Cabinet Secretary, Ministry of Health v Aura & 13 others (Civil Appeal (Application) E565 of 2024) [2024] KECA 1195 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1195 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E565 OF 2024

F TUIYOTT, A ALI-ARONI & LA ACHODE, JJA

SEPTEMBER 20, 2024

BETWEEN

THE CABINET SECRETARY, MINISTRY OF HEALTH ..... APPELLANT

AND

JOSEPH ENOCK AURA ..... 1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF INFORMATION, COMMUNICATION AND THE DIGITAL ECONOMY IN KENYA ..... 2ND RESPONDENT

SOCIAL HEALTH AUTHORITY ..... 3RD RESPONDENT

COMMISSIONER ON REVENUE ALLOCATION ..... 4TH RESPONDENT

THE NATIONAL ASSEMBLY OF KENYA ..... 5TH RESPONDENT

THE SENATE OF KENYA ..... 6TH RESPONDENT

COUNCIL OF GOVERNORS ..... 7TH RESPONDENT

THE PRESIDENT OF THE REPUBLIC OF KENYA SUED THRO' THE ATTORNEY GENERAL ..... 8TH RESPONDENT

OFFICE OF THE DATA PROTECTION COMMISSIONER ... 9TH RESPONDENT

HEALTH RECORDS AND INFORMATION MANAGERS BOARD .... 10TH RESPONDENT

CLINICAL OFFICERS COUNCIL OF KENYA ..... 11TH RESPONDENT

THE HON. ATTORNEY GENERAL ..... 12TH RESPONDENT

KENYA MEDICAL PRACTITIONERS AND DENTIST COUNCIL .... 13TH RESPONDENT

KENYA MEDICAL ASSOCIATION ..... 14TH RESPONDENT

(Being an application for stay of execution and/or implementation of the Judgement/Decree of the High Court of Kenya at Nairobi (Mabeya, Limo & Mugambi, JJ.) delivered on 11th July, 2024 in HC Petition No. E473 of 2023)

RULING

1. On 19th October 2023, the Social Health *Insurance Act* (SHIA), the Digital *Health Act*, and the Primary Health Care Act were enacted by Parliament. The Cabinet Secretary of Health (the Cabinet Secretary) contends that the three statutes transform healthcare services in the country and are a milestone towards the attainment of the right to Health required by Article 43(1)(a) of *the Constitution*.

2. The statutes, however, suffered an early setback, when in a judgment dated 12th July 2024, the High Court (Mabeya, Limo and Mugambi, JJ.) declared all three to be unconstitutional. The Cabinet Secretary is aggrieved by that decision and lodged a notice of appeal dated 23rd July 2024 evincing her intention to challenge the decision on appeal and in follow up has filed this appeal.

3. The Cabinet Secretary is now before us in a notice of motion dated 26th July 2024 seeking, in the main, an order for stay of execution and of implementation of the judgment/decree of the High Court pending the hearing and determination of the appeal. The motion is brought under the provisions of rules 1(2), 5(2)(b) of the Court of Appeal Rules and is also said to be premised upon sections 3A and 3B of the *Appellate Jurisdiction Act*.

4. There are at least three holdings in the decision that the applicant calls into question. In the impugned decision, the High Court directed that "Parliament undertakes sensitization, adequate, reasonable, sufficient and inclusive public participation in accordance with *the Constitution* before enacting the said acts". The applicant contends that it is not feasible to enact statutes that are already enacted and that the High Court has adjudged a standard of public participation that is not within the contemplation of Articles 10 and 118 of *the Constitution*. The applicant argues that the sensitization of the public which has been decreed to apply prior to public participation is akin to civil education which exercise is appropriate in the conduct of a referendum.

5. The High Court also faulted sections 26(5) and 27 of the Social Health *Insurance Act* on the basis that the two provisions infringe on the right to access to emergency services. The Cabinet Secretary thinks the holding to be erroneous and asserts that section 28 of SHIA establishes the Emergency, Chronic and Critical Illness Fund and every person is entitled as of right to emergency treatment. We are reminded that the right to emergency treatment is set out in Article 43(2) of *the Constitution* and cannot and is not infringed by the two faulted provisions. Further, that the fund established by section 28 is funded by the National Government and requires no prior registration or contribution from individuals.

