



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

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

JUDICIAL REVIEW NO. 1 OF 2019

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF MIGORI1ST RESPONDENT

THE COUNTY SECRETARY

COUNTY GOVERNMENT OF MIGORI2ND RESPONDENT

AND

1. SUNA NURSING & MATERNITY HOME LTD

2. DR. GEORGE OTIENO RAE..... EXPARTE APPLICANTS

JUDGMENT

Introduction:

1. This matter revolves around the demand by the County Government of Migori, the First Respondent herein, on the *Exparte* Applicants to pay Kshs. 117,300/= as Single Business Permit Fees for providing their services to the members of public within the County.
2. There are two *Exparte* Applicants in this matter. They are *Suna Nursing & Maternity Home Ltd* and *Dr. George Otieno Rae*.
3. The First *Exparte* Applicant (hereinafter referred to as '**Suna Nursing Home**') is duly registered and incorporated as a limited liability company under the **Companies Act**, Cap. 486 of the Laws of Kenya. It is also alleged that Suna Nursing Home is duly licensed under **Medical Practitioners and Dentist Act** (Cap. 265) Laws of Kenya.
4. The Second *Exparte* Applicant is described as a registered medical practitioner in Kenya and a Co-Director of the first *exparte* applicant. I will hereinafter refer him to as '**Dr. Otieno**'.
5. The First Respondent is a devolved Government under the **Constitution of Kenya** and the **County Government Act, 2012**. It is a legal entity capable of suing and being sued in law. The Second Respondent is the chief administrative officer of the First Respondent.
6. Leave to apply for orders of prohibition and *certiorari* was granted on 11/07/2019. The leave was also to apply as a stay of the decision of the Respondents to charge the fees aforesaid and a further stay of the seizure of any items removed from Suna Nursing Home premises in Migori town.
7. The matter was not defended despite appropriate service.

The Exparte Applicants' case:

8. The *Exparte* Applicants' case is contained in the *Exparte* Chamber Summons dated 11/07/2019, the Affidavit Verifying the Facts sworn by Dr. Otieno on 11/07/2019, the Statements of Facts and Reliefs and the substantive Notice of Motion dated 29/07/2019.

9. The Ex parte Applicants contended that they are duly authorized in law to practice medicine in Kenya. They annexed a copy of the Certificate of Incorporation for Suna Nursing Home. The company was incorporated on 10/04/1991. They also annexed a copy of a Licence issued by the *Medical Practitioners and Dentists Board* (hereinafter referred to as '**the Board**') on 01/01/2019 authorizing Suna Nursing Home to operate as a private medical institution for the year 2019.

10. The Applicants contended that on 27/06/2019 the Respondents' officers went into Suna Nursing Home premises in Migori town and unlawfully seized and carted away several medical equipment demanding the payment of the Single Business Permit Fees of Kshs. 117,300/=.

11. The Applicants further contended that the Respondents' actions were unlawful and contravened the **Constitution**. They prayed, vide the Notice of Motion dated 29/07/2019, for the following orders: -

1. CERTIORARI directed at the County Government of Migori and the Secretary, County Government of Migori to remove and bring to the High Court of Kenya at Migori their decision to Levy demand payments and executing their demand by seizing and carrying away the Applicants CPUBAR CORD-SGHQ 44PQZQ, POWER MICROSCOPE-XS2 107BN, execution thereof carried out on 27/6/19 FOR SINGLE BUSINESS PERMIT FEES and returning the seized items.

2. PROHIBITION directed at the County Government of Migori and the Secretary, County Government of Migori prohibiting them from Levying demanding payments and or executing their demand by seizing and carrying away any of the equipment belonging to the Applicants and carrying away any of the equipments belonging to the Applicants and used by the Applicants for the purposes of operating the SUNA NURSING AND MATERNITY HOME LTD in future under the pretext of enforcing SINGLE BUSINESS PERMIT FEES OR OTHERWISE.

