



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**HCC PETITION NO. E002 OF 2019.**

**JOMEC LIMITED.....PETITIONER/APPLICANT**

**VERSUS**

**NATIONAL HOSPITAL INSURANCE FUND BOARD.....DEFENDANT/RESPONDENT**

**AND**

**WESLEY BARGORET KOMEN & 75 OTHERS.....INTERESTED PARTIES**

**RULING**

**Background**

1. Through the petition dated 14<sup>th</sup> June 2019, the petitioner herein, a body corporate and a healthcare facility based in Nakuru County sued the respondent a public body established under the National Hospital Insurance Fund Act seeking the following orders:-

***A. A declaration that the respondent's conduct with regard to the purported termination of the unspecified contract is null and void on the grounds that such termination or expiry/offends both the subject contracts and the Constitution of Kenya at Article 47(1) and (2) for being unreasonable, unfair, unprocedural, lacking in bona fides and is contrary to public policy.***

***B. Damages for breach of the subject five (5) contracts.***

***C. A declaration that the fundamental rights and freedoms guaranteed to the interested parties especially under Articles 2, 3, 20(1), 20(2), 21(1), 22(1), 23(1), 27(1) (2) & 43(1) (a)(c) (d), & 47(1) & (2) of the Constitution have been contravened by the respondent.***

***D. Any other relief that this Honourable Court shall deem fit to grant in the circumstances.***

***E That cost of this petition be provided for.***

2. Concurrently with the petition, the petitioner filed an application dated 14<sup>th</sup> June 2019 wherein it sought the following orders:

***1. Spent***

***2. That this Honourable court be pleased to issue a temporary injunction against the respondent by itself, its servants and or agents restraining it from terminating the contracts, withdrawing from the same and/or from implementing the effect and/or continuing to implement the effect of the purported letter of termination letter dated 3<sup>rd</sup> June, 2019 pending inter parties hearing of this application.***

***3. That this Honourable court be pleased to issue a temporary injunction against the respondent by itself, its servants and or agents restraining it from terminating the contracts, withdrawing from the same and/or from implementing the effect and/or continuing to implement the effect of the purported letter of termination letter dated 3<sup>rd</sup> June, 2019 pending the hearing and determination of this application.***

**4. That this Honourable court be pleased to issue a temporary injunction against the respondent by itself, its servants and or agents restraining it from terminating the contracts, withdrawing from the same and/or from implementing the effect and/or continuing to implement the effect of the purported letter of termination letter dated 3<sup>rd</sup> June, 2019 pending the hearing and determination of this petition.**

**5. That after the grant of an injunction order and further appropriate reliefs as ought in this motion and petition this Honourable court be pleased to further issue an order referring the dispute between the parties to arbitration as contracted by the parties herein.**

**6. That costs of this application be borne by the respondent.**

3. A summary of the petitioner's case is that on 12<sup>th</sup> June 2017 it entered into a contract with the respondent in which it was agreed that the petitioner would provide healthcare services to civil servants and disciplined forces which services the respondent would pay for. The said contract was to subsist for 24 months and was to be subject to review 3 months before the expiry period for consideration of renewal.

4. The petitioner contends that contrary to the express terms of their said contract on 3<sup>rd</sup> June 2019, the respondent purported to terminate the contract with effect from 11<sup>th</sup> June 2019 which termination, if implemented, would deprive over 1500 patients of their right to healthcare services

5. When the matter came up for mention on 25<sup>th</sup> June 2019, this court issued directions regarding the hearing of the said application dated 14<sup>th</sup> June 2019. In addition to the directions, the court allowed prayer No. 2 of the application which was to the effect that:

***“That a temporary injunction be and is hereby issued against the respondent by itself, its servants and or agents restraining it from termination the contracts, withdrawing from the same and/or from implementing the effect and/or continuing to implement the effect of the purported letter of termination letter dated 3<sup>rd</sup> June, 2019 pending inter parties hearing of this application.*”**

#### **Contempt of court application**

6. Following the issuance of the orders of injunction, the petitioner filed an application dated 2<sup>nd</sup> October 2019 wherein it cited the respondent's Acting Chief Executive Officer **Mr. Nickodemus O. Odongo** and Nakuru Acting Branch Manager **Rebecca Okumu** for contempt of court citing blatant disobedience of the said orders.

