



**Kenya Association of Private Hospitals v Mombasa County Government & another  
(Petition E101 of 2023) [2024] KEHC 12125 (KLR) (2 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12125 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
PETITION E101 OF 2023**

**OA SEWE, J**

**OCTOBER 2, 2024**

**IN THE MATTER OF ARTICLES 10, 19(2), 21(1),22,23,24(2)(A) & (B),  
27(1) & (2), 40,43,191(2), 209(3) (C), (5), 258 OF THE CONSTITUTION OF  
KENYA, 2010, PART 2 OF THE FOURTH SCHEDULE PARAGRAPH 7(1)**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL  
RIGHTS UNDER ARTICLE 43 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF CONFLICT OF LAWS, TO WIT, THE CONSTITUTION OF  
KENYA, 2010, THE MEDICAL PRACTITIONERS AND DENTISTS ACT, CAP 253,  
LAWS OF KENYA AND THE MOMBASA COUNTY TRADE LICENSING ACT,  
NO. 5 OF 2014 AND THE MOMBASA COUNTY FINANCE ACT NO. 1 OF 2023**

**BETWEEN**

**KENYA ASSOCIATION OF PRIVATE HOSPITALS ..... PETITIONER**

**AND**

**MOMBASA COUNTY GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**MOMBASA COUNTY ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This Petition was filed by the Kenya Association of Private Hospitals hereinafter, “the petitioner”. It described itself at paragraph 1 of the Petition as an association incorporated with the objective of, amongst others, acting as the representative body of private hospitals in Kenya, to advise generally on health and medical matters and to safeguard the interest of its members. Its membership comprises of private hospitals who provide health services all over the 47 counties in Kenya.



2. The petitioner averred that, over the years, its members within Nairobi City County and other Counties have been practicing their profession peacefully without any requirement for a Single Business Permit/Trade Licence; and therefore the 1<sup>st</sup> and 2<sup>nd</sup> respondents have never had any reason to interfere with the practice of doctors within their jurisdiction. The petitioner further averred that, on or about the January 21, 2023, it received a letter from one of its members, namely, Mombasa Hospital, complaining that the 1<sup>st</sup> respondent's agents entered their premises and demanded for payment for Single Business Permit/licence.
3. The petitioner further stated that the intimidation and harassment of the medical health facilities by the respondents extended to other medical health facilities within the County of Mombasa who also filed their respective complaints with the Association. It explained that its members can only undertake their business upon obtaining an annual valid licence issued by the Council under the *Medical Practitioners and Dentists Act*, Chapter 253 of the Laws of Kenya. It was therefore the contention of the petitioner that the medical health facilities are excluded from taking out licences from the respondents and the attempt by the respondents to demand levies from its members is unconstitutional.
4. Accordingly, the petitioner prayed for the following reliefs against the respondents:
  - a A declaration that the actions of the respondents in continuing to demand, insist upon, or ordering health facilities to pay for licences and/or single business permits to the County Government of Mombasa is in contravention of *the Constitution* of Kenya.
  - b A declaration that the provisions of the Mombasa County Trade Licensing Act, 2014 and the Mombasa County Finance Act, 2021 in so far as they apply to health facilities within the County of Mombasa is illegal and in contravention of *the Constitution* of Kenya.
  - c An order of certiorari to remove into this Court for quashing and to quash the decision of the respondents purporting to impose, demand, levy, charge, collect, retain or enforce by criminal prosecution or otherwise trade licence fees and/or Single Business Permit from/against health facilities within Mombasa County.
  - d An order of prohibition to prohibit the respondents from imposing, demanding, levying, charging, collecting by criminal prosecution or otherwise, trade licence fees and/or Single Business Permit fees from doctors within the County.
  - e The costs of and incidental to this Petition.
  - f Any other orders the Court may deem fit to grant.
5. The Petition was amended by consent on March 17, 2023 by replacing the Mombasa County Finance No. 1 of 2021 with the Mombasa County Finance *Act No. 1 of 2023*. The Petition, as amended, was supported by the Amended Supporting Affidavit sworn on the 8<sup>th</sup> March 2023 by the current Chairman of the petitioner, Dr. Mohamed Abdi. The petitioner reiterated the contents of the Petition and annexed a copy of the letter of complaint dated 20<sup>th</sup> January 2023 from Mombasa Hospital Annexure "AM1" as well as a copy of Gazette Supplement No. 227 dated 3<sup>rd</sup> December 2021 Annexure "AM2" which is the basis for levying licensing fees to health facilities.
6. The petitioner contended that its members are being subjected to double taxation, in contravention of Article 209 and Section 7b, Part 2 of the Fourth Schedule to the Constitution. Accordingly, the petitioner prayed for the reliefs aforementioned to stop what it referred to as the harassment of its members by the respondents.



