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**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MISCELLANOUS APPLICATION NO 895 OF 2004**  
**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**  
**AND**  
**IN THE MATTER OF THE SESSIONAL PAPER NO 2 OF 2004 ON NATIONAL**  
**SOCIAL HEALTH INSURANCE IN KENYA**  
**AND**  
**IN THE MATTER OF THE NATIONAL HOSPITAL INSURANCE FUND (NHIF)**  
**ACT (1998)**  
**AND**  
**IN THE MATTER OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA**  
**AND**  
**IN THE MATTER OF ORDER LIII OF THE CIVIL PROCEDURE RULES**  
**IN THE MATTER OF AN APPLIATION BY:-**

- 1. MOSES ROBERT MAGOTSI ..... 1ST APPLICANT**
- 2. ANDREW KARUGA MAINA ..... 2ND APPLICANT**
- 3. COSMAS MAKORI ..... 3RD APPLICANT**
- 4. LAWRENCE WANGACH ..... 4TH APPLICANT**
- 5. JOSHUA ENANE AMWAYI ..... 5TH APPLICANT**
- 6. BOOKER MUDHAI ..... 6TH APPLICANT**

**FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AGAINST**

**THE HONOURABLE MINISTER FOR HEALTH ..... 1ST RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 2ND RESPONDENT**

**RULING**

The application dated 14th July 2004 does raise weighty matters concerning the proposed Health Insurance Scheme as described in the application. In particular it is asserted that the scheme lacks the necessary legislation which is said to be in the form of a Bill currently before Parliament. The other major point raised are the enormous taxation implications on nearly all major employers and employees including the informal sector.

The other factor is that there is in existence a Sessional Paper on the subject – it is perhaps reasonable to assume that the sessional paper has been considered and approved by the Cabinet in view of the existence of the Bill.

The other factor for consideration is the alleged lack of consultations with the applicants.

From a legal standpoint I have the following matters to take into account:-

1. This nation including its Constitution has the rule of law as a major commitment and provision. We do indeed on all relevant fora express the fact that we respect the rule of law.

One of the components of the principle of the rule of law is that all subjects must be governed by law. Tied to this important principle in our governance is that there cannot be taxation without law. Each year the Minister for Finance seeks the power to levy taxes through various Finance Acts.

This is the clearest testimony to our adherence to this principle.

2. The other point I must highlight is this nation's constitutional commitment to the doctrine of the separation of powers between the Legislative, Executive and the Judiciary. This means all the three constitutional bodies are supposed to be separate and any unnecessary overlap must be avoided as much as possible. To give one illustration the generally Courts of law are not concerned with matters of policy – this is the arena of the Executive nor with legislation – this is the arena of Parliament.

Having set out the beacons to guide this court it is important to start off by applying the above principles which we hold dear and cherish to the matter before the court.

1. Judicial review is aimed at addressing ... errors of law, breach of rules of natural justice, impropriety of procedure, taking into account irrelevant considerations, abuse of power, and more recently the principle of proportionality ie whether the “means justify the ends.

2. The interests or rights and concerns of the applicants in this matter are not addressed or directed to any decisions or orders which the Executive has made and none have been exhibited. It is a requirement of O 53 rule 7 that any certified order or decision under attack or challenge must be attached, long before the hearing. This has not been done.

Counsel for the applicant in answer to courts query tried to look for newspapers pronouncements or cuttings but none has been availed to this court.

Granted that this court takes judicial notice of the absence of supporting legislation a strong point in granting or refusing leave there is no formal decision exhibited.

3. It is therefore clear that while the applicants have fears as to what is happening on the ground, they have not produced any formal decision or order to which this court can direct its supervisory jurisdiction and give relief.

4. The doctrine of separation of powers require of this court not to concern itself with policy. It would indeed be usurping the Executive powers to act on a Sessional paper and to pilot through Parliament any enabling legislation.

This court has no right to speculate concerning the Bill in Parliament and what it will provide or not provide. It is the prerogative of Parliament.

This court would be concerned with the state of law as it exists today and no prima facie proof has been produced to show that:-

- a) If the current NHIF Act has been violated by the Executive or the NHIF Board itself
- b) Or that taxation without legislation is being levied.

Had proof of these two matters been availed to the court this court would have readily come to the aid of the applicants by way of invoking its supervisory jurisdiction over public officials and public bodies including Ministers and other Governmental bodies.

Putting all in balance, it is the considered view of the Court that the application at the moment is speculative and premature and nothing has crystallised to warrant the giving of leave at the moment.

For the totality of the above reasons I decline to give leave but in view of the fact that the application is *ex parte* and had not been served, I make no order as to costs.

**Dated and delivered at Nairobi this 15th day of July 2004.**

**J G NYAMU**

**JUDGE**