



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**JUDICIAL REVIEW NO. 13 OF 2016**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR**

**JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI**

**AND**

**IN THE MATTER OF THE MEDICAL PRACTITIONERS AND DENTISTS ACT, CAP 253**

**AND**

**IN THE MATTER OF THE NURSES ACT,CAP 257**

**AND**

**IN THE MATTER OF CLINICAL OFFICERS COUNCIL(TRAINING,**

**REGISTRATION AND LICENSING) ACT, CAP 260**

**AND**

**IN THE MATTER OF KENYA MEDICAL LABORATORIES ,**

**TECHNICIANS AND TECHNOLOGISTS ACT NO 10 OF 1999**

**AND**

**IN THE MATTER OF PHARMACY AND POISON BOARD ACT, CAP 244**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENT ACT**

**AND**

**IN THE MATTER OF ARTICLES 26,43,185,191 AND CLAUSE 7(b) PART II OF**

**THE 4<sup>TH</sup> SCHEDULE OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF DEMAND FOR PAYMENT FOR SINGLE BUSINESS PERMIT**

**AND**

**IN THE MATTER OF 2014/2015 KAJIADO COUNTY FINACE ACT**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT, CAP 26**

**BETWEEN**

**ANNE WANJIRU KINGORI.....1<sup>ST</sup> APPLICANT**

**CHARLES NDUATI.....2<sup>ND</sup> APPLICANT**

**PETER KAGUAI.....3<sup>RD</sup> APPLICANT**

**MAGDALINE THIGA.....4<sup>TH</sup> APPLICANT**

**RICHARD WAMBUGU WAMGOMBE.....5<sup>TH</sup> APPLICANT**

**JOSEPH MAINA.....6<sup>TH</sup> APPLICANT**

**YUSSUF MBURU NJOGU.....7<sup>TH</sup> APPLICANT**

**PETER MAINA MWANGI.....8<sup>TH</sup> APPLICANT**

**CHARLES GITHINJI.....9<sup>TH</sup> APPLICANT**

**DAVID MURIITHI MUNENE.....10<sup>TH</sup> APPLICANT**

**NICHOLAS MUURU MBUGUA.....11<sup>TH</sup> APPLICANT**

**PETER NJOROGE GICHOHI.....12<sup>TH</sup> APPLICANT**

**BENJAMIN MOKI KITHEKA.....13<sup>TH</sup> APPLICANT**

**WILSON M. NDUNG'U.....14<sup>TH</sup> APPLICANT**

**VERSUS**

**THE KAJIADO COUNTY ASSEMBLY.....1<sup>ST</sup> RESPONDENT**

**KAJIADO COUNTY GOVERNOR.....2<sup>ND</sup> RESPONDENT**

KAJIADO COUNTY SECRETARY.....3<sup>RD</sup> RESPONDENT

KAJIADO COUNTY ENFORCEMENT OFFICER.....4<sup>TH</sup> RESPONDENT

KAJIADO COUNTY EXECUTIVE FOR HEALTH.....5<sup>TH</sup> RESPONDENT

KAJIADO COUNTY EXECUTIVE FOR TREASURY.....6<sup>TH</sup> RESPONDENT

KAJIADO COUNTY REVENUE OFFICER.....7<sup>TH</sup> RESPONDENT

KAJIADO NORTH SUB COUNTY REVENUE OFFICER....8<sup>TH</sup> RESPONDENT

## JUDGEMENT

### **Applicants' Case**

1. Through an application dated 27<sup>th</sup> July 2016 filed at the Judicial Review division of the High Court at Nairobi, the Applicants sought leave to file a judicial review application. Leave was granted by this court on the 8<sup>th</sup> of November 2016 and the main application for review subsequently filed on the 14<sup>th</sup> December 2016 seeking for orders that:

- a. An order of Certiorari do issue to remove into this court and quash the decision of the respondents purporting to levy from members of the medical profession for Single Business Permit
- b. An order of Prohibition do issue to prohibit the Respondents and/or their agents and/or servants from implementing their decision to levy from members of the medical profession for Single Business Permit
- c. The costs of this application be borne by the respondents.

