



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Petition 1 of 2011**

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF SECTION 33 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE NATIONAL HOSPITAL INSURANCE FUND ACT 1998**

**AND**

**IN THE MATTER OF SECTION 4 (1) OF THE NATIONAL HOSPITAL INSURANCE FUND  
ACT 1998**

**BETWEEN**

**SAMUEL KEROSI ONDIEKI ..... APPLICANT**

**VERSUS**

**THE NATIONAL HOSPITAL INSURANCE**

**FUND BOARD OF MANAGEMENT ..... 1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. By the Petition dated and filed in court on 20<sup>th</sup> January 2011, the Petitioner, Mr. Kerosi Ondieki who is an advocate of this Court based in Kisii Town, seeks a declaration to be made by this Honourable Court to the effect that in so far as he is not afforded representation in the Board established under the provisions of **section 4 (1)** of the **National Hospital Insurance Fund Act 1998**, (the Act) that provision discriminates against him as a special contributor and therefore offends **section 27** of the **Constitution**, and is thus unconstitutional. The Petitioner also prays for general damages as well as costs of the petition to be awarded to him.

2. Contemporaneously with the petition, the petitioner filed a Notice of Motion dated 20<sup>th</sup> January 2011 seeking interim orders restraining the 1<sup>st</sup> respondent from carrying on its operations, discharging or otherwise performing any of its powers, duties or functions prescribed under the Act while pending inter partes hearing of the application and eventual determination of the petition.

3. The 1<sup>st</sup> Respondent opposed the application vide a Replying Affidavit sworn by Richard L. Kerich, the Chief Executive of the Fund and in charge of the day to day running of all the Fund's Operations. In the main, the deponent avers that though the petitioner herein was not made a party to Industrial Court Case No.87 of 2010, his interests as an employer through the firm of Kerosi Ondieki & Co. Advocates, were adequately represented by the Federation of Kenya Employers. That in any event, the prayers sought in this case are similar to the issues raised in the above quoted case albeit the petitioner's complaint that he and others like him have neither been consulted nor are they represented in the 1<sup>st</sup> respondent's management Board. The deponent also avers that this Petition is premature because neither the petitioner nor any such other self employed contributor has mobilized any such category of self employed workers into any legally recognized organization for purposes of electing a representative to the Board, nor has such grouping of such persons, if at all mobilized Parliament to pass an appropriate amendment to the Act to incorporate such representation in the Management Board as provided under **Article 27 (6)** of the **Constitution of Kenya, 2010**. Finally and in addition to the averments in the main body of the Replying Affidavit, the deponent avers that the Petitioner has not shown any reason to doubt that his representation by the 1<sup>st</sup> Respondent is any less effective than if he himself sat on the Management Board of the Fund. The deponent says that not too many representatives can be taken up unless there is a genuine need to do so. The deponent urged this court to dismiss both the application and the petition with costs.

4. By consent of the parties recorded in court on 28<sup>th</sup> February 2011, the parties dispensed with the interlocutory application. Parties agreed to rely on the affidavits filed in respect of the said application during the hearing of the petition, with leave to both parties to file Supplementary Affidavits. Though initially the parties indicated that they would make oral submissions on the basis of the filed affidavits, they later on agreed to file and exchange written submissions together with relevant authorities.

5. The rival submissions were duly filed and are on record. Counsel for the petitioner, M/s Minda & Co. Advocates submitted that the petitioner has moved the court under the provisions of **Article 22 (1)** of the **Constitution of Kenya, 2010** which give every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. It was further submitted that this court has jurisdiction under **Article 165 (3)** of the **Constitution of Kenya**, to hear and determine the questions of law raised in this petition. This court is empowered by **Article 23 (3)** of the **Constitution** to grant appropriate relief, including –

- a) *a declaration of rights;*
- b) *an injunction;*
- c) *a conservancy order;*
- d) *a declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; and*
- e) *an order for compensation; and*
- f) *an order of judicial review.*

6. The Petitioner's case is anchored in **sections 15 and 4** of the **Act** which define a contributor and establish the 1<sup>st</sup> Respondent's Management Board respectively. The Petitioner contends that as a contributor under **section 15** of the **Act**, **section 4 (1)** thereof discriminates against the Petitioner and other persons who make special contributions under **section 15 (2)** of the **Act**, and consequently that such discrimination is in direct contravention of the provisions of **section 27** of the **Constitution of Kenya**,

**2010. Article 27** provides *inter alia*, that every person is equal before the law and has the right to equal protection and equal benefit of the law and that equality includes the full and equal enjoyment of all rights and fundamental freedoms.

