



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Miscellaneous Application 1747 of 2004**

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

**IN THE MATTER OF:**     **THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA**

**IN THE MATTER OF:**     **THE CIVIL PROCEDURE ACT CAP 21 OF THE LAWS OF KENYA**

**IN THE MATTER OF:**     **AN APPLICATION BY CENTRAL ORGANISATION OF TRADE UNIONS (KENYA) FOR LEAVE TO BRING JUDICIAL REVIEW PROCEEDINGS AGAINST THE DECISION OF THE BOARD OF MANAGEMENT OF THE NATIONAL HOSPITAL INSURANCE FUND THRO' THE CHIEF EXECUTIVE AND HON. MRS. CHARITY NGILU THE MINISTER FOR HEALTH BY WAY OF ORDERS OF CERTIORARI AND MANDAMUS.**

**EX-PARTE CHAMBER SUMMONS**

**(Pursuant to Order LIII Rules 1 and 2 of the Civil Procedure Rules, Section 8 and 9 of the Law Reform Act, Cap 26 of the Laws of Kenya, Section 3A of the Civil Procedure Act Order XXXVI Rule 3© and all**

**Enabling Provisions of the Law**

**JUDGMENT**

The applicant seeks an order of certiorari to bring to this court the decision of Hon Mrs Charity Ngilu, Minister for Health carried under Gazette Notice No. 376 of 19<sup>th</sup> December, 2003 wherein the appointment of the applicants' member to the Board of Management of the National Hospital Insurance Fund was degazetted. The member's name is one Mr George Muchai who had vide an earlier Gazette Notice No. 5463 of 23<sup>rd</sup> August, 2002 been gazetted as a member of the Board of Management. The applicant COTU (Central Organisation of Trade Unions) further seeks an order of mandamus to compel the Respondents to comply with Gazette Notice No. 5463 of 23<sup>rd</sup> August, 2002 by effecting reinstatement of Mr George Muchai to the Board of Management of the Fund.

When the matter came for hearing before me on 5<sup>th</sup> December, 2005 Counsel for the respective parties agreed that they intended to have the preliminary objection raised by the 1<sup>st</sup> Respondent's Counsel argued and determined first.

However before setting out the grounds of objection it is necessary to outline the factual background since parties have agreed that they do share a common ground on this:

1. By a letter dated 28<sup>th</sup> April, 2003 the 2<sup>nd</sup> Respondent had requested the Applicant to nominate 3 persons from whom the Minister for Health could appoint any one of them to be a member of the 2<sup>nd</sup> Respondent's Board.
2. By a letter dated 28<sup>th</sup> April, 2003 the Applicant submitted 3 nominees for consideration by the Minister for Health.
3. By a letter dated 12<sup>th</sup> May 2003 the Applicant indicated to the 2<sup>nd</sup> Respondent that its preferred nominee would be Mr George Muchai.
4. By a Gazette Notice 5463 of 23<sup>rd</sup> August 2002 Mr. George Muchai was appointed a member of the 2<sup>nd</sup> Respondent's Board. The term was to convene on 15<sup>th</sup> July, 2002 and expire on 14<sup>th</sup> May 2005.
5. By Gazette Notice 376 of 19<sup>th</sup> January 2004 Mr. George Muchai was removed from the Board of Management.
6. On 23<sup>rd</sup> December, 2003 Mr. George Muchai filed an application being HCC Misc 1613 of 2003 seeking precisely the same orders and based essentially on the same disputed grounds as in this suit.
7. On 2<sup>nd</sup> July 2004 this Court dismissed Mr Muchai's application.
8. On 31<sup>st</sup> May 2004 the applicant herein COTU sought leave to apply for the same orders and the same was granted by this court.
9. On 21<sup>st</sup> June, 2005 the current application by way of Notice of Motion was filed.

The objections raised are:

- a) The orders sought are not available in law and the Honourable Court has no jurisdiction to grant the orders as pleaded.
- b) The suit is debarred by the principle of res judicata and/or issue estoppel and can only be struck off
- c) The application is fatally defective, frivolous and a collateral attack on the rejection of an earlier suit.

