers and the list was advertised in the local dailies of 28th August 2010 after which a contract was executed between the Fund Board of Management and **Meridian Medical Centre Limited**, for provision of primary healthcare and treatment services and thereafter **Meridian Medical Centre Limited** and each of the other successful bidders were then accredited by the Fund as providers of healthcare services within the meaning of the Fund Act and were subsequently gazette. It is deposed that as at January 2012 Meridian had increased its facilities to 11 clinics, which had also been inspected by the team from the Fund. However gazettement of all facilities and the responsibility thereto under the contract was upon the Fund was being awaited. According to him, Meridian Medical Centre Limited and the other successful bidders provided healthcare services to the beneficiaries during the six (6) month pilot phase to the satisfaction of the Fund and the beneficiaries and as a consequence thereof the healthcare providers were accordingly awarded fresh contracts to provide the same services for a further period of three (3) years beginning January 2012. When therefore the Civil servants and the members of Disciplined Services Medical Scheme was rolled out Country wide, it was not restricted only to the aforesaid successful bidders but to the contrary all medical facilities accredited by the Fund at the time, which were each allowed to compete equally on the same terms and Civil Servants and members of the disciplined services in Kenya were allowed to choose their preferred healthcare provider which would adequately serve them and their beneficiaries, all numbering a maximum of five (5), and as a consequence thereof each healthcare provider participating in the Scheme would then be paid the agreed sum per beneficiary and would be expected, on that budget to provide both inpatient and outpatient medical services to the beneficiaries who had selected it. Conversely, the beneficiaries would also be free to change their healthcare provider within three (3) months and would

automatically leave the service provider if they felt that they did not receive the best quality of services.

7. The deponent avers that in order to improve service delivery and quality of care to patients or beneficiates who would have chosen Meridian Medical Centre facilitates, they increased their facilities to a total of 20 clinics across the country from the initial four (4) facilities and they were duly registered, on their successful applications, as private medical institutions by the Regulatory Body, being the Medical Practitioners and Dentists Board. In February 2012 or thereabout there was an inspection of the healthcare facilities offering the scheme and the team included representatives from the Ministry of Medical Services, the Ministry of Public Service, the Public Service Commission, Kenya Prisons Services, Administration Police, Kenya National Police, among others which the team concluded their inspection and thereafter prepared a report and on 9th February 2012 the applicants received a letter from the Fund with the inpatient referral protocols ad guidelines. According to the deponent, during the first phase of the Scheme, all the Fund's accredited healthcare providers were paid according to the same formula based on the number of the beneficiaries and who selected their respective facility and Meridian Medical Centre was chosen by 34,824 civil servants and members of the disciplined services and was accordingly paid Kshs.116,935,500/= based purely on the contract with the Fund and for services rendered as envisaged n the existing contract. Similarly, **Clinix Healthcare Limited** was chosen by58,900 people and as a consequence thereof it was paid the sum of Kshs.202,161,187.50 noting that the formula used to pay all healthcare providers in the scheme at the time participating was Kshs.2,850 x 5 beneficiaries ¼ quarterly, plus the number of beneficiaries who chose the healthcare provider.
8. However, immediately after the payments were made to the participating healthcare provider, in strict compliance with the contracts with the Fund, some politicians and other third parties, who did not understand how the scheme was designed, the issue of capitation and how it operated, started accusing the Fund and the Healthcare providers, including Meridian Medical Centre, of engaging in corruption through the press and other modes as a result of which Ethics and Anti-corruption Commission commenced investigations on the scheme and arising from the publicity of the scheme various other Government agencies including the Efficiency Monitoring Unit, the Inspectorate of State Corporations, the Parliamentary Committee on Health, the Kenya National Audit Office and the Ethics and Anti-corruption Commission undertook investigations on the Scheme and all of them apart from except the Ethics and Anti-corruption Commission, found there was no corruption involved and further that no money was lost.
9. The deponent consequently wrote several communications to the Fund and other agencies to pursue the outstanding sum that was contractually due to Meridian. However, arising from the bad publicity of the scheme and for other extraneous reasons the Board of Management of the Fund cancelled the contract with **Meridian Medical Centre Limited** on 14th June 2012 without any notice which cancellation according to the deponent, was for extraneous reasons, other than performance of the applicant's facilities, and as a result thereof the applicants instructed their advocates to sue the Fund for breach of contract and on 5th August 2013 they filed suit against the Fund in Nairobi, H.C.C.C. No. 345 of 2013, **Meridian Medical Centre Limited –vs- National Hospital Insurance Fund**, at the Milimani Law Courts for breach of contract and service of the pleadings thereof was effected upon the Defendants thereto and the Fund duly filed a defence but with incomplete witness statements. According to the deponent, the action by the Director of Public Prosecution and the Ethics and Anti-Corruption Authority to charge him and others in ACC. No 12 of 2013, **Republic –vs- Richard Langat Kerich, Marwa Fadhili Chacha, David Kipruto Chingi, Peter Ngunjiri Wambugu, Ndiba Wairioko and Meridian Medical Centre Limited** was actuated by the aforesaid civil suit hence he reasons why the pleadings filed by NHIF therein being incomplete. Following the said charge, on 2nd October 2013 the applicants were arraigned in Court together with some employees of the Fund on charges relating to the contract between **Meridian Medical Centre Limited** and the Fund.
10. In his view, the charge for conspiracy to defraud NHIF of Kshs.116,935,500/= contrary to Section 317 of the ***Penal Code*** and obtaining the sum of Kshs.18,902,625/= contrary to section 313 of the ***Penal Code***, are inter alia, unfounded, discriminatory, unreasonable and an abuse of the court process, for reasons that the Ethics and Anti-Corruption Commission and Director of Public Prosecution failed to consider that the Healthcare provider had a commercial contract with the

