



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

JUDICIAL REVIEW CASE NO. 2 OF 2020

REPUBLIC.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF EMBU.....RESPONDENT

AND

DR. MARY WAIRIMU NJOROGE

T/A EMBU CONSULTANT CLINIC.....1ST EX-PARTE APPLICANT

DR. JACINTA MUTHONI NJAGI

T/A NEEMA PLAZA CLINIC.....2ND EX-PARTE APPLICANT

DR. JOHN GACHANJA MUNDIA

T/A EMBU DYNAMIC IMAGING CENTRE...3RD EX-PARTE APPLICANT

RULING

1. By way of a Notice of Motion dated 21.10.2020, the *ex parte* applicants moved this court seeking the following orders:-

1) That judicial review order of certiorari be granted to the ex-parte applicant and directed at the County Government of Embu to remove and bring to this Honourable Court its decision to levy and demand payments and executing its demand by seizing and carrying away the 2nd ex-parte applicant's blood pressure machine while issuing them with bonds to appear in court and invoices, an execution that was carried out on 1st and 17th September 2020 respectively for single business permit fees and returning the seized items.

2) That judicial review order of prohibition be granted to the ex-parte applicants and directed at the County Government of Embu prohibiting it from levying, demanding payments and/ or executing their demand by seizing and carrying away of any equipment belonging to the ex-parte applicants and used by them for the purposes of operating the specific clinics which are Embu Consultants clinic, Neema Plaza Clinic and Embu Dynamic Imaging Centre in future under the pretext of enforcing single business permit fees or otherwise.

3) That the grant of leave continue to operate as stay of the decision of the County Government of Embu to levy, demand or execute the decision by seizure of property or equipment in the premises of the ex-parte applicants or issuing bond for court attendance and invoices for purposes of enforcing payment of single business permit fees upon the ex-parte applicants pending the hearing and determination of this suit.

4) That costs of this application be provided for.

5) That any other and further relief that this Honourable Court may deem fit and just to grant in the circumstances.

2. The application is premised on the grounds on the face of the same, the annexed affidavit by the *ex-parte* applicants and further, on the statement of facts at the leave stage. In a nutshell, it is the applicants' case that they are doctors by profession and representatives of the aforesaid clinics and fully licensed to operate as such by the Medical Practitioners and Dentists Board and have a regulatory body wherein they pay annual fee to practice and to which they have paid. That as such, the respondent does not have any mandate over the same and

cannot regulate professionals such as doctors and demand payment for business permit fees from them as they make practice fee payment to a professional body.

3. That, however, on or about 1.09.2020 the respondent's employees visited the 1st ex-parte applicant's clinic and demanded payment for business permits and that failure to pay the same would result in arrest and arraignment in court for operating a business without a business permit. That on 17.09.2020 the respondent's employees entered the 2nd and 3rd ex-parte applicants' premises and demanded payment of the business permit fees, issued bond to appear in court and invoices and further carted away blood pressure machine belonging to the 2nd ex-parte applicants whereas there was no formal demand for the fees or reasons as to why they were being subjected to the fees whereas they are professionals.

4. They deposed that they were denied an opportunity to defend why they ought not to pay the fees and were never served with prior written notice to demand payment of the business permit fees. That as professionals, they pay license fees to the regulatory board which operate as practice permit and demanding the business permit from them would subject them to two tax regimes which amounts to double taxation and which acts are arbitrary and without any just reasons and which has subjected them to unconstitutional and financial constraints. Further that the respondent has acted outside its mandate in the above-mentioned actions which fails to meet the expectations of the law thus the same is unconstitutional and unlawful.

5. The application proceeded ex-parte in the first instance. However, vide the orders of 24.02.2021 in Embu Judicial Review No. E001 of 2020, the respondent was granted leave to defend the application. The respondent in opposing the application filed a replying affidavit sworn by Johnson N. Nyaga the County Secretary for the respondent and wherein it was deposed that the Fourth Schedule to the Constitution of Kenya 2010 sets out the functions of the respondent and which includes trade licensing.

6. Further that the respondent enacted Embu County Finance (Amendment Act) 2020 which sets out the charges, levies and fees to be collected by the respondent and that the single business permit is a charge imposed on establishments trading on drugs and other items in health establishments like clinics, health centres etc which have a pharmacy or a chemist within them and which fees is different from the professional fees payable to their professional bodies and the same is imposed on establishments selling pharmaceutical products as opposed to the ex-parte applicants as professionals. That the imposition of the said fees does not amount to the regulation of medical profession.

