



**REPUBLIC OF KENYA**

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

**PETITION NO. 4 OF 2018**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 2(1), 2(3), 23(3), 185(2), 291(B) AND 209 (8) (5) OF THE CONSTITUTION OF KENYA, 2010.**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF PART 2 OF PARAGRAPH 7(B) OF THE 4TH SCHEDULE OF THE CONSTITUTION, 2010 VIOLATION OF THE PROVISIONS OF ARTICLES 40, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF RULE 4 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURES RULE (2013)**

**AND**

**IN THE MATTER OF SECTION 8 AND 87 OF THE COUNTY GOVERNMENT ACT, ACT NO. 17 OF 2012**

**AND**

**TECHNOLOGIST ACT NO 10 OF 1999, PHARMACY AND POISON BOARD ACT CAP 244, NURSES ACT 257, CLINICAL OFFICER COUNCIL (TRAINING REGISTRATION AND LICENCING ACT CAP 16)**

**AND**

**IN THE MATTER OF THE TRANS NZOIA COUNTY FINANCIAL BILL, 2017**

**BETWEEN**

**SAMUEL MAHINDU & 25 OTHERS .....PETITIONERS**

**VERSUS**

**TANS NZOIA COUNTY GOVERNMENT .....1ST RESPONDENT**

**THE FINANCE COUNTY EXECUTIVE.....2ND RESPONDENT**

**RULING**

1. The Applicants application dated 17/7/2018 prays for the order that;

1). Spend

2) Pending the hearing and determination of the Petition a conservatory order does issue staying and or to stay/suspend the following provisions of Trans Nzoia County Finance Bill 2017.

2. The application has been supported by the sworn affidavit of Samuel Mahindu dated 17/7/2018 together with the attached annexures.

3. Substantially, the Applicants are medical practitioners within this county of Trans Nzoia. They are complaining that the Respondents have passed 2017 Finance Act which has demanded a single business licences from the applicants. They argue that the same is ultra vires and against the provisions of clause 7(d) Part II of the 4<sup>th</sup> Schedule of the Constitution. In effect what the Respondent has done is to regulate the applicants which is a professional body and in effect tax the applicants twice.

4. In a nut shell they are alleging that the only body required to regulate them is their Professional bodies and not the Respondent.

5. As a consequence of the Respondent action, their members have been coerced to pay the fees and those who refused have been threatened with Criminal action. Infact they have been summoned to appear in court. They are therefore seeking the court's protection pending the determination of the substantial petition.

6. One Sifuna Wakofula has filed a replying affidavit in favour of the Respondents dated 10/9/2018. He argued interalia that the 2<sup>nd</sup> Respondent is mandated under Section 35 of the County Governments Act No. 17/2012 to perform such actions as are prescribed under Section 36 of the said Act. That part 2 of the 4<sup>th</sup> Schedule to the Constitution sets forth the functions of the County Governments which include levying of fees and other charges.

7. He argued that levying of licencing fees is not equivalent to the professional charges paid by the applicants to their professional bodies. He said that there was a distinction between the Professional charges and the trade fees.

8. The duty of this court for now is not to determine the substantive petition. That is left for another day. The question is whether in the light of the pleadings exhibited, the applicants are entitled to the conservative orders as prayed. It is trite law that the Applicants must demonstrate what danger they stand to suffer or prejudice if the orders are not granted.

9. In *Martin Nyaga Wambora Vs Speaker of the County Assembly of Embu & 3 others (2014) eKLR*, Justice Mwongo J stated as follows in the question of "real danger";

**“ To those erudite words I would only highlight the importance of demonstration of “real danger”.**

**The danger must be imminent and evident, true and actual and not fictitious; so much so that it desires immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the courts attention.**

**Therefore the burden is on the person seeking to suspend the operationalisation of a legislation or part of it to show that there is danger which is imminent and evidence, true and actual and not fictitious and which danger deserves immediate remedial attention or redress by the court. A remote danger will not do. In other words the applicants must show that the probability as opposed to mere possibility of the danger occurring is real and imminent”.**

10. On the face of it, there is nothing exhibited by the applicants to show that the respondent has passed the impugned Act or the bill. The only annexure shown by the applicants are some trade licences as well as Professional qualifications. It becomes therefore difficult to determine the issues raised in the absence of the key document. There was no gazette exhibited at all.

11. The respondent have not done better. Although they have no obligation to prop the applicant's case, it would have been appropriate to show the court too.

13. Be it as it may, does the applicants stand to suffer any loss or prejudice pursuant to the defendants action? I do not think so. Some of the members have already complied. The distinction between the Professional charges and the trading fees are clear and distinct in my view. This would however be distinguished clearly at the substantive determination of the petition.

14. For now this court is not satisfied that they (applicants) stand to suffer such loss that cannot be compensated even by award of damages.

15. The application is therefore disallowed. Costs shall await the outcome of the petition.

**Delivered, signed and dated at Kitale this 30<sup>th</sup> day of January, 2019.**

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**H.K. CHEMITEI**

**JUDGE**

**30/1/19**

**In the presence of:**

**Arunga for the Petitioners**

**No appearance for the Respondents**

**Court Assistant – Kirong**

**Ruling read in open court.**