Cabinet Secretary Ministry of Health v Aura & 13 others (Civil Application E583 of 2023) [2024] KECA 2 (KLR) (19 January 2024) (Ruling)

Neutral citation: [2024] KECA 2 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E583 OF 2023

PO KIAGE, P NYAMWEYA & GWN MACHARIA, JJA

JANUARY 19, 2024

BETWEEN

THE CABINET SECRETARY MINISTRY OF HEALTH ..... PETITIONER

AND

JOSEPH ENOCK AURA ..... 1ST RESPONDENT

MINISTRY OF INFORMATION, COMMUNICATION AND THE DIGITAL ECONOMY IN KENYA ..... 2ND RESPONDENT

SOCIAL HEALTH AUTHORITY ..... 3RD RESPONDENT

COMMISSION ON REVENUE ALLOCATION ..... 4TH RESPONDENT

NATIONAL ASSEMBLY OF KENYA ..... 5TH RESPONDENT

SENATE OF KENYA ..... 6TH RESPONDENT

COUCIL OF GOVERNORS ..... 7TH RESPONDENT

PRESIDENT SUED THROUGH THE ATTORNEY GENERAL OF KENYA ..... 8TH RESPONDENT

OFFICE OF THE DATA PROTECTION COMMISSION ..... 9TH RESPONDENT

HEALTH RECORDS AND INFORMATION MANAGERS BOARD .... 10TH RESPONDENT

CLINICAL OFFICERS COUNCIL OF KENYA ..... 11TH RESPONDENT

HON ATTORNEY GENERAL ..... 12TH RESPONDENT

MEDICAL PRACTITIONER & DENTIST COUNCIL ..... 13TH RESPONDENT

KENYA MEDICAL ASSOCIATION ..... 14TH RESPONDENT

(An application under Rule 5(2)(b) of the Court of Appeal Rules for stay of execution and/or implementation of the Orders of the High Court of Kenya at Nairobi (Chacha Mwita, J.) dated 27th November, 2023 in Constitutional Petition No. E473 of 2023)

Court of Appeal Suspends High Court orders restraining the implementation and enforcement of the Social Health Insurance Act, 2023, the Primary Health Care Act, 2023 and the Digital Health Act, 2023, save for some provisions of the Social Health Insurance Act

The application sought essentially an order for the enforcement and/or implementation of the orders issued by the High Court to be lifted and/or stayed pending the hearing and determination of the intended appeal. The court held that it could not stay execution of an order with respect to which there was no notice of appeal. The court further highlighted the main guiding considerations for the grant of stay orders. The court also held that whereas arguable points should ideally be expressed in the form of a draft memorandum of appeal, there was no rule that it must be so.

Reported by Kakai Toili

Jurisdiction *– jurisdiction of the Court of Appeal – jurisdiction to stay execution of an order with respect to which there was no notice of appeal - whether the Court of Appeal could stay execution of an order with respect to which there was no notice of appeal.*

Civil Practice and Procedure *– orders – stay orders - what were the main guiding considerations for the grant of stay in an application for stay - whether failure to raise arguable points in a draft memorandum of appeal in an application for stay of orders of the High Court was fatal.*

Brief facts

The 1st respondent filed a petition before the High Court and alleged that; the Social Health Insurance Act, 2023, the Primary Health Care Act, 2023 and the Digital Health Care Act 2023, breached or threatened to breach the Constitution of Kenya. Simultaneously, the 1st respondent filed a notice of motion application in which he sought among others, conservative orders prohibiting the respondents therein from enforcing any aspect of or the whole of the impugned statutes pending the hearing and determination of the petition. The High Court issued a conservatory order restraining the respondents, their agents and/or anyone acting on their directives from implementing and/or enforcing the impugned Acts until February 7, 2024.

Subsequently, the petitioner, the Cabinet Secretary Ministry of Health (the Cabinet Secretary) filed an application citing a looming monumental crisis in the health sector and a regulatory vacuum negatively impacting members of the National Health Insurance Act on account of the repeal of the eponymous statute, she prayed that the conservatory orders issued be lifted and/or suspended pending the hearing and determination of the application. The High Court ordered that parties comply with the directions earlier issued.

