



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

PETITION NO. E009 OF 2020

IN THE MATTER OF: ARTICLES 10, 20, 21,22,23,26,28,35,43,159,258 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE PUBLIC HEALTH ACT

BETWEEN

- 1. MARGARET KISINGO MUGA**
- 2. ZAHRA ABDUL MURBE**
- 3. MOHAMED ABDULHALIM**
- 4. SAID AHMED**
- 5. SWALEH ABDALLA**
- 6. RAMADHAN JUMA**
- 7. HASSAN MZEE**
- 8. HASSAN ABDUL**
- 9. KHALID ESMAIL**
- 10. ESMAIL ESSAJEE**
- 11. HENRY MBOGHO**
- 12. SULEIMAN KIBWANA**
- 13. NASSIR KHAMIS**
- 14. AMINA HASSAN**
- 15. QUMAR ABDULKADIR**
- 16. MWINYI ABDALLA**
- 17. NASSIR SAID**
- 18. MAIMUNA AWADH**
- 19. ELIZABETH OKETCH**
- 20. MOHAMED A.**

21. VIRGINIA GHAO..... PETITIONERS

AND

1. THE COUNTY GOVERNMENT OF MOMBASA

2. THE MINISTRY OF HEALTH

3. THE HONOURABLE ATTORNEY GENERALRESPONDENTS

JUDGMENT

1. By a petition filed herein on 6/11/2020, the Petitioners who claim to be adults residing or working in Mombasa, have sued the County Government of Mombasa, the Ministry of Health Services and the Attorney General of the Republic of Kenya as 1st, 2nd and 3rd Respondents respectively.

2. The Petitioners state that within their residency there is a public hospital for the benefit of residents of Mvita Clinic. To their shock, however, they have learnt that the 1st and 2nd Respondents have designated the said clinic as a Covid-19 isolation and treatment centre with effect from 10/11/2020, and that there are construction activities on the site to achieve this objective. The Petitioners are apprehensive that with schools and businesses around the clinic, converting the facility to a Covid-19 centre will pose a high risk to the Petitioners, thereby endangering their lives since some of them have underlying health problems, especially children and the elderly. The Petitioners state that the decision to convert Mvita Clinic to a Covid-19 isolation centre was reached without public participation and should be reversed, noting that there are other hospital facilities within Mombasa which can be made Covid-19 isolation centres. They aver that the said decision infringes their right to good health and is in violation of Article 10 on national values; Articles 20, 21 and 22 on fundamental rights and freedoms; Article 28 on right to dignity, Article 26 on right to life; Article 35 on right to information, and Article 43 on economic and social right.

3. The Petitioners pray for the following orders:

(a) A declaration that the conversion of Mvita Clinic within Mvita constituency Mombasa County to a Covid-19 Isolation and Treatment Centre is in contravention of the Petitioners rights.

(b) A conservatory order do issue preventing the Respondents from converting Mvita Clinic within Mvita constituency Mombasa County to a Covid-19 Isolation and Treatment Centre.

(c) Costs of this petition.

4. The petition is supported by affidavit of Margaret Kisingo Muga sworn on 6/11/2020. The deponent has also filed her authority to act, given to her by the other Petitioners.

The Response

5. The 1st Respondent opposed the petition vide a Replying Affidavit sworn by Pauline Oginga on 13/11/2020. The deponent deposed that she is the Chief Officer, Public Health of the 1st Respondent and that she is conversant with these proceedings and has the authority to depone to the Replying Affidavit.

6. The 1st Respondent denies it received an alleged letter annexed to the Petition drafted by 'Majengo Wireless Residents' that has been signed off on 4/11/2020. The 1st Respondent avers that the alleged letter was never delivered to it. In any event the said letter is not signed and has no provative value. Yet this letter forms the basis of the Petition herein, a clear indication that this Petition is based on falsehood.