7. When the contempt application came up for hearing on 31<sup>st</sup> October 2019, counsel for the respondent informed the court that the respondent was yet to file a replying affidavit to the application for contempt. Counsel further indicated that to the best of the respondent's knowledge, there had been full compliance with the court orders issued on 26<sup>th</sup> June 2019 and that the petitioner's National Hospital Insurance Fund system and claims were being processed.

8. In response to the respondent's counsel's revelation of the petitioner's National Hospital Insurance Fund status, the parties took the following directions, by consent, in respect to the contempt application.

***“That on application for contempt the same be mentioned on 4<sup>th</sup> December, 2019 for the respondent to confirm that the National Hospital Insurance Fund system is in service and that they are processing claims and that it has not been tempered with.”***

9. After a lot of back and forth between the parties in subsequent mentions, on 11<sup>th</sup> December 2019 the court ordered the respondent's Ag. Chief Executive Officer and Ag. Nakuru Branch Manager to appear in court on 17<sup>th</sup> December and show cause why they should not be committed to civil Jail for contempt of the court's orders issued on 31<sup>st</sup> October 2019 and 4<sup>th</sup> December 2019.

10. When the matter came up for mention on 17<sup>th</sup> December 2019, parties recorded the following consent order: -

***1. That all the pending claims up to date to be processed and paid within 30 days from today's date.***

***2. That the respondent to file an appropriate affidavit to confirm that indeed all the claims have been processed and paid before the next hearing date;***

***3. That in the event of non-compliance, the court to issue appropriate sanctions as prayed for in the contempt application dated 2<sup>nd</sup> October 2019.***

***4. That in the event of non-compliance the cited contemnors to be personally present in court on the mention date being 28<sup>th</sup> January 2020.***

***5. That interim orders are extended.***

11. The petitioner now argues that the consent orders of 31<sup>st</sup> October 2019, 4<sup>th</sup> December 2019 and 17<sup>th</sup> December 2019 amounted to an admission, by the respondent, that they were in contempt of the court orders of 26<sup>th</sup> June 2019 and had opted to compromise the contempt application by processing and paying all the claims within 30 days from 17<sup>th</sup> December 2019.

12. Counsel for the petitioner submitted that as at 15<sup>th</sup> January 2020, the respondent had not processed or paid any claims and that the only issue for determination in this application is whether the contemnors have purged the contempt.

13. The petitioner's counsel submitted that the respondent's replying affidavit dated 28<sup>th</sup> January 2020 is a classic example of impunity and an affront to the court orders of 26<sup>th</sup> June 2019, 31<sup>st</sup> October 2019 and 17<sup>th</sup> December 2019.

14. Counsel submitted that the respondent had only partially paid the claims leaving an outstanding balance of Kshs 283,694,421 that is the subject of these proceedings. It was further submitted that the respondent did not proceed settle any claims arising from the impugned orders and have instead introduced a figure of Kshs 49,806,733.90 as the amount they had paid to the petitioner which amount was paid during the period long before the petition was filed.

15. Counsel accused the respondent's Chief Executive Officer of perjury and for creating the wrong impression that an amount of Kshs 56,637,738.00 was credited into the petitioner's account on 27<sup>th</sup> January 2020 in compliance with the existing court order when no such payments were made. Counsel further accused the respondent of deliberate acts of sabotage and an attempt to defeat the course of justice when the sum of Kshs 273,694,421 remains unpaid to-date.

