



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**[Coram: A. C. Mrima, J.]**

**CONSTITUTIONAL PETITION NO. 5 OF 2019**

MAMA NURSING HOME KABARU.....1<sup>st</sup> PETITIONER

ALPHA COMMUNITY NURSING HOME.....2<sup>nd</sup> PETITIONER

MOTHER FLORA MEDICAL .....3<sup>rd</sup> PETITIONER

MAMA MARIA CLINIC LIMITED.....4<sup>th</sup> PETITIONER

**VERSUS**

THE COUNTY GOVERNMENT OF MIGORI .....RESPONDENT

**JUDGMENT**

**Introduction:**

1. The Petition revolves around the demand by the County Government of Migori, the Respondent herein, on the Petitioners to pay Single Business Permit Fees for providing their services to the members of public within the County.
2. The Petitioners instituted proceedings before this Court contesting the decision by the Respondent. They contended that as members of the medical profession in Migori County, the Petitioners are exempted from such a requirement.

**The Pleadings and Submissions:**

3. The Petition was filed on 12/07/2019. It was dated 11/07/2019. It sought the following prayers: -

(a) A declaration that the Respondent's decision to impose single business permit fees on the petitioners and vandalize and take away the petitioner's property are illegal, null and void.

(b) A declaration that the meetings and decisions of the Respondents to destroy, demolish and carry away the private property and investments of the Petitioners are:-

1. Unfair
2. Discriminatory
3. Not procedural
4. Unreasonable and irrational.

(c) An order of prohibition do issue to prohibit the respondent from implementing its decision of levying single business permit from the petitioners and or members of medical profession in Migori County

(d) Damages

**(e) Any other reliefs or orders this Honourable Court may deem appropriate.**

4. Alongside the Petition, the Petitioners filed an application for conservatory orders. It was a Notice of Motion dated 11/07/2019. Interlocutory conservatory orders were issued pending the determination of the Petition.
5. The Petition was heard by way reliance on the affidavit evidence and written submissions. The Petitioners filed their joint submissions on 15/10/2019.
6. The Respondent entered appearance on 14/11/2019. It also filed its written submissions.
7. The Petitioners instituted the Petition as duly licensed private medical facilities by the *Kenya Medical Practitioners Dentist Board* (hereinafter referred to as '**the Board**'). They brought the Petition on their own behalf and on behalf of the public who are entitled to their services under **Article 43(1)(a)** of the **Constitution** and in public interest.
8. The Petitioners contended that each paid a fee of Kshs. 30,000/= to the Board on application for their respective licenses. That they were duly inspected and approved to operate by the Board. The Petitioners further contended that they provide medical services through qualified Nurses, Clinical Officers and Doctors. They averred that their proprietors are Medical Doctors.
9. The Petitioners posited that they also paid public health charges to the Respondent and were issued with Clearance Certificates.
10. Having complied with all the legal requirements, the Petitioners further posited that they duly carried on with their duties until 01/09/2019 when the Respondent through its about 20 officers stormed their respective premises and demanded to see the Single Business Permits. None of the Petitioners had the said Permits. Resulting thereof, the Respondent ransacked the premises and confiscated various equipment in full view of patients.
11. The Petitioners also alleged that their items were handled so negligently and without care and they highly doubt their working conditions and are exposing the Petitioners to professional negligence.
12. The Petitioners' position is that they are not liable to pay for any Single Business Permits under the law and that the Respondent's actions are unjustifiable under the **Constitution** and the law. The Petitioners therefore sought the foregone prayers.
13. Buttressing their arguments, the Petitioners filed submissions. They submitted that the requirement to obtain Single Business Permits was tantamount to regulating the medical profession, a mandate not donated to the Respondent under the **Constitution** and the law. The decisions in **Peter Ndungu Mbugua & 39 Others vs. County Assembly of Nyandarua & 2 Others (2018) eKLR, Nairobi Constitutional & Human Rights Division Petition No. 97 of 2016 Kenya Pharmaceutical Association of Kenya vs. Nairobi County Government & 46 Others** were cited in support.
14. It was further submitted that the Respondent's actions were unprocedural, unreasonable, irrational, unfair and discriminatory. It was also submitted that the actions went against the grain of **Articles 47 and 50** of the **Constitution** as well as **Section 4** of the **Fair Administrative Action Act, 2015**.
15. The Petitioners further submitted that orders of prohibition were appropriate to restrain the unlawful actions and that the orders were available by virtue of **Articles 22 and 23** of the Constitution. They relied in **Kenya National Examination Council vs. Republic ex parte Geoffrey Gathenji Njoroge and Others Nairobi Civil Application No. 226 of 1996** (unreported).
16. The Petitioners also rooted for damages and costs.
17. As said, the Respondent did not file any response to the Petition. It however filed written submissions where it raised the issue of the *locus standi* of the Petitioners, that there were no constitutional issues raised in the Petition and that the Petition was not proved.
18. The Respondent fully associated itself with the holding in **Peter Ndungu Mbugua & 39 Others** case (supra). It however submitted that the immunity from paying for the Single Business Permit fees attached to the individual medical practitioners who must be identified and proved as such. The Respondent further took issue with the deponent of the Supporting Affidavit one *Japheth Masina Masina* who described himself as a Director of the 4<sup>th</sup> Petitioner.
19. The Respondent also submitted that none of the Petitioners disclosed that they were members of the medical profession. The Respondent prayed that the Petition be dismissed with costs.

