



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 67 OF 2015**

**DICKSON MATEI t/a**

**MACHETE AUCTIONEERS AND 10 OTHERS.....1<sup>ST</sup> PETITIONER**

**VERSUS**

**THE NAIROBI COUNTY GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**THE FINANCE COUNTY EXECUTIVE OF THE**

**NAIROBI CITY COUNTY GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. This petition concerns the levying of taxes and charges by the 1<sup>st</sup> respondent in its Finance Act, 2013. The petitioners, all of whom are auctioneers, are aggrieved by the decision of the respondent to levy from them the sum of Ksh35,000/- pursuant to paragraph 2.6 of the schedule of the Nairobi City County Finance Act, 2013.
2. They assert that they are professionals and have paid their trade licences to their professional body, the Auctioneering Licensing Board, pursuant to the Auctioneers Act No 5 of 1996 and Rules of 1997. They should therefore not be required to make any payment to the county government as Paragraph 7(b) of Part 2 of the Fourth Schedule of the Constitution, enacted pursuant to Article 185(2), provides that the County Government shall deal with trade licences excluding regulations of professionals.
3. Their view is that the respondents are not empowered to collect any taxes, fees or charges from them, and they therefore challenge the constitutionality of paragraph 2.6 of the Schedule to the Nairobi City County Finance Act, 2013 which they argue is unconstitutional, and they seek a declaration to that effect.
4. The 1<sup>st</sup> respondent is the County Government of Nairobi, established under Article 6 (1) of the Constitution of Kenya and the County Governments Act, No. 17 of 2012, Laws of Kenya. The 2<sup>nd</sup> respondent is an office within the county government of Nairobi established pursuant to Article

179 (1) of the Constitution and section 3 (2) (d) of the County Government Act.

5. The parties filed submissions in support of their respective cases, which Counsel for the respondents, in the absence of Counsel for the petitioners on the date fixed for hearing of the matter, requested the Court to rely on in rendering its decision on the matter.

### **The Petitioners' Case**

6. The petitioners' case is contained in their petition dated 19<sup>th</sup> February, 2015, an affidavit in support sworn by the 1<sup>st</sup> petitioner, Dickson Matei, on the same date, and submissions dated 10<sup>th</sup> September, 2015.
7. The petitioners contend that their businesses are governed by the Auctioneers Act and Rules of 1997. They state that one can only undertake the business of an auctioneer upon obtaining a valid auctioneers licence issued by the Auctioneers Licensing Board under the Act. The licences are issued and renewed yearly upon payment of a sum prescribed by the Auctioneers Licensing Board. At the time of filing this petition, the sum was Kshs 8,500/= for a Class B licence.
8. Mr. Matei averred that auctioneers have never paid any taxes, fees, charges or levies to the Nairobi City Council or the Nairobi county government. However, in 2009 and 2011, the Nairobi City Council attempted to levy single business permits against different professionals, including auctioneers. However, by a letter dated 28<sup>th</sup> September, 2009 and Circular No. 35/2011, Ref MLG/919/(20) of 15<sup>th</sup> February, 2011, both from the Permanent Secretary, Ministry of Local Government, addressed to all Town Clerks, City Council of Nairobi, Municipal and Town Councils and all the Regional Local Government officers, all the Councils were stopped from levying single business permits to the members of professional bodies indicated in the circular, including engineers.
9. The petitioners argue that the Circular was issued after certain professionals lodged suits to stop the Nairobi City Council from collecting taxes and/or charges from them while they had paid for their professional licences to their respective professional bodies. Following the Circular, the Nairobi City Council stopped demanding the fees.
10. According to the petitioners, they have been operating their professional businesses since the promulgation of the Constitution, 2010 without much interference from the respondents. Upon the passage of the Nairobi City County Finance Act, 2013 however, officials of the respondent have been harassing them to pay the aforesaid levy of Kshs.35,000/=.
11. The petitioners contend that they are professionals and are regulated by a body established under an Act of Parliament. Consequently, they are excluded from taking out licences as the respondents are demanding. It is their argument further that the Fourth Schedule to the Constitution prohibits County Governments from regulating professionals and the demand for levies from the petitioners by the respondents is therefore irregular and unlawful.
12. In their submissions, the petitioners argue that the question whether the county government should levy charges or taxes against professionals has been the subject of many court decisions including **Republic vs Municipal Council of Thika and Another ex parte Kenya Medical Association and 5 Others, Nairobi Miscellaneous Application No. 782 of 2000 and Republic vs City Council of Nairobi and Another ex parte Law Society of Kenya, [2014] eKLR**. Their contention is further that paragraph 7 (b) of Part 2 of the Fourth Schedule to the Constitution prohibits county governments from regulating professions. In their view, the assertion by the respondents that they have control over professions and can control or screen the petitioners to establish who is competent to engage in auctioneering business within the jurisdiction of Nairobi City is misplaced, a fallacy and not supported by any law.