### **Respondent's case**

16. The respondent opposed the application dated 2<sup>nd</sup> October 2019 through the replying affidavit of its legal officer **M/S Janet Boit** who states that:

*a) The respondent has not at any time terminated or purported to terminate any of the contracts entered between it and the applicant. The respondent's letter dated 3<sup>rd</sup> June 2019 did not terminate any of those contracts but merely notified the applicant that the respondent did not intend to renew those contracts upon their expiry in accordance with their terms. By their own terms, the contracts were fixed-term contracts and a fixed-term contract expires naturally on its expiry date, without the need for any action by either party to such contract. The notification of expiry was merely a courtesy extended by the respondent to the applicant.*

*b) The respondent has not withdrawn from any of the contracts and has maintained the status quo as at the date of the court order.*

17. She states that the payments sought through the applicant's demand letter dated 25<sup>th</sup> September 2019 are the subject of the main suit and that an order compelling the respondent to make such payments would defeat the outcome of the main suit and have the effect of determining the main case at an interlocutory stage.

18. She avers that nothing in the National Hospital Insurance Fund Act or any other law compels the respondent to pay "all claims" in regard to its members forwarded by JOMEC Limited for payment without delay and that the respondent is only obligated to pay undisputed claims presented in accordance with the National Hospital Insurance Fund Act and Regulations.

19. The respondent's Chief Executive Officer **Mr. Nicodemus Odongo** filed a further affidavit dated 28<sup>th</sup> January 2020 wherein he avers that between the year 2017 to 2019, the respondent received a total of 1889 claims amounting to Kshs 306,864,678.00 from the petitioner which he categorized as follows: -

*a) 160 claims for kshs 28,742,407.00 were notified in the system by physical claims have not been submitted to the respondent for processing for payment.*

*b) 485 claims for kshs 87,679,538.00 were found not to have been notified to the fund as per the claim requirements.*

*c) 168 claims for Kshs 27,825,600.00 are for claimants who have not provided their National IDs nor NHIF numbers for identification and/or verification purposes hence not payable and were therefore rejected.*

*d) 420 claims for Kshs 49,806,733.90 were found to be genuine by the respondent therefore payable and were duly paid. Annexed hereto marked No. 5 and No.6 (a) (b) is a list of the said claims and copies of the proof of payment of Kshs 49,806,733.90 by the respondent to the petitioner/applicant.*

*e) 606 claims for Kshs 102,516,960.00 were rejected for various given reasons as per the attached report.*

*f) 50 claims for kshs 10,293,440.00 were returned to the hospital for the petitioner to do necessary rectification and/or take necessary action. The same could not be paid.*

20. He reiterates that the respondent has complied with all the court orders and is therefore not in contempt.

21. At the hearing of the application **Miss Wanyama**, learned counsel for the respondent submitted that the five contracts that are the subject of the application dated 14<sup>th</sup> June 2019 expired on 12<sup>th</sup> June 2019 and that the petition and application dated 14<sup>th</sup> June 2019 were filed 2 days after the expiry of the said contracts.

22. It was submitted that the temporary orders of injunction issued on 26<sup>th</sup> June 2019 were issued over contracts that had expired and that the

said orders should be discharged or vacated. It was submitted that the respondent had settled all the valid claims made by the petitioner in excess and that the respondent had provided reasons for the rejected claims. She added that under the National Hospital Insurance Fund Act, any valid claims that are rejected ought to be resubmitted within 90 days.

23. It was further submitted that the respondent is a public body that owes a duty to the general public not to make fraudulent payments and that the respondent will require time to verify all the claims before making any payments.

#### **The interested parties' case.**

24. The interested parties supported the petitioner's application through the submissions of **Mr. Mutua**, learned counsel for the interested parties, who argued that the court orders issued on 26<sup>th</sup> June 2019 were clear on the issue of the termination of the contracts and that the consent order of 17<sup>th</sup> December 2019 was an acknowledgment of the contempt. It was submitted that the impugned orders have not been set aside or varied and should therefore be enforced/obeyed.

