Republic v National Health Insurance Fund Management Board & 2 others; Joy Nursing Home & Maternity (Exparte) (Application E069 of 2003) [2024] KEHC 3822 (KLR) (23 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3822 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

APPLICATION E069 OF 2003

J NGAAH, J

APRIL 23, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

NATIONAL HEALTH INSURANCE FUND MANAGEMENT BOARD ..... 1ST RESPONDENT

KENYA MEDICAL PRACTIONERS & DENTISTS COUNCIL .... 2ND RESPONDENT

MINISTRY OF HEALTH ..... 3RD RESPONDENT

AND

JOY NURSING HOME & MATERNITY ..... EXPARTE

JUDGMENT

1. The applicant's application is a motion dated 26 June 2023 expressed to be brought under Articles 22, 23 and 47 of *the Constitution*; Sections 8, 9, 10 and 11 of *Fair Administrative Action Act*, 2015; Sections 8 and 9 of the *Law Reform Act*, cap. 26; and, Order 53 rule 3 of the Civil Procedure Rules. The motion seeks orders whose prayers have been framed as follows:

> " 1. That the Honourable court be pleased to grant an order of Certiorari to quash the decision made by the 1st respondent to shut down the Health Insurance Claim System and to suspend the applicant's operation with it.
>
> 2. That the Honourable court be pleased to grant an order of mandamus directed to the 1st respondent compelling it to open the Health Insurance Claim System

and to lift suspension of the applicant's operation to allow it to operate and carry on with its business as usual.

3. That the Honourable Court be pleased to grant an order certiorari to quash the decision of the 2nd and 3rd Respondents to suspend the operation licence of the Applicant without following due process and according the applicant a fair administrative action.

4. That this Honourable Court be pleased to an order of mandamus to compel the 2nd and 3rd Respondents to lift suspension of the applicant's operation licence and applicant be allowed to continue with its business as usual.

5. That grant of leave herein do operate as stay of media statement dated 20th June 2023 from NHIF and letter dated 19th June 2023 from KMPDC respectively until the determination of this Judicial Review application or until such further Orders are made in that regard by this Honourable Court;

6. Costs of and incidental to the application be provided for;

7. Such further or other relief as the Honourable Court may deem just and expedient to grant."

The motion is based on a statutory statement dated 26 June 2023 and an affidavit sworn on even date by Kennedy Otieno Tindi verifying the facts relied upon.

2. According to these documents, on or about July, 2022, the applicant and the 1st respondent entered into a written contract in which the applicant agreed to provide health care services to the beneficiaries of the 1st respondent. The latter was to pay the applicant for the health care services provided to its beneficiaries.

3. In discharge of its obligations under the contract, the applicant provided the services as was required of it. However, on 18 June 2023 NTV Media, a media company, aired a feature alleging that there are certain healthcare facilities, including the applicant, that are scamming vulnerable Kenyans, misusing public resources and providing what the applicant has described as "injurious healthcare services to patients."

4. Following this expose`, on 19 June, 2023 the Cabinet Secretary for the Ministry of Health directed the 1st respondent, through a press release, to suspend all those health facilities that had been named by the NTV Media expose`. On the same material date, the applicant received a letter dated 19 June 2023 indicating that its licence to operate as healthcare provider had been suspended. Thereafter, the applicant's Health Insurance Claim System was shut down by the 1st respondent. The 1st respondent also released a press statement advising its beneficiaries to seek health services from alternative health providers other than the applicant.

5. It is the applicant's contention that the applicant was never given opportunity to be heard and respond to allegations against it before the suspension of its services to the 1st respondent's beneficiaries. According to the applicant, the respondents' actions are ultra vires and unconstitutional.

6. Dr. Samson Kuhora swore a replying affidavit on behalf of the 1st respondent and stated that he was the acting Chief Executive Officer of the 1st respondent. He has admitted that he is aware that on 18 June 2023, NTV aired an expose' which shed light on healthcare facilities involved in scamming vulnerable Kenyans, misusing public resources and providing injurious healthcare services to patients. As far as the applicant is concerned, the expose' highlighted that the applicant facility took advantage

of the elderly and vulnerable citizens in need of medical attention with a view of fraudulently claiming reimbursement from the 1st respondent for procedures and services not actually offered.

