IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

MISC. CIVIL APPLICATION NO.111 OF 2022

UHURU HOSPITAL LIMITED .....APPLICANT

VERSUS

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

ATTORNEY GENERAL.....2ND RESPONDENT

SOLICITOR GENERAL.....3RD RESPONDENT

RULING

Date of Last Order: 03/11/2022

Date of Ruling: 07/11/2022

Kamana. J:

Under certificate of urgency, Uhuru Hospital Limited hereinafter to be referred as the Applicant filed this Application against National Health Insurance Fund (1st Respondent), Attorney General (2nd Respondent) and Solicitor General (3rd Respondent). The Application was made under section 2(1) and (3) of the Judicature and Application of Laws Act, Cap. 358 [RE.2019], sections 68(e) and 95 of the Civil Procedure Code, Cap. 33 [RE.2019] and any other enabling provisions of the law.

The Application was mainly for the order that *status quo* be maintained in respect of Tshs.758,548,966/- which is about to be confiscated by the 1st Respondent pending the hearing and determination of an application for temporary injunction to be filed after the expiry of 90 days statutory notice of intention to sue the Government as per the Government Proceedings Act, Cap.5. In support

of the Application there was an affidavit taken by Dr. Derick Nyasebwa, the principal officer of the Applicant. On the other hand, there was a joint Counter Affidavit of both Respondents sworn by Jarlath Mushashu, Regional Manager of the 1st Respondent in Mwanza.

Succinctly, the Applicant and the 1st Respondent have a business relationship in which the former provides health services to the members of the latter which is the health insurance fund. The said business relationship was regulated by their Agreement entered on 28th September, 2020. It is gathered from the pleadings that on 12th August, 2021 the 1st Respondent concluded what is termed as a fraud investigation in which it found that the Applicant defrauded a total Tshs.758,548,966/- mainly through falsification of facts.

It is on that account, the 1st Respondent, after a series of communication with the Applicant, informed the latter through a letter dated 30th September, 2022 that it will commence the deduction of such defrauded amount from the Applicant. Aggrieved by such action of the 1st Respondent, the Applicant has issued a 90 days statutory notice with a view to suing the Government. Meanwhile, the Applicant is seeking from this Court an order for maintenance of *status quo* which in effect aims at restraining the 1st Respondent from deducting the claimed amount until the hearing and determination of the application for temporary injunction.

When the Application was called on for hearing, the Applicant was advocated by Mr. Kelvin Mutatina, learned Counsel. The Respondents

were represented by Ms. Subira Mwandambo, learned Senior State Attorney.

However, before hearing the Application, the Court found itself adjudicating on preliminary objections raised by Ms. Mwandambo, learned State Attorney. The preliminary objections were to the effect that:

1. This Application is bad in law for joining the 3rd Respondent.
2. This Court was not properly moved to grant prayers sought in the Chamber summons.

In support of the first preliminary objection, Ms. Mwandambo submitted that by virtue of the provisions of section 6(3) of the Government Proceedings Act, Cap.5, the suit against the Government should include the Attorney General as a party and the copy of the Plaint or Application be served to the Solicitor General. It was her contention that by joining the Solicitor General, the Application is bad in law and ought to be struck out.

Responding to the averments advanced by the learned Senior State Attorney, Mr. Mutatina referred this Court to the provisions of Order I Rule 9 of the Civil Procedure Code, Cap. 33 which stipulate that misjoinder or non joinder of parties does not defeat the suit. In such circumstances, the learned Counsel for the Applicant contended that the law governing civil procedures do not take misjoinder of parties as fatal. He was of the position that such misjoinder is curable under section 97 of the Code as the Applicant can pray for the amendment. Ms.

Mwandambo did opt not to rejoin with regard to the first preliminary objection.

As rightly submitted by the learned State Attorney, the provisions of section 6(3) of the Government Proceedings Act provides that a copy of the Plaint must be served to the Solicitor General. The said subsection reads.

