KENYA PLANTATION AND AGRICULTURAL WORKERS UNION.....CLAIMANT

-VERSUS-

JAMES FINLAY (K) LIMITED.....RESPONDENT

JUDGMENT

The claimant **Kenya Plantation and Agricultural Workers Union** filed the memorandum of claim on 08.02.2013 together with the notice of motion dated 07.02.2013. In the notice of motion the claimant prayed that the court sets aside the notice and stays the process of redundancy in the letter dated 16.01.2013 pending the hearing and determination of the application. The claimant also prayed that the court issues an order restraining the respondent from closing down or outsourcing in-outpatient health services provided at the James Finlay's Health Centre based at Chomogonday. Finally, the application prayed for an order that the respondent to produce the partnership agreement between Unilever Tea (K) Limited and the respondent outsourcing outpatient and inpatient services to the Central Hospital in Kericho Town. The application was supported by the affidavit of **Meshack Khisa**, the claimant's National Organising Secretary sworn on 7.02.2013. Upon considering the material on record and hearing counsel for the claimant in absence of the respondent, the court certified the application urgent for inter-partes hearing on 18.02.2013 at 9.00 am and further ordered that:

a) **the respondent's process leading to redundancy of staff at James Finlay's Health Centre based at Chomogonday is stayed until the inter-partes hearing of the application;**

b) **the respondent to file in court a copy of the partnership agreement between the respondent and Unilever Tea (K) Limited for outsourcing outpatient and in-patient services to the Central Hospital in Kericho town;**

c) **parties are at liberty to apply for further orders by the court; and**

d) **costs in the cause.**

On 18.02.2013, the respondent **James Finlay's (K) Limited** had filed the response to the claim and the replying affidavit of **Doctor Augustine Kibet Kirui** sworn on 14.02.2013. At the same time, the claimant had filed on 18.02.2013, the notice of motion supported by the affidavit of **Thomas Kipkemboi**, the claimant's Deputy General Secretary seeking committal of the respondent's Managing Director, one **Simeon Hutchinson**, to prison for disobeying the court's interim orders staying the redundancy process. Upon hearing preliminary submissions for both parties on 18.02.2013, by consent of the parties, the court fixed the main claim for hearing on 27.02.2013. The parties were to maintain the prevailing *status quo* on all the issues in dispute pending the hearing and determination of the cause.

The circumstances of this case are as follows;

On 16. 01. 2013, the respondent issued a notice of intended redundancy for 59 employees following intention by the respondent to close down its James Finlay's (K) Limited Hospital at Chomogonday. The notice being **appendix 2** on the memorandum of claim stated as follows:

"16th January 2013
The General Secretary

Kenya Plantation and Agricultural Workers Union

Box 1161
Nakuru

The County Labour Officer
Kericho County
Dear Sir/ Madam
NOTICE OF INTENDED REDUNDANCY

In 2010 we embarked upon a detailed review of our medical services provision model, and over the last two years we have scrutinized as many facets of this as we possibly can. During that time we have made a number of improvements to our Primary Health Care facilities (which is still ongoing), resulting in a reduction in the number of patients requiring admission to hospital. The underutilization of the inpatient facility has resulted in a very inefficient method of delivering secondary health care.

During the review, we have looked at a number of possible solutions. Of these, only one was viable in the long run, and that was to join forces with another medical service provider. We have therefore entered into a strategic partnership with Unilever Tea Kenya Ltd to source outpatient and inpatient services from their Central Hospital in Kericho town. In so doing, we will be able to offer our employees a wider range of services than presently available at Chomogonday. For example, the Unilever Tea Central Hospital has a modern maternity wing, amongst others.

I would like to stress that no medical benefits are being withdrawn as a result of this move.

We will redeploy within Finlays as many of the affected staff employable in other roles as we can. In spite of this, it is regrettable that some roles in our current medical establishment will cease to exist. These are the patient attendants, catering, laundry services, radiography and pharmacy. This is likely to affect up to 59 employees. We will handle these employees with as much sensitivity as we can within the scope of our Collective Bargaining Agreement and the Labour Laws. We will carry out the appropriate counselling sessions for those affected.

This decision will culminate in the eventual closure of our central hospital by the end of February 2013. There will be a brief transition period commencing immediately, and guidelines about how to access the services at Unilever Central Hospital will be communicated to all employees appropriately.

We will in due course communicate to the affected employees as per laid down procedure.

Yours faithfully,
For James Finlay Kenya Limited
Signed
Simeon Hutchinson
Managing Director"

