



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

PETITION NO. 1 OF 2014

IN THE MATTER OF: ARTICLES 19, 20, 12, 22 AND 23 OF THE CONSTITUTION

AND

IN THE MATTER OF: THE OBJECTS OF DEVOLUTION UNDER ARTICLE 174 OF THE CONSTITUTION

AND

IN THE MATTER OF: ARTICLE 10 OF THE CONSTITUTION

AND

IN THE MATTER OF: THE DEVOLVED FUNCTIONS OF AGRICULTURE, ANIMAL HUSBANDRY AND VETERINARY SERVICES UNDER PART 2 OF THE FOURTH SCHEDULE TO THE CONSTITUTION

AND

IN THE MATTER OF: A THREAT TO THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE AND CONSULTATION AND PARTICIPATION OF THE PEOPLE

AND

IN THE MATTER OF: THE PRIVATE VETERINARY SURGEONS AND VETERINARY PARALEGALS PROFESSIONAL OF MURANG'A COUNTY

AND

IN THE MATTER OF: COUNTY GOVERNMENT ACT

AND

IN THE MATTER OF: COUNTY GOVERNOR OF MURANG'A ACTIONS

AND

IN THE MATTER OF: THE VETERINARY SURGEONS AND VETERINARY PARAPROFESSIONALS ACT (NO.29 OF 2011)

BETWEEN

- 1. DR. THUKU KIRORI**
- 2. JACKSON MUNGAI NGIGI**
- 3. ORESTE KARANJA KURIA**
- 4. GRACE KAMUYU MUGWERU**
- 5. PAUL MAINA NJOROGE**

(Suing for and on behalf of the private

Veterinary Professional of Murang'a county).....**PETITIONERS**

VERSUS

COUNTY GOVERNMENT OF MURANG'A.....1ST RESPONDENT

THE COUNTY GOVERNOR, MURANG'A COUNTY.....2ND RESPONDENT

JUDGMENT

The petitioners filed in this court a constitutional petition dated 16th January, 2014 seeking several declarations against the respondents, jointly and severally; these declarations were framed as follows:

- a. ***Declaration that proper governance and constitutionalism requires the participation of the people and stake holders consultation in matters affecting them directly both at the National and County levels of government;***
- b. ***Declaration that the respondents intended rollout, commencement, launch or initiation of Artificial Insemination Programme within the county without the stakeholder and public participation by collecting their views and concerns is against the principles of governance of participation of the people as recognised by Article 10(2)(a) and Article 174 (c) of the Constitution;***
- c. ***Declaration that any intended rollout, commencement, launch or initiation of the Artificial insemination programme ought to be in conformity with the Constitution and any legislations either by the national or county government governing veterinary and animal husbandry services that is in force;***

Apart from seeking the foregoing declarations, the petitioners also sought for a permanent injunction restraining the respondents jointly and severally from launching, commencing or initiating artificial insemination services and programmes appurtenant thereto without the participation of the people and other stakeholders. They also sought for costs of the petition.

The petition was supported by an affidavit jointly sworn by all the petitioners on 16th January, 2014; in that affidavit the petitioners have also deposed that they are swearing the affidavit on their own behalf and also on behalf of private veterinary professionals who, like the petitioners herein, provide private artificial insemination services within Murang'a County.

The petitioners' case against the respondents is that the latter were in the process of recruiting personnel

to provide veterinary services within Murang'a County on behalf of the County Government. In pursuit of this course, the County Government is alleged to have sponsored several people to undertake training on animal health at a Government institute at Kabete.

The petitioners' qualm with what would appear to be a noble initiative by the County Government of Murang'a is well summarised in paragraph 13 of their affidavit; that paragraph states;

“That the respondent intends to be charging Kshs. 500 to persons interested in these services whereas we charge Kshs. 1000/= and with the subsidised cost the public is likely to prefer cheaper services and thereby avoiding or keeping off from our services thereby creating financial hardship whereas the respondents did not consult us or even call (sic), convene or initiate any stakeholder meeting well knowing that the Government through a Sessional Paper in parliament introduced in 1988 decentralised and introduced clinical and Artificial Insemination Services to be offered by private individuals only maintaining public health, disease control, training and regulations services or role(sic). The respondents are therefore reversing the gain (sic) attained by liberalisation and opening up a free market.”

