



Abdile v Social Health Authority (SHA) & 3 others (Petition E078 of 2025) [2025] KEELRC 1552 (KLR) (29 May 2025) (Ruling)

Neutral citation: [2025] KEELRC 1552 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E078 OF 2025**

**B ONGAYA, J
MAY 29, 2025**

**IN THE MATTER OF ARTICLES 2, 10, 24, 27, 41, 47, 73,
232 AND 258 OF THE CONSTITUTION OF KENYA, 2010
IN THE MATTER OF THE EMPLOYMENT ACT NO. 11 OF 2007,
THE PUBLIC SERVICE COMMISSION ACT NO. 10 OF 2017 AND
THE FAIR ADMINISTRATIVE ACTION ACT NO.4 OF 2015
IN THE MATTER OF SECTION 75 AND 76 OF
THE SOCIAL HEALTH INSURANCE ACT 2023**

AND

**IN THE MATTER OF UNFAIR, DISCRIMINATORY, AND IRREGULAR
RECRUITMENT PRACTICES BY THE SOCIAL HEALTH AUTHORITY (SHA)**

BETWEEN

SAID OMAR ABDILE PETITIONER

AND

SOCIAL HEALTH AUTHORITY (SHA) 1ST RESPONDENT

CABINET SECRETARY MINISTRY OF HEALTH 2ND RESPONDENT

**OFFICE OF THE PRESIDENT OF PUBLIC SERVICE
COMMISSION 3RD RESPONDENT**

ATTORNER GENERAL 4TH RESPONDENT

RULING

1. The petitioner is Said Omar Abdille. He describes himself as a Kenyan Citizen of Identification No. 23733751 and a public spirited individual with a legitimate interest in integrity, fairness, transparency,



equal opportunity of public employment in state and public institutions. He further states that he has filed the instant proceedings by way of a petition and the application subject to this ruling on behalf of Kenyans to protect *the Constitution* of Kenya as underpinned in Articles 22, 23, 24, 41, 47, and 258 of *the Constitution* of Kenya, 2010.

2. The petitioner filed the application dated 28.04.2025 through Duwane and Wethow Advocates. The application was under Articles 2, 10, 24, 27, 41, 47, 73, 162(2) (a), 232 and 258 of *the Constitution* of Kenya; section 3 and 12 of the *Employment and Labour Relations Court Act*, 2011; Rule 17 of the Employment and Labour Relations Court (Procedure) Rules 2016; and all other enabling provisions of law. The applicant prayed for orders as follows:

1. (Spent).
2. (Spent).
3. That pending the hearing and determination of the petition the Honourable Court be pleased to issue conservatory orders staying or restraining the 1st respondent Social Health Authority (SHA) from proceeding with the current recruitment process published on its website in March 2025 which restrict recruitment to former staff and former employees of the defunct National Health Insurance Fund.
4. (Spent).
5. That the Honourable Court be pleased to direct the 1st respondent to re-advertise all positions including but not limited to Quality Assurance Officers, County Coordinators, Directors, Deputy Directors, and other roles through an open, competitive, fair and transparent process in accordance with the law devoid of restrictions or limitations to former staff of the defunct National Health Insurance Fund (NHIF).
6. That the Honourable Court to grant any other orders of reliefs it may deem necessary to meet the ends of justice.
7. That the costs of the application be provided for.

3. The application was based upon the attached petitioner's supporting affidavit , exhibits thereto and upon the following grounds:

- a. In March 2025 the 1st respondent published on its website portal an internal advertisement for various positions including senior and middle level management roles limiting eligibility to former staff of National Health Insurance Fund (NHIF). The limitation was in violation of the Social Health Authority Act, the *Public Service Commission Act*, and other statutes. The advertised positions whose recruitment is restricted to be from amongst staff of former NHIF included Quality Assurance Officers; County Coordinators; Directors; Deputy Directors; Finance Officers; Accountants' vacancies; Benefits and Actuarial Officers; Claims and Case Management Officers; Administration Officers; Records Management Officers; Corporate Communications Officers; Provider Management Officers; Primary Healthcare Fund Management Positions; Primary Healthcare Fund Management positions; Beneficiary Registration and Compliance Officer Positions; Legal Officer Positions; Office Administrator Positions; Driver Positions; Supply Chain Officer II Positions; Corporate Communications Officer Positions; Information Technology Position; Planning and Linkages Positions; and, Human Resource Management Positions.