Fund and it undertook its obligation under the said contract in issue by treating patients, as envisaged in the contract; the Investigating body failed to consider that the healthcare providers were contracted after undergoing a competitive tender process which was not challenged as envisaged in Law; the investigating body failed to consider the process prior to execution of the contract between the Fund and **Meridian Medical Centre Limited** as stated herein above; capacity was not a term of the contract for the provision of the requisite healthcare services and even if it was, the alleged want of capacity would only ground a breach of contract and not a criminal offence; none of the beneficiaries who chose **Meridian Medical Centre Limited** and who received treatment at its facilities had complained about the quality of services that they received during the pilot phase or thereafter; the investigating body failed to consider that after press coverage of the scheme the Regulatory body, being the Medical Practitioners and Dentists Board, visited the healthcare provider's facilitates and affirmed its capacity t undertake the contract. Further, the contract had a provision for termination in case of breach by either party; there are several healthcare providers who participated in the scheme and who received payments under their respective contracts whose capacities are, in the estimation as a medical practitioner in Kenya, much lower than that of Meridian medical Centre and who have not been investigated or charged; and during the performance of the contract dated 1st January 2012 the applicants rendered the same services to NHIF beneficiaries, together with over 300 other healthcare producers, and all of the said providers were paid by NHIF under the same terms and computation. However, it's regrettable that only themselves were charged for an alleged criminal offence.

11. He further avers that charges against are actuated by malice, discriminatory and made with extraneous reasons for reasons that if mere participation in the expression of interest by ourselves and in the accepted to undertake and offer our professional services under that scheme was the crime that **Meridian Medical Centre** committed, then all the other healthcare providers who participated in the scheme should have been charged; Prior to the arrangement in Court of the Directions of Meridian Medical Centre on alleged corruption related charges the local newspapers as well the news bulletins of 1st October 2013 extensively revealed that he Directors of the Meridian Medical Centre Limited would be arraigned in Court on criminal charges making an inference that they had advance knowledge; and the Applicants charged with corruption on the basis of the facts narrated herein above would not only be a gross abuse of Office but would also be discriminatory since all the other healthcare providers who participated n Scheme have not being subjected to the same treatment. Instead only the Applicants are being singled out for harassment simply because they were chosen by many beneficiaries who chose it nor can it be said that there was anything wrong with being a preferred healthcare provider.
12. It is further deposed that any dispute under the contract was to be settled through Arbitration but the Fund failed to invoke the dispute resolution under its parent Act or the contract between the parties and yet the applicants' facilities were duly registered by the Regulatory board and the said Board was mandated by statute to regulate medical profession in Kenya and was the proper body to confirm the issue of capacity.
13. According to the applicant, prosecutions of the Applicants would not only violate their fundamental rights but would also violate the objectives and purposes of the ***Anti-Corruption and Economic Crimes Act***, the Office of the ***Director of Public Prosecution Act, 2013*** as well as Constitution of the Republic of Kenya hence it is only fair and just that this Honourable Court grants the orders sought herein to protect this Constitution of Kenya from being violated and also to safeguard the fundamental rights and freedoms of the Applicants.

<u>RESPONDENTS' CASE</u>

14. The Respondents filed the following grounds of opposition:

1. **The application is misconceived, frivolous, vexatious, incompetent, improperly before court and an open abuse of the court process.**
2. **The application has not met the prerequisite requirements for the grant of the orders sought.**
3. **The matters raised by the applicants in the pleadings filed herein form the basis of their defences which should be raised before the trial court and as such cannot be raised before**

the High Court in the manner proposed herein.

