



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
MISC. CIVIL APPLICATION JR NO. 135 OF 2007

KENYA PHARMACEUTICAL ASSOCIATION.....APPLICANT

VERSUS

CITY COUNCIL OF NAIROBI.....1ST RESPONDENT

MINISTER FOR LOCAL GOVERNMENT.....2ND RESPONDENT

**THE TRANS NZOIA COUNTY AND OTHER COUNTY GOVERNMENTS..INTERESTED
PARTIES**

RULING

1. By a Notice of Motion dated 16th September, 2014, the applicant herein, **Kenya Pharmaceutical Association**, seeks the following orders:

1. **This application be certified as urgent and be heard Ex parte in the first instance.**
2. **This honourable court do join the Interested Parties herein as parties to these proceedings.**
3. **That this honourable court do order and declare that all the County Governments in the Republic of Kenya are bound by the orders made in this suit having inherited all the Assets and Liabilities of the defunct Local Authorities.**
4. **That leave granted to the Applicant to serve the County Governments with this application through advertisement in the Daily Nation Newspaper once.**

2. However before the application could be heard and determined, the 1st respondent herein filed a notice of preliminary objection in which it was contended that:

1. **That this court lacks jurisdiction to the extent that there is now a new devolved system of government and numerous but different county statutes which cannot now be challenged collaterally through proceedings which were commenced and anchored in the context of the former constitution, past and currently repealed laws, and in a very different administrative context.**
2. **That this court lacks subject matter jurisdiction as the Ex parte Applicant has not filed any justifiable and/or substantive proceedings upon which the court's jurisdiction can be invoked.**

3. Similarly, the interested party raised the following preliminary objections :

1. **The order issued by the court dated 26th January 2011 were issued against the City Council of Nairobi and the Ministry of Local Government hence do not bind the Interested Parties.**
2. **The orders issued contravene Article 210 and 209 of the Constitution of Kenya 2010.**
3. **The case before court is res judicata and raising a miscellaneous Application under it is statute barred.**
4. **The order of injunction staying in place for more than twelve months contravenes Order 40 Rules 6 of the Civil Procedure Rules 2010.**
5. **That the Interested Parties have not been properly enjoined in the proceedings and therefore non-suited entity.**

4. It was submitted that the order sought to be relied upon was based on the repealed *Trade Licensing Act*, Cap 497 which was repealed by section 112 of the *Licensing Laws (Repeal and Amendment) Act*, 2006. Similarly with the promulgation of the new Constitution, the *Local Government Act* upon which the said decision was anchored was repealed and replaced with the *County Governments Act*, 2012 by virtue of which the Nairobi County Assembly enacted the *Nairobi City Finance Act, 2013* which set out the taxes, fees and charges for services and other revenues the County is entitled to charge including professional services and that it is on the basis of this Act that the County has been levying fees for business permits.

5. It was therefore contended that in light of the foregoing this Court lacks jurisdiction in the instant application. It was contended that the inclusion of pharmacies in part 3.4 of the *Nairobi City Finance Act, 2013* can only be challenged on a clear showing of illegality in terms of the passing of the said Act, a matter which does not fall for determination in these proceedings.

6. On its part the applicant contended that by virtue of section 3 of the *Transition to Devolved Government Act*, 2012, the County Governments inherited the liabilities and assets of the defunct local authorities hence a decree prohibiting certain acts giving rights to individuals cannot be wished away by the County Governments. To the applicant there is no provision to the effect that court orders issued against the defunct local authorities automatically ceased to have effect upon the coming into being of the County Governments.

7. To the applicant, it is regulated by Cap 244 Laws of Kenya and pays taxes to the national government in the name of practising certificate hence to enact a *Finance Act* that deals with the same tax in the name of Business permit does not take away the protection of the law and the decree with respect to double taxation.

8. I have considered the issues raised before me.

9. That the Court in these proceedings issued an order of certiorari quashing the decision by the defunct City Council of Nairobi to impose Single Business permit fees to the members of the ex parte applicant is not in dispute. The issue, however, is whether in light of the current legal regime the Respondents are bound by the said order. The importance of the devolved system of governance was appreciated by the Supreme Court in *Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR* in which Mutunga, CJ expressed himself as follows:

“The current devolution provisions in Chapter 11 of the new Constitution are a major shift from the fiscal and administrative decentralisation initiatives that preceded it. It encompasses elements of political, administrative and fiscal devolution. There is a vertical and horizontal dispersal of power that puts the exercise of State power in check... Devolution is the core promise of the new Constitution. It reverses the system of control and authority established by the colonial powers and continued by successive Presidents. The large panoply of institutions that play a role in devolution-matters, evidences the central place of devolution in the deconstruction-reconstruction of the Kenyan state...”