Though the paragraph is a bit verbose and the language rather winded and convoluted, it is not difficult to discern the petitioner's complaint; their apprehension is that they are likely to be driven out of business because the introduction of Government subsidy in artificial insemination services will render the private practitioners' services in this field less competitive. Consumers will obviously prefer less expensive government subsidised artificial insemination services to those offered by private practitioners which, no doubt, are more expensive. This competition, according to the petitioners, is unhealthy for a liberalised market which has been sustained since the adoption of the national Government's Sessional Paper of 1988 and which, amongst other things, liberalised the provision of artificial insemination services.

Before even considering the respondents' answer to the petitioners' claim, I must hasten to mention here that, as I understand it, a liberalised market envisages competition where the consumer is presented with a variety of choices from which he may pick the most suitable for his needs subject only to his capacity to access them; this must be what the doctrine of *laissez-faire* is all about. Competition does not clog but rather oils the engine of a liberalised market economy. Whether a government should completely abstain from such a competition or how far or active it should participate, particularly where the services offered are essential or basic to the economic empowerment of its subjects, is a question that cannot be answered in this judgment and I will not pretend to take that direction except to discount the petitioners' argument at this stage that a choice for less expensive products in a free market is averse to liberalism.

Going back to the petition herein, the director of veterinary services in Murang'a County swore an affidavit on behalf of the first respondent and denied that the petitioners are registered to provide veterinary services contrary to what they have alleged in their petition. He also deposed that animal breeding services together with artificial insemination and animal reproductive health management are part of the functions devolved to the County Government; it is the duty of the County Government of Murang'a to make these services not only easily accessible to the populace within its jurisdiction but it must also ensure that these services are affordable.

The director doubted the petitioners' capacity to provide veterinary services at the scale the County Government wants to provide them or even at all considering that they are neither registered with the director of veterinary services nor licensed to provide those services. He denied that the personnel they have engaged are incompetent; to the contrary, so he argued, they are duly qualified and attend refresher courses from time to time to build their capacity and improve their skills.

On his part the second respondent swore a replying affidavit in which he denied that the provision of artificial insemination services by his county government can, by any stretch of imagination, amount to an infringement of constitutional right of any individual or a group of individuals such as the petitioners herein. The governor further wondered why, being an initiative by the County Government, he was joined to the petition in his private capacity.

The governor also contended that the rollout of the artificial insemination programme will not deny the petitioners the right to practise, presumably if they are licensed to undertake such services, but that it is a project intended to offer alternative and affordable artificial insemination services to the people of his county.

A fortiori, so argued the governor, one of the objects of devolution which his government, as an instrument of devolution, must strive to achieve in execution of its constitutional mandate is to promote social and economic development and provide proximate, and easily accessible services, which in this regard would include veterinary services; this is underlined under **article 174(c)** of the Constitution and being a constitutional mandate accorded to his government, it would be unconstitutional for anybody, including this court, to stop it from delivering on its constitutional responsibilities.

The governor deposed that his government consulted widely with the public who, being predominantly farmers, appreciated the need for affordable artificial insemination services. He discounted the petitioners' allegations that the people engaged by the county government are not qualified to provide veterinary services because it is clear, even from the list of persons exhibited on the petitioners' own affidavit that those people are duly qualified to provide the services for which they have been engaged.

I have given due consideration to the parties' pleadings, the affidavits in support of and in opposition to the petition and the submissions made on the positions they have taken in respect of the petition herein. I must mention here that the written submissions which the parties adopted largely replicated what was contained in their pleadings and their respective affidavits.

One of the issues that emerged as a divergent point between the petitioners and the respondents and which issue, in my humble view, this appeal largely turns is the petitioners' capacity to initiate this petition. The respondents disputed the petitioners' standing as a professional group and their legal capacity to initiate any legal proceedings as such. The petitioners' response was that under **article 22** of the Constitution and **Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** any person can file proceedings alleging a threat to violation of fundamental rights and freedoms and this right is not limited to a specific group.

Article 22 (1) of the **Constitution** which is the law in focus on this issue states:

Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

As far as capacity to institute court proceedings alleging infringement of rights or fundamental freedoms in the Bill of Rights is concerned there is no doubt that under this article "every person" is entitled to that recourse. While it is true that "every person" has access to court under this provision of the Constitution, the petitioners did not approach the court as "every person". Instead, they described themselves in their petition as veterinary professionals within Murang'a County. To quote them, they stated in paragraph 4 of their petition;

"The petitioners institute this petition for and on behalf of other private veterinary professionals within the county and having been duly instructed by them."