2. The application was grounded on the grounds set out therein and in the statutory statement and affidavit of Anne Wanjiru Kingori filed on the 27<sup>th</sup> July 2016. The Applicants averred that they are all private medical practitioners being doctors, pharmacists, nurses, clinical officers and laboratory technologists and are as such professionals belonging to their respective professional bodies namely Nurses Council established under **The Nurses Act**; clinical officers council established under **Clinical Officers Council(Training, Registration And Licensing) Act, Cap 260**; Medical and Dentists board established under **The Medical Practitioners And Dentists Act, Cap 253**; the Medical Technicians and Technologists Board established under the **Kenya Medical Laboratories , Technicians And Technologists Act No 10 Of 1999** and the Pharmacy and Poisons Board established under the **Pharmacy And Poison Board Act, Cap 244**.

3. It was the Applicants' averment that their practice is regulated by their respective professional bodies and the Kajiado County Government cannot purport to demand that they take out Single Business Permits or any other trade licenses because it has no legal capacity to regulate the medical profession. The Applicants' asserted that the 2014/2015 Kajiado Finance Act passed by the 1<sup>st</sup> respondent purported to levy a single business permit on the medical profession hence usurping the powers of regulating the Applicants in their professional practice.

4. The Applicants averred that the 8<sup>th</sup> Respondent issued a demand notice for the payment of the single business permit which has led to them being harassed and intimidated by the agents of the respondents which harassment has affected the provision of health services as the Applicants' have been forced to

close down their health facilities.

5. The Applicants' contend that the passing of the law by the 1<sup>st</sup> Respondent County Assembly and the demand and levy for Single Business Permits from the Applicants is *ultra vires*, illegal, malicious, unconstitutional. That it is a violation of the Applicants rights as provided for under **Clause 7(b) of Part Two of the Fourth Schedule of the Constitution** which empowers County governments to embark on trade development and regulation, including markets and trade licenses excluding regulation of professions. The Applicants aver that the Respondents' action amounts to double taxation.

6. The applicants averred that the Respondents actions were taken unilaterally without their involvement and this amounted to condemning the Applicants unheard, contrary to the rules of natural justice

### **The Respondent's Case**

7. The 1<sup>st</sup> Respondent opposed the Application via an affidavit sworn by Daniel Owino Konyango while the 2<sup>nd</sup> to 8<sup>th</sup> Respondents affidavit was sworn by Dr. Kennedy Ole Karei. Both were dated 7<sup>th</sup> March 2017. It was posited that the 1<sup>st</sup> Respondent has the legislative authority vested in it by Article 185 of The Constitution and Section 8 of the County Government Act to make laws necessary for the effective performance of the functions and exercise of the powers of the County Government.

8. It was averred by the Respondents that the Kajiado County Finance Act 2014/2015 was passed after being subjected to the rigorous processes that always precede county legislation. All the intended effects were laid out the general public in the crucial public participation forums. Parties likely to be affected by the various components of the Bill were expected to appear and ventilate their issues.

9. The Respondents asserted that the County Finance Act 2014/2015, the subject matter of this application, had long served its purpose rendering the current application overtaken by events.

10. The Respondents were of the position that the Constitution clearly authorizes County Governments to levy charges on the services they provide. It is upon these premises that the Finance Act 2014/15 was enacted and in no way does it amount to regulating the applicants in their professional practice.

11. According to the Respondents, it was misleading of the Applicants to insinuate that the Respondents were purporting to regulate their profession by legislating on matters within its purview. At no time did the Respondents subject the applicants' qualification documents to scrutiny before issuing the necessary permits as that is the mandate of their respective regulatory bodies

12. The Respondents averred that there was nothing unconstitutional, improper or otherwise unlawful in the 1<sup>st</sup> Respondent enacting legislation to levy the fees complained about and that the application is misconceived and should be dismissed with costs.

### **Applicants Submissions**

13. The Applicants submitted that they all belong to Medical Professional bodies established by Acts of Parliament which bodies were mandated to train, regulate and license both the practice including the premises from which the Applicants are supposed to operate while in practice.

14. The Medical Professional bodies are the Nurses Council established **under The Nurses Act**; Clinical Officers Council established under **Clinical Officers Council(Training, Registration And Licensing) Act, Cap 260**; Medical and Dentists board established under **The Medical Practitioners And Dentists**

**Act, Cap 253**; the Medical Technicians and Technologists Board established under **the Kenya Medical Laboratories , Technicians And Technologists Act No 10 Of 1999** and the Pharmacy and Poisons Board established under the **Pharmacy And Poison Board Act, Cap 244**.