7. The expose' further highlighted that the applicant facility received payments in the sum of over KES 225,000,000/= as payment for medical services and procedures allegedly offered to the 1st respondent's beneficiaries between July 2022 and June 2023. Following the expose' the Kenya Medical Practitioner's and Dentists Council, the 2nd respondent in these proceedings, invoked the provisions of section 15(9) of the Medical Practitioners and Dentist Act cap. 253 and suspended the applicant' s licence to operate a health facility pending the hearing and determination of the matter. The decision to suspend the license was communicated to the Applicant on 19 June, 2023.

8. The 1st respondent subsequently suspended the applicant's contract pending further investigations. It is the contract executed between the applicant and the 1st respondent that governed their relationship. Under Clause 23.2.2. of that Contract, the 1st respondent was empowered to terminate the contract in certain instances including cases of fraud and malpractice. In the event of fraud and corrupt practices, clause 16. 2 of the Contract empowered the 1st respondent to suspend the health care provider pending investigations.

9. It is the 1st respondent's case that the suspension of the applicant was in accordance with the terms of the contract and for this reason, the dispute is commercial in nature and cannot be determined as judicial review application.

   Dr. Kuhora has also sworn that even after the applicant's suspension, the 1st respondent held meetings with the applicant and communicated its preliminary findings on an audit that the 1st respondent had undertaken. The applicant was requested to provide information to assist in the investigations but as the time he swore his affidavit, the applicant had not provided the information requested.

   This suit, it has been sworn, is orchestrated to derail the on-going investigations.

10. The 2nd respondent also opposed the application and to that end Mr. Michael Onyango, the 2nd respondent's corporation secretary, swore a replying affidavit. The depositions in his affidavit are along the same lines as Mr. Kuhora's affidavit. In particular, he has sworn that he is aware of the article published in the Daily Nation on what was described in that news feature as rogue health facilities which included the applicant. These facilities were said to be preying on the elderly and, in particular, the applicant is said to have taken advantage of the elderly and vulnerable citizens in need of medical attention, with a view to fraudulently claiming reimbursement from the National Health Insurance Fund for procedures or services that were never provided.

11. On 19 June 2023, the Cabinet Secretary for Health directed the 1st respondent to suspend those facilities including the applicant, mentioned in the Daily Nation expose`. In compliance with that directive, the 1st respondent directed the applicant to submit documents to aid in the investigation of the allegations. The 1st respondent's team of investigators also visited the applicant's facility to carry out further inquiry.

12. In line with the 2nd respondent's mandate and, in order to ensure patient safety and to forestall any attempts of interfering with the investigations, the applicant's licence was suspended pending conclusion of the investigations.

13. Among the functions of the 2nd respondent under Section 4(1)(k) of the *Medical Practitioners and Dentists Act*, is the regulation and licensing of health institutions and doing all such other things as are necessary in the discharge of all or any part of its functions; these include temporarily suspending licenses as mandated under section 4 (1)(p) of the Act. The applicant, being a registered health

institution under the Act, is well within the jurisdiction of the 2nd respondent with respect to regulation and licensing.

14. And, pursuant to Rule 6 and 8 of the Medical Practitioners and Dentists (lnquiry and Disciplinary Proceedings) Rules, 2022, the 2nd respondent is also within its legal mandate and discretion to make inquiries and to take interim measures such as suspension of a license, if satisfied that a health institution is operating in manner that contravenes the Act or any regulations made under the Act and for preservation of patient safety.

15. In strict compliance with these provisions of the law, the applicant's licence was suspended pending conclusion of the investigations or determination of the matter. The suspension was not final but was a temporary measure to enable the 2nd respondent conclusively investigate the allegations.

