REPUBLIC OF KENYA

IN THE HIGH COURT KENYA

AT NAIROBI (MILIMANI LAW COURTS)

MISCELLANEOUS CASE 306 OF 2010

CENTRAL ORGANIZATION OF TRADE UNIONS (K)......................................APPLICANT

VERSUS

THE NATIONAL HOSPITAL INSURANCE FUND BOARD MANAGEMENT....RESPONDENT

JUDGMENT

Pursuant to leave granted on 1st October 2010, the applicant filed the Notice of Motion dated 7th October 2010 seeking the following orders;

1. THAT an order of certiorari be issued to remove to this Honourable Court for the purpose of being quashed the national Hospital Insurance Fund (Standard and Special Contributions) (Amendment) Regulations, 2010 vide Legal Notice No.107 published in the Kenya Gazette supplement No.43 of 2nd July 2010.

2. THAT an order of prohibition be issued to restrain the Respondent from receiving contributions or demanding payment of the moneys prescribed in legal Notices No.107 and 108 published in the Kenya Gazette supplement No.43 (Legislative supplement No.29) of 2nd July 2010.

3. THAT an order of certiorari be issued to remove to this Honourable Court for the purpose of being quashed the National Hospital Insurance Fund (Voluntary Contributions) (Amendments) Regulations vide legal Notice No.108 published in the Kenya Gazette Supplement No.43 (Legislative supplement No.29) of 2nd July, 2010.

4. THAT cost of this application be borne by the Respondent.

The application is brought by the applicant in its capacity as umbrella body of trade Unions in Kenya which derives its membership from affiliate whose members in turn are workers of employees in various sectors. By virtue of employees' monthly income they are required by statute to become members of the respondent and to contribute at rates that are fixed from time to time. Such contributions are managed and controlled by the respondent and their misapplications and/or misappropriations can only raised by the contributors.

On about 2nd July 2010 the respondent carried out a gazettement of legal notices Nos.107 and 108 of 2010 in the Kenya Gazette supplement No.43 in which it proposed to increase members' contributions as follows:-

Legal Notice No.107

"IN EXERCISE of the powers conferred by section 20 of the National Hospital Insurance Fund Act, the National Hospital Insurance Fund Board in consultation with the Minister for Medical Services makes the following Regulations:-

THE NATIONAL HOSPITAL INSURANCE FUND (STANDARD AND SPECIAL CONTRIBUTIONS) AMENDMENT) REGULATIONS, 2010

1. These Regulations may be cited as the national Hospital Insurance Fund (Standard and Special Contributions) (amendment) Regulations, 2010.

2. Regulation 3 of the National Hospital Insurance Fund L.N. 185/2003. (Standard and Special Contributions) Regulations, 2003 is amended by deleting paragraph (30 and substituting therefore the following:-

3. The rate of contribution shall be graduated as follows:-

Gross income (Kshs.)	**Contributions (KSh.)**
<5,000	**150**
6,000 to 7,999	**300**
8,000 to 11,999	**400**
12,000 to 14,999	**500**
15,000 to 19,999	**600**
20,000 to 24,999	**750**
25,000 to 29,999	**850**
30,000 to 49,999	**1,000**
50,000 to 99,999	**1,500**
Over 100,000	**2,000**
Self employed (special)	**500**

Legal Notice No.108

IN EXERCISE of the powers conferred by section 20 of the national Hospital Insurance Fund Act, the National Insurance Fund Board makes the following Regulations:-

THE NATIONAL HOSPITAL INSURANCE FUND (VOLUNTARY CONTRIBUTIONS) (AMENDMENT) REGULATIONS, 2010

1. These Regulations may be cited as the national Hospital Insurance Fund (Voluntary Contributions) (Amendment) Regulations, 2010.

2. The National Hospital Insurance Fund (Voluntary L.N. 187/2003. Contributions) Regulations, 2003 are amended in Regulation 5 by deleting the proviso and substituting therefore the following:-

"Provided that the minimum rate of contribution shall be the sum of three hundred shillings per month".