Aggrieved, the Cabinet Secretary filed a notice of appeal expressing intent to appeal against the orders of the High Court. The Cabinet Secretary subsequently filed the instant application seeking essentially an order that enforcement and/or implementation of the orders issued by the High Court be lifted and/or stayed pending the hearing and determination of the intended appeal.

Issues

i. Whether the Court of Appeal could stay execution of an order with respect to which there was no notice of appeal.
ii. What were the main guiding considerations for the grant of stay in an application for stay?
iii. Whether failure to raise arguable points in a draft memorandum of appeal in an application for stay of orders of the High Court was fatal.

Held

1. It was not for the court at the determination of the application, or even at the determination of the appeal by whichever bench of the court, to make any findings one way or the other on the contested issues. The proper forum of their ventilation, interrogation and determination was the High Court upon hearing of the petition. It was also not the court's remit at that stage to determine whether the High Court committed a grave error of law in issuing *ex-parte* orders that suspended the operation of three statutes passed by Parliament. That was to be decided by the bench that shall hear the appeal. All the court could legitimately do within its mandate was decide whether a case had been made out for the stay of enforcement of the High Court's order suspending the operationalization of the challenged statutes.
2. The court could not stay execution of an order with respect to which there was no notice of appeal. In the instant application, a notice of appeal was filed against the orders given by the High Court on December 11, 2023. The orders of December 11, 2023 made specific reference to the orders granted on November 27, 2023, which the parties were directed to comply with. Thereby, the High Court in effect adopted and repeated or reiterated the orders of November 27, 2023 on December 11, 2023. It would thus be an exercise of splitting of hairs to argue that the orders of November 27, 2023 were different from those of December 11, 2023. As they were the same orders, the court had jurisdiction in the matter.
3. The jurisdiction to grant stay lay at the discretion of the court and was exercised on the basis of sound and settled principles, not arbitrarily or capriciously on a whim or in consideration of any extraneous matters. The main guiding consideration was that the application must show;
    1. that he or she had an arguable appeal;
    2. that the appeal was likely to be rendered nugatory unless the orders sought were granted in the interim; and
    3. public interest.
4. An arguable appeal was not one that must succeed and an applicant need not proffer a multiplicity of arguable points. One was sufficient. For a point to be arguable it needed merely to raise a *bona fide* point of law or fact sufficient to call for an answer from the respondent and was worthy of the court's consideration. Moreover, whereas such arguable points should ideally and conveniently be expressed in the form of a draft memorandum of appeal, there was no rule that it must be so. One could raise such grounds on the face of the motion and even in the supporting affidavit. The appeal was eminently arguable.
5. The scenario said to have been precipitated by the conservatory order could not be taken lightly. The injuncting of the regulatory framework intended by the restrained statutes was said to have led to confusion and to have exposed patients to serious risk to health as they stood to be denied treatment. Given what had been sworn by the Cabinet Secretary there was a real and present danger to the health rights of countless citizens who were not parties to the litigation pending before the courts. The confusion, the *lacuna* and the risk and harm to citizens pending the hearing and determination of the appeal was a price too dear to pay, and it would have the effect of rendering the appeal nugatory having regard to the duty to give the term its full meaning.
6. A case had been made out for the grant of the motion. The discretion the court had in those matters included granting such a plea on terms as were just. The court was concerned at the arguably irreversible effect of some of the provisions of the Social Health Insurance Act identified in the 1st respondent's prayers in the petition. The court therefore isolated them and they shall therefore remain suspended, even as the rest of that statute, and the other two suspended statutes, were unshackled for operationalization and enforcement pending the hearing and determination of the appeal.

Application partly allowed.