15. It was submitted that the applicants are private practitioners and it is therefore clear from the law that there is no other body or bodies mandated by the law to license or regulate the applicants in their private practice other than their professional bodies. The powers of legislation by the county government with regard to licensing and issuance of trade permits in relation to professionals including medical practitioners were excluded as functions of the County Governments as set out under **Clause 7(b) of Part Two of the Fourth Schedule of the Constitution**.

16. The Applicants submitted that having been making payments for licensing and regulations to their respective professional bodies, the Respondents seeking to levy fees for Single Business Permits amounted to double taxation which is unconstitutional and illegal.

17. It was the Applicants submission that the passing of the County Finance Act of 2014/2015 was done so in excess of jurisdiction, was illegal, unconstitutional, abuse of powers by the 1<sup>st</sup> Respondent's County Assembly and therefore null and void.

18. It was submitted that the County Governments have no regulatory powers over the medical practitioners who are professionals and their being professionals specifically excluded them from the functions of the County Government.

19. It was further submitted that no evidence was presented by the Respondents as proof that the Act was submitted to public participation and the same was therefore unconstitutional. The Applicants were never given a hearing before the decision was made and incorporated in the Finance Act contrary to the rules of natural justice.

20. The Applicants submitted that the Respondents' in their replying affidavits, had not addressed themselves to the provisions **Clause 7(b) of Part Two of the Fourth Schedule of the Constitution** to the effect that the County Governments have no mandate from the constitution to legislate on the regulation of professionals.

21. Per the Applicants, the current application has not been overtaken by events as the same is not begged on the Financial Act 2014/2015 alone but the orders sought will apply to future and past legislations in as far as it will purport to levy charges in terms of single business permit on medical practitioners.

22. The applicants sought to rely on the case of **Republic vs. Nakuru County Assembly & Others, Nakuru HCCC JR NO. 14 of 2014** where the court found that the County Government of Nakuru had no powers to pass laws directed to regulations by levying Single Business Permits upon medical practitioners within the county as that function was specifically excluded under **Clause 7(b) of Part Two of the Fourth Schedule of the Constitution** and the court went on to issue orders of certiorari to quash the levy and prohibit the county government from implementing the same.

23. The Applicants also cited the case of **Medina Hospital Limited & 5 others v County Government of Garissa [2015] eKLR** where the Court granted orders of Certiorari against the Respondent county Government quashing the levying of licence fees on medical practitioners for the reason that it amounted to double taxation by two levels of the same government. In the ruling the court found as follows:

*“The respondent has not stated that the fees listed by the applicants were not being paid to the National Government. In my view, those levies or licensing fees were paid to the Government by the applicants as the certificates annexed documents issued by Government Institutions such as the Registrar Medical Practitioners and Dentist Board. It cannot thus be said that the annual license to operate as a Medical Practitioner, a Hospitals or a Pharmacy has not been issued by Government. Consequently any other charge or levy towards another Government institution, whether at the National or County level, amounts in my view to double taxation. This is irrespective of the passage of the new Constitution of Kenya 2010. The two levels of Government should, between themselves, determine who among them should license and regulate medical practice. Once one level of Government takes taxes and licenses the operation,*

*the other level cannot levy licence fees. I find and hold that it is wrong for the time being for the County Government (the respondent) to also levy licence fees to medical practitioners and hospitals, clinics and pharmacies. I will grant certiorari orders.”*

### **The Respondents Submissions**

24. The 1<sup>st</sup> respondent submitted that it was not in contention that the Applicants belong to a professional body. However, that does not remove them from the jurisdiction of Kajiado County for the purposes of levying taxes for certain services it provides them. All the 1<sup>st</sup> Respondent has legislated on is for purposes of imposing tax for the services it provides as envisioned in **Article 209(4) of the Constitution**.

25. It was further submitted that it would be fatal to the County Governments revenue raising measures if all professional bodies were to avoid taxation yet they benefit from the services provided by the County Government of Kajiado.

26. The position of the 2<sup>nd</sup> to 8<sup>th</sup> Respondents as submitted by Counsel is that the rationale for issuing a Single Business Permit is not a regulation but rather permission for the Applicants to operate business within the county just like any other business is required to do. The sole intention of the Kajiado County Finance Act was to raise revenue through the imposition of tax.

