



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW NO 9 OF 2018**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE MEDICAL PRACTITIONERS AND DENTIST ACT CAP 253**

**AND**

**IN THE MATTER OF NURSES ACT CAP 257**

**AND**

**IN THE MATTER OF CLINICAL OFFICERS COUNCIL (TRAINING, REGISTRATION AND LICENSING)ACT, CAP 260**

**AND**

**IN THE MATTER OF KENYA MEDICAL LABORATORIES, TECHNICIANS AND TECHNOLOGISTS ACT NO. 10 OF 1999**

**AND**

**IN THE MATTER OF PHARMACY AND POISON BOARDS ACT CAP 244**

**AND**

**IN THE MATTER OF COUNTY GOVERNMENT ACT, 2012 (NO.17 OF 2012)**

**AND**

**IN THE MATTER OF ARTICLES 22(1), 23(1) & 3. 159 (2)(A), 165(3)(B,D) & 258 1&2(B) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 10 (1)(2), 21(2),27(1)(2),47(1) & 2 AND CLAUSE 7(B) PART II OF THE FOURTH SCHEDULE OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTIONS 4 AND 7 OF THE KAJIADO COUNTY TRADE LICENSE ACT, 2016**

**AND**

**IN THE MATTER OF PAYMENT FOR SINGLE BUSINESS PERMIT**

**AND**

IN THE MATTER OF LAW REFORM ACT

REPUBLIC.....APPLICANT

VERSUS

THE KAJIADO COUNTY ASSEMBLY ..... 1<sup>ST</sup> RESPONDENT

THE KAJIADO COUNTY GOVERNOR.....2<sup>ND</sup> RESPONDENT

THE KAJIADO COUNTY SECRETARY..... 3<sup>RD</sup> RESPONDENT

KAJIADO COUNTY ENFORCEMENT OFFICER.....4<sup>TH</sup> RESPONDENT

KAJIADO COUNTY EXECUTIVE FOR HEALTH.....5<sup>TH</sup> RESPONDENT

KAJIADO COUNTY EXECUTIVE TREASURY.....6<sup>TH</sup> RESPONDENT

KAJIADO COUNTY REVENUE OFFICER.....7<sup>TH</sup> RESPONDENT

KAJIADO NORTH SUB COUNTY REVENUE OFFICER.....8<sup>TH</sup> RESPONDENT

KAJIADO SUB COUNTY LICENSING OFFICER.....9<sup>TH</sup> RESPONDENT

AND

1. RICHARD WAMBUGU WANGOMBE

2. ANNE WANJIRU KINGORI

3. PETER KAGUAI WANGUNYU

4. MAGDALINE THIGA

5. DAVID MURIITHI MUNENE.....EX PARTE APPLICANTS'

JUDGMENT

1. The Ex parte applicants moved this court by way of a notice of motion dated and filed 12<sup>th</sup> July, 2018 brought under order 53(1) of the Civil Procedure Rules, sections 8(2) and 9 of the Law Reform Act, chapter 26 laws of Kenya and all other enabling provisions of the law. The motion was filed pursuant to leave of court granted to the applicants on 3<sup>rd</sup> July, 2018 to institute judicial review proceedings to challenge the respondents' decision to levy single business permit against the Ex parte applicants. They sought the following orders;

- a) An order of certiorari to remove into the high court and quash the decision of the respondents purporting to levy single business permit license from the applicants who are members of the medical profession*
- b) An order of certiorari to move into the High Court and quash the decisions of respondents to levying single business permit and declare sections 4 and 7 of the Kajiado county trade license act as unconstitutional*
- c) An order of prohibition directed to all the respondents jointly and severally prohibiting any of them from carrying out and/or proceeding with the implementation of their decision to levy from the applicants and the members of the medical profession practicing within Kajiado county for single business permit*
- d) An order of prohibition directed to all the respondents jointly and severally prohibiting any of them from bringing, instigating, instituting, carrying out or proceeding with any criminal proceedings or charges in connection with the single business permit payment by the applicants*
- e) An order that the costs of this application be paid for by the respondents*

2. The motion was based on the statutory statement filed together with the application for leave on 12 July, 2018 and the verifying affidavit by Richard Wambugu Wang'ombe of the same day. The Ex parte applicants stated that they are members of professional bodies practising and operating private medical and other facilities within Kajiado County. They took issue with the enactment of the Kajiado Trade License Act, 2016 which introduced single business permit levy against them.