7. But even if the said letter was delivered as alleged, the Petitioners did not give the Respondents time to respond to the queries or an opportunity for the Respondents to give a feedback to the residents. The Petitioners immediately rushed to court on the 6/11/2020 and filed this instant Petition. Further, the 1st Respondent avers that the Petitioners ought to have first exhausted all the avenues for dispute

resolution before rushing to this Court for redress. The alleged letter was just but an excuse for the filing of this instant Petition rather than seeking a redress to the issue at hand.

8. On the allegation by the Petitioners that they were denied access to information, the 1st Respondent avers that the Petitioners have failed to comply with provisions of The Access to Information Act No. 31 of 2016.

9. The 1st Respondent further avers that there is no evidence that the Petitioners are indeed residents residing near Mvita Clinic, and that they could be imposters whose sole intent is to ensure the project on Covid-19 does not take off.

10. The 1st Respondent states that the Mvita Clinic isolation center is supposed to serve the majority of the Mvita Residents and Mombasa Residents and not only the Petitioners in this instant Petition. Therefore, this Court should consider the interest of the general good of the public rather than that of 22 individuals. The current Covid-19 pandemic is a pandemic that was unforeseen and not something that the

world was expecting. Therefore, there is a need to ensure the virus is contained to stop its spreading and where a community is exposed, there is a need to set up relevant facilities to cater for their medical attention. The 1st Respondent further states that the State Government, when easing the restrictions it had placed earlier, directed all counties to establish isolation centers with a minimum capacity of 300 beds. In compliance the 1st Respondent initially set up isolation centers at the Coast General Teaching and Referral Hospital and the Technical University of Mombasa. The Technical University of Mombasa had a bed capacity of 300 while the Coast General Teaching and Referral Hospital has a bed capacity of only 120 together with the Intensive care unit. Due to the resumption of education, the isolation center set up at the Technical University of Mombasa was shut down and thus the County Government of Mombasa has a deficit of 300 beds to cater for covid-19 patients within the County. The Coast General Teaching and Referral Hospital has an isolation center of bed capacity of 90 beds, and as of now the isolation center is fully occupied. Together with the isolation ward, there is also Intensive Care Unit. Mvita Clinic is not the only health institution that the County Government of Mombasa is taking steps to include as an Isolation Centre. Similar Isolation Centres will be set up in Tudor, Marimani and Mtongwe.

11. The setting up of such Centres will fully comply with Ministry of Health Regulations and guidelines including the provision of PPEs for clinical team and support staff; handling of all medical waste will be as per the infection prevention and control guidelines with proper disposal mechanisms put in place; provision of adequate sanitary facilities; regular Covid-19 test for staff at the facility and quarantine for a fortnight after completion of 16 days of duty; CCTV coverage provided within the ward to minimize patient/staff interaction and to monitor any unnecessary movements; clear demarcation of the green and red zone to reduce unnecessary interaction with Covid-19 patients admitted at the facility; staff in green zone area will be provided with surgical masks, hand sanitizers and hand wash points; the facility will use a paperless system for recording patients' clinical data; drainage has been improved to ensure no discharge leaves the facility untreated; partitions made to secure the area where patients will be admitted, and perimeter fence to secure the facility, among other regulations and guidelines.

12. Apart from the above precautionary measures, the 1st Respondent states that there are regular training and sensitization of staff on infection prevention and control. This includes, training support staff on infection prevention and control measures and handling of different types of waste. In addition, the clinical team shall be divided into two separate teams that work in different shifts to avoid exposure to the entire team in case a member turns positive for Covid-19. The 1st Respondent states that the Petitioners are misleading this Court by stating that Mvita Clinic is the only health facility around the area that they can seek medical attention from. To the contrary there are other health facilities namely: Kingorani Dispensary, Majengo Dispensary, Mwembe Tayari Dispensary and Ganjoni Dispensary.