Under the umbrella of the above general grounds the 2<sup>nd</sup> Respondent has specified his objections as under

- (i) The statement of facts does not specify what relief and grounds or orders are being sought by the applicant contrary to O 53 rule 1(2).
- (ii) The grounds as set out do not envisage the illegality or/and irrationality and/or outrageousness of the 2<sup>nd</sup> Respondent's decision making process
- (iii) Notice under O 53 rule 1(3) was not given later than the preceding day
- (iv) That the application for leave was filed on 17<sup>th</sup> December 2004 to challenge a decision made on 10<sup>th</sup> January 2004 contrary to O 53 rule 2 which provide that no leave shall be granted for orders of certiorari unless the leave is made "not later than six months."
- (v) No notice was given by the Applicant to the 2<sup>nd</sup> Respondent prior to instituting this suit
- (vi) The orders sought cannot be granted or effected as the term for which Mr George Muchai was to serve in the 2<sup>nd</sup> Respondent's Board expired on 14<sup>th</sup> May before leave was granted

(vii) Mr George Muchai having filed HC Misc 1613/03 which was dismissed on 2<sup>nd</sup> July 2004, it is trite that issue estoppel and res judicata bars a party from relitigating matters already ruled on by the court and that the application is a collateral attack on the rejection of H C Misc 1613/2003.

(viii) The applicant failed to disclose to the court that at the time leave was being granted the term to serve on the board for Mr George Muchai had expired or 14<sup>th</sup> May 2005 and the Applicants affidavit sworn by Mr. Francis Atwoli dated 15<sup>th</sup> December, 2004 is misleading as material facts were concealed yet those facts were essential in determining whether the Applicant was eligible for leave to institute judicial review proceedings

(ix) Applicant must act uberrimae fides by making full and frank disclosure of all material facts to be determined at the threshold.

The applicant has responded as under:

1. The grounds upon which the application is grounded are:

a) The unprocedural replacement of George Muchai

b) The Respondents are duty bound to honour and comply with the provisions of Gazette Notice 5463 of 23<sup>rd</sup> August, 2002.

c) The Respondents have denied the applicants the right to their preferred nominee to the Board of Management

d) That the applicants right to nominate will continue to be denied and/or breached

e) Issue estoppel or res judicata do not apply since HC Misc 1613 of 2002 was instituted by another party and the parties in two suits are different

f) Judicial orders sought lie because George Muchai's term expired on 14<sup>th</sup> May 2005 and the application for leave filed on 17<sup>th</sup> December, 2004 before the expiry of Muchai's term

g) Paragraph B of the Statement of Facts indicates that a quashing order ie. Certiorari and an order of compliance ie. Mandamus will be sought

h) The Notice preceding the filing of the ex parte Chamber Summons for leave was duly lodged on 10<sup>th</sup> December 2004 and the application filed on 17<sup>th</sup> December 2004 and this complies with O 53 rule 1(3)

i) That leave having been granted the precondition for its grant cannot be reopened.

The 2<sup>nd</sup> Respondent's Counsel has cited several authorities which I have considered.

1

#### ALLEGED DEFECTS IN THE STATEMENT

It is contended that the statement does not specify what relief and/or grounds are being sought by the applicant as required under O53 rule 1. I have perused the statement and the applicant has sought a quashing order as per relief B (a). It is not necessary to specify that one is seeking an order of certiorari – a quashing order or certiorari would suffice – a quashing order is the other name for the Judicial order of certiorari, a compliance order or compelling order would suffice for mandamus.

Concerning reinstatement the objection to it can only arise from the fact that once a quashing order is

given the decision making body has to appoint in accordance with the law and the court cannot make the decision for the challenged body and the body appears to have a discretion in appointing any one of the nominees. It can literally reject Geroge Muchai each time without offending the law.

On the part concerning the adequacy of the grounds, the applicant has raised arguable grounds and whether or not they are valid is a matter for contention and not suitable for summary disposal as a preliminary point.

For the above reasons I disallow the objection in this category as well.

2

### GROUND RELIED ON DO NOT BRING THE MATTER WITHIN JUDICIAL REVIEW JURISDICTION

The Respondent has contended that the grounds relied on do not envisage illegality or/and irrationality and/or agreement of the 2<sup>nd</sup> Respondent in the decision making process.

While it is true that so far the jurisdiction of a judicial review court has been principally based on the 3 “Is” namely illegality, irrationality and impropriety of procedure categories of intervention by the Court are likely to be expanded in future on a case to case basis. Thus, in a recent public transport cases, *R v TRANSPORT LICENSING BOARD Ex parte CHARLES KARANJA*, I did extend the jurisdiction on the basis of the principle of proportionality. I would therefore be reluctant to uphold this objection in summary manner without delving into the facts. I would disallow this objection.

3

### FAILURE TO GIVE NOTICE UNDER o 53 rule 1(3)

It is contended that the applicant failed to give the Deputy Registrar Notice not later than the preceding day.

Although the rule is worded in mandatory terms the Court does have a discretion under the proviso to excuse the failure to file the notice for good cause shown. However no cause was shown and I would sustain the objection on this ground as well.