4. **No sufficient grounds have been advanced to warrant the grant of the orders sought.**
5. **The applicants are guilt of material non-disclosure.**
6. **The laws of Kenya provide essential safeguards for a fair trial which is also entrenched in the Constitution of Kenya 2010. It has not been demonstrated that the applicants will not be accorded a fair trial before the subordinate court to warrant the granting of the orders sought.**
7. **An order of certiorari cannot issue against an action or decision which has been taken or made in execution and discharge of a legal mandate.**
8. **The institution of criminal proceedings against the applicants or either of them cannot be said to be an abuse of the process, discriminatory or actuated by malice or ulterior motives.**
9. **The High Court has no jurisdiction to determine whether or not the applicants are guilty or not.**
10. **The High Court has no jurisdiction to determine whether or not any criminal office was committed by any of the petitioners/applicants in relation to the matters the subject of the pleadings herein.**

15. Apart from the said grounds the 1st respondent filed a replying affidavit sworn by **Laura Spira**, a prosecution counsel in the office of the 1st respondent on 4th November 2013.
16. According to the deponent, under Article 157 sub Article 6 of the Constitution of the Republic of Kenya 2010, the director of Public Prosecution (sic) including the institution, undertaking, taking over, continuance and or termination of criminal proceedings amongst other functions and duties and in the in the discharge of its duties and functions, the staff of the Office of the Director of Public Prosecutions is bound by, do respect, observe and uphold the following Constitutional provisions, inter alia regard to public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process under Article 157 sub Article 11; upholding and defending the Constitution; the national values and principles of governance enshrined in Article 10 in the application, interpretation of the Constitution as well in making and implementing the laws and public policy decisions; respecting, observing, protecting, implementing, promoting and upholding the rights and freedoms in the Bill of rights enshrined in Chapter four; accountability to the public for decisions and actions taken and generally observance of Chapter Six (Leadership and Integrity); and accountability for administrative acts and observance of the values and principles of public service under Chapter Thirteen.
17. According to her, ex parte applicants have not demonstrated that in making the decision to prefer criminal charges against them, either the Director of Public prosecutions or any member of staff of the Office of the Director of Public Prosecutions has acted without or in excess of the powers conferred upon them by the law or have infringed, violated, contravened or in any other manner failed to comply with or respect and observe the foregoing provisions of the Constitution of Kenya 2010 or any other provision thereof. Further, pursuant to Section 35 of the Anti-Corruption and Economic Crimes Act, 2003, the Director of Public prosecutions received the investigations file with a report and recommendations from the interested party in respect of the matter the subject and the criminal charges sought to be quashed herein and the DPP independently reviewed and analysed the evidence contained in the investigations file including the witness statements, documentary exhibits and statements of the ex parte applicants as required by law and it was on the basis of the said review and analysis that the DPP gave directions to prosecute the applicants.
18. The decision to charge the applicants, it is deposed, was informed by the sufficiency of evidence on record and the public interest and not any other considerations and that the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support of the charges.
19. According to the deponent, under Article 157 sub Article 6 of the Constitution of Kenya 2010, the Director of Public Prosecution exercises State powers of prosecution and in that capacity, may institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed; under Article 157(10) of the Constitution of Kenya 2010, as replicated in section 6 of the Office of the director of Public Prosecutions Act, 2013, the director of Public Prosecution does not require the consent of any person or authority for the

commencement of criminal proceedings. Further, and in the exercise of his powers or functions, the director of Public Prosecutions does not act under the direction or control of any person or authority. The decision to institute criminal proceedings by the DPP is therefore discretionary; under Article 249 sub Article 2 of the Constitution, as an independent office, the director of Public Prosecutions is subject only to the Constitution and the law and is not subject to the direction or control by any person or authority; in view of the foregoing, the court should exercise extreme care and caution not to interfere with the Constitutional powers of the DPP to institute and undertake criminal proceedings and should only interfere with the independent judgement of the DPP if it is shown that the exercise of his powers is contrary to the Constitution, is in bad faith or amounts to an abuse of process which requirement the applicants have failed to satisfy; under section 193A of the ***Criminal Procedure Code***, Cap 75, Laws of Kenya, 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 criminal proceedings; under section 35 of the ***Anti-Corruption and Economic Crimes Act***, 2003, following an investigation, the Ethics and Anti Corruption Commission (EACC) is mandated to report to the Director of Public Prosecutions on the results of the investigations whereupon the Director of Public Prosecutions is supposed to make a decision whether to prosecute or not; and It is apparent from the foregoing statutory provisions that the allegation by the ex parte applicants is without merit, legal reason or backing.

