



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.21 OF 2019

IN THE MATTER OF : ARTICLES 10, 19(2), 21(1), 22, 23, 24(2), 27(1) & (2), 47, 50, 191(2), 209(1),

(3) & (5), 258, Section 7 of the 6th Schedule OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF RULES 4, 11, 13 AND 23(1) OF THE PROTECTION OF RIGHTS

AND FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 10, 47(1)

& (2), 50(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF SECTION 4

OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE MACHAKOS COUNTY FINANCE ACT, 2014

AND

IN THE MATTER OF THE HEALTH ACT NO 21 OF 2017

AND

IN THE MATTER OF THE PHARMACY AND POISONS ACT 254

AND

IN THE MATTER OF MEDICAL LABORATORY TECHNICIANS

AND TECHNOLOGISTS ACT NO 10 OF 1999

AND

IN THE MATTER OF CLINICAL OFFICERS TRAINING, REGISTRATION

AND LICENSING ACT (CAP 260 LAWS OF KENYA

BETWEEN

GIDEON NDAMBUKI MUNYAO.....1ST PETITIONER
WYCLIFFE ONDIEKI.....2ND PETITIONER
AGGREY MAJANGA.....3RD PETITIONER
AUGUSTINE KILONZO.....4TH PETITIONER
NICODEMUS KINYAMASYO.....5TH PETITIONER
MICHAEL KYALO.....6TH PETITIONER
JANE NJOGU.....7TH PETITIONER
RACHAEL NDUNGE MUSYOKA.....8TH PETITIONER
WASHINGTON OYAMO.....9TH PETITIONER
NATHANIEL MWOLOLO.....10TH PETITIONER
FREDRICK KIIO.....11TH PETITIONER
RUTH MWITA.....12TH PETITIONER
WILLIAM MUTUA.....13TH PETITIONER
PETER MUASYA.....14TH PETITIONER

VERSUS

COUNTY GOVERNMENT OF MACHAKOS.....1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

RULING

1. The Petitioners have filed the Notice of Motion dated 29th May 2020 on 4th June 2020 seeking review of orders vide the court's ruling delivered on 7th May 2020 in respect of the Petitioner's Notice of Motion dated 27th June 2019. The two main prayers sought are firstly; that this court do stay the implementation of the order by the 1st respondent against the applicants as well as the cancellation of trading licenses pending the determination of the application and secondly; the review of this court's ruling dated 7.5.2020.

2. The application is supported by the grounds set out on the face of the application and the affidavits of Gideon Ndambuki Munyao and Rachael Ndunge Musyoka sworn on even date. The gravamen of the applicants is that there are errors in the ruling and that there are sufficient reasons warranting a review of the ruling. It was finally claimed that the court did not consider certain matters that had been pleaded and considered others not pleaded. It is the contention of the applicants that if orders are not granted then they stand prejudiced as they will be condemned to pay for trade licenses.

3. The application was strongly opposed by the 1st respondent through its Chief Public Officer Lucas Mwove who swore an affidavit dated 10th June 2020 and who raised several grounds of objections inter alia: that the court lacks jurisdiction to determine the matter as there is already an appeal lodged before the Court of Appeal; that this court conclusively pronounced itself on the petition in its ruling more specifically paragraphs 37-38 of its ruling; that the only avenue is for the applicants to pursue its appeal now pending in the Court of Appeal; that the matters sought for review are matters of law which should be dealt with on appeal; that the applicants seem to confuse trade license from professional licenses yet the 1st respondent was only interested in the former; that no new issues have arisen warranting review and hence the application should be dismissed with costs.

4. Parties agreed to canvass the application by way of written submissions. The petitioners' submissions are dated 14.12.2020 while those of the 1st respondent are dated 18.11.2020. I have given due consideration to the application and the rival affidavits as well as the submissions

of learned counsels. The single issue for determination is whether the applicants have presented sufficient reasons to warrant an order of review of this court's ruling.

5. The Petitioners Notice of Motion dated 29th May 2020 was filed under Order 45 Rule (1) (b) of the Civil Procedure Rules, 2010. The main grounds for review under the Order are therefore; **discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.**

6. Further, **Section 80 of the Civil Procedure Act** provides inter alia:-

Any person who considers himself aggrieved—

a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

7. However, I note that a Notice of Appeal to the Court of Appeal had been filed by the Petitioners on 5th May 2020 against the Courts ruling which the Petitioners are seeking to be reviewed. The First Respondent asserts that the Petitioners application is incompetent since there is a filed Notice of Appeal.

7. The First Respondent places reliance on the Court of Appeal decision in **Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR** where the court dealt with the competency of the Review application and if threshold under Order 45 of the Civil Procedure Rules had been met. The First Respondent submits that if the Petitioners wish to continue prosecuting the review application, the Notice of Appeal must be withdrawn.

8. The Petitioners submit that there is no appeal as the timelines for the notice of appeal lodged had lapsed and that as far as the applicants are concerned there is no appeal and are perfectly in order to approach this court for review. Learned counsel for the applicants drew the court's attention to Rule 83 of the Court of Appeal Rules provides: -

Rule 83:

“Effect of default in instituting appeal:

If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.”