    It is the 2nd respondent's case that the applicant has neither demonstrated that its suspension was ultra vires nor that there are grounds for review of the legality of an administrative decision. If anything, the applicant is said to have resisted attempts by the 2nd respondent to investigate the complaint leveled against it and, therefore, disrupting conditions of a fair hearing of the matter.

16. The 2nd respondent or through its Disciplinary and Ethics Committee appointed for that purpose, has the requisite legal jurisdiction to inquire into any complaint of professional misconduct, malpractice or any breach of standards as per Section 20(2) of the *Medical Practitioners and Dentists Act*. The applicant ought to allow the due process take its course and, in the event it will be aggrieved with the decision of the 2nd respondent, it will have a recourse to this Honourable Court.

17. The general welfare of the public, according to the 2nd respondent, is the 2nd respondent's paramount consideration in regulation of health institutions hence the need to ensure that every citizen attains the highest attainable standard of health including the right to health care services guaranteed under Article 43(1) (a) of *the Constitution* of Kenya. The public legitimately expects the 2nd respondent, in performance of its statutory duties, to ensure patient safety and operational fitness of health institutions. If the 2nd respondent fails to act accordingly, it would be deemed to have abused its discretion and to have failed to discharge its statutory duties under the Act.

18. In the applicant's submissions, only two issues were raised for determination; these are first, "whether the 2nd respondent acted ultra vires by suspending the license of the applicant" and second, "whether the 1st respondent was justified in blocking the NHIF systems of the applicant".

19. The learned counsel for the applicant urged that the application was generally grounded on Article 50(1) of *the Constitution* which is to the effect that every person has a right to have any dispute that can be resolved by application of the law decided in a fair and public hearing in a court of law or a tribunal. Article 47 of *the Constitution* guarantees the right to a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The applicant also invoked section 4(3) of the *Fair Administrative Action Act*, 2015 which enjoins any person taking an administrative action that is likely to adversely affect another to meet certain pre-requisites before the action in question.

20. The applicant's case is that the actions taken by the respondents violated the principles of fairness and procedural propriety embedded in the foregoing legal provisions. In particular, the applicant urges that it was denied the right to be heard and defend itself against the respondents' allegations. The respondents' actions, it is urged, have disrupted the applicant's ability to function as a health institution and also destroyed its reputation in the health sector.

21. On the particular issue of whether the respondents acted ultra vires, the applicant submitted that the respondents acted beyond the scope of their legal authority and powers. To be precise, the

2nd respondent's decision to suspend the applicant's licence was without justification and bereft of procedural regularity because the decision was taken arbitrarily and without according the applicant opportunity to be heard. Similarly, the 1st respondent's decision to block the NHIF system was contrary to contractual terms between the 1st respondent and the applicant. The Ministry of Health's directive was, on the other hand, based on unverified media reports.

22. On whether the 1st respondent's action was justified, the applicant has submitted that it was not because the action was not informed by any investigation or evidence of impropriety on the part of the applicant. In any event, the action taken was not proportional to the alleged infractions.

23. On the 1st respondent's part, three issues were identified for determination and these are; first, whether judicial review orders can be granted while the dispute is subject of a commercial contract; second, whether the applicant has exhausted the remedies available to it under the contract; and, third, whether the applicant is entitled to the orders sought against the 1st respondent.

24. In addressing these issues, the learned counsel for the applicant largely rehashed what was deposed in the affidavit sworn on behalf of the 1st respondent in response to the applicant's application. In particular, it was reiterated that the action taken by the 1st respondent in suspending the 1st respondent's services was consistent with clause 16.2 of the contract under which the 1st respondent could suspend the applicant pending investigations on allegations of corrupt or fraudulent practices. Clause 23.2.2 of the contract empowers the 1st respondent to terminate the contract if the health care provider's licence is revoked and cancelled.

25. And according to clause 2.2, the applicant was required to comply with the law and policies provided by the National Health Insurance Fund, Medical Practitioners and Dentist Act and the *Health Act*, among other laws, listed in the contract. The most crucial requirement was that the applicant could only operate as a health care service provider if it was duly licensed to operate as such. It followed that if it did not have a licence, it could continue offering medical services to the 1st respondent's contributors.