- b. The restriction of the internal advertisement to recruitment to the positions exclusively to the staff of the defunct NHIF is unconstitutional, illegal, and, discriminatory because SHA is a new legal entity created under the Social Health *Insurance Act*, 2023(SHI Act); the NHIF Act cap 255 was repealed under section 75 (1) of the said SHI Act, 2023 and as such, the former staff of NHIF ceased to be public servants as of the repeal and winding up of the NHIF; and, the purported on-going recruitment limiting eligibility only to former staff of NHIF is being conducted in closed, opaque and discriminatory manner and violates the constitutional principles of equal opportunity and fairness amongst numerous provisions of *the Constitution* and statutes.
 - c. By treating staff of the defunct NHIF as “internal” candidates and limiting the recruitment accordingly from participation by candidates from the open public, the 1st respondent has violated the constitutional rights to fair labour practices, equal treatment devoid of discrimination, equality, public service values, and, fair administrative action. It is in breach of section 17 as read with clause 6 of the Transitional Provisions of the SHI Act, 2023 which expressly mandates the 1st respondent to recruit afresh, based on merit, integrity and suitability and not automatic absorption or preferential internal recruitment of former defunct NHIF staff.
 - d. The recruitment to restrict recruitment as done is founded upon absolute bad faith, devoid of reasonable justification in law, offends the constitutional requirements of public participation and transparency and further contrary to petitioner’s legitimate expectation thus, irregular, ultra vires, illegal, null and void.
 - e. Interests of justice demand that the Court should intervene to arrest the illegality and violations of *the Constitution* and the law and the breach of fundamental freedoms and rights of the petitioner and people of Kenya.
 - f. If the on-going internal recruitment is not stopped by interim order as prayed for, the petitioner and many qualified and experienced job seekers and Kenyans will be locked out of recruitment by the 1st respondent and will be highly prejudicial, and, the petition rendered an otiose and mere academic exercise.
 - g. The defunct NHIF faced numerous allegations of corruption, mismanagement, and inefficiencies over the years which contributed to its repeal and replacement with 1st respondent. The cases of NHIF inefficiency and corruption included documented mismanagement; fraudulent claims and ghost patients; kickbacks and procurement scandals; misuse of funds and poor coverage; unpaid hospital claims leading to collapse of hospitals; and fake NHIF cards and identity theft and, per exhibited newspaper reports and more so, the Report of the Auditor-General on NHIF for year ended 20.06.2023.
4. The 1st, 2nd and 4th respondents filed a notice of appointment of Advocates dated 05.05.2025 and through learned Chief State Counsel Mr. Oscar M. Eredi for the Attorney General. The 1st, 2nd, and 4th respondents did not file papers to oppose the application and learned Counsel Ms. Akuno submitted in that behalf that they full relied upon and supported the case as urged for the 3rd respondent.
 5. The 3rd respondent filed a memorandum of appearance dated 06.05.2025 and filed by learned Assistant Director, Legal Services, Mr. Michael Maurice Ogosso. The 3rd respondent further filed grounds of objection dated 17.05.2025 and urged that the application dated 28.04.2025 be struck out or dismissed with costs upon the following grounds:



- a. Under Paragraph 6(3) of the First Schedule to the Social Health *Insurance Act*, No.16 of 2023, the staff of the defunct NHIF are required apply for the vacant positions at SHA and be considered where they are found suitably qualified for the advertised positions.
 - b. By dint of Paragraph 6(4) of the First Schedule to the Social Health *Insurance Act*, No.16 of 2023, SHA is mandatorily required by law to review the qualifications of the staff of the defunct NHIF whenever it is conducting its recruitment exercise.
 - c. By virtue of Paragraph 6(4) of the First Schedule to the Social Health *Insurance Act*, No.16 of 2023, the staff of the defunct NHIF are required to be given priority in the recruitment exercise to be conducted by the Social Health Authority. This is the legal basis for the internal advertisements as opposed to the external advertisement
 - d. The impugned internal advertisements placed by SHA in the recruitment exercise giving priority to the staff of the defunct NHIF has a statutory underpinning by dint of Paragraph 6(4) of the First Schedule to the Social Health *Insurance Act*, No.16 of 2023.
 - e. The Application is incurably defective and bad in law for having been lodged in contravention of the transitional provisions outlined in the First Schedule to the Social Health *Insurance Act*, No.16 of 2023.
 - f. The Application is aimed at defeating the transition process from the defunct National Health Insurance Fund to the Social Health Authority.
6. Parties made oral submissions. The Court has considered the material on record. The Court returns as follows.
 7. The 1st issue relates to the transitional provisions under the SHI Act, 2023 and their impact on the fate of the staff of the defunct NHIF.
 8. Sub-section 4(3) of SHI Act, 2023 states thus, “The provisions of the First Schedule shall have effect with respect to the Authority.” Further, section 17 of the Act, on the general powers of the Authority, the 1st respondent with respect to the employees states thus, “The Board may appoint such staff as may be necessary for the proper discharge of the functions of the Authority under this Act, upon such terms and conditions of service as the Board may determine upon the advice of the Salaries and Remuneration Commission.”
 9. By gazette notice no.194 of 21.11.2023 the Cabinet Secretary for Health Nakhumicha S. Wafula communicated thus, “IN EXERCISE of the powers conferred by section 1 of the Social Health *Insurance Act*, 2023, the Cabinet Secretary for Health designates the 22nd November, 2023, as the date on which the Social Health *Insurance Act*, 2023, shall come into operation. Dated the 21st November, 2023.” Thus SHI Act, 2023 commenced operation on 22.11.2023. Accordingly, per section 54 of the SHI Act, 2023, the NHIF Act, 1998 became repealed effective 22.11.2023. Accordingly, the First Schedule to SHI Act, 2023 also became operational effective 22.11.2023. Paragraph 1 of the First Schedule states that “appointed day” means the day appointed for the coming into operation of the Social Health *Insurance Act*, 2023, thus, 22.11.2023. Paragraph 2 of the First Schedule provides for vesting of the defunct NHIF’s assets and properties, moveable and immovable, effective the “appointed day” being 22.11.2023.
 10. With respect to staff of the defunct NHIF and the staff of the 1st respondent during the transition, paragraph 6 of the First Schedule provides as follows:



- (1) Notwithstanding the provisions of paragraph (2), the National Health Insurance Fund Board shall wind up the Fund within one year from the appointed day and the cash balances and all other assets shall be transferred to the Authority.
- (2) Despite subparagraph (1), the Board of the Social Health Authority established under section 4 of the Act shall competitively recruit and appoint its staff under section 17 of the Act subject to the approved staff establishment and on such terms and conditions of service as may be determined by the Board.
- (3) Notwithstanding the provisions of subparagraph (1), the staff of the Fund are eligible to apply for the positions advertised by the Authority and may be considered for appointment where they are suitably qualified for the positions advertised.
- (4) Despite the provisions of sub-paragraph (2) and (3), the Authority shall review the qualifications of all the staff of the Fund and shall, in the appointment of its staff, give priority to the staff of the Fund who are found to be suitably qualified for the positions in the approved staff establishment.
- (5) A staff of the Fund not appointed by the Authority under subparagraph (2) may exercise his or her option to either —
 - (a) retire from public service; or,
 - (b) be redeployed within the public service.