The claimant objected to the respondent's move as conveyed in the quoted notice. By the letter dated 17.01.2013 signed by **Francis Atwoli**, the claimant's General Secretary, the respondent replied that ILO convention No. 87 stipulated that a worker cannot be denied a facility that he or she has been enjoying over the years and the same formed part of **"…non inclusive provision within the existing terms and conditions of service you (respondent) can only improve on it but you can't deny a worker."** The claimant suggested a meeting on 23.01.2013 at 10.00 am at its boardroom to amicably resolve the issues. That reply letter by the respondent is **appendix 3** on the memorandum of claim. As part of

appendix 3 on the memorandum of claim, the claimant attached a protest letter by the Kericho leadership opposing the closure of the hospital. The protestation raised questions including that:

a) **the Chomogonday hospital was beneficial to the respondent's staff, the local community and the stakeholders;**

b) **the Walter Reed Project had pumped Ksh. 18 million to the hospital to serve the community and Ksh. 30 million was provided annually for research through the Jackson Foundation. Such funding was in public interest and domain;**

c) **the hospital had a long history having been built in 1946 after the second world war and to support the local community;**

d) **patients with HIV and TB cases received government medical supplies through the hospital which is accredited by the NHIF;**

e) **the Unilever Tea Central Hospital did not guarantee the benefits accruing from the respondent's Chomogonday hospital and challenges of long distances to be covered by patients had not been addressed by the respondent;**

f) **the Unilever Tea Central Hospital had not committed itself to expand and shoulder the extra workload; and**

g) **the respondent had failed to demonstrate leadership and to work in consultation with the local leadership on important matters touching on many people's livelihoods.**

The parties to this cause held a meeting on 23.01.2013 whose minutes are **appendix 4** on the memorandum of claim. A visit by the parties to the Unilever Tea Central Hospital was agreed upon to take place on 29th or 30th January to view the hospital facilities. Another meeting took place on 04.02. 2013 as per the attendance record marked **appendix 5** on the memorandum of claim but no resolutions were made hence, the filing of this cause on 08.02.2013. The claimant has prayed for the court to make orders:

a) **setting aside of the respondent's notice of intended redundancy and closure of the Central Hospital of James Finlays (K) Limited;**

b) **to prohibit the intended closure of the James Finlays (K) Limited, Chomogonday Central Hospital;**

c) **to prohibit the intended redundancy of 59 employees from the medical department; and**

d) **to provide for costs of the suit.**

The respondent has opposed the claim and prayed that the suit be dismissed with costs to the respondent because the court cannot micro manage the respondent's business and there is no contract between the respondent and its employees to operate the hospital. The respondent has further pleaded that the court does not have jurisdiction to order the respondent to employ the 59 employees whose services are superfluous once their point and position of employment no longer exist.

The hearing proceeded on 27.02.2013 as scheduled. The claimant called three witnesses, namely, Geoffrey Onsti Mayo **(CW1)**, Robert Nyagaka Moragoli **(CW2**), and Stephen Kiprono Busienei **(CW3)**. All the three were employees of the respondent. CW1 testified that his wife had been unwell on 1.02.2013. She was expectant and she suffered a miscarriage. During that period, his wife attended the Unilever Central Hospital and the services were not as good as the respondent's Chomogonday Hospital. It was his evidence that the nurses and other staff were not responsive; they were abusive and not courteous. He admitted that upon treatment his wife improved, he had used the respondent's

ambulance to take his wife to the Unilever Central Hospital because the respondent's Chomogonday Hospital had closed and, he knew the Chomogonday Hospital had ceased operating sometimes in January 2013 as it had been closed. It was his further evidence that the respondent's management had informed staff about closure of the hospital and the Unilever Central Hospital showed priority and favoured treatment to staff of Unilever Tea (K) Hospital over the respondent's staff.

CW2 had previously been sick and the respondent's resident doctor at the Chomogonday Hospital had operated upon the left leg of the witness. He testified he was due for a second operation on the same leg due to persistent pain on the leg. The same doctor was to carry out the operation but unfortunately on the due date he was referred to the Unilever Central Hospital in Kericho town. It was his testimony that the medical attention was poor because he was not operated as prescribed by the doctor. Instead, he was asked to take medicine and he protested and turned down that line of treatment. It was his position that the Unilever Hospital lacked capacity to undertake the operation. He later called upon the respondent's resident doctor who prescribed medicine and light duties. He testified he would need resources to go for the operation elsewhere. He testified that the ailment was associated to the heavy workload. He admitted that it was not uncommon for patients to be referred to any other hospital by the respondent's medical staff at the respondent's Chomogonday Hospital. He also stated that after closure of the respondent's hospital which supplied medicine to patients upon prescription, he had to cover a long distance to Tea-land Chemist to collect medicine which the doctor had prescribed.

CW3 was initially employed as a driver by the respondent. He worked at the respondent's Chomogonday Central Hospital. In March 2012, he became sick and he was referred to Eldoret Hospital to be attended to by one **Dr. Koech**, a neural surgeon. He had spinal pains and ailment. He was at that hospital for five days and the respondent paid all the bills. After the sick and annual leave he reported back to work in July 2012. His leg was numb and he could not drive. The respondent re-designated him and deployed him to perform clerical duties in the respondent's Chomogonday Hospital. On 16.01.2013, the respondent's managing director called the hospital staff and informed them at a meeting that the hospital would close because it offered sub-standard services. The director promised that many of the staff would be redeployed but unfortunately others would leave on redundancy. Particularly, those in patients' attendance, x-ray, and pharmacy staff would be declared redundant.