26. It was urged that the suspension of the applicant's services being contract-based, it cannot be challenged by way of judicial review. In this regard, the applicant cited Consolata Kihara & 241 others v Director Kenya, Trypanosomiasis Research Institute [2003] eKLR where it was held as follows:

> " As it was also put by Lord Morris of Borth-y-Gest in the Judicial Committee of the Privy Council in Vidyodaya University of Ceylon v Silva [1965] 1 WLR 77, at p 79: "The Law is well settled that if, where there is an ordinary contractual relationship of master and servant, the master terminates the contract, the servant cannot obtain an order of certiorari. If the master rightfully ends the contract there can be no complaint: if the master wrongfully ends the contract then the servant can pursue a claim for damages."

27. On the issue of whether the applicant has exhausted the remedies available to it under the contract, it was urged that Clause 37 of the Contract provides for dispute resolution mechanisms in the event of a dispute between the parties; that clause provides that disputes shall be resolved amicably through negotiations and mediation and in the event there is no resolution through mediation, the dispute shall be referred to arbitration. It is urged, therefore, that this suit is premature as the applicant has not exhausted the dispute resolution mechanisms provided under the contract.

28. In this submission, the 1st respondent relied on William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR where it was held, inter alia, that the exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the

protection of his own interest within the mechanisms in place for resolution outside the Courts. On the same theme, the 1st respondent also relied on the cases of Jeremiah Memba Ocharo v Evangeline Njoka & 3 others (2022) eKLR and Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others (2015) eKLR. In the latter decision it was held that it is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked.

29. On the question of suspension of the applicant, the 1st respondent urged that the 1st respondent could suspend the applicant under clause 16.2 of the contract and further relied on Consolata Kihara & 241 others v Director Kenya, Trypanosomiasis Research Institute [2003] eKLR where it was held that the court cannot grant an order of certiorari in contractual matters and the only remedy available for the applicant is for damages for breach of contract. As far as the prayer for mandamus is concerned, the 1st respondent relied on the cases of Republic v Jomo Kenyatta University of Agriculture and Technology Ex parte Elijah Kamau Mwangi (2021) Eklr and Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants (2007) 2 EA 441 where the court held that the mandatory order will only issue if there is no other legal remedy that is available to remedy the infringement of a legal right.

30. This order would not be available to the applicant because the applicant does not seek the 1st respondent to perform a public duty but seeks the performance of the contract between them. The performance of the contract is not a public duty that the 1st respondent can be compelled to perform through mandamus. It is also urged that even if the court was to find merit in the application, the suspension of the contract can only be lifted if the applicant has met all the conditions for the performance of the contract. As long as the applicant's licence to operate as a healthcare provider remains suspended, it cannot provide healthcare services.

31. Upon consideration of the application, the response thereto and the submissions by the learned counsel, I come to the conclusion that applicant's application is more of an action in contract. This is written all over its pleadings and the affidavits sworn in support of the application. But nowhere is this clearer than in what is purported to be the grounds upon which relief is sought. Sample this:

> " 1. That on or about July 2022 the applicant and the 1st respondent entered into a written contract in which the plaintiff (sic) agreed to provide health services offered to the beneficiaries of the 1st respondent.
>
> 2. That the 1st respondent was to pay for the health services offered to its beneficiaries.
>
> 3. That the applicant has carried out its mandates and obligations as stipulated in the contract and that none of the beneficiaries of the 1st respondent has complained of being denied health services.
>
> 4. That the applicant has complied with clause 2.19 of the Agreement between it and the 1st respondent which requires the applicant to ensure that it maintains confidentiality with regards to the data and information about the beneficiaries of the respondent.
>
> 16. That clause 16.2 of the Agreement talks about suspension on suspicion and not on conviction as the 1st respondent has indicated in their media statement dated 20th June 2023."

38. The culmination of these averments is what appears to be the applicant's bid for what would, in ordinary circumstances, be a prayer for specific performance in action on contract. This is what I read from paragraph 17 of the purported grounds for which relief is sought where the applicant contends as follows:

> " 17. That it is in the interest of (sic) respondents be compelled to open the Health Insurance Claim System and to lift illegal suspension against the applicant to avoid inconveniencing the operations of the applicant pending the hearing and determination of this application."

