



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CONSTITUTIONAL PETITION NO. E016 OF 2021

THE TRUSTEES RURAL, PRIVATE

HOSPITAL ASSOCIATION OF KENYA.....PETITIONER

VERSUS

THE CHIEF EXECUTIVE OFFICER NATIONAL

HOSPITAL INSURANCE FUND.....1ST RESPONDENT

CABINET SECRETARY MINISTRY OF HEALTH.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

AND

KENYA MEDICAL PRACTITIONERS AND DENTIST BOARD.....1ST INTERESTED PARTY

KENYA HEALTH PROFESSIONALS OVERSIGHT AUTHORITY.....2ND INTERESTED PARTY

RULING

1. The petitioner herein filed this petition seeking *inter alia* several reliefs against the 1st respondent. Contemporaneously it filed a chamber summons application dated **12th July 2021** seeking conservatory orders against the 1st respondent to stop it from implementing the notice dated **14/6/2021-HF/C/1001 C (88)** regarding manual identification of patients.

2. The 1st respondent filed a replying affidavit in opposition to the said application. Subsequently the 1st respondent filed a **notice of motion** application dated **18th day of August 2021** under a certificate urgency seeking this courts orders to dismiss the applicant’s application on a point of law. The same basically was in tandem with a similar notice of preliminary objection dated the same date.

3. It is necessary in the circumstances and as the practice is to determine the said preliminary objection as it appears to challenge the jurisdiction of this court among others.

4. The application sought the following for orders ,that;

- a) The plaintiff’s application dated 12th July 2021 and the petition of even date be struck out.**
- b) This court do issue any other order deemed just and fair to be granted in the circumstances.**
- c) The costs of this application be provided for.**

5. The application is premised on the grounds on the face of the record and the supporting affidavit of the 1st respondent’s Claim’s Manager one **James Letangule**. The deponent averred that the relationship between NHIF and hospitals is governed by **Section 30 of the NHIF Act**.

6. The deponent averred further that this court lacks jurisdiction to hear and determine the complaints raised by the petitioner as they are contractual in nature and governed by commercial contracts between the parties. Conservatory orders sought for breach of constitutional rights cannot issue as the parties’ rights and reliefs are stipulated in the terms and conditions under a contract. The petition discloses no

reasonable cause of action against the 1st respondent as none of the contracted hospitals have raised any grievance against the implementation of e-claim and or biometric registration of users.

7. The petitioner has no *locus standi* in view of **Article 22 (2) as the Association** can only agitate the interest of one or more of its members. The petition/application states that Association represents over 850 Health care facilities but none of the 850 have a contractual relationship with NHIF and/or raised any complaint. As a result, the current proceedings have been brought in clear contravention of constitutional provisions and are unmerited, irredeemably defective, wrongly brought and cannot lie for want of *locus standi*. An association cannot ventilate commercial issues which the alleged aggrieved members can ventilate directly under the individual contracts.

8. It is averred that the biometric and e-claims systems are not new as alleged by the petitioner. They were implemented in 2017 and great strides have been made resulting in increased efficiency in the services delivery in the general public. The petitioner's motive in bringing this case at this point is suspect as they had earlier on 26th May 2021 congratulated NHIF for the successful roll out of the biometric identification as well as reintroduction of the e-claims system which has assisted to curb fraudulent claims by 56%. NHIF has also been effectively settling claims to the tunes of billions of shillings every week which has enhanced service delivery.

9. It is averred that it is not clear whom the petitioner is agitating for considering that no disclosure has been made on which hospitals are represented by the Petitioner. It is therefore fair and just that this application be allowed and parties be allowed to comply with their contractual obligations.

10. The preliminary objection added that the petitioner is guilty of laches and has not moved the court with the required promptitude considering the implementation of digital systems started way back in 2017 and as a result is not deserving of the orders of this Honourable Court.

11. Parties were directed to canvass the application by way of written submissions which they have complied and the court has perused the same together with the attached authorities.

1ST RESPONDENT'S SUBMISSIONS TO THE APPLICATION AND NOTICE OF PRELIMINARY APPLICATION DATED 18/08/2021.

12. The 1st respondent submitted that there is no reply to the application dated 18/08/2021 hence the same stands unopposed. The 1st respondent raised three issues for determination in its submissions.

a) Whether the petitioner has locus standi to institute this petition.

b) Whether the petitioner is guilty of laches

c) Whether the substratum of the petition will be rendered nugatory if orders are not granted.

13. On whether the petitioner has *locus standi* it was submitted that the petitioner is non-suited to bring the claim as the contract between the hospitals and the 1st respondent is a private commercial matter hence third parties that are not privy to the contract cannot claim to have any rights. The petitioner claims to be suing on behalf of its members and on behalf of the general public. Whereas, the liberal approach to the issue of *locus standi* in public interest litigation is recommended in Kenyan Courts, the court or tribunal must always strike a balance between opening itself to discourses by anyone or limiting its doors to busy bodies.