INTERESTED PARTY'S CASE

20. The interested party on the other hand on 7th November 2013 filed a replying affidavit sworn by **Ignatius Wekesa**, an investigator with the interested party on 7th November 2013.
21. According to the deponent, following public uproar over the implementation of the Civil Servants and Disciplined Forces Insurance Scheme (hereinafter referred to as 'the Scheme') in which it was reported that two little known companies had been paid a substantial amount of the money set aside for the purposes, the Ethics and Anti-Corruption Commission (EACC) was invited by the Government to conduct investigations into the matter and the deponent was a member of the investigating team. The decision to conduct the said investigations was a Government decision made on or about 8th May, 2012 and not a reaction to civil suit no. 345 of 2013 (**Meridian Medical Centre vs. National Hospital Insurance Fund**) as claimed by the Applicants which suit was filed on or about 5th August, 2013, barely one month before these Judicial review proceedings were instituted. I annex hereto and mark EZCC 2, the first page of the plaint in respect of the said suit. According to the deponent, the Fund is a fund created under the ***National Insurance Fund Act*** (NHIF Act) to finance insurance services nationally and it also establishes the National Hospital Insurance Fund Management board (hereinafter, 'the Board') to manage the Fund. The Board is mandated under Section 2 as read together with Section 22 of the NHIF Act to pay from the Fund, benefits to declared hospitals for expenses incurred in those hospitals by any contributor, his named spouse, child or other named dependant. According to the said investigations, the Chief Executive acting in concert with a few handpicked employees of the Fund conspired with the Directors of at least two companies to run the scheme contrary to the law governing the Fund, the ***Public Procurement and disposal Act*** and other laws, the effect of which was that a substantial part of the money paid by the government as premium of the Scheme ended up in the accounts of the two companies without a corresponding benefit to the members and their dependants. One of the companies involved, according to the deponent, is Meridian Medical Services, the 1st Applicant herein, acting under the agency of the 2nd and 3rd Applicants while the other company was **Clinix Health Care Ltd** and similar charges are in the process of being brought against it, its directors and officials of NHIF. It is his view that from inception, the Scheme was operated contrary to law and at the end of the day, there are no verifiable benefits to a majority of the Members and their dependants.
22. According to him, a system of payment known as capitation was adopted the effect of which is that money would be paid before any service is rendered by the service provider which is contrary to the NHIF Act particularly section 22, section 45(2) of the ***Anti Corruption and Economic Crimes Act*** (ACECA) and other Government Regulations. Secondly, no legally permissible procurement procedure was adopted and the reference to a procurement process by the Applicants

is a reference to an initial project known as the pilot project and which was the subject of a separate contract. No procurement Committee of NHIF was involved in the selection of the Companies.Thirdly, contracts were entered into with the companies rather than declared hospitals under the Act with the result that payment would be made without reference to a corresponding service. Fourthly, it was declared that a certain number of members had chosen the companies whereas in fact no such selection took place. What occurred is an assignment of beneficiaries for purposes of inflating the capitation whereas the beneficiaries were not aware or otherwise came to learn of the assignment much later. Remarkably, the two companies are the only institutions who purportedly attracted beneficiaries from each and every NHIF station although they were mainly concentrated in Nairobi. Fifthly, assignment was made to the companies in respect of non-existent institutions and even when they existed, they were not accredited by NHIF and were therefore not declared hospitals within the meaning of the Act. In addition, the contract was signed in the third and final month of the quarter in respect of which the payment relate meaning that for the majority of the period, services, if any, were rendered without a contract. As a result money was paid for services not rendered or not adequately rendered contrary to the law. To ensure that the plan received little resistance, the Chief Executive Officer of NHIF operated the Scheme outside the structure of NHIF and thereby bypassed inbuilt checks and balances and appointed a team of four mid-level officers to run the scheme and as at 1st January, 2012, when the contract was supposed to begin, Meridian Medical Services had only 4 institutions duly registered and accredited by NHIF all of which were in Nairobi and these were Yaya Centre Branch, Nation Centre Branch, Donholm Clinic and The Mall, Westlands Branch. As at January, 2012, only 10 of the 1st Applicant's medical institutions had been registered all except Kitengela Branch were in Nairobi. It is deposed that the obvious inadequacies notwithstanding, the 1st Applicant was initially allocated 30,091 members from around the Country which figure was subsequently revised upwards to 32,688 with members being in each and every NHIF station in the County including Baringo, Mandera, West Pokot, Isiolo, Wajir, Taita Taveta and Samburu. Meridian Medical Centre - Remarkably also, the 1st Applicant was purportedly preferred by more Principal members than local hospitals even where they had no presence. While acknowledging receipt of 32,824 members 'amounting to Kshs. 116 935, 500' the 2nd applicant stated in a letter dated 22nd, February, 2012 that they had 18 clinics nationally, a fact which he knew to be false at the time but were paid a total sum therefore of Kshs 116,035,500 yet only Yaya Centre Branch, Nation Centre Branch, Donholm Clinic and The Mall, Westlands Branch were duly licensed and gazette as per the law. The total amounts paid in respect of the licensed and declared institutions according to the Applicants' own document is Kshs. 19,464,200 while the balance of the money amounting to Kshs. 95,571,300, as per the Applicants' own documents, represents payments in respect of unlicensed and/or undeclared institutions which are not legitimate payments in view of the provisions of the ***Medical Doctors and Dentists Act***, cap. 253 and the ***NHIF Act*** and constitute unlawful acquisition of public property contrary to the provisions of section 45 of ACECA.

