



REPUBLIC OF KENYA



**Muithya & another v National Hospital Insurance Fund (Petition E038 of 2022)
[2023] KEHC 22246 (KLR) (Nairobi) (15 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22246 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
AT NAIROBI
PETITION E038 OF 2022
M THANDE, J
SEPTEMBER 15, 2023**

BETWEEN

EVELYNE MUTHINI MUTHYA 1ST PETITIONER

BRIAN WAMBUA 2ND PETITIONER

AND

NATIONAL HOSPITAL INSURANCE FUND RESPONDENT

JUDGMENT

1. In a Petition dated 7.1.22, the Petitioners seek prayers that:
 - a. This Honourable Court be pleased to declare that the Respondent's failure to settle the 2nd Petitioner's hospital bill amounted a violation of the Petitioners' right to fair administrative action and threatened the 2nd Petitioner's right to health.
 - b. This Honourable Court be pleased to order certiorari to remove into the Court and quash the decision by the Respondent rejecting settlement of the hospital bill amounting to KES 269,112.
 - c. An order directing the Respondent to draft, review, and/or make its policies and/or guidelines regarding the procedure for eligibility of beneficiaries and cut-off ages under the Respondent's Civil Servants' Comprehensive Medical Insurance Scheme and all other related medical schemes.
 - d. Special Damages of KES 269,112 with interest thereon at court rates from 5th August 2021 to the date of full payment.



- e. An order for General Damages for violation of the Petitioners' constitutional rights.
 - f. Any further order, writs, directions as this Honourable Court may consider appropriate.
 - g. Costs of this Petition.
2. The Petitioners' case as set out in the Petition and affidavit sworn on even date by the 1st Petitioner is that the 1st Petitioner is a civil servant working for a gain as a TVET Trainer in Makueni County, Kenya and is a bona fide member of NHIF Civil Servants Comprehensive Medical Insurance Scheme (the Scheme) under reference number 1631628. The 1st Petitioner's two children, one of whom is the 2nd Petitioner, are declared as beneficiaries under the NHIF cover. The 2nd Petitioner is currently 25 years old and a student at Meru University of Science and Technology. On 30.7.21, the 2nd Petitioner was admitted for treatment at the Nairobi Hospital (the Hospital) between 30.7.21 and 4.8.21 when he was discharged. At the point of admission at the Hospital, it was clearly understood that all medical bills arising from admission and treatment of the 2nd Petitioner would be settled by the Respondent in terms of the NHIF cover. Accordingly, the Petitioners presented all the required documents to the Hospital including the 2nd Petitioner's national identity card and proof of student status at the University. The Respondent acknowledged by SMS message the 2nd Petitioner's admission under the cover. On this basis, there was the legitimate expectation that the Respondent would settle all of the 2nd Petitioner's hospital bills.
3. The Petitioners aver that because of their lack of finances, they would have opted not to seek medical treatment at the Hospital, had the Respondent not provided them with an implicit assurance that it would cover the medical expenses. In spite of the Hospital issuing the Respondent with the accrued medical bill the same was not approved. Even after the Hospital resubmitted the 2nd Petitioner's documentation, as requested by the Respondent, the bill was not settled. Despite numerous telephone calls to the Respondent and clear assurance from the Respondent's agents that the medical bill would be approved, the Respondent did not settle the bill. The reason given was that the 2nd Petitioner was not eligible to benefit under the NHIF cover on account of his age. As a result of the Respondent's failure to settle the medical bill, the 2nd Petitioner could not be discharged from the Hospital without settling the amount of KES 269,112. To secure the 2nd Petitioner's release, the 1st Petitioner was forced to borrow money from her friends and family for the settlement of the bill to avoid escalation. The Petitioners were exposed to shame, ridicule, anxiety and embarrassment as they had a period of seven hours to raise the enormous amount.
4. The Petitioners are aggrieved by the Respondent's failure to settle the bill despite having given clear representation that it would cater for the bill. The Petitioners point out that all the Hospital bills, both interim and final, clearly indicated on their face that the 2nd Petitioner was "Covered By: Nhif-civil Servants Account." It was averred that the decision made by the Respondent in respect of the 2nd Petitioner's medical bill was neither expeditious, efficient, lawful, reasonable nor procedurally fair. The decision was characterized by uncertainty, unreliability, long delays, unreasonableness and patent illegality. Further that there was no clear rule that the 2nd Petitioner ceased to be covered upon celebration of a beneficiary's 25th birthday. The Petitioners contend that the Respondent's conduct is in breach of the Petitioners' rights and contrary to the provisions of Article 47 of the *Constitution* and Section 4 of the *Fair Administrative Action Act*, which guarantee fair administrative action that is be expeditious, efficient, lawful, reasonable and procedurally fair.