32. So, it is apparent from the applicant's own pleadings that its relationship with the 1st respondent is governed by terms of the contract that the two parties executed. Assuming any of the parties is in breach of any of the terms of the contract, as the applicant suggests, it would have an action in contract and not a recourse to judicial review to enforce the contract. The relief for mandamus, for instance, is to compel a public officer to perform a public duty and not to enforce a private right.

33. According to Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/5. JUDICIAL REMEDIES/ (1) INTRODUCTION paragraph 689:

> " A mandatory order is, in form, a command issuing from the High Court, directed to any person, corporation or inferior tribunal requiring him, or them, to do some particular thing specified in the command which appertains to his or their office and is in the nature of a public duty (See Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997, [1968] 1 All ER 694, HL). The breach of duty may be a failure to exercise a discretion, or a failure to exercise it according to proper legal principles."

This is reiterated in paragraph 703 which states:

> " A mandatory order is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or it to do some particular thing specified in the order which appertains to his or its office and is in the nature of a public duty... the purpose of a mandatory order is to compel the performance of a public duty, whether of an inferior court or tribunal to exercise its jurisdiction, or that of an administrative body to fulfil its public law obligations. It is a discretionary remedy."

34. And with particular reference to public officers who fail to perform their duty, paragraph 706 is clear that a mandamus order may be issued to compel them to carry out the duty. It reads as follows:

> "
>
> " 706. Public duties by government officials.
> If public officials or public bodies fail to perform any public duty with which they have been charged, a mandatory (mandamus) order may be made to compel them to carry out the duty (See R v Metropolitan Police Comr, ex p Blackburn (No 3) [1973] QB 241, [1973] 1 All ER 324, CA; R v London Transport Executive, ex p GLC [1983] QB 484, [1983] 2 All ER 262, DC.)"

35. It is apparent that an obligation in a contract cannot be regarded as a public duty with which a public officer is charged and for which a mandamus order would issue in the event of failure to perform the contract.

36. Be that as it may, the applicant's licence was suspended by the second respondent before the 1st respondent terminated the applicant's services. This is apparent from what the applicant has presented as the grounds upon which relief is sought. In those 'grounds' it has stated as follows:

> "5. That on 18 June 2023 NTV media without justification aired a feature alleging that there are some healthcare facilities who (sic) are involved in scamming vulnerable Kenyans, misusing public resources and providing injurious healthcare services to patients.
>
> 6. That on 19th June, 2023 the Cabinet Secretary for the Ministry of Health made a press release in which she directed the 2nd respondent (sic) to suspend the facilities that had been mentioned by NTV media on 18th June 2023.
>
> 7. That on the same day the applicant received a letter dated 19th June 2023 from Medical Practitioners and Dentists Council indicating that its licence to operate as a health care provider has been suspended.
>
> 8. That on or about 20th June 2023, while the applicant's officers were trying to log into the Health Insurance Claim System, it became apparent that they had been shut out of the system.
>
> 9. That on enquiry they noticed that the system had been shut down by the 1st respondent.
>
> 10. That the 1st respondent without any notice shut down the system hence causing inconveniences to the applicant."

38. These assertions appear to be consistent with the depositions sworn on behalf of the 1st respondent which are to the effect that the contract between the applicant and the 1st respondent was not sustainable because the applicant's licence as a heath service provider had been suspended. In the affidavit, Mr. Kuhora swore as follows:

> "6. That following the expose' the Kenya Medical Practitioner's and Dentists Council sued as the 2nd respondent herein invoked the provisions of section 15(9) of the Medical Practitioners and Dentist Act CAP 253 and suspended the Applicant' s license to operate a health facility pending the hearing and determination of the matter. The decision to suspend the license was communicated to the Applicant on 19th June, 2020.
>
> 7. That following the suspension of the license, the 1st respondent subsequently suspended the applicant's contract pending further investigations. I wish to draw the attention of the court to the contract signed between the applicant and the 1st respondent. At all times material time the relationship between the Applicant and the 1st Respondent is to be guided by the contract between the parties."