The director also informed the meeting that the services the hospital provided would be provided by the Unilever Tea Central Hospital. The director said the hospital would close by 28.02.2013. The witness stated that he did not explain the terminal dues that would apply. The witness also stated that the director had thanked staff saying they had performed very well and contributed to his success. The witness told the court that after 16.01.2013, the maternity wing closed. Nobody was admitted in that wing on 17.01.2013. Patients in that wing were transferred to the Unilever Tea Central Hospital. Other wings progressively discharged the patients. He informed the court that on 08.02.2013 at about 11.00 o'clock in the morning the last three patients were transferred to the Unilever Tea Central Hospital for admission. An inventory of hospital property was done on 09.02.2013 and all mattresses taken to the store. The medical staff was still in employment and the Hospital at the time of hearing served as the health centre for the northern zone. The witness informed the court that the director informed the staff that the resident **Dr. Kirui** employed by the respondent would remain in employment until his retirement age. The laboratory, according to the testimony, would continue to undertake medical occupational tests for the flower scheme employees. The respondent's theatre would remain closed in circumstances whereby the Unilever Tea Central Hospital has inferior facilities and patients had, as per this witness, to be referred to another hospital at Twenek and in which case the respondent will meet only up to a maximum of Ksh10, 000 of the bill for union staff and Ksh.20, 000 for senior staff. The witness feared that as a clerical staff he may be among those who may have to leave on redundancy. He stated that he was 52 years old and he was due for retirement in three years. He informed the court that the affected hospital staff was 154 including the managers. He stated that by 1.02.2013, the hospital had effectively closed its inpatient services.

The claimant called two witnesses including one **Daniel Kibet Kirui (RW1)** being the respondent's Director for Human Resource and one **Dr. Augustine Kibet Kirui (RW2)**, being a medical doctor in employment of the respondent and specialized in Endocrine and Trauma. RW1 testified that the

respondent had for the past 11years substantially improved the primary health care of its staff leading to declining inpatient or secondary health care cases between 2002 and 2012. He referred the court to the graph marked **AAK1** on the replying affidavit of **Dr. Augustine Kibet Kirui** sworn on 14.02.2013. Accordingly, the respondent had decided to close down its Chomogonday Hospital whose inpatient services were on low demand as the hospital operated below the optimal level. The witness referred the court to schedule marked **AKK3** to show that only 29% of the bed capacity of the respondent's 100 beds were utilized. The witness also referred the court to the agreement marked AKK2 between the respondent and Unilever Tea (K) Limited to show that the respondent would continue to provide the inpatient services through the Unilever Tea Central Hospital at Kericho. The agreement, the witness admitted, was dated 04.02.2013 coming long after the notice of redundancy dated 16.01.2013 being appendix 2 on the memorandum of claim. He explained that the agreement was to take effect from 15.03.2013 because the parties thereto were already in an understanding of collaboration. The witness stated that the Chomogonday facility would continue to provide outpatient services as a dispensary alongside the respondent's other dispensaries. The witness stated that there had been meetings between the parties on the closure of the hospital and the main reason for closure was that running the hospital was unsustainable due to under utilization, wastage of equipment, escalation of costs and generally inefficient provision of the secondary health care to the staff. The witness stated that the collective agreement was clear on the terminal dues upon redundancy taking effect; it was in paragraph 26(9) of the collective agreement.

RW2 testified that he had been a medical doctor for 27 years and a consultant surgeon for 17 years. He stated that the respondent had transferred the inpatient services to the Unilever Tea Central Hospital effective 8.01.2013. He confirmed that the respondent's surgical facilities were better than those at Unilever Hospital in terms of the laboratory, theatre, sterilization and anaesthesia spaces and facilities. Nevertheless, the Unilever facilities were functional. He had worked at the Unilever facility and the space was small. The bed capacity as per **AKK3** on his affidavit showed that the Unilever hospital would accommodate both the needs of Unilever and respondent's staff. He informed the court that he was still in the employment of the respondent as the manager of health services and he performed medical operations when required to do so and using the facilities at Unilever.

The doctor told the court that during the transition there were teething problems one of which related to the Walter Reed Project-Kenya. That is a project under which the respondent's hospital subject to the closure was substantially funded. It is a United States Military HIV Research Program run together with the Kenya Medical Research Institute (KEMRI). The Unilever Tea Central Hospital at Kericho does not enjoy the benefits of the Program. The project conducts expansive and comprehensive HIV research, prevention, care and treatment of employees of the respondent, their dependants and the wider Kericho community. The program was an integral part of the inpatient services at the respondent's Chomogonday hospital. That was the account of the Program in the affidavit of **Meshack Khisa** and which is not rebutted by affidavit or by other evidence at the hearing. The doctor, **RW2**, told the court that many people were benefiting from the Walter Reed Project and it was hoped that the program would eventually be continued at the Unilever Tea Central Hospital. The witness stated that issues will have to be ironed out.

Another teething issue according to RW2 was how surgeries will have to be dealt with in view of the limited space at the Unilever Hospital. The witness said he had worked for the respondent for 13 years helping to build the medical theatre facilities and he was depressed to witness the closure. He admitted that he had received complaints following the transfer of services to Unilever Tea Central Hospital and they are issues that can be resolved. He confirmed that the hospital was accredited by the National Hospital Insurance Fund (NHIF). It served the surrounding community and received the NHIF refunds. The doctor stated that the hospital undertook twenty major medical operations and twenty minor ones per month. He also informed the court that for other major operations such as hip replacement they did not refer the patients out and instead the relevant experts visited the respondent's Chomogonday Hospital to undertake the operations and the respondent in such cases benefited transfer of skills.

