



Federation of Kenya Employers v National Health Insurance Fund Management Board & 4 others; Saratuki & another (Interested Parties) (Petition E066 of 2022) [2022] KEELRC 4141 (KLR) (29 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 4141 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E066 OF 2022
M MBARŪ, J
SEPTEMBER 29, 2022**

BETWEEN

FEDERATION OF KENYA EMPLOYERS PETITIONER

AND

**NATIONAL HEALTH INSURANCE FUND MANAGEMENT BOARD 1ST RESPONDENT
CABINET SECRETARY MINISTRY OF HEALTH 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT
NATIONAL ASSEMBLY 4TH RESPONDENT
SENATE 5TH RESPONDENT**

AND

**DAVID MANYONGE SARATUKI INTERESTED PARTY
ASSOCIATION OF KENYA INSURERS INTERESTED PARTY**

RULING

1. The petitioner filed application dated May 26, 2022 under the provisions of article 165(4) of the [Constitution](#) and section 21(2) of the [Employment and Labour Relations Court Act](#) seeking for orders that;
 1. An order be and is hereby made that the petition and the application for conservatory orders both dated April 21, 2022 raise substantial questions of law under article 165(3)(b) and (d) of the [Constitution](#);



2. The petition and application for conservatory orders both dated April 21, 2022 be and are hereby referred to the honourable chief justice for assignment of an uneven number of judges being not less than three to hear and determine the matters.
3. Costs of this application be provided for.
2. The affidavit is supported by the affidavit of Jacqueline Mugo and on the grounds that the petitioner filed the instant petition challenging the constitutionality of the amendments to the National Health Insurance Fund Act through the National Hospital Insurance Fund (Amendment) Act, 2022 and which was assented on 10th January, 2022 with a commencement date of 28th January, 2022 despite the amendments being passed without public participation and some amendments violate the petitioners' members right to property, equality under the law, economic and social rights and rights to fair administrative action.
3. In the Supporting Affidavit, Ms Mugo avers that the petition dated 21st April, 2022 raises substantial questions of law the main challenge being the legality surrounding the enactment of the National Insurance Fund (Amendment) Act, 2022 and the resultant amendments to the National Health Insurance Fund Act. the petition is that there amendments were passed without public participation when the 1st respondent promised to undertake consultative meetings with the petitioner but failed, refused and neglected to do so and in one occasion the petitioner was given 3 working days by the 4th respondent to collect and collate views of its members who are spread across all sectors, and on another occasion the petitioner was given 7 days by the 5th respondent to collect and collate views of its members. The petitioner sought to enrich the views of the 1st, 4th and 5th respondents with views from those who will be most affected by the Act but these views were ignored. Disregarding the views of the 1st respondent defeated the principle of public participation and Article 27 of the Constitution.
4. Other grounds in support of the application are that the National Insurance Fund (Amendment) Act, 2022 introduces a requirement on employer to match contributions by employees which represents a threat of violation of the petitioner's and its member's right to property. The private sector including the petitioner and its members are already required to pay taxes to the public sector that are in turn required to offer healthcare as a right under the Constitution.
5. The petitioner and its members are required under Section 34 of the *Employment Act*, 2007 to ensure the provision of sufficient and of proper medicine for employees during illness and medical attendance during illness.
6. The amendments therefore burden the petitioner and its members with taxes that will be used to cover the public sector, paying matching contributions for their own employees and all the while ensuring that they offer medical assistance as required under the *Employment Act*, 2007. The petitioner and its members have a legitimate expectation that the burden of health policy shall not be shifted from the government to the private sector.
7. The enactment of the amendments to the National Health Insurance Fun through the National Insurance Fund (Amendment) Act, 2022 threaten to violate the petitioner and its members right to fair administrative action in that when the 1st respondent proceeds to take administrative action the amendments does not require the 1st respondent to give reasons for the decision taken, issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal and specify the manner and period within which such appeal shall be lodged.