7. Further that the ex-parte applicants by running clinics in the course of offering their professional services in compliance with rule 17(1) of the Medical Practitioners & Dentists (Inspection and Licensing) Rules 2014, they ought to pay levies for the shops and establishments involved in trading in drugs and which does not amount to double taxation. Further that in levying the said permits, the applicants acted within the provisions of article 209 of the Constitution.

8. The parties took directions that the application be canvassed by way of written submissions and wherein each of the parties submitted in support of their rival positions.

9. I have considered the instant application, the reply thereto and the rival written submissions. It is clear that ex-parte applicants seek judicial review orders of certiorari and prohibition.

10. It is not in dispute that the respondent herein is a public body having been established under the Constitution of Kenya and the County Government Act of 2012 and as such, it is a proper body against which judicial review orders can issue. It is clear that the decision subject of this application is that of the respondent imposing single business permit fees on the ex-parte applicants yet their trade (as deposed) is exempt from such levies; proceeding to demand payment of the said fees and issuing invoices in that regard and carting away equipments from the 2nd ex-parte applicant's premises. The ex-parte applicants deposed that this was done without prior notice and demand of payment and thus they were denied an opportunity to present their case as to why they ought not to pay the fees as demanded. That the demand of business permit fees by the respondent would subject them to two tax regimes which would be double taxation and that the respondent has acted outside its mandate and as such, failed to meet the expectations of the law and that the same is unconstitutional and unlawful.

11. In opposing the application, the respondent deposed that the levies are legal as they are in relation to the business establishment as opposed to the profession (which the respondent agreed that it has no capacity to levy) and deposed further that in levying the business permit, they acted within the provisions of article 209 of the Constitution, section 2(a) and 7(b) of Part 2 of the Forth Schedule to the Constitution and section 8 of the Embu County Finance Act, 2019.

12. It is trite that judicial review proceedings are mainly concerned with the process leading to the making of the decision and not the merits of the decision. The purpose of the remedy of judicial review is therefore to ensure that an individual is given fair treatment by the authority to which he or she has been subjected. As was held in **Republic –vs- Kenya Revenue Authority Ex parte Yaya Towers Limited, (2008) eKLR**, the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. (See also the case of **Municipal Council of Mombasa –vs- Republic Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007 (2002) eKLR**).

13. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli –vs- Kabale District Local Government Council and Others [2008] 2 EA 300** and wherein the court citing with approval the decision in **Council of Civil Unions –vs- Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at 479 held that:-

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before

it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

14. Further, judicial review remedies (such as certiorari and prohibition- the ones sought herein) *are only available against public bodies (See **Kenya National Examination Council –vs- Republic Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No.266 of 1996**).*

15. In **Kenya National Examination Council –vs- Republic Exparte Geoffrey Gathenji & 9 Others (supra)**, the court held that an order of certiorari can quash a decision already made as it will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or such like reasons. In addressing the issue as to when an order of prohibition can be issued by the court, the Court stated the grounds upon which such an order may issue as follows;

“What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY’S LAW OF ENGLAND, 4th Edition, and Vol.1 at pg. 37 paragraphs 128.....”

(See also **Director of Public Prosecutions versus Martin Maina & 4 Others [2017] eKLR**)

16. So can the acts and/ or decision by the respondent be subject to judicial review and can an order of certiorari and/ or prohibition issue? In other words, *have ex-parte applicants met the grounds for granting of judicial review order of certiorari and prohibition. In my view this is the issue which this court ought to decide.*

17. As for the suitability of the orders of certiorari, article 185 of the Constitution bestows powers on the County Assembly to enact laws and such laws include the levying of taxes and charges. The applicants’ complaint is that the respondents in purporting to levy single business permits, have acted illegally and ultra vires their powers as that amounts to double taxation since they pay taxes to their Regulating body. Article 209(3)(c) of the Constitution provides that;

‘A county may impose-

a) Property rates

b) Entertainment taxes and

c) Any other tax that it is authorized to impose by an Act of Parliament’

18. Under article 260(4) legislation is defined to include an Act of Parliament or a law made under authority conferred by an Act of Parliament; or a law made by an assembly of a County Government, or under authority conferred by such law. Thus, where a county government enacts a legislation to provide for levying of taxes within its jurisdiction, such an Act is prima facie constitutional unless challenged as the said County Government is allowed to impose taxes if there is an Act of Parliament sanctioning the same. The applicants herein have not challenged the existence of the law or the power of the respondent to levy taxes for single business permits in general. What they are challenging is the decision by the respondent to levy the said fees upon them yet they are professionals who pay their licensing fees to the national government and the same amounts to double taxation and is beyond their mandate. They attached their practising certificates and thus it is not in doubt that they are professionals in the field they profess.

