



**Kenya Union of Commercial, Food and Allied Workers v National Health Insurance Fund & 2 others (Employment and Labour Relations Cause E1030 of 2023) [2024] KEELRC 175 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 175 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**EMPLOYMENT AND LABOUR RELATIONS CAUSE E1030 OF 2023**  
**BOM MANANI, J**  
**FEBRUARY 8, 2024**

**BETWEEN**

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS ..... CLAIMANT**

**AND**

**NATIONAL HEALTH INSURANCE FUND ..... 1<sup>ST</sup> RESPONDENT**

**SOCIAL HEALTH INSURANCE AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF HEALTH ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Claimant is a Trade Union that represents workers in various sectors within the Republic of Kenya. It has membership within the 1<sup>st</sup> Respondent organization (now defunct) which is in transition.
2. On 19<sup>th</sup> October 2023, the [\*Social Health Act \(SHA\)\*](#) received Presidential assent thereby transiting into an Act of Parliament. The Act repealed the [\*National Health Insurance Fund Act\*](#) (NHIF Act).
3. As a result of the foregoing, the National Health Insurance Fund (NHIF), a body that was established under the [\*NHIF Act\*](#) to administer social health insurance in Kenya was dissolved. In its place, the Social Health Authority was established to manage the docket.
4. The [\*SHA\*](#) sets out mechanisms for transition of resources from the NHIF to the Social Health Authority. These include human resource.
5. In this respect, section 6 of the First Schedule to the [\*SHA\*](#) provides as follows:-
  - i. 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.

- ii. 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.
  - iii. 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.
  - iv. 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.
  - v. 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.
6. From the foregoing, it is clear that the Social Health Authority is mandated by law to competitively recruit its own staff. The new law permits staff from the defunct NHIF to apply for positions in the Social Health Authority so long as they qualify for them. The law also obligates the Social Health Authority to give priority to staff from NHIF who will have applied for position in it (the Social Health Authority) so long as they meet the necessary qualifications. Those who will not be absorbed have the option to retire or be deployed to other departments within the civil service.
7. What I understand this arrangement to mean is that the Social Health Authority is recognized as a new legal entity which is distinct from the defunct NHIF. As a consequence, it has been allowed the latitude to run its own affairs including those relating to human resource. Indeed, section 4 of the [SHA](#) recognizes the Authority as a distinct legal entity with the power to sue and be sued, acquire and own property and execute any other functions as by law permitted.
8. The Claimant has filed this action demanding, inter alia, that as the representative of the employees who were working for the NHIF, it should be involved in the transition process. It also demands that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents absorb the employees of NHIF under their current terms of engagement. It also demands that the 3<sup>rd</sup> Respondent provides it (the Claimant) with its Human Resource Manuals and salary and career progression guidelines.
9. Accompanying the Memorandum of Claim is the instant application. In the application the Claimant seeks a plethora of orders including:-
  - a. That the court stops the transition process pending resolution of the dispute.
  - b. That the court directs the Respondents to fully involve it (the Claimant) in the transition process.



- c. That the court issues an injunction to stop the 2<sup>nd</sup> Respondent from declaring the 1<sup>st</sup> Respondent's employees redundant or retiring them or transferring them to other sectors in the public service.
  - d. That the court issues an order restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from hiring new unionisable staff for the 3<sup>rd</sup> Respondent.
10. The Respondents have opposed the application. The thrust of their objection is that there is an order which was issued vide High Court Constitutional Petition No E473 of 2023 in which the transition was stayed. Therefore, it serves no useful purpose to issue similar orders through this action.
  11. The Respondents further argue that they have not declined to involve the Claimant in the transition. However, since the process has not begun, nothing is happening with respect to the matters that have been raised by the Claimant. Therefore, the instant action is premature.
  12. The Respondents also aver that after the SHA was enacted, the National Hospital Insurance Fund Board was dissolved. It is therefore nonexistent. On the other hand, the Social Health Authority Board is yet to be put in place due to the stay orders aforesaid. Therefore, the transition process has yet to tick off.
  13. The Respondent further argues that to grant the orders sought will in any event jeopardize public interest. The Respondent submits that since the NHIF Act has been repealed by the SHA, management of the public health insurance scheme should be allowed to flawlessly transit to the Social Health Authority in order to cater for the medical needs of members of the public who are the intended beneficiaries. According to the Respondent, the orders sought by the Claimant will interfere with this process at great public expense. Therefore and if not for anything else, they should not issue.