27. It was also submitted that the Kajiado County Finance Act 2014/2015 was passed after being subjected to the rigorous processes that always precede county legislation. All the intended effects were laid out the general public in the crucial public participation forums. Parties likely to be affected by the various components of the Bill were expected to appear and ventilate their issues. Additionally, it was submitted that the Act is shaped by emerging realities in conformity with the guiding policies as well as the input from public participation. The Constitution clearly authorizes county governments to levy charges for the services they provide and it is the solemn duty of all good citizens to support devolution in so far as their contribution is reasonable and justified.

28. Lastly, it was the respondents' submission that they have never subjected the applicants' qualification documents to scrutiny before issuing the necessary permits as that is the mandate of their respective regulatory bodies. There was nothing unconstitutional, improper or otherwise unlawful in the 1<sup>st</sup> Respondent enacting legislation to levy the fees complained about and that the levy does not in any way amount to double taxation.

### **Analysis and Determination**

29. Having carefully considered the submissions and the arguments set forth by all the parties, the following issues for determination become clear to me:

- a. Whether the Kajiado County Assembly acted *ultra vires* in passing the Kajiado County Finance Act of 2014/2015
- b. Whether the levying of taxes for services provided by the Kajiado County government amounted to the regulation of professionals as envisioned in Clause 7(b) of Part Two of the Fourth Schedule of the Constitution
- c. Whether the application has been overtaken by events
- d. Whether the Act was passed with sufficient public participation
- e. Whether the court ought to grant the orders sought by the applicants.

30. on the issue of whether the County Government acted *ultra vires* in passing the Finance Act, it is important to note that the County government derives its legislative authority from **Article 185 of the Constitution** to wit:

**(1) The legislative authority of a county is vested in, and exercised by, its county assembly.**

**(2) A county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule**

31. The Applicants in their submissions contend that the passing of the law and the demand for Single Business permits is *ultra vires* and unconstitutional. However, they did not specify which particular provisions of the impugned Act were in violation of the constitution. Apart from contesting unspecified provisions of the Act, neither the Applicants nor the Respondents availed a copy of the Act that is the subject matter of the application before the court. This leaves the court in a difficult position as it is expected to investigate and make conclusions on the constitutionality of a document that has not been brought before it.

32. Regarding whether the application has been overtaken by events, counsel for the applicants submitted that it had not as the same is not begged on the Financial Act 2014/2015 alone but the orders sought will apply to future and past legislations in as far as it will purport to levy charges in terms of single business permit on medical practitioners. On the other hand, the respondents maintained that the subject matter of the application, that is the County Finance Act for the year 2014/2015, had long served its purpose rendering the current application overtaken by events. The courts position on the matter is that every financial year, county government assemblies formulate and enact a finance Act after taking into consideration the budgetary allocations and the prevailing realities of that particular year. As such, the orders sought in this current application are untenable as the impugned Act is no longer in application. Furthermore, the court cannot purport to issue orders as to the constitutionality of future Acts not under consideration.

33. on the issue of public participation I stand guided by Odunga J in **Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR** where he opined thus

*“ In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were*

*and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. Article 196(1)(b) just like the South African position requires just that. Dealing with the issue I wish to reiterate what was held in **Doctors for Life International vs. Speaker of the National Assembly and Others (supra)** to the effect that: “The phrase “facilitate public involvement” is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are “facilitate” and “involvement”. To “facilitate” means to “make easy or easier”, “promote” or “help forward”. The phrase “public involvement” is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of “involve” includes to “bring a person into a matter” while participation is defined as “[a] taking part with others (in an action or matter); . . . the active involvement of members of a community or organization in decisions which affect them”. According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the plain meaning of section 72(1)(a). This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in *New Clicks*, “[t]he Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies.” The democratic government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process.”*

34. In this instant case, the applicants submit that the Respondents have not adduced proof that the Act was subjected to public participation and was therefore unconstitutional. The respondents rebutted this allegation by stating that all the intended effects of the Act were laid out the general public in the crucial public participation forums. Parties likely to be affected by the various components of the Bill were expected to appear and ventilate their issues. However, the Respondents did not adduce any evidence to support this assertion.