13. The petitioners have further argued that the rationale for the enactment of the aforesaid paragraph 7 (b) of the Fourth Schedule was to guard professions from double taxation. They have relied on the decision in **Medina Hospital Limited and 6 Others vs County Government of Garissa [2015] eKLR** for this proposition. It is their contention that they provide services across different counties and it would be absurd and stifling to demand that they obtain licences from different counties before they operate as this would amount to subjecting them to taxation several times over.
14. According to the petitioners, they pay their fees and charges to the Consolidated Fund and they are therefore contributing to the national coffers. The respondents should therefore not be allowed to benefit twice, from the national revenue and from the petitioners through the imposed charges as this would amount to double taxation.
15. The petitioners argue further that the imposition of the charges against them as a precondition to conduct their business is inconsistent with the Fourth Schedule to the Constitution, and they ask that their petition be allowed and the following orders granted:
- a. *A declaration that the actions of the respondents in continuing demanding, insisting upon, or ordering that the petitioners to pay the fees, taxes and/or charges of Kshs 35,000/= indicated at para 2.6 (row 2) of the Schedule of the Nairobi City County Finance Act, 2013 legislated pursuant to section 2 thereof expressly violates the provisions of paragraph 7 (b) of Part 2 of the Fourth Schedule of the Constitution legislated pursuant to Article 185 (2) of the Constitution that provides that the County Government shall issue trade licences excluding regulation of professions.*
  - b. *An injunction do issue permanently restraining the respondents by themselves, their officials, or any person, servant and or agent howsoever of the respondents acting under or at their behest, from imposing, any taxes, fees and charges contained in paragraph 2.6 of the Schedule to the Nairobi City County Finance Act against the petitioners.*
  - c. *In the alternative to (a) above, a declaration that paragraph 2.6 of the Schedule of the Nairobi City County Finance Act, 2013 enacted pursuant to section 2 of the Nairobi City County Finance Act is not applicable to the petitioners in view of Articles 185 (2) and 186 of the Constitution read together with the Fourth Schedule to the Constitution, 2010.*
  - d. *The costs of this petition be borne by the respondents.*
  - e. *Any other orders that this Honourable Court may deem fit to grant.*

### **The Response**

16. The respondents oppose the petition and have filed an affidavit in reply sworn by the Head of the County Public Service Board of Nairobi City County, Gregory Mwanong'o, on 13<sup>th</sup> July, 2015. They have also filed submissions dated 24<sup>th</sup> September, 2015.
17. The respondents concede that in 2007, different professional bodies sued the then Nairobi City Council in **High Court Misc Civil App J.R No. 135 of 2007, Kenya Pharmaceutical Association vs City Council of Nairobi and 2 Others**, in which the High Court issued interim orders stopping the Nairobi City Council from issuing single business permits from professional persons. They aver, however, that the **Trade Licensing Act** whose Second Schedule exempted auctioneers from payment of single business permits was repealed by section 112 of the **Licensing Laws (Repeals and Amendment) Act No. 17 of 2006** vide **Gazette Notice No. 101, Act No. 17 of 2007** and therefore is no longer part of the Kenyan laws.
18. The respondents submit that Article 175 (2) of the Constitution requires that county governments have reliable resources to enable them govern and deliver services effectively. It is their