It is the contention of the applicant that the respondent's amendment of legal notices 185 of 2003 and 187 of 2003 is a nullity, invalid and void ab initio for being ultra vires the powers of the respondent under section 20 of the National Hospital Insurance Fund Act 1998. Under section 20 the Board has no powers to make or amend regulations in respect of Standard and Special contributions provided for in section 15 of the Act. The Board has no powers to vary upwards the minimum rate of contributions. In the absence of an express amendment of the Act to extend the benefits payable under the Act, the Board has no powers to increase the contributions payable.

It is also contended by the applicant that Legal Notices No.107 and 108 are unreasonable and motivated by ulterior motives and amounts to an abuse of office in that;

(1) The rate of increment of contributions payable is grossly disproportionate and at odds with Kenya's economy.

(2) The increment of contributions amounts to new taxation without added benefit or service.

(3) The increment of contributions is blind to other taxes payable by contributors as neither the Ministry for Finance nor Parliament has approved it.

It was submitted by **Mrs. Guserwa** learned counsel for the applicant that the gazettement of Legal Notices No.107 and 108 was without authority and amounts to an exercise of an illegal power. The learned counsel submitted that the workers had been denied the enjoyment of the right to property and are being subjected to deductions without their consent or legal authority.

The application was opposed and the respondent has filed and served an affidavit sworn on 16th November 2010 by **Mr. Richard Kerich** who is the Chief Executive officer of the respondent. The respondent also filed a Notice of Preliminary Objection on the following grounds;

(1) The substantive Notice of Motion seeking judicial review orders is an abuse of the process of this court in that the applicant has duplicated an application previously filed by Kiriro Wangugi and Diana Patel in HCMC.262 of 2010 which application is still pending for hearing and which this court granted leave for its filing but declined a prayer that the leave operate as a stay of Legal Notices Nos.107 and 108 of 2010.

(2) The applicant is engaged in filing a multiplicity of actions as against the respondent over the same subject matter in that the applicant was a claimant in Industrial Court cause No.887 of 2010 filed against the respondent and in which they sought orders whose effect if granted would be the same as the effect of the orders prayed for in the Notice of Motion under determination.

(3) The applicant are forum shopping and having made an election to pursue their claim in the Industrial court Cause No.887 of 2010, it cannot now file the present proceedings having their cause dismissed in Industrial Court.

Mr. Chacha Odera learned counsel for the respondent submitted that the application is an abuse of the court process since the applicant filed, proceeded and prosecuted previous proceedings against the respondent. He also submitted that upon the respondent in these proceedings raising preliminary objection as to the jurisdiction of the Industrial court to hear and determine the suit before it and upon submissions by the applicant, the said court delivered a ruling agreeing with the submissions made by the applicant herein in dismissing the said preliminary objection. In dismissing the preliminary objection by the respondent, the Industrial court in Cause No.887 of 2010 had this to say;

"We do not deny the High Court retains the original jurisdiction. It has the powers to review judicially. This however as pointed out by Mrs. Guserwa is one of the options, not the only option available to the workers. Judicial review could have been a remedy among other remedies. In our view, the Claimant exercised the correct option in its choice of forum and remedy."

It is also submitted by the respondent that the grounds and the facts on which the applicant in these proceedings based their suit is the same in all material aspects with earlier matters filed before the Industrial court and in the High Court. The applicant's counsel having in the industrial court taken the position that the Industrial Court was the proper forum to urge the applicant's case in respect of Legal Notices No.107 and 108 of 2010, the applicant is precluded by estoppel by deed from filing the present proceedings. The applicant having made an election to file in the Industrial court cannot resile from that election and now file the present proceedings. The applicant having argued in the Industrial Court that the said court had the jurisdiction to hear its complaint arising out of Legal Notices 107 and 108 of 2010

and made the election for the said court to hear the said dispute cannot now be heard to bring proceedings in this court having taken advantage of being heard by the Industrial court. The Industrial Court determined the matters being raised in these proceedings which has not been set aside by the applicant. In short **Mr. Chacha Odera** submitted that the applicant is precluded from re-litigating the issues arising from the publication of Legal Notices No.107 and 108 of 2010.