6. There is then section 38 of the SHIA which the High Court perceives to have been introduced during parliamentary debate and was not subjected to public participation. The applicant will be arguing at appeal that during parliamentary debate section 38 was deleted and section 39 renumbered section 38 suggesting that the High Court misapprehended the evidence.

7. In an affidavit sworn on 26th July 2024 in support of the motion, Harry Kimtai, the Principal Secretary, of the State Department for Medical Services, seeks to demonstrate the hardship likely to be caused by the decision and why its implementation at this stage would render the appeal nugatory. He deposes that it is not feasible to carry out sensitization of the public within 120 days as directed by the High

Court; no lawful authority shall be in existence during the period of suspension of the statutes to authorize treatment of contributors who have paid their contributions towards health insurance; and to hinder and/or suspend realization of the Article 43(1)(a) right is a violation of *the Constitution*. Finally, that the three statutes have been in operation during the last six (6) months without any complaint and they are the main pillars of universal health care in their absence, the Health Service shall be in jeopardy and/or collapse altogether.

8. Joseph Enock Aura (the 1st respondent or Mr. Aura) opposes the motion and swore an affidavit on 9th August 2023 whose contents we abridge. Mr. Aura asserts that the motion is grossly incompetent as the impugned laws have already been declared unconstitutional by the High Court on very specific grounds and cannot be rendered constitutional at an interlocutory hearing. It is argued that the motion constitutes a gross abuse of the court process as the applicant lodged a similar plea, orally, before the Constitutional Court on the date of delivery of the judgment upon which a stay of 45 days was granted. The applicant is assailed for not providing any evidence of the alleged health crisis deposed to by Mr. Kimtai. We are also told that the threshold for grant of stay under rule 5(2)(b) has not been met as the affected parties to the High Court petitions have not been served with either the notice of appeal or the record of proceedings by the applicant. Further, no harm/loss stands to be suffered if the impugned "Social/Digital Health Laws" stayed by the Constitutional Court are not implemented as the draft regulations intended to give effect to the impugned legislative are yet to be enacted.

9. Touching on the arguability of the appeal, Mr. Aura, at some length, sought to demonstrate why, in his view, the High Court never stepped out of the laid down principles of public participation. It is argued that; the High Court faulted the manner in which the appellant selected stakeholders for the alleged public participation and not a session was held in the Kiswahili language; contrary to the Handbook on Public Participation by the National Assembly, both the Assembly and Senate failed to accord him adequate invitation in time or sufficient time to prepare his submissions; and contrary to allegations by Mr. Kimtai that the public participation directed by the court was at variance with Article 10 and 118 of *the Constitution*, the decision of the court accords with the provisions of sections 11 and 12 of the *Public Service (Values and Principles) Act* No 1A of 2015.

10. Regarding section 26(5) of SHIA, Mr. Aura contends that the aggregate and gamut of services offered invariably at a fee by the National and County Government will become inaccessible to any person not digitally registered; any person who is not up-to-date in remittance of prescribed dues will be automatically barred from accessing health service; and contrary to the applicant's deposition, there can be no access to emergency health absent compliance with the provisions of the section.

11. Mr. Aura states that no irreparable loss has been demonstrated as there is a one-year transition period from NHIF to SHIA, which period has not expired. Ultimately it is urged that public interest tilts in favour of not granting a stay.

12. At plenary hearing of the motion, representation was as follows: Mr. Ngatia learned Senior Counsel for the applicant, Mr. Harrison Kinyanjui learned Counsel for the 1st respondent, Mr. Kaunda learned Counsel for the 2nd, 3rd, 8th, 10th and 12th respondents, Mr. Mbarak learned Counsel for the 5th respondent, Ms. Thanji learned Counsel for the 6th respondent, Ms. Kaunda learned Counsel for the 9th respondent and Ms. Kuchio learned Counsel for the 1st interested party. The other parties neither appeared nor were represented. All counsel present save for the 1st respondent informed the Court that their clients supported the application. Other than Mr. Ngatia and Mr. Kinyanjui, we allowed Mr. Mbarak appearing for the 5th respondent to address us as he had filed submissions within the timelines directed by Court.