### **Analysis and Determination**

14. I have considered the prayers in the application by the Claimant and the objections raised by the Respondents. I note that although there was an order issued in High Court Petition No E473 of 2023 which stayed operations of the SHA, these orders were substantially varied by the Court of Appeal in Nairobi Civil Application No E583 of 2023, Cabinet Secretary Ministry of Health v Joseph Enock Aura and others (unreported). In effect, all processes under the Act including staff transition are to proceed with the exception of the aspects that the Court of Appeal directed that they remain suspended.
15. The Claimant has prayed that the court issues an order of injunction to stop the transition process until the issues it has raised in the cause have been determined. However, the Respondent has objected to this request on the ground that such orders will prejudice the greater public good.
16. The Respondent contends that to issue the orders in question will stall the transition process with the consequence that the right of members of the public to access medical care under the new scheme will be rendered impossible for the duration of the orders. According to the Respondent, when the interest of the Claimants' members is weighed against that of the greater public, the scale should tilt in favour of the greater public.
17. The question of public interest in respect of the impugned scheme was addressed by the Court of Appeal in Nairobi Civil Application No E583 of 2023, Cabinet Secretary Ministry of Health v Joseph Enock Aura and others (*supra*). It was the court's view that in considering whether to grant conservatory orders, the court should consider the ramifications of the orders sought on the greater public.



18. The court went further to quote with approval commentaries regarding the nomenclature of public interest in the case of *East African Cables Limited v Public Procurement Complaints, Review and Appeals Board & another* [2007] eKLR where the court observed as follows:-
- “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.”
19. In the instant dispute, it is apparent that if the court issues orders stalling the transition process, implementation of the new public health insurance scheme will be prejudiced. Undoubtedly, this will deprive the public of the benefits that the scheme is intended to provide.
20. Having regard to the fact that the *NHIF Act* has been repealed and with it the public health insurance scheme under it, the consequence of the orders that the Claimant now seeks will be to expose the public to the risk of having no public medical insurance scheme for the duration of the orders. Certainly, such order will prejudice the public.
21. On the other hand, refusal to grant the orders will prejudice the Claimant’s members. However, given their numbers (the Claimant’s members) in contradistinction to those of the general public, the principle of public interest dictates that I decline the request to stop the transition.
22. I note from the response by the Respondents that they have not expressed objection to involving the Claimant in deliberations relating to the transition of its members who were in the employment of the NHIF. Indeed, as the Trade Union representing the affected unionized employees, the Claimant is entitled to be consulted on their transition (*Kenya Aviation Workers Union v Kenya Airways PLC* [2020] eKLR). In the premises, I direct that as and when the transition exercise begins, the Respondents should facilitate consultations with the Claimant in order to protect the interests of its members.
23. With regard to the request to stop the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from hiring new unionisable employees, I am of the view that the request is unmerited. This is because as the law currently stands, the statutory power to hire staff for the Social Health Authority has been donated to the Authority. Absent evidence of breach of statute, there would be no basis for the court to issue an order to prevent a statutory body from discharging its statutory mandate. From the preliminary evidence that has been placed before me, I am unable to discern any breaches of law that have been committed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents regarding recruitment of staff to the 3<sup>rd</sup> Respondent.
24. The Claimant has prayed for an interim order to stop the 2<sup>nd</sup> Respondent from declaring its members redundant or retiring them from public service or deploying them to other sectors within the public service. From the preliminary evidence on record, the Claimant’s members were employees of the NHIF which was a distinct legal entity. They were not employees of the 2<sup>nd</sup> Respondent. Therefore, the 2<sup>nd</sup> Respondent has no powers to declare the said employees redundant or to retire them or deploy them to other sections within the public sector. In the face of the demise of the NHIF, such function can only be executed by the Public Service Commission on behalf of the National Government. In any event, there is no evidence that has been provided at this stage to suggest that what is going on is a redundancy process. Consequently, this request is declined.



25. Each party shall bear its own costs.

**Summary of Determination**

26. Having considered the rival positions on the matter, I make the following orders:-

- a. I decline to issue orders stopping the impugned transition process pending the hearing of the cause.
- b. Instead, I order that the Respondents involve the Claimant in deliberations that will lead to the transition in question.
- c. I decline to issue orders to restrain the 3<sup>rd</sup> Respondent from hiring new unionizable staff in the interim as this is the express statutory mandate of the 2<sup>nd</sup> Respondent which can only be questioned if there is evidence of breach of the law.
- d. I decline to issue an order purporting to stop the 2<sup>nd</sup> Respondent from declaring members of the Claimant who were employees of NHIF redundant or retiring or deploying them since the 2<sup>nd</sup> Respondent has no powers to act in this manner in respect of the employees of NHIF (now defunct) and there is no evidence placed before me to suggest that the 2<sup>nd</sup> Respondent has attempted to engage in such acts which will be ultra vires her powers.
- e. Each party to bear own costs.

**DATED, SIGNED AND DELIVERED ON THE 8TH DAY OF FEBRUARY, 2024**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

.....for the Claimant

.....for the Respondents

**ORDER**

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M. MANANI**