3. The applicants contended that the decision to levy single business permit against them is *ultra vires*, unconstitutional, discriminatory, unreasonable, oppressive and amounts to double taxation, thus contravenes their constitutional right to equality before the law and fair administrative action guaranteed under Articles 27(1) and 47(1) of the Constitution. In the view of the applicants' courts have already held that where there is another written law for the regulation and control of a trade, occupation or a profession, the respondents have no legal authority or power to regulate or control the particular trade, occupation or profession.

4. The 1<sup>st</sup> respondent filed a replying affidavit by Josiah Leboo Saisa Yiaro, its acting clerk sworn and filed on 22<sup>nd</sup> October 2018 He deposed that the Kajiado Trade License Act 2016 was passed after it had been subjected rigorous process before its enactment; that the process went through public participation and those likely to be affected by the legislation given an opportunity to present views. He stated that Act does not regulate the Ex parte applicants' professional practice but its purpose is to levy fee which does not amount to double taxation.

5. The 2<sup>nd</sup> to 9<sup>th</sup> respondents filed a Notice of Preliminary objection dated 26<sup>th</sup> September 2018 and filed in court on the same day. They contended that the application is *res judicata*; that the issues and orders are the same as those determined in **Judicial Review No. 13 of 2016** and therefore the present application cannot stand.

6. They also filed a replying affidavit by Maurice Kaikai, the County Attorney, sworn on 27<sup>th</sup> February 2019 and filed in court on 30<sup>th</sup> April 2019. He deposed that the present suit is bad in law; offends the doctrine of *res judicata* and is an abuse of the court process. He further deposed that the impugned Act was enacted on 4<sup>th</sup> August 2016 yet the applicants did not challenge the constitutionality of sections 4 and 7 of the Act in the former suit, **JR No 13 of 2016**. He stated that the fees imposed is for operating businesses selling drugs which is different from license fees paid by the Ex Parte applicants to their professional bodies and, therefore, it is not double taxation.

7. Mr Kaikai further stated that the establishments operated by the applicants comprise of shops selling pharmaceuticals and the single business permit is a charge imposed on shops and establishments trading in drugs and other items sold in chemists or other establishments. This, he contended, is different from the fees the applicants pay as individual members to their professional bodies..

#### ***Applicants' submissions***

8. Mr Wakla, learned counsel for the Ex parte applicants submitted highlighting their written submissions dated 20<sup>th</sup> November, 2018 and filed in court on 23<sup>rd</sup> November, 2018. He argued, first; that the application is not *res judicata*. According to counsel, the issue of *res judicata* does not arise and therefore the preliminary objection should be dismissed. He submitted that the issue in the present application is the about constitutionality of section 4 and 7 of the impugned Act of 2016 when juxtaposed against clause 7(b) Part 2 of the Fourth Schedule to the Constitution. In counsel's view, the issue of constitutionality never arose in the former suit.

9. Mr Wakla again argued that the former suit was about the County finance Act of 2014/2015 which had been overtaken by events by the time of filing of the present application. It was counsel's submission that the issues in the present application revolve around the 2016 Act which did not exist when the former suit was filed. He also argued that the former suit was not heard and determine on merit since the orders sought were found to be untenable given that the impugned Act was no longer in force.

