



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL PETITION NO 97 OF 2016

In the matter of Articles 19 (2), 21 (1), 22, 23, 24 (2) (a) & (b), 27 (1) and 40, 191(2), 209 (2), 258, of the Constitution of Kenya, 2010, The Sixth Schedule-Transitional and Consequential provisions section 7 (1)

and

In the matter of Alleged Contravention of Fundamental Rights under Article 40 of the Constitution of Kenya

and

In the matter of conflict of Laws, to wit, the Pharmacy and Poisons Act, Cap 244, Laws of Kenya and the County Government Finance Acts

PETER OWINO-CHAIRMAN

DORCAS CHEPKORIR- TREASURER

**MAHAT SARA-HON. SECRETARY GENERAL
OF**

**KENYA PHARMACEUTICAL ASSOCIATION.....1ST
PETITIONER**

**PHARMACEUTICAL SOCIETY OF KENYA.....2ND
PETITIONER**

VERSUS

**THE NAIROBI CITY COUNT AND THE 46 OTHER COUNTY
GOVERNMENTS...RESPONDENTS**

AND

**COUNCIL OF GOVERNORS.....INTERESTED
PARTY**

JUDGEMENT

Petitioners' case

1. The petitioners seek two substantive reliefs, namely:- **(a)** a declaration that the County Finance Acts are unconstitutional to the extent that they require the petitioners who are regulated by the Pharmacy and Poisons Act,[\[1\]](#) to pay trade licenses; and **(b)** a declaration that the Pharmacy and Poisons Act[\[2\]](#) is superior to the County Government Finance Acts as provided by article 191 (2), 209 (2) of the constitution, the sixth schedule-transitional and consequential provisions and the County Finance Acts are to the extent of being inconsistent with the said act null and void.

2. Briefly, the petitioners case is that the 47 County Governments in Kenya enacted Finance Acts in their respective counties which are discriminatory in that the acts expose the members of the petitioners to double taxation because the petitioners under Pharmacy and Poisons Act[\[3\]](#) pay license fees, yet the County Finance Acts require them to pay Trade Licenses in the Respective Counties.

3. The petitioners argue that to the extent that the County Finance Acts are in conflict with the Pharmacy and Poisons Act[\[4\]](#) and the constitutional guarantee to be treated fairly, the Acts are unconstitutional. The petitioners cited Judicial Review Application number 135 of 2007 in which the petitioners sued the defunct Nairobi City Council and Minister for Local Government and the court prohibited the then local authorities from demanding the single business permit fees.

4. The petitioners maintain that they are professionals regulated by the Pharmacy and Poisons Act,[\[5\]](#) and pay license fees as per the act, hence, they should not be grouped together with businesses such as Bars, Groceries, Butcheries etc and that they are subjected to double jeopardy and that the County Finance Acts are out rightly inconsistent with the Pharmacy and Poisons Act[\[6\]](#) hence unconstitutional.

Respondents' Response to the petition

5. In opposition to the petition are responses/grounds of opposition/Replying affidavits filed by Siaya County Government, Kilifi County Government, County Government of Nyamira, Bungoma County Governments, County Government of Kiambu, County Government of Marsabit, Nakuru County Government, County Government of Nairobi.

6. The common thread in all the Responses or grounds of opposition is *inter alia* that:-

i. the fourth schedule of the constitution sets out the functions and mandate of County Governments and Rule 7 thereof provides for trade licensing (excluding regulation of professionals);

ii. in conformity with Article 209 of the County Governments enacted the Finance Acts, which set out the charges, levies and fees to be collected by the County Governments in fulfilment of their respective revenue raising mandate;

iii. that the single business permit in question is a charge imposed on shops and establishments trading on drugs and other items in chemists or establishments manned by the petitioners members;

iv. that the fee paid by the petitioners to their association is a professional levy paid to their professional association and has no correlation with trading component of shops selling pharmaceutical ;

v. it would be discriminatory to other traders to exempt the petitioners trade license;

vi. that the constitution requires the Respondent to provide services to its residents and that these services are financed through the fees and charges imposed on functions that fall within the mandate of the county government as set out in the fourth schedule.

vii. that the decision cited by the petitioners is in applicable in view of the provisions of article 11, 175 (b), 185 (20 and 209 (3) of the constitution;