8. The amendments to the National Health Insurance Fund Act directly and substantially affect the rights of the petitioner, its members and Kenyans across all 47 counties who are either employers or employees.
9. The nature of matters raised in the petition are of great public interests concerning all Kenyans and touching on violations of articles 10, 27, 40, 41 and 47 of the Constitution and the need for the respondents to comply with the Constitution is of general public importance and requires recognition and protection.
10. The nature of amendments proposed seek to significantly alter the manner in which the 1st respondent is funded by effectively shifting the burden from the government to private persons including the petitioner and its members and the manner of enactment and content of the Act is challenged in the petition. The impact of the proposed amendments shall be required to remit large sums of money to the 1st respondent as a result of a process that as conducted in fragrant violation of the constitution.
11. The amendments threaten to negatively impact on health insurance industry which is a substantial issue that ought to be heard and determined by an uneven bench of not less than 3 judges and in the circumstances the orders sought should be allowed.
12. The petitioner filed a List of Cases and bundle of authorities.
13. The 1st respondent filed Grounds of Opposition to the application and on the basis that the petition challenging the constitutional validity of the enactment of the National Insurance Fund (Amendment) Act, 2022 include grounds of alleged lack of public participation, violation of the petitioner's right to property and right to fair administrative action which matters can be effectively determined by a single judge and the decision of a panel of more than one judge is of equal force to that of a single judge exercising the same jurisdiction. The issues raised in the petition are neither complex nor novel free from difficulty. There is no uncertainty in the law to justify the empanelment of 3 judges.
14. The petition has not met the threshold under Article 165(4) of the Constitution or the principles laid down by the Court of Appeal in *Okiya Omtatah Okoiti & another v Anne Waiguru – Cabinet Secretary, Devolution and Planning & 3 others* [2017] eKLR. Whereas the petitioner invites the court to exercise its discretion there is no outline of the substantive questions of law so as to justify reference to the Chief Justice for empanelment of a bench of more than one judge and the application should be dismissed with costs.
15. The 2nd and 4th respondents filed Grounds of Opposition to the application and on the basis that the petitioner has not met the threshold of Article 165(4) of the Constitution for the petition to be sent to the Chief Justice for empanelment of an uneven number of judges to hear the petition. The issues and facts raised in the petition are neither novel nor complex or substantial questions of law worth of a bench of not less than 3 judges and the constitutional issues raised can be completely dealt with by a single judge.
16. Other grounds are that the petition and application is an afterthought meant to obstruct and delay the cause of justice and should be dismissed with costs.
17. The 2nd interested party supported the petitioner's application.
18. Parties attended court and agreed to file written submissions which are analysed and put into account.

Determination

19. The gist of the application by the petitioner is Article 165(4) of the Constitution which requires that;



- (4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

Clause (3) (b) or (d) thereof provides that;

- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- (c) ...;
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - i. the question whether any law is inconsistent with or in contravention of this Constitution;
 - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - iv. a question relating to conflict of laws under Article 191; and....

20. Similarly, Section 21(2) of the *Employment and Labour Relations Court Act*, 2011 (ELRC Act) address the same issue in the following terms;

- 2. Notwithstanding subsection (1), any matter certified by the Court as raising a substantial question of law under Article 165(3)(b) or (d) of the Constitution shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

21. It is clear that the context in which the function of assigning more than one judge a matter under Article 165(4) of the Constitution read together with Section 21(2) of the ELRC Act is to facilitate the hearing of matters that raise a substantial question of law.

22. In addressing the issue of what constitutes a substantive question of law, the court in the case of *County Government of Meru v Ethics and Anti-Corruption Commission* [2014] eKLR held that such matter must be determined in the circumstances of each case since not all substantive questions of law are necessary novel or complex to warrant invitation to the Chief Justice to empanel a bench of not less than 3 judges but take into account all factors surrounding the case particularly dispensation of justice without delay and the opportunity to allow the parties to litigate the matter to the highest levels available.. The court held that;

The principles which govern the exercise of discretion in an application such as the one before the court can be distilled as follows: -

- a. The grant of a certificate under Article 165(4) of the Constitution is an exception rather than the rule.
- b. The substantial question of law is a question to be determined in the circumstances of the case. Substantial issue of law is not necessarily a weight one or one that raises a



novel issue of law or even that is complex. Many provisions of our Constitution are untested and bring forth novel issues yet it is not every day that we call upon the Chief Justice to empanel a bench of not less than three judges.

- c. Public interest may be considered but is not necessarily a decisive factor. It is the nature of petitions filed to enforce, the provisions of the Constitution, to be matters of public interest generally.
- d. The court ought to take into account other provisions of the Constitution, the need to dispense justice without delay having regard to the subject matter and the opportunity afforded parties to litigate the matter up to the Supreme Court.

23. In the case of Lambert Lwanga Ochochi & 6 others v Ponangipali Venkata Ramana Rao & 8 others [2022] eKLR, the court in addressing a similar question of what constitutes a substantive question of law referred to the case of Chunilal v Mehta v Century Spinning and Manufacturing Co. AIR 1962 SC 1314, that;

A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is probably absurd, the question would not be substantial.