Orders

i. *The court suspended orders of the High Court restraining the implementation and or enforcement of the Social Health Insurance Act, 2023, the Primary Health Care Act, 2023 and the Digital Health Act, 2023, save for the following provisions of the Social Health Insurance Act that shall remain suspended pending the hearing and determination of the applicant's appeal in Civil Appeal No E984 of 2023;*
   a. *Section 26(5) which made registration and contribution a precondition for dealing with or accessing public services from the National and County Governments or their entities.*
   b. *Section 27(4) which provided that a person shall only access healthcare services where their contributions to the social health insurance fund were up to date and active.*
   c. *Section 47(3) which obligated every Kenyan to be uniquely identified for purposes of provision of health services.*

ii. *In order to ensure that Civil Appeal No E984 of 2023 was heard and determined in expedited fashion, the court directed that the parties therein shall file and serve written submissions and bundles of authorities in accordance with the following timelines;*
   a. *The applicant/appellant and all parties in support of the appeal within 7 days of today.*
   b. *The 1st respondent within 7 days of being served with the appellant's submissions.*
   c. *The appellant shall file rejoinder submissions if any, within 5 days of being served by the 1st respondent.*

iii. *The Registrar of the court shall thereafter allocate a hearing date for Civil Appeal No E984 of 2023 on a priority basis, and no later than March 31, 2024.*

iv. *The costs of the motion shall abide and follow the outcome in Civil Appeal No E984 of 2023.*

Citations

Cases

1. Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others (Petition 15 of 2020; [2023] KESC 14 (KLR)) — Explained
2. Bloggers' Association of Kenya (Bake) v Attorney General & 5 others (Petition 206 of 2018; [2018] eKLR) — Explained
3. Gatirau v Githinji & 2 others (Petition 2B of 2014; [2014] 4 KLR 316) — Explained
4. Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & Watts Enterprises Limited (Civil Application 74 of 2015; [2015] KECA 447 (KLR)) — Explained
5. Kenya Hotel Properties Limited v Willisden Investments Limited & 6 others (Civil Application 24 of 2012; [2013] KECA 370 (KLR)) — Explained
6. Munene v Kingara & 2 others (Petition 7 of 2014; [2014] eKLR) — Explained
7. Nguruman Limited v Shompole Group Ranch & another (Civil Application 90 of 2013; [2014] KECA 358 (KLR)) — Explained
8. Ontweka & 3 others v Onderi (Civil Application E332 of 2023; [2023] KECA 1032 (KLR)) — Explained
9. Potters House Academy v Leah Chemeli Kemer (Cause E021 of 2021; [2022] eKLR) — Explained
10. Stanley Kangethe Kinyanjui v Tony Ketter & 5 others (Civil Application 31 of 2013; [2013] KECA 378 (KLR)) — Explained
11. Reliance Bank Ltd vs Norlake Investments Ltd ([2002] EA 227) — Explained

Statutes

1. Constitution of Kenya, 2010 — article 10(2)(b); 258(1)(2); 118(b); Schedule 4 — Interpreted
2. Court of Appeal Rules, 2010 (cap 9 sub leg) — rule 5(2)(b) — Interpreted
3. Digital Health Care Act, 2023 (Act No 15 of 2023) — In general — Cited
4. National Health Insurance Act (cap 255 repealed) — In general — Interpreted
5. NHIF Act, 1998 (Act No 9 of 1998 repealed) — In general — Interpreted

6. Primary Health Care Act, 2023 (Act No 13 of 2023) — In general — Cited
7. Social Health Insurance Act, 2023 (Act No 16 of 2023) — section 26(5); 27(1)(a); 27(4); 38, 47(3) — Interpreted
8. Statutory Instruments Act, 2013 (Act No 23 of 2013) — In general — Cited

Advocates

None mentioned

RULING

1. On November 24, 2023, one Joseph Enock Aura, (hereinafter 'Mr Aura'), by all indications a public spirited citizen of this Republic, filed a petition before the High Court at Nairobi. He did so in exercise of his right to approach that court pursuant to article 258(1) of the *Constitution*, and stated that he was doing so "on his own behalf, on behalf of the people of Kenya and in protection of their constitutional and statutorily rights," and was thus acting in the public interest as recognized by article 258(2) of the *Constitution*.

2. He alleged in the petition that some three statutes, to wit; The *Social Health Insurance Act, 2023*, the *Primary Health Care Act, 2023* and the *Digital Health Care Act 2023*, all signed into law on October 19, 2023, by the President of the Republic, who was sued through the Attorney-General as the 8th respondent, breached or threatened to breach the *Constitution* in various respects, all stated and particularized.