7. The Petitioner thus contended that the Fund Board as established under **section 4 (1)** of the **Act** denies the petitioner and his class of contributors representation while the Board continues to make decisions on the increment of contributions and/or penalties without the input of the petitioner and the special contributors. The petitioner asked the court to declare **section 4 (1)** of the **Act** unconstitutional.

8. The 1<sup>st</sup> respondent's view is completely different. The respondent framed the following issues for determination by the court:-

1. *Whether this Petition as presented constitutes a claim for the determination of the unconstitutionality of that provision of the law in relation to the Petitioner as an independent individual self employed contributor to the 1<sup>st</sup> Respondent's Fund or it is brought on his own behalf and on behalf of the rest of the alleged self employed contributors to the 1<sup>st</sup> Respondent's Fund.*

2. *Depending on the answer to the issue raised in the preceding paragraph, whether on the interpretation of the said provision of section 4 (1) of the NHIF Act, 1998, there is no representation of the Petitioner or the class of the alleged self employed contributors to the Board of Management of the 1<sup>st</sup> Respondent's Fund?*

3. *Depending on the answer to the issue raised in the preceding paragraph, whether the omission, if proved, would be construed to be discriminatory to the Petitioner or the class of such self employed contributors?*

4. *If the answer to the issue raised in the preceding paragraph is in the affirmative, whether it renders the provisions of section 4 to be deemed as a negation of the express provisions of section 27 of the constitution of the Republic of Kenya, hence unconstitutional?*

5. *Is the Petitioner entitled to general damages as claimed and from which of the Respondents, if at all?*

6. *Who will bear the costs of these proceedings?*

9. As far as the first issue is concerned, the 1<sup>st</sup> Respondent contended that apart from making empty and wild allegations about that special group of contributors to which the petitioner belongs and which group the petitioner says contributes up to 25% of the annual revenue collected by the Fund, the Petitioner does not say anywhere in the affidavits that he is representing that group of self employed workers, nor does he identify any one of such workers and their alleged contributions nor from where he has obtained the information he refers to in his affidavit and petition. In any event, counsel for the Fund argued that the petitioner did not obtain the requisite leave for a representative suit as provided by **Order 1 Rule 8** of the **CPR**, nor was any advertisement published to invite any person of the said class of people to join the suit. It was therefore contended that the pleadings do not, on their face support the line of a representative suit. Reliance for this line of argument was placed on **Nairobi HCCC No.2155 of 2000 – Tarlock Singh Nandhra & others –vs- Robin Cahill & others.**

10. What comes out from the above stated authority is that the petitioner must first of all identify that specific group or show that their names were readily ascertainable at any time, and then show that they have a common interest, a common grievance and that the relief sought shall be beneficial to all of them. The court, in the **Tarlock case** (above) referred to the decision in the English case of **Prudential Assurance Co. Ltd. –vs- Newman Industries Ltd. [1981] Ch.229** and the propositions therefrom by the learned editors of the SUPREME COURT PRACTICE 1997, Vol. 1. The comment was with reference to **Order 15 rule 12** at 15/12/4:-