9. The operative word there being **“..he shall be deemed to have withdrawn his Notice of Appeal..”** In **Mae Properties Limited v Joseph Kibe & another [2017] eKLR** the Court of Appeal stated: - **“We think that the true meaning and import of the rule is more often than not scarcely appreciated. The rule as framed prescribes the legal consequence for non-institution of an appeal within the 60 days appointed by the Rules of Court. Moreover, the said consequence is couched in mandatory, peremptory terms: the offending party shall be deemed to have withdrawn the appeal. It seems to us that the deeming sets in the moment the appointed time lapses.**

10. In **Dismas Ombongi t/a Kamili Dog Farm v Inter Security Services Limited [2018] eKLR** Kamau J held at para.31 that:-

“..It was therefore clear that failure by the Respondent to have instituted its Appeal within sixty (60) days from 15th March 2018 and failure to furnish this court with proof of compliance with Rule 82 of the Court of Appeal Rules lent this court to deem that the Respondent withdrew its Notice of Appeal in line with the provisions of Rule 83 of the Court of Appeal Rules.....hence there was no Appeal...”

11. **Rule 82 (1) and (2) of Court of Appeal Rules** was not complied with by the applicants hence there is no appeal before the Court of Appeal pursuant to Rule 83 as submitted by the Petitioners. In the absence of an appeal, it is my considered view that the applicants are perfectly in order to approach this court for review of orders as the notice of appeal is deemed as withdrawn upon the timelines stipulated in the Rules expiring.

12. I now consider whether the Petitioners application for review has met the threshold under Order 45.

At Paragraph 6 of the Affidavit, the First Petitioner pleads as follows:-

a. The court did not pronounce itself on whether the First to Fourth Petitioners who are professionals offering laboratory services and not drugs selling business are subject to the Machakos County Finance Acting respect of payment of trading licenses?

-In my opinion the court did pronounce itself on the issue at paragraph 37 pages 29 to 30 of the ruling and hence no error apparent on the record has been shown. The court noted that **‘...There has been a thin line regarding the practice of pharmacy and**

laboratory viz a viz general trade.....". The First Respondent being a County Government is under an obligation to collect taxes for use in the provision of services...." This court clearly pointed out that the 1st respondent is entitled to demand for trade licenses and that the petitioners were free to be regulated by their professional bodies. The court found that the petitioners appear to have confused a trade license from a professional license and thus found that the 1st respondent's action in regulating the trade licenses was legitimate as it did not touch on the petitioners' professional licenses.

b. The court did not pronounce itself on the merits of the case against the Second Respondent since the case against Second Respondent had been withdrawn by the petitioners.

13. The court dealt with the issue at paragraph 34 pages 24 and 25 of its ruling. I note at paragraph 15 of the ruling the court explained itself why it was safe to assume that the case had been withdrawn against the Second Respondent. There had been no objection by the Second Respondent to the withdrawal of the case against it.

14. Nevertheless it is my opinion that even if it is submitted that the case was not withdrawn against the Second Respondent, I note that there were no express orders sought against the Second Respondent in the pleadings apart from seeking the orders to stay the criminal proceedings. It is obvious that the orders against the 2nd respondent would automatically arise upon the success of the petitioners claim against the 1st respondent. Again, the conservatory orders issued against the 2nd respondent at the interlocutory stage of the matter became spent upon determination of the petition. It was the petitioners through their counsel who indicated their wish to withdraw their claim against the 2nd respondent and it is thus surprising for the petitioners to now deny the same. Suffice here to add that the petitioners have not said anything to the effect that their former advocates had no authority to compromise the suit against the 2nd respondent. This is not a ground for review of the court's ruling.

15. Furthermore the court did render itself from paragraph 28 to 37 of its ruling in respect of the petition. I note at paragraph 35 of the court's ruling that a directive had been issued by the Governor on 13th March 2019 requiring compliance by the affected parties on/before 31st May 2019. It was the court's finding that the Petitioners were aware of the notice and therefore had notice of their implementation.

16. At paragraph 37 of the court's ruling the court did find that the First Respondent's actions were rightly backed up by the Machakos Finance Act 2018 that is still in operation as the law governing finances in the county which by then had not been declared as unconstitutional or been repealed.

17. From the above explanations as noted from the impugned ruling, it is clear there are no discoveries of new matters which were not within the possession of the applicant at the time of the determination of the petition. The applicants' complaints merely relate to the claim that this court did not properly consider their case. If that is their view, then they are saying that this court went into error on matters of both fact and law. It is trite law that a misdirection by a court is not a ground for review but one for an appeal. That being the position, I find that the applicants have not satisfied the grounds for review of the ruling dated 7.5.2020.

18. In the result, it is my finding that the applicants' application dated 29.5.2020 lacks merit. The same is dismissed with no order as to costs.

It is so ordered.

Dated and delivered at **Machakos** this **24th** day of **February, 2021**.

D. K. Kemei

Judge