3. In the petition, citing as respondents the Cabinet Secretary in charge of the Ministry of Health (hereinafter 'the CS') as well as other cabinet secretaries, and various officers, authorities and entities of Government. Mr Aura sought various declarations, orders of prohibition and injunctions including, specifically;

> "
>
> " 1. A declaration do issue that sections 26(5), 27(1)(a), 27(4), 38, and 47(3) of the *Social Health Insurance Fund Act, 2023*, are inconsistent with the *Constitution of Kenya* and therefore null and void to the said extent.
>
> 6. A declaration do issue that the entire *Social Health Insurance Fund Act, 2023*; the entire *Digital Health Act, 2023* and the entire *Primary Health Act, 2023* are all invalid having been enacted without complying with the mandatory requirements of the *Statutory Instruments Act*.
>
> 7. A declaration do issue that the entire *Social Health Insurance Fund Act, 2023*; the *Digital Health Act, 2023* and the entire *Primary Health Act, 2023* are all invalid for lack of effective, tangible and mandatory public participations as prescribed and required under articles 10(2)(b) and 118(b) of the *Constitution of Kenya* and are all therefore null and void."
>
> He also prayed that;
>
> " 8. An order of prohibition do issue, restraining the respondents either jointly and/or severally by themselves, their officers acting at the behest, agents, assigns, representatives, employees, servants or otherwise howsoever from giving effect to, enforcing, or taking any

steps to enforce, or in any way implementing and/or continuing the implementation of any aspect of the impugned of the *Social Health Insurance Fund Act, 2023*, *Digital Health Act, 2023* and the *Primary Health Act, 2023*."

4. Simultaneously, Mr Aura filed a notice of motion riding on the petition, in which he sought conservative orders prohibiting the respondents therein from enforcing any aspect of or the whole of the impugned statutes first, "2. Pending the hearing and determination of this motion" and, second "3. Pending the hearing and determination of the petition."

5. In the alternative to those two prayers, he prayed thus;

> "4. In saving judicial time and costs, an order do issue on the terms of an expedited and fast tracked hearing of the petition itself as may be appropriate."

6. Both the petition and the accompanying notice of motion came up for directions ex-parte before Mwita, J on November 27, 2023 whereupon the learned Judge, after stating that he was satisfied that the petition raised important constitutional and legal questions that deserved urgent and serious consideration, proceeded to make orders all touching on the Petition, as follows;

> " 1. That the pleadings be served immediately.
>
> 2. That the respondents do file responses to the petition within 7 days after service.
>
> 3. That once served, the petitioner will have 7 days to file and serve a supplementary affidavit if need be together with written submissions to the petition, not exceeding 10 pages.
>
> 4. That the respondents will then have 2 days after service to file and serve written submissions to the petition, not exceeding 10 pages each.
>
> 5. That highlighting of submissions on February 7, 2023."

7. The learned Judge then made an order in apparent grant of the notice of motion;

> " 6. That in the meantime, a conservatory order is hereby issued restraining the respondents, their agents and or anyone acting on their directives from implementing and or enforcing the *Social Health Insurance Act, 2023*, the *Primary Health Care Act, 2023* and the *Digital Health Act, 2023* until February 7, 2024."

8. Upon being served with the pleadings and the aforesaid order, the CS filed a notice of motion dated December 8, 2023. Citing, in the founding grounds and supporting affidavit, a looming monumental crisis in the health sector and a regulatory vacuum negatively impacting some 17 million members of the *National Health nsurance Act* on account of the repeal of the eponymous statute, she prayed, in the main that;

> " 2. Due to urgency and the looming crisis in the health sector, the conservatory orders issued by this honourable court (*ex parte*) to stay the universal health care legislations namely *Social Health Insurance Act, 2023*; *Primary Health Care Act, 2023* and *Digital Health Act, 2023* be lifted and/or suspended

pending the hearing and determination of this motion and/or directions on the disposal of the petition."

9. She also prayed, in terms uncannily echoing Aura's alternative prayer we earlier quoted, as follows;

> " 3. That the motion herein be subsumed in the petition so that the petition proceeds for hearing and determination on merits since the issues herein transcend the partisan interest of the litigants and raise matters of general public importance."