10. With regard to whether sections 4 and 7 of the impugned Act contravene clause 7(b) of part 2 of the Fourth Schedule to the Constitution, counsel argued that they do and are therefore unconstitutional. Citing Article 185 of the Constitution, counsel argued that the Article empowers the 1<sup>st</sup> respondent to make laws that are necessary for the effective performance of its functions and the exercise of its powers under the Fourth Schedule. However, according to counsel, the Fourth Schedule not only gives the powers but also limits the scope of application to the extent of regulation of professionals. In his view, the Constitution is clear that regulation of trade excludes professionals.

11. Mr. Wakla further submitted that the effect of sections 4 and 7 of the impugned Act is to compel every person conducting business within the county, including professionals, to pay for the single business permit, regardless of whether or not the professionals have paid such fees to the national government through their respective governing bodies. Counsel argued that the Ex parte applicants have been making annual payments for their licensing and regulation to their respective professional bodies and obtain license certificates. He contended therefore, that seeking to levy fees for single business permit against the applicants amounts to double taxation which is unconstitutional.

12. Reliance was placed on ***Republic v Nakuru County Assembly & others, (Nakuru HCCC JR No. 14 of 2014)*** where the court held that ***"the county government of Nakuru had no powers to pass laws directed to regulations by levying single business permit upon medical practitioners within the county as that function was specifically excluded under clause 7(b) of part two of the fourth schedule of the constitution and the court went on to issue orders of certiorari to quash the levy and prohibit the county government from implementing the same."***

13. Counsel argued, therefore, that imposition of the single business permit levy against the applicants as a precondition to conducting their businesses within the county is inconsistent with the Fourth Schedule to the Constitution and a violation of their rights.

#### ***1<sup>st</sup> respondent's submissions***

14. Mr. Koin, learned counsel for the 1<sup>st</sup> respondent, submitted also highlighting their written submissions dated 9<sup>th</sup> April 2019 and filed in court on 10<sup>th</sup> April, 2019, that sections 4 and 7 of the impugned Act are constitutional. Counsel argued that the powers of the county government are derived from the Constitution and one such power is issuance of trade licenses. Counsel contended that the 1<sup>st</sup> respondent is not regulating the applicant's profession by demanding payments for trade licenses from them. He relied on ***Andrew Wasswa Atetwa Kilimanjaro auctioneers & 21 others v Mombasa County Government and another 2015***.

15. In that case it was held that what the respondents were doing in levying taxes did not amount to regulating the applicant's profession. The court was of the view that the respondents were only charging a fee for the service they rendered which services make the applicants run their business smoothly. For that reason, the applicants were not expected to get services from the county government without paying for services such as garbage collection, provisions of water and sewerage services, cleaning of the environment and many other services provided by the county government. That was what the county government was charging.

16. It was counsel's submission that the demand by the county government for payment of trade licenses does not amount to double taxation of the applicants. In his view, payment for licenses to various regulatory bodies of the applicants is for purposes of satisfying those bodies that they meet the required standards to be granted such licenses. He also contended that the county government is demanding payment for services it renders to the applicants.

### **2<sup>nd</sup>-9<sup>th</sup> respondent's submissions**

17. Mr. Nyakwana, learned counsel for the 2<sup>nd</sup> to 9<sup>th</sup> respondents also submitted highlighting their written submissions dated 13<sup>th</sup> February, 2019 and filed in court on 14<sup>th</sup> February 2019 that the application is *res judicata* in that the issues raised therein ought to have been raised in the previous suit. According to counsel, the impugned Act was enacted on 4<sup>th</sup> August, 2016 and existed at the time of filing the former suit. In counsel's view, the former application, **J R No. 13 of 2016**, was on the Finance Act 2014/15 and the Ex parte applicants negligently failed to plead the constitutionality of sections 4 and 7 of the Kajiado County Trade License Act in that suit.

18. He submitted that the issues in this application were directly and substantially in issue in the former suit and the court determined them on merit. In his view, it is untenable for the applicants to argue that the former suit was challenging the constitutionality of the Finance Act 2014/2015 and is to that extent different from the present application. He contends that the applicants should have exercised reasonable diligence and plead their entire claim in the former suit and if they were aggrieved by the decision of the court they should have appealed.