RW2 further informed the court that the respondent still had the medical records for the patients. He stated some had been transferred to the Unilever Tea Central Hospital but where the staff have

complained and objected, they have continued to hold on the records. He explained that the issue of records was a vague area because in ordinary circumstances hospitals do not transfer patients' medical records to other hospitals. Further he stated a patient had a right to keep his or her records but the records generally belonged to the hospital the patient attended. He stated that retired officers had been telephoned to collect their records. For the employees in the Walter Reed Project, RW2 stated that their records had not been taken to the other hospital. The witness stated that the fate of the Project was not known and its running had been interfered with during the transition.

In view of the pleadings, the evidence and the submissions made the court considers that the following are the key issues for determination:

1. **Whether the respondent, after closing its Chomogonday hospital, will discharge its legal obligations on the health care the respondent being an employer should provide to its staff.**

2. **Whether the respondent has complied with the legal requirements for closing a hospital.**

3. **Whether the court can interfere with the respondent's discretion to declare affected employees redundant following the closure of the hospital.**

4. **Whether the claimant is entitled to the remedies as prayed for.**

The first issue for determination is whether the respondent, after closing its Chomogonday hospital, will discharge its legal obligations on the health care, the respondent being an employer, should provide to its staff. For the claimant it was submitted that the respondent as an employer has a responsibility to provide medical care to its staff and that was not in dispute. The disputed issue, it was submitted for the claimant, is whether the claimant should be held to a lower standard of providing medical care as stated in the outdated Employment (Medical Treatment) Rules of 1977 and as restated in clause 12(d) and (j) of the Collective Bargaining Agreement. The claimant's submission was that the Rules provided for the basic minimum standards to be met in delivering medical care to the employees and the respondent's staff already had the highest attainable standards of medical care as offered at the respondent's Chomogonday hospital.

Thus, closing down the hospital was tantamount to denying the employees the right as enshrined in **Article 43(1) (a) of the Constitution of Kenya**. The Article provides that every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care. The respondent having attained that standard through the hospital, closing it would be denying the employees that particular right. It was submitted that the respondent should be held to providing its staff a higher standard of health care in view of the provisions of **Article 259(1)** which requires the Constitution to be interpreted in a manner that:

a) **promotes constitutional purposes, values and principles;**

b) **advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;**

c) **permits the development of law; and**

d) **contributes to good governance.**

It was further submitted that by transferring HIV patients to another medical facility, the respondent would be discriminating the patients in contravention of Article 27 of the Constitution.

On the standards of medical care, the claimant further referred the court to Plantations Convention, 1958(No. 110) on conditions of employment of plantation workers. Article 89 of the Convention provides that the appropriate authorities shall, in consultation with the representatives of the employers' and workers' organizations concerned, where such organizations exist, encourage the provision of adequate

medical services for plantation workers and members of their families. Article 90 provides that medical services shall be of a standard prescribed by the public authorities, shall be adequate having regard to the number of persons involved, and shall be operated by a sufficient number of qualified personnel.

For the respondent, it was submitted that the respondent is under no legal obligation to operate a hospital but it is under the legal obligation to provide medical attendance to its employees in accordance with section 34 of the Employment Act, 2007. The section provides as follows:

"34. (1) Subject to subsection (2), an employer shall ensure the provision sufficient and of proper medicine for his employees during illness and if possible, medical attendance during serious illness.

(2) An employer shall take all reasonable steps to ensure that he is notified of the illness of an employee as soon as reasonably practicable after the first occurrence of the illness.

(3) It shall be a defence to a prosecution for an offence under subsection (1) if the employer shows that he did not know that the employee was ill and that he took all reasonable steps to ensure that the illness was brought to his notice or that it would have been unreasonable, in all the circumstances of the case, to have required him to know that the employee was ill.

(4) This section shall not apply where-

a) **the illness or injury to the employee was contracted during a period when the employee wa absent from his employment without lawful cause or excuse;**

b) **the illness or injury is proved to have been self inflicted ;**

c) **medical treatment is provided free of charge by the Government or under any insurance scheme established under any written law which covers the employee."**

It was further submitted for the respondent that the respondent operated thirteen dispensaries to provide proper medicine for employees and the arrangement with the Unilever Tea Central Hospital would ensure staff are provided with medical attention during serious illness. The respondent, it was submitted, had referral system in event of complex medical cases and it maintained a fleet of ambulances for that purpose.

The court finds that the basic medical standards the respondent was to provide to its staff were as per **section 34 of the Employment Act, 2007** and as repeated in clause 12(c) and (d) of the collective agreement between the parties. Clause 12(c) provides **"In case of Industrial sickness, it is agreed that the terms of Work Injury Benefits Act shall apply."** Clause 12 (c) provides, **"Every employer shall ensure the provision for his employees of proper medicines during illness, and medical attendance during serious illness, and shall take reasonable steps to ensure that such illness is brought to his notice as soon as reasonably practical after the first occurrence thereof. An employer shall observe the requirements of Medical Rules in the Employment Act."** The provisions of the collective agreement are similar to the provisions of section 34 of the Act. The salient ingredients of the standards include: (a) provision for employees of proper medicines during illness; and (b) medical attendance during serious illness.