13. The submissions by Mr. Ngatia and Mr. Kinyanjui substantially coincided with the arguments set out in the application and replying affidavit and we need not repeat them. As for Mr. Mbarak, he submitted that the repealed NHIF Act was enacted before *the Constitution* 2010 which introduced Article 43(1)(a) on the right to emergency health care and that section 28 of SHIA which creates an Emergency, Chronic, and Critical Illness Fund aspires to make that right a reality. Making reference to the Primary Health Care Fund, counsel argued that it would be difficult for Kenyans to access emergency health care which they had to pay for, if the two funds were to be suspended. We were also asked to bear in mind that only two sections of SHIA were declared unconstitutional in substance as the others were declared unconstitutional because of irregular public participation.

14. The principles upon which this Court grants stay under its rule 5(2)(b) jurisdiction is a well-trodden path. The intended appeal must, in the first place, be arguable. An arguable appeal is not one that must necessarily succeed. It is enough that it simply raises a matter that is not frivolous and which deserves further consideration at a hearing of the main appeal. Second, and this too must be demonstrated, the appeal will be rendered nugatory if stay is not granted. See amongst a litany of others, the decision of this Court in Stanley Kangethe Kinyanjui vs Tony Keter & 5 others [2013] eKLR.

15. Where litigation involves a public interest element, then a further consideration could be whether or not it is in the public interest for the stay to be granted. This is explained in the decision of this Court East African Cables Limited vs Public Procurement Complaints, Review And Appeals Board & Another [2007] eKLR;

> " We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable."

16. But there are two preliminary issues raised by the 1st respondent that warrant our determination before considering the substance of the motion.

17. It is contended by the 1st respondent that the motion before us is incompetent because service of the notice of appeal has not been effected on all parties affected. The 1st respondent would be referring to the requirements of rule 79. While the failure to serve the notice on all persons affected by the appeal within the time prescribed by the rules would amount to a failure to take an essential step in the proceedings and opens up such a notice to striking out under rule 86, we are reluctant to uphold the argument by the 1st respondent because he does not specifically point out which affected person has not been served. To be sure it is not the 1st respondent who complains of non-service and none of the other parties have raised the issue.

18. There is then the argument that the orders sought are not available because the National Assembly and Senate, the law- making bodies have not appealed the decision. We do not think that anything should turn on this, even if true because the applicant was a substantive party to the petition before the High Court. In addition, as the Cabinet Secretary responsible for medical services policy and social health insurance policy, the applicant is not a peripheral party and would no doubt be affected by the decision of the Court. The Cabinet Secretary can appeal the decision and seek stay in her own right.

19. The 1st respondent has made strong arguments in which he diminishes the prospects of the appeal and those arguments may well prevail at the main appeal. Our duty here, however, is much less involved than of the Court that will hear and decide the appeal. All that the applicant is required to demonstrate is that the appeal, even on a single point, is not frivolous and is one which deserves consideration at the main hearing. One of the ultimate orders by the High Court was: -

> " Let Parliament undertake sensitization, adequate, reasonable, sufficient and inclusive public participation in accordance with *the Constitution* before enacting the said Acts and amend the unconstitutional provisions in terms of this judgment."

20. The applicant argues that sensitization is a principle unknown in public participation. The opposing side sees it differently and does not perceive that the word sensitization widens the scope outside the well-settled parameters of what entails public participation in Kenya, a discussion of which would be incomplete without setting out the principles that guide this important constitutional imperative as comprehensively laid down by the apex court in British American Tobacco Kenya & Anor vs Cabinet Secretary for the Ministry of Health & 2 others [2019] eKLR. The Court hearing the appeal will be invited to interrogate what the High Court meant by sensitization and whether it imposes a more exerting and unreasonable duty on a public body than that contemplated in British American Tobacco Kenya. A second issue raised by the applicant is that direction of the High Court is impossible to implement because public participation cannot be undertaken when the three statutes have already been enacted. While we make no call on the merit of these two arguments, we do not think them to be trivial. In a word, the appeal is arguable.

21. The more difficult task for us is to determine on which side public interest lies on the question of stay. The 1st respondent's submission that it is inimical to public interest to retain, even for a minute, statutes which a court of law has found to be unconstitutional is a forceful argument because it may be viewed as contrary to the rule of law to allow the implementation of a statute that has been found to be incongruent with *the Constitution*.

