



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

JUDICIAL REVIEW CAUSE NO. 2 OF 2021

**IN THE MATTER OF ARTICLES 2(1),(2), (4), 10(1) (a), (b) & (c) (2) (b), 27 (4), 43, 185, 191, & 209 (5) OF THE CONSTITUTION,
2010**

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012, NO. 17 OF 2012;

AND

IN THE MATTER OF THE MEDICAL PRACTITIONERS AND DENTISTS ACT, CAP 253, LAWS OF KENYA;

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW PURSUANT TO SECTIONS 8 &
9 OF THE LAW REFORM ACT;**

AND

IN THE MATTER OF KISII COUNTY FINANCE ACT, 2020;

AND

IN THE MATTER OF SINGLE BUSINESS PERMIT

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KISII COUNTY ASSEMBLY.....1ST RESPONDENT

KISII COUNTY EXECUTIVE

MEMBER OF HEALTH.....2ND RESPONDENT

THE GOVERNOR,

KISII COUNTY GOVERNMENT.....3RD RESPONDENT

COUNTY CEC FINANCE..... 4TH RESPONDENT

COUNTY REVENUE DIRECTOR..... 5TH RESPONDENT

AND

KISII COUNTY SECRETARY.....1ST INTERESTED PARTY

KISII COUNTY, HEAD OF REVENUE.....2ND INTERESTED PARTY

KISII COUNTY EXECUTIVE,

FINANCE AND ECONOMIC PLANNING..... 3RD INTERESTED PARTY

EXPARTE

DR. JOHN ABOKO KUMENDA.....1ST EXPARTE APPLICANT

DR. FLORENCE GATUNE WAITHIEGENI..... 2ND EXPARTE APPLICANT

JUDGEMENT

1. The 1st and 2nd *ex-parte* applicants are doctors by profession currently practicing in private medical institutions referred to as **GUCHA COTTAGE MATERNITY & NURSING HOME LTD** and **KISII MEDICAL DIAGONSTIC AND IMAGING CLINIC LTD** respectively. They have moved this court by their Notice of Motion dated 28th April 2021 for the following orders against the respondents;

- a) An order of certiorari to remove into this Honorable Court and quash the decision of the respondents requiring members of the Medical Profession within KSII COUNTY GOVERNMENT, including the Applicants herein from having single business permits;
- b) An order of prohibition directed at the Respondents, prohibiting and restraining them from levying monies and or implementing their decision to levy single business permits from members of the Medical Profession within KISII COUNTY GOVERNMENT, to which the Applicants herein belong;
- c) The Honourable Court be pleased to grant such other or further reliefs as it may deem fit in the circumstance; and
- d) The costs of these proceedings be borne by the Respondents.

2. The application is based on the grounds set out therein, the statutory statement of facts and verifying affidavit sworn by the 1st *ex-parte* applicant on behalf of his co-applicant.

3. In his affidavit, the 1st *ex-parte* applicant averred that the operations of their medical practice are regulated and licensed by the Medical and Dentists Board, to whom they pay licensing fees on an annual basis. He complained that the 1st respondent had enacted into law, the Kisii County Finance Act, 2020, which empowered the county to levy single business permits on businesses that operated within the county including private health clinics, doctors' surgeries, dentists, physiotherapists and other health professionals.

4. The 1st *ex-parte* applicant averred that he had been served with an invoice demanding that he pay a sum of Kshs. 151,000/= failure to which he would be faced with dire consequences. In his view, the decision by the respondents to levy single business permits on members of the medical profession was *ultra vires* as the Constitution expressly excluded them from imposing a levy on professionals.

5. On behalf of the 2nd, 3rd, 4th and 5th respondents, the Chief Officer in charge of revenue collection in the County Government of Kisii, Benard Omosa swore affidavits on 24th May 2021 and 5th July 2021 in opposition to the application. He averred that Articles 209 (3) (c), 209 (4) and 185 of the Constitution empowered County Governments to enact laws to impose or levy taxes for the services they provided. He argued that since the respondents provides several services to the *ex-parte* applicants, they were legally bound to pay for the services.

6. Benard also deposed that the *ex-parte* applicants sold drugs, coffins and operated hearse services which were taxable under the Kisii Finance Act.