5. The Petition is opposed by the Respondent *vide* a replying affidavit sworn on 19.4.22 by Janet Boit, its Legal Officer. She acknowledged that the 1st Petitioner is indeed a member of the Scheme and that her 2 children were covered thereunder. However, that Section 2 of the NHIF Act, the governing statute of the Scheme, allows inclusion in the cover of a child below the age of 21 years. The cover will also extend to a child who is continuing with education until such child attains the age of 21 years. This is also provided in the contract dated 30.6.21 for provision of comprehensive medical insurance scheme for civil servants between the Government of the Republic of Kenya and represented by the Ministry of Public Service and Gender, the State Department for Public Service and the Board of Management of the National Hospital Insurance Fund. The inclusion of the 2nd Petitioner as a beneficiary under the 1st Petitioner's cover thus lapsed upon his attaining the age of 25 years on 14.6.21. In light of this, there can be no sustainable claim or benefit to the 2nd Petitioner under the Scheme given that his admission in hospital on 30.7.21 was after that date.
6. It was further averred that the doctrine of legitimate expectation can only apply if the person who is said to have created that expectation actually had the power to perform the expected action. In the present case, the Respondent had no mandate to extend the age limit for the 2nd Petitioner to be included in the 1st Petitioner's cover. As such, the doctrine has been improperly invoked herein and cannot be used to compel one to act *ultra vires*. The Petition is thus unsustainable and lacks merit, is without legal grounding and should be dismissed with costs to the Respondent.
7. Parties filed their written submissions which I have duly considered.
8. The Petitioners' complaint is that the Respondent declined to settle the 2nd Petitioner's hospital bill following his admission, on account of his having attained the cut off age of 25 years. They contend that in spite of assurances by the Respondent's agents that the bill would be settled, the Respondent declined to do so on grounds that the 2nd Petitioner was not eligible on account of his age. It is the Petitioners' case that they had a legitimate expectation that the bill would be settled because the 1st Petitioner was a bona fide member of the Scheme and that 2nd Petitioner was included in the 1st Petitioner's cover as a beneficiary. They further contend that the allegation that the 2nd Respondent was no longer entitled to benefit under the 1st Petitioner's cover is an absurdity as there is no clear rule in this regard. Further that the Respondent which is the custodian of all its policies and coverage confirmed the 2nd Petitioner's hospital admission under the 1st Petitioner's cover, thereby creating a legitimate expectation that the bill would be settled.
9. The Respondent contends that the 2nd Petitioner could not benefit from the 1st Petitioner's cover in the Scheme having attained the age of 25 years. As such, no legitimate expectation arose or existed ab initio. The Respondent declined to settle the hospital bill in question because that was beyond/in excess of its purview of the contract relating to the Scheme. Accordingly, the Respondent did not violate the alleged legitimate expectation.
10. The Respondent is a creature of statute and is established under Section 3 of the [National Health Insurance Fund](#) which provides:
 - 3 There shall be established a Fund, to be known as the National Health
 - (1). Insurance Fund which shall vest in and be operated and managed by the Board.
11. The 1st Petitioner is for the purposes of the Act, a contributor to the Respondent under the Scheme. Section 2 of the Act defines "contributor" means a person liable to contribute to the Fund under section 15. The question before this Court is whether the 2nd Petitioner is a beneficiary under the 1st Petitioner's cover under the Scheme, that is administered by the Respondent, having attained the age of 25 years.