> *'(3) All suits against the Government shall, after the expiry of the notice be brought against the Attorney-General, and a copy of the plaint shall be served upon the Solicitor General, Government Ministry, Department or Officer that is alleged to have committed the civil wrong on which the civil suit is based.'*

However, I sharply differ with Ms. Mwandambo in her capacity as the learned Senior State Attorney that by joining the Solicitor General, the Application is bad in law. It is trite law in this jurisdiction that misjoinder or non joinder of parties does not vitiate the suit or in this context the Application. I concur with the learned Counsel for the Applicant that the provisions of Order 1 Rule 9 are to the effect of protecting the litigants who misjoin parties to the suit. The provisions read:

> *'9. A suit shall not be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it.'*

That being the case, it is my finding the first preliminary objection is devoid of merits. In that case, I think it is pertinent to address the aftermath of such misjoinder and I invite Order I Rule 10(2) of the Code which stipulates:

> *'(2) The court may, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.'*

Consequently, I invoke the provisions of Order 1 Rule 10(2) of the Code by ordering striking out of the name of the Solicitor General as the 3rd Respondent.

Coming to the second preliminary objection, Ms. Mwandambo submitted that section 1 of the Judicature and Application of Laws Act provides for general powers of the Court for both civil and criminal matters. It was his position that the said section has nothing to do with the application for the maintenance of *status quo*. She further averred that section 2(3) is applicable where there is a lacuna and usually when applying for mareva injuction and not maintenance of *status quo*.

With regard to section 68(e) of the Code, Ms. Mwandambo submitted that the said section provides for general powers of this Court in interlocutory proceedings and the same to be applied there must be a main suit. Concerning section 95 of the Code, the learned Senior State Attorney was of the view that such section provides for inherent powers of this Court and so far as this Application is concerned the said section does confer jurisdiction on this Court to entertain the Application. To buttress her position, Ms. Mwandambo invited this Court to consider the case of **Tanzania Electric Supply Company v. IPTL** [2002[TLR, 327. She summed up by praying this Court to struck out the Application with costs.

Countering Ms. Mwandambo's arguments, Mr. Mutatina cited the case of **Abdallah M. Malik and 345 Others v. Attorney General and Another**, Misc. Land Application No. 119 of 2017. He averred that in the cited case, the application was filed under the same provisions his client used to file its Application. He submitted that it was the position of the Court that the application for maintenance of *status quo* was properly filed before the Court and there is no law which provides for enabling provision so far as application for maintenance of *status quo* is concerned.

In rejoining, Ms. Mwandambo vehemently contended that in the Abdallah M. Malik's case, the discussed section was section 2(3) of the Judicature and Application of Laws Act which in her opinion is

specifically for mareva injunction and not for maintenance of *status quo* which was prayed in in the instant Application.

Again, I differ with the learned Senior State Attorney. Mareva injunction traces its origin in the English case of **Mareva Compania Naviera S.A v. International Bull Carries S.A** [1980] I ALL ER 213. Mareva injunction entails injunctive order that is issued by courts pending institution of a suit whereby institution of the same depends on fulfilment of some legal conditions. In that case, any application for an order which is injunctive in nature and which is preferred before the institution of a suit falls within the principle enunciated in Mareva's case. In the instant Application, the order which is sought by the Applicant is for maintenance of *status quo* pending filing of the suit after the expiry of the 90 days notice issued to the Government. Indeed, the Application falls within the principle articulated in Mareva's case.

That being the case, the Application was properly before this Court for being preferred under section 2(3) of the Judicature and Application of Laws Act. In the interest of time, I am not prepared to discuss other provisions as doing so is equally to an academic exercise which this Court provides no forum. The second ground is devoid of merits.

Reverting to the Application, Mr. Mutatina, learned Counsel for the Applicant contended that his client is about to institute a suit against the Respondents at the expiry of the 90 days notice issued to the Government. According to paragraph 11 of the affidavit and the notice issued to the Government, the cause of action, in relation to the

intended suit, is what is termed as a breach of contract (Clauses 14.2, 16.1 and 20) between the Applicant and the 1st Respondent regarding provisions of medical services which was entered on 28th September, 2020.

With regard to the averments of the Applicant in paragraph 11, the Respondents disputed them. Ms. Mwandambo submitted that the intended deduction will be conducted in the exercise of the 1st Respondent's legal duty as per section 27(1) of the National Health Insurance Act, Cap. 395 [RE.2015].

In rejoining, Mr. Mutatina was of the view that the 1st Respondent as a party to their agreement was supposed to equally involve its counterpart, the Applicant. He was of the view that before concluding that the Applicant has defrauded the said amount, the 1st Respondent was required to refer the matter to the impartial authority for its determination of such claims.