13. In any event Isolation Centre that was situated at the Technical University of Mombasa that neighbored schools, residences, mosques, churches, restaurants and many other institutions did not report any Covid-19 spread in that particular area. Coast General Teaching and Referral Hospital is similarly situated around a residential area. It harbors schools, business entities and such other institutions yet there have been no reports of Covid-19 spreading sporadically in that area. The 1st Respondent states that the manner of the spread of Covid-10 is now scientifically known, and does not lend itself to conjectures, speculation or guesswork, and so there should be no alarm about the proposed Covid-19 Isolation Centre of Mvita Clinic.

14. The 1st Respondent states that the Petition herein does not meet the threshold test for the prayers sought and consequently the Petition should be dismissed with costs to the Respondents.

15. The 2nd and 3rd Respondents filed Grounds of Opposition on 13/11/2020 stating that the petition is frivolous, vexatious and an abuse of court process and does not merit orders sought therein.

Submissions

16. The petition was canvassed through written submissions. The Petitioners filed submissions on 17/11/2020.

17. The 1st Respondent filed their submissions on 20/11/2020.

18. I have carefully considered the Petition and opposition to it. I have also considered submissions of all parties and authorities relied on.

Determination

19. In my view the following issues arise for determination by this Court.

- (i) Whether the petition raises constitutional issues.
- (ii) Whether the Petitioners' right under Article 35 was abrogated.
- (iii) Whether there was need for public participation, and if so, whether the same was done.
- (iv) Whether the doctrine of necessity applies.

(i) Whether the petition raises constitutional issues

20. The 2nd and 3rd Respondents have raised grounds of opposition on the basis that the petition does not conform with the Law in that it does not particularize the rights being infringed. However, in my view, the Petition has cited **article 43 of the Constitution** which provides for the right to highest attainable standard of health. The Petitioners have stated that the setting up of Mvita Clinic as an isolation and treatment centre for Covid-19 will affect their health as the disease has a high rate of transmission.

21. The Petitioners have also relied on **Article 35 of the Constitution** in relation to right to information on the process of setting up the Covid-19 isolation and treatment centre. The Petitioners allege that they were not given an opportunity to participate in any public hearings and/or discussions before the Respondents could embark on the process of converting and/or setting up the same. I am therefore satisfied that the Petition has met the threshold set up in **JOO (also known as JM) v Attorney General & 6 others [2018] eKLR**, where the Court in considering the competency of a Petition before it made the following observation:

“My view is that this ground cannot succeed as the Petitioner was clear and precise in her Petition regarding her grievances and in detailing the alleged violation of her rights. Nonetheless even if there were shortcomings Article 159 of the Constitution demands that in exercising Judicial authority courts shall be guided by principles that include justice being administered without due regard to technicalities. In *Trusted Society of Human rights Alliances Vs. AG & Others* High Court Petition 229 of 2012 the High court stated,

“... the test does not demand mathematical precision in drawing Constitutional Petitions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a Constitutional Petition are fashioned in a way that gives proper notice to the Respondent about the nature of the claims being made so that they can adequately prepare their case.

(ii) Whether the Petitioners’ right to access information under Article 35 of the constitution was abrogated.

22. Article 35 of the Constitution guarantees citizens right to access public information. Before that however, there is a clear procedure to be followed by anybody who seeks information under Article 35 of the constitution. The relevant provisions are as follows:

“35(1) Every Citizen has a right of access to:

(a) Information held by the state,

(b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.”

23. Pursuant to this Article, there was enacted the Access to Information Act, No. 31 of 2016 whose preamble is in these terms:

An Act of Parliament to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes.

24. Clearly this Act was enacted for the purpose of conferring upon the “*Commission on Administrative Justice*” the oversight authority and responsibility in the enforcement and eventual fulfillment of those matters envisaged as falling within the purview of Article 35 of the Constitution. This, and no less, is the purpose and responsibility of that body. By reason of the above enactment, PART III of that Act makes provision for ACCESS TO INFORMATION, and then, at Section 7(1) thereof provides as follows:

“(1) A chief executive officer of a public entity shall be an information access officer for purposes of this Act.”