23. The deponent avers that despite the scheme having began on 1st January, 2012, it was not until 1st March 2012, a month to the end of the 1st quarter, that a contract was purportedly entered. The contract which was poorly drawn, ambiguous and not specific to the 1st Applicant was curiously left to a mid-level officer to execute on behalf of the NHIF Board of Management. The contract did not mention or describe the applicant and it is not clear whether the stamp placed against the part for the other contracting party is that of the 1st Applicant as a service provide or a holding company. The obligations of the 1st Applicant and the locations where service is supposed to be rendered and by which provider and to which number of members is not set out. To him, the contract ought to have been executed with each registered and declared medical institution and not with a limited liability company purporting to be the holding company as seems to have happened in this case. In further contradiction, the Contract describes 'the Health Provider' as 'an institution which is legally licensed as a health care provider and is recognized by NHIF offering medical care and treatment' which therefore does not include a limited liability company unless duly licensed and accredited. Having been assigned 32, 688 beneficiaries and a purported contract drawn, an internal memo was generated by one of the accused persons to the Chief Executive (also accused) and a payment voucher prepared on or about 6th March, 2012. In further contradiction,

the internal memo stated that the 1st Applicant was being paid in respect of 19 clinics yet the said clinics have not been set out. The deponent avers that besides **Clinix Health Care Ltd** which was paid Kshs. 202, 161,188, no other institution, including National Hospitals such as **Kenyatta National Hospital** and **Moi Teaching and Referral Hospital**, was paid money in excess of 5 million shillings. To the deponent, it is incumbent on the institution which seeks accreditation to satisfy the Board that it has complied with all the conditions hence to suggest that it was the responsibility of NHIF to accredit is tantamount to saying that it is incumbent on the examiner to ensure that the student passes. Such an agreement as referred to by the Applicants, if it exists, is repugnant and unenforceable and can only be viewed in the wider conspiracy between the applicants and the Chief Executive of NHIF to acquire public property illegally and in his view, parties cannot compromise their affairs in contravention of the law and that in the premises, any agreement to deal with undeclared hospitals is illegal, null and void. According to the interested party, 43 witnesses have been lined up to prove the case.

APPLICANTS' SUBMISIONS

24. On behalf of the applicant it was submitted, after reiterating the brief facts on the circumstances leading to this cause that the issues in these proceedings and in the impugned proceedings before the Magistrate's Court are the same as they relate to the same facts, issues and parties hence based on the hierarchy of Courts, the latter ought to give way to the instant proceedings. This course, it is submitted is meant to avoid wastage of judicial time in the event that the instant application succeeds. In support of this line of argument the Supreme Court decision in **Re The Matter of the Interim Independent Electoral Commission [2011] eKLR** was cited.
25. It is further submitted that this Court found that the applicants have established a *prima facie* case and that the applicant intend to argue that the impugned proceedings amount to abuse of the Court process as they are connected to and relate to a pending civil suit in which the contract between the Fund and Meridian is in issue hence the criminalisation of what is otherwise a civil dispute is an indication of improper and ulterior motive in commencement of the criminal case; that the criminal case was commenced to exert pressure on Meridian to compromise or settle the said civil suit hence the selective prosecution; that the criminal vase was initiated in the absence of proper foundation and basis. In support of this submission, the applicants relied on **Gerald Mbogo Mwaniki & Another vs. the Attorney General & Another Misc. Appl. No. 931 of 2004**; **Republic vs. Tarus [2003] 2 KLR 588**, **Republic vs. The Chief Magistrate's Court, Ex parte Qian Guo Jun** and **Macharia & Another vs. Attorney General [2001] KLR 448**.
26. According to the applicants, the present cause may be rendered nugatory if the High Court allows the Subordinate Court to proceed with the proceedings therein in case of an eventual decision in the High Court in favour of the applicants and they cite ***Judicial Review Handbook*** by Michael Fordham, Fourth Edition 2004 at 415-425; **Shah vs. Resident Magistrate, Nairobi [2000] EA 208**; **Christopher Ndarathi Murungaru vs. Kenya Anti-Corruption Commission & Another [2006] eKLR** and **Njuguna vs. Minister for Agriculture [2000] 1 EA 184**.
27. It is submitted that whereas the grant of the stay sought would not prejudice the DPP, the refusal to grant the same will highly prejudice the applicants in their business and calling yet this Court has a moral duty to protect indigenous Companies from collapsing and hundreds of citizens from losing their only source of revenue or employment as a result of cramped up charges. It is submitted that the health care provider, Meridian, has been forced to close down some of it facilities as a result of the said criminal case and further appearances thereat continues to adversely affect its business. It is also contended that as a result of the said criminal proceedings a foreign investor who was intending to inject substantial funds into the said Meridian has pulled out.
28. In his oral address, **Mr Kilukumi**, learned counsel for the applicants submitted that unless the proceedings in the Magistrate's Court are stayed there is a likelihood that the appellants may be convicted in which event they are likely to lose their liberty hence rendering the success in these proceedings nugatory. According to him the criminal case is set down for hearing on 27th January 2014 and while appreciating the fact that judicial review matters are expedited and may well be concluded before the hearing date, learned counsel submitted that in the circumstances of this case, there is a vacation coming up hence that likelihood is purely speculative. To him the stay