12. Section 2 of the Act which governs the Scheme defines a beneficiary as follows:

“beneficiary” means a person who—

- a. has not attained the age of twenty-one years, has no income of his own and is living with the contributor;
- b. has not attained the age of twenty-five years, is undergoing a full-time course of education at a university, college, school or other educational establishment or serving under articles or an indenture with a view to qualifying in a trade or profession and is not in receipt of any income other than a scholarship, bursary or other similar grant or award;
- c. is a person with disability and is wholly dependent on and living with the contributor;
- d. is a spouse; or
- e. is a contributor;

13. From the above definition, and relevant to the matter herein is that a person who may have attained the age of 21 years continues to be a beneficiary, as long as such person has not attained the age of 25 years. It must however be demonstrated that such person is a fulltime student in some institution and has no income of their own and is still dependent. The availability of the cover shall cease on the day such person shall attain the age of 25 years. That is the law.

14. There is exhibited the contract for provision of a comprehensive medical insurance scheme to civil servants dated 30.6.21 between Government of the Republic of Kenya represented by the Ministry of Public Service and Gender, State Department for Public Service and the Board of Management of the National Hospital Insurance Fund, which the Court has looked at. Clause 5 of the contract provides as follows, regarding person eligible for the medical insurance cover:

5.1 Persons eligible for the medical insurance cover shall be the following:

- 1.1 A Principal Member.
- 1.2 A spouse declared in an NHIF prescribed form by the Principal Member.
- 1.3 Up to five (5) children, who may either be biological or legally adopted children of 0 to 21 years of age and/or to 25 years if fully dependent on the Principal Member and enrolled in post-secondary education provided that:
 - 1.3.1 Additional Dependant children may be covered at an additional premium; and
 - 1.3.2 The age limit provided in Clause 5.1.3 above shall not apply to children with



disability wholly dependent on the principal member and registered with the National Council for Persons with Disability.

15. The provisions of Clause 5 of the contract on eligibility of beneficiaries are similar to those in Section 2 of the Act, save that the contract provides that a person aged 25 is eligible. The Act is explicit that a person who has attained the age of 25 is not eligible. The provisions of the Act prevail over the contract, which cannot have a provision that is inconsistent with the governing statute.
16. It is not disputed that the 2nd Petitioner was 25 years old at the material time. It is also not disputed that he was a fulltime student at Meru University of Science and Technology. The exhibited national identity card indicates that he was born on 14.6.96. Accordingly, he attained the age of 25 years on his birthday on 14.6.21. This was over 1 month before his admission in hospital on 30.7.21. Both Petitioners were clearly aware of this fact. Given the eligibility criteria set out in Section 2 of the Act, the 2nd Petitioner ceased to be the beneficiary on 14.6.21, when he attained the age of 25 years.
17. In view of the foregoing, can a legitimate expectation be deemed to have arisen in favour of the Petitioners?
18. In the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR, the Supreme Court considered the doctrine of legitimate expectation and stated:
 - (263) “Legitimate expectation” is a doctrine well recognized within the realm of administrative law, as is clear from the English case, *In re Westminster City Council*, [1986] A.C. 668 at 692 (Lord Bridge):

“...the courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation”.
 - (264) In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.
 - (265) An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation.
19. Flowing from the cited authority, legitimate expectation arises when an entity by holding itself out or by representation of past practice provokes an expectation that is within its power to fulfil. Such entity must be consistent in its dealings with all persons and engender trust that it will not renege on past practice.
20. In support of their contention that they had a legitimate expectation that the Respondent would settle the 2nd Petitioner’s medical bill, the Petitioners argued that the Respondent signed a contract with the Government of Kenya on behalf of the Petitioners and other beneficiaries and is bound by the same.