Then, sub-section (2) provides:

“(2) A chief executive officer of a public entity may delegate the performance of his or her duties as an information access officer under this Act to any officer of the public entity.”

25. In this respect, there is established in every Public body, a designation of an Information Access Officer. Such an office as stated above having been established, Section 8 makes provision for the Application for Access to such information as follows:

“(1) An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.

(2) Where an applicant is unable to make a written request for access to information in accordance with subsection (1) because of illiteracy or disability, the information officer shall take the necessary steps to ensure that the applicant makes a request in a manner that meets their needs.

(3) The information officer shall reduce to writing, in a prescribed form the request made under subsection (2) and the information officer shall then furnish the applicant with a copy of the written request.”

26. For the avoidance of doubt, and to buttress the necessity of the framing and making of an application in the manner prescribed, sub-section (4) thereof provides as follows:

“(4) A public entity may prescribe a form for making an application to access information, but any such form shall not be such as to unreasonably delay requests or place an undue burden upon applicants and no application may be rejected on the ground only that the applicant has not used the prescribed form.”

27. Once such an application has been made, provision is made at Section 9 of the manner in which this information is to be processed. That Section 9 provides as follows:

- “(1) Subject to section 10, a public officer shall make a decision on an application as soon as possible, but in any event, within twenty one days of receipt of the application.**
- (2) Where the information sought concerns the life or liberty of a person, the information officer shall provide the information within forty-eight hours of the receipt of the application.**
- (3) The information officer to whom a request is made under subsection (2) may extend the period for response on a single occasion for a period of not more than fourteen days if—**
- (a) the request is for a large amount of information or requires a search through a large amount of information and meeting the stipulated time would unreasonably interfere with the activities of the information holder; or**
 - (b) Consultations are necessary so as to comply with the request and the consultations cannot be reasonably completed within the stipulated time.**
- (4) As soon as the information access officer has made a decision as to whether to provide access to information, he or she shall immediately communicate the decision to the requester, indicating—**
- (a) whether or not the public entity or private body holds the information sought;**
 - (b) whether the request for information is approved:**
 - (c) if the request is declined the reasons for making that decision, including the basis for deciding that the information sought is exempt, unless the reasons themselves would be exempt information; and**
 - (d) if the request is declined, a statement about how the requester may appeal to the Commission”; (Emphasis given)**
- (5) A public officer referred to in subsection (1) may seek the assistance of any other public officer as the first mentioned public officer considers necessary for the proper discharge of his or her duties and such other public officer shall render the required assistance.”**

28. Of great significance in this enactment is sub-section (6) which provides as follows:

“(6) Where the applicant does not receive a response to an application within the period stated in subsection (1), the application shall be deemed to have been rejected.”

29. It is therefore the view of this Court that this Act has provided a full mechanism of the manner in which a citizen should apply for and obtain information from the state or other public body. Where any such information is denied, then the public body is duty bound, by the provisions of Section 9 (d) to provide the applicant, in that Section called “the requester” with a comprehensive Statement on how such “requester” will make an appeal “to the Commission”.

30. Section 2 of the Act interprets the term Commission to mean:

“the Commission on Administrative Justice established by Section 3 of the Commission on Administrative Justice Act, No. 23 of 2011.”

31. Apart from complaints to the Commission, which are provided for in Part III of the Act, Part IV of that Act provides for REVIEW of Decisions by the Commission. By Section 14 of that Part, provision is made as follows:

- (1) Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information—**
- (a) a decision refusing to grant access to the information applied for;**
 - (b) a decision granting access to information in edited form;**
 - (c) a decision purporting to grant access, but not actually granting the access in accordance with an application;**
 - (d) a decision to defer providing the access to information;**
 - (e) a decision relating to imposition of a fee or the amount of the fee;**
 - (f) a decision relating to the remission of a prescribed application fee;**

(g) a decision to grant access to information only to a specified person; or

(h) a decision refusing to correct, update or annotate a record of personal information in accordance with an application made under section 13.

