



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 52 OF 2014

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 2(1), 2(3), 3(2), 23(3), (D), 27(2), 185(2), 201(B) (II) AND 2098(5) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF PART 2 OF PARAGRAPH 7(B) OF THE FOURTH (4TH) SCHEDULE OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: RULE 4 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF: SECTION 8 AND 87 OF THE COUNTY GOVERNMENT ACT, ACT NO. 17 OF 2012

AND

IN THE MATTER OF: SECTION 1(1), 4 AND 8 OF THE AUCTIONEERS ACT, ACT NO. 5 OF 1996

AND

IN THE MATTER OF: PARAGRAPH 107 (PROFESSIONAL AND TECHNICAL SERVICES) OF THE SCHEDULE OF THE MOMBASA COUNTY FINANCE ACT, ENACTED PURSUANT TO PART TWO (2) OF THE MOMBASA COUNTY FINANCE

BETWEEN

ANDREW WASSWA ATETWE T/A

KILIMANJARO AUCTIONEERS & 21 OTHERS.....PETITIONERS

VERSUS

1. THE MOMBASA COUNTY GOVERNMENT

2. THE FINANCE COUNTY EXECUTIVE OF THE MOMBASA

COUNTY GOVERNMENT
.....RESPONDENTS

JUGMENT

1. There are twenty one Petitioners in the Petition dated and filed on 14th September, 2015, the subject of this Judgment. They all have one thing in common. They are all licensed auctioneers. The Respondent is the Government of the County of Mombasa as First Respondent, and the Executive Committee member for Finance in the Government of the County of Mombasa (together “the Respondents”)

2. The Petitioners principal claim is that they as a body of auctioneers are professionals subject to licensing once by their body, and are not subject to further licensing under the Respondent’s Mombasa County Finance Act, 2014 under which the Petitioners are charged a fee of Kshs. 30,000/= in order to conduct the business of auctioneers within the Respondent’s County.

3. They challenge the constitutionality of the Mombasa County Finance Act, 2014, (Act No. 2 of 2014), and seek the following orders –

(a) A declaration that the actions of the Respondents in continuing to demand, insisting upon, or ordering that the Petitioners do pay the fees, taxes and/or charges of Kshs. 30,000/= on grounds that the Petitioners are small professional services firms, expressly violates the provisions of paragraph 7(b) of Part 2 of the Fourth Schedule of the Constitution pursuant to Mombasa County Finance Act, 2014 legislated pursuant to Article 185(2) of the Constitution, provides that the County Government shall issue trade licences excluding the regulation of professionals, hence unconstitutional;

(b) An order of injunction and/or prohibition be issued 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 Mombasa County Finance Act, 2015 against the Petitioners;

(c) In the alternative to (a) above, a declaration that Part II of the Mombasa County Finance Act, 2014 enacted pursuant to Article 185(2) and Article 86(1) is not applicable to the Petitioners in view of Article 185(2) and Article 186 of the Constitution of Kenya 2010 read together with the Fourth Schedule of the Constitution of Kenya 2010;

(d) The costs of the Petition be borne by the Respondents

4. The Petition was supported by the Affidavit of the First Petitioner, Andrew Wasswa Atetwe sworn on 14th September, 2015, the grounds on the face of the Petition, together also with the written submissions of the Petitioners’ counsel as well as List of Authorities dated 14th September, 2015.

5. The Petition was however opposed by the Respondents through the Grounds of Opposition dated and filed on 5th October, 2015 and the Reply to the Petition of even date, and the Replying Affidavit of Jimmy Waliaula and the First Respondent’s written submissions dated and filed on 28th October, 2015.

6. The Petition raises one basic issue whether the licensing provisions of the Mombasa County Finance Act, 2014, are inconsistent with and contrary to any of the provisions of the Constitution, and in particular Article 185 and 186 thereof.

THE PETITIONERS’ CASE

7. The Petitioners submit that the licensing of the Petitioners by the County Government under the

Mombasa County Finance Act, 2014, is *ultra vires* the provisions of Article 185(2) and 186 of the Constitution, and all should therefore be declared unconstitutional. In their submissions, counsel for the Petitioners relied on the cases of **MEDINA HOSPITAL LIMITED & 5 OTHERS VS. COUNTY GOVERNMENT OF GARISSA [2015] eKLR** in which the court found and held that the payment of licensing fees by the Hospital operators, pharmacists, mother and child health care facility and educational institutions were paid to the National Government, and that any further fees demanded by the County Government amounted to double taxation. The learned Judge also opined that the **“two levels of Government should, between themselves, determine who among them should licence and regulate the medical practice, and that once one level of Government takes taxes and licences the operation, the other level of Government cannot levy fees....”** The learned Judge proceeded to issue an order of certiorari with regard to medical practitioners and hospitals, clinics and pharmacies.

8. The Petitioners’ counsel also cited my decision in Judicial Review (Application No. 282/2000) **REPUBLIC VS. THE MUNICIPAL COUNCIL OF THIKA & OTHERS, ex parte Kenya Medical Association & 5 others**, in which I granted the orders of certiorari against the Respondents quashing the Council’s decision to levy licensing fees against Doctors and Pharmacists practicing within the jurisdiction of that Council.