I have considered the application, the statement of facts and the supporting affidavit by the applicant. I have also considered the replying affidavit and the submissions by the respondent. The issue for my determination is whether the applicant is entitled to the orders sought. It is clear that the issue concerning Legal Notices No.107 and 108 of 2010 were litigated between the applicant and the respondent in various suits. There is no doubt that the applicant seeks to quash legal notices No.107 and 108 of 2010 which were gazetted by the respondent in order to amend its standard and special contributions regulation and voluntary contributions. The applicant is also seeking to have the respondent prohibited from receiving, collecting and demanding contributions as prescribed in the two Legal Notices. For the applicant to be entitled to the orders sought, it is important to determine whether the issues concerning the two legal notices were litigated and determined by a court of competent jurisdiction.

On 5th August 2010 the applicant instituted against the respondent in the Industrial Court Cause No.887 of 2010 seeking similar reliefs as the one in my determination. The respondent filed and argued a preliminary objection based on question of jurisdiction. The said objection was argued and in a reasoned ruling delivered by **Justice James Riika** the objection was dismissed. Consequent upon the said ruling the respondent filed an affidavit in reply to the Chamber Summons application dated 3rd August 2010 and also challenged the applicant's statement of claim. The applicant's claim was argued interpartes and on 27th September 2010 **Justice James Riika** dismissed both application and statement of claim.

In HC. MISC. No.262 of 2010 **Kiriro Wangugi** and **Diana Patel** filed an application in the Judicial Review section of the High Court Nairobi seeking an order of certiorari against the respondent in respect of the two gazette Notices 107 and 108 of 2010. The two applicants also sought an order of prohibition to restrain the respondent from receiving contributions or demanding payments of the monies prescribed in Legal Notices No.107 and 108 of 2010. The two applicants also sought orders of leave and that the leave to operate as a stay but the court declined to grant stay and only allowed them to file the Notice of Motion. As the said matter was pending the two applicants also filed Petition No.17 of 2010 seeking similar orders as High Court Misc.262 of 2010. In essence they were seeking a conservatory order of temporary injunction to be issued to restrain the National Hospital Insurance Fund Board of management from levying or collecting contributions pursuant to legal notices No.107 and 108 of 2010. The matter was then heard by **Lady Justice Wendoh** and in her reasoned ruling delivered on 31st August 2010 had this to say;

"The Applicants did not need to file two applications to get the orders that they seek.

No explanation has been given as to why the Applicants filed H. Misc.262/2010 first instead of this Petition in which they could seek any order. I also do agree with the Respondents that nowhere in this Petition did the Applicants disclose that they had been denied a stay order in H.Misc.262/2010. In the instant application, the Petitioners have withheld material facts which points to bad faith. When the applicant approached the court for leave, the court denied to grant stay. In the chamber summons filed in this petition the applicant is seeking to prohibit or bar the implementation of legal Notices 107 and 108 and to bar the Respondent from demanding or receiving any payments pursuant to the Legal Notices. That is exactly what the stay order in the Judicial Review application sought to do. The Applicant having failed to achieve their aim of staying the implementation of Legal Notices 107 and 108, they are trying the matters again in this Petition. It is not denied that Rules 20 and 21 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 do provide for preservation of the substratum pending the hearing and determination of the Petition but having been aware that they wanted to come under

those rules, why did the applicants file the Judicial Review application? There is no explanation given and the only logical conclusion that can be arrived at is that the Applicant tried their luck in the Judicial Review application and stay having been denied they have come to have another go by way of this constitutional application. I would agree with the courts observation in ASEA BROWN CASE (SUPRA) that the Applicants are playing judicial lottery with this court and such behaviour and actions should be frowned upon by the court and discouraged at all costs. I find and uphold the objection raised by the 3rd Respondent that it is an abuse of the court process to have two courts or more, of concurrent jurisdiction to adjudicate on the same subject matter between the same parties at the same time. The Judicial Review application is still alive and pending determination. In CHURCH ROAD DEVELOPMENT –VS- BARCLAYS BANK HCC 296/06, the court adopted the case of ATTORNEY GENERAL –VS- BAKER, THE TIEMS MARCH 2000 where Lord Bingham C. J. said:-