11. The Court has considered the provisions of paragraph 6 of the First Schedule and reckons as follows:

- a. The 1st respondent's Board shall not embark on competitive recruitment and appointment of staff envisaged in subparagraph 6(2) unless an approved staff establishment is in place. The SHI Act 2023 does not provide for the process of putting in place and the content of such approved staff establishment. Accordingly, the provisions of the [Public Service Commission Act, 2017](#) and in particular, Part IV on Establishment and Abolition of Offices in the Public Service apply on the determination and creation of the number and kinds of offices for the 1st respondent. Similarly, SHI Act, 2023 does not provide for criteria for the competitive recruitment and appointment envisaged in paragraph 6(2) of the First Schedule and the provisions of the [Public Service Commission Act, 2017](#) and in particular, Part VI on Appointments, Confirmation of Appointments and Transfers apply. One critical element of competitive recruitment and appointment under the Part VI in section 37 thereof is advertisement and it is provided, thus,

“ 37. Advertisement of vacancies

- (1) Where a vacancy in a public office is to be filled, the Commission or authorized officer shall invite applications by advertising the vacancy in the Commission's website, at least one daily newspaper of nationwide coverage, the radio and other modes of communication, so as to reach as wide a population of potential applicants as possible.
- (2) The Commission or an authorised officer shall ensure that an invitation for application does not discriminate against any person.



- (3) The advertisements in subsection (1) shall be conducted in an efficient and effective manner so as to ensure that the applicants, including persons who for any reason have been or may be disadvantaged, have an equal opportunity to apply for the advertised positions.
 - (4) An advertisement inviting applications to fill any vacancy in a public office shall provide for—
 - (a) the title and rank of the public office;
 - (b) the public body in which the office is tenable;
 - (c) the background and context of the work, where necessary;
 - (d) the terms of employment;
 - (e) the applicable remuneration including salary, allowances and other benefits;
 - (f) the prescribed qualifications applicable, including any desired previous achievements;
 - (g) the core duties of the office;
 - (h) the expected deliverables of the office;
 - (i) the supervision, accountability and reporting arrangements;
 - (j) any added advantage applicable;
 - (k) the mode and deadline of transmitting the application;
 - (l) any consideration that may occasion disqualification; and
 - (m) any consideration of equity or affirmative action.”
- b. The Court considers that paragraph 6(2) on approved establishment and then, competitive recruitment and appointments applies generally, during the transition and thereafter.
- c. With respect to staff of the defunct NHIF subparagraph 6(3) of the First Schedule declares that they are eligible to apply for the positions advertised by the Authority and may be considered for appointment where they are suitably qualified for the positions advertised. It appears that the provision is declaratory, that staff of the defunct NHIF can apply for vacancies advertised by the Board of the 1st respondent, in the transition or even thereafter – that they may not be barred from employment of the 1st respondent upon the consideration that they served in the defunct NHIF.