7. The respondents opposed the Petition vide their Replying Affidavit sworn by its counsel, Ms. Elizabeth Kuria. She averred that a Single Business Permit is not a professional licence and therefore for the respondents to require medical practitioners to obtain such licence does not, in any way, amount to regulation of medical professionals. The respondents contended that, through the Single Business Permit, the respondents are simply levying charges for the services they provide to the residents of the County.
8. The petitioner filed a Further Affidavit with leave of the Court, in response to some of the averments made by the respondents in their Replying Affidavit. They reiterated their position that the respondents acted ultra vires in legislating and charging Single Business Permit fees in the face of the express provisions of Section 7b of the Fourth Schedule of the Constitution.
9. The Petition was canvassed by way of written submissions in accordance with the directions given herein on 3<sup>rd</sup> May 2023. In the petitioner's written submissions dated 14<sup>th</sup> July 2024, the following issues were flagged up for determination:
  - a Whether the respondents, in demanding, insisting upon or ordering health facilities to pay for Single Business Permit/licences to the County Government of Mombasa, contravened the Constitution of Kenya.
  - b Whether the Mombasa County Trade Licensing Act 2014 and the Mombasa County Finance Act No. 1 of 2023, in so far as they purport to provide for the levying of Single Business Permit/trade licence fees upon health facilities within the County of Mombasa, is in contravention of the Constitution.
10. The petitioner submitted that, since its members are professionals rendering professional services, they are regulated only by the Kenya Medical Practitioners and Dentists Council. It was their contention that it is a contravention of the Constitution for the respondents to levy licence fees on its members. They made reference to Articles 21, 22, 1852, 1833 and 2093 and 5 of the Constitution as well as Section 7b of Part 2 of the Fourth Schedule to the Constitution to support their submission that, in demanding and insisting that health facilities pay for Single Business Permits, the petitioners are in effect subjecting the members of the petitioner to double taxation. The petitioner relied on *Medina Hospital Limited & others v County Government of Garissa 2015 eKLR* to buttress this argument.
11. On the constitutionality of the Mombasa County Trade Licensing Act, 2014 and the Mombasa County Finance Act No. 1 of 2023, the petitioner relied on *Republic v Kisii County Assembly & 4 others, Ex Parte John Akoko Kumenda & another; Kisii County Secretary & 2 others Interested Parties 2021 eKLR*, among other authorities, for the proposition that the Constitution does not permit the regulation of professionals by the County Government. On that account the petitioner urged the Court to find that the Mombasa County Licensing Act and Section 31, Section 5 and Section 8 as well as Item Charge No. 647-650 of the Schedule to the Mombasa County Finance Act No. 1 of 2023 are in contravention of the Constitution.
12. On their part, the respondents conceded that, for purposes of regulation as professionals, the members of the petitioner fall under the ambit of the National Government through the Kenya Medical Practitioners and Dentists Council KMPDC established under the Medical Practitioners and Dentists Act CAP 253. The respondents nevertheless maintained their stance that the fact that the petitioners have been confirmed qualified to offer medical services by KMPDC does not preclude them from paying for Single Business Permit in their Counties of operation. In essence, the respondents submitted that there is no conflict between the licence issued by them and the licence issued by KMPDC.



