



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO 3 OF 2018**

**(FORMERLY NYAHURURU HC CONSTITUTIONAL PETITION NO 3 OF 2018)**

**WAITHANJI RICHARD GITAHI**

**(T/A MUHOTETU CHEMIST) & 9 OTHERS.....PETITIONERS**

**VERSUS**

**COUNTY GOVERNMENT OF LAIKIPIA.....RESPONDENT**

**AND**

**1. PHARMACY AND POISON BOARD**

**2. COUNTY ASSEMBLY OF LAIKIPIA.....INTERESTED PARTIES**

**R U L I N G**

1. Article 176(1) of the Constitution of Kenya, 2010 provides -

***“176. (1) There shall be a county government for each county consisting of a county assembly and a county executive.”***

By legal description therefore, the 2<sup>nd</sup> Interested Party in these proceedings (as sued by the Petitioners), **County Assembly of Laikipia**, is part and parcel of the Respondent, the **County Government of Laikipia**. The Petitioners therefore cannot properly sue both (separately) the **County Government of Laikipia** and the **County Assembly of Laikipia** as the latter, along with the **Laikipia County Executive**, comprise the former!

2.The 2<sup>nd</sup> Interested Party is therefore misjoined in these proceedings, and its name is hereby struck out of these proceedings, with costs against the Petitioners. It is so ordered.

3.Having gotten rid of that preliminary issue, I now turn to the application at hand. That application is the **notice of motion dated 06/04/2018** (filed on 15/05/2018) by the 1<sup>st</sup> Interested Party, **Pharmacy and Poisons Board**. It seeks the main order that its name be struck out from these proceedings. The application is said to be bought under **Articles 48 and 159(2) (d)** of the **Constitution of Kenya**; and also under **Rules 3, 5 (d) (i) & 19** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** (hereinafter called **Mutungu Rules**).

4. The grounds for the application as set out on the face thereof are -

(i) That the 1<sup>st</sup> Interested Party was improperly joined in these proceedings by the Petitioners.

(ii) That in the petition and the application for conservatory orders (notice of motion dated 09/03/2018) the Petitioners have not in any way demonstrated how the 1<sup>st</sup> Interest Party is a necessary party in the proceedings.

(iii) That the 1<sup>st</sup> Interested Party does not have any legal or other identifiable stake or interest in the proceedings.

The application is supported by an affidavit sworn by one **Kibet Kisorio**, the Legal Officer of the 1<sup>st</sup> Interested Party.

5. When the application came up for hearing on 17/07/2018 the court was informed that the Respondent and the 2<sup>nd</sup> Interested Party do not oppose the application.

6. As for the Petitioners, they filed grounds of opposition dated 03/07/2018. Those grounds are:-

(i) That the 1<sup>st</sup> Interested Party is properly joined in the proceedings in its capacity as the regulator of the Petitioner's profession under the ***Pharmacy and Poisons Act, Cap 244***.

(ii) That the 1<sup>st</sup> Interested Party is a necessary party "...as the petition related to licensing of business premises operated by the Petitioners which are already licensed by the (1<sup>st</sup> Interested Party)."

(iii) That the 1<sup>st</sup> Interested Party has an identifiable stake and legal interest in the proceedings as a regulator.

(iv) That the proceedings concern the issue "...whether imposition by the Respondent of a single business permit upon the Petitioners' business premises (when) they (already) pay to the Interested Party a Premises Registration Certificate amounts to double taxation."

(v) That the presence of the 1<sup>st</sup> Interest Party shall enable the court to effectually and completely adjudicate upon and settle all questions involved in the proceedings.

The Petitioners did not file any replying affidavit.

7. I have considered the submissions of counsels for the 1<sup>st</sup> Interested Party and the Petitioners, including the cases cited.

8. The main and specific reliefs sought by the Petitioners in the petition are:-

(a) A declaration that the 4<sup>th</sup> Schedule to the ***Laikipia County Finance Act, 2017*** is unconstitutional and invalid to the extent that it provides for charging fees for operating chemists in contravention of **Article 191** of the ***Constitution of Kenya, 2010*** and **section 23(1)** of the ***Pharmacy and Poisons Act, Cap 244***.

(b) An order of injunction to restrain the Respondent from imposing, demanding, levying, charging, collecting, retaining or enforcing by criminal prosecution or otherwise single business permits against chemists under the ***Laikipia County Finance Act, 2017*** or any other subsequent Act in contravention of **Article 191** of the ***Constitution of Kenya*** and the ***Pharmacy and Poisons Act***.

9. The term "Interested Party" is defined in the Mutunga Rules as follows -

***"A person or entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation."***

10. The 1<sup>st</sup> Interested Party is the regulator of the chemist or pharmacy profession under the relevant statute. It appears to levy from the professionals it regulates certain fees, including fees for premises in which they carry out their profession. It is part of the Petitioners' case in the present proceedings that those fees charged by the 1<sup>st</sup> Interested Party are a form of taxation, and that therefore if the Respondent is permitted to charge the Petitioners similar fees, this will amount to double taxation.

11. The 1<sup>st</sup> Interested Party, it will be noted, filed grounds of opposition dated 12/07/2018 in respect to the petition. Some (13) grounds are set out. Many of those grounds join issue with the Petitioners upon their case as pleaded in the petition, or raise substantive issues of law that will be necessary to determine at the hearing of the petition.

12. I am therefore satisfied upon the material now before the court, that the 1<sup>st</sup> Interested Party has an identifiable stake and legal interest as regulator of the pharmacy profession in the present proceedings. It is a necessary party, as evidenced by its own grounds of opposition to the petition, for the effectual and complete adjudication and settlement of all questions involved in the proceedings.

13. I therefore refuse the application by notice of motion dated 06/04/2018, and the same is hereby dismissed. Costs thereof shall be in the main cause. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS 22<sup>ND</sup> DAY OF NOVEMBER 2018**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 22<sup>ND</sup> DAY OF NOVEMBER 2018**