**Issues for Determination:**

20. From the pleadings, depositions and submissions the following issues arise for determination: -
  - i) Whether the Petitioners have appropriate *locus standi* in the Petition;
  - ii) Whether the Petition raises any constitutional issues;
  - iii) Whether the Petition be allowed;

iv) Who will bear the costs?

**Analysis and Determination:**

21. I will deal with each of the issues separately.

**Whether the Petitioners have appropriate locus standi in the Petition.**

22. The subject of *locus standi* in constitutional petitions has been largely dealt with by Courts. The Court of Appeal in **Nairobi in Civil Appeal No. 290 of 2012 Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** held that: -

*27. .... this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the Courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. .... We hold that in the absence of a showing of bad faith as claimed by the Appellant, without more, the first Respondent had the locus standi to file the Petition. Apart from this, we argue with the Superior Court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution....*

*28. It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of the Constitution in 2010 by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some specific interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to Article 22(3) aforesaid, the Chief Justice has made rules contained in Legal Notice No. 117 of 28<sup>th</sup> June 2013.... “the Mutunga Rules” to inter alia, facilitate the application of the right of standing..... The rules reiterate that any person other than a person whose right or fundamental freedom under the Constitution is allegedly denied, violated or infringed or threatened has a right of standing and can institute proceedings as envisaged under Article 22(2) and 258 of the Constitution.*

*29. It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reasons of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the Court for relief, any member of the public can maintain an application for appropriate direction, order or writ in the High Court under Articles 22 and 258 of the Constitution.*

23. The Petitioners described themselves as institutions duly licensed by the Board to operate as private medical facilities. They brought the Petition on their behalf and on behalf of the public who are entitled to their services under **Article 43(1)(a) of the Constitution**.

24. Guided by **Articles 22 and 258 of the Constitution**, the binding decision in **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others** case (supra) and a look at the Petition and the issues raised therein I find no difficulty in finding that the Petitioners had the requisite *locus standi* in the matter.

**Whether the Petition raises any constitutional issues.**

25. The Petitioners contended that the Respondent actions in demanding the payment of Single Business Permits and carting away their equipment were unprocedural, unreasonable, irrational, unfair and discriminatory. They further contended that the actions contravened **Articles 19, 20, 21, 42, 43(1)(a), 47, 50 and 70 of the Constitution** as well as **Section 4 of the Fair Administrative Action Act, 2015**.

26. The Respondent was of the contrary position. It held that there were no violations of any constitutional rights since it promptly returned the equipment it collected to the Petitioners.

27. In view of the admission by the Respondent, it emerges that one of the issues to be determined shall be whether the taking away and returning of the Petitioners’ equipment contravened the rights of the Petitioners under the **Constitution** and the law. I therefore answer the issue in the affirmative.

**Whether the Petition be allowed:**

28. The Respondent rightly associated itself with the decision in **Peter Ndungu Mbugua & 39 Others** case (supra). I have as well gone through the said decision. I agree with the analysis and findings subject to the finding on Pharmacists in **Kenya Pharmaceutical Association of Kenya** case (supra).

29. There is no doubt that professionals like Doctors and lawyers are specially trained. They are also regulated by professional bodies created by law. In the case of the medical profession the Board is the regulator under the **Medical Practitioners and Dentist Act, Cap. 253** of the Laws of Kenya.

30. Under the **Fourth Schedule** to the **Constitution**, trade licensing is a devolved function. However, the **Constitution** clearly excludes *regulation of professionals*. It therefore means that no devolved unit has the power to regulate any member of a profession operating within its boundaries. A County Government cannot therefore charge levies for Single Business Permits for services rendered by professionals. Such professionals cannot be regarded as traders or business people who are under the regulation of a devolved unit. That is a constitutional

preserve of the National Government. To that end, the law is so clear.