25. Counsel noted that the respondents had not demonstrated that they made any payments to the applicant after the court orders of 17<sup>th</sup> December 2019.

#### **Analysis and determination.**

26. I have carefully considered the pleadings filed herein the submissions by the parties' respective advocates together with the law and the authorities that they cited.

27. The applicant's case is that the respondent has disobeyed the court order issued on 26<sup>th</sup> June 2019 that culminated in the consent order of 17<sup>th</sup> December 2019.

28. On its part, the respondent categorically denies being in contempt of the said orders and has at paragraph 5(a) and (b) of its Legal Officer's replying affidavit sworn on 16<sup>th</sup> December 2019 stated that the subject contracts have not been terminated. The respondent argued that it had not withdrawn from any of the contracts but had maintained the status quo as at the date of the court order.

29. This court however notes that contrary to the respondent's averments in the said replying affidavit, the respondent submitted that the subject contracts had already expired as at the date the court's orders of 26<sup>th</sup> June 2019 were issued and that the said orders ought to be discharged or vacated.

30. My finding is that the respondent cannot be seen to blow hot and cold on the issue of the termination of the contracts as it cannot be seen to on one hand say, in the replying affidavit, that the contracts have not been terminated and in the same breath state that they had expired.

31. My take is that if indeed the said contracts had expired as at the time the order of 26<sup>th</sup> June 2019 was issued, then nothing could have been easier than for the respondent to file an application to set aside the said orders considering that they were issued ex-parte. Instead, the respondent continued to participate in the proceedings before this court and on 17<sup>th</sup> December 2019 recorded a consent order agreeing that it would process and pay all the pending claims as at the said date within 30 days. The respondent further undertook to file an appropriate affidavit to confirm that it had indeed processed and paid all the claims before the next hearing date.

32. I note that the respondents Chief Executive Officer filed a further replying affidavit dated 28<sup>th</sup> January 2020 wherein at paragraph 5 thereof, a schedule of the received and processed claims were highlighted. In the same schedule, claims that were not paid have also been listed and reasons for their rejection provided. It is apparent that the petitioner is dissatisfied with the explanation offered by the respondent in its response to the orders of 17<sup>th</sup> December 2019.

33. According to the petitioner, the respondent is yet to pay a substantial sum of Kshs 283,694,421 and is therefore in contempt of the court orders issued between June and December 2019.

34. My finding is that considering the respondent's deponent's own averment to the effect that the subject contracts have not been terminated, this court cannot find that the orders of 26<sup>th</sup> June 2019 have been disobeyed.

35. I note that the application dated 2<sup>nd</sup> October 2019 is a build up from the orders of 26<sup>th</sup> June 2019 that culminated in the recording of the consent order of 17<sup>th</sup> December 2019 (hereinafter "**the December consent** "). It is to be noted that even though the parties recorded the December consent to the effect that all pending claims would be processed and paid within 30 days the actual amount pending or stated to be pending as at that time was not indicated. I further note that the instant petition is not about a claim for a specific amount but was mainly intended to forestall the termination of the subject contracts besides the prayer for damages for breach of the contracts and declaration of rights.

36. My humble view is that if the petitioner's case is that despite the averments contained in the respondents further replying affidavit regarding the payments made, there still remains an outstanding balance of Kshs 283,694,421, then that amount ought to be the subject of a separate claim where the petitioner will be called upon to lay bare specific and strict proof of its liquidated claim against the respondents.

37. For the reasons and observations that I have made in this ruling, I am unable to find that the cited contemnors are in contempt of the court orders issued herein and the order that commends itself to me is the order to dismiss the application dated 2<sup>nd</sup> October 2019 with orders that costs shall abide the outcome of the petition.

Dated, signed and delivered via Microsoft Teams at Nairobi this 5<sup>th</sup> day of June 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.

W. A. OKWANY

JUDGE

**In the presence of:**

Mr. Busiega for the petitioner/applicant.

Mr. Mutua for the interested parties

Court Assistant: Silvia