“A representative action can be brought by a plaintiff suing on behalf of himself and all the members class, each member of which including the plaintiff, is alleged to have a separate cause of action in tort, e.g. damages for conspiracy, subject however to three overriding conditions, namely (1) that no order will be made in such an action if its effects might in any circumstances be to confer a right of action on a member of the class represented who would not otherwise be able to assert such a right in a separate proceedings, or to bar a defence which might otherwise have been available to the defendant in such a separate action, and therefore the only relief which will normally, if not invariably be capable of being obtained by the plaintiff in a representative capacity will be declaratory relief, e.g. a declaration that all the members of the class represented are entitled to damages for conspiracy from the defendants, and it is not clear how far injunctive relief may be granted to the plaintiff in his representative capacity; )2) that all the members of the class represented shared an interest which was common to all of them, so that there must be a common ingredient in the cause of action of each member of the class; and (3) that the Court must be satisfied that it is for the benefit of the class that the plaintiff should be permitted to sue in such a representative action, e.g. that the issues common to every member of the class will be decided after full discovery and in the light of all the evidence capable of being adduced in favour of the claim (Prudential Assurance Co. Ltd. –vs- Newman Industries Ltd. [1981] CH 229; [1979] 3 All E.R. 507). If the plaintiff in his representative capacity establishes his claim to the declaratory relief sought, it will still be necessary for each member of the class to bring his own action to establish damage suffered by him within six years from the date when the cause of action arose, since the court has no power to make an order for damages in a representative action, and the only effect of the declaratory order in favour of the plaintiff in his representative capacity is that the issues covered by that order would be res judicata between members of the class and the defendants.”

11. It was thus submitted on behalf of the Fund that this petition can only be addressed as a claim by the petitioner for his separate and independent claim for an interpretation that the provisions of **section 4 (1)** of the **Act** are discriminatory of him, because according to the Petitioner, he ought to be afforded an opportunity for representation on the Management Board of the Fund and that failure to do so is a clear breach of the petitioner’s personal constitutional right as per the provisions of **Article 27** of the **Constitution**.

12. In response to the arguments made on behalf of the Fund on the first issue, counsel for the Petitioner contended that under **Article 22** of the **Constitution of Kenya**, the petitioner is allowed to present proceedings in his own capacity, or in the interest of a group or class of persons or as a person acting in the public interest. Because of the said provisions, counsel argued that the Tarlock case relied upon by the 1<sup>st</sup> respondent is distinguishable and in fact irrelevant to the peculiar circumstances obtaining in the instant case. Counsel also submitted that it has been demonstrated sufficiently that **section 4 (1)** of the **Act** has and continues to discriminate against the Petitioner and other self employed.

13. I have carefully considered the above submissions made on behalf of the Petitioner and of the 1<sup>st</sup> Respondent. I have read all the authorities cited to me on behalf of the Fund. I hasten to note here that the Petitioner’s counsel did not cite any authority. I have also read the decision of the High Court of Kenya at Nairobi in R.M. –vs- Attorney General & 4 others – Petition NO.705 of 2007 at High Court Nairobi. In the said case, the Petitioner sought a declaration, *inter alia*, that as an inter sexual, he and other intersexuals in Kenya have suffered, are suffering and continue to suffer lack of legal recognition and protection under the Kenyan Statutes. It was argued on behalf of the Petitioner that as a result of the alleged discrimination, the petitioner and other inter sexuals in Kenya (a group that was neither named nor identified by the Petitioner), the petitioner and other intersexuals in Kenya had been deprived of their constitutional right to education, identity documents and freedom of movement as enshrined in **section 81** of the repealed **Constitution of Kenya** and the universal Declaration of Human Rights since intersexuals were not provided for in Statutory forms like PPO which one was required to fill as a passport application form nor were they given facilities that were required for the purposes of obtaining a Kenyan passport or for enjoyment of the right of free movement in Kenya.

14. The R.M. case(above) was the first of its kind in Kenya and like in that case the court in this case has to determine what “**public interest**” means. The court in the R.M. case said the following as to what

amounts to “public interest”:

“Public Interest is defined in Black’s Law Dictionary 8<sup>th</sup> Edition as: “1.