- viii. *the court ought to consider the nature of services offered by the petitioners and that granting the reliefs sought amounts to challenging the constitutionality of sections 2 (a) and 7 (b) of part 2 of the fourth schedule to the constitution.*
- ix. *the decision relied upon by the petitioners was rendered prior to the promulgation of the 2010 constitution, hence irrelevant to the dispensation under the 2010 constitution;*
- x. *that under the fourth schedule, the function of trade development and regulation including trade licenses (excluding) regulation of professions) is allocated to the county governments under part 2 of paragraph 7;*
- xi. *that there is no provision in the Finance Acts that attempts to regulate any profession and in particular the petitioners herein;*
- xii. *that single business permits imposed on establishments selling pharmaceutical products is not a charge on the individual member of the petitioner as professionals but a charge on the shop and establishment trading in medicines and other items in chemists manned by members of the petitioner and that other professionals cited by the petitioner among them architects, advocates and accountants do not sell, trade or own shops or engage in trading activities.*
- xiii. *the County Government in accordance with article 210 (1) of the constitution enact Finance Acts every financial year to provide the legal and statutory basis for levying of charges and fees for traders within the county;*
- xiv. *that the imposition of a business permit of establishments selling pharmaceutical products does not amount to the regulation of the pharmacy profession by counties but for the shops and establishments involved in trading in drugs;*
- xv. *that the other professions mentioned by the petitioners such as advocates & architects provide services only;*
- xvi. *that the petition does not take into account the devolved governments.*
- xvii. *the petitioners have not demonstrated violation of constitutional rights and that not all rights are absolute;*
- xviii. *that article 209 (4) allows for imposition of charges for services;*
- xix. *that the professional licenses are issued based on regulation by professional bodies and fees collected is not paid to the County governments;*
- xx. *that the fees paid is not discriminatory;*
- xxi. *that section 23 of the act cited by the petitioner is not applicable and the reasons for the levies paid to the county government and the levies to the professional bodies are different.*
- xxii. *that Trade fees is different from License fees, hence double taxation does not arise.*

Petitioners advocates submissions

7. The first petitioners counsel submitted that:- **(a)** this court cannot uphold devolution if doing so amounts to violating other national values; **(b)** that the constitution does not authorize county assemblies to pass legislation which permits taxation of professionals; **(c)** that the petitioners are professionals and that trade license subjects them to double taxation; **(d)** that the constitution bars County Governments from regulating professionals and urged the court to declare the Finance Acts unconstitutional.

8. The second petitioners counsel submitted that:- **(a)** that county governments are not permitted to regulate professionals; **(b)** that pharmacy is a profession not trade, **(d)** that county governments are not mandated to regulate professionals; **(e)** that the Finance Acts to the extent that they impose licenses on the petitioners are unconstitutional; **(f)** that the petitioners are subjected to two tax regimes which amounts to double taxation. Counsel went into detail to define a trade, profession and pharmacy and insisted that professionals should not be required to pay single business permits and insisted that by levying the taxes complained of, the county governments are acting illegally.

Respondents' Advocates submissions

9. Counsel for the Kiambu County Government submitted that:- **(a)** County Governments have constitutional mandate to make legislation to impose trade licenses; **(b)** that trade license only regulates a trade and not a profession,^[7] **(d)** that levying trade license does not amount to double taxation and justified this with the definition of double taxation in the Black's Law Dictionary.^[8] He insisted that the County Finance Acts are not in conflict with the Pharmacy and Poisons Act^[9] and that the petitioners are not entitled to the reliefs sought.

10. Counsel for the County Government of Kakamega submitted that Counties have a constitutional mandate to:- **(a)** regulate businesses; **(b)** that there is no conflict of laws between the Pharmacy and Poisons Act^[10] and the impugned provisions of the County Finance Acts are not discriminatory.

11. Counsel for Kilifi County Government submitted that the petitioner failed to specify the impugned provisions of the acts which violate the constitution; that there is no mention of any specific legislation passed by the Kilifi County Government that has been alleged to be unconstitutional; that the reliefs sought are not specific.

12. Nairobi County Government's counsel submitted that the petitioners have not demonstrated that the impugned statutes are unconstitutional while counsel for Bungoma County Government submitted that the requirement of a trade license does not amount to a regulation and that the Pharmacy and Poisons act ought to be construed to conform with the 2010 constitution.

13. Counsel for Siaya county submitted that the petitioners did not plead with a reasonable degree of precision the alleged infringement of constitutional rights, that the statutes in question do not contravene the constitution and that the trade license levied does not amount to double taxation nor is it arbitrary or discriminatory.

14. Counsel for the interested party urged the court to adopt a constitutional interpretation that advances the values and principles of the constitution; that the constitution allows county governments to impose trade licenses; that imposition of trade licenses does not amount to regulating the petitioners profession; ^[11] that there is no conflict between the county governments Finance legislations and the Pharmacy and Poisons Act;^[12] and that the petitioners did not cite any provisions of the act that are in conflict with the Finance Acts. Counsel also submitted that all laws in force as at the time of the promulgation of the constitution must be read with the necessary alterations, adaptations, qualifications to bring them to conform with the constitution, hence the Pharmacy and Poisons Act must be construed to conform with the constitution.