The court has considered the submissions and the evidence and considers that the obligation revolving upon the employer to provide sufficient and proper medicine for employees during illness and if possible, medical attendance during serious illness stands on the same pedestal as other obligations vested in the employer such as the obligations to pay wages or salary, pension or other terminal benefits, to authorize leave and other obligations in the nature of benefits to the staff. The statute sets the principles or minimum standards and parties to the employment contract may negotiate and agree upon standards above the minimum. Parties may also, by conduct and without agreement, implement standards above or those that barely meet the statutory prescription including the methodology for the realization of the

standards. What is at the core of obligations that benefit staff, in the opinion of the court, is that the employee is entitled to negotiate and any real or perceived adverse variation is a genuine grievance which the employee is entitled to raise as envisaged in **section 46 (h) of the Employment Act, 2007**. The benefit cannot be imposed one way or the other through the unilateral decision of the employer.

The court considers that where the employee is entitled to an election between two options of a beneficial obligation from the employer, the employee is entitled to the most beneficial option or is deemed to elect the most beneficial option available. These considerations apply to both the content of the benefit and the methodology applied towards its realization. The employer is not at liberty to dictate the content or the methodology. It is the court's opinion that both are negotiable and any complaints should be subjected to the agreed or prevailing grievance management procedures. In arriving at such conclusions, the court has been carefully navigated by the provisions of the Employment Act, 2007. In particular, on the basic minimum conditions of employment, subsection 26(2) of the Act provides, **"26. (2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply."** In addition, subsection 10(1), (2) and (3) of the Act stipulates particulars of a written contract of employment including at 10(2) (k), **"any other prescribed matter".** The court holds that section 34 on medical attention is such prescribed matter and its variation is subject to provisions of subsection 10 (5) which states, **"10. (5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing."**

In the opinion of the court, the measure whether the employer has discharged the obligation is an objective test based on the unique facts of every individual case. In the instant case the RW2 who was an expert witness informed the court the following pertinent and adverse consequences that flow from the respondent's closure of its central hospital at Chomogonday:

a) **He confirmed that the respondent's surgical facilities were better than those at Unilever Hospital in terms of the laboratory, theatre, sterilization and anaesthesia spaces and facilities.**

b) **The doctor told the court that during the transition there were teething problems one of which related to the Walter Reed Project-Kenya, a project under which the respondent's hospital subject to the closure was substantially funded. It is a United States Military HIV Research Program run together with the Kenya Medical Research Institute (KEMRI). The Unilever Tea Central Hospital at Kericho does not enjoy the benefits of the Program. The doctor, RW2, told the court that many people (including staff of the respondent) were benefiting from the Walter Reed Project and it was hoped that the program would eventually be continued at the Unilever Tea Central Hospital. The witness stated that issues will have to be ironed out.**

c) **Another teething issue according to RW2 was how surgeries will have to be dealt with in view of the limited space at the Unilever Hospital.**

d) **He admitted that he had received complaints following the transfer of services to Unilever Tea Central Hospital and there were issues that needed to be resolved.**

e) **He confirmed that the hospital was accredited by the National Hospital Insurance Fund (NHIF). It served the surrounding community and received the NHIF refunds. The doctor stated that the hospital undertook twenty major medical operations and twenty minor ones per month. He also informed the court that for other major operations such as hip replacement they did not refer the patients out and instead the relevant experts visited the respondent's Chomogonday Hospital to undertake the operations and the respondent in such cases benefited transfer of skills.**

f) **RW2 further informed the court that the respondent still had the medical records for the patients. He stated some had been transferred to the Unilever Tea Central Hospital but where the**

staff had complained and objected, they had continued to hold on the records. He explained that the issue of records was a vague area because in ordinary circumstances hospitals do not transfer patients' medical records to other hospitals.

The court, in view of the pending complaints that have not been resolved and taking into account section 34 of the Act on the employees' entitlement to the better option of available and accrued medical care, the court finds that the closure of the respondent's central hospital at Chomogonday amounts to irregular variation to discharge its legal obligations on the health care the respondent should provide its employees. The court finds that the respondent cannot unilaterally vary the methodology of discharging such employees' beneficial obligation and without addressing the emerging real or perceived complaints through the agreed grievance management procedures; it is the finding of the court that the closure of the hospital at least amounts to disputable standards prescribed in section 34 of the Act or as agreed in clause 12 of the collective agreement namely, (a) provision for employees of proper medicines during illness; and (b) if possible, medical attendance during serious illness.

For avoidance of doubt, it is the holding of the court that an employer is entitled to determine the content and methodology of discharging section 34 obligation on provision for employees of proper medicines during illness and if possible, medical attendance during serious illness. However, it is also the holding of the court that if the content and methodology of discharging the obligation is in place and operational, the statutory provisions require the employer to consult the employee before varying that content and methodology. In the instant case the respondent discharged the obligation, for a long period of time, through running its central hospital at Chomogonday and the court finds that closure of the hospital, and thereby changes in the methodology, would be unlawful if implemented without proper and genuine consultations between the parties. As submitted for both parties, principles of good industrial practice required proper and genuine consultations between the parties. The court has found that such due process and good industrial practice was not upheld in this case.