19. On whether sections 4 and 7 of the impugned Act are unconstitutional, counsel submitted that the Constitution requires the 2<sup>nd</sup>-9<sup>th</sup> respondents to provide services to residents and these services are financed through fees and charges imposed to discharge functions that fall within the mandate of the county government under the Fourth Schedule. And in conformity with Article 209 of the Constitution, the county enacted the Act which sets out the charges, levies and fees to be collected in fulfilment of its revenue raising mandate.

20. According to counsel, although the applicants belong to professional bodies, that membership does not remove them from the jurisdiction of county government for the purpose of levying taxes for certain services it provides to them. Counsel contended that exempting the applicants from paying for those services would be unfair given that other stakeholders pay their taxes. He argued that professional practitioners within the county benefit from services provided by the county government and, therefore, it will be detrimental to the county government's revenue raising measures if all professional were to be precluded from taxation.

21. On the issue of whether the levying of taxes for services provided by the County Government amounted to regulations of professionals as envisioned in clause 7(b) of Part 2 of the Fourth Schedule to the Constitution, counsel relied on ***Medina Hospital Limited & 5 others v County government of Garissa*** [2015] eKLR for the submission that there is a clear distinction between fees paid to a professional regulatory body for the exercise of a profession and fees imposed by a county government for the provision of services contemplated under Article 209(4) of the Constitution for which the county government has a right to collect.

22. Mr. Nyakwana further argued that the establishments ran by the applicants comprise of shops selling pharmaceutical goods and therefore, the single business permit is a charge imposed on the shops and establishment is a charge on trading in pharmaceutical goods in those establishments. He contended that the trade fees imposed on the premises selling drugs is different from license fees paid by the applicants to their professional bodies.

23. In counsel's view, fee paid by the applicants to their professional bodies is a professional levy paid to those bodies and has no correlation with the trading component of shop selling pharmaceutical goods within their establishment. Counsel sought to draw a distinction between the applicants and other professionals such as advocates, who, he argued, do not sell, trade or own shops or engage in trading activities but provide legal services only.

24. Counsel relied on ***Kenya Pharmaceuticals Association and another v Nairobi City County & 46 others*** [2017] eKLR to support his case. In that case the court held that;

***“Trade license for operating the premises of selling drugs is not the same as license fees and in my view cannot amount to regulation. The court went on to The provisions of the institution are clear. The regulation of trade excludes professionals. Regulation means the state of being controlled or governed.” The preamble of the pharmacy and poisons act provides that it is “an act of parliament to make better provision for the control of the profession of pharmacy and trade in drugs so that unqualified persons do not engage in the profession and trade of selling drugs. To regulate means to “control by laws or rule.” That merely means that the petitioners must have a certificate from the professional body that they are qualified for the year in question to be issued with a licence to carry out the prescribed activities for the period or year in question. The payment of a fee for the grant an annual practicing certificate by the petitioners is not a bar to any other legitimate charges that may be imposed by the county government. In other words what a county government is prohibited from doing is the issue of a regulatory licence. The trade licensing fee is paid for trading in the county.”***

25. He urged that the application be dismissed with costs.

### **Determination**

26. I have considered the application; responses, submissions and the authorities relied on. Two issues arise for determination. First, whether the application is **res judicata** and, depending on the answer to the above issue, whether sections 4 and 7 of the impugned Act are constitutionally invalid.

27. The applicants are professionals plying their trade within Kajiado County. They have brought this application to challenge the respondents' decision to levy single business permit against them. They argue that the action is illegal and unlawful. They have therefore challenged the county legislation that introduced the levy. They also argue that the action amounts to regulation contrary to the Constitution. They hold the view that sections 4 and 7 of the Act violate clause 7(b) of the Part 2 of the Fourth Schedule to the Constitution and are therefore unconstitutional.

28. The respondents raised a preliminary objection against the application arguing that the current application is **res judicata**. According to them, the issues raised in the application were determined in **JR No. 13 of 2016**. They contended in the alternative, that the issue raised in the present application ought to have been raised in the previous suit because Kajiado Trade License Act was in existence at that time.