- d. It also appears to the Court that subparagraph 6(4) is also declaratory that while there will be approved establishment then competitive recruitment and appointment per paragraph 6(2), and, while staff of defunct NHIF may apply for vacancies in the transition or thereafter per paragraph 6(3), nevertheless, the Board of the 1st respondent shall (must) review the qualifications of all the staff of the NHIF and shall, in the appointment of its staff, give priority to the staff of the Fund who are found to be suitably qualified for the positions in the approved staff establishment. The purpose of the review of the qualifications of all staff is not necessarily to employ them on priority. The Court considers that even if qualified, such individual staff may opt not to apply but to retire or get deployed in the wider public service as envisaged in subparagraph 6(5) of the said First Schedule to SHI Act, 2023. The Court considers that the mandatory review of the qualifications would serve to inform the qualifications in the approved staff establishment for 1st respondent one way or the other; to facilitate priority employment for the staff who will opt to apply once the advertisements are made per approved establishment; to guide absorption into the public service for those who will so opt per paragraph 6(5) of the First Schedule; and, to document the qualifications as an obligation imposed by statute and for whatever use as may be necessary, accordingly.
- e. Further, the Court considers that the only process under which the 1st respondent may employ a staff of the defunct NHIF, in absence of any other material before the Court, is per subparagraph 6(2) of the First Schedule. In particular, subparagraph 6(5) of the First Schedule envisages that the option to retire from public service or to be redeployed in public service accrues only where, the staff of defunct NHIF are not employed under sub-paragraph 6(2) of the First Schedule – and in circumstances that, the First Schedule, other than in sub-paragraph 6(2), has not provided for any other method or procedure or criteria the staff of defunct NHIF may get employed by the 1st respondent.
12. Accordingly the Court returns that the effect of provisions of the said paragraph 6 of the First Schedule about the transitional destiny of the staff of the defunct NHIF appears to be as follows:
- a. The staff do not enjoy automatic transition as staff of the 1st respondent.
- b. The 1st respondent must first ensure that its approved established is in place as found earlier in this ruling. Concurrently, the 1st respondent must review qualifications of all staff of the defunct NHIF staff, preferably manifested in an appropriate “Defunct NHIF Staff Qualifications Report.”
- c. Next, the 1st respondent’s Board should initiate an open competitive recruitment and appointment process as found earlier herein per provisions of the [Public Service Commission Act, 2017](#). The staff of the defunct NHIF who consider themselves qualified for any of the advertised vacancies in the 1st respondent’s approved establishment are entitled to apply. It appears that such individual staff is eligible to apply for as many of the vacancies in the approved establishment that will be advertised as long as the staff considers that the prescribed qualifications per the open advertisement are met. In that way, the staff should enhance their chances of employment on priority as envisaged in the transition.
- d. In undertaking the competitive recruitment, the 1st respondent must give priority appointment to suitably qualified staff of the defunct NHIF. The effect appears to be that if such staff are qualified for any of the openly advertised vacancies and has opted to apply, then they will get appointment in priority to equally and suitably qualified candidates but not being staff of the defunct NHIF.



- a. After conclusion of the competitive recruitment and appointments, any of the staff of the defunct NHIF having applied but not recruited and appointed shall be given an option to retire from the public service or to be redeployed within the public service. Similarly, staff opting not to participate in the open competitive recruitment will be accorded the same option. For staff opting not to apply and taking into account the prescribed qualifications review as should be manifested in what the Court referred earlier herein to as “Defunct NHIF Staff Qualifications Report” as measured against the qualifications of various jobs in the approved staff established, the offer to retire from or be redeployed within the public service will be made. It is in that sense that the Court has found that the processes of reviewing the qualifications of the defunct NHIF staff and the approval of the 1st respondent’s staff establishment ought to be undertaken nearly concurrently because the two would complement each other in guiding decision making. It further appears to the Court that until the competitive open recruitment and appointment for the various jobs in the 1st respondent’s approved establishment is completed and successful candidates assume duty, the defunct NHIF staff would continue in temporary service of the 1st respondent. Accordingly, the Court considers that staff of the defunct NHIF (those applying for the openly and competitively advertised jobs, and those opting not to apply at all) will be given the offer to opt to so retire from the public service or to get redeployed within the public service, after conclusion of the said open and competitive recruitment and appointment. The specific date appears to the Court to be the date the openly and competitively recruited staff of the 1st respondent assume or report on duty – ensuring that there will be no break in service delivery by the 1st respondent.
13. In making the foregoing findings, the Court considers that learned Counsel for the 3rd respondent correctly submitted that as a deviation from the traditional transitional provisions that staff of a defunct public body or department transit as staff of the successor public body or agency, the First Schedule to the SHI Act, 2023 did not provide for such automatic continued employment or absorption of staff of defunct NHIF into the service of the 1st respondent. The Court further upholds the submission by learned Counsel Mr. Mohammed Duwane Advocate for the petitioner that the NHIF being defunct, it was misconceived for the 1st respondent to publish on its website a restrictive advertisement for vacancies limiting prospective applicants to staff of the defunct NHIF, because, in any event, there could be no “internal advertisement” with respect to the defunct NHIF. As submitted for the petitioner, the staff of the defunct NHIF, under the transitional provisions, cannot be treated as internal applicants to the 1st respondent as they have never transited as such or become employees of the 1st respondent as such, and in particular, per the said paragraph 6 of the First Schedule of SHI Act, 2023.
 14. The Court therefore considers that in view of the ensuing findings, the petitioner has established that the purported internal advertisements offended fair, meritorious and competitive recruitment and appointments envisaged in Articles 27 on equality and freedom from discrimination; 41 on fair labour practices; 47 on fair administrative action; and, 232 of *the Constitution* on fair competition and merit as basis of appointments and promotions, representation of Kenya’s diverse communities, and, affording adequate and equal opportunities for appointment, training and advancement at all levels of public service of: men and women, the members of all ethnic groups, and, persons with disabilities. The enumerated constitutional safeguards have been operationalized in the transitional provisions in the First Schedule of SHI Act, 2023 and particularly paragraph 6 thereof, as found in this ruling. Further, the Court has found that the step by step procedure and considerations for realization of the impact