3. That the said Leave if granted to operate as stay of the decision of the County Government of Migori to Levy, demanded or execute that decision by seizure of property or equipment in the premises of the Applicants for purpose of enforcing payment of Single Business Permit fees upon the Applicants pending the hearing and determination of this suit.

4. Costs of this application be provided for.

12. The third prayer had already been granted at the interlocutory stage hence could not be contained in the substantive Notice of Motion.

13. As stated, the matter was not defended.

14. On the directions of this Court, the matter was heard by way of written submissions. The Applicants duly filed written submissions and referred to two persuasive decisions of **Peter Ndungu Mbugua & 39 Others vs. County Assembly of Nyandarua & 2 Others (2018) eKLR** and **Medina Hospital Limited & 5 Others vs. County Government of Garissa (2015) eKLR** in praying that the orders sought be granted.

Analysis & Determinations:

15. I have certainly perused and understood the contents of the pleadings, the submissions and the decisions referred thereto. It is therefore for this Court to determine which of the prayers sought in the substantive Notice of Motion ought to issue, but first the province of Judicial Review.

16. Judicial review has over time been a subject of litigation in Courts. The Court of Appeal in **Civil Appeal No 185 of 2001 Municipal Council of Mombasa -vs- Republic & Umoja Construction Ltd** (unreported) in stated its parameters as follows: -

Judicial Review is concerned with the decision-making process not with the merits of the decision itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision makers took into account relevant matters or did take into account irrelevant matters. The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decisions. (emphasis added).

17. The foregone was restated in **Republic -vs- Kenya Revenue Authority exparte Yaya Towers Ltd (2008) eKLR** with the holding that the remedy of judicial review is concerned with reviewing not the merits of the decisions of which the application of judicial review is made but the decision-making process itself.

18. *The Halsbury's Laws of England 4th Edition Vol. (1)(1)* at paragraph 60 cautions that the purpose of Judicial Review is to ensure that an individual is given a fair treatment by the authority in which she/he has been subjected to and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question and unless the restriction on the power of the Court is observed, the Court, will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power.

19. Be that as it may, the grounds on which Courts exercises its judicial review jurisdiction have also been a subject of consideration by Courts. In the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others (2008) 2 EA 300**, the Court citing with approval the cases of **Council of Civil Unions vs Minister for the Civil Service (1985) AC 2** and **an application by Bukoba Gymkhana Club (1963) EA 478** held as follows: -

In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.....Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrator Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the power to do so are vested by law in the District Service Commission....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision is usually in defiance of logic and acceptable moral standards..... Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice or to act with procedural favour towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision. (emphasis added).

20. This Court is alive to the truism that the grounds upon which it exercises its judicial review jurisdiction are incapable of exhaustive listing due to the developing jurisprudence. That was the holding by the Court of Appeal in **David Mugo -vs- Republic Civil Appeal No. 265 of 1997(unreported)** where the Court held that as long as orders by way of judicial review remain the only legally practical remedies for the control of administrative decisions and in view of the changing concepts of good governance which demand transparency by anybody of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review orders shall continue to extend so as to meet the changing conditions and demands affecting administrative decisions.

21. The above analysis is in tandem with the holding in **Re Bivac International SA (Bureau Veritas) (2005) & EA 43** where the development of judicial review was equated to the Biblical mustard seed which a man took and sow in his field and despite being the smaller of all seeds, it grew to become the bigger shrub of all and became a tree so that the birds of the air came and sheltered in its branches. It has also been held that judicial review stems from the doctrine of *ultra-vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality or impropriety of procedure (the three "I's") and has become the most powerful enforcement of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness and that the grounds of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of **Donoghue vs Stephenson** in the last century.