38. It is apparent from the contract itself that the contract between the applicant and the 1st respondent was conditional on the applicant having a valid licence as a health care service provider. In clauses 18.3.3 and 18.3.4.1, for instance, the contract stated:

> "

"18. 3.3. The Agreement
The information set out in this Agreement is true, accurate and not misleading.

18. 3.4. Regulatory Matters

18. 3.4.1. The Health Care Provider has obtained all licences, permissions, authorisations (public or private) and consents (together with Approvals) required for carrying on its business effectively in the place and in the manner in which it is carried on at the date of this Agreement and in accordance with all Applicable Law and regulations in each case in all material respects. These Approvals are in full force and effect, are not limited in duration or subject to any materially unusual or onerous conditions, have been complied within all material respects. There are no circumstances which indicate that any Approval will or is likely to be revoked or not renewed, in whole or in part, in the ordinary course of events.

And clause 18.3.5.3 provided:

18. 3.5.3. All regulatory approvals, certificates, licences, consents, permits and authorisations have been obtained by and are in the possession of the Health Care Provider to enable the Health Care Provider to carry on its business effectively in the places and manner in which such business is carried on and all such approvals, certificates, licences, consents, permits and authorisations are valid and subsisting and there is no reason why any of them should be restricted, varied, suspended, cancelled or revoked in any way.

38. It follows that without the licence to provide health care services, it is not going to be possible for the applicant to offer the services for which it had contracted to provide.

But even if it was not suspended, the licence to provide the health care services expired on 31 December 2023. There is no evidence, that this licence was renewed or that the applicant had a valid licence for the year 2024. Granting the order to lift the suspension of an expired licence in these circumstances would be an exercise in futility.

38. It is necessary in exercising the discretion whether or not to grant a judicial review relief, to consider the effect of doing so and factors which may be relevant in this regard include whether the grant of the remedy is unnecessary or futile (see for instance, R versus Ministry of Agriculture Fisheries and Food, ex p Live Sheep Traders Ltd (1995) COD 297, DC where it was held that it is no part of the court's function to make academic declarations.

39. For the foregoing reasons, none of the prayers sought can possibly be granted. In any case the applicant has not provided any proof of the grounds of illegality and procedural impropriety which, as far as I can gather from the statutory statement, are the only two judicial review grounds upon which judicial review reliefs are sought.

These grounds, are among the three traditional grounds for judicial review as defined in Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410. In that case, Lord Diplock explained the ground of "illegality" to "mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it". And "procedural impropriety" to mean not only failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision but also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative

instrument by which its jurisdiction is conferred, notwithstanding that such failure does not involve any denial of natural justice.

38. As noted earlier the relationship between the applicant and the 1st respondent was governed by terms of a contract executed between them. If the 1st respondent breached the contract or any of its terms, that breach cannot be termed as an illegality, in the sense of a ground for judicial review, for which an aggrieved party may obtain a judicial review relief. The same would be said of the ground of procedural impropriety in the case against the 1st respondent.

39. As for the 2nd respondent, section 15(9) of the Medical Practitioners and Dentist Act and Rule 6 and 8 of the Medical Practitioners and Dentists (lnquiry and Disciplinary Proceedings) Rules, 2022 were cited as having been the basis upon which the 2nd respondent acted in suspending the applicant's licence and suspending it in the manner it did. This has not been disputed. But it has been noted that even assuming the suspension of the licence was procedurally improper, the lifting of that suspension would be of no consequence because, the licence has since expired.

40. For the reasons I have given, I am not satisfied that the applicant's application has any merits. It is, in fact, an abuse of the process of this Honourable Court. It is dismissed with costs to the respondents. It is so ordered.

Signed, dated and delivered on 23 April 2024

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Ngaah Jairus

JUDGE

5**|JR. APPLICATION NO. E069 OF 2023: JUDGMENT**