31. Whereas the regulation of professionals is a mandate of the National Government on one hand, the devolved units are legally mandated to control and regulate trading activities and businesses on the other hand.

32. A devolved unit is reasonably expected to be aware of all businesses and services provided within its borders. That information is crucial as it enables the devolved unit in planning and provision of the necessary support services.

33. How then is a County Government expected to be aware of the professionals operating within that county? A County Government must make enquiries to that end. That can be undertaken in many lawful ways. Therefore, a devolved unit has a right to make enquiries on a professional or a professional institution providing services within the county and such a professional or a professional institution is under a duty to avail the necessary information. The request must however be purely for gathering information aforesaid and should not amount to regulation. Even in cases where a devolved unit becomes aware of professionals or professional institutions not carrying out their duties in accordance with the law, the much it may do, in public interest, is to lodge complaints with the relevant regulatory body or bodies.

34. That now brings me to another limb of the discussion. It is on the standard of proof required by a Petitioner to sustain a Petition on allegations of infringement of the rights of a professional or a professional institution in an instance as the one in this case. I believe the standard of proof is on balance of probabilities. A Petitioner is expected to at least prove that the one whose rights are allegedly infringed or threatened with infringement is duly regulated by a professional body.

35. In this case, the Petition was not instituted by the medical professionals themselves. Instead the Petition was taken out by the medical institutions. The 1<sup>st</sup> Petitioner, *Mama Nursing Home Karabu*, described itself in the Petition as a business name duly licensed by the Board to operate as a private medical facility. It availed a Licence to operate as a Private Medical Institution issued by the Board for the year 2019. The Licence had the physical location of the institution within Migori. That was the position in respect to the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners.

36. The 4<sup>th</sup> Petitioner described itself as a limited liability company duly incorporated and registered under **Cap. 486** Laws of Kenya. It however did not avail its Licence issued by the Board to operate as a Private Medical Institution for the year 2019 or at all.

37. The Respondent was not satisfied with what was laid before Court by the Petitioners. It contended that the Petitioners were to prove that the persons running the institutions which sued as the Petitioners herein they were duly qualified members of the medical profession so as to benefit from the non-regulation by itself.

38. The argument by the Respondent is very attractive from the outset. However, calling for such proof will be tantamount to raising the standard of proof beyond the balance of probabilities. To me, it suffices for a Petitioner to prove that it is under the regulation of the Board by at least producing a licence.

39. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners attained that bar. That is however not the case with the 4<sup>th</sup> Petitioner.

40. From the whole analysis, it therefore follows that only the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners have proved on a balance of probabilities that they are regulated by the Board.

41. The Petitioners contention that the Respondent demanded levies for Single Business Permits and confiscated their equipment was not controverted. The Respondent only posited that it immediately released the equipment to the Petitioners. In view of the analysis herein the Respondent's actions did not have any legal leg to stand on and were uncalled for. There is no evidence that the Petitioners were requested to avail any information about themselves, but declined. **Articles 10, 40, 43, 47 and 50** of the **Constitution** were variously contravened.

42. This Court has been called upon to issue declarations and other orders including an award of general damages.

43. On damages, the Court of Appeal in **Lucas Omoto Wamari vs, The Attorney General & Another Nairobi Civil Appeal No. 213 of 2014 (2017) eKLR** dealt with importance of making awards on general damages in constitutional petitions where violations are ascertained and such damages sought. The Court faulted the High Court in not making any awards on general damages despite the Petitioner proving violation of his constitutional rights and fundamental freedoms more so given that the Petitioner had sought for such damages. The Court held as follows: -

***39. .... Mere declarations without any specific award of damages do not vindicate the appellant neither do they convey a deterrent message regarding the sanctity of the Constitution and the need for protection of fundamental rights and freedoms. Therefore, the omission to make a specific award for these violations, was an error that justifies the intervention of this Court.***

44. The equipment in this case was removed on 01/07/2019 and returned on the strength of the order of this Court issued on 25/07/2019. That was close to a month.