29. To this argument, the applicants countered that the application is not **res judicata**. According to them, the former suit revolved around Kajiado Finance Act 2014/2015 and at the time of filing that suit, Kajiado Trade License Act had not been enacted. They also argued that, the issue in the present application is on the constitutionality of sections 4 and 7 of the Kajiado Trade License Act which they argue contravene clause 7 (b) Part 2 of the Fourth Schedule to the Constitution.

#### **Whether the application is res judicata**

30. **Res judicata** is a principle of law that is intended to bring litigation to an end. It bars subsequent suits against the same parties over the same subject matter where issues in contention have previously been fully determined by a court of competent jurisdiction. In this respect, for a suit to be **res judicata**, the subsequent suit must raise similar or substantially similar issues to those in the former suit; the suit must be between the same parties and relate to the same subject matter and the issues must have been conclusively determined by a court of competent jurisdiction.

31. Section 7 of the Civil Procedure Act embodies the principle of **res judicata**. It bars subsequent proceedings that are similar to those in former suits, between same parties or parties acting on their behalf and over similar or substantially similar issues which have been heard and determined by a court of competent jurisdiction. The section provides:

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”***

32. The doctrine of **res judicata** is intended to ensure that no person is to be vexed twice on the same cause and that litigation comes to an end. There are many decisions on this point and this court needs not be labour the point. However, if authority is required on the subject, it suffices to refer to the Court of Appeal decision in **John Florence Maritime Services Ltd & another v Cabinet Secretary for Transport and Infrastructure & 3 others** [2015]eKLR, where after discussing the ingredients of **res judicata**, and the fact that it was no longer a novel issue, the court stated;

***“The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court’s inherent power to prevent abuse of process under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata. However we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.”***

33. I have perused the pleadings in **JR No. 13 of 2016** and the judgment delivered on 29<sup>th</sup> September 2017. In that suit, the court considered the issues of whether the County Assembly acted **ultra vires** in enacting the Kajiado Finance Act 2014/2015; whether levying of taxes for services provided by the Kajiado county government amounted to regulation of professionals as envisioned in clause 7(b) of part 2 of the Fourth Schedule to the Constitution; whether the application had been overtaken by events and whether there was sufficient public participation before enactment of that Act.

34. The court dismissed the application holding that the Act, the basis of that application, was no longer in force and therefore the orders sought were untenable. The court further held that neither the applicants nor the respondents had attached the impugned Act and that the applicants did not specify the provisions of the Act they were challenging. For that reason, the court could not consider constitutionality of an Act that no longer existed. The court further stated that the applicants had not challenge the constitutionality of the County Finance Act 2014/2015 and that levying single business permit did not amount to regulation of professionals. The court was of the view that levying of

taxes was in accordance with the constitutional mandate of the county governments with regard to raising of revenue and was therefore different from regulation of professionals through their respective regulatory professional bodies. It is on the above basis that the respondents have argued that the present application is *res judicata*.

35. There is no doubt that parties in the former suit and in the present suit are the same. The former suit was heard and determined by a court of competent jurisdiction. The issue in the former suit was about taxation of the applicants by way of single business permit introduced by the respondents through the impugned 2014/2015 Act. The respondents' contention therefore is that the present suit is similar to the former suit and is thus *res judicata*. The applicants argue that the application is not *res judicata* because the law they challenge was not in existence when they filed the former suit.

36. The Kajiado Trade License Act, 2016 was assented to on 30<sup>th</sup> May 2016, and was to commence 7 days after assent (section 1). The application for leave to file Judicial Review in the former suit was made on 27<sup>th</sup> July 2016 in Judicial **Review No. 326 of 2016** in Nairobi. It was however transferred to this court and assigned **JR. No 13 of 2016**. Leave was granted on 8<sup>th</sup> November 2016 and the substantive motion filed on 16<sup>th</sup> December 2016. It was heard and concluded and judgment delivered on 29<sup>th</sup> September 2017. There is no doubt therefore that the former suit was filed during the lifetime of the legislation impugned in the present application. This is because the legislation was published on 4<sup>th</sup> August 2016 in a Special Issue, **Kajiado County Gazette Supplement No. 10(Acts No5)**.