Mr. Mutatina, in explaining the contents of paragraph 15 of the affidavit, stated that the intended deduction of such a huge amount will cause an irreparable loss to the Applicant and the staff employed by the Applicant. In opposing such averments, Ms. Mwandambo contended that the Applicant will not suffer irreparable loss since it has no genuine claim against the 1st Respondent. She further submitted that the 1st Respondent is to suffer irreparable loss as the amount it claims is the public money.

In substantiating how the Applicant will greatly suffer as compared to the 1st Respondent, the learned Counsel for the Applicant referred to paragraph 14 of the affidavit whereby the Applicant stated to have spent its money with a view to providing health services to the members of the Applicant and beneficiaries with expectation of returning such money from the 1st Respondent. Ms. Mwandambo disputed that argument by averring that the Applicant breached the terms and conditions of the contract for not adhering to the standard treatment guidelines, engaging in forgery and failure to submit relevant evidence as to procurement of medicines.

Having gone through the pleadings and submissions of both parties, the issue for my determination is whether the Application is meritorious. In determining that question, I will be guided by the celebrated case of Atilio v. Mbowe [1969] HCD 284. In that case, it was observed that the Court prior to issuing an order for maintenance of *status quo*, it must consider that the Applicant has met the following conditions:

1. The applicant must demonstrate the existence of a serious triable issue on the alleged facts and probability that the applicant will be entitled to the relief prayed.
2. The Applicant must demonstrate that the courts interference is necessary to protect the applicant from any kind of injury which may be irreparable before his legal rights are established.
3. The Applicant must demonstrate that on the balance of convenience there will be greater hardship suffered by the him

from withholding the prayed order than will be suffered by the Respondent from granting it.

Starting with the existence of a serious triable issue, the Applicant has pleaded that the 1st Respondent has breached terms of their agreement specifically Clauses 14.2, 16.1 and 20. On the other hand, the Respondents oppose that allegation and contends that the intended deduction is legally sanctioned vide section 27(1) of the National Health Insurance Act, Cap. 395[RE.2015]. That being the case, it is my considered view that there is a serious triable issue.

Concerning on whether the 1st Respondent will suffer irreparable loss, this Court thought it pertinent to understand what irreparable loss means. In the case of **Morgan Air and Sea Freight Logistics Limited v. Serengeti Fresh Limited**, Misc. Civil Application No. 10 of 2021, this Court (Mteule, J.) had this:

> *'At this point the conceptual and contextual meaning of irreparable loss is not a new notion in our jurisprudence. In short, it is simply measured by an injury which cannot be recovered by way of damages or if recoverable, not sufficiently or adequately. (See Kaare vs. General manager Mara Cooperation Union [1924] Ltd (1987) TLR 17).*

It is clear from the above passage that irreparable loss must be the one which cannot be remedied sufficiently by way of damages. In view of that, this Court asked itself whether the alleged irreparable loss

to the Applicant and its staff on account of the intended deduction as per paragraph 15 of the affidavit cannot be remedied monetarily. The answer was in negative. Taking into consideration the fact that the subject matter is money which can easily be calculated in terms of ascertaining actual amount and damages accrued to the Applicant in case it triumphs the Respondents, I do not think that the Applicant will suffer irreparable loss. By the way, it is worthy to note that the affidavit taken by the Applicant failed considerably to disclose how it and its staff will suffer irreparable loss.

At this juncture it is imperative to note that for an application for maintenance of *status quo* to succeed, both three conditions enunciated in Atilio's case must cumulatively be met. This is a well established position which has been taken by this Court in a number of cases. In the case of **Denis Mkabai and Other v. Kinondoni Municipal Council and Other**, Misc. Land Application No. 366 of 2022, this Court (Msafiri, J) stated:

> *'Basing on the principle set out in the case of Attilio vs. Mbowe (supra) and other numerous cases referred to in this application that the three conditions must be met cumulatively and not alternatively...'*

In view of this position and taking into consideration my holding that the Applicant is not likely to suffer irreparable loss, it will serve no purpose to determine the third condition. Forthwith, I struck out this Application. No order as to costs.

It is so ordered.

KS Kamana

JUDGE

07/11/2022

The Ruling delivered this 7th day of November, 2022 in the presence of learned Counsel for both parties.

KS Kamana

JUDGE

07/11/2022