14. The 1st respondent relied in the court of appeal case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** and submitted that the court must caution itself against over-liberalizing the Rule of *locus standi* in public interest litigation. The subject matter of the instant petition is contractual in nature and it is governed by the doctrine of "privity of contract" hence the petitioner not being a party lacks the standing to institute the instant petition.

15. On whether the petition is barred under the doctrine of laches, it was submitted that the E-claim was premiered in 2017 and it is a laudable step towards achieving universal health coverage as part of the big 4 agenda. Therefore, the petitioner's allegation that the E-claim system is a novel development lacks foundation. Equity aids the vigilant and not the indolent. The petitioner ought to have moved the court promptly if they were aggrieved by the initial roll out, coming to court years later proves that the petition is a mere afterthought, which should not be entertained.

16. The 1st respondent placed reliance in the case of **James Kanyiita Nderitu v A.G and Another** and submitted that unreasonable delay is an abuse of the Court process. The court should also consider that since the launch of E-claims system in 2017, public funds and other resources have been injected into the project to enhance its success, hence these are weighty economic decisions that affect the public and the NHIF contributors.

17. The project should not be stalled on account of the Petitioner who slept on their rights. By virtue of the letter of 26th May 2021 congratulating the roll out of the system, the petitioner is estopped from faulting the biometric system and therefore they should not be heard to say that the system was introduced in July 2021.

18. On whether the petitioner has *locus standi* to institute this petition it was submitted that the petitioner has not put forward a satisfactory argument that the petition will be rendered nugatory if a conservatory order is not granted. Reliance was placed in the case of **Nelson Andayi Havi v Law Society of Kenya & 3 others [2018] eKLR** in support of the sentiment that in the event that the court finds in favour of the petitioner, the court retains the jurisdiction to quash and reverse the NHIF directives. Therefore, if the implementation of the biometric

system is stopped and the petition is dismissed, the result will be loss of public funds and perpetuation of fraud, abuse and wastage which is against public interest.

19. The 1st respondent relied on the case of **Martin Nyaga Wambora v Speaker of the County Assembly of Embu & 3 others [2014] eKLR** and submitted that the petitioner have not demonstrated that they will suffer any prejudice or real danger if the conservatory orders are not granted. The petitioner's alleged prejudice is a mere unreasonable apprehension as it has not adduced evidence to the required standard to demonstrate any cost imposed on them to warrant suspension at this interlocutory stage.

20. The 1st respondent urged this court to exercise judicial restraint and decline to grant the conservatory orders sought and instead allow the 1st respondent's application and the Notice of Preliminary objection dated 18th August 2021 with costs.

21. The Honourable Attorney general in its submission dated 12th August 2021 associated himself with the sentiments of the 1st respondent. It argued inter alia that this was purely a commercial dispute fashioned as constitutional in nature. The contract between the parties annexed to the application clearly demonstrated this. The mere claims of infringements of constitutional articles by the 1st respondent does not lie.

22. It urged this court to find that there are no constitutional issues raised by the applicant and the same ought to be ventilated in a commercial court. It relied among others in the case of **CCK & 5 OTHERS V. ROYAL MEDIA SERVICES LIMITED AND 5 OTHERS (2014) eKLR**.

PETITIONER'S SUBMISSIONS ON THE PRELIMINARY OBJECTION

23. The petitioner submitted that grounds 1,2,3,5 and 6 of the preliminary objection are not pure points of law and the same need some form of evidence for the court to make a full determination. The points have thus not been raised correctly and therefore they should be dismissed with costs to the petitioner.

24. On whether the petitioner has locus standi, the petitioner placed reliance in the case of **Sollo Nzuki v Salaries and Remuneration Commission & 2 others [2019] eKLR** and submitted the petitioners have all the rights to bring their grievances to court as the constitution is threatened and/or has already been violated by the acts of the 1st Respondent. The acts of the 1st respondent in purporting to change the mode of registration and identification of beneficiaries to the NHIF scheme is an amendment to **Section 21,22 and 23** of the NHIF Act. Hence, the 1st respondent has acted contrary to **Article 94 (5)** since the 1st respondent does not have power and no such power has been delegated to it either by parliament or the NHIF Act to make provisions having the force of law.

25. The petitioners being citizens of the Republic of Kenya and being major stakeholders in the NHIF scheme, have bona fide grounds to challenge the acts of the 1st respondent and therefore their prayers in the petition and the grounds thereto cannot amount to an abuse of this court's process. The petitioners submitted that they have sufficient interests and thus the requisite locus standi as they represent rural health care facilities. The chairman of the petitioner in his affidavit of support demonstrated that his health care facility had been contracted by the 1st respondent hence the nexus between them and the 1st respondent has been established.