The second issue for determination is whether the respondent has complied with the legal requirements for closing a hospital. On this issue, it was submitted for both parties that there were no elaborate statutory provisions applying to the proprietors of hospitals who desired to close down voluntarily and for whatever reasons. The parties submitted that the prevailing regulatory regime empowers the Medical Practitioners and Dentists Board to refuse to grant registration or to review a licence or to revoke or cancel a licence where in the opinion of the Board a private medical institution is managed contrary to the Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000. The Board, the parties were unanimous, may under the Rules revoke the licence in the public interest.

It was submitted by counsel for the respondent that the establishment and operation of hospitals other than those operated by the Government (meaning the ministry responsible for health or medical services) are regulated by the Public Health Act, Cap. 242 and the Medical Practitioners and Dentist Act, Cap. 253. It was submitted that under **section 32 of the Public Health Act**, any municipal council may with the approval of the Central Board of Health established in section 3 of the Act, provide for the use of its inhabitants its area hospitals or temporary places foe reception of the sick and for that purpose may the council may itself build such hospitals, contract for the use of any such hospitals or part of a hospital or contract any person having the management of any hospital, for purpose of offering treatment to the inhabitants at a fee.

The further submission was that private persons like the Respondent can establish hospitals in accordance with the registration and licence regime under the Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000. It was submitted that the respondent's central hospital at Chomogonday was a private medical institution within the meaning of the Rules and the licence marked **R1** in these proceedings showed that the respondent's hospital was licensed to operate as such. It was submitted for the respondent that the running of hospitals was a highly regulated business and a hospital closes or ceases operations where the licence is revoked or cancelled, the hospital is deregistered, or like in the current case, if the proprietor decides to stop running the hospital and in which event, the court cannot order continued operation of the hospital.

As submitted for the respondent, a hospital is a special and highly regulated business. A proprietor of a hospital who desires to close the hospital or to downsize must comply with the applicable regulatory laws and invariably requires instituting an elaborate downsizing or closing strategy. It is the court's considered opinion that hospitals planning to close down or to downsize must give advance notice to the relevant state agency responsible for the licensing or registration, and in this case, the Medical Practitioners and Dentists Board. If the licensing or registration authority is not notified, the hospital will be in breach of the licensing legislation. Section 42 of the Interpretation and General Provisions Act, Cap. 2 provides, **"42. Where a written law confers a power or imposes a duty, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion arises."** Under paragraph 12 of the Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000, it is the responsibility of the owner and the managing body of a private medical institution to acquaint themselves fully with the qualifications and the professional conduct of all medical practitioners and dentists working at the private medical institution and shall consult the Board in case of any doubt. Further, the owner or the managing body of a private medical institution and the medical practitioner or dentist concerned, shall be responsible for any instance of professional misconduct occurring within the premises about which they know or ought to reasonably to have known. Under paragraph 13 of the Rules, the administrator of a private medical institution shall ensure that the medical practitioners and dentists working there engage only within their respective areas of specialization and competence, except, going beyond their areas in cases of emergency or where the practitioners with requisite specializations are not reasonably available.

It is the court's holding that the cited duties and powers imposed by the Rules subsist throughout the period of registration of a private medical institution. The court considers that the lapsing of the licence in itself does not make a hospital to cease to exist and such lapsing of the license does not absolve the concerned owner, administrator or medical practitioners and dentists the duties and powers vested under the cited provisions of the Rules. The lapsing of the licence, like in the instant case may only stop the operation of the hospital and not closure of the hospital. Thus, subparagraph 6(2) of the Rules is clear that **"An institution shall be registered and licensed as a private medical institution…."** The provision is clear that registration is a precondition to licensing and it is the court's holding that it is the act of registration that brings the hospital into existence. Similarly, the court holds that it is the act by the Registrar of removing the registered institution from the register that brings the existence of the medical institution or hospital to an end.

The statutory law on this point is clear. Persons who are not medical practitioners or dentists, such as the respondent, may be registered and licensed to render medical or dental services as per paragraph 6(2) of the Rules. The primary power to register and licence such non-professional persons is provided for in section 13 of the Medical Practitioners and Dentists Act which states that the same may be done in the public interest. The alteration of the registration is provided for in section 8 of the register. The section provides as follows:

"8. (1) The Registrar shall from time to time make any necessary alterations and corrections in the register in relation to any entry therein.

(2) The Registrar shall remove from the register-

a) the name of every deceased person;

b) the name of every person convicted of an offence under section 19;

c) the name of every person whose name the Board has under section 20 directed should be struck off the register; and

d) any entry which has been incorrectly or fraudulently made in the register.

(3) The Registrar may, with the consent of the person concerned, remove from the register the name of a person who has ceased to practice.

(4) The Registrar shall, not later than 1st July in each year, send by registered post to every person registered in the register a notice inquiring whether or not that person has ceased to practice or has changed his address, and, if no answer is returned to the enquiry within six months from the posting thereof, the name of that person may be removed from the register; but a name removed under this subsection may, at the request of the person concerned and on payment of the prescribed fee, be reinstated by the registrar.

(5) The Registrar-General of Births and Deaths

shall notify the Registrar of the death of any

registered medical practitioner or dentist."

Further, the court has taken into account the provisions of section 3 of the Act

which provides:

"3. The expressions 'legally qualified medical practitioner' and 'duly qualified medical practitioner' or any words importing a person recognized by law as a medical practitioner or a member of the medical profession, when used in any written law with reference to that person, shall be construed to mean a person registered as a medical practitioner under this Act or, where the context so admits, a person who is licensed by the Board under section 13."