### LIMITATION ON CERTIORARI

I am unable to uphold the objection for the reasons stated in *R v GOLDENBEG COMMISSION & ANOTHER Ex parte MWALULU*. O 53 rule 2 only relates to the challenge of the formal orders set out in the rule and it is not of general application. The challenged decision in this case falls outside the formal orders set out therein.

In any event the decision was reflected in Gazette notice and not in any order. This does fall outside the limitation under the order and the objection is overruled.

### FAILURE TO GIVE NOTICE

It is contended that the applicant did fail to give notice prior to the institution of this suit.

**On this I am persuaded to approve and adopt the suggestion made in *R v HORSHAM DISTRICT COUNCIL ex p WENMAN [1993]*. The TIMES 21<sup>st</sup> October, “that would be applicant’s lawyers should only commence Review proceedings after giving the intended Respondent an opportunity to put right their clients concerns the so called “letter before action”. The failure to do so could no doubt, in a suitable case, be treated as a reason to refuse grant of leave.”**

However leave having been granted in this matter. I cannot reopen it in order to apply this principle. I am therefore unable to uphold this objection a well.

6

#### EFFECT OF LEAVE BEING GRANTED AFTER THE EXPIRY OF THE DIRECTORS TERM

It is not denied that the term of the affected director had expired on 14<sup>th</sup> May 2005 before leave was granted. No disclosure had been made to the Court concerning this. On this I find that the objection is sustainable both on the ground that the order for reinstatement is being sought in vain and also for material nondisclosure of the fact to the Court see *R v KENSINGTON COMMISSIONER EX P POLIGNAC* 1917 I KB 486 *R v LAND REGISTRAR KAJIADO Ex p KINSERK*.

7,8 and 9

#### RESJUDICATA AND ISSUE ESTOPEL

This has been raised as one of the objections. However 3<sup>rd</sup> Edition Halsburys para 156 pg 83 reads:

**“When an application for an order of certiorari, prohibition or mandamus has been made, argued and refused on the ground of defects in the case as disclosed in the affidavits supporting the application, it is not competent for the applicant to make a second application for the same order on amended affidavits containing fresh materials.”**

It is clear to the Court that the above only applies where it is the same applicant re-applying and therefore would not apply to this case.

Similarly in *DE SMITH WOOLF AND J OWELL JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* at page 196 para 3-075 the learned author has observed:

**“The principle of res judicata does not normally apply to judicial review.”**

When grounds are made out upon which the court might grant the order, it will not do so where no benefit could arise from granting it (pg 141).

Applications for judicial review are required to be made promptly – undue delay in applying is a major factor and the needs of good administration must be borne in mind. Courts cannot hold the decision making bodies hostage. *R KESINGTON INCOME TAX COMMISSIONERS, Ex parte Princes Edmond De Polignac*.

On an application for leave the utmost good faith is required and if the applicant in his affidavit suppresses material facts the Court will refuse an order without going into the merits.

Finally in *R v SECRETARY OF STATE FOR THE ENVIRONMENT Ex parte HACKNEY LONDON BOUROUGH COUNCIL [1984] I WLR 592, 602 A-B & 606D* it was doubted whether issue estoppel has any place in judicial review.

For the above reasons the objection would not in the view of the Court lend itself to determination in a summary procedure.

The Court must however acknowledge that in *RAJWANI v CHIEF MAGISTRATES COURT* 1544/2004 there was a determination that the three Judges could not undo what a single Judge had held on the basis of the res judicata. The court could have arrived at the same decision on grounds of policy of the law or abuse of process. The applicant also contends that res judicata does not apply where a different party is an applicant.

It must therefore be considered that the legal position concerning application of res judicata to judicial review is still in a fluid state and perhaps this is not a point for determination in a summary manner for this reason. It seems to me by hind right there could be good policy considerations for not applying res judicata and estoppel to judicial review.

Even when an applicant discloses meritorious grounds for relief such relief can be denied if he sat on his rights and failed to seek relief in good time and with due diligence. This is what tilts the balance in favour of the respondent.

### **SUMMARY**

Grounds 1,2,4,7,8 and 9 are disallowed or refused

Grounds 3,5, and 6 allowed

I attached considerable weight to objection 6 in that the term of the affected director having expired this court was being invited to act in vain. The application seeking relief was not filed promptly and presented within the unexpired term. The court must again emphasise that the importance of promptness in judicial review matters.

The upshot is that the application dated 17<sup>th</sup> June, 2005 is dismissed with costs to the respondent.

DATED and delivered at Nairobi this 3<sup>rd</sup> day of February 2006.

**J G NYAMU**

**JUDGE**