**The general welfare of the public that warrants recognition and protection. 2. Something in which the public as a whole has a stake especially an interest that justifies governmental regulations.” Thus in order to determine whether the suit before us is one of public interest, and whether the petitioner has locus standi to bring a representative suit, several questions are: who is an intersex person? Is there a body of persons in this country known as Intersex persons or intersexuals? Is the petitioner an intersex person? Are issues concerning intersex persons issues concerning the general welfare of the public, or issues in which the public as a whole has a stake?**

15. It was argued by the Respondents in the **R.M. case** (above) that the Petitioner did not have *locus standi* to bring the petition in a representative capacity on behalf of other intersex persons, especially when these other inter sex persons were not identified by name nor were their numbers known. The court referred to the case of **Priscilla Nyokabi Kanyua –vs- The Attorney General – Constitutional Petition No. 7 of 2010 at Nairobi** and said the following:-

“In that case, the development of judicial precedent on the issue of

**locus standi was traced, and a conclusion arrived at that in matters of public interest, Courts have moved away from the previous restrictive position that a petitioner, other than the Attorney General, must show that the matter of public interest complained of injured him over and above the general public. The approach now preferred is a broader and more purposeful approach giving locus standi to anyone acting in good faith with minimal personal interest in a matter of public interest, to seek judicial intervention to ensure the sanctity of the Constitution.”**

16. The above position is now directly reflected in **Article 22 (1)** of the **Constitution of Kenya, 2010** which provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened, and such an action can be brought by any such person in the public interest. This was also the position adopted by the Court in **Lemeiguran & 3 others –vs- Attorney General & 2 others [2008] 3 KLR (EP 325** (also known as the I1 Chamus Case). Thus the restrictive approach to the question of *locus standi* adopted by Nyamu and Wendoh JJ in **Alphonse Mwangemi Munga & 10 others –vs- African Safari Club Ltd. [2008] e KLR** in public interest cases had drastically changed. I associate myself with the paradigm shift in the judicial thought on this issue, since that shift is consistent with **Article 22** of the **Constitution of Kenya 2010**. These provisions give *locus standi* to every person, in matters of public interest to pursue a suit for breach or threatened breach of fundamental rights and freedoms, of a body of Persons to which such person belongs or has an interest.

17. The question that I need to deal with here is whether there is in this country a group of persons who pay special contributions to the Fund. In deciding this issue, I refer to **section 15 (2)** of the **Act** which provides:-

“15 (2) A person liable as a contributor under this section shall pay to the Board –

(a) **In the case of a person whose income is derived from salaried employment, standard contribution; or**

(b) **In the case of a person whose income is derived from self employment, a special contribution.”**

18. The Petitioner argued that as a self employed person, he meets the requirements of **section 15 (1)** of the **Act** and therefore makes special contributions from his self employment and that as such, he and others like him are entitled to representation at the Board; and should not continue to be discriminated against by the Act as provided under **section 4 (1)** of the **Act** which sets out particulars of those to sit on the Board.

19. In my considered view, the Petitioner has established that as a self employed person, he makes special contributions to the Fund.

20. Having so found that the Petitioner is a self employed person, this court must proceed to answer the question as to whether there is an identified group of persons who make these special contributions to the Fund. If there is such a group, where are the members? It was contended very generally both by the Petitioner and the Fund that about 50% of the contributors to the Fund belong to this special group of persons, but no statistical data was given to the court by either side to establish specifically the presence of this body of persons in this country. The Petitioner made the general statement to support his argument that this group of persons requires representation on the Board, while the Fund made the statement to support his argument that such a group would be too large if each member was to sit on the Board. Whichever side one looks at, there was need for particulars to help the court in determining who these people are and how they can be integrated or catered for in the Fund in terms of representation on the Board.

21. What I am saying is that there is no data provided by the petitioner and the Fund upon which I can conclusively say who these special contributors are. There is however no doubt that in this country, the informal sector feeds many mouths and keep the economy of this country going, but the petitioner needed to do more than make general statements. He needed to put facts and figures before the court for the better appreciation of the Petitioner's case as a public interest case. He needed to show who these groups are – are they identifiable along professional, social or other lines.

22. A look at **section 4 (1)** of the **Act** clearly shows that representation on the Board, other than the offices of the Permanent Secretaries as provided by **section 4 (1) (b) (c) and (d)** is by nomination by organized groups such as the Federation of Kenya Employers, the Central Organization of Trade Unions, the Kenya National Union of Teachers, the Kenya National Farmers Union the Association of Kenya Insurers and the Non-Profit Making Health Care Providers.