It is apparent from the petition that the description the petitioners adopted for themselves was not in vain; if indeed they are persons they claimed to be, the measures taken by the county Government of Murang'a would impact them, one way or the other.

Logically, if they were not going to be affected they would not have had any reason to bring this petition; in other words, the petitioners' profession is the linchpin of their petition. Without stretching this argument any further it suffices to say, as correctly stated in **Anarita Karimi versus Attorney General (1979) KLR 154 (No.1)**, it would have been difficult for the petitioners to question the constitutionality of the county Government's actions and how such actions affected them as individuals without disclosing their professions.

The burden that came along with the petitioners' description was the need to demonstrate that they are indeed the professionals they claimed to be; this was necessary not only because the respondents had disputed the petitioners' standing as professionals in the veterinary services field but also because without such a proof, it was going to be difficult for them to persuade this court that they have any cause of action against the respondents either jointly or severally. As noted their cause of action was inextricably intertwined with their identity as professionals in a particular field and by extension their capacity to sue as such.

Part 111 of the **Veterinary Surgeons and Veterinary Para-Professionals Act (cap 366)** sets out the provisions relating to registration and practice of veterinary surgeons and veterinary para-professionals; **section 13** thereof is of particular relevance of the issue herein and due its import it is necessary to quote it here verbatim.

13. Requirement for registration

(1) No person shall practise, or hold himself out, whether directly or indirectly, as practising or being able to practise as a veterinary surgeon or veterinary para-professional or to take up employment unless he is registered and licensed under this Act.

(2) No organisation or institution shall offer animal health services unless it is registered and issued with a licence by the Board and has a registered veterinary surgeon in its employment in charge of the animal health and welfare services.

According to this section, one must be duly registered and secondly he must be licensed to practise as a veterinary surgeon or a veterinary para-professional. Although the petitioners held themselves out as veterinary surgeons and veterinary para-professionals none of them exhibited any evidence that he has complied with **section 13** of the **Act** and that he is registered and licensed to provide veterinary services as described by the Act. There was no evidence that any of them was a qualified veterinary surgeon or a veterinary para-professional, let alone being registered or licensed to practise.

In view of the express provisions of the **Veterinary Surgeons and Veterinary Para-Professionals Act (cap 366)**, it would be erroneous and contrary to this Act for this court to assume that the petitioners are veterinary surgeons or veterinary para-professionals and therefore entitled to remedies which, in a deserving case, would only be available to people who are duly qualified, registered and licensed in accordance with the Act.

The learned judges Trevelyan and Hancox JJ statement in **Anarita Karimi versus Attorney General (supra)** is a constant reminder, in matters such the petition herein, of the necessity of the link between the aggrieved party, the provisions in the constitution alleged to have been contravened and the manner of the contravention or infringement. At page 156 of their decision, the learned judges were clear that:

“We would however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to have been infringed.”

The petitioners have been proved not to be the persons they claimed to be and therefore the issue of whether they have any complaint, or any particular provisions of the Constitution has been infringed or the manner in which those provisions have been infringed cannot even arise.

Even if the petitioners were properly before court, I would find it difficult to accept their argument which in effect implied that the county Government's initiative to reduce the cost of artificial insemination services by fifty per cent is unconstitutional because the public were not engaged prior to the rollout of this initiative. With due respect to the petitioners and their learned counsel, it would be ridiculous for any member of the public, purporting to invoke any of the constitutional provisions that have been cited by

the petitioners, to come to this court and complain that his constitutional rights have been violated because, as a result of the county Government's initiative, he is going to spend less for the same or even better quality artificial insemination services.

My understanding of the concept of public participation as contemplated under **articles 10 and 174** of the constitution is that the participation of the public in affairs that concern them should not be narrowly interpreted to mean engagement of a section of people purporting to be professionals who are out to rip maximum profits out of services for which they are neither registered nor qualified to offer; the ultimate goal for public engagement as envisaged in the constitution is for the larger public benefit. In my view such benefit would include a county government's provision of the basic infrastructure at a minimum cost for the economic empowerment of its people; this is certainly consistent with the national values and principles of governance enshrined in **article 10 2 (d)** of the Constitution and the actualisation of the promotion of social and economic development which the same Constitution subscribes to in **article 174 (f)** thereof.

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 act *intra vires* the constitution and the applicable statutes.

I have come to the conclusion that apart from being improperly before this court I cannot find any merit in the petitioners' petition; I accordingly dismiss it with costs.

Signed dated and delivered in open court this 13th day of June, 2014

Ngaah Jairus

JUDGE