- contention that the fees levied from the issuance of business permits under paragraph 2.6 of the Nairobi City County Finance Act is a source of revenue contemplated under Article 175. Further, that Article 209 (3) and (4) of the Constitution confers upon the county governments the mandate to levy taxes and or duty pursuant to county legislation such as the Nairobi City County Finance Act, which provides for the payment of a single business permit by the petitioners.
19. The respondents further argue that whereas professional licences are issued based on the kind of practice involved, business and single business permits are issued depending on the business location for purposes of advising the licensing authorities that the business is functioning and meeting safety, soundness and tax regulations for the national and county government. Such licences are, in their view, express permissions granted by a competent authority to exercise certain privileges, and without such authorisation, the exercise of such acts would be illegal. The respondents contend therefore that the licensing of the petitioners enables the Nairobi City County to control and screen applications that are competent to engage in the auctioneering business within its jurisdiction.
  20. The respondents further term the issuance of business permits and licensing as a major tax collection function of county governments under the Constitution. The collection from business permits and licences, being the primary source of the county's income, lays the benchmark from which the county's plans and programmes are established.
  21. The respondents therefore submit that allowing the petitioners not to pay for single business permits to the Nairobi county government would amount to stifling its operations by putting a dent in the county's coffers therefore making it unable to perform its constitutional functions. In their view, it would be in the public interest not to issue an order declaring paragraph 2.6 of the Nairobi City County Finance Act inapplicable since such an order would open the floodgates to a myriad of suits against the Nairobi City County Government and other governments on the pretext that the county governments are not eligible to levy taxes in the form of single business permits since every group of persons will be claiming to be professionals.
  22. In their written submissions, the respondents maintain that *“the fees levied from the issuance of business permits under paragraph 2.6 of the Schedule to the Nairobi City County Finance Act is the relevant law contemplated under Article 185 (2) of the Constitution.”* In their view, the imposition of single business permits is one of the sources of revenue contemplated under Article 175 of the Constitution. It is also their contention that the issuance of business permits and licensing is one of the major functions of county governments under the Fourth Schedule to the Constitution.
  23. The respondents rely on the definition of the word “profession” in **Black's Law Dictionary, 9th Edition**, to submit that a professional renders a specialized service based upon advanced specialized knowledge and skill, and dealing with its problems primarily on an intellectual plane rather than on a physical or a manual labour plane. Their argument was that the petitioners as auctioneers do not fall under the purview of professionals as defined in **Black's Law Dictionary**, and Article 185 of the Constitution does not therefore apply to them. It was their submission that the petitioners have not demonstrated that they possess the three key qualities of a profession as they do not attend vocational training to become auctioneers as is clearly noted in the Auctioneers Act.
  24. The respondents contrasted the eligibility criteria for an auctioneer under the Auctioneers Act with those of medical and dental practitioners under the Medical Practitioners and Dentist Board Act, Chapter 253 Laws of Kenya and that of Advocates under the Advocates Act, Chapter 16, Laws of Kenya. They relied on the decision in **Okenyo Omwansa George and Another vs Attorney General and 2 Others [2012] eKLR** to submit that for a person to be a complete professional, they need not only be vested with requisite educational training in the relevant field, but also the general knowledge imparted by senior or older members of their profession.
  25. It was also their submission that from certificate level all the way to the degree or masters level,

there is not a single school in Kenya that offers a course in auctioneering and the Auctioneering Board does not regulate the profession by offering an entry exam or even any training whatsoever. Their argument was therefore that auctioneers cannot be bundled in the same category as genuine professionals and the mere existence of the Auctioneers Licensing Board does not make auctioneering a profession. In their view, it remains only a business regulated under section 2 of the Repealed Trade Licensing Act.

26. The respondents also observed that from the manner in which the auction trade is carried out, it lacks the element of privacy, and as defined under Black's Law Dictionary, 9<sup>th</sup> Edition, the auction business entails the sale of property in public and cannot therefore be compared, for example, to the strict guidelines that professions possess regarding confidentiality, the sacred nature of the doctor-patient relationship, which cannot be broken as to do so would expose doctors to legal sanctions. They therefore urged the court to dismiss the petition with costs.