9. At the time that decision was made auctioneers were scheduled as **“a Profession”** along with Doctors and Dentists, Pharmacists and Nurses, and Veterinary Surgeons, Architects, Engineers and Quantity Surveyors, Accountants and Certified Public Secretaries, Valuers and Surveyors and Estate Agents and Advocates”. The Trade Licensing Act was however repealed by the Licensing Laws (Repeals and Amendment) Act, 2006, and its provisions regarding the licensing of professionals has no application to these or other proceedings. Thus the only issue is whether the provisions of the Mombasa Finance Act 2014 is *ultra vires* the provisions of Articles 185(1) and 186 of the Constitution.

10. Article 185(1) vests legislative authority of a county in its county assembly and Article 183(2) empowers a county assembly to 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.

11. Among the services devolved to County Governments is Trade Development and Regulation, including –

- (a) ...
- (b) trade licences (excluding regulation of professionals);

12. The question then becomes what does the phrase **“excluding of professions”** mean? Importantly Article 260 of the Constitution is not helpful in this area. It does not define what a “profession” means. We cannot fall upon section 16 of the Trading Licensing Act (Cap 497), which has since been repealed. We must revert to common perception of who is or what being a profession entails.

13. According to Black’s Law Dictionary, 8th Edition, at page 1246, where the authors say –

“Profession” means “a vocation requiring advanced education and training especially of the three traditional learned professionals – law, medicine and the ministry (church)”

14. But what the court said in the state of Massachusetts case of **COMMON WEALTH VS. BROWN, 20 N.E. 2d.478** (Mass 1939) still rings true today.

“Learned professions are characterized by the need of unusual learning, the existence of confidential relations, the adherence to the standards of ethics higher than that of the market place, and in a profession like that of medicine by intimate and 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.”

15. Roscoe Pound, in the **“The Lawyer from Antiquity to Modern Times** (St. Paul Minn West Publishing Company 1953) defined a “professional” as –

“a group pursuing a learned art as a common calling in the spirit of public service – no less a public service it may incidentally be a means of livelihood.”

16. Longman Dictionary of Law by L Curson & P. H. Richards, defines a **“profession”** in the present use of language **“involves the idea of an occupation requiring purely intellectual skill, or of any manual skill as in printing and sculpture, or surgery, skill controlled by the intellectual skill of the operator”** per Scrutton L. J. in **IRC vs. MAXSE [1919] 1KB 647**, **“a professional body”** means a body which regulates the practice of its profession.

17. On the other hand the test of who is a professional was stated in the case of **BOLAM VS. FRIERN HOSPITAL MANAGEMTN COMMITTEE [1957] 1 WLR 582**, according to which a professional person will not be guilty of negligence if he **can show that he acted in accordance with practices accepted by a substantial, responsible body of persons skilled in a field. The test applies to all who exercise or profess to exercise of a particular skill and its application does not depend on the actual profession of a relevant qualification”**, per Morrit L.J. in **Adams vs. Plymney Valley DC (2000) 150 NLJ, 123.”**

18. I have no intention and nor is this proper space to discuss what constitutes a “learned art”. Suffice it to say, the decision herein will not be based upon being licensed to carry out or carry on business of an auctioneer constitutes the licensee a professional in the traditional sense of learning and admission to practice that profession. The decision herein is on whether the National or County Government is the government mandated under the Constitution to carry out designated functions of Government at the respective levels under the Fourth Schedule.

19. It is the Petitioners claim that as **“professionals”** their function is regulated by the national government, and not the County Government. The question is what does the expression excluding **“regulation of professionals”** mean. To “regulate” means to **“control by law or rules”**. That merely means that the Petitioners must have a certificate from the presiding body that they are qualified for the year in question to be issued with a licence to carry out the prescribed activities for the period or year in question. The payment of a fee for the grant 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 Licence 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. In this regard, I agree with the decision of the court in **THUKU KIRORO & 4 OTHERS VS. COUNTY GOVERNMENT OF MURANGA [2014]eKLR**, where the court held –

“Moreover, where a statute or the constitution for that matter, has expressly delegated specific functions, duties or responsibilities to particular organs, state or otherwise, this court will be hesitant to intervene and curtail these organs’ efforts to execute their statutory or constitutional mandates, it is the duty of this court to interpret the constitution in a purposive rather than a restrictive manner. As far as devolution is concerned, the County Governments must be encouraged, and not restrained to deliver on their devolved functions as long as they are intra vires the constitution and the applicable statutes.”

20. The case of **MEDINA HOSPITAL LIMITED & 5 OTHERS VS. COUNTY GOVERNMENT OF GARISSA [2015] eKLR** is distinguishable from the present; that case concerned the licensing of Hospitals and Health Facilities, which though a devolved service, is subject “regulation” at the National Government.

21. In this regard the decision in **DILEEP MANIBEN PATEL & 3 OTHERS VS. MUNICIPAL COUNCIL OF NAKURU & ANOTHER [2014]eKLR** is apt, because the taxes, levies, cess or by whatever name called, paid to county authorities, or for that matter the national government, go into a

pool or fund from which payments are made and in return residents of the counties or cities and towns and rural areas of the counties, get the benefit of clean water, public lighting, access roads, sewerage and sanitation, and all ancillary facilities and maintenance thereof.

22. For those reasons I find and hold that the charging upon the Petitioners of trade licensing fees in the Counties of Mombasa, Kwale, Kilifi and Lamu is not unconstitutional.

23. The Petition dated and filed on 14th September, 2015 is therefore dismissed with costs to the Respondents.

24. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 2nd day of December, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. Matata holding brief for Mr. Gikandi

No Appearance for Respondents

Court Assistant Silas Kaunda