22. The above position was also captured by Nyamu, J (as he then was) in **Republic vs Commissioner of Lands exparte Lake Flowers Limited Nairobi High Court Misc. Application No. 1235 of 1998** (unreported) as follows: -

Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief..... The High Court has the same power as the High Court in England upto 1977 and much more because it has the exceptional heritage of another constitution and the doctrines of the common law and equity in so far as they are applicable and the courts must resist the temptation to try and contain judicial review in a straight-jacket...Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.. The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectation... Even on the important principle of establishing standing for the purposes of judicial review the courts must resist being rigid chained to the past defined situations of standing and look at the nature of the matter before them..... Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis.... The court envisions a future growth of judicial review in human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society.

23. I believe I have said enough on the jurisdiction of this Court on judicial review. It is hence on the foregone that further discussions shall follow.

24. The Applicants' complaint is the demand by the Respondents for business permit fees amounting to Kshs. 117,300/=. In judicial review the Applicants cannot challenge the decision to levy the fees *per se*. The Applicants can only challenge the process towards making that decision and the process of its implementation.

25. The complaint was deponed to by Dr. Otieno in paragraphs 2 and 4 of the Verifying Affidavit as follows: -

2. That on 27/6/19 County of Migori Officers went into my Nursing and Maternity Home Ltd premises and unlawfully seized and carried away the following Hospital equipment from the Hospital i.e.

CPA BAR CORDSQHQ 44 PQZR, POWER MICROSCOPE-XS2-107BN, CENTRIFUGE 800d - Annexed is a copy of Certificate of Registration and document the officers left in my premises after the seizure and taking away the Hospital equipment marked G. O. R EXT 1A and 1B respectively.

4. That I sincerely believe that the acts of the County Government of Migori are Wrong Unconstitutional, Unlawful.

26. The Applicants submitted that the Respondents' officers walked into Suna Nursing Home and demanded the impugned payment. That, they carted away several items as they left behind an invoice. I have seen a copy of the invoice. It is not dated. I therefore have to agree with the Applicants that the invoice was left behind as the officers carted away the items from Suna Nursing and Maternity Home.

27. The Respondents therefore did not make a formal demand for the fees. Had they done so the Applicants would have had an opportunity to make presentations as to whether they ought to pay the fees or otherwise. The demand was precedent to the enforcement. This was hence a

case where the Respondents' officers just walked into Suna Nursing Home and carted away the medical equipment without any prior notice.

28. The Applicants are entitled to own property in line with **Article 40** of the **Constitution**. There is no contention that the Applicants unlawfully acquired the property which was carted away by the Respondents' officers. The Respondents also contravened **Article 47** of the **Constitution** for want of giving written reasons for their actions.

29. **Section 4(3), (4), (5) and (6)** of the **Fair Administrative Act, 2015** spells out various steps to be taken by any person undertaking an administrative action which action is likely to adversely affect the rights or fundamental freedoms of any person. There was as well no such compliance.

30. The Respondents' conduct therefore failed to meet the expectations of the law. To that extent the decision cannot stand.

31. I recently dealt with the issue of the legality of the decision to levy business fees upon practicing medical officers. That was in **Migori High Court Constitutional Petition No. 5 of 2018 Mama Nursing Home Kabaru & 3 Others versus The County Government of Migori** (unreported). This is what I stated: -

*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 1st 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 2nd and 3rd Petitioners.

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

40. *From the whole analysis, it therefore follows that only the 1st, 2nd and 3rd 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.*

Disposition:

32. It therefore follows that the actions of the Respondents are devoid of legality. I am satisfied that the Applicants have proved their entitlement to the prayers sought in the Notice of Motion dated 29/07/2019. The Respondents shall bear the costs of the suit.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of May, 2020.

A. C. MRIMA

JUDGE

Judgment delivered electronically: -

1. rochodhiambocoadvocates@gmail.com / nyakwarokul@gmail.com for Odhiambo & Co. Advocates for the Exparte Applicants.
2. No appearance for the Respondents.
3. Parties are at liberty to obtain hard copies of the Ruling from the Registry upon payment of the requisite charges.

A. C. MRIMA

JUDGE