They submitted that the Respondent is a public body created by Statute. Further that in paragraph 8.3 of its Handbook guiding civil servants titled The obligation of the Fund to the Member and Health Care providers shall be as follows:

I. Ensure adherence to the terms of agreement by all parties; And Pay service providers in a timely manner,...

21. The Petitioners further relied on the case of *Republic v Commissioner of Domestic Taxes Exparte Sony Holdings Limited* [2019] eKLR where Mativo, J. (as he then was) stated:

209. The basic premise underlying the protection of legitimate expectations seems to be the promotion of legal certainty.[141] Individuals should be able to rely on government actions and policies and shape their lives and planning on such representations. The trust engendered by such reliance is said to be central to the concept of the rule of law.[142] Forsyth describes the impact of such trust and the role the protection of legitimate expectations play in this regard aptly as follows:-

“Good government depends in large measure on officials being believed by the governed. Little could be more corrosive of the public’s fragile trust in government if it were clear that public authorities could freely renege on their past undertakings or long-established practices.”

22. Promotion of legal certainty is a key component of legitimate expectation. It is an issue of trust and public bodies such as the Respondent, should be believed by those in respect and on behalf of whom decisions are made. In order to maintain public trust, a public body must not renege on policies and long established practices. Persons should be able to rely on actions and policies of public bodies, and based thereon, make decisions and conduct themselves accordingly.

23. In the case of *Republic v Kenya Revenue Authority; Proto Energy Limited* (Exparte) (Judicial Review Application E023 of 2021) [2022] KEHC 5 (KLR) (24 January 2022) (Judgment), Mativo, J. (as he then was) stated:

The basic premise underlying the protection of legitimate expectations seems to be the promotion of legal certainty.⁵¹ Individuals should be able to rely on government actions and policies and shape their lives and planning on such representations. The trust engendered by such reliance is said to be central to the concept of the rule of law.⁵² Forsyth describes the impact of such trust and the role the protection of legitimate expectations play in this regard aptly as follows: -

“Good government depends in large measure on officials being believed by the governed. Little could be more corrosive of the public’s fragile trust in government if it were clear that public authorities could freely renege on their past undertakings or long-established practices.”

24. The learned Judge went on to state:

“The requirements for the existence of such an expectation were restated in *National Director of Public Prosecutions v Philips*.⁵⁴ These include:- (i) that there must be a representation which is “clear, unambiguous and devoid of relevant qualification,” (ii) that the expectation must be reasonable in the sense that a reasonable person would act upon



it, (iii) that the expectation must have been induced by the decision-maker and (iv) that it must have been lawful for the decision-maker to make such representation. If such an expectation exists it will be incumbent on the administrator to respect it. If the court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner."

25. For the Petitioners to succeed in a plea of legitimate expectation, they must demonstrate first, that the representation by the Respondent was clear, unambiguous and devoid of relevant qualification. Second, the expectation must be reasonable. Third, the expectation must have been induced by the Respondent. Finally, it must be demonstrated that it was lawful for the Respondent to make such representation.

26. As important as legal certainty is in protection of a legitimate expectation, legality overrides legal certainty. The learned Judge stated:

210. Legal certainty is not, however the only principle at play in legitimate expectation doctrine. The counter value of legality is especially important in the context of the substantive protection of legitimate expectations.[144] The fear in protecting legitimate expectations substantively is that administrators may be forced to act ultra vires. That would be the case where an administrator has created an expectation of some conduct, which is beyond his authority or has become beyond his authority due to a change of law or policy. If the administrator were consequently held to that representation, he would be forced to act contra legem. It is clear that such representations will not be upheld by the court.[145] The value of legality in law has led to the requirement that the expectation must be one of lawful administrative action before it can be either reasonable or legitimate. Legality therefore seems to take precedence over legal certainty in law.

213. It follows that statutory words override an expectation howsoever founded. Thus, a decision maker cannot be required to act against clear provisions of a statute just to meet ones expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute. At the risk of repeating myself, I state that the doctrine cannot operate against clear provisions of the law and that it must be devoid of relevant qualification.