10. The learned President of the Supreme Court continued:

“Given Kenya’s history, which shows the central government to have previously starved decentralized units of resources, the extent to which the Constitution endeavours to guarantee a financial lifeline for the devolved units is a reflection of this experience and, more specifically, an insurance against recurrence. Indeed, in practically all its eighteen Chapters, only in Chapter Twelve (on public finance with respect to devolution) does the Constitution express itself in the most precise mathematical language. This is not in vain. It affirms the “constitutional commitment to protect”; and it acknowledges an inherent need to assure sufficient resources for the devolved units... Article 96 of the Constitution represents the *raison d’être* of the Senate as “to protect” devolution. Therefore, when there is even a scintilla of a threat to devolution, and the Senate approaches the Court to exercise its advisory jurisdiction under Article 163 (6) of the Constitution, the Court has a duty to ward off the threat. The Court’s inclination would not be any different if some other State organ approached it. Thus, if the process of devolution is threatened, whether by Parliamentary or other institutional acts, a basis emerges for remedial action by the Courts in general, and by the Supreme Court in particular... It is relevant to consider the range of responsibilities shouldered by these nascent county governments. The Bill of Rights (Chapter 4 of the Constitution) is one of the most progressive and most modern in the world. It not only contains political and civil rights, but also expands the canvas of rights to include cultural, social, and economic rights. Significantly, some of these second-generation rights, such as food, health, environment, and education, fall under the mandate of the county governments, and will thus have to be realized at that level. This means that county governments will require substantial resources, to enable them to deliver on these rights, and fulfil their own constitutional responsibilities.....National values and principles are important anchors of interpretive frameworks of the Constitution, under Article 259 (a). *Devolution* is a fundamental principle of the Constitution. It is pivotal to the facilitation of Kenya’s social, economic and political growth, as the historical account clearly indicates. In my view, the constitutional duty imposed on the Supreme Court to promote devolution is not in doubt. The basis of *developing rich jurisprudence on devolution* could not have been more clearly reflected than in the provisions of the Constitution and the *Supreme Court Act*.”

11. It ought to be appreciated that under the Constitution and the *County Governments Act*, there is an elaborate procedure for the enactment of county legislation with public participation playing a pivotal role therein which procedure was not available during the tenure of the local authorities as opposed to County Governments. As section 7(1) of the Transitional and Consequential Provisions of the Constitution of Kenya provides:

All laws 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.

12. Under Article 185 of the Constitution, the legislative authority of a county is vested in, and exercised by, its county assembly and the county assembly is empowered to make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule.

13. It is contended that the County enacted the *Nairobi City County Finance Act, 2013* under which the impugned fees are provided for as against the ex parte applicant. The Applicant however contends that the Respondents cannot enact legislation whose effect would be to deprive the applicant of its rights under the said Court order.

14. It is contended that the *Trade Licensing Act (Cap 497) Laws of Kenya* pursuant to which judgment and order in Nairobi HC JR No. 596 of 2008 was apparently delivered and issued, was repealed by the *Licensing Laws (Repeals and Amendment) Act No. 17 of 2006*, at section 112 thereof, thus is no longer part of Kenyan law, and therefore, the substratum of the decision in these proceedings no longer exists as part of Kenyan law. The said decision was delivered on 26th January, 2011. By that time the *Licensing Laws (Repeals and Amendment) Act No. 17 of 2006* had already been enacted. It cannot therefore be

successfully contended that the Court's decision was not grounded on the provisions of the said *Trade Licensing Act (Cap 497) Laws of Kenya* as alleged by the Respondents.

15. That notwithstanding, under the current constitutional dispensation, devolution is a key pillar in the values and principles of governance in Chapter 10 of the Constitution. As this Court held in Nairobi High Court Miscellaneous Application No. 596 of 2008 - **Kenya Union of Savings and Credit Cooperatives (KUSCCO) Limited vs. Nairobi City Council (Now Nairobi City County)**:

“...all the pre-Constitution of Kenya, 2010 decisions must now, pursuant to section 7(1) of the Transitional and Consequential Provisions of the Constitution, be looked at in the light of the current constitutional dispensation. This does not mean that all such decisions ought to be ignored but must be interpreted and construed in a manner that gives effect to the Constitution. Since the imposition of the Single Business Permit is pursuant to the said County Legislation which as of now has not been nullified, I hold that the decision given herein must be looked at in the light of the current devolution system of governance and since County Governments are empowered to enact legislation, where the Legislation enacted is inconsistent with the pre-2010 decisions and the said Legislation is not inconsistent with the Constitution, the pre-2010 decision cannot stand if its effect would be to contradict the legislation, it is no longer good law...Accordingly, the order the subject of these proceedings must be construed in accordance with the current Constitutional dispensation and the prevailing legal regime and I find that in so far as the *Nairobi City County Finance Act, 2013* entitles the County to impose and recover single business permits against *inter alia*, SACCOs and Co-operative Societies including the Applicant herein, the Respondents are not in contempt of Court by collecting the said Single Business Permits from the applicant since their action is permitted by the law.”

16. Since the powers which the Respondent purports to be exercising emanate from its *Finance Act*, unless and until the said legislation is successfully challenged, this Court cannot make a decision whose effect would be to nullify the provisions of the said legislation. The same position would apply to County Governments which have enacted similar provisions.

17. This decision however ought not to be construed to mean that by imposing payment in respect of single business permits on the applicant's members, the *Nairobi City County Finance Act, 2013* and similarly enacted county legislation cannot be challenged. That issue however is not before me and is beyond the scope of this discourse.

Order

18. It follows that the preliminary objections raised herein succeed and the Notice of Motion dated 16th September, 2014 is hereby struck out but in the circumstances of this case where the application was based on an order of this Court, there will be no order as to costs.

19. Those shall be the orders of the Court.

Dated at Nairobi this 14th day December, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mrs Kariuki-Owesi for Mr J K Mwalimu for County Government of Kitui

Mr Ongwae for Mwangi for the ex parte applicant

