

**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO E017 OF 2024**

**MUMIAS WEST HEALTH CARE .....**

**PETITIONER**

**VERSUS**

**THE COUNTY GOVERNMENT OF KAKAMEGA .....**

**RESPONDENT**

**AND**

**RURAL & URBAN PRIVATE HOSPITALS  
ASSOCIATION OF KENYA .....**

**INTERESTED PARTY**

**RULING**

1. This matter comes before this Court by way of an amended Constitutional Petition dated 13th January 2025, filed by Mumias West Health Care (the Petitioner), seeking, inter alia, a declaration that the Respondent's imposition of a single business permit fee and the confiscation of the Petitioner's property are illegal, null, and void, and violate Articles 40, 43, 47, and 50 of the Constitution of Kenya, 2010. The

Petitioner further seeks exemplary damages for the alleged violations.

2. The Petitioner and the Interested Party prayed that the court refer the Petition to the Chief Justice to constitute a three-judge bench to hear it. They cite its substantial public interest and the need for a definitive resolution of the issue of single business permit fees imposed on private healthcare facilities, which the Petitioner and the Interested Party argue constitute double taxation.
3. In their submissions dated 12<sup>th</sup> February 2025-, the Petitioner states that they were operating a healthcare facility which complied with the legal requirements in place until on 17th October 2024 when the Respondent, through its officers stormed its premises and demanded to see the single business permit and in its absence, confiscated several equipment including a three-seater metal chair, digital weighing scale, biometric scanner machine and a complete set of computer.
4. According to the Petitioner, the Respondent violated some provisions of the Constitution, including Article 47, which is the right to fair administrative action, as they failed to inquire and ascertain whether the

Petitioner had complied with the required licensing process.

5. They further aver that the Respondent violated Article 40 on the right to own property when they entered the Petitioner's establishment and confiscated equipment for failure to produce the single business permit.
6. They further contend that the Respondent failed to give them a chance to be heard, hence violating Article 50 of the Constitution. The Petitioner avers that the Respondent's confiscation of their equipment and closure of their facility constitute a violation of Article 43(a) and, therefore, warrant that the case be heard and determined on the merits and that they be awarded exemplary damages.
7. The Interested Party, Rural & Urban Private Hospitals Association of Kenya (RUPHA) supports the application for a three-judge bench, contending that the issue of single business permit fees for healthcare facilities has been inconsistently adjudicated by courts of equal status, necessitating a consolidated and authoritative determination.

8. In support of their arguments, they relied on several cases, such as in ***High Court Nairobi Misc. Application No. 782 of 2000 - Republic vs. The Municipal Council of Thika & Another Ex parte the Kenya Medical Association & 5 Others [U/R]*** and ***Garissa Misc. Case No. 2 of 2015, Medina Hospital Limited & 6 others v. County Government of Garissa***, and finally, ***Nairobi Petition No. E189 of 2021 - RUPHA vs. Mombasa County & 46 others***, where the Court has issued Conservatory Orders suspending payment of Single Business Fees to the 47 Counties.
9. The Respondent, the County Government of Kakamega, had not filed its submissions at the time of writing this ruling.

### **Analysis and Determination**

10. The issue for determination by this court is whether the Applicants have met the threshold for empanelment of a three-judge bench.
11. The determination of what constitutes a “*substantial question of law*” is a matter of judicial discretion, guided

by precedent and the public interest and founded on Article 165(3) (b) (d) and (4) of the Constitution.

12. Article 165 (3) (b) (d) and (4) provides that:-

**“(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;**

**(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;**

**(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.”**

13. In ***Philomena Mbeti Mwilu v Director of Public Prosecution, Director of Criminal Investigation, Chief Magistrate’s Court (Anti-Corruption) Nairobi, Attorney General & Stanley Muluvi Kiima [2018] KEHC 3432 (KLR)***, the court in determining

what constitutes a *substantial question of law* stated as follows:-

***“...a question of law would be a substantial question of law if it directly or indirectly affects the rights of parties; there is some doubt or difference of opinion on the issues raised and that the issue is capable of generating different interpretations. If however the question has been well settled by the highest court or the general principles to be applied in determining the question before court have been well-settled, the mere application of those principles to a new set of facts presented in a case before the court would not on their own constitute a substantial question of law. There must be the possibility of the matter attracting different interpretations or opinion in its interpretation or application of the principles espoused in the matter to make it a substantial question of law. All this notwithstanding, it is up to the individual judge to decide whether the matter raises a substantial question of law for purposes of reference.”***

14. Similarly, in ***Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others [2017] KECA 679 (KLR)***, the Court of Appeal laid down the principles to be applied when considering an application for empanelment and rendered itself as follows:-

***“42. There are, in our view, parallels to be drawn between certification for purposes Article 163(4) (b) of the Constitution and certification for purposes of Article 165(4) notwithstanding that the drafters of the Constitution, in providing for certification of matters for purposes of appeal to the Supreme Court under Article 163(4)(b) stipulated that a matter should be of “general public importance”, The word, “substantial” in its ordinary meaning, means “of considerable importance”. There is therefore wisdom to be gained from the pronouncements of the Supreme Court of Kenya respecting interpretation of Article 163(4)(b). In *Hermanus Phillipus Steyn v Giovanni Gnechi- Ruscone [2013] eKLR* the Supreme Court of Kenya pronounced governing***

***principles for purposes of certification under Article 163(4)(b) some of which are relevant in the context of certification under Article 165(4). Drawing therefrom, we adopt, with modification, the following principles:(i)For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest; The applicant must show that there is a state of uncertainty in the law; The matter to be certified must fall within the terms of Article 165 (3)(b) or (d) of the Constitution;The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.”43.It is our judgment therefore, that whether a matter raises a substantial point of law for purposes of Article 165(4) of the Constitution is a matter for***