and effect of the said paragraph 6 of the First Schedule are in the relevant provisions of the [Public Service Commission Act, 2017](#) together with the relevant standing Commission's regulations and instructions thereunder.

15. The Counsel for the 3rd respondent as supported by Counsel for the 1st, 2nd and 4th respondents urged that the facts in the case were not disputed and the Court ought to proceed and determine the petition together with the application. On the other hand, the Counsel for the petitioner took the same view and later reluctantly urged that he may need to file further submissions on the petition. It appears to the Court that in view of the submissions by that parties' respective Counsel in that regard and together with the findings in this ruling, there would be no prejudice to the parties for the instant ruling to rest the petition, as well. The Court has found that both the application for interim orders and the petition have succeeded and are allowable.
16. The petition was in the public interest and each party will bear own costs of the application and petition.

In conclusion, the petition and the application are hereby determined with orders as follows:

1. The declaration hereby issued that the 1st respondent's recruitment process restricting eligibility and applications to former staff of the defunct National Health Insurance Fund violates Articles 27, 41, 47, and 232 of [the Constitution](#).
2. The declaration that former staff of the defunct National Health Insurance Fund (NHIF) having not automatically transited as staff of the 1st respondent under paragraph 6 of the First Schedule of the Social Health [Insurance Act, 2023](#) and the staff cannot be treated as internal applicants to the purported internal or restrictive advertisements as published by the 1st respondent on its website.
3. The declaration that the continuing or conducted recruitment process by the 1st respondent which limits or limited eligibility for positions of Quality Assurance Officers, County Coordinators, Directors, Deputy Directors and other advertised roles or vacancies herein exclusively to former NHIF staff was discriminatory, unconstitutional and violated the principles of fair competition and equality of opportunity under Article 232 of [the Constitution](#).
4. The order of prohibition hereby issued restraining the 1st respondent from proceeding with the current recruitment process published on its website in March 2025 which purported to restrict recruitment and eligibility to former staff of defunct National Hospital Insurance Fund.
5. An order of mandamus hereby issued compelling the 1st respondent to advertise, all vacancies in its approved establishment envisaged in subparagraph 6(2) of the First Schedule of the Social Health [Insurance Act, 2023](#) including positions of Quality Assurance Officers, County Coordinators, Directors, Deputy Directors and other advertised roles or vacancies herein, through an open, fair, competitive, and transparent process in accordance with the law devoid of restrictions and limitations.
6. An order of certiorari hereby issued quashing any decisions made pursuant to the impugned and unlawful purported internal advertisement herein.
7. Each party to bear own costs of the application and petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 29TH MAY, 2025.



**BYRAM ONGAYA
PRINCIPAL JUDGE**