13. The respondents relied on *Anne Wanjiru Kingori & 13 others v Kajiado County Assembly & 7 others* 2017 eKLR and *Andrew Wasawa Atetwe t/a Kilimanjaro Auctioneers & 21 others v Mombasa County Government & another* 2015 eKLR to support their submission that they are not out to regulate the members of the petitioner but simply charging for services rendered to them within the County of Mombasa.
14. In the light of the foregoing, the single issue for determination is whether the legislation requiring the petitioner’s members to pay a single business permit as provided for under Section 31 Mombasa County Trade Licence Act 2014 and Sections 5 and 8 of the Mombasa County Finance [Act No. 1 of 2023](#) as well as provisions for Items Charge No. 647 -650 of the Schedule of the latter Act are in conflict with the provisions of [the Constitution](#).
15. In exercising its interpretive function, the first point of reference is Article 259 of the Constitution, which prescribes the manner in which [the Constitution](#) is to be interpreted. It states:
- 1 This Constitution shall be interpreted in a manner that—
- a. promotes its purposes, values and principles;
  - b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
  - c. permits the development of the law; and
  - d. contributes to good governance.
16. In addition, enduring principles have been developed over the years to guide in the construction of [the Constitution](#). For instance, in the Ugandan case of *Tinyefuza v Attorney General Constitutional Appeal No. 1 of 1997 UGCC 3*, the holistic approach was proffered thus:
- The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.”
17. In the same vein, in the *Matter of the Principle of Gender Representation in the National Assembly and the Senate* 2012 eKLR, the Supreme Court provided the following insights:
- 54 Certain provisions of [the Constitution](#) of Kenya have to be perceived in the context of such variable ground-situations, and of such open texture in the scope for necessary public actions. A consideration of different Constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a Constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, a norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and



delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm.”

18. As for statutory interpretation, the decision of the three judge bench in Petition No. 150 of 2016 as consolidated with Petition No. 234 of 2016 EG & 7 others v Attorney General; DKM & 9 others Interested Parties; Katiba Institute & another Amicus Curiae, is instructive. The court held:

...The technique of paying attention to context in statutory construction is now required by *the Constitution*. As pointed out earlier, *the Constitution* introduced a mandatory requirement to construe every piece of legislation in a manner that promotes the ‘spirit, purport and objects of the Bill of Rights.’

348. The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law. The often quoted dissenting judgment of Schreiner JA eloquently articulates the importance of context in statutory interpretation thus:-

“Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that ‘the context’, as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background.”

349. A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. When confronted with legislation, which includes wording not capable of sustaining an interpretation that would render it constitutionally compliant, courts are required to declare the legislation unconstitutional and invalid. As it stands, this exposition is generally accepted, but it must be said that context is everything in law, and obviously one needs to examine the particular statute and all the facts that gave rise to it.

19. Further to the foregoing, the Supreme Court had the following to say in Law Society of Kenya v Attorney General & another 2019 eKLR:

...37 At the forefront of these principles is a general but rebuttable presumption that a statutory provision is consistent with *the Constitution*. The party that alleges inconsistency has the burden of proving such a contention. In construing whether statutory provisions offend *the Constitution*, courts must therefore subject the same to an objective inquiry as to whether they conform with *the Constitution*. That is why in Hamdaraddawa Khana vs Union of India and Others 1960 AIR 554 it was stated thus;

“Another principle which has to be borne in mind in examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected



representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment.”

38 In addition to the above, and to fully comprehend whether a statutory provision is unconstitutional or not, its true essence must also be considered. This gives rise to the second principle which is the determination of the purpose and effect of such a statutory provision. In other words, what is the provision directed or aimed at? Can the intention of the drafters be discerned with clarity? These were our sentiments expressed in *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others*, Supreme Court Petition No. 26 of 2014 2014 eKLR, where we opined that a purposive interpretation should be given to statutes so as to reveal the intention of the Legislature and the Statute itself. We thus observed as follows:

In *Pepper vs. Hart* 1992 3 WLR, Lord Griffiths observed that the “purposive approach to legislative interpretation” has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:

“The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous, I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.”