Analysis of the facts, issues, the law and submissions

15. The petitioners placed heavy reliance on the decision rendered in J.R. No. 135 of 2007 which was determined prior to the promulgation of the 2010 constitution under the provisions of the Repealed Local Government Act.^[13] In my view, the said decision is not good law under the present constitutional dispensation. Schedule 6 Part 2, section 7 of the constitution provides as follows:-

7. (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

(2) If, with respect to any particular matter—

(a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and

(b) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict.

16. All laws must meet the mandatory constitutional muster. It follows, that the provisions of the Pharmacy and Poisons Act^[14] must be construed to conform with the provisions of the constitution of Kenya 2010 which is the supreme law of the land. Part 2 of the fourth Schedule to the constitution vests the function of Trade Development and Regulation including trade licenses (excluding regulation of profession) on County Governments. Further, the legislative mandate of the County Assemblies pursuant to article 185 of the constitution has not been doubted.

17. With regard to the relevancy of the decision rendered in J.R. No. **135** of 2007 to this case, I assert that a case is only an authority for what it decides. This position was well enumerated in *State of Orissa v. Sudhansu Sekhar Misra* where it was held that:-^[15]

*"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury, LC said in *Quinn vs. Leatham*, ^[16]that "Now before discussing the case of *Allen vs. Flood*^[17] and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides..." (Emphasis added)*

18. The ratio of any decision must be understood in the background of the facts of that case.^[18] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.^[19] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.^[20]

19. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.^[21] In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.^[22] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.^[23] My plea is to keep the path of justice clear of obstructions which could impede it.

20. I find that the Judicial Review No. **135** of 2007 cited by the petitioners has no relevancy or precedential value to the case before me. First, it was premised on a law that has since been repealed. Secondly, the provisions of the constitution on the functions of County Governments are clear. The constitutional mandate of County Governments to regulate trade has not been disputed. The legal mandate of county governments to legislate has not been questioned.

21. Article 209 (3) (c) of the constitution provides that a county government may impose "any other tax that it is authorized to impose by an act of Parliament." Sub-article (4) provides that the national and county governments may impose charges for services they provide. Article 260 of the constitution defines legislation to include a law made by an assembly of a county government, or under authority conferred by such law.

22. The first issue is whether or not the petitioners have been legally called upon to pay trade licenses. This raises the question whether or not Pharmacy is classified as a trade. Pharmacists are [healthcare professionals](#) with specialised education and training who perform various roles to ensure optimal [health](#) outcomes for their patients through the quality use of medicines. Pharmacists may also be [Business](#) proprietors, owning the pharmacy in which they practice.

23. The Black's Law Dictionary[24] defines Trade as "the business of buying and selling or bartering goods or services; commerce." It defines commerce as "the exchange of goods and services." However, the presence of 'qualified pharmacists' in drug dispensing is an essential requirement to provide patient counselling, rational use of drugs, drug safety and pharmacy services to patients for better health care.

24. The Respondents aver that they charge trade license fees but not the practising license fees which is paid to the professional body. I think this explains the crucial difference in this case. Trade license for operating the premises of selling drugs is not the same as license fees and this in my view cannot amount to regulation.

25. The provisions of the constitution are clear. The regulation of trade excludes professions. Regulation means "[the state of being controlled or governed](#)." The preamble to 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 the trade in drugs and poisons](#)." The act in my view controls the profession of pharmacy and trade in drugs so that unqualified persons do not engage in the profession and trade of selling drugs.

26. To "[regulate](#)" means to "**control by law or rules**". 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.[25] The payment of a fee for the grant an Annual Practising Certificate by the petitioners is not a bar to any other legitimate charges that may be imposed by a County Government.[26] 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.[27]

27. In *Thuku Kiroro & 4 Others vs. County Government of Muranga*,[28] the court held that: –

“Moreover, where a statute or the constitution for that matter, has expressly delegated specific functions, duties or responsibilities to particular organs, state or otherwise, this court will be hesitant to intervene and curtail these organs’ efforts to execute their statutory or constitutional mandates, it is the duty of this court to interpret the constitution in a purposive rather than a restrictive manner. As far as devolution is concerned, the County Governments must be encouraged, and not restrained to deliver on their devolved functions as long as they are intra vires the constitution and the applicable statutes.”

28. **What is the definition of double taxation?** Double tax is the taxing of the same income twice.[29] I do not think payment of trade license to the Respondents and professional license fees to the professional body amounts to double taxation.

29. As stated earlier, the constitutionality of the County Acts has not been questioned. Instead, the petitioners state that there is a conflict between the Finance Act and the Pharmacy and Poisons Act. No particular provisions were cited in support of the said argument. Further, as stated above, the County Legislations deal with Trade Licenses while the act deals with license fees under the act. These two are different and in my view, there is no conflict at all.