45. The Respondent's actions complained of were captured in paragraphs 7 to 12 inclusive of the Petition as follows: -

**7. On the 1<sup>st</sup> July 2019, and without notice at all, about 20 officers from the Respondent's department of revenue collection rudely stormed into the petitioner's premises demanding for single business permit license, which the petitioners are not liable to pay under the law.**

**8. The Petitioners aver that the said officers upon being informed that the petitioners don't have the said license and that**

they are liable to take out the same from the County having taken out license to operate from the Kenya Medical Practitioners and dentist board, they, with impunity began ransacking the petitioners various premises haphazardly without care that there were patients in the said premises and further without care that they were dealing with very sensitive institutions with sensitive operational equipment's.

9. The petitioners further aver that the respondent's officers confiscated the petitioner's various equipment's as enumerated herein, he same were taken away by persons unqualified to handle them hence their safety is not guaranteed, the following are the equipment's; crown centrifuge MAG 6 cylinders operational, Olympus microscope with 4 powers 100,20,40 x 2001 belonging to the 1<sup>st</sup> petitioner and 1 microscope, 1 centrifuge, 1 computer, 1 fridge, a suction machine, 1 observation lamp and 1 weighing scale belonging to the 2<sup>nd</sup> to 4<sup>th</sup> petitioners.

10. The petitioner further aver that the aforesaid equipment's were taken away during laboratory testing processes and the respondents took away the said equipment's together with samples and patients are left to wonder when their medical results shall be released to them.

11. The petitioners aver that to make matters even worse the respondents have kept the said equipment's under very reckless conditions and the same are not safe, the petitioners are even wondering if they shall get the same back in working condition.

12. The aforesaid items being laboratory equipment's need extremely high standard of care in order that the test results are not misleading as such may make the [petitioners liable for professional negligence which attach to dire consequences as losing practicing licenses.

46. The Court of Appeal dealt with the manner in which officers of the Respondent herein acted with impunity in Kisumu Civil Appeal No. 129 of 2019 Migori County Government & Another vs. Josiah Onyango Okello t/a Cargo Secured Services (2019) eKLR. In that case the Respondent herein had impounded a lorry demanding the payment of the requisite levies to operate transport business within the County. Despite production of the evidence the Respondent still did not release the lorry for a period of 49 days. The owner of the lorry eventually filed a suit in the High Court. The trial court, yours truly, awarded *inter alia* the sum of Kshs. 500,000/= as general damages for the unlawful impoundment and detention of the lorry.

47. On appeal the Court had the following to say: -

*73. .... Notwithstanding, the trial judge correctly held that an award for general damages is due to the respondent for the unlawful actions of the officers of the appellant in the impoundment and detention of the vehicle. We are likewise of the view that an award of general damages is due to the respondent. The appellants' officers conduct was high-handed, reprehensible, capricious and borders on abuse of power. This is a case where we would have awarded exemplary damages if the same were pleaded and prayed for. Despite impounding the vehicles, the appellants stone facedly denied the same. Such conduct is detestable and unbecoming of public officers. We therefore find that the general damages awarded by the trial court did not sufficiently take into account the unlawful conduct of the appellants officers and the stone face denial of impoundment of the vehicles. Nevertheless, there is no cross-appeal on the award of general damages....*

48. I find and hold that the manner in which the officers of the Respondent acted in ransacking the premises in the presence of patients, impounding equipment and withholding the equipment for close to a month was 'high-handed, reprehensible, capricious and borders on abuse of power.' The successful Petitioners are entitled to damages for such conduct.

49. Having said so, I now make the following final orders: -

(a) The Petition by the 4<sup>th</sup> Petitioner herein, *Mama Maria Clinic Limited*, is hereby dismissed with costs.

(b) The following orders are jointly and severally issued for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners against the Respondent: -

(i) A declaration hereby issues that the decision to impose single business permit fees on the Petitioners and to carry away the Petitioners' property in enforcement of such a decision is illegal, unprocedural, null and void.

(ii) An order of prohibition hereby issues prohibiting the Respondent from implementing its decision to levy single business permit fees from the Petitioners herein.

(iii) Each of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners are hereby awarded the sum of Kshs. 1,000,000/= (One Million Only) as general damages for ransacking the premises in the presence of patients, impounding equipment and withholding the equipment for close to a month.

(iv) The Respondent shall shoulder the costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 20<sup>th</sup> day of February, 2020.

A. C. MRIMA

**JUDGE**

**Judgment delivered in open court and in the presence of: -**

**Mr. Okoth** Counsel instructed by the firm of Messrs. Okoth & Co. Advocates for the Petitioners.

**Mr. Omonde Kisera** Counsel instructed by the firm of Messrs. Omonde Kisera & Company Advocates for the Respondent.

**Evelyne Nyauke** – Court Assistant