37. In the former suit, the applicants sought two orders. First, an order of **certiorari** to quash the respondents' decision to levy single business permit from the applicants, and second, an order of **prohibition** to prohibit the respondents from implementing the decision to levy single business permit against them. According to the statutory statement in support of that application, the applicants were challenging the 2014/2015 County Finance Act. Some of the applicants had received demand notices on 7<sup>th</sup> May 2016 for payment of the levies.

38. From those pleadings, the issue in the former suit was, therefore, whether levying of single business permit against the applicants amounted to regulation of professionals contrary to clause 7(b) of Part 2 of the Fourth Schedule to the Constitution.

39. It is also true that the current application challenges the same action though under the 2016 County Trade License Act, a different legal regime. The applicants further challenge the constitutionality of sections 4 and 7 of the Kajiado County Trade License Act, 2016 contending that they violate clause 7(b) of part 2 of the Fourth Schedule to the Constitution.

40. For purposes of clarity, I reproduce here below the orders the applicants seek in the present application;

*a) An order of certiorari to remove into the high court and quash the decision of the respondents purporting to levy single business permit license from the applicants who are members of the medical profession*

*b) An order of certiorari to move into the High Court and quash the decisions of respondents to levying single business permit and declare sections 4 and 7 of the Kajiado county trade license act as unconstitutional*

*c) An order of prohibition directed to all the respondents jointly and severally prohibiting any of them from carrying out and/or proceeding with the implementation of their decision to levy from the applicants and the members of the medical profession practicing within Kajiado county for single business permit*

*d) An order of prohibition directed to all the respondents jointly and severally prohibiting any of them from bringing, instigating, instituting, carrying out or proceeding with any criminal proceedings or charges in connection with the single business permit payment by the applicants.*

41. The theme running through the orders sought in the present application is levying of single business permit against the applicants as professionals. It is undeniable that parties in the former suit and those in the present suit are the same. It is also true that the reliefs sought in the current suit are similar to those the applicants had sought in the previous suit. That is **certiorari** and **prohibition**. The applicants have however added other prayers contending that sections 4 and 7 of the impugned Act contravene clause 7(b) Part 2 of the Fourth Schedule to the Constitution. It is therefore clear that the pleadings and prayers in the former suit and those in the present suit are similar except the additional prayer for a finding of unconstitutionality of sections 4 and 7 of the impugned Act.

42. From the above facts, is the current suit *res judicata*? The answer to this question must be in the affirmative. I will explain. The applicants challenged the respondents' decision to levy single business permit against them using the 2014/2015 County legislation. They argued that the respondents' action was *ultra vires* and that the levy amounted to double regulation in contravention of clause 7(b) Part 2 of the Second Schedule to the Constitution. That matter was between the same parties as those in the present application. The application was heard and determined by a court of competent jurisdiction.

43. The central issue in that application was about levying of single business permit against the applicants as professionals. In its determination, the court made a specific pronouncement on whether levying of a single business permit against the applicants amounted to double regulation and stated:

*“[T]he biggest bone of contention in this application is the issue of whether the levying of taxes for services provided by the Kajiado County government amounted to the regulation of professionals as envisioned in Clause 7(b) of Part Two of the Fourth Schedule of the Constitution which empowers the County Government in Trade development and regulation, including-*

*a) .....*

**b) Trade licences (excluding regulation of professions)**

**[36] The applicants have advanced the position taken by the court in Republic vs. Nakuru County Assembly & Others, Nakuru HCCC JR NO. 14 of 2014 and Medina Hospital Limited & 5 others Vs. County Government of Garissa [2015] eKLR...[37] I would like to depart from this position. It is my view that there should be a clear distinction between fees paid to a professional regulatory body for the exercise of a profession and fees imposed by a County Government for the provision of services contemplated under Article 209 (4) of the Constitution for which the County Government has the right to collect.**