will only be for a limited period hence causing no prejudice.

29. On the issue of the intitulement of the Motion, learned counsel submitted that the Motion satisfies all the requirements laid down in **Farmers Bus Service and Others vs. The Transport Licensing Appeal Tribunal [1959] EA 779** since the applicant is the Republic and the Respondents and the applicants are clearly named. He submitted that at the stage of leave there are no respondents and the application shows the applicant. In his view, the era of technical objection was swept away by the Constitution of Kenya, 2010.
30. On the issue whether the application ought to have been by Chamber Summons he submitted that Order 53 lays down that the application is to be made to a Judge in Chambers while under Order 51 all applications are by Motion so that it makes no difference whether it is by Chamber Summons or by Motion. He therefore urged the Court to administer substantive justice.
31. In learned counsel's view the issues raised in reply address the substantive Motion matters which ought to be dealt with at the hearing.
32. It was submitted that Article 157(11) of the Constitution as well as section 4 lays down a Constitutional obligation on the DPP to consider the need to avoid abuse of judicial process otherwise the DPP would be acting without jurisdiction if he did otherwise. He relied on **Re Githunguri Case** in support of this submission. Since it is the applicants' case that the criminal legal process is being abused, it is the applicants' case that the issue need full consideration hence the stay ought to be granted.

RESPONDENTS' SUBMISIONS

33. On behalf of the respondent, it was submitted by **Mr Mule**, that the decision to charge the having been made, it would be an exercise in futility to grant the orders barring the applicants from being charged since the Court cannot stay what has already taken place. It was further submitted based on **Kenya National Examination Council vs. Republic Civil Appeal No. 266 of 1996** that an order of certiorari only issues to quash a decision made without jurisdiction or in excess thereof or in breach of the rules of natural justice, the High Court cannot take the place of the Anti-Corruption Court established under the ***Anti-Corruption and Economic Crimes Act*** 2003 which is the Court competent to make a finding whether or not a criminal offence was committed after hearing the evidence. In support of this position the case of **Thuita Mwangi & 2 Others vs. the Ethics & Anti-Corruption Commission & 3 Others High Court Petition No. 369 of 2013** was cited. It was submitted that based on Article 157(6) and 157(10) to issue or grant the orders sought would be tantamount to ordering the DPP not to discharge its Constitutional mandate and functions. Since the respondents acted within the provisions of the relevant enabling legislation so the orders of certiorari and prohibition cannot be sustained. It was therefore submitted that since the substantive Motion is unmeritorious the accompanying conservatory orders based thereon cannot be sustained. Further since the criminal case is scheduled for hearing on 27th to 31st January 2014 it is unlikely that it will be heard before the said date and by that time these proceedings would have been concluded.
34. It is submitted that the matters raised by the applicants ought to form the basis of their defences before the trial court and since the laws of Kenya provide essential safeguards for a fair trial entrenched in the Constitution, it has not been demonstrated that the applicants will not be accorded a fair trial before the subordinate court to warrant the granting of the orders sought.

INTERESTED PARTY'S SUBMISSIONS

35. On behalf of the interested party, **Mr Murei** submitted based on **Republic vs. Attorney General & Another ex parte Vaya & Another [2004] KLR 281** that it is in the public interest that criminal cases, particularly those touching on the misuse of funds be prosecuted expeditiously. According to him, once the DPP has directed that a prosecution be commenced against a person the same ought not to be interrupted unless he is abusing his powers and he relied on **Reg. vs. DPP Ex Parte Kebilene [2000] 2 AC 326** that the Court should be slow to allow a collateral challenge to the prosecution of a criminal case once the prosecuting authority has, upon consideration decided to charge a person with a criminal offence. To him the strength or otherwise of the criminal case is a matter for determination by the trial court hence the decision of the

prosecuting authority to charge cannot be questioned and in support of this submission he relied on **Thuita Mwangi and 2 Others vs. the Ethics and Anti-Corruption Commission High Court Petition No. 153 of 2013**.