30. The other difficulty I have is that the petitioners allege that the County Finance Acts are unconstitutional and contradict the provisions of the Pharmacy and Poisons Act.[30] It is common knowledge that each County Assembly passed its Finance Act. The Petitioners did not specify which specific provisions they claim to be unconstitutional or contradicting the Pharmacy and Poisons Act. The petition makes a blanket condemnation of all the Finance Acts in the 47 Counties and leaves it to the court to guess which sections are under attack. The assumption is that all are identical and contain similar

provisions.

31. To me, the petition lacks specificity. It ought to specify the specific Acts for each county which it attacks and give details of the specific provisions. It has been held time without a number that allegations of constitutional violations must be specifically pleaded with clarity and specificity and that the provisions of the constitution alleged to have been violated must also be pleaded with clarity.

32. In my view, the petition contains generalized allegations. There are 47 Counties each of which has passed County legislations regulating finance and in particular Trade. It would have been more prudent for the petition to contain particulars of the alleged provisions in each County legislation, specify the impugned provisions, the violations subjected upon the petitioners members and even give details of such violations, the loss or damage if any suffered as a result of the violations. That way, the Respondents would each have been confronted with a specific claim to respond to. To, me, this petition lacks clarity and with tremendous respect the reliefs sought are totally unclear.

33. The core issue here is to understand the function of and purpose of good pleadings. In this regard, I recall the words of the Australian Court^[31] where Vickery J said this of the principles of good pleading:-

"In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with maximum effect. In filmmaking, elegance is a simple message with complex meaning. The most challenging games have the fewest rules, as do the most dynamic societies and organizations. An elegant solution is quite often a single tiny idea that changes everything.

... Elegance is the simplicity found on the far side of complexity.

While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of case which is sought to be advanced.

Pleading should not be dismissed as a lost art. It has an important part to play in civil litigation conducted within the adversarial system. Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.

Although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination.^[32] (Emphasis supplied)

34. The function of a pleading in civil proceedings is to alert the other party to the case they need to meet (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial; The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression "material facts" is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action; a pleading should not be so prolix that the opposite party is unable to ascertain with precision the causes of action and the material facts that are alleged against it.

35. In conclusion, I find that functions of County Governments include Trade Development and regulation (Excluding regulation of professions). As stated earlier, pharmacy is a profession but to the extent that it also involves selling of pharmaceutical products, it is a trade as opposed to professions such as law and architecture which render services only. By being asked to pay Trade licenses for their business premises, the County Governments cannot in any manner be said to be regulating or controlling the profession.

36. Further, the petitioners have failed to demonstrate that the Finance Acts are unconstitutional. As pointed out above, the petition did not specify the alleged offending provisions, hence the petition lacks specificity and precision.

37. The upshot is that this petition has no merits at all and I hereby dismiss it with no orders as to costs.

Orders accordingly

Signed, Dated at Nairobi this **21st** day of **September**, 2017

John M. Mativo

Judge

[1] Cap 244, Laws of Kenya

[2] Ibid

[3] Ibid

[4] Ibid

[5] Ibid

[6] Ibid

[7] Counsel cited Andrew Wasswa Atetwe T/A Kilimanjaro Auctioneers & 21 Others vs Mombasa County Government & Another {2015}eKLR cited

[8] 6th Edition

[9] Supra

[10]Ibid

[11] Andrew Wasswa Atetwe t/a Kilimanjro Auctioneers & 21 Others vs Mombasa County Government & Another {2015}eKLR cited

[12] Ibid

[13] Cap 265, Laws of Kenya-Repealed

[14] Supra

[15] MANU/SC/0047/1967

[16] {1901} AC 495

[17] {1898} AC 1

[18]Ambica Quarry Works vs. State of Gujarat and Ors. MANU/SC/0049/1986

[19] Ibid

[20] Bhavnagar University vs. Palitana Sugar Mills Pvt Ltd (2003) 2 SC 111 (vide para 59)

[21] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, Prashant Vats Versus University of Delhi & Anr. (Citing Lord Denning).

[22] Ibid

[23] Ibid

[24] Ninth Edition

[25] Andrew Wasswa Atetwe t/a Kilimanjaro Auctioneers & 21 others v Mombasa County Government & another [2015] eKLR

[26] Ibid

[27] Ibid

[28] {2014}eKLR

[29] <http://www.myaccountingcourse.com/accounting-dictionary/double-taxation>

[30] Supra

[31] In SMEC Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd {2011} VSC 492 at [3]-[6]

[32] See also Downer Connect Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd [2008] VSC 77 [1-4]; Hoh v Frosthollow Pty Ltd and Ors [2014] VSC 77 at [13] – [20].