39 Therefore intention is construed by scrutinizing the language used in the provision which inevitably discloses its purpose and effect. It is the task of a court to give a literal meaning to the words used and the language of the provision must be taken as conclusive unless there is an expressed legislative intention to the contrary...”

20. At paragraph 41 of the above decision, the Supreme Court added the following comments:

41 On interpretation, specifically of a statute or even *the Constitution* itself, the Supreme Court of India in *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd.* {1987} 1 SCC 424 and others observed that: -

Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual.”

21. It is equally important to bear in mind that the burden of proof was on the petitioner to prove all its assertions on a balance of probabilities. Thus, in *Wamwere & 5 Others v Attorney General* Petition 26, 34 & 35 of 2019 Consolidated 2023 KESC 3 KLR Constitutional and Human Rights 27 January 2023 the Supreme Court held:

A petitioner bore the burden to prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which was on a balance of probabilities. Such claims were by nature civil causes. The onus of proof was on the 1<sup>st</sup> appellant to



adduce sufficient evidence to demonstrate that she owned or erected or lived in the alleged properties; and that State agents interfered or deprived her of the subject properties. That was the import of section 107 of the *Evidence Act* on the burden of proof.”

22. The Mombasa County Trade Licence Act requires all businesses within its County to apply for a trade licence. Section 31 Mombasa County Trade Licence Act 2014 is simple in terms. It provides that:

No person shall conduct a business within the county, unless he or she is the holder of a trade licence for that business.”

23. The first question to pose is whether the provision is attuned to *the Constitution*. Put differently, did the respondents have the power to make such an enactment? The answer to that question is to be found in Article 209 of *the Constitution*, which states:

- 1 Only the national government may impose—
  - a income tax;
  - b value-added tax;
  - c customs duties and other duties on import and export goods; and
  - d excise tax.
- 2 An Act of Parliament may authorise the national government to impose any other tax or duty, except a tax specified in clause 3 a or b.
- 3 A county may impose—
  - a property rates;
  - b entertainment taxes; and
  - c any other tax that it is authorised to impose by an Act of Parliament.
- 4 The national and county governments may impose charges for the services they provide.
- 5 The taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour.

24. It is therefore plain from the above provision that in addition to property rates, entertainment taxes and any other tax authorized by an Act of Parliament, a County Government may impose charges for the services they provide. I am therefore in agreement with the viewpoint expressed in *Base Titanium Limited v The County Government of Mombasa & another* 2017 eKLR by Hon. Ogola, J. that:

In plain language interpretation, the sub-Article 5 of Article 209 of *the Constitution* acknowledges the power of county governments to tax under Article 2093 and otherwise raise revenues including the service charges under Article 2094, with an injunction that the said power shall not be exercised in such a manner that will prejudice the interests set out therein.”

25. Further to the foregoing, Article 2101 of *the Constitution* is explicit as to the manner in which such taxes, levies or charges are to be imposed. It provides:

“No tax or licensing fee may be imposed, waived or varied except as provided by legislation.”



26. In this instance, there is no dispute that it was pursuant to the aforementioned provisions of *the Constitution* that the respondents enacted the impugned legislations.
27. Section 5 of the Mombasa County Finance *Act No. 1 of 2023* requires that all businesses within the County hold a licence or permit, while Section 8 states that all businesses shall pay licences, fees and charges as per the columns in the Schedule of the Act. In particular, Section 5 of the Mombasa County Finance *Act No. 1 of 2023* provides:
- 1 A person shall not carry out any business or service within the County without a valid licence or permit issued by the relevant County office.
  - 2 A person who intends to carry out any of the business listed in the schedule or the single business permit regulations shall apply for a licence or permit from any of the County offices or a designated agent as shall be prescribed by the County Government from time to time.
  - 3 A person who applies for a licence or single business permit under subsection 2 shall be issued with a licence on the payment of the applicable fee, depending on the location and size of the business as specified in the schedule or the single business permit regulations.
  - 4 A Licence or permit issued under subsection 3 must be visibly displayed at the business premise at all times.
  - 5 A person who contravenes any of the provisions of this section commits an offence.
28. Section 8 of the Mombasa County Finance *Act No. 1 of 2023*, on the other hand, states:
- 1 A person operating a business shall be required to pay the relevant licenses, fees and charges as prescribed in the relevant column of the Schedule.
  - 2 Any person operating a business who fails to pay the said fees, charges or licenses set under the schedule and the single business permit regulations commits an offence.
29. Accordingly, the Mombasa County Finance *Act, No. 1 of 2023*, included medical facilities and services in the Schedule under the heading Private Education, Health and Entertainment Services with applicable charges for Single Business Permit as hereunder:



NO	Particulars	2022/2023
	Item Of Charge	Kshs.
	38. Single Business Permit	
	Medical Facilities and Services	
647	Large Private Health Facility: Hospital, Clinic, Nursing Home providing overnight accommodation with capacity over 30 beds, Funeral Home.	600,000
648	Medium Private Health Facility: Providing overnight accommodation with capacity from 11 to 30 beds.	200,000.00
649	Small Private Health Facility: Providing overnight accommodation with capacity up to 10 beds.	150,000.00
650	Health Clinic with no overnight accommodation available.	35,000.00

30. It is plain therefore that the respondents had the constitutional and statutory basis to charge members of the petitioner for Single Business Permit/licence. The contention of the petitioner was however that its members comprise professionals who, under Section 7 of Part 2 of the Fourth Schedule of the Constitution, cannot be regulated by the respondents.
31. The distribution of functions between the National Government and the County Government is elaborately set out in the Fourth Schedule of the Constitution. Under Part 2-County Governments, Section 7 provides that the functions and powers of the County include:
- Trade development and regulation, including—
- a markets;
  - b trade licences excluding regulation of professions;
  - c fair trading practices;
  - d local tourism; and
  - e cooperative societies.
32. The parties were in agreement that professional members employed by the various hospitals forming the membership of the petitioner are regulated by the Kenya Medical Practitioners and Dentists



Council and are therefore required to pay annual licences to KMPDC. Additionally, the requirement for the payment of licences is anchored in statute under Section 89 of the *Health Act* No. 21 of 2017 as well as Section 15 of the *Medical Practitioners and Dentists Act* which requires that all health institutions be registered and pay an annual licence for them to be permitted to operate. In particular, Section 89 of the *Health Act* No. 21 of 2017 provides:

- 1 Private entities shall be permitted to operate hospitals, clinics, laboratories and other institutions in the health sector, subject to licensing by the appropriate regulatory bodies.
  - 2 The standards to be met in order to qualify for the issue of an operational licence under this section and the conditions that may be attached to such a licence shall be as defined in regulations issued under this Act by the Cabinet Secretary.
33. Section 15 of the *Medical Practitioners and Dentists Act* provides:
- 1 A person or organization may apply to the Council for the registration of a health institution in the prescribed form which shall be accompanied by the prescribed fee.
  - 2 Where the applicant satisfies the Council that the institution meets the requirements for registration, the Council shall register the facility as an approved health institution.
  - 3 The Council shall issue to every approved health institution registered under this Act, a certificate of registration in the prescribed form.
  - 4 The Council shall issue in accordance with this section and rules made under this Act, a licence authorizing the use of any premises as a health institution.
  - 5 An application for a licence under subsection 4 shall be made to the Council in the prescribed form and accompanied by the prescribed fees and shall be made on or before the thirtieth of October of each practising year.
  - 6 A licence issued under this section shall bear the date of day on which it is issued and shall have effect from that date:  
  