35. the biggest bone of contention in this application is the issue of whether the levying of taxes for services provided by the Kajiado County government amounted to the regulation of professionals as envisioned in **Clause 7(b) of Part Two of the Fourth Schedule of the Constitution** which empowers the County Governments in

## **7. Trade development and regulation, including—**

**(a) .....**

**(b) Trade licences (excluding regulation of professions);**

36. the Applicants have advanced the position taken by the court in **Republic vs. Nakuru County Assembly & Others, Nakuru HCCC JR NO. 14 of 2014** and **Medina Hospital Limited & 5 others v County Government of Garissa [2015] eKLR**. In the latter case, Dulu J held inter alia:

*“The respondent has not stated that the fees listed by the applicants were not being paid to the National Government. In my view, those levies or licensing fees were paid to the Government by the applicants as the certificates annexed documents issued by Government Institutions such as the Registrar Medical Practitioners and Dentist Board. It cannot thus be said that the annual license to operate as a Medical Practitioner, a Hospitals or a Pharmacy has not been issued by Government. Consequently any other charge or levy towards another Government institution, whether at the National or County level, amounts in my view to double taxation. This is irrespective of the passage of the new Constitution of Kenya 2010. The two levels of Government should, between themselves, determine who among them should license and regulate medical practice. Once one level of Government takes taxes and licenses the operation, the other level cannot levy licence fees. I find and hold that it is wrong for the time being for the County Government (the respondent) to also levy licence fees to medical practitioners and hospitals, clinics and pharmacies. I will grant certiorari orders.”*

39. I would like to depart from this position. It is my view that there should be a clear distinction between fees paid to a professional regulatory body for the exercise of a profession and fees imposed by a County Government for the provision of services contemplated under **Article 209(4) of the Constitution** for which the county government has the right to collect.

38. I am persuaded by the position taken by Emukule J in **Andrew Wasswa Atetwe t/a Kilimanjaro Auctioneers & 21 others v Mombasa County Government & another [2015] eKLR** verbatim

*“... The question is what does the expression excluding “**regulation of professionals**” mean. To “regulate” means to “**control by law or rules**”. That merely means that the Petitioners must have a certificate from the presiding body that they are qualified for the year in question to be issued with a licence to carry out the prescribed activities for the period or year in question. The payment of a fee for the grant an Annual Practicing Certificate by the Auctioneers Licensing Board neither constitutes the licensee into professional, nor is it a bar to any other legitimate charges that may be imposed by a County Government. In other words what a County Government is prohibited from doing is the issue of a Regulatory Licence which is a function of the National Government. That fee indeed goes to the Consolidated Fund. The trade licensing fee is paid for trading in the County...”*

39. Precluding County governments from raising revenue by imposing taxes for the provision of services contemplated in Part two of the Fourth Schedule flies in the face of the decision in **Thuku Kiroro & 4 Others Vs. County Government Of Muranga [2014]EKlr**, where the court held –

*“Moreover, where a statute or the constitution for that matter, has expressly delegated specific functions, duties or responsibilities to particular organs, state or otherwise, this court will be hesitant to intervene and curtail these organs’ efforts to execute their statutory or constitutional mandates, it is the duty of this court to interpret the constitution in a purposive rather than a restrictive manner. As far as devolution is concerned, the County Governments must be encouraged, and not restrained to deliver on their devolved functions as long as they are intra vires the constitution and the applicable statutes.”*

40. The preceding discourse ultimately leads to the final issue as to whether the court ought to grant the orders sought by the applicants. The Applicants failed to challenge the constitutionality of the Kajiado County Finance Act 2014/2015 as shown above. On the other hand, the respondents did not convince the court that proper public participation had been conducted in the process of formulating the impugned Act. Even so, it has been shown that the subject matter upon which the application was based has been overtaken by events. As if that was not enough, the court has endeavored to draw a parallel between the between the levying of taxes in accordance with the Constitutional mandate of the County Governments with regard to the raising of revenue and regulation of professionals through their respective regulatory

mechanisms.

41. In the premises, the application cannot succeed for the reasons reiterated above.

**Order**

***(1) The Application dated 14<sup>th</sup> December 2016 is dismissed.***

***(2) No orders as to costs***

***It is so ordered.***

**DATED, DELIVERED AND SIGNED AT KAJIADO THIS 29<sup>th</sup> DAY OF SEPTEMBER, 2017.**

**R NYAKUNDI**

**JUDGE**

***Delivered in the presence of:***

Mr. Turunga advocate for the petitioners

Mr. Kaikai advocate for the respondents

Mr. Mateli Court Assistant



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