10. That motion came before the learned Judge on December 11, 2023, and the learned judge rendered himself thereon as follows;

> " I note that the court has already issued directions on the hearing of the petition taking into account the urgency of the matter, public interest and the issues raised in the petition.
>
> It is hereby ordered;
>
> 1. That parties comply with the discretions issued in this matter and the hearing date remains as assigned."

11. This aggrieved the CS and on the same day she filed a notice of appeal expressing intent to appeal against the orders of the honourable judge. She has since instituted the substantive appeal, being Civil Appeal Number E984 of 2023.

12. Before the said record of appeal was lodged, however, the CS filed the motion before us. Dated December 13, 2023 and brought under rule 5(2)(b) of the *Court of Appeal Rules*, it seeks essentially an order that;

> " .....
>
> b. Enforcement and/or implementation of the orders issued by the High Court on November 27, 2023 be lifted and/or stayed pending the hearing and determination of the intended appeal."

13. The motion is supported by the affidavit of Nakhumincha S Wafula, (the CS) sworn on December 13, 2023. That affidavit gives the history of the dispute and the litigation between the parties as we have captured herein. She swore that on being moved to vacate his *ex parte* orders the learned judge merely reiterated the said orders hence her appeal against them which is the fulcrum of her complaint on appeal; that the learned Judge violated

> " a cardinal rule enshrined in the *Constitution* that a party be heard before an adverse order is made against that party,";

and that the said orders continue to be implemented against her without her being accorded an opportunity to be heard. She also swears that it was "not reasonable or viable to suspend treatment of patients until February 7, 2023 (sic)" when the matter is to be heard before the High Court. She urges the court to "consider the plight of patients and denying them treatment is against the constitutional expectations."

14. Various parties filed affidavits in replying with Mr Aura's, which is sworn on December 27, 2023, being the only one opposed to the motion. Running into 60 paragraphs, the affidavit expresses Mr Aura's opposition on grounds that the motion is incompetent; it is an abuse of court process; the notice of

appeal has not been served on him; there is no evidence of any health crisis tendered, and there is no harm or loss that will accrue as draft regulations for implementation of the three statutes have not been enacted; no memorandum of appeal was attached; and the motion is an afterthought. We need not rehash at length the ensuing explication of those grounds of objection.

15. Written submissions were filed by the parties as were lists and bundles of authorities before the plenary hearing of the motion before us on January 10, 2024. Learned senior counsel, Mr Fred Ngatia, SC appeared for the CS while learned counsel Mr Harrision Kinyanjui appeared for Mr Aura, who is the 1st respondent. Other learned counsel appearing were Mr Bita for the 2nd, 8th and 12th respondents, Ms Nganyi for the 5th, Ms Thanji for the 6th, Mr Lawi for the 7th and Mr Wako for the 11th respondents, respectively.

16. Before the start of the hearing, we engaged counsel for the protagonists on the possibility and advisability of finding a middle ground in keeping with our constitutional command and pragmatic approach to seek the most efficient and cost-effective use of scarce judicial resources and with a view to focusing on the main issues in controversy that await interrogation and decision of the petition at the High Court, instead of focusing on the application for interim relief within an interlocutory appeal. However, as we did, the counsel insisted on being heard.

17. Going first, Mr Ngatia reiterated his Written Submissions on behalf of the CS and referred to various authorities cited therein, which we have noted, including the Supreme Court decision of *Bia Tosha Distributors Ltd v Kenya Breweries & 6 others* [2023] eKLR on conservatory orders as remedies under the *Constitution* in the supreme law of the land, and *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 others* [2014]eKLR which stated that they should be granted on inherent merit (meaning both sides must be heard fairly and weighted, according to counsel) and bearing in mind the public interest. Also cited was *Potters House Academy v Leah Chemeli Kemer* [2022] eKLR which expressed the need for parties to have their day in court and, since ex-parte hearings deprive a party of such right to be heard, they should only be conducted in exceptional cases where it is evident the defendant was served but failed or ignored to come to court.

18. It was Mr Ngatia's contention that an arguable appeal had been established principally on the learned Judge's issuance of ex-parte orders that were final in nature contrary to the constitutional guarantee of fair trial and the rules of natural justice, and that the said appeal would be rendered nugatory were the learned judge's orders to still subsist, since the right to Kenyans to health was jeopardized and patients' need for treatment cannot be suspended as the parties litigate. He decried as untenable the absence of a regulatory framework for health due to the impugned orders that left the health sector in a state of animated suspension. He urged us to stay or suspend "those blanket orders."