Thus, it is the conclusive finding of the court that a hospital or a medical institution does not close and cease to exist by the mere fact of the owner taking steps to occasion its physical inaccessibility. As long as the hospital is on the register, the owner must discharge the duties and powers conferred under the Rules to ensure professional conduct of the professional medical staff. In this case, the **RW2** highlighted crucial unresolved professional issues emerging from the respondent's pretended closure of the hospital. One such important professional issue requiring the respondent to consult the Board long before the closure of the hospital relates to the destiny of the patients' records which invariably are governed by the principle of the doctor-patient confidentiality. RW2 admitted that the destiny of the records was a bleak and vague issue.

This issue is of particular concern to the court because under Sub-Article 31(c) of the Constitution, every person has the right to privacy which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed. In the opinion of the court, such right includes the right to have information such as official records, photographs, correspondence, diaries and medical records kept private and confidential. It is the further opinion of the court that in the instant case, the respondent in discharge of the duty to uphold medical professional ethics of its medical staff as prescribed in the Rules is obligated to take positive steps to prevent intrusions into the privacy of its hospital's patients. Further, the court considers that the respondent must notify the Board of the intention to close the hospital and consult the Board on the steps to be taken to ensure the respondent's medical professional staff does not breach their respective professional ethics during the closure of the hospital.

The court has been informed that the respondent's hospital is involved in HIV-AIDS research project and that obviously means that the hospital has collected a lot of medical data and maintains comprehensive records on its patients and who include its staff, falling within the sphere of private life and protected under the doctor – patient confidentiality. The court holds that such information must be protected from invasive intrusion into the private lives of those affected as the information cannot be used for a purpose that was not agreed or in a manner that undermines medical professional ethics as well as medical research ethics that the respondent is duty bound to uphold under the Rules in the capacity of an owner of a private medical institution.

To answer the issue for determination, the court holds that in closing down a hospital, the owner must address the statutory obligation to notify the Board and to uphold the medical professional ethics over and above taking into account the statutory and agreed employer-employee obligations and rights in view of

the closure. In the instant case the court has found that the respondent has not complied with the statutory obligation to notify the Board and to uphold medical professional ethics so that the closure process is not in accordance with the prescribed legal standards. In arriving at that finding, the court nevertheless notes the convoluted and lack of clarity of the relevant statutory provisions that require modernization to effectively deal with the expanded and ever growing sector of private medical institutions. It is the opinion of the court that modernization project should be undertaken by the Board and the concerned stakeholders and on priority basis in view of the difficulties and issues that have emerged in this case. Some of the questions to be answered in such policy and legislative project may include:

a) **What authority should register and licence national government, county government and private hospitals?**

b) **What steps should be involved in the registration and licensing of hospitals?**

c) **What is the effect of registration, licensing, deregistration and revocation of a licence?**

d) **What steps should govern voluntary closure of a hospital by the national government, county government and private owners?**

e) **What should be the scope of public participation and in particular the persons affected by registration, licensing, deregistration and revocation of licence?**

f) **How should concerns of medical professional ethics be addressed in running and at closure of a hospital especially in event of divergent interests of the owner, patients and the medical professional staff involved?**

g) **What should be the effective and efficient dispute resolution procedure in the processes of registration, licensing, deregistration and revocation of licence?**

h) **What regulatory provisions should apply to a medical institution or hospital that hosts or undertakes research including in event of its restructuring, downsizing or closure?**

The next issue for determination is whether the court can interfere with the respondent's discretion to declare affected employees redundant following the closure of the hospital. It has been submitted for the respondent that the redundancy notice was issued in accordance with the provisions of section 40 of the Employment Act, 2007 and for the notice to be set aside the claimant must establish that it is illegally issued, for instance, that it is fraudulent, mistaken or in violation of express statutory provision. Further, it was submitted for the respondent that issuance of the notice is in accordance with Article 41(1) providing for fair labour practices and conforms to good industrial practice whereby the employer gives as much warning as possible of impending redundancies to enable union employees as may be affected to know the facts, consider alternatives, and find alternative jobs. The union, it was submitted, should be consulted on the best means to achieve the management's desired results, fairly and with least hardship to the employees. The respondent referred to **Kenya Airways Corporation Limited – Versus- Tobias Oganya Auma and Others**, where the Court of Appeal held that it would be economically illogical for a court of law to expect an employer to retain in employment workers until they attain the age of retirement whether they deliver or not and whether the employer was solvent or not. Further, the court stated in the case that it was open for an employer to adopt any modern technology and to restructure provided all the regulations were observed by the employer.[1] It was submitted that it was uneconomical for the respondent in the current case to continue with uneconomical operation of its hospital having already heavily invested in the employees' primary health care and with a viable alternative to their secondary health care. The hospital having been closed, the respondent submitted that it should be allowed to declare the identified 53 employees redundant.

For the claimant, it was submitted that the respondent did not produce any evidence to show that it was a financial burden to continue running the hospital. Further, the respondent had acted with malice and without conclusive consultation to close the hospital long before the communicated date. Thus, the

redundancy notice should be set aside.

