



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS CONSTITUTIONAL DIVISION

(Coram: Kemei – J)

PETITION NO. 21 OF 2019

IN THE MATTER OF : ARTICLES 10, 19(2), 21(1), 22, 23, 24(2), 27(1) & (2), 47, 50, 191(2), 209(1),(3) & (5), 258, Section 7 of the 6th Schedule OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF RULES 4, 11, 13 AND 23(1) OF THE PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 10, 47(1) & (2), 50(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONRAVENTION OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE MACHAKOS COUNTY FINANCE ACT, 2014

AND

IN THE MATTER OF THE HEALTH ACT NO 21 OF 2017

AND

IN THE MATTER OF THE PHARMACY AND POISONS ACT 254

AND

IN THE MATTER OF MEDICAL LABORATORY TECHNICIANS AND TECHNOLOGISTS ACT NO 10 OF 1999

AND

IN THE MATTER OF CLINICAL OFFICERS TRAINING, REGISTRATION AND LICENSING ACT (CAP 260 LAWS OF KENYA

BETWEEN

GIDEON NDAMBUKI MUNYAO.....1ST PETITIONER

WYCLIFFE ONDIEKI.....2ND PETITIONER

AGGREY MAJANGA.....3RD PETITIONER

AUGUSTINE KILONZO.....4TH PETITIONER
NICODEMUS KINYAMASYO.....5TH PETITIONER
MICHAEL KYALO.....6TH PETITIONER
JANE NJOGU.....7TH PETITIONER
RACHAEL NDUNGE MUSYOKA.....8TH PETITIONER
WASHINGTON OYAMO.....9TH PETITIONER
NATHANIEL MWOLOLO.....10TH PETITIONER
FREDRICK KIIO.....11TH PETITIONER
RUTH MWITA.....12TH PETITIONER
WILLIAM MUTUA.....13TH PETITIONER
PETER MUASYA.....14TH PETITIONER

VERSUS

COUNTY GOVERNMENT OF MACHAKOS.....1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

R U L I N G

Introduction

1. This ruling is in respect an application filed by the petitioners vide notice of motion dated 27.6.2019 that is brought under **Rules 4, 5, 13 And 23(1) of the Protection of Rights and Fundamental freedoms practice and Procedure Rules, 2013.**
2. The 1st Respondent in the petition is indicated as responsible for creating the Machakos County Finance Act, 2014.
3. The 2nd Respondent is a creature of Article 157 of the Constitution mandated to institute and undertake prosecution of criminal matters and all other related incidents.
4. What provoked this suit was the closing down of the petitioners' premises by the 1st respondent purporting to levy single business permits from members of the medical profession and that the petitioners were arrested for practicing without licenses in accordance with the Machakos County Finance Act, 2018.
5. Aggrieved by these actions, the Petitioners herein filed the petition as well as the instant application. In the application, they seek the following orders:

(a) Spent.

(b) Spent

(c) That this honorable court be pleased to issue an order of prohibition prohibiting the 1st respondent from interfering in any manner with the petitioner's practice of their profession pending hearing and determination of the petition

(d) Spent.

(e) The honorable court do stay the criminal proceedings against the petitioners in Machakos Criminal Cases Number 501, 500,, 524, 526, 527, 502, 515, 517, 520, 522, 525, 513, 514, 516, 518 and 519 all of 2019 now scheduled for mention before the chief magistrate on 2.7.2019 and 4.7.2019 pending hearing and determination of the petition;

(f) An order of this honorable court barring the 1st respondent from seeking from the petitioners any kind of payment for the issuance of business permits pending the hearing and determination of the petition

(g) That this honorable court do issue an order of prohibition to prohibit the 1st respondent from implementing their decision of levying for single business permit from the members of the Medical Profession within Machakos County.

(h) Costs of this application be provided for

6. The petitioners in the petition sought for the following reliefs namely:

i) That the court do issue an order of certiorari to quash the decision of the 1st respondent purporting to relocate all private health facilities within a minimum of 300 metres from Machakos Level 4 hospital in the county of Machakos and a minimum of 100 metres from any Health center/ level 3 facility and a suitable distance away from any dispensary depending on the set up of the area the government facility is located.

ii) An order of prohibition prohibiting the 1st respondent from interfering in any manner or way with the practice of their profession requiring the 2nd respondent to stay criminal proceedings in Machakos criminal cases number 501/2019, 500/2019, 524/2019, 521/2019, 526/2019, 527/2019, 502/2019, 515/2019, 517/2019, 520/2019, 522/2019, 525/2019, 513/2019, 514/2019, 516/2019, 518/2019, 519/2019, now scheduled for mention before the Chief Magistrate on 2/7/2019 and 4/7/2019 and restrain the 1st respondent through her agents or any other person acting under its instructions from harassing or interfering with the petitioners practice of their profession pending hearing and determination of the petition herein.

iii) A declaration that the arraignment and continuation of prosecution of the petitioners and their employees by the 2nd Respondent is in contravention to Article 157 of the Constitution.

iv) An order of declaration of this Honourable court that the 1st respondent is not entitled to receive any payments for the issuance of permits as the petitioners are professionals who pay licensing fees to their respective regulatory bodies.

v) An order of this Honourable court that the decision of the 2nd respondent to prefer criminal charges against the petitioners for practicing their profession of chemists and laboratories without permits is unconstitutional, null and void.

vi) A declaration that the acts of the respondents herein are in breach of the petitioners' constitutional rights and particularly Articles 47(1) and (2) and 50(1) of the constitution and should therefore be stopped forthwith.

vii) Costs of the petition

viii) Any other relief this Honourable court deems fit to grant in the circumstances.

Petitioner's Case

7. In support of their case the petitioners filed supporting affidavits deponed by Gideon Ndambuki Muasya, Ruth Mwita and Rachael Nduge.

8. According to the 1st petitioner, he is registered as a medical laboratory technologist and that his employees were arrested on 17.6.2019 for operating without a business permit and yet he had paid an annual license fee of Kshs 40,000/- to the Kenya Medical Laboratory Technician & Technologists Board for operating a private medical laboratory and was issued with an operating license for the year 2019. It was averred that the permit on display was confiscated and that the laboratory was closed since 18.6.2019 as a result of which the chemical reagents in the factory were in danger of being wasted.

9. It was deposed by Rachael Nduge Musyoka and Ruth Mwita, the 8th and 12th petitioners that they had been issued with a single permit license by the County Government of Machakos and had a license for 2019 but were however arrested on 17.6.2019 and taken to court and that on 18.6.2019 their pharmacies were closed and this has caused them financial loss.

10. The petitioners' case was represented vide written submissions. Counsel notified the court of the provisions of Section 21 of the Medical Laboratory Technicians and Technologists Act No 10 of 1999 and Section 27(1) of the Pharmacy and Poisons Act and submitted that the 1st respondent was not entitled to levy charges for payment of single business permits on the petitioners as there is a national legislation mandating the practice of the petitioners and hence it is in contravention of Article 209(3) of the Constitution that limits the powers of the County Government to levy taxes. Learned counsel invited the court to consider the case of **Peter Ndungu Mbugua & 39 Others v County Assembly of Nyandarua & 2 Others (2018) eKLR**. Learned counsel submitted that the respondents did not follow procedure in closing down the petitioners' health facilities hence were in breach of Article 47(1) of the Constitution and Section 4(3) of the Fair Administrative Actions Act.

1st Respondent's Case

11. The 1st Respondent's case was based substantially on the affidavit sworn by **Lucas Mwove**, the Chief Officer, Public Health and Community Outreach with the 1st respondent and the Accounting officer thereof.

12. According to the deponent the court lacks jurisdiction to entertain the instant application and petition and can only handle matters related to the criminal trial by way of appeal. It was deposed that the charge sheets of the petitioners indicate that they have been charged with

different offences and not that of operating a pharmacy. It was deponed that the 1st respondent has enacted several Acts so as to raise revenue for implementation of devolved functions. It was averred that the said Acts have never been declared unconstitutional by any court of law. It was averred that the Machakos County Finance Act, 2018 provides that the petitioners are required to pay for trade licenses and other county levies before they can be allowed to operate businesses within the county and that the petitioners are mistaking professional licenses for trade licenses. It was averred that the petitioners have not produced any trade licenses from the county government in court. It was averred that the 1st respondent acting in exercise of its constitutional powers, on 13th March, 2019 issued a directive that required that County Health Employees were to relocate or close their businesses located near the county referral hospital and that the affected persons were given up to 31st May, 2019 to comply hence the decision was not administratively wrong. It was averred that the confiscated drugs and reagents were labelled Government of Kenya and that the health facilities could not account for how the drugs ended up with them. It was averred that no professional licenses or trade licenses for the arrested employees were attached to the application.

13. Mr. Makundi for the petitioners filed submissions dated 30.8.2019 wherein he raised two issues for determination the first being whether the 1st respondent was justified to arrest and charge the petitioners on allegations of conducting business without business license; Secondly, whether due process was followed during the closure of the petitioners' premises. Learned counsel submitted that the petitioners have already secured their practicing licenses from the Kenya Medical Laboratory Technicians and Technologists Board and as such the 1st respondent is not entitled to levy charges for payment of single business permits as it amounts to double taxation which is offensive to Article 209(5) of the constitution. On the second issue, it was submitted that the petitioner's rights under Article 47(1) of the constitution and section 4(3) of the Fair Administrative Act were not adhered to by the 1st Respondent when it commenced the actions against the petitioners whose constitutional right to earn a living by practicing their profession has been interfered with and hence the need for this court to allow the application and petition in entirety.

14. On behalf of the 1st Respondents it was submitted by Counsel B.M. Mungata & Co. Advocates that it was not proved that the petitioners were charged or shops closed or that the petitioners belonged to the professed professions. Reliance was placed on the case of **Kenya Pharmaceutical Association & Another v Nairobi City County & the Other County Governments & Another (2017) eKLR** and submitted that there was no evidence that anyone was charged for failing to meet professional qualification. It was submitted by counsel in placing reliance on the case of **Kenya Pharmaceutical Association & Another v Nairobi City County & the Other County Governments & Another (2017) eKLR** that the petitioners could not be allowed to trade without procuring trade licenses from the 1st respondent. In placing reliance on the case of **Munawar Shuttle v County Government of Kilifi & 2 Others (2018) eKLR** he submitted that the petitioners had not proved a violation of their rights as alleged and he urged the court to dismiss the petition with costs.

2nd Respondent's Case

15. There is no indication of any reply or submissions on their behalf. However, the court record for the 10.7.2019 reveals that learned counsel for the Petitioners Mr. Muli indicated to the court that he wished to withdraw the claim against the 2nd respondent whereupon Mr. Machogu for the 2nd respondent indicated that he had no objection but sought for 21 days within which to file any response if need be. The 2nd respondent has not filed any replies and thus it is safe to assume that the request by the petitioners to withdraw their claim against the 2nd respondent still stands. Indeed, there has been no participation by the said 2nd respondent in this matter since then thereby confirming that it did not need to file any response upon the withdrawal of the claim against them by the petitioners on the 10.7.2019c

Determination

16. I have considered the application the subject of this ruling, the various responses thereto, the submissions made on behalf of the parties hereto and the authorities cited. It is noted that earlier some of the prayers in the application were granted in the interim and what remains for determination are the pending prayers 3, 5, 6, 7 and 8 together with the petition. Suffice to add here that petitions cannot be filed in isolation as they must be accompanied by an application. Since some of the prayers had earlier been granted then the main task now is to determine the remainder together with the petition. Indeed, the counsels for the petitioners and 1st respondent have submitted on the application as well as the attendant petition.

17. Before delving into the merits of the application and the petition, an issue of jurisdiction was raised by the 1st respondent. The issue was to the effect that this court has no power to entertain the application and petition in view of the constitutional powers conferred on the 2nd respondent. **Nyarangi, JA** in the case of **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** while citing **Words and Phrases Legally Defined** – Vol. 3: I-N page 13 held:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

In that case the court further held:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the

matter before it the moment it holds the opinion that it is without jurisdiction”.

18. I would have to be satisfied on the requisite jurisdiction because without jurisdiction I have no option but to lay down my tools. I note that no provisions of the law were cited by the counsel for the 1st respondent regarding the aspect of jurisdiction.

19. Article 21(a) of the Constitution provides that “it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.” Under Article 1 of the Constitution sovereign power belongs to the people and it is to be exercised in accordance with the Constitution. That sovereign power is delegated to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; the Judiciary and independent tribunals must perform their functions in accordance with the Constitution.

20. Even though the petitioners withdrew their claim against the 2nd respondent, I find it necessary to analyze its role since the petitioners in their affidavit and submissions have raised the issue of jurisdiction. The office of the DPP is established by Article 157 of the constitution with a mandate to be in charge of all criminal prosecutions save for those in the court martial. Article 157(11) of the 1995 constitution is to the effect that;

“In exercising his or her powers under this Article, the DPP shall have regard to the Public interest, the interest of administration of justice and the need to prevent abuse of legal process”

Article 157(10) of the constitution is to the effect that;

In exercise of the functions conferred on him/her by this Article, the DPP shall not be subject to the direction or control by any person or authority.

21. Nevertheless, Article 23 grants the High Court power to uphold and enforce the bill of rights. A public authority will be found to have acted unlawfully and or unconstitutionally if it has made a decision or done something; without the legal power to do so (unlawful on the grounds of illegality); or so unreasonable that no reasonable decision-maker could have come to the same decision or done the same thing (unlawful on the grounds of reasonableness); or without observing the rules of natural justice (unlawful on the grounds of procedural impropriety or fairness).

22. The applicants/petitioners in this case are principally asking the court to interfere with the authority of the DPP’s office on grounds that the DPP has profiled the Petitioners and had them charged. They have also alleged that their actions have prejudiced the petitioners as they have been harassed from conducting their legitimate business within Machakos Township.

23. The decisions of the DPP are subject to Judicial review since in exercise of their powers under the Constitution the DPP is in effect performing an administrative act in nature akin to exercise of a quasi-judicial function, which it must be presumed will be exercised fairly and honestly within the ambit of the wide discretion bestowed on him by the Constitution, but he must keep within the legal limits of the exercise of his powers as laid down by the Constitution. See ***Matalulu v Director of Public Prosecutions [2003] 4 LRC 712; Sharma v Browne-Antoine et al [2006] UKPC 75 [2007] 1 WLR 78***. Similarly, the actions of the 1st respondent must be checked lest they engage in some excesses to the detriment of the citizens within the county. These entities are bound by the provisions of Article 47 of the constitution and section 4(3) of the Fair Administrative Actions Act that require that persons to be affected by decisions made by bodies are entitled to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

24. In light of the above provisions of the law, it is clear that this court has jurisdiction to entertain an application for judicial review when appropriately brought against the decisions of the respondents and therefore I am satisfied that the court has jurisdiction to entertain the instant application.

25. The next issue for determination is whether the orders sought should be granted. From the outset it must be noted that a Constitutional court has to be circumspect when entertaining matters challenging criminal proceedings in a civil court. This court being a civil court cannot delve into propriety of criminal proceedings in a criminal court on whether the evidence is sufficient to sustain the charges brought against the applicants. There is an appeal system in criminal trials through which the applicants can challenge the proceedings in the criminal court. **The House of Lords held in *Imperial Tobacco Ltd vs Att. Gen. [1981] A.C 718*** that where criminal proceedings have been properly instituted and are not vexatious or an abuse of the court process, it is not a proper exercise of the court’s discretion to grant a declaration to the defendant in those proceedings that the facts alleged by the prosecution do not in law prove the offence charged.

26. This would mean that the petitioners would have to satisfy the court that they meet the requirements for grant of the orders sought namely primarily conservatory orders against collecting levies, continuance of criminal proceedings against the petitioners and prohibiting them from interfering with the petitioners’ profession.

27. The circumstances under which conservatory orders may be granted were discussed **In *Judicial Service Commission v. Speaker of the National Assembly & Another [2013] eKLR***:

“Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personum. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

This position was reinforced by the Supreme Court in **Gatirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Ors** (supra) where the highest Court in the land held:

“Conservatory orders’ bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the “prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success’ in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

28. The issues which the petitioners have presented to the court are the contention that the respondents are harassing the petitioners and acting in breach of rights as listed in the application and the petition. The duty to be cognizant of whether or not any continued prosecution of the petitioners as well as the collection of levies has demonstrated that during the proceedings, the human rights of the petitioners have been violated to the extent described in their petition. No matter how strong the evidence against them may be, no fair trial can be achieved and any subsequent trials would be a waste of time and an abuse of court process. There is dicta and holdings from cases in the United Kingdom as well as courts here which provide persuasive guidance to this court in determining whether it has power to issue the orders sought and when such an order may be issued.

29. Lord Griffiths in **R vs Horseferry Road Magistrates Ex parte Bennet [1994] 1 A.C. 42** the House of Lords stated:

“.....the Judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. ... [Authorities in the field of administrative law contend] that it is the function of the High Court to ensure that the executive action is exercised responsibly and as Parliament intended. So also it should be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it. ... The Courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution.”

In the same case the House of Lords held that:

“.....the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court’s conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of the jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the Court’s process has been abused.”

30. In **Republic vs The Chief Magistrate, Milimani and 2 Others Ex. P Tusker Mattresses Ltd and 3 Others HC Misc. Civil Application No. 179 of 2012** it was 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.”

31. Irrationality was defined by Lord Diplock in **Council of Civil Service (1984) AC 110** as **“Wednesbury reasonableness”** he cited the decision in **Associated Provincial Pictures Houses Ltd vs Wednesbury Corporation (1984) K.B 223** wherein it was stated that irrationality is born out instances when the decision making authority acts so unreasonably that in the eyes of the court hearing the application, no reasonable authority properly directing itself to the facts and the law would make such decisions.

32. The petitioners are to bear the burden of proof regarding their claims against the Respondents. They have averred that the 1st respondent has ordered them to pay trade licenses in the form of single business permits yet they already have paid their professional license with their regulatory body namely Laboratory Technicians and Technologist Board and hence the new charges amount to double taxation. They have also claimed that they have been ordered to relocate away from the County Referral Hospital and finally that their members have been arraigned in court over the issue of the business permits. The petitioners have also presented documents annexed to the supporting affidavits as evidence of the alleged violation of their rights and have sought reliance in Article 47(1) and 209(5) of the Constitution as well as section 4(3) of the Fair Administrative Actions Act. It was the submission of their counsel that due to the violations complained of then the prayers sought in the application and petition ought to be granted.

33. The 1st respondent’s case is that the Machakos County Finance Act 2018 allows it to levy taxes and to regulate the conduct of trade within its area of jurisdiction and that the petitioners being engaged in business within Machakos town ought to pay the single business permit like other traders and should not confuse their professional license with business permit licenses. It was also the 1st respondent’s case that the directive to relocate away from the county referral hospital was issued in the month of March 2019 and that persons affected were expected to have complied with by the 31st May 2019 and hence the petitioners had been aware. Finally, it was the 1st respondent’s case that the arraignment of the petitioners and their workers was lawful as they had contravened the laws. It was the submission of their counsel that as long as the County Finance Act has not been declared as unconstitutional then the 1st respondent is within its rights to take the actions now complained of.

34. As regards the 2nd respondent it is noted that it neither filed a replying affidavit nor filed submissions. The petitioners having withdrawn their claim against it then it had nothing to respond to. This was a blunder on the part of the petitioners since their claim against their arraignment in court would have been aptly responded to by the said 2nd respondent who is constitutionally mandated to prosecute criminal

offences. The petitioners are well aware that prosecution of criminal cases is the preserve of the 2nd respondent and not the 1st respondent. Without any claims against the 2nd respondent then the petitioners' prayer for an order of stay of criminal proceedings as well as an order for declaration vide prayers 2, 3, and 5 in the petition dated 27.6.2019 must fail. This then leaves out prayers 1, 4, and 6 of the petition to be determined. I shall deal with them sequentially.

35. As regards the first prayer in the petition, it is noted that the 1st respondent through its Governor issued directives on the 13.3.2019 inter alia; that all private health facilities including pharmacies and laboratories operating within 300 metres from the County referral hospital or any county health facility were ordered to close or relocate and that all affected persons or entities were given up to 31.5.2019 to comply. The 1st respondent's chief officer in charge of public health and community outreach in his affidavit averred that the said directive was made pursuant to rampant pilferage of hospital drugs and equipment from the nearby county referral hospital which was confirmed during a raid on nearby health facilities that led to recovery of government issue drugs and equipment. The petitioners have claimed that they were not accorded a fair hearing as demanded under Article 47(1) of the constitution and section 4(3) of the Fair Administrative Actions Act. Article 47(1) and (2) provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and that he has a right to be given written reasons for the action if such a right or fundamental freedom is likely to be affected by such administrative action. The Fair Administrative Actions Act echoes the above provision of the constitution. The petitioners maintain that these provisions were not followed when the decision dated 18.6.2019 was taken by the 1st respondent. It is noted that the decision aforesaid was pursuant to the directives made on 13.3.2019 which had given a dateline of 31st May 2019. It is thus believed that the petitioners got to know about it since several of the petitioners' colleagues in a similar petition number 19 of 2019 availed a notice of the said directive. That being the position I am satisfied that the petitioners were aware of the directive quite early before the decision was made on 18.6.2019 and had plenty of time to engage the 1st respondent and as such I find their rights under Article 47 of the constitution were not violated. In any event it is within the 1st respondent's duty to manage its town planning activities for the convenience of the town residents. Consequently, the request for an order of certiorari to quash the decision is not merited.

36. On the issue of payments for the issuance of permits, Article 209(3) of the constitution provides as follows:

“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”

Article 209(5) provides that:

“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”

37. It is therefore clear that the 1st respondent is allowed to impose taxes if there is an Act of Parliament sanctioning the same. The 1st respondent has relied on its Machakos Finance Act 2018 which is the law governing the imposition of taxes within the county. Hence their actions are backed by legislation and which are prima facie legal and ought to be presumed constitutional. It is noted that the petitioners have not availed evidence to show that the said Finance Act has been declared unconstitutional. The presumption of constitutionality of statutes is thus not in doubt. This court in **Simen Kioko Kitheka & 18 Others v County Government of Machakos & 2 Others (2018) eKLR** quoted the case of **Nyanabo v A.G (2001) E.A 485** which stated :

“in interpreting the constitution, the court would be guided by the general principles that there is a rebuttable presumption that legislation is constitutional hence the onus of rebutting the presumption rests on those who challenge that legislation's status save that, where those who support a restriction on fundamental right rely on a claw back or exclusion clause, the onus is on them to justify the restriction”

It is to be noted that the said Finance Act is the basis of the imposition of the taxes or levies now complained of. The enactment of the said Act flows from the right granted to County Governments to enact laws vide Article 185 of the constitution. The petitioners have availed documents showing that they have already paid their professional license fees with their regulatory body namely Medical Laboratory Technicians and Technologists Board and as such they cannot again be compelled to pay single business permit licenses by the 1st respondent as it amounts to double taxation. I note that some of the petitioners have annexed copies of the single business permits indicating that they had been paying the same in the past. They now want to be exempted from paying the same since they are professionals regulated by a statutory body. There has been a thin line regarding the practice of pharmacy and laboratory viz a viz general trade due to the fact that any person can engage in such business for instance those selling pharmaceutical products. It is not unusual for one to find pharmaceutical products such as lotions, perfumes etc. being sold in some chemist shops in towns. It is also not uncommon to find persons who are not pharmacists but ordinary business people running pharmacies through trained pharmacists. In such situations a local authority will be entitled to impose taxes in the form of business permits. The 1st respondent being a county government is under obligation to collect taxes for use in the provision of services to the citizens. My considered view is that even though pharmacy is a profession the fact that other products or items other than drugs for human use are lumped together for sale makes it to appear like any other business which then warrants imposition of business permit license. Further those engaged in pharmacy business only sell their items and do not engage in offering services doctors seeing patients. A pharmacist's job only sells goods across the counter. This then makes this kind of trade to be like any other in the market warranting a local authority to impose the requisite business permits. In Petition 9 of 2016 Kenya pharmaceutical Association of Kenya Vs Nairobi County Government and 46 Other County Governments the court was faced with the question as to whether pharmacists are liable to pay trade licenses and the court proceeded to hold that they are liable to pay trade licenses because they sell pharmaceutical goods. Justice

Mativo in the said case held as follows:

“...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.”

I wish to associate myself with the above decision of Mativo J. As long as the petitioners continue to sell drugs and not services unlike their counterparts like medical doctors, lawyers etc. they must be prepared to pay the business permit fees required of them. The practice has always been that it is doctors who prescribe medicine to their clients who then proceed to the chemist to purchase the drugs from the pharmacist. The pharmacist plays no role at all in offering services of attending to patients and prescribing drugs other than selling his or her goods at the counter. Such a scenario leaves no doubt that the petitioners trade is just like any other within such a locality. The Machakos County Finance Act still being in force entitles the 1st respondent to collect taxes. Hence decisions that stem from the application of the said statute cannot be voided or invalidated. The 1st respondent is permitted by the said Act and has a free hand to raise revenue for use in running the devolved functions. That being the position I find that the 1st respondent is entitled to levy the trade license fees from the petitioners. The petitioners must regulate their issues of licenses with the 1st respondent as they engage in their trade. There is no double taxation as claimed by the petitioners.

38. In the final analysis it is my finding that the petitioners' application and petition dated 27.6.2019 lacks merit. The same are ordered dismissed with no order as to costs. The interim orders earlier issued are hereby vacated.

It is so ordered.

Dated and delivered at Machakos this 7th day of May, 2020.

D. K. Kemei

Judge