**[39] Precluding County governments from raising revenue by imposing taxes for the provision of services contemplated in part two of the Fourth Schedule flies in the face of the decision in Thuku Kiroro & 4 others vs County Government of Muranga [2014] eKLR..."**

44. In the **Thuku Kiroro case** the court held that where a statute or the Constitution has expressly delegated specific functions duties or responsibilities to particular organs state or otherwise, the court will be hesitant to interfere and curtail these organs' efforts to execute their statutory or constitutional mandates.

45. In the present suit, the applicants have essentially sought reliefs similar to those they had sought in the previous suit. The central issue they want this court to determine was determined in the previous suit to wit **JR No. 13 of 2016**. The court made a definitive finding that levying of single business permit against the applicants did not amount to regulation as contemplated under clause 7(b) Part 2 of the Fourth Schedule to the Constitution. The court also observed that the levy was not limited to a particular legal regime. That finding of fact was not appealed against. The present suit is really on the same issue as the former suit though based on the 2016 county legislation. It is not a new issue in a proper understanding of the principle of **res judicata**. I agree with the respondents that the issue in the present application was finally determined in the former suit and therefore the present application is **res judicata**.

46. I am aware that the applicants have also sought to challenge constitutional validity of sections 4 and 7 of the 2016 legislation on the ground that they contravene clause 7 (b) Part 2 of the Fourth Schedule to the Constitution. This argument was also made in the previous suit. This alone cannot make the present application new given that the applicants made similar arguments in the previous application.

47. I agree with the observation made in **ET v Attorney General & another** [2012]eKLR that:

***“Courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of new cause of action which has been resolved by a Court of competent jurisdiction”***

48. The same view was expressed in **Omondi v National Bank of Kenya Limited and Others** [2001] EA 177, the court held that parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit

49. I must also point out that the view of this court is that judicial review by way of a notice of motion cannot be used to challenge constitutionality of a national or county legislation. Where a party contends that legislation is for whatever reason constitutionally invalid, the party should move the court by way of a constitutional petition and specifically plead the provisions that he contends contravene the constitution and the Articles concerned.

50. Parties must remain alive to the limit of judicial review jurisdiction under the Law Reform Act and Order 53 of the Civil Procedure Rules which is mainly directed at administrative actions. Judicial review jurisdiction is intended to check the legality, proportionality and or procedural propriety of administrative actions. On the other hand, A claim of constitutional invalidity is much more than an administrative action. It goes to the root of the impugned legislation. The challenged legislation is to be laid besides the Article of the constitution concerned for the court to determine whether it really contravenes the constitution.

51. This view was expressed in **U.S v Butler**, 297 U.S. 1 (1936) thus:

***“When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.”***

52. A finding of invalidity would lead to a declaration invalidating the legislation or its provision which must entail a detailed investigation by the court and cannot be done by way of exercise of judicial review jurisdiction where the court is moved by way of notice of motion. In a claim of constitutional invalidity, the court exercises its jurisdiction under Article 165(3)(d)(i) of the Constitution to determine the question of whether any law is inconsistent with or in contravention of the Constitution.

53. Flowing from my analysis above, it is clear to me that the applicants lost an opportunity to move the court again on this issue the moment they lost the former suit. They cannot be allowed to repackage the same cause of action and ask this court to try the same issue that it had already pronounced itself on. That in my respectful view is an abuse of the court process which should not be countenanced.

54. Consequently and for the above reasons, the conclusion I come to is that the suit is res judicata and therefore unsustainable. It is therefore struck out. Costs being discretionary, I order that each party do bear their own costs.

**Dated Signed and Delivered at Kajiado this 22<sup>nd</sup> Day of November 2019.**

**E C MWITA**

**JUDGE**