***determination on a case-by-case basis. The categories of factors that should be taken into account in arriving at that decision cannot be closed.”***

15. The Petitioner and Interested Party argue that the imposition of single business permit fees on healthcare facilities raises a substantial question of law due to alleged double taxation and conflicting judicial decisions. They cite ***Republic v The Municipal Council of Thika & Another Ex parte Kenya Medical Association & 5 Others [2000] eKLR, Medina Hospital Limited & 6 Others v County Government of Garissa [2015] eKLR, and Rural & Urban Private Hospitals Association of Kenya (RUPHA) v Mombasa County & 46 Others [2021] eKLR***, where courts issued conservatory orders or made findings exempting medical institutions from single business permit fees.

16. In ***RUPHA v Mombasa County & 46 Others [2021] KEHC 189 (KLR)***, J. Thande (as she then was) issued conservatory orders suspending the payment of single business permit fees by private healthcare facilities

across 47 counties, finding a prima facie case of double taxation. The Court reasoned: **“The imposition of additional fees on entities already licensed under professional and regulatory frameworks risks violating Article 209(5) of the Constitution, which prohibits double taxation.”** However, this decision was interlocutory and did not conclusively determine the constitutionality of the fees.

17. In ***Mama Nursing Home Kabaru & 3 Others v County Government of Migori [2015] eKLR***, the Court upheld the county’s authority to impose permit fees under Article 209(1)(c) but stressed compliance with Article 47 (fair administrative action) and public participation under Article 10. The Court did not find double taxation but emphasized procedural fairness.
18. I have carefully reviewed the past decisions cited by the two parties. At a cursory glance, one gains the impression that there are conflicting decisions regarding the issues raised in this petition; however, on closer scrutiny. It is evident that the parties’ assertion that conflicting judicial decisions is overstated. The cited cases do not demonstrate irreconcilable

interpretations of the law. For instance, in **RUPHA v Mombasa County (supra)**, the Applicants were granted interim relief based on a prima facie case. In contrast, the court in the Mama Nursing Home case addressed procedural compliance without ruling on the issue of double taxation. The two decisions are therefore distinct and context-specific and do not necessitate harmonization by a three-judge bench.

19. In my view, questions of double taxation and procedural fairness are well within the High Court's jurisdiction under Article 165(3)(b) and have been addressed in prior cases without necessitating multi-judge adjudication. From my perusal of the past decisions, what is apparent is that some petitions or applications dealt with the singular issue of levying of permits on healthcare professionals by the County governments while others dealt with multiple issues, including facilities where other goods and services that do not fall within the ambit of the Kenya Medical Practitioners and Dentists Council are provided. Therefore, what would appear to be conflicting decisions are, in fact, distinct decisions unique to the issues before the different

courts at each point, as they were not all based on the exact same issues.

20. In the case of ***Law Society of Kenya & 3 Others v Attorney General & 7 others, Kenya National Commission on Human Rights & others (Interested Parties) [2025] KEHC 5719 (KLR)***, the court declined an application for empanelment noting that the matters in issue had earlier been litigated upon and the petition did not raise novel and substantial constitutional issues.
21. Flowing from the above, this Court finds that the issues raised by the Petition are neither novel nor irreconcilably conflicted. Moreover, several courts have rendered decisions favourable to the Interested Party's members and other private healthcare providers, which the affected County governments have not appealed.
22. Regarding the public interest argument, while compelling due to the impact on healthcare access, it does not automatically warrant reference to a three-judge bench. It has not been demonstrated that the public would be prejudiced by a single judge's decision in respect of the Petition.

23. In ***Wycliffe Ambetsa Oparanya & 2 others v Director Of Public Prosecutions & another [2016] KEHC 1987 (KLR)***, the court stated that:-

***“22. ...In my view the issue is not merely to do with complexity or difficulty of the case in the views of the applicant but ought to be one that turns on cardinal issues of law or of jurisprudential moment...Whereas the issues may not exactly be same, one cannot say that there is complete dearth of jurisprudence in that area. To me it is a matter of the application of such principles to the matter at hand. Such application, in my view does not constitute a substantial question of law for the purposes of Article 165(4) of the Constitution.”***

24. Although I am persuaded that the issue is important to the parties, I am convinced that it does not raise novel constitutional issues or demonstrate jurisprudential uncertainty or complexity that would warrant empanelment of a bench. I am of the view that this Court is competent to hear and determine the Petition as set out. What the Interested Party needs to do is to

seek the joinder of the Council of Governors so that all the 47 counties are heard, and a final decision affecting all the devolved governments is rendered.

25. Having carefully considered the pleadings, submissions, and the applicable principles, I am not satisfied that the Petition raises a substantial question of law as contemplated by Article 165(4) of the Constitution.

26. Consequently, the application for certification of the Petition for purposes of empanelment is hereby declined, and the following orders are made:-

- i. The application for empanelment is dismissed.
- ii. The Petition shall proceed to a hearing before a single Judge of this Court.
- iii. Costs shall be in the cause.

Dated, signed and delivered at Kakamega this 19<sup>th</sup> day of December 2025.

**A. C. BETT  
JUDGE**

**In the presence of:**

Ms. Kibet holding brief for Mr. Isuchi for 1<sup>st</sup> Respondent

Mr. Mutwiri holding brief for Mr. Wanyundi for Petitioners

No appearance for Interested Party

Court Assistant: Polycap

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