36. According to the interested party there are no parties in the recital and based on **Farmer's Case** (supra) the application is incurably incompetent. It was further submitted that the application for leave s made by way of Notice of Motion contrary to Order 53 and judicial review proceedings being special proceedings the procedures set out ought to be used hence the application before the Court is not one for leave as contemplated under Order 53, is incompetent and ought to be struck out and leave vacated.
37. It is submitted that the grounds disclosed in the application are not grounds for judicial review but for a Constitutional petition and that the interested party has disclosed that a prima facie case of obtaining by false pretences and conspiracy to defraud has been made out against the applicants and other accused persons.
38. It is submitted that since the applicants are charged together with other persons even without them the case against the other persons would still go on hence any proceedings in the interim period would not be in vain. With respect to the bad publicity it is submitted that this is the price to pay for democracy and that once the applicants are vindicated any dent to their reputation will be repaired. It is submitted that since the prosecution has lined up 43 witnesses there is no way the criminal case can be concluded earlier than these proceedings which are at an advanced stage of hearing. With respect to the allegation of the need to protect indigenous companies, it is submitted that we cannot set a lower standard for such companies.

DETERMINATIONS

39. I have considered the application, the affidavits filed herein and the submissions made by the parties and this is the view I form of the issues raised.
40. It is alleged that the application for leave is incompetent for the reason that the said application does not indicate who the parties thereto are and reliance is placed on the case of **Farmers Bus Service and Others vs. The Transport Licensing Appeal Tribunal** (supra). In that case it was held that when proceedings in the High Court by originating summons or originating motion are *inter partes*, it is not sufficient to intitule them as 'In the matter of', etc. This must be followed by the names of the applicants and respondents. However, the Court further provided that The *ex parte* application for leave to apply for an order (for prerogative writ) should have been intituled:

> **"In the matter of an application by (applicants) for leave to apply for an order of Certiorari and**
>
> **In the matter of Appeals Nos. 11 to 16 inclusive, 30, 32-35 inclusive, 37, 39, 41-43 inclusive, all of 1958, of the Transport Licensing Appeal Tribunal."**

41. Similarly, the issue of intitulement of an application for leave was dealt with by **Maraga, J** (as he then was) in **Republic vs. Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L) 563,** where he held that an application for leave ought to be intituled as hereunder:

> **In the Matter of An Application by (the applicants for leave to apply for orders of certiorari and prohibition**
>
> **And**
>
> **In the Matter of Kenya Ports Authority Act**
>
> **And**
>
> **In the Matter of the National Environmental Management and Co-ordination Act 1999.**

42. When a party makes an application for leave it is usually presumed that the application will be heard ex parte. It therefore follows that at that stage it is not necessary to have applicants and respondents in the title to the application. In this case it is clear that the application identifies what the matter in dispute is and who the persons moving the Court are. Accordingly, I do not agree that the application is incompetent on that score.
43. Nevertheless, in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal stated:

"Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court".

44. It follows that the objection is unmerited.
45. The second issue on the competency of the application was that the application for leave was commenced by Notice of Motion as opposed to Chamber Summons. Order 53 rule 1(2) of the ***Civil Procedure Rules*** provides:

An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

46. It is clear that the said provision only states where the application is to be made but does not expressly state by what procedure the application is to be heard. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486**, the Court held that Judicial review is a special procedure and as the Court is exercising neither a civil or criminal jurisdiction in the strict sense of the word, the invocation of the provisions of section 3A and Order 1 rule 8 of the Civil Procedure Rules render the application wholly incompetent and fatally defective since a representative suit can only be brought in an ordinary action under the Civil Procedure Act and rules. It would follow that strictly speaking the provisions of Order 51 rule 1 of the Civil Procedure Rules which provide that "all applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide" does not apply to applications for leave under Order 53 rule 1(2).
47. It is however my view that in light of no express procedure provided for making such an application, it would be elevating procedural requirements to a fetish if the Court were to disallow the application on that basis. It is therefore my view and I so find that an application for leave made by way of Notice of Motion is not ipso facto fatally incompetent. Even if it were incompetent, that is the kind of irregularity that would be cured under the provisions of Article 159(2)(d) of the Constitution. I accordingly decline to disallow the application on that ground.
48. That determination now leads me to the substance of the application.
49. The decision whether or not to grant a stay pursuant to leave is no doubt an exercise of judicial discretion and that discretion like any other judicial discretion must be exercised judiciously. What then are the circumstances under which the grant of leave in a judicial review application may be directed to operate as a stay? Order 53 Rule 1(4) of the ***Civil Procedure Rules*** provides:

> ***The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.***

50. Where, however, the decision sought to be quashed has been implemented leave ought not to operate as a stay. See **George Philip M Wekulo vs. The Law Society of Kenya & Another**

Kakamega HCMISCA No. 29 of 2005.