"Although the term abuse of the court process is not defined in the rules of practice directions, it has been explained in another context as, using the process for a purpose or in a way significantly different from its ordinary and proper use. It is an abuse to bring vexatious proceedings in two or more sets of proceedings in respect of the same subject matter which amounts to harassment of the Defendant, in order to make him fight the same battle more than once with the attendant multiplication of costs, time and stress. In this context, it is immaterial whether the proceedings are brought concurrently or severally."

Apart from making the Respondent to fight several battles in various courts, the Applicants herein are taking up and wasting the very previous and scarce judicial that would have been used to deal with other matters. Apart from that, the various courts can arrive at conflicting and embarrassing decisions.

The orders sought in the chamber summons are exactly similar in effect to the stay that was declined in H. Misc.262/2010 and the court will uphold the Respondent's objection and strike out the chamber summons application dated 17.8.2010."

As was rightly pointed out by **Lady Justice Wendoh** the applicant is using the court process for a purpose or in a way totally different from its ordinary and proper objective. Pursuing the same remedies in parallel courts which are competent to hear and determine the issues in dispute amounts to an abuse of the court process. It is an abuse to bring suits over the same matters or issues in different courts without disclosing that the matter has been heard and determined by a court of competent jurisdiction. In my view the filing of multiplicity of suits by the applicant and others over matters which could be encompassed in one matter amounts to a glaring abuse of the court process. The Industrial Court has listened to arguments on the proper procedure, remedy and jurisdiction of the issues in dispute and rendered a determination. There is no evidence that the Industrial Court acted in excess of jurisdiction or that there was denial of justice to warrant the filing of the present matter by the applicant. Matters once heard and determined must be left to rest in so far as the invocation of the same jurisdiction is concerned. One cannot be allowed to fight the same battle more than once in different courts with the same or similar jurisdiction. The net results of the orders sought in the earlier matters and in this matter are similar and/or the same. The rules against multiplicity of suits over the same issues are designed to facilitate justice and further its ends. It is meant to shut out frivolous and vexatious litigants from knocking the doors of the court and seeking justice with limitless and countless applications over the same issues. I am therefore in total agreement with **Mr. Chacha Odera** learned counsel for the respondent that the applicant's counsel in having taken the position that the Industrial Court was the proper forum in respect of Legal Notices 107 and 108 of 2010 is now precluded by estoppel by deed from filing the present proceedings. The applicant having made an election to file suit in the Industrial Court cannot be allowed to file another suit after final determination was made by the said court. If the applicant was aggrieved by the decision of the Industrial Court it was incumbent upon it to invoke the correct procedure of the relevant court. It is also correct as was rightly pointed out by **Mr. Chacha Odera** that the applicant having argued before the Industrial court that the said court had jurisdiction to hear its complaints arising out of Legal Notices 107 and 108 of 2010, cannot now be allowed to bring proceedings before this court having taken advantage of being heard by the Industrial Court. The

Industrial Court made a determination on the issues being made the subject of the present proceedings. The court was of the view that the complaint by the applicant was without any basis and merits. The award of the Industrial Court is a judgment in red and while it remains unchallenged the applicant is precluded from commencing another matter over the same issues. Consequently, it is my view that the orders of certiorari and prohibition are not available to the applicants as sought. It is also my determination that judicial review is not an appeal from a decision but a review of the manner in which decision was made. The application dated 7th October 2010 has no merits and is dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 28th day of March 2012.

M. WARSAME

JUDGE