26. The petitioner placed reliance in the case of **Sammy Osundin Likarino v JSC & 3 others** and submitted that the petition was brought under the provisions of **Article 22 and 258 of the Constitution**, seeking for redress for the members of the public thus this is public interest litigation. The petitioner based its argument on the case of Sammy Osundin (supra) and urged the court to find that the preliminary objection is without merit and the same should be dismissed with costs.

Issues for determination

27. I have considered the 1st respondent's application, the supporting affidavit, the preliminary objection and the submissions by both parties and the following questions fall for determination.

a) **Whether the High Court has jurisdiction to determine the issues raised by the petitioner?**

b) **Whether the petitioner has the locus standi to institute this suit.**

(a) Whether the High Court has jurisdiction to determine the issues raised by the petitioner.

28. The definition of a preliminary objection was well set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**.

"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

29. This was followed up by the judgment of Sir Charles Newbold in the same case:

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points

by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

30. The issue must therefore be plainly gleaned from the pleadings without any need to refer to any evidence. In other words, it must not be factual.

31. On the issue of jurisdiction, the court in the case of owners of the **Motor Vessel “Lilian s “v. Caltex Oil (Kenya) ltd (1989) eKLR** settled it when it stated that;

‘I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.’

32. In the premises it is necessary that this issue be determined as of priority. The supporting affidavit of Brian Lishenga Makamu under paragraph 4 thereof indicates that ;

“The petitioner’s members have individually entered into standard form contracts prepared by the respondent to provide medical services to members of the 1st respondent and to claim payment of the benefits from the 1st respondent. The members of the associations contracts were for a term of 3 years all lapsing on 30th June 2021.”

33. Paragraph 5 goes on to state that;

“That the contracts are entered into after a process of accreditation by the 1st respondent.”

34. This position is supported by the replying affidavit of the 1st respondent through one James Letangule who has gone ahead to attached a standard contract between the 1st respondent and the health facility which in this case I presume should be a member of the applicant.

35. The said contract has is 106 pages with several clauses which protects the interest of both parties. Two clauses numbers 35.2 and 35.3 deals with mediation and arbitration respectively. In essence whenever there is any breach by either of the two parties, they have provided for themselves mutually how they intend to resolve including seeking legal redress in court.

36. In light of the above observation can one conclude that the issues between the parties here are not commercial in nature.? I humbly find the contract to be commercial. Although there may have been traces of what the applicant called infringement of some constitutional rights the same are not so weighty as to outdo the contract they have subjected themselves to.

37. Their engagement from the beginning was contractual in nature. Constitutional jurisdiction of the court is very clear and specific and it is only called upon whenever there is no other recourse. Ordinary disputes between the parties like in this case must be litigated upon in the right court and fora. Despite being clothed with many constitutional jargons, the substratum of this petition is clear, that it is based on a contract between the parties which contains all provisions including how they intend to resolve their disputes.

38. The parties entered into a commercial contract. The 1st respondent agreed to settle bills incurred by the patients who visited the applicant’s hospitals and other health facilities as long as they are accredited by the 1st respondent. They agreed on a mechanism to follow including identification biometrically and other formats. Where then does the constitution fall.?

39. If there is any breach of the contract for instance in this case where the applicant is arguing that the 1st respondent is introducing a new system of identification, then the right way is to construe that contract by taking it to a commercial arbiter and not this court in its constitutional jurisdiction. The most probable way was perhaps to file a commercial dispute arguing that the 1st respondent had breached the contract. As found above this matter is purely contractual and not constitutional at all. All the averments in the rival affidavits point to this fact. If the applicant is unhappy with the new changes then the right forum is not this court in its constitutional nature but its commercial jurisdiction.

(b)Whether the applicant has the locus standi to bring this petition.

40. This issue in my view is subjective taking into account the provisions of Article 3(1) of our Constitution. This article grants any party who feels that the constitutional rights have been infringed to approach the court. It is obvious that the applicant is duly registered and is representing 850 members although there is no formal list exhibited. On the other hand, the 1st respondent was happy to receive a congratulatory letter from the applicant dated 26th June 2021.

41. In view of the above observations this court finds that the constitution has granted a wide door and latitude to parties which hitherto would not have had any locus. The applicant including Mr. Makamu have been given such liberty. The test however is whether the issues they are raising passes the legal master or are acting in good faith with a view of vindicating the cause of justice.

42. In the premises, I find that this ground of objection does not stand. The issues raised by the applicant affects its membership and they have the right of representing them. They are not meant to advance any personal gain or out of any political motivation or at all. It is

advancing the commercial interest of its members.

CONCLUSION

43. For the foregoing reasons this court finds that the issues raised by the petitioner in the petition are contractual in nature. They are commercial. This court in its constitutional suit cannot adjudicate over the same. This is based on agreements between the parties and there is no constitutional breach or at all.

44. The preliminary objection is allowed. The application for conservatory orders dated 12th July 2021 and the entire petition is dismissed with no order as to costs.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 4TH DAY OF OCTOBER 2021.

H K CHEMITEL.

JUDGE