



**Kenya Union of Clinical Officers v Clerk of the County Assembly, County Government of Kisii & 2 others (Petition E028 of 2024) [2024] KEELRC 2854 (KLR) (20 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2854 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**PETITION E028 OF 2024**

**NZIOKI WA MAKAU, J**

**NOVEMBER 20, 2024**

**IN THE MATTER OF: ARTICLES; 1, 2(1), (2) & (3), 3(1) & (2), 6(3), 10,19, 20, 41, 43, 47, 73, 75, 110, 174, 175, 176 AND 186 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE FOURTH SCHEDULE OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ENFORCEMENT OF THE BILL OF RIGHTS UNDER THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION AND VIOLATION OF THE PROVISIONS OF THE CONSTITUTION AS ENshrINED UNDER ARTICLES; 1, 2(1), (2) & (3), 3(1) & (2), 6(3), 10,19, 20, 41, 43, 47, 73,75, 110, 174, 175, 176 AND 186 OF THE CONSTITUTION OF KENYA, 2010 AND THE FOURTH SCHEDULE OF THE CONSTITUTION OF KENYA, 2010**

**AND**

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

**AND**

**IN THE MATTER OF: THE FAIR ADMINSTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF: THE COUNTY GOVERNMENT ACT, 2012**

**AND**

**IN THE MATTER OF: THE STATE CORPORATIONS ACT, 2005**



**BETWEEN**

**KENYA UNION OF CLINICAL OFFICERS ..... PETITIONER**

**AND**

**CLERK OF THE COUNTY ASSEMBLY, COUNTY GOVERNMENT OF  
KISII ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY SECRETARY & HEAD OF PUBLIC SERVICE COUNTY  
GOVERNMENT OF KISII ..... 2<sup>ND</sup> RESPONDENT**

**THE CHIEF EXECUTIVE KISII TEACHING AND REFERRAL  
HOSPITAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The application before the court is the Petitioner's Application dated 12<sup>th</sup> August 2024. It seeks for orders that
  - i. A declaration do issue that the Kisii Teaching and Referral Hospital Bill 2024 and unconstitutional.
  - ii. A declaration do issue that the Respondents have no legal power or authority to establish the 3<sup>rd</sup> Respondent to operate as a State Corporation.
  - iii. A declaration that the advertisement and recruitment done by the 3<sup>rd</sup> Respondent within the knowledge of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent is unlawful.
  - iv. An order quashing the employment of the Petitioner's members as the 3<sup>rd</sup> Respondent has been using a wrong body for Clinical Medicine Practice ordained and approved Career Guidelines by the Public Service Commission.
  - v. This Honourable Court be pleased to issue any other order that may deem to be fit and just to ensure that Law and Order is maintained in church and that the rule of law is upheld.
  - vi. Costs of this Petition.
2. The application was supported by the affidavit sworn thereof in support by Mr. George M. Gibore as well as grounds on the face of the motion which in brief were that:
  - a. The 1<sup>st</sup> Respondent tabled a Bill to establish the 3<sup>rd</sup> Respondent as a state corporation against the provisions of *the Constitution* of Kenya and the *State Corporations Act*.
  - b. The 3<sup>rd</sup> Respondent in knowledge of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent proceeded to advertise, recruit and employ Clinical Officers based on the Bill that the 1<sup>st</sup> Respondent passed illegally.
  - c. The 3<sup>rd</sup> Respondent offered employment to Clinical Officers in its institution citing terms and demands and more specifically offered remuneration way below the required pay for Clinical Officers.
3. It was argued by the Petitioner that there was contravention of the law and *the Constitution*. In the challenge to the actions of the Respondent it was asserted that:



- a. In contravention of Article 47(1) of *the Constitution*, the Bill passed by the 1<sup>st</sup> Respondent undertook an administrative action that is neither lawful, reasonable, nor procedurally fair.
  - b. In contravention of Section 4(3) of the *Fair Administrative Action Act*, the 3<sup>rd</sup> Respondent with the knowledge of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent have undertaken an administrative action that is very likely to adversely affect the rights or fundamental freedoms of the Petitioner and its members.
  - c. The County Government's Act does not authorize the 1<sup>st</sup> Respondent to establish State Corporations within the County.
4. The 1<sup>st</sup> Respondent opposed the motion and filed an affidavit sworn by Mr. Jacob Onkeo Acting Clerk of Kisii County Assembly and who is the 1<sup>st</sup> Respondent in the Petition herein. The 1<sup>st</sup> Respondent asserts that the Application together with the Petition dated 12<sup>th</sup> August 2024, herein are misconceived, frivolous, bad in law, vexatious and disclose no grounds for issuance of orders sought which may in the end cause a lot of injustice to the people of Kisii County. It is asserted that having read the pleadings and the issues raised by the Petitioner, it has become apparent that the entire Application together with the Petition are premised on a complete misunderstanding of the workings of the Kisii County Assembly, or in the alternative that the proceedings are aimed at achieving a different collateral purpose not in any way connected to the issues raised. It was deposed that on or about the year 2014 the Kisii County Assembly enacted the Kisii Teaching and Referral Hospital Act of 2014 as an Act of the Kisii County Assembly to provide for the establishment of the Kisii Teaching and Referral Hospital, to provide for its incorporation, functions and governance and for purposes related and incidental thereto.
  5. The 1<sup>st</sup> Respondent further asserts that the need to repeal the older act was necessitated by the urgency to streamline the services and offer a solution to the rising demand to comply with the current standards of practice was the reason the Kisii County Assembly enacted the Kisii Teaching and Referral Hospital Act of 2024 as an Act of the County Assembly to provide for the regulation, promotion and development of health services generally, to provide for the establishment, powers and functions of the Kisii Teaching and Referral Hospital Board and for matters connected therewith and incidental thereto. The 1<sup>st</sup> Respondent asserts that he knows on his own knowledge that on 6<sup>th</sup> April 2024, the Kisii County Assembly placed an advertisement in the Standard Newspaper informing members of the public about a scheduled public participation exercise in respect to Kisii Teaching And Referral Hospital Bill of 2024 and the Kisii County Cooperation Bill, 2024 which advertisement invited members of the general public, civil society organization and interest groups to give views and submissions concerning the two Bills.
  6. The 1<sup>st</sup> Respondent thus asserted that the public participation took place on 16<sup>th</sup> April 2024 at the Kisii Cultural Hall where views were collected from members of the public and that the Select Committee on Health Services recorded attendances of members of the public present at the Kisii Cultural Hall. It was further asserted that the Select Committee on Health Services of the Kisii County Assembly wrote a report for tabling in the Assembly and committed to the House Business Committee for allotment of time in the order paper which was done on 23<sup>rd</sup> April 2024. The 1<sup>st</sup> Respondent asserts that the report was debated by Members of the County Assembly and the Bill was later passed and that given the above chronology of the events in respect to the Kisii Teaching And Referral Hospital Bill of 2024, it is therefore not true that the said Act was not subjected to public participation in obedience to the provisions of Article 196 of *the Constitution* of Kenya 2010, section 87 of the *County Governments Act* 2012, and the Standing Orders of the Kisii County Assembly. The 1<sup>st</sup> Respondent therefore asserts that the Petitioner has not made out a case to warrant the grant of the orders sought herein and that



the instant Petition is a classic case of abuse of court process which ought to be dismissed in limine, with costs.

7. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents responded to the application and Petition vide an affidavit sworn by Mr. Robert Ombasa, the County Secretary of Kisii County. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents assert the instant Application is incurably defective, unknown in law and the Applicant has sought final orders at an interim stage. They assert the Application is plainly bad in law, incurably defective, and merely filed to vex and drag the Respondents to Court; that the Notice of Motion Application is devoid of particulars and the Applicant has not demonstrated in what way or manner the Respondents have acted contrary to the law, if any. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents assert that contrary to the averments in the Prayers sought, that the Applicant has failed to plead with precision in accordance with the principles in *Anarita Karimi v Republic* hence the Respondents are greatly prejudiced o understanding and comprehending the nature of the Claim. It was asserted that Acts of Parliament enjoy the presumption of constitutionality and as such, the Applicant has not demonstrated in what way the Kisii Teaching and Referral Hospital Act, 2024 is unconstitutional and urge the Applicant has not made out a case to warrant the grant of any such interim orders, including an order staying any impugned decision. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents assert that an order of stay in any way is not only prejudicial to the Respondents but also the people of Kisii and members of the public as it will hamper the right to health and related services which are being rendered by the Kisii Teaching and Referral Hospital. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents argue that health services are devolved and a shared unit between the national and County Governments. Whereas the national government's role is limited to the formulation of a health policy, the County Governments are given the exclusive mandate under Part 2, Schedule 4 to [the Constitution](#) of Kenya, 2010 to include, inter alia county health services, including, in particular – (a) County health facilities and pharmacies; (b) Ambulance services; (c) Promotion of primary healthcare etc. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents state that it is misleading for the Applicant/Petitioner to contend that the Kisii Teaching and Referral Hospital Bill was tabled without any public participation or involvement of the people. That contrary to the Applicant's/Petitioner's averments, there was exclusive and comprehensive public participation as invitations were sent out calling for input from the members of the public whereat dates, time, and venues for public participation were shared and members of the public invited to submit their views, comments, and memoranda, which they did and participated. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents assert the Petitioner/Applicant has not established a prima facie case to warrant the grant of any interim orders or any such interim reliefs and neither has it satisfied the principles in regard to the grant of conservatory and stay orders and further that the grant of the orders sought herein would greatly undermine and paralyze the provisions of health services and related functions in Kisii County and further affect third parties and persons not before this Honourable Court. It was asserted that public interest overrides the Applicant's private interests and public interest abhors the grant of any such stay orders in the circumstances of the instant Application and Petition. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents verily believe that there has been no violation of any of the Applicant's/ Petitioner's fundamental rights and freedoms and/or any contravention of any such law as alleged by the Applicant. It was thus urged that the motion be denied with costs.
8. The parties were directed to file submissions in respect of the application. In the Petitioner's submissions, it was the Petitioner's position that it is a duly registered trade union and the sole labour organization with the mandate of representing the interests of Clinical Officers on Employment and Labour Relations matters. The Petitioner submits it is obligated to be vocal about the welfare and any matters affecting members of the union in scope of employment.
9. The Petitioner submitted that the 1<sup>st</sup> Respondent tabled a Bill to establish the 3<sup>rd</sup> Respondent as a state corporation against the provisions of [the Constitution](#) of Kenya and the [State Corporations Act](#). The



Petitioner submits that the 3<sup>rd</sup> Respondent in the knowledge of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent proceeded to advertise, recruit and employ clinical officers based on the Bill that the 1<sup>st</sup> Respondent passed illegally. The Petitioner submits the 3<sup>rd</sup> Respondent offered employment to clinical officers in its institution citing terms and demands and more specifically offered remuneration way below the required pay for clinical officers. The Petitioner submits the totality of its claim is that the Kisii Teaching and Referral Hospital Bill 2024 is illegal and unconstitutional and any further action relying on the Bill are unprocedural and unlawful. It was submitted that the issues that fall for determination are:

- i. Whether the Kisii Teaching and Referral Hospital Bill 2024 is illegal and unconstitutional;
- ii. Whether the recruitment done by the 3<sup>rd</sup> Respondent legal;
- iii. Whether the Applicant is entitled to the reliefs sought.

10. The Petitioner submits that the process of passing the said Bill was not transparent and did not follow the due process provided for in the Constitution of Kenya. The Petitioner submits that the County Governments Act does not authorize the 1<sup>st</sup> Respondent to establish State Corporations within the county. It was submitted that section 3(b) of the County Governments Act provides that one of the purposes of the Act is to give effect to the objects and principles of devolution as set out in Article 174 and 175 of the Constitution. It was submitted that Article 174(c) of the Constitution provides that one of the objects of devolution is to give power to self-governance to the people and enhance the participation of the people in the exercise of the powers of the state and in making decisions affecting them. The Petitioner submits that however, no public participation was ever done to the public regarding establishment of the 3<sup>rd</sup> Respondent as a State Corporation, therefore rendering the Bill/Act unconstitutional, illegal and unlawful. The Petitioner submits that pending the passing of the KTRH Bill 2024, the 3<sup>rd</sup> Respondent relied on the Bill to advertise and recruit Clinical Officers. The Petitioner submits the recruitment procedure was conducted to conclusion with the 3<sup>rd</sup> Respondent acting as a state corporation. It was the Petitioner's submission that the Respondents' unprocedurally, unfairly and unlawfully passed the Kisii Teaching and Referral Bill 2024 and employed Clinical Officers illegal relying on the unconstitutional Bill. The Petitioner thus urged this Honourable Court to render itself thus and issue a declaration that the employment of the Clinical Officers by the 3<sup>rd</sup> Respondent was unlawful, illegal and unconstitutional and the process be revised in accordance to the law.