(2) An application under subsection (1) shall be made within thirty days, or such further period as the Commission may allow, from the day on which the decision is notified to the applicant.

(3) The Commission may, on its own initiative or upon request by any person, review a decision by a public entity refusing to publish information that it is required to publish under this Act.

Again to underscore the necessity of meticulously following this enactment, sub-section (4) of that Section provides as follow:

(4) The procedure for submitting a request for a review by the Commission shall be the same as the procedure for lodging complaints with the Commission stipulated under section 22 of this Act or as prescribed by the Commission.

32. In the light of the foregoing, it is clear that this Act has a comprehensive procedure to be followed by any citizen in need of any information from a public body. The mode of applying for such information has been set out. The manner of complaining against any unfavourable decision of the Commission has been given. The manner of applying for Review of a decision of the Commission has also been provided for. These procedural requirements have all been flouted, if not forgotten by the Petitioner herein, and they cannot now purport that their rights to information under Article 35 of the Constitution has been denied.

(iii) Whether Petitioners social and economic rights under Article 43 were fringed.

33. It is worth noting that the State Government during the initial stages had imposed restrictions ranging from cessation of movement as between counties to curfew hours. The various restrictions that were imposed brought about a low growth in the economy and this necessitated the State Government through consultations with the Council of Governors to ease some of the restrictions that were earlier imposed. The easing of the restrictions required counties to set up isolation centres with a minimum of 300 (three hundred) bed capacity. The County Government of Mombasa initially had set up such a facility at the Technical University of Mombasa, however due to the resumption of education services it was shut down. Currently, the only Isolation Centre that is available is at the Coast General Teaching and Referral Hospital that has a general ward isolation capacity of only 90 beds which are fully occupied. With this reality on the ground, the County Government of Mombasa applied of Section 13 of the Public Health Act which states as follows:

“13. General duties of health authorities

It shall be the duty of every health authority to take all lawful, necessary and, under its special circumstances, reasonably practicable measures for preventing the occurrence or dealing with any outbreak or prevalence of any infectious, communicable or preventable disease, to safeguard and promote the public health and to exercise the powers and perform the duties in respect of the public health conferred or imposed on it by this Act or by any other law”.

The 1st Respondent applied the precautionary principle established in **Republic v Ministry & 3 Others Ex-Parte Kennedy Amdany Langat & 27 Others [2018] eKLR** as follows:

“126. Therefore, applying the precautionary principle, which principle is designed to prevent potential risks, I find and hold that it is the duty of the state to take protective measures without having to wait until the reality and seriousness of those risks are fully demonstrated or manifested. This approach takes into account the actual risk to public health, especially where there is uncertainty as to the existence or extent of risks to the health of consumers. The state may take protective measures without having to wait until the reality and the seriousness of those risks are apparent.”

It was further held that: -

“128. At the core of this precautionary principle are many of the attributes of public health practice including a focus on primary prevention and a recognition that unforeseen and unwanted consequences of human activities are not unusual.

“129. Additionally, where, in matters of public health, it proves impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted as was alleged by the applicants in this case, but the likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures, provided they are non-discriminatory and objective.”

34. Furthermore, the Cabinet Secretary for the Ministry of Health subject to Section 36(m) of the Public Health Act made regulations *“The Public Health (Prevention, Control and Suppression of Covid-19) Regulations, 2020.”*

Regulation 13 of the above cited regulations states as follows: -

“Subject to the conditions to be specified by the Cabinet Secretary by notice in the Gazette, the Cabinet Secretary may depending on the circumstances in an area, whether designated as an infected area or not, designate a private health facility, an educational institution, hotel or any other establishment as he may deem appropriate as a designated facility for purposes of handling and or

treatment of COVID-19 patients.”