19. The respondents in justifying the imposition of the said fees deposed that the same is anchored in law as it was in relation to the premises within which they offer their professional services since they sell drugs therein.

20. The question therefore is whether the ex-parte applicants (being medical practitioners) are exempt from paying for single business permits by virtue of their profession.

21. In **Peter Ndungu Mbugua & 39 others v County Assembly of Nyandarua & 2 others [2018] eKLR** R.V.P Wendo J while deciding on a similar matter and which decision I agree with held that:-

“Since 2010, there are two layers of Government, National and County Government. The National Government does have its own mandates and levies taxes on some functions. However, some functions are levied by the County Government in areas where the services fall within the County and where there are no similar taxes levied by the National Government. Once the National Government levies a particular tax, the same cannot be levied by the County Government. In this case, the medical doctors, nurses, clinical officers already pay their regulatory bodies for their yearly certificate in order to practice their professions.....No doubt the applicants being professionals are regulated by the relevant professional bodies. Their functions are regulated by the National Government where they pay the said bodies in order to be issued with an annual Practising Certificates confirming that they are qualified for the year in question in order to carry out their activities for the year.”

22. The Learned Judge proceeded to hold that under the Fourth Schedule to the Constitution, among the services devolved to the County Government is Trade Development and Regulation and which includes trade licensing (excluding regulation of professionals) and therefore County Governments are prohibited from issuing regulatory licenses. As such, by demanding single business permit from the applicants (save for Pharmacists), the same is oppressive and the respondents are acting outside their powers.

23. In Mama Nursing Home Kabaru, Alpha Community Nursing Home, Mother Flora Medical & Mama Maria Clinic Limited –vs- County Government of Migori, Migori High Court Constituional Petition No. 5 OF 2019 A. C Mrima J held that;-

“30. Under the Fourth Schedule to the Constitution, trade licensing is a devolved function. However, the Constitution clearly excludes regulation of professionals. It therefore means that no devolved unit has the power to regulate any member of a profession operating within its boundaries. A County Government cannot therefore charge levies for Single Business Permits for services rendered by professionals. Such professionals cannot be regarded as traders or business people who are under the regulation of a devolved unit. That is a constitutional preserve of the National Government. To that end, the law is so clear.”

24. In the instant case, the ex-parte applicants being medical practitioners are in my view exempt from paying for single business permit.

25. They deposed that they operate their clinics as consultancy practices and do not engage in any other trade or business in the said clinics. These depositions were never controverted as the respondents only deposed that the ex-parte applicants stock their premises with drugs and as such they conduct business as opposed to other professions such as advocates. However, there was no evidence of any of such stocking having been made and/or the ex-parte applicants offering their stock for sale. The petitioners are not pharmacists who are licensed to offer drugs for sale and who by virtue of selling of pharmaceutical products ought to pay for the single business permit. (See Kenya Pharmaceutical Association & another v Nairobi City County and the 46 other County Governments & another [2017] eKLR).

26. As such, it is my view that the respondents by demanding single business permits and levying taxes for the same, acted in excess of its powers and thus *ultra vires* to the provisions of the Constitution. Further, the actions were illegal and against the express provision of the law more so, the constitution. That being the case, it therefore means that the respondent’s acts (through its employees) to execute its demand by seizing and carrying away the 2nd ex-parte applicant’s blood pressure machine while issuing them with bonds to appear in court and invoices on the dates mentioned by the ex-parte applicants for single business permit fees was also illegal and in violation of their constitutional rights. The said machines should be returned to the respective applicants. As thus, the orders of certiorari are hereby issued in terms of prayer 1 of the application.

27. As for the suitability of the orders of prohibition, as I have already pointed out, an order of prohibition is an order *from the High Court directed to an inferior tribunal or body which forbids that tribunal or body from continuing with proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. In the instant case, and as I have already noted, the decision and acts by the respondent are illegal and in contravention of the constitution. As such an order of prohibition is hereby granted to the ex-parte applicants in terms of prayer 2 of the application.*

28. The ex-parte applicants prayed for costs of this application to be provided for. **Section 27 of the Civil Procedure Act** gives the Court discretion to grant costs. However, costs always follow the events and the successful party should then be the one to be awarded costs unless there are special circumstances which should warrant the Court from deviating. The ex-parte applicants in this instant application being the successful parties are awarded costs of the application.

29. *It is so ordered.*

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF JULY, 2021.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the exparte applicants