



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS CONSTITUTIONAL DIVISION**

**PETITION NO. 19 OF 2019**

**IN THE MATTER OF ARTICLES 2, 3, 6, 10, 19, 20, 21, 22, 23, 24, 35, 40, 43, 46, 47, 48, 50, 159, 165, 174 and 258 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE PHARMACY AND POISONS ACT CAP 244 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO 4 OF 2014**

**AND**

**IN THE MATTER OF ACCESS TO INFORMATION ACT NO 31 OF 2016**

**AND**

**IN THE MATTER OF THE CONSUMER PROTECTION ACT, 2012**

**BETWEEN**

**DR JACINTA MUKONZO.....1<sup>ST</sup> PETITIONER**

**DR MICHAEL MUSYOKI KAMALA.....2<sup>ND</sup> PETITIONER**

**DR WILSON KYALO MUTUA.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**GOVERNOR MACHAKOS COUNTY.....1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MACHAKOS.....2<sup>ND</sup> RESPONDENT**

**AND**

**PHARMACY AND POISONS BOARD.....INTERESTED PARTY**

**JUDGEMENT**

**Introduction**

1. This judgement is in respect of the petition filed by the petitioners vide petition dated 19.6.2019 that is founded on Articles 2, 3, 10, 22, 23, 35, 40, 43, 46, 50, 165, 174, 232 and 258 of the Constitution of Kenya, 2010.

2. The Petitioners are indicated as Pharmacists registered in line with Section 16 and 19 of the Pharmacy and Poisons Act Cap 244 by the Pharmacy and Poisons Board.

3. The 1<sup>st</sup> Respondent in the petition is elected under Article 180 of the Constitution and a state officer in the context of Article 260 of the Constitution.

4. The 2<sup>nd</sup> Respondent is a creature of Article 176 of the Constitution.

5. The interested party is a creature of statute under Section 3 of the Pharmacy and Poisons Act CAP 22 with a duty of governing the practice of Pharmacy and ensuring that pharmaceutical products are in line with the standards set.

6. What provoked this petition was the directions issued by the respondents that pharmacies operating within a kilometer radius from the county hospital be closed and their licenses be revoked immediately (hereinafter referred to as the directions). In addition it was alleged that some of the petitioners were arraigned and indicted as well as prohibited from entering their pharmacy outlets in fear of being arrested. It was also the petitioners' gravamen that the respondents are in the process of usurping the role and functions of the Pharmacy and Poisons board and that the general public is being denied medicines hence a violation of their right to health.

7. Aggrieved by these actions, the Petitioners herein filed the instant petition together with an application that was dispensed with at first instance. In the petition they seek the following orders:

**(a) A declaratory order that the actions of the Respondents contravene the Provisions of Articles 2, 3, 10, 22, 23, 35, 40, 43, 46, 50, 165, 174, 232 and 258 of the Constitution of Kenya, 2010 and THUS contravened the rights and freedoms of the petitioners and the general public.**

**(b) A prohibitory injunction against the respondents proscribing them from;**

**i. Closing down any pharmacy that is operating lawfully in any geographical location within Machakos County.**

**ii. Revoking any licenses of registered pharmacies operating legally in Machakos County.**

**(c) A mandatory injunction to the respondents compelling them to**

**i. Restitute all pharmacies' licenses revoked on the basis of proximity from the county hospital**

**ii. Withdraw all charges against the pharmacists arrested for operating pharmacies close to the county hospital**

**(d) An order of compensation to all affected pharmacies and pharmacists for**

**i. Unlawful arrest and unlawful prosecution**

**ii. Loss of income for the period their facilities were closed down**

**iii. Arbitrary arrests and public humiliation**

**iv. Defamation of the Pharmacists' character**

**v. Contravention of the rights of the pharmacists within the bill of rights**

**(e) Any other relief the court deems fit to grant**

**(f) Costs of this application(sic) be borne by the respondent**

#### Petitioners' Case

8. In support of the petition was an affidavit deponed by Dr Michael Musyoki Kamala on 20.6.2019. It was averred that the deponent is a registered pharmacist. It was averred that the respondents on 17.6.2019 gave directions that are the subject of this petition and annexed were copies of the directive that according to the deponent is not based on any known law. It was averred that the respondents caused the arraignment of some of the petitioners hence humiliating them as indicated in DKM3 that is a cash bail receipt in the names of Onesmus Mutinda.

9. Annexed to the petition was a joint affidavit deponed by Dr Jacinta Mukonzo on 19.6.2019 but not deponed and by Wilson Kyalo Mutua unsigned and undated though a commissioner's stamp has been carelessly placed at the tail end of the affidavit. The same also has interlineations that are not countersigned. The deponents associated themselves with the petition.

10. On record is a supplementary affidavit by the 2<sup>nd</sup> petitioner deponed on 24.9.2019 to which he annexed a copy of the premises license and copies of sales records for the pharmacy. It was averred that the respondents failed to demonstrate that any pharmacy was in possession of pharmaceutical products with the GOK symbol.

11. The petitioner's case was represented by the Akusala Company Advocates who filed written submissions on 25.9.2019. Four issues for

determination were framed in the submissions the first being whether the public raid and closure of the pharmacies was lawful and justifiable; Secondly whether the arrest and subsequent detention of Pharmacists was lawful; Thirdly, whether there was a breach of the Constitution, statutes and Fair Administrative Action and finally whether the orders prayed for in the petition can be granted. On the 1<sup>st</sup> issue, it was submitted that the Annexure DMK2 proved that the 1<sup>st</sup> respondent closed clinics and chemists and labs near Machakos Government Public Health facilities. On the 2<sup>nd</sup> issue, it was submitted that there was no prosecutable evidence for the arrests and detention of the pharmacists in Criminal Case 524 of 2019. On the 3<sup>rd</sup> issue, it was submitted there have been breaches of the constitution and the fair Administrative Actions Act. On the 4<sup>th</sup> issue, it was submitted in placing reliance on the case of **Judicial Service Commission of Kenya v Mbalu Mutava & Another (2015) eKLR** that the petitioners were denied the right to fair administrative action.

### The Respondents' Case

12. The Respondents' case was based substantially on the reply by the respondents.

13. According to 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 is the respondents' case that the petitioners have not demonstrated how their rights have been violated. It was the respondents' case that compensation of the petitioners would be tantamount to usurping the powers of the trial court.

14. On behalf of the 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 1<sup>st</sup> respondent. In placing reliance on the case of **Munawar Shuttle v County Government of Kilifi & 2 Others (2018) eKLR** that the petitioners had not proved a violation of their rights as alleged.

### Determination

15. I have considered the petition the subject of this judgement, the various responses thereto, the submissions made on behalf of the parties hereto and the authorities cited.

16. Before delving into the merits of the application, an issue of jurisdiction in my view was alluded to by the respondents. The issue was to the effect that this Court has no power to determine or entertain the petition. **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”.**

17. I would have to be satisfied on the issue of the requisite jurisdiction because without jurisdiction I have no option but to lay down my tools.

18. In support of this contention, reference was made to the DPP though no provision of the law was cited.

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; and the Judiciary and must perform their functions in accordance with the Constitution.

20. 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. Article 245 establishes the command of the National Police Service and states that:

**no person may give a direction to the Inspector-**

**General with respect to—**

**(a) the investigation of any particular offence or offences;**

**(b) the enforcement of the law against any particular person or persons; or**

**(c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service**

22. 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).

23. The petitioners in this case are principally asking the court to interfere with the authority of the DPP’s office and the IGP’s office though they have not made the DPP and the IGP parties to the case. They have imputed that the actions of the respondents have prejudiced the petitioners.

24. This would mean that the decisions of DPP and the IGP are subject to Judicial Review and this would be subject to proof of the petitioners’ case. It is clear that this court has jurisdiction to allow an application for judicial review when appropriately brought against the decisions of DPP and IGP 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. It should be noted that a Constitutional court has to be circumspect when handling matters presented by litigants challenging criminal proceedings in a civil court. This court being a civil court cannot delve into propriety of criminal proceedings in a criminal court or whether the evidence is sufficient to sustain the charges brought against the applicant as that is the preserve of the trial courts. There is an appeal system in criminal trials through which the applicant can challenge 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 petitioner would have to satisfy the court that they meet the requirements for grant of the orders sought and that they have sued the correct parties.

27. Whereas the petition seeks to prohibit the respondents from revoking licenses of the petitioners and closing down their pharmacies great care must be taken to ensure that no one is condemned unheard. The petitioner bears the burden to prove whether or not in the closing down of their pharmacies and revoking licenses of registered pharmacies, the human rights of the petitioners had been violated to the extent described in their petition.

28. **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."**

29. Having considered the evidence on record, I am unable to find that the petitioners have satisfied their burden of proof. More so the pleadings lack clarity on how the respondents have violated the rights of the petitioners; they mention persons who are not party to the suit or have not sworn affidavits to enable court make a finding that indeed they were affected by the actions of the Respondents. Counsel ought to be quite well aware of the procedure for filing representative suits and having not sued in representative capacity, this court cannot make assumptions on what has not been presented on the table.

30. It is the respondents' case that they have not *done anything that is unconstitutional*. According to the respondent, their actions are backed by legislations that are prima-facie legal and presumed constitutional and therefore the petitioners are not entitled to the relief sought. This Court has previously held that the presumption of constitutionality of statutes is not in doubt. The Court in **Simeon Kioko Kitheka & 18 Others v County Government of Machakos & 2 Others (2018) eKLR** quoted the case of **Ndyanabo v A.G. (2001) EA 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 a fundamental right rely on a claw back or exclusion clause, the onus is on them to justify the restriction."* [emphasis mine]**

31. From the pleadings, and as submitted by the respondent, there is no challenge on the constitutionality of the provisions of **The Machakos County Finance Act 2018** and on this basis alone decisions that stem from the application of the said statutes cannot be voided or invalidated. The second respondent is permitted by the said Act to raise revenue through various regulations for use in running the devolved functions. As long as the said Act is still in force then the second respondent has a free hand in running its activities. This means that prayer 1 of the petition fails.

32. I will then address the other prayers sought by the petitioners. Having made my finding in paragraph 31 above, it follows therefore the court is unable to make an order directed to the respondents yet the powers are provided for in a statute that has not been challenged and hence prayer 2 and 3 in the petition fails. In any event, if the petitioners desire to operate their trade within Machakos County, then they ought to seek licenses from the 2<sup>nd</sup> respondent. I am guided by the finding in **Kenya Pharmaceutical Association & Another v Nairobi City County & the Other County Governments & Another (2017) eKLR** where the court found that there was a distinction between professional and trading licenses and the petitioners could not be allowed to trade without procuring trade licenses from the 1<sup>st</sup> respondent. The petitioners must regulate their issues of licenses with the 2<sup>nd</sup> Respondent as they engage in their pharmacy practice.

33. As regards, the prayer on compensation, the respondents have argued that compensation would interfere with the pending criminal trials and the powers of the trial court. As indicated earlier, the petitioners challenge the exercise of the powers of the IGP and the DPP who are not party to the suit. Therefore, the court sees no need to delve into the issue of compensation. Suffice to add that the trial courts are yet to finalize with the cases and hence it is too early for the petitioners to jump the gun but they should address the same within the alleged pending cases.

34. After considering the relevant provisions of the law, as well as the submissions made before me, and after taking due account of the persuasive authorities from a number of jurisdictions, I have come to the conclusion that every law is presumed valid unless challenged. From the record before me, it cannot be disputed that the petitioner has not challenged the validity of the laws that the respondent is relying upon; further the petitioner purports to challenge actions of persons who are not party to the suit and on this account, I cannot entertain the prayers sought in the petition and thus reject the same.

35. In the result it is my finding that the petition dated 19.6.2019 lacks merit. The same is 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 7<sup>th</sup> day of **May, 2020**.

**D. K. Kemei**

**Judge**