24. Based on the foregoing, the decision whether or not to certify a matter under Article 165(4) of the Constitution read together with Section 21(2) of the ELRC Act is in the discretion of the Court. That discretion is to be exercised judicially. The substantial question of law must be strictly under sub-article 3(b) and (d) of Article 165 of the Constitution. Further, the said substantial question must either be specifically set out in the pleadings before court or should be a necessary implication from the pleadings filed.
25. The petitioner has set out the reasons upon which the court should apply the provisions of Article 165(4) of the Constitution being that the National Hospital Insurance Fund (Amendment) Act No.1 of 2022 was passed without adequate public participation while some amendments violate the petitioner's' members right to property, equality before the law, economic and social rights and right to fair administrative action. That the root of the petition is a challenge to the legality surrounding the enactment of the National Insurance Fund (Amendment) Act, 2022 and the resultant amendment to the National Health Insurance Fund Act. that there was no public participation in accordance with the Constitution and the National Insurance Fund (Amendment) Act, 2022 introduces a requirement on employers to match contributions by employees which is a violation to the right to property and a contravention of Section 34 of the Employment Act, 2007 which directs employers to ensure the provision of medicine to employees during illness. Further that the National Insurance Fund (Amendment) Act, 2022 introduces a requirement on employer to match contributions by employees whereas the petitioner and its members have a legitimate expectation that the burden of health policy should be upon government and not to the private sector.
26. The petitioner also contends that the amendments to the National Health Insurance Fund Act directly and substantially affect the rights of the petitioner and its members and Kenyans across all 47 counties who are either employers or employees and hence the matters raised in the petition are of great public interest concerning all Kenyans and in violation of Article 10, 27, 41 and 47 of the Constitution.



27. The respondents filed Grounds of Opposition without abiding the provisions of Rule 17(9) of the Employment and Labour Relations Court (Procedure) Rules, 2016 which regulate procedures before this court that;

A party may respond to an application by filing grounds of opposition verified by an affidavit

28. The petitioner submitted at length the principles outlined by the Court of Appeal in the case of Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR and expressed itself thus: -

governing principles for purposes of certification under Article 163(4) (b) some of which are relevant in the context of certification under Article 165(4). Drawing therefrom, we adopt, with modification, the following principles:

- i. For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;
- ii. The applicant must show that there is a state of uncertainty in the law;
- iii. The matter to be certified must fall within the terms of Article 165 (3) or (d) of the Constitution;
- (vi) The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.

It is our judgment therefore, that whether a matter raises a substantial point of law for purposes of Article 165(4) of the Constitution is a matter for determination on a case-by-case basis. The categories of factors that should be taken into account in arriving at that decision cannot be closed.

29. And in the case of Republic v Public Service Commission & Keriako Tobiko Ex parte Nelson Havi [2017] eKLR the Court held that;

Whereas this Court appreciates that the decision of an enlarged bench may well be of the same jurisprudential value in terms of precedent or stare decisis principles as a decision arrived at by a single High Court judge, the Constitution itself does recognise that in certain circumstances it may be prudent to have a matter which satisfies the constitutional criteria determined by a bench composed of numerically superior judges...

30. The petitioner has outlined the grounds and reasons that the amendments to the national Health Insurance Fund Act through the National Hospital Insurance Fund (Amendment) Act, 2022 directly and substantially affect rights of the petitioner and its members and Kenyans across all 47 counties who are either employers or employees. the implications this shall have vies-a-vies the application of Article 10, 27, 40, 41 and 47 of the Constitution and Section 34 of the Employment Act, 2007.

31. This then become matters of general public importance, the requirement for all employers to match contributions for all employees and the impact this is likely to have on members of the 2nd interested party with regard to provision of health insurance and in the totality all raising substantial questions of law, which matters transcends the circumstances of the petitioner's case with a significant bearing on the public interest.



32. On the challenge to the constitutionality of the National Hospital Insurance Fund (Amendment) Act, 2022 and its application together with other statutes particularly the *Employment Act*, 2007, this calls for an expanded panel of Judges of more than one as envisaged under Article 165(4) of the Constitution read together with Section 21(2) of the ELRC Act. The unique circumstances of this case, it is my view that the matter ought to be so certified. There exist important questions of law which warrant that the petition be dealt with by an enlarged bench.
33. In the circumstances, I hereby certify that this matter raises a substantial question of law to warrant reference of the same to the Chief Justice as required under Article 165(4) of the Constitution.
34. Accordingly this matter is hereby referred to the Hon. The Chief Justice for the said purpose.
35. The costs will be in the cause. It is so ordered.

DELIVERED IN OPEN COURT AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 2022.

M. MBARÚ JUDGE

In the presence of:

Court assistant – Okodoi

..... and