19. We next invited counsel for the respondents who were in support of the application. Mr Bita argued that there was an arguable appeal made out to the extent that the impugned orders affected numerous people who were not party to the proceedings and also suspended the existing framework for the attainment of a fundamental right in the *Constitution*. He urged us to issue a stay so as to allow for the progressive attainment of the right of health. He cautioned that if we did not issue a stay "the consequences on numerous people will be irreversible."

20. Going next Ms Nganyi stated that by suspending the implementation of the *Social Health Insurance Act*, the learned judge improperly created confusion and a regulatory vacuum with the result that patients cannot obtain much-needed relief. Moreover, she added, the learned judge improperly departed from his own decision in Petition No E413 of 2023 in which he had denied a request for the suspension of two of the very statutes he suspended in the present case.

21. On her part, Ms. Thanji submitted that the legislative process leading to the enactment of the statutes was long and rigorous in which there was public participation. She urged that the appeal is arguable as the *ex parte* blanket suspension of the statutes is a weighty matter and it cannot be in the public interest for the High Court suspend Acts of Parliament without hearing the other parties.

22. Also in support was Mr Lawi for the Council of Governors who, like those who went before him, associated himself with and adopted Mr Ngatia's submissions. He stated that the 4th Schedule to the *Constitution* assigns county health services to the counties and contended that the counties and *wananchi* are the most affected by the lacuna created by the impugned orders as they affected pre-treatment approvals for both inpatient and outpatient services. His view was that the interests of justice required that the application be allowed. He cited this court's decision in *Housing Finance of Kenya v Sharok Kher Mohammed Ali Hirji & another* -Nairobi Civil Application No 74 of 2015.

23. Mr Kinyanjui opposed the motion because, first, this court is bereft of jurisdiction as the applicant never appealed against the orders of November 26, 2023. He next stated that no single averment had been made that a single Kenyan had been denied access to health. Nor was any hospital or dispensary mentioned. He questioned the absence of a memorandum of appeal and also took the view that it was not proper that scarce judicial resources should be expended on the application before us while the substantive petition pends. He urged that the learned judgedid consider the application and the public interest before directing that the petition be heard on February 7, 2024. Lastly, that the applicant does have a chance to ventilate all her complaints at the High Court.

24. When we sought to know whether it was not arguable if it was permissible for the learned judge to make the impugned orders *ex parte* thereby essentially determining the motion before hearing the respondents thereto, counsel responded that the learned judge had discretion not to hear the application and go straight to the petition. He, however, conceded, albeit reluctantly, that the matter was arguable, but only if the CS had appealed against the orders of November 27, 2023 but she had not. He also conceded that when the CS's application came before the learned judge on December 4, 2023, he did not hear it but rather reiterated the orders he had made on November 27, 2023. He defended such move as being within the judge's discretion, for which he cited a High Court decision he opined to be on all fours, being *Bloggers' Association of Kenya (Bake) vs Attorney General & 5 others* [2018] eKLR.

25. In his reply Mr Ngatia pointed out that the nugatory aspect was well-established by the CS's averment that some 17 million members of the now defunct NHIF stood affected by the challenged orders which created a regulatory vacuum. On arguability, he asserted that the learned judge improperly gave a final as opposed to an interim conservatory order.

26. Regarding the competence of the application before us, counsel took the view that the notice of appeal on record is efficacious to donate jurisdiction to the court to stay the orders of November 27, 2023 because the orders of December 11, 2023 reiterated those earlier orders. Finally, on the non-display of a draft memorandum of appeal, Mr Ngatia contended that there is no requirement that one be attached to an application for stay, it being sufficient that an applicant disclose an arguable point and the CS did so in her supporting affidavit. He relied on this court's decision in *Ontweka & 3 others v Onderi* Civil Application No E332 of 2023.