51. This position arises from the fact that once a decision has been implemented stay is nolonger efficacious as there may be nothing remaining to be stayed. It is only in cases where either the decision has not been implemented or where the same is in the course of implementation that stay may be granted.
52. However even where the leave is granted, it was held in **Jared Benson Kangwana Vs. Attorney General Nairobi HCCC No. 446 of 1995** that in considering whether the said leave ought to operate as a stay of proceedings the Court has to be careful in what it states lest it touches on the merits of the main application for judicial review and that where the application raises important points deserving determination by way of judicial review it cannot be said to be frivolous. I however agree that the strength or weakness of the applicant's case is a factor to be taken into consideration since it would not be right to stay proceedings where the Court is clear in its mind that the chances of the judicial review proceeding being successful are slim. However, in granting leave the Court usually takes into account whether a prima facie case has been made out. As was held by the Court of Appeal in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR**:

"Although leave granted *ex parte* can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear cut cases unless it be contended that judges of the Superior Court grant leave as a matter of course which is not correct. Unless the case is an obvious one, such as where an order of *certiorari* is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the application coming to court and there is, therefore, no prospects at all of success, the court would discourage practitioners from routinely following the grant of leave with application to set aside. Fortunately such applications are rare and like the Judges in the United Kingdom, the court would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted."

53. It is therefore my view that for a Court to find that the chances of applicant's case succeeding are slim after leave has been granted would lead to an absurdity. Where however, the application for leave and for stay are argued together, the Court is perfectly entitled to decline to grant the stay sought on the ground that the chances of the application succeeding are slim. Therefore having made a finding that the applicant's case disclosures a prima facie case, the issue of the merit or otherwise of the applicants' case is nolonger material as to consider the same would require me to go into the merits of the Motion which is yet to be heard.
54. However the mere fact that the application discloses a prima facie case does not necessarily qualify the matter to a grant of stay.
55. In my view, it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding.
56. **Maraga, J** (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** was of the view that:

    "As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction… In judicial review applications the Court should always ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited… The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act… A stay order framed in such a

way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted."

57. Therefore it is not in every case that there are chances of the High Court reaching a decision contrary to the one in the proceedings sought to be stayed that the High Court will stay those proceedings. It must be shown that the probability of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor.
58. In this case it has been submitted that there is a possibility taking into account the Court vacation that the criminal proceedings may be determined before these proceedings are concluded and that in that event the applicants are in danger of losing their liberty when the proceedings leading thereto are being challenged before this Court. The said criminal proceedings are slated for hearing on 27th January 2014. I agree that where the applicant is in danger of losing his liberty as a result of proceedings whose validity are being challenged stay ought to be granted. As was held in **United Insurance Co. Ltd. vs. Stephen Ngare Nyamboki Civil Application No. Nai. 295 of 2001,** in a matter involving the threat of imprisonment, if the order of imprisonment were to be enforced, even for a few days and the intended appeal were to succeed, that success will obviously be rendered nugatory and therefore stay granted. It must however be shown that there is a threat of imprisonment and not just that the prosecution may lead to imprisonment. In most criminal cases there is always a possibility that the accused may be imprisoned. That however does not mean that in all cases where a challenge is taken to criminal proceedings stay ought to be granted as a matter of course. Each case must be decided on its peculiar facts and circumstances.
59. In my view an application for stay may be made at any time in the proceedings and as and when the occasion arises though being discretionary the Court is entitled to take into account delay in applying for the same. In this case there is no threat of imprisonment of the applicant as yet. The hearing of the case is yet to commence and they have not even been placed on their defence. Accordingly I am not prepared to hold that at this stage the applicants are in danger of losing their liberty.
60. It is however contended that the applicants stand to lose both in their calling and business. That the institution of criminal proceedings invariably has the potential of somehow adversely affecting the accused's standing cannot be farfetched. That however is no a basis for blocking a criminal trial since if it turns out that the criminal process was invoked maliciously and without any reasonable basis one can sue for damages. Similarly the potential of losing business is not without more a basis for staying criminal proceedings.
61. On the issue of trumped up charges, that is an issue which must await the hearing and determination of the Notice of Motion.
62. I have also taken into account the fact that not all the accused persons in the subject criminal case are before me hence to grant orders staying the said proceedings without the other parties being afforded an opportunity of being heard may be prejudicial to their interests.
63. I have said enough to show that the orders sought in the Notice of Motion dated 15th October 2013 in so far as they relate to stay of the criminal proceedings are unmerited.

ORDER

64. In the result I decline to stay the proceedings in ACC. No. 12 of 2013, **Republic vs. Richard Langat Kerich, Marwa Fadhili Chacha, David Kipruto Chingi, Peter Ngunjiri Wambugu, Ndiba Wairioko and Median Medical Centre Limited at this stage.**

Dated at Nairobi this day 15th of November 2013

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Munge for the applicant

Mr Ndege for the Respondent

Mr Murei for the Interested Party