27. As indicated herein, Clause 5 of the contract for provision of comprehensive medical insurance scheme includes a 25 year old person in the list of persons eligible for the medical insurance cover. The only rider is that such person must be fully dependent on the principal member and enrolled in post-secondary education. This is no doubt what the Petitioners relied on in their expectation that the Respondent would settle the medical bill in question. However, the law is clear that a 25 year old person is not a beneficiary within the meaning of Section 2 of the Act. It is clear from the contract that the Respondent created an expectation that the 2nd Petitioner was covered thereunder. However, this representation was beyond its authority as it is inconsistent with the governing statute, namely, the NHIF Act. Statutory words override an expectation howsoever founded, including under a contract. It follows therefore that by declining to settle the 2nd Petitioner's medical bill at the Hospital, the Respondent simply followed the law. As such, it cannot be said that by complying with the law, the



Respondent violated the Petitioners' rights. Indeed, had the Respondent settled the medical bill, it would have contravened the law. The doctrine of legitimate expectation cannot operate against clear provisions of the law.

28. For an expectation to be legitimate it must not contravene the law. Mativo, J. (as he then was) went on to speak to the legitimacy of an expectation and stated the following, which is relevant to the case herein:

66. Discussing legitimate expectation, H. W. R. Wade & C. F. Forsyth⁵⁵ states thus:-

“It is not enough that an expectation should exist; it must in addition be legitimate....First of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation..... Second, clear statutory words, of course, override an expectation howsoever founded..... Third, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy....”

“An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice.” (Emphasis added).

67. Statutory words override an expectation howsoever founded. A decision maker cannot be required to act against clear provisions of a statute just to meet one's expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute. I have placed the tests for legitimate expectation explicated in the above authorities' side by side with the applicants' arguments and the facts of this case. I find that the applicant has not satisfied the tests for the doctrine of legitimate expectation.

29. As demonstrated herein, by dint of Section 2 of the Act, a person ceases to be a beneficiary on the day such person attains the age of 25 years except as provided under the Act. The 2nd Petitioner attained the age of 25 years on 14.6.21. As such, he was not a beneficiary under the 1st Petitioner's medical cover on 30.7.21 when he was admitted to the Hospital. The Respondent could not therefore be required to act against clear provisions of a statute just to meet the Petitioners expectations, which unfortunately, were misguided. Accordingly, the fulfilment of the Petitioners' expectation that the Respondent should settle the medical bill in question would require the Respondent to make an unlawful decision which would be a violation of the principle of legality, a key principle in Rule of Law. Were the Respondent to settle the 2nd Petitioner's medical bill, the Respondent would in effect rewrite an Act of Parliament by adopting an unlawful practice. In this regard, it matters not that the Respondent's agents made assurances to the Petitioners that the medical bill would be settled by the Respondents.



30. The Petitioners contend that the Respondent’s “belated interpretation to the effect that the 25-year age cut off strictly applied upon celebration of a beneficiary’s 25th birthday was never made clear to the Petitioners before the admission or at any other prior time.” This argument in my view, rings hollow because contributors to a scheme such as the one herein owe it to themselves to familiarise themselves with the extent of the cover that applies to them, including the amount of the cover, the facilities in which services may be accessed, the number and age of beneficiaries covered and relationship to the contributor as well as the governing law. Indeed, ignorantia juris non excusat is a well settled principle of law, namely that ignorance of the law is no excuse. Accordingly, the Petitioners ought to have acquainted themselves with the cover under the scheme and the governing law. In view of the cut off age and being aware that the 2nd Respondent was 25 years old, they ought at the very least to have made enquiries from the Respondent before admission to the Hospital. Had they done so, they would have noted that the 2nd Petitioner having attained the age of 25 years was not a beneficiary and thus not entitled under medical cover of the 1st Petitioner administered by the Respondent.
31. Before I conclude, I must state that it behoves the Respondent to takes steps to ensure that the contract for provision of comprehensive medical insurance scheme for civil servants is in line with the [National Health Insurance Act](#), the governing Act, to avoid creating expectations that cannot be fulfilled without acting ultra vires the law.
32. In the end, the Court finds that the Petition lacks merit and the same is hereby dismissed. Given that the contract relied on by the Petitioners was misleading, there shall be no orders as to costs.

DATED AND DELIVERED IN NAIROBI THIS 15TH DAY OF SEPTEMBER 2023

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M. THANDE
JUDGE