### **Determination**

27. From the pleadings and submissions of the parties set out above, it appears to me that the key issue for determination is whether paragraph 2.6 of the Schedule to the Nairobi City County Finance Act is unconstitutional as alleged, and if so, whether the petitioners are entitled to the remedies that they seek in their petition. The core of their grievance against its application to them is that they are professionals and should therefore not be charged any levies or taxes by county governments in view of the provisions of Article 185 and paragraph 7(b) of the Fourth Schedule to the Constitution.

28. Paragraph 2.6 of the Schedule to the Nairobi City County Finance Act, 2013 provides that small professional services firms with 1-20 employees and or an area of up to 100 sq. m are to pay a sum of Kshs 35, 000/= for business permits. The respondents justify the charges on the basis that the Trade Licensing Act, whose Second Schedule exempted auctioneers from payment of single business permits was repealed by section 112 of the Licensing Laws (Repeals and Amendment) Act No. 17 of 2006 vide Gazette Notice No. 17 of 2007.

29. Under Article 185 of the Constitution, county governments are granted legislative powers in respect of functions falling within their mandate. It provides that:

1. ***The legislative authority of a county is vested in, and exercised by, its county assembly.***
2. ***A county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule.***
3. ...
4. ...

30. However, paragraph 7 of the Fourth Schedule to the Constitution provides that:

***The functions and powers of the county are trade development and regulation, including***

- a. ***Markets;***
- b. ***Trade licences (excluding regulation of professions);***
- c. ***Fair trading practices;***
- d. ***Local tourism; and***
- e. ***Cooperative societies.***

31. The first question to address is whether, as the petitioners allege, they are "professionals" and therefore covered under the exception in paragraph 7(b) of the Fourth Schedule. As submitted by

the respondents, a professional is a person who is a member of a professional body due to the educational qualification and follows the prescribed moral and professional code of conduct. The **Oxford English Dictionary** defines a profession as a “Paid occupation, especially one involving training and a formal qualification [treated as *sing*, or a body of people engaged in a profession.” In **Black’s Law Dictionary**, a profession is defined as:

**“1. A vocation requiring advanced education and training; esp. one of the three traditional learned professions – law, medicine, and the ministry.**

**“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”**

**2. Collectively, the members of such a vocation.”**

32. Thus, and as is evident from the view of the Court in the case of **Okenyo Omwansa George and Another vs Attorney General and 2 Others (supra)**, a profession presupposes a course of academic, professional and ethical training, as well as exposure for a period of time to such high professional and ethical standards through working for senior colleagues in the profession. There is no argument or suggestion by the petitioners that this is the case with the business of auctioneers, and I am therefore unable to find that they fall within the exception in paragraph 7(b) of Part 2 of the Fourth Schedule.

33. Having so found, does this mean that the respondents are entitled to levy the charges and taxes that they have purported to levy under the County Finance Act 2013?

34. I have considered the law with regard to carrying on the business of auctioneers. I note that it is provided for in an Act of Parliament, the **Auctioneers Act**. This Act, which was revised in 2012, is “***an Act of Parliament to consolidate and amend the law relating to auctioneers, to provide for the licensing and regulations of the business and practice of auctioneers, and for connected purposes.*** The Act establishes the Auctioneers Licensing Board whose mandate is defined under section 4 as follows:

1. ***The object and purpose for which the Board is established is to exercise general supervision and control over the business and practice of auctioneers.***
2. ***Without prejudice to the generality of subsection (1), the Board shall—***
  - a. ***licence and regulate the business and practice of auctioneers;***
  - b. ***supervise and discipline licenced auctioneers;***
  - c. ***to carry out training programmes for licenced auctioneers, and such secretary shall hold office for a renewable term of three years.***

35. Section 12 of the Auctioneers Act provides for the manner of application for licences to carry on the business of an auctioneer and provides that:

1. ***An application for a licence shall be made in the prescribed form and shall be forwarded to the Board together with the prescribed fee.***
2. ***In considering the application, the Board may require the applicant to supply such additional information in support of the application as it may consider necessary.***

3. *The Board may, subject to the provisions of this Act and to the payment of the prescribed fee, issue a licence in the prescribed form to the applicant.*