22. Yet the opposing argument is also not without its strength. As observed by Lamer CJ in the Canadian Supreme Court decision of Schachter v. Canada [1992] 2 SCR 679;

> " Temporarily suspending the declaration of invalidity to give Parliament or the provincial legislature in question an opportunity to bring the impugned legislation or legislative provision into line with its constitutional obligations will be warranted even where striking down has been deemed the most appropriate option on the basis of one of the above criteria if:
>
> A. striking down the legislation without enacting something in its place would pose a danger to the public;
>
> B. striking down the legislation without enacting something in its place would threaten the rule of law; or,
>
> C. the legislation was deemed unconstitutional because of under inclusiveness rather than overbreadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated.

I should emphasize before I move on that the above propositions are intended as guidelines to assist courts in determining what action under s. 52 is most appropriate in a given case, not as hard and fast rules to be applied regardless of factual context."

23. So, does the refusal of stay create a state of uncertainty in the health sector in Kenya? For a start the full implication of the orders granted by High Court need to be understood. While the High Court gave the applicant 120 days from the date of the decision to undertake "sensitization, adequate, reasonable, sufficient and inclusive public participation", order C was unequivocal that within that period, the Acts would remain suspended. The effect of suspension of a statute is to render it inoperative. And this would have been the position in regard to the three statutes had the High Court not given a temporary stay of execution of the entire judgment and further, had we not granted a similar stay pending this ruling.

24. While the 1st respondent posits that the 120 days given would be sufficient for the applicant to undertake public participation so as to save the statutes, the applicant doubts the time to be sufficient given that it understands the order to also require a time-consuming sensitization exercise. Further is the question whether the post-enactment public participation which the High Court decreed can in fact validate a statute found to be unconstitutional for want of adequate public participation in the first place. It therefore seems to us that if stay is not granted, then there is a real likelihood that the 120 days will lapse and the default declaration of unconstitutionality will automatically kick in. So, to the question, what will be the effect of such an eventuality? Is this likely to create the sort of lacuna frowned upon in Schachter?

25. Section 54 of SHIA repeals the National Health Insurance Fund Act (NHIF Act, 1998) and we agree with learned Counsel Mr. Kinyanyui that once SHIA goes, so too must section 54 with the effect that the repeal of the NHIF Act will have been reversed (See the Supreme Court decision in Senate & 2 others vs Council of County of Governors & 8 others, Petition *No 25 of 2019* [2022] eKLR. In that sense, therefore, there will be no lacuna because the repealed statute will have been restored.

26. Nevertheless, there is still another concern. The three statutes commenced on 22nd November 2023 about 9 (nine) months now and as deposed by Mr. Kimtai, upon repeal of the NHIF Act, all functions hitherto vested upon NHIF were to be taken over by the Social Health Insurance Authority established by section 4 of the Social Health *Insurance Act*. The 1st respondent on the other hand confidently asserts that the regulations intended to give effect to the impugned legislation are yet to be enacted.

While this is no evidence that the regulations have been made, it does not seem to us that the implementation of the statutes is entirely dependent on the existence of regulations because in the language of the seminal provisions of SHIA and the Primary Health Care Act, the regulations are simply for the better carrying out of the provisions of the statutes.

27. In these intractable circumstances, we lean towards granting stay as the High Court decision is tested before this Court and an authoritative pronouncement is made regarding the validity of the three statutes. We reach this decision because the statutes have been with us for nine months and to allow the framework under which the health sector is operating to revert to the old framework with the possibility of it returning back again to the current framework (in the event of the appeal succeeding) is to put this undeniably crucial sector in a state of flux and uncertainty.

28. That said, the statutes have already been adjudged as unconstitutional and it is in the interest of all, not least the applicant as a key implementer of the statues, that the question of their validity be settled urgently and with finality. So that the issue does not linger on much longer, we shall be directing that the appeal be disposed of on priority basis.

29. In in the end, we grant the stay sought in prayer C of the notice of motion dated 26th July 2024 pending the hearing and determination of the appeal but with no order as to costs. This file shall immediately be placed before the President of the Court for his directions as to an urgent hearing.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

F. TUIYOTT

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.