Provided that a licence issued during the first month of any practising year shall have effect for all purposes from the beginning of that month.
  - 7 A licence issued under this section shall be displayed in a conspicuous place at the health institution to which the licence relates.
  - 8 A licence issued under this section shall specify the nature of services that may be provided by the health institution.
  - 9 The Council may decline to renew, cancel, withdraw or revoke any licence issued under this section, if it is satisfied that the health institution is being operated in a manner that contravenes any provisions of the Act or any regulations made under this Act.
  10. A health institution registered under this Act shall be inspected by the Council.
  - 11 No premise shall be used by any person as a health institution unless it is registered and licenced for such use by the Council.
34. It is manifest that, in the light of the foregoing, the argument by the petitioner that by being required to pay Single Business Permit to the County Government its members are being subjected to double taxation is flawed, granted the stark difference between a trade licence for a medical facility and a regulatory licence for individual professionals and health institutions. In the case of Kenya



Pharmaceutical Association & another v Nairobi City County and the 46 other County Governments & another 2017 eKLR, in which the court Hon. Mativo, J., as he then was had occasion to consider the import of Section 7 aforementioned, it held:

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. 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 a 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...
  28. What is the definition of double taxation? Double tax is the taxing of the same income twice. 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."
35. The Court of Appeal was of the same thinking on double taxation in *Kenya Revenue Authority v Waweru & 3 others; Institute of Certified Public Accountants & 2 others Interested Parties* Civil Appeal E591 of 2021 2022 KECA 1306 KLR 2 December 2022 Judgment. It held:

On the issue of double taxation, the trial court did not set out which two taxes were of a similar nature, imposed on the same income and in the same period to justify the conclusion of double taxation. The trial court only noted that the imposition of minimum tax had the possibility of double taxation, the key word there being "possibility", but, nowhere in its judgment did the court show the possibility of double taxation."

36. It is also noteworthy that the Petition herein has been filed on behalf health facility/institution. The definition of a health facility/institution is more or less the same in the *Health Act* No. 21 of 2017 and the *Medical Practitioners and Dentists Act* save for the fact that the latter specifies that the Act applies to medical and dental practitioners. For purposes of clarity, Section 2 of the *Health Act* No. 21 of 2017 provides: -

health facility" means the whole or part of a public or private institution, building or place, whether for profit or not, that is operated or designed to provide in-patient or out-patient treatment, diagnostic or therapeutic interventions, nursing, rehabilitative, palliative, convalescent, preventative or other health service;



37. Section 2 of the *Medical Practitioners and Dentists Act*, on the other hand, provides: -

health facility" has the meaning assigned to it in the *Health Act*, No. 21 of 2017;

"health institution" means a facility that is operated or designed to provide in-patient or out-patient treatment, diagnostic or therapeutic interventions, nursing, rehabilitative, palliative, convalescent, preventative or other health service for public and private use by medical and dental practitioners;

38. Thus, in Section 2 of the *Health Act*, the definition of a health facility implies that the institution can be managed by any person or organization, and that it is not a requirement for the person to be medical or dental practitioner; whereas Section 2 of the *Medical Practitioners and Dentists Act* is explicit that regulates the professionals in such facilities, namely the medical and dental practitioners. Indeed, the preamble to the latter Act states:

An Act of Parliament to consolidate and amend the law to make provision for the registration of medical practitioners and dentists and for purposes connected therewith and incidental thereto”.

39. It is plain then that there is a distinction between health facilities and the professionals employed in such facilities. Under the *Medical Practitioners and Dentists Act*, the regulatory body with the mandate for the registration of health institutions is the Kenya Medical Practitioners and Dentists Council. In this case, the petitioner made it plain that its membership is comprised of private hospitals and that it was in that capacity that it received and acted on the complaint by Mombasa Hospital.

40. In the premises, the petitioner failed to establish any conflict between the Mombasa County Trade Licence Act 2014 and the Mombasa County Finance *Act No. 1 of 2023* and *the Constitution*. Indeed, in *Thuku Kiroro & 4 Others vs. County Government of Muranga*, the court held that:

...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.”

41. In view of the above, it is my finding that the Amended Petition dated March 8, 2023 lacks merit and it is hereby dismissed. Each Party to bear their own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 2<sup>ND</sup> DAY OF OCTOBER 2024**

**OLGA SEWE**

**JUDGE**