7. He claimed that Gucha Cottage Hospital offered 24-hour outpatient and laboratory services, x-ray, inpatient services, pharmacy, funeral services and ambulance hearse services. Kisii Diagnostic and Imaging Ltd sold X-ray services not only to Gucha Cottage Maternity and Nursing Home Ltd but to others. According to him, the 3rd respondent was legally bound to demand trading charges from the *ex-parte* applicants and not regulatory fees payable to the National Government.

8. In brief rejoinder, the 1st *ex-parte* applicant deposed that one could not separate services offered in medical practice. He explained that the Health Ministry categorized hospitals based on the nature of services offered. He denied the claim that they offered hearse services and stated that he knew for a fact that Kisii Diagnostic and Imaging Limited did not sell medical equipment. The applicant clarified that their core business was to offer medical services and denied the claim that they sold equipment and drugs which fell within category 6-6012 of the Kisii Finance Act, 2020.

9. The 1st respondent did not enter appearance or file a response to the application.

10. The application was canvassed by way of written submissions which I have duly considered.

ANALYSIS AND DETERMINATION

11. The question in the instant application is essentially whether the 1st respondent acted *ultra vires* in excess of its powers in charging levies in the nature of single business permits from members of the medical profession including the *ex-parte* applicants.

12. The genesis of this matter, as can be drawn from the foregoing summary, is the respondent's decision to levy trading licence fees for members of the medical profession vide the Kisii County Finance Act, 2020. The *ex-parte* applicants maintain that County Governments cannot do so as that would amount to a violation of the express provisions of **Clause 7(b), Part 2** of the **Fourth Schedule**, of the **Constitution** which stipulates that among the functions and powers of the county are;

7. Trade development and regulation including-

(b) trade licenses (excluding regulation of professions)[*Emphasis added*]

13. To support their position, the applicants cited the decisions of the courts in *Peter Ndung'u Mbugua and 39 others versus County Assembly of Nyandarua and 2 others J.R. No. 8 of 2017, Nakuru County Government exparte John Njenga Ngethe and 117 others Judicial Review No. 14 of 2014, Medina Hospital Ltd and others versus County Government of Garissa [2015]eKLR, MISC. 2 of 2015, Mama Nursing Home Kabaru and 3 Others versus the County Government of Migori, constitutional petition No. 5 of 2019 and Dickson Matei v/a Machete Auctioneers and 10 Others versus Nairobi County Government and Another [2016]eKLR.*

14. The respondents countered that County Governments are prohibited from charging regulatory fees from professionals but trading licence fees are the preserve of County Governments. They argued that the County is entitled to collect trading licence fees from professionals who engage in activities outside their ordinary professional training.

15. The respondents annexed photos of a bill board advertisement by Gucha Hospital Services which showed that the entity was operating a pharmacy and offered laboratory, funeral, ambulance and hearse services in addition to professional services.

16. The *ex-parte* applicants do not dispute that the 1st respondent is entitled to levy charges for various services. Under **Article 209 (3)** of the Constitution, County Governments are empowered to impose "any other tax that it is authorized to impose by an act of Parliament." They may also impose charges for the services they provide, under Article 209 (4).

17. What the *ex-parte* applicants oppose is the imposition of levies upon members of the medical profession.

18. **Clause 7(b), Part 2** of the **Fourth Schedule**, of the Constitution reproduced above prohibits the regulation of professionals by County Governments. A profession is defined in the Black's Law Dictionary, 9th Edition at page 1329 as, "a vocation requiring advanced education and training especially one of the three traditional learned professions- law medicine and the ministry."

19. The dictionary adds that;

"Learned professions are characterized by the need of unusual learning, the existence of confidential relations, the adherence to a standard of ethics higher than that of the market place, and in a profession like that of medicine by intimate and delicate personal ministrations. Traditionally, the learned professions were theology, law and medicine; but some other occupations have climbed, and still others may climb to the professional plane." Commonwealth v Brown, 20 N.E.2d 478, 481 (Mass.1939)"

20. The *ex-parte* applicants are both medical doctors and are without doubt medical professionals. The functions of medical doctors are regulated by the Medical Practitioners and Dentists Council, Act. They pay their fees to the Medical Practitioners and Dentists Council and are issued with annual practising licences authorizing them to practice medicine.

21. Since medical doctors are professionals, it follows that the county governments are not permitted to regulate them or charge levies for single business permits from them. This has been emphasized in a multitude of judicial authorities.

22. In the case of *Peter Ndungu Mbugua & 39 others v County Assembly of Nyandarua & 2 others [2018] eKLR* for instance, the court held;

"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."

23. Similarly, in *Medina Hospital Limited & 5 others v County Government of Garissa [2015] eKLR* the court held;

"Once one level of Government takes taxes and licenses the operation, the other level cannot levy licence fees. I find and hold that it is wrong for the time being for the County Government (the respondent) to also levy licence fees to medical practitioners and hospitals, clinics and pharmacies. I will grant certiorari orders."

24. The 1st respondent passed The Kisii County Finance Act, 2020 ("the Act") to provide for various levies, fees and charges for services, and for other revenue raising measures by the County Government. Schedule 1, of the Act provides for fees, charges and licenses related to

the Department of Trade, Tourism and industrialization. Among the medical facilities required to operate with a single business permit under Schedule 1 of the Kisii County Finance Act, 2020 are;

- a) Large Private Health Facility Hospital, Clinic, Nursing Home providing Overnight Accommodation. Funeral Home;
- b) Medium and small Private Health Facility Funeral Homes;
- c) Large Private Health Facility outpatient services, Doctor's Surgery, Dentist, Physiotherapist, Psychologists, opticians, Consultant office and others;
- d) Medium Private Health Facility outpatient services, Doctor's Surgery, Dentist, Physiotherapist, Psychologists, opticians, Consultant office and others;
- e) Small private health facility outpatient services, Doctors Surgery, Dentist, Physiotherapist, Psychologists, Opticians, Consultant office, Private Labs and others;
- f) Private funeral services (hearse);
- g) Small and Big Private Clinics;
- h) Physiotherapists;
- i) Large and small laboratories;
- j) Small Laboratory; and
- k) Wholesale and large, medium and small chemists/ pharmacies

25. As I have already held above, devolved units are prohibited from imposing levies for services provided by medical professionals. The demand by the respondents that various medical facilities operate with a single business permit is therefore *ultra vires* **Clause 7(b), Part 2** of the **Fourth Schedule**, of the Constitution.

26. I must however emphasize that while devolved units are prohibited from regulating professions, they have the constitutional mandate to regulate trading activities and businesses.

27. The respondents have demonstrated that the 1st ex-parte applicant is operating various businesses under the entity known as Gucha Cottage Maternity & Nursing Home Ltd including laboratory services, X-ray, inpatient services, a pharmacy, funeral services, ambulance and hearse services.

28. Although laboratory services, X-rays, inpatient and ambulance services are part and parcel of the medical profession, funeral and hearse services are not. Funeral services are not considered a profession as one does not need to undergo specialized training to engage in that line of work. The selling of drugs is also a trade that falls within the scope of trades and businesses that are regulated by devolved units.

29. I concur with the finding of the court in the case of ***Kenya Pharmaceutical Association & another v Nairobi City County and the 46 other County Governments & another CONSTITUTIONAL PETITION NO 97 OF 2016 [2017] eKLR*** where it was held;

“Pharmacy is a profession but to the extent that it also involves selling of pharmaceutical products. It is a trade as opposed to a profession such as law or Architecture which render services only. By being asked to pay trade licenses, for their business premises, the County Government cannot in any manner be said to be regulating or controlling the profession.”

30. It is my considered view, that medical practitioners practicing their professions are exempt from levies by County Governments. However, in instances where they engage in the bartering goods or services that do not come within the meaning of a profession, they are obliged to pay any levies, charges or fees prescribed by County Governments.

31. In the end, the application dated 28th April 2021 is found partially successful and is allowed in the following terms;

- a) An order of certiorari be and is hereby issued removing into this Honorable Court and quashing the decision of the respondents requiring members of the medical profession within Kisii County, including the Applicants herein from having single business permits;
- b) An order of prohibition is hereby issued directed at the Respondents, prohibiting and restraining them from levying monies and or implementing their decision to levy single business permits from members of the medical profession within Kisii County, to which the Applicants herein belong;
- c) For the avoidance of doubt, the respondents are entitled to impose fees, charges and licenses for the trade of goods and for services that do not constitute a profession;

d) The 1st and 2nd ex-parte applicants shall have half the costs of these proceedings.

DATED, SIGNED AND DELIVERED AT KISII THIS 6TH DAY OF OCTOBER, 2021.

A. K. NDUNG'U

JUDGE