The court agrees with counsel for the respondent that it is for the respondent to decide if and when to close down a business and a clear lawful cessation of business would amount to a redundancy situation. However, the court's further opinion is that the respondent's subjective classifying of the intended termination as being on account of redundancy as potentially fair or otherwise is open to interrogation by this court. Thus, **section 43 of the Employment Act, 2007** requires an employer to prove the reason for termination failing which the termination shall be deemed to be unfair. Under the section, the reason for termination must be matters which the employer genuinely believes to exist at the time of termination. The court holds that the section applies to the termination on account of redundancy under section 40 of the Act. Under section 2 of the Act, redundancy means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.

The court considers that the employer is entitled to undertake redundancy just like the other human resource functions like recruitment and selection, appointment and promotion, training and development and termination of the contract of service including dismissal on disciplinary grounds. The general principle is that the court shall not interfere in the employer's entitlement to undertake these functions and interference by the court shall be exercised very sparingly. The court's rare intervention can be justified on account of obvious breach by the employer of the statutory or agreed due process or such other manifest injustice and in circumstances whereby the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process. In the instant case with compounded circumstances, the court finds that rare situation that justifies the court's intervention to exist. First, the consultative process that would facilitate resolution of the disputed issues as per prevailing procedures has collapsed. Secondly, the court has found that the reason for termination on account of redundancy is premised upon the respondent's misconceived and pretended closure of the hospital in contravention of the Medical Practitioners and Dentists Act whose consequence is that the reason for the redundancy does not pass the validity test of the cited section 43 of the Employment Act, 2007. Finally, the material before the court show that the redundancy when permitted to go on as desired would expose the respondent and the concerned medical staff to liability for breach of the duty to uphold medical professional ethics. Accordingly, the court finds that the redundancy notice dated 16.01.2013 is amenable to being set aside.

During the hearing, the parties spent considerable time addressing the issues of the relevance of the provisions of **Article 10 of the Constitution** on the national principles and values of governance as well as the issue of the manner of pleading alleged breach of the constitutionally protected fundamental rights. Those were useful matters but as it has turned out, and in accordance with the submissions by counsel for the respondent, the issues were outside the scope of the present case. The issues will continue to simmer and hopefully be determined in an appropriate future case.

Nevertheless, the court draws the parties to the assertion in the case of Kenneth **Njiru Nyorani –Versus- Doshia Packaging Limited,** where this court stated, thus

"In making this finding the court recognizes that the right to fair termination has constitutional basis as provided for in Article 47(1) of the Constitution which states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Managerial decisions by employers are properly administrative actions within the province of Article 47 of the Constitution on the right to fair administrative action. The Constitution breaks the curtains and it does not matter whether the employer is in public service or private sector. The Constitution in Article 10 clearly states that the national values and principles of governance apply to all persons and the principles and values include human rights. Thus, in the instant case, the respondent was bound to accord the claimant the right to a fair administrative action through observance of the rules of natural justice and as expressly envisaged in section 45(5) of the Act."[2]

That opinion is upheld in this case and every employer, both in public and private sector is

constitutionally bound to uphold the realization of the national values and principles spelt out in Article 10 of the Constitution.

Finally, there were concerns raised in this case that the community served by the hospital had strong objections to the closure of the hospital. It was submitted for the claimant that the community included both employees of the respondent and members of the general public. It was submitted for the respondent that the case related to employer-employee rights and obligations so that the issue of the interests of the hospital's community were extraneous to the scope of the dispute.

The court has considered the submissions and finds that an employer whose business is to run a hospital which also serves the employer's staff may find it a mirage to draw a line between staff and the hospital's community especially in event of objections to downsizing or closure of the hospital. Further, to ameliorate hostilities associated with closure or downsizing as may be advanced by the community, it is the opinion of the court that such an employer should institute a comprehensive values-oriented hospital ethics and integrity program. The program should have an in-built high standard of ethics and integrity to create confidence and an environment of an ethical hospital that supports staff, patients, the hospital's community and other hospital's stakeholders.

The ethics and integrity program should encompass organizational support framework, substantive ethical standards to be observed, training and awareness program, a mechanism for reporting compliance or breaches or enforcement, and a framework for monitoring and evaluation. Of particular interest, it is the court's opinion that closure or downsizing in the case of a medical institution should invariably incorporate the ethics and integrity component. The court further takes the view that ethics and integrity issues will have to be taken into account even where the owner of the hospital does not run the hospital as the core business as it was submitted to be the respondent's position in this matter.

In conclusion, judgment is entered for the claimant against the respondent for orders that:

a) **the redundancy notice dated 16.01.2013 issued by the respondent is set aside;**

b) **the respondent shall not close its James Finlays (K) Limited, Chomogonday Central Hospital unless the closure is in accordance with the provisions of the Medical Practitioners and Dentists Act and, the Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000;**

c) **the Deputy Registrar of this court to serve this judgment upon the Medical Practitioners and Dentists Board within seven days from the date of the judgment; and**

d) **the respondent to pay the costs of the case.**

Signed, dated and **delivered** in courtat **Nakuru** this **Friday, 22nd March, 2013.**

BYRAM ONGAYA
JUDGE

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[1] Civil Appeal No. 350 of 2002.

[2] Industrial Cause No. 431 of 2010 at Nairobi, page 7 of the judgment.