27. We have given due and anxious consideration to the application, the affidavits in support of and that in opposition thereto, as well as the rival submissions filed and made before us and the authorities cited. We do not for a moment doubt that the petition now before the High Court raises serious constitutional and statutory issues as was noted by the learned judgewhen he made the impugned orders. Reading through it we see the alarm raised by Mr Aura that various fundamental rights stand

violated or under threat of violation by the enactment and enforcement of the impugned pieces of legislation.

28. The CS and the parties supporting her position take the view that Mr Aura is just being alarmist and he misled the High Court in painting an apocalyptic picture of monstrous violation of rights in the name of providing universal healthcare. They see no substance in the complaints of virtual enslavement, violation of privacy and children's rights, unreasonable denial of all rights and services totally unrelated to health, and the like, as well as denial of public participation before enactment. It is not for us at the determination of this application, or even at the determination of the appeal by whichever bench of this court, to make any findings one way or the other on those contested issues. The proper forum of their ventilation, interrogation and determination is the High Court upon hearing of the Petition.

29. It is also not our remit at this stage to determine whether, as urged and denied, the learned judge committed a grave error of law in issuing *ex parte* orders that suspended the operation of three statutes passed by parliament. That is to be decided by the bench that shall hear the appeal.

30. All we can legitimately do within our mandate is decide whether a case has been made out for the stay of enforcement of the learned judge's order suspending the operationalization of the challenged statutes. A preliminary issue was raised by Mr Aura's counsel as regards our jurisdiction to grant the stay, on account of the fact that there was no notice of appeal filed by the applicant against the orders of November 27, 2023 that are sought to be stayed. We are in agreement with the holding in *Nguruman Limited v Shompole Group Ranch & another* [2014] eKLR, that this court cannot stay execution of an order with respect to which there is no notice of appeal. In the present application, a notice of appeal was filed against the orders given by the learned judge on December 11, 2023. The said orders of December 11, 2023 made specific reference to the orders granted on November 27, 2023, which the parties were directed to comply with. Thereby, the learned judge in effect adopted and repeated or reiterated the orders of November 27, 2023 on December 11, 2023. It would thus be an exercise of splitting of hairs to argue that the orders of November 27, 2023 are different from those of December 11, 2023. As they were the same orders, we have no difficulty holding that we have jurisdiction in this matter.

31. The jurisdiction to grant stay lies at the discretion of this court and is exercised on the basis of sound and settled principles, not arbitrarily or capriciously on a whim or in consideration of any extraneous matters. The main guiding consideration, set out in a long line of authorities of this court, is that the application must show, first, that he or she has an arguable appeal, and, second that the said appeal is likely to be rendered nugatory unless the orders sought are granted in the interim. A full enunciation of the applicable principles and leading authorities therein was done by this court in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2023] eKLR and we need not regurgitate them, save to add that it is now accepted that the public interest is a legitimate consideration as well, as guided by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* (*supra*) and *Mary Wambui Munene v Peter Gichuki Kingara & 2 others* [2014] eKLR. We need say no more than quote what was stated by this court in *Kenya Hotel Properties Ltd v Willisden Investment Ltd & 6 others* [2013] eKLR; which we endorse;

> " 20. Turning to the issue of whether the appeal raises an arguable point of "public interest", we wish to pause a question as to when public interest is put in motion. In the case of *East African Cables Limited vs The Public Procurement Complaints, Review & Appeals Board and another* [2007] eKLR the Court of

Appeal indicated situations where public interest should take precedence in the following words: -

> "We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable.'"

32. An arguable appeal is not one that must succeed and an applicant need not proffer a multiplicity of arguable points. One is sufficient. For a point to be arguable it needs merely to raise a *bona fide* point of law or fact sufficient to call for an answer from the respondent and is worthy of the court's consideration.

33. Moreover, whereas such arguable points should ideally and conveniently be expressed in the form of a draft memorandum of appeal, there is no rule that it must be so. One can raise such grounds on the face of the motion and even in the supporting affidavit, as happened in this case. We reiterate what was said recently in *Ontweka & 3 others vs. Onderi* (*supra*)

> "While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application. The applicant set out what it considers to be arguable points that it intends to raise during the appeal and addressed at length on the same. This is sufficient to demonstrate its grievances against the orders that it seeks to be reversed."