23. It seems to me that this special class of persons of which the Petitioner speaks whoever they are and wherever they are, must organize themselves into groups or a group so as to bring themselves under the umbrella of the provisions of **section 4 (1)** of the **Act** via an amendment. Otherwise, as ably argued by counsel for the Fund, it would be difficult and near impossible to accommodate individuals of the unnamed special group of persons onto the Board.

24. It may turn out eventually that when the group is identified, there may be many sub-groups in there depending on the peculiar interest represented by each.

25. The next issue for determination is whether on the interpretation of **section 4 (1)** of the **Act**, the Petitioner and others like him who are in self employment have no representation on the Board. The Petitioner says so. On the other hand, counsel for the Fund contends that these groups of persons who are self employed and legally recognized by the Fund, have always made their contributions without any complaint whatsoever. See **Section 15 (1)** of the **Act**. Counsel submitted that the petitioner has not discharged the burden thrust upon him of proving that the petitioner and this group of persons are not represented on the Board. I have already said that the Petitioner did not provide any statistical data to show particulars of the persons who fall in this group. Such information would have also shown whether such persons are or are not members of any of the members provided under **section 4(1) (d), (e), (f), (g), (h), (i) or (k)** of the **Act**. Without such details, this court is unable to conclusively say that there is no representation of the Petitioner or the class of the alleged self employed special contributors to the Fund on the Fund Board. I think myself that whereas the Petitioner's thinking embraces the letter and spirit of the **Constitution of Kenya 2010**, he needs to do much more than just making general statements. Let him provide the data and confront Parliament with it through his Member of Parliament for appropriate amendments to the Act if it indeed appears that this particular group to which the Petitioner belongs is truly not represented on the Board. The law is clear that he who alleges that a certain set of facts exist must prove such existence. The evidence before me is not sufficient to prove that that particular group or class of persons has no representation on the Board. If the group exists, there will be nothing to stop its voice from being heard once it comes on board. All authority in this country be it judicial, executive or

legislative belongs to the people of Kenya and shall be exercised only in accordance with the Constitution. Such power is to be exercised by the people either directly or indirectly through the peoples' democratically elected representatives. Under the **Constitution of Kenya 2010**, the people of Kenya are empowered, they are liberated and they are informed. Nothing happening in the public arena will escape the ever sharp eye of the Kenyan people, whether that something happens within the Executive, Legislative or Judicial arm of Government. I can foresee a situation where the public eye will become so much the sharper with the coming unto force of the devolved government after the first General Elections Scheduled for 4<sup>th</sup> March 2013 under the Constitution of Kenya 2010. The Petitioner's eye in this case must therefore see beyond generalizations and get down to specifics. In that way the public will be served better. That is when the fruits of **Chapter Four – The Bill of Rights** – and **Chapter Six – Leadership and Integrity** – **Chapter Eleven – Devolved Government** – **Chapter Twelve – Public Finance** – **Chapter Thirteen – the Public Service** – of the **Constitution** shall trickle down to every citizen of this country and even to those who live within the borders of this country. The Petitioner is to be commended for his vigilance over the implementation of the Constitution of Kenya 2010, but in the instant case, he needed to do a little more by going beyond the simplistic purview of **section 4 (1)** of the **Act**.

26. In the premises and for the reasons above stated, this court is unable to reach the conclusion that the Petitioner is not afforded representation in the Board established under **section 4 (1)** of the **Act** and that the said provision discriminates against the Petitioner as a special contributor and therefore offends **Article 27** of the **Constitution** hence it is unconstitutional. I also find that a case for general damages was not made out by the Petitioner. The petition is accordingly dismissed but with no order as to costs.

27. Lastly, the delay in delivering this judgment is very much regretted. At the time it was due, I was engaged in hearing and determining the more than 125 boundary dispute cases filed against the Independent Electoral and Boundaries Commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9<sup>th</sup> July 2012.

**Dated and delivered at Kisii this 11<sup>th</sup> day of October, 2012**

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:

Mr. C. Okenye for Minda (present) for Petitioner

N/A for Respondents

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE.**