35. The 1st Respondent in their Response at paragraph 20, 21, 22, 23, 24 and 32 has highlighted all the precautionary measures that will be undertaken in ensuring the Mvita Clinic is safe to not only the Petitioners but the general residents of Mombasa and the Covid-19 patients.

36. In my view, in fact to the contrary the 1st Respondent in setting up this Isolation Centre is ensuring that the Petitioners rights as enshrined in Article 43 of the Constitution, the right to highest attainable standard of health, is protected. The Petitioners should therefore be embracing this initiative instead of opposing it.

(iv) Whether the doctrine of necessity applies.

37. The doctrine of necessity is a term used to describe the basis on which extraordinary actions by administrative authority, which are designed to restore order or uphold fundamental constitutional principles, are found to be constitutional even if such an action would normally be deemed to be in contravention to established norms or conventions. It also includes the ability of a private person to violate a law without punishment where the violation of law was necessary to prevent even worse harm. The maxim on which the doctrine is based originated in the writings of the medieval jurist **Henry de Bracton**, and similar justifications for this kind of extra-legal action have been advanced by more recent legal authorities, including William Blackstone.

In modern times, the doctrine was first used in a controversial 1954 judgment in which Pakistani Chief Justice Muhammad Munir validated the extra-constitutional use of emergency powers by Governor General, Ghulam Mohammad. [1] In his judgment, the Chief Justice cited Bracton's maxim, *'that which is otherwise not lawful is made lawful by necessity'*, thereby providing the label that would come to be attached to the judgment and the doctrine that it was establishing. The doctrine of necessity has since been applied in a number of Commonwealth countries, and in 2010 was invoked to justify extra-legal actions in Nigeria.

38. The doctrine of necessity can therefore be used to justify a situation which under ordinary conditions cannot be allowed. In my view, Covid-19 pandemic is a perfect situation which would warrant deviation from the normal. As the Cabinet Secretary for Health Mutahi Kagwe frequently says, **if we treat Covid-19 normally, it will treat us abnormally**. We should therefore uploud the efforts being made by the Respondent to respond to, and to control Covid-19 pandemic. This disease did not give the world notice of its arrival. Therefore, the normal constitutional requirements could not be met when programmes were put in place to fight Covid-19 pandemic.

39. Courts have dealt with the concepts of public participation and stakeholders' consultation or engagement. The High Court in **Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR** while referring to the South African decision in **Doctors for Life International vs. Speaker of the National Assembly & Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC)** adopted the following definition of public participation: -

According to their plain and ordinary meaning, the words public involvement or public participation refers 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.

40. Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms. At times it may include consultations. The Black's Law Dictionary 10th Edition defines 'consultation' as follows: -

The act of asking the advice or opinion of someone. A meeting in which parties consult or confer.

41. The Petitioners have alleged that there was no public participation in the decision to make Mvita Clinic Isolation Centre for covid-19 patients. In my view, and applying the doctrine of necessity above, there was no time to engage the Petitioners or the public on public participation in the making of that decision. However, the Respondents were obligated, and they appreciated this obligation, to explain to the public what they were doing and the possible health consequences of their project. More importantly, the Respondents had the mandate to explain, in whichever forum, that their action would be guided by the regulations and guidelines of the Ministry of Health in the management and control of the infection and spread of Covid-19. This, in my view, was done. If the action or the manner in which it was done was not adequate, this shortcoming was cured by the law of necessity. It is the collective duty of every mankind on planet earth to stop corona.

42. For the foregoing reasons, I find and hold that the Petition herein was not proved as required by the law, lacks merit and the same is herewith dismissed. Parties shall bear their own costs.

Dated, Signed and Delivered at Mombasa this 17th day of December, 2020.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Tojbhai for 1st Respondent

No appearance for Petitioners

Ms. Peris Court Assistant

Note:

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.