11. The 1<sup>st</sup> Respondent submitted that the Applicant has merely cited the provisions of the law without supplying any particulars of derogation other than the basic assertion that the Respondents infringed on the rights of the Applicant. The 1<sup>st</sup> Respondent cited the case of Stephen Wasikhe Wakhu & another v Security Express Limited [2006] eKLR where it was held that

A party seeking Justice must place before the court all material evidence, and facts which considered in light of the law would enable the court to arrive at a decision as to whether the relief sought is available. Hence, the legal dictum that "he who alleges must prove". Without evidence as to the terms of the agreement allegedly giving rise to the Plaintiffs' claim the court is unable to establish a basis or foundation for the same.

12. It was the 1<sup>st</sup> Respondents submissions that the Applicant not only failed to plead their grievances with precision, but also failed altogether to prove their allegations. The 1<sup>st</sup> Respondent submits that we are equally guided by the principles established in case of Anarita Karimi Njeru v Republic [1979] eKLR in which the appeal highlighted the difference between substantive evidence and mere reiteration of claims. The 1<sup>st</sup> Respondent submits the court in that case emphasized that convictions cannot be based solely on assertions without accompanying credible evidence. The 1<sup>st</sup> Respondent submits that reliance on speculative statements and uncorroborated claims has significantly weakened the



Applicant's position as noted in the Anarita Karimi Njeru v Republic case. It was submitted that courts require substantive evidence, not mere reiteration of claims devoid of factual support.

13. The 1<sup>st</sup> Respondent submits that the Respondents have the power pursuant to Article 185 of *the Constitution* of Kenya 2010 to make laws that are necessary for, or incidental to, the performance of the functions and exercise of the powers of the County Government under the Fourth Schedule. It was submitted that the County Assembly's functions are limited to representation, legislation and oversight in line with article 185 of *the Constitution* and that healthcare is a devolved function under *the Constitution* of Kenya, 2010. It was submitted that allows County Governments to design innovative models and interventions that suit the unique health sector needs in their context. The Kisii Teaching and Referral Hospital Act, 2024 establishes a County Corporation within the meaning of the Kisii County Corporation Act 2024 which Act defines a "County Corporation" as a body corporate established before or after the commencement of this Act by or under an Act of the County Assembly but not a co-operative society established under the *Co-operative Societies Act* (Cap. 490); a building society established in accordance with the *Building Societies Act* (Cap. 489); a company incorporated under the *Companies Act*, 2015 which is not wholly owned or controlled by the County Corporation. It was submitted that there is a clear and distinct difference between a County Corporation and State Corporation and that the two entities are meant to govern different levels of government i.e. County Government and National Government respectively. The 1<sup>st</sup> Respondent thus submitted the motion is for denial as well as the Petition.
14. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the provision of healthcare is majorly a County function, and that it is well within the County Government of Kisii to set up mechanisms for the implementation of the same in order to ensure effective and efficient service delivery towards the realization of the right to health pursuant to Article 43 of *the Constitution* of Kenya. It was submitted that it would be greatly prejudicial should this Honourable Court issue any stay orders whose effect would be to paralyze the provision of health services and serve to paralyze the implementation of health programmes and initiatives in Kisii County. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent submits the orders if granted would negate the objects of devolution and would hamper service delivery and the health care system in Kisii County. Regarding the allegations by the Applicant/Petitioner on the matter of public participation, it is the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's submission that it is misleading for the Applicant/Petitioner to contend that the Kisii Teaching and Referral Hospital Bill was tabled without any public participation or involvement of the people. It was submitted that there was exclusive and comprehensive public participation as invitations were sent out calling for input from the members of the public whereat dates, time and venues for public participation were shared and members of the public duly invited to submit their views, comments, and memoranda, which they did and participated. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submit that *the Constitution* under Article grants the County Government an express constitutional legislative authority to enact any such law and put in place any such mechanism for the necessary and effective performance of its functions and exercises of its powers pursuant to the Fourth Schedule to *the Constitution*. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submit that the Applicant's/Petitioner's argument is therefore misplaced and based on a misdirection, selective and misreading of the law. They submit that the orders sought herein are draconian and have far reaching effects which cannot be reversed.
15. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents cite the book, CONSTITUTIONAL LAW, DOCTRINES AND THE LITIGATION OF FUNDAMENTAL RIGHTS AND FREEDOMS (LawAfrica, Nairobi, 2023) Isaac Lenaola SCJ & Arnold Ochieng' at pages 104-107 were the authors note thus:

“In constitutional litigation, the courts have adopted various principles to be considered before the grant of these orders. They have recognized that such orders are firstly, discretionary in nature; it has been acknowledged that the court in the exercise of the



discretion must act cautiously and with a great degree of care but still with reasonableness or flexibility and fairness to promote the enhancement and enforcement of fundamental rights and freedoms of the individual and the public at large, where appropriate; arguable case – a prima facie case as already alluded to here; such a prima facie case, however, has been stated not to mean that it is debatable. To have an arguable case, it has been said that it is one that raises serious if not fundamental and/or substantial issues or questions that ought to be given a reasonable or fair chance to be heard, articulated and ventilated in a court of law.....the third consideration is that a court must pose the question on whether an application or case will be rendered nugatory if the conservatory order is not granted... additionally, the courts have propounded another principle which is that of a balance of convenience. Here, the court is to weigh the various competing interests between the applicant and the respondent in order to strike a proper balance that the justice of the case demands. Where public interests are involved, the threshold is even higher as the applicant must satisfy the court that individual private interest outweighs public interest."

16. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents also cite the case of Republic v Nairobi City County Assembly Service Board Ex Parte Applicant Pauline Sarah Akuku [2022] eKLR for the argument that a grant of the orders at this interim stage would be tantamount to granting the final orders in the Petition and therefore not tenable. They argue the grant of the orders would be inappropriate, inefficacious and is likely to occasion confusion and disruption. They thus urge the Court to disallow the motion by the Petitioner/Applicant.
17. The Court has considered the pleadings, the rival submissions of parties, authorities cited and the law in coming to this decision. The issues that have been distilled for determination by the Court are:
  - i. Whether the Kisii Teaching and Referral Hospital Act 2024 is illegal and unconstitutional.
  - ii. Whether the recruitment done by the 3<sup>rd</sup> Respondent is legal.
  - iii. Whether the Petitioner/Applicant is entitled to the reliefs sought.
18. The Court is alive to the fact that should the application fail, the Petition will be moot and it too shall fail. As such, the determination of the notice of motion application which has sought the exact same reliefs as in the main petition will doom or save the Petition. The Court has reviewed the provisions of Articles 174, 175, 176, 185, and 186 of *the Constitution* of Kenya. It is my finding that contrary to the averments by the Applicant/Petitioner these Articles of *the Constitution* read together with the *County Governments Act* grants County Governments through the respective County Assemblies the legislative authority to enact laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the County Governments under the Fourth Schedule.
19. The Kisii Teaching and Referral Hospital Act of 2024 was enacted as an Act of the County Assembly to provide for the regulation, promotion and development of health services generally, to provide for the establishment, powers and functions of the Kisii Teaching and Referral Hospital Board and for matters connected therewith and incidental thereto. There was extensive public participation as evidenced by the documentation availed by the Respondents. The 1<sup>st</sup> Respondent was actually involved in facilitating the public participation and the consultation undertaken by the County Government of Kisii before the enactment of the legislation. The Court notes that the Kisii Teaching and Referral Hospital Act, 2024 establishes a County Corporation within the meaning of the Kisii County Corporation Act 2024 which Act defines a "County Corporation" as a body corporate as established therein. The Court discerns that there is no attempt to create a state corporation at the



County but instead a County Corporation which is a county entity and not a national government outfit.

20. The above demonstrates that the Kisii Teaching and Referral Hospital Act of 2024 was legally and lawfully enacted and it is not unconstitutional. Having so found, is the recruitment under the Act unlawful? I find that there can be no illegality if the recruitment was in accordance with the provisions of the Kisii Teaching and Referral Hospital Act 2024. There has been no demonstration of a single constitutional infringement by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents in their handling of the enactment as well as actions subsequent to the enactment of the Kisii Teaching and Referral Hospital Act 2024, the successor to the Kisii Teaching and Referral Act 2014 (now repealed). As such, there is no ground to grant any of the reliefs sought by the Petitioner/Applicant. What is the disposition of the Court in as far as the motion and the Petition? Both are misplaced, misconceived and an abuse of the Court process granted the fact the Petitioner was aware of the public participation that was undertaken as well as the remit of County Assemblies in enacting legislation under *the Constitution* of Kenya. The Court therefore does not hesitate to declare the only fate the Petition and application must meet. The Court finds it fit to dismiss the application and the Petition with costs to the Respondents.

It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 20<sup>TH</sup> DAY OF NOVEMBER 2024**

**NZIOKI WA MAKAU, MCIARB.**

**JUDGE**