4. *Licences issued by the Board shall be classified in such manner as may be prescribed.*

5. *A licence issued under this section shall, unless earlier revoked, be valid for twelve months next following the date of issue: Provided that where an application for its renewal is made, the licence shall be deemed to continue in force until the application for its renewal is determined.*

36. Under section 14, the Auctioneers Act sets out the conditions to be adhered to by persons licenced to carry out the business of auctioneering, while sections 18 and 19 provide for the revocation or suspension of licences respectively where the circumstances so warrant. It is thus evident that the business of auctioneers in Kenya is regulated by national legislation and a Board, the Auctioneers Licensing Board, put in place by statute to oversee the auctioneering business in Kenya, with the mandate to issue, suspend or revoke licences.

37. It appears to me therefore that in attempting to impose licence fees of Kshs35,000 on auctioneers under the Nairobi City County Finance Act, 2013, the respondents are subjecting auctioneers to double charges for the same business, and requiring them to obtain two parallel licences, one from the Auctioneering Licensing Board which has the statutory mandate to issue the licences, and one from the county government.

38. The implication of upholding such action on the part of the county government of Nairobi is that each county would be at liberty to impose its own conditions on the carrying out of businesses which are already regulated by national legislation aimed at uniform regulation throughout the country. The result would be to impose additional and unjust charges on parties such as the petitioners who may be licenced to carry out business in various parts of the country, and not just the county of Nairobi.

39. While county governments do have the mandate to regulate trade development within their counties, they should be cognizant of the existing legislations on the same issues. This was the position taken by the Court, in dealing with a similar situation to that which this Court is confronted with, in the case of **Robert N. Gakuru and Others vs Governor Kiambu County and 3 Others, Petition No 532 of 2013**. The Court noted the provisions of Article 209(3)-(5) of the Constitution which state as follows with respect to the revenue raising powers of counties:

*(2) A county may impose—*

*(a) property rates;*

*(b) entertainment taxes; and*

*(c) any other tax that it is authorised to impose by an Act of Parliament.*

3. *The national and county governments may impose charges for the services they provide.*

*(5) 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.*

40. In finding that the County of Kiambu could not impose charges or taxes on quarried stones transported across counties, the Court observed that:

*“[81] It is therefore clear that the County Assembly may only impose property*

***rates and entertainment taxes unless otherwise authorized by an Act of Parliament and this position is emphasized by the provisions of Article 210 (1) of the Constitution which expressly provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation. County Governments are however empowered to impose charges on services they provide. Such service would include parking and market fees. However to levy charges on the stones quarried unless authorized by an Act of Parliament or any services rendered by the County Governments towards that end would be clearly illegal. Further the levying of such taxes ought not to be such as to prejudice national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour...*** (Emphasis added)

41. This is a position I agree with. While the County of Nairobi and all other county governments have the constitutional mandate to raise revenue, they must bear in mind the provisions of Article 209. The imposition of the Kshs35,000 charge for trade licences on auctioneers, who are already subjected to the payment of licence fees under an Act of Parliament is, in the circumstances, unreasonable and unjustified, and the petition therefore succeeds on the basis set out above.

42. Article 23(3) vests in the High Court the jurisdiction to issue appropriate orders in a claim brought under Article 22 of the Constitution. While I have not found that the petitioners are professionals and therefore exempted under paragraph 7(b) of Part 2 of the Fourth Schedule to the Constitution, it is my finding, and I do declare, as follows:

a. ***That in light of the provisions of Article 209 of the Constitution and the Auctioneers Act, paragraph 2.6 of the Schedule to the Nairobi City County Finance Act, 2013 is not applicable to auctioneers undertaking the auctioneering business in Kenya.***

b. ***Each party shall bear its own costs of the petition.***

**Dated, Delivered and Signed at Nairobi this 5<sup>th</sup> day of April 2016**

**MUMBI NGUGI**

**JUDGE**

**Mr. Change instructed by the firm of CFL Advocates & Co. for the petitioners.**

**Ms. Barasa instructed by the firm of Prof Tom Ojienda & Associates for the respondents.**