34. The essence of the grounds raised by the CS is that the conservatory orders given by the learned judge were too wide in scope, suspended three statutes at ex-parte stage and were final in character and effect, and essentially disposed of the notice of motion without affording her and the other respondents thereto an opportunity to be heard, contrary to the constitutional right to fair trial and the tenets of natural justice. While, as we have stated, it is not our place to decide the points, we have no difficulty holding, and in fact counsel for Mr Aura did essentially concede, as he had to, that the complaints by the CS are not idle. The appeal is therefore eminently arguable.

35. As to the second limb, which must also be satisfied, the argument made is that the orders under attack created a lacuna and a vacuum in the regulatory framework leaving it in a state of animated suspension, caught in the no-man's land of the repeal of the *NHIF Act* and the scuttled operation of the successor legislation. It is averred under oath that this has bred confusion leading to inability to grant pre-treatment authorization for the former members of the NHIF, said to number 17 million, and exposing the sick to the imminent threat of denial of treatment contrary to their fundamental rights. A plea is therefore made to the public interest of allowing the health sector to operate in a properly regulated legal environment and to ensure that no patient is denied treatment or otherwise prejudiced

by the restraint on the implementation and enforcement of three statutes imposed by the conservatory order.

36. We think, with respect to Mr Aura, that the scenario said to have been precipitated by the conservatory order cannot be taken lightly. The injuncting of the regulatory framework intended by the restrained statutes is said to have led to confusion and to have exposed patients to serious risk to health as they stand to be denied treatment.

37. We think that given what has been sworn by the CS there is a real and present danger to the health rights of countless citizens who are not parties to the litigation pending before our courts. We are persuaded that the confusion, the lacuna and the risk and harm to citizens pending the hearing and determination of the appeal is a price too dear to pay, and it would have the effect of rendering the appeal nugatory having regard to the duty to give the term its full meaning as was stated in *Reliance Bank Ltd v Norlake Investments Ltd* [2002] EA 227. There, the court stated, and we would apply the same consideration herein that;

> "To refuse to grant an order of stay to the appellant would cause it such hardships as would be out of proposition to any suffering the respondent might undergo while waiting for the applicant's appeal to be heard and determined."

38. We find, therefore, that the second limb is also satisfied. A case has thus been made out for the grant of the motion. We are cognizant, however, that the discretion we have in these matters include granting such a plea on terms as are just. Bearing this in mind, we are concerned at the arguably irreversible effect of some of the provisions of the *Social Health Insurance Act* identified in Mr Aura's prayers in the petition as set out earlier in this ruling. We have therefore isolated them and they shall therefore remain suspended, even as the rest of that statute, and the other two suspended statutes, are unshackled for operationalization and enforcement pending the hearing and determination of the appeal.

39. For the avoidance of doubt we accordingly order as follows:

    1. We hereby suspend the orders of the High Court restraining the implementation and or enforcement of the *Social Health Insurance Act, 2023*, the *Primary Health Care Act, 2023* and the *Digital Health Act, 2023*, save for the following provisions of the *Social Health Insurance Act* that shall remain suspended pending the hearing and determination of the applicant's appeal in Civil Appeal No E984 of 2023;

        a. Section 26(5) which makes registration and contribution a precondition for dealing with or accessing public services from the national and county governments or their entities.

        b. Section 27(4) which provides that a person shall only access healthcare services where their contributions to the Social Health Insurance Fund are up to date and active.

        c. Section 47(3) which obligates every Kenyan to be uniquely identified for purposes of provision of health services.

    2. In order to ensure that Civil Appeal No E984 of 2023 is heard and determined in expedited fashion, we direct that the parties therein shall file and serve written submissions and bundles of authorities in accordance with these timelines;

        a. The applicant/appellant and all parties in support of the appeal within 7 days of today.

        b. The 1st respondent within 7 days of being served with the appellant's submissions.

c. The appellant shall file rejoinder submissions if any, within 5 days of being served by the 1st respondent.

3. The registrar of this court shall thereafter allocate a hearing date for Civil Appeal No E984 of 2023 on a priority basis, and no later than March 31, 2024.

4. The costs of this motion shall abide and follow the outcome in Civil Appeal No E984 of 2023.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JANUARY, 2024.

P. O. KIAGE

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR