



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAHURURU**

**J.R.NO.8 OF 2017**

**PETER NDUNGU MBUGUA & 39 OTHERS ..... APPLICANT**

**VERSUS**

**COUNTY ASSEMBLY OF NYANDARUA ..... 1<sup>ST</sup> RESPONDENT**

**NYANDARUA COUNTY EXECUTIVE ..... 2<sup>ND</sup> RESPONDENT**

**NYANDARUA COUNTY GOVERNOR ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

Before me is the **Notice of Motion** dated 3/4/2017 brought by the ex parte applicant Peter Ndungu Mbugua and 39 other applicants against the County Assembly of Nyandarua, Nyandarua County Executive of Health and Nyandarua County Governor (1<sup>st</sup> to 3<sup>rd</sup> respondent) seeking the following orders:

- 1. That the court do issue an order of certiorari to remove into this Hon. Court and to quash the decision of the respondents purporting to levy for single Business permit from the members of the Medical Profession within Nyandarua County.**
- 2. That this court do issue an order of prohibition to prohibit the respondent from implementing their decision of levying for Single Business Permit from the members of Medical Profession within Nyandarua County.**
- 3. The costs of the application be borne by the respondents.**

The application was premised on grounds found in statement of facts filed along with the chamber summons dated 24/3/2017 and the verifying affidavit dated 24/3/2017, sworn by Peter Ndung'u Mbugua, the 1<sup>st</sup> ex parte applicant on behalf of the other applicants.

The applicants are members of the medical profession offering Health Care Services within Nyandarua County Government. They include nurses, clinical officers, pharmacists e.t.c. They contend that they are licensed by their professional bodies to offer services and the said bodies regulate their operations and in addition, they pay Kshs.10,000/= for inspection of their premises; that the monies are collected on behalf of the National Government; that the County Government of Nyandarua has issued them with invoices exhibited to the verifying affidavit, purporting to levy single business permits from the members of the medical profession. They contend that the said action by the respondents is unconstitutional and amounts to double taxation.

In the 1<sup>st</sup> Schedule of the Act at No.724 – 741 Private Health Facilities, Chemists and Pharmaceuticals have to pay business licenses in terms of Section 4(1) of the Act and that is what is contested.

Ms. Njoroge, counsel for the applicants also filed submissions in which she urged that:

- (1) Doctors and Dentists are members of the Medical Practitioners and Dentists Board established under the Medical Practitioners and Dentist Act (Cap.253);***
- (2) Pharmacists are members of Pharmacy and Poison Board which is established under the Pharmacy and Poisons Act (Cap.254);***
- (3) Nurses are members of Nurses Council established under the Nurses Act (Cap.257);***
- (4) Laboratory Technicians are members of Kenya Medical Technicians and Technologists Laboratory technologist Board established under the Medical Laboratory Technicians and Technologists Act No.10 of 1999.***

**(5) Clinical officers are members established under the clinical officers training, registration and Licensing Act (Cap.260) Laws of Kenya.**

The applicants content that they pay licensing fees to their respective regulatory bodies who regulate their operations; that the County Government does not have the capacity to regulate them; counsel also submitted that Article 209(1) and (3) of the Constitution authorizes the County Government to impose taxes but with a limitation under Article 209(5) that the taxes imposed should not prejudice National Economic Policies.

Counsel relied on the decisions of **Republic v Municipal Council of Thika and another exparte Kenya Medical Association & 5 others Misc.782/2000** where the same issue was considered. Counsel also relied on **J.R.14/2014 Nakuru County Government exparte John Njenga Ngethe & 117 others**. Counsel also noted that the Law Society of Kenya in **Misc.53/2007, Republic v The City Council of Nairobi & another ex parte**. The Law Society of Kenya challenged a decision to impose a Single Business permit on them and the court found that the decision to impose a single permit offended Article 209(5) of the Constitution.

Counsel distinguished this case with the decision in **J.R.97/2016 Peter Owino for Kenya Pharmaceutical Association** where J. Mativo recently held that when Pharmacists sell drugs they are trading, unlike the other practitioners who merely see patients and prescribe drugs.

The application was opposed. Mr. Okubasu appeared for the respondents and interested parties. Counsel filed grounds of opposition on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents dated 15/5/2017 and the interested parties. A further affidavit was sworn by Kelly Malenya Advocate, dated 9/10/2017 opposing the application. Counsel also filed grounds of opposition dated 20/11/2017. The gist of the grounds is that there was already a similar matter pending in court **Pet.97/2016. Chairman, Treasurer and Hon. Secretary General of Kenya Pharmaceutical Association v County Government of Nairobi and 46 other County Governments** and that this application is an abuse of the court process. The further affidavit introduced the decision in **Pet.97/2016 (Supra)** where the court found that professions like Pharmacy ought to pay single business permit, and that it did not amount to double taxation; that in so far as the applicants purport to include pharmacists in this application, the issue has been determined.

Mr. Okubasu also argued that every year, the County Government enacts a different Finance Act and that this application is directed at legislation whose term has ended Counsel also argued that the applicants invoked the wrong jurisdiction to challenge the decision making process; that Article 185 of the Constitution vests the County Government with legislative authority to make any legislation for the performance of its duties and the question before the court is the constitutionality of the Finance Act but not that the County Government acted *ultra vires* its powers; that the challenge should have been by way of a Constitutional Petition; that Judicial Review Jurisdiction is concerned with the decision making process but not the merits of the decision. Counsel also urged that the levying of single business permit is not double taxation; that **Republic v Thika Municipal Council ( supra)** is a case decided under the old dispensation; that in imposing the single permit, the County Government would not be regulating the profession but the license is for trading in the County; that if orders are granted, they will imperil the collection of all revenue.

Having considered the pleadings and case law cited, I think that the main issues for consideration are what the counsel for the respondents and interested parties framed;

- 1. Whether the application is properly before this court;**
- 2. Whether County Governments are prevented from charging for trade licenses or a single Business Permits from members of professional bodies such as the applicants.**

The applicants included herein are Doctors, Dentists, Pharmacists, Nurses, Laboratory Technicians and Clinical Officers.

[Blacks' Law Dictionary 10<sup>th</sup> Edition at page 1903 defines profession as 'A vocation requiring advanced education and training especially one of the three traditional learned professions – Law, Medicine and the Ministry.'

Concise Oxford English Dictionary 12<sup>th</sup> Edition defines profession as '*paid occupation, especially one involving training and a formal qualification.*']

Whether the application is properly before this court by way of Judicial Review; Judicial Review orders issue against public bodies or public officers when they act beyond their powers or act without powers (*ultra vires*) or if they act illegally. Judicial Review orders also lie where rules of natural justice have been flouted. The applicants have alleged that the Respondents have acted *ultra vires* their powers and therefore they could invoke the Judicial Review jurisdiction. Looking at some of the cited decisions where legislation has been challenged, Judicial Review jurisdiction has been invoked. In **Medina Hospital Ltd & others V County Government of Garissa (2017) KLR** though the matter was commenced as a petition, Judicial Review orders of *certiorari* were sought; **JR 33/2007 Republic V City Council of Nairobi and another for Local Government ex parte LSK (Misc.2 of 2015)**, the applicants came by way of Judicial Review and orders were granted. See also **J.R.244/2011 Republic v County Council of Nairobi ex parte Emirates Airline**. In my view, the applicant's application cannot fail merely because it is by way of Judicial Review. The applicants are properly before this court.

**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 applicant's 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 already pay taxes to their Regulating bodies.

The respondent opposed this application on grounds that it is an omnibus since the issue is *Res judicata* as regards pharmacists whose case was determined by J. Mativo in **Petition 97/2016, the Kenya Pharmaceutical Association of Kenya Vs Nairobi County Government and 46 others County Governments**. The court considered the question whether pharmacists are liable to pay trade licenses. The court held that they are liable to pay trade licenses because they also sell pharmaceutical goods. The court said:

***“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.”***

The above decision applied to all pharmacists in Kenya because all the 47 counties were enjoined to the said application. The applicants did not indicate whether there has been any appeal against that decision. As regards pharmacists, therefore, the issue of payment of trade licenses is res judicata and they should not have been part of the application.

Article 209(3)(c) of the Constitution provides;

***“3 A County Government may impose:***

***(c) Any other tax that it is authorized to impose by an Act of parliament.***

***At Article 209(4), both the National and County Government may impose charges for the services they provide, while Article 260 as goes to define legislation to include***

***4(a) an Act of Parliament or a law made under authority conferred by an Act of Parliament; or***

***(b) A law made by an assembly of a County Government, or under authority conferred by such law.”***

It follows that the laws made by the County Government of Nyandarua are legislation. This includes Section 4 of the Finance Act that is under challenge.

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. In ***Pet 97/2016, Kenya Pharmaceutical Association of Kenya(supra)***, J. Mativo observed that the pharmacy profession was different from the other professions like law or architecture. I believe this would also include medicine.

In the case of ***Wasswa (supra)*** J. Emukule found that the mere payment of fees to the Auctioneers Licensing Board did not warrant the Auctioneers being professionals. Anybody can become an auctioneer and does not need to undergo any training or so auctioneers were liable to pay trade licenses to the County Governments.

The Judge said:-

Justice Emukule found that ***“The payment of a fee for the grant of an Annual Practicing Certificate by the Auctioneers Licensing Board neither constitutes the licensee into professional, nor is it a bar to any other legitimate charges that may be imposed by a County Government. In other words, what a County Government is prohibited from doing is the issue of a Regulatory License which is a function of the National Government. That fee indeed goes to the Consolidated Fund. The trade licensing fee is paid for trading in the County”.***

Though ***Republic V the Municipal Council of Thika Misc. Appl 782/2000*** and ***JR 53/2007 Rep Vrs City Hall of Nairobi ex parte LSK*** are decisions filed under the retired Constitution, they are still valid as long as the professionals still pay for their yearly certificates to their Regulatory bodies.

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 Practicing Certificates confirming that they are qualified for the year in question in order to carry out their activities for the year.

In the Fourth Schedule to the Constitution, among the services devolved to the County Government is Trade Development and Regulation which includes:

(a).....

(b) Trade licensing (excluding regulation of professionals).

The County Government is therefore prohibited from issuing regulatory licenses.

In the end, I come to the conclusion that by demanding single business permit from the applicants (save for Pharmacists), the same is oppressive and the respondents are acting outside their powers. I therefore grant the orders as prayed:-

***i. An order of certiorari to call into this court and hereby quash the decision of the respondents having single business permit from the members of the medical profession within Nyandarua County except for pharmacists.***

*ii. I also grant an order of prohibition to bar the respondents for implementing their decision to levy single business permit from members of medical professional within Nyandarua County except for pharmacists.*

*iii. Costs to be borne by the respondents.*

Dated, Signed and delivered at Nyahururu this 16<sup>th</sup> day of October, 2018.

.....

**R.V.P Wendoh**

**JUDGE**

**PRESENT:**

Mr. Chege holding brief for Ms. Njoroge

C/Assistant – Soi