



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 42 OF 2018

(CONSOLIDATED WITH PETITION NO. 46 OF 2018)

IN THE MATTER OF: ARTICLES 19, 20, 21, 22, 23, 24, 27, 41(1), 46, AND 55 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED VIOLATION AND/OR THREATENED VIOLATION OF FUNDAMENTAL RIGHTS

AND

FREEDOMS AS ENSHRINED UNDER ARTICLES 27 AND 41 OF THE CONSTITUTION;

AND

IN THE MATTER OF: THE EMPLOYMENT ACT No. 14 OF 2007

AND

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

AND

IN THE MATTER OF: THE CITIZENSHIP AND IMMIGRATION ACT 2012, THE MEDICAL PRACTITIONERS AND DENTISTS ACT CAP 253, THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT No. 1A OF 2015

AND

IN THE MATTER OF: PUBLIC SERVICE CODE OF REGULATIONS, KENYA CITIZENSHIP AND IMMIGRATION REGULATIONS 2012

AND

IN THE MATTER OF: EMPLOYMENT /DEPLOYMENT OF FOREIGN MEDICAL PRACTITIONERS TO KENYAN PUBLIC MEDICAL FACILITIES

AND

IN THE MATTER OF: THE PRINCIPLE OF EQUALITY AND NON-DISCRIMINATION

AND

IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATION

BETWEEN

DR. SAMUEL NDUATI

DR. REUEL MAINA

DR. FRANCIS THUKU

DR. SAMSON ROBERT MISANGO.....PETITIONERS

~VERSUS~

CABINET SECRETARY MINISTRY OF

HEALTH.....1ST RESPONDENT

CHAIRMAN COUNCIL OF THE COUNTY

GOVERNORS.....2ND RESPONDENT

PUBLIC SERVICE COMMISSION.....3RD RESPONDENT

KENYA MEDICAL PRACTITIONERS &

DENTISTS BOARD.....4TH RESPONDENT

CABINET SECRETARY MINISTRY OF INTERIOR &

CORDINATION OF NATIONAL GOVERNMENT.....5TH RESPONDENT

THE ATTORNEY GENERAL.....6TH RESPONDENT

COUNCIL OF GOVERNORS.....7TH RESPONDENT

DIRECTOR OF IMMIGRATION.....8TH RESPONDENT

KENYA MEDICAL PRACTITIONERS

PHARMACISTS & DENTISTS UNION (KMPDU).....1ST INTERESTED PARTY

KENYA MEDICAL ASSOCIATION.....2ND INTERERSTED PARTY

JUDGMENT

Introduction

1. The petitioners are all Kenyan citizens qualified and licensed medical practitioners residing in the Republic of Kenya. The 1st, 2nd, and 3rd petitioners brought this petition against 1st -6th respondent, while the 4th petitioner brought petition No. 46 of 2018 against the 1st and 6th -8th respondents. The petitioners are challenging the decision and the conduct by the respondents of hiring foreign doctors and in particular, doctors from Cuba to work in Kenyan public medical facilities. The recruitment was done in Cuba and the hired doctors were expected to arrive in Kenya on 31.5.2018.

2. The petitioners in this petition seek the following orders:

a) A declaration that the decision of the government of the republic of Kenya through the 1st and 2nd respondents to hire foreign doctors and in particular doctors from Cuba to work in Kenyan public medical facilities is inconsistent and in conflict with the constitution and thus null and void.

b) An order of certiorari to bring into this court and quash the decision of the government of the republic of Kenya through the 1st and 2nd respondents to hire foreign doctors and in particular doctors from Cuba to work in Kenyan public medical facilities.

c) An order of prohibition to restrain the respondents either by themselves or agents and /or on behalf of the government of the Kenya , from hiring and /or employing and /or recruiting foreign doctors and in particular doctors from Cuba to work in Kenyan public medical facilities.

d) Costs of the petition.

3. The petitioner in petition No.46 of 2018 seeks the following orders:

- a) Declaration that the conduct of the respondents of seeking to recruit and employing foreign doctors and in particular Cuban doctors without advertising the said employment positions to local doctors is discriminatory, unconstitutional and violates the petitioner's rights in particular Articles 27,41, 46,47 and 50 of the constitution of Kenya 2010.
- b) A permanent injunction restraining the respondents by themselves, their agents or servants from issuing licenses and work permit for the year 2018 and thereafter to the Cuban doctors and or any other foreign medical practitioners and restrain all medical facilities in Kenya from employing the Cuban doctors or any other foreign medical practitioner or dentist, unless the positions have first been competitively offered to the local doctors.
- c) Costs of the petition.
- d) Any other orders, writs and directions the Honourable Court considers appropriate and just to grant for the purpose of the petitioner's constitutional rights.

4. The petitions were supported by the interested parties but vehemently opposed by the respondents through replying affidavits and grounds of opposition. The two petitions were consolidated under this one on 31.5.2018 and heard on 6.6.2018 on the basis of the material filed in court and oral submissions by counsel.

Petitioners' case in petition 42 of 2018

5. The petitioners contend that they are qualified and licensed doctors who are currently unemployed, and are members of Kenya Medical Practitioners and Dentists Union. They have brought the petition on their own behalf and on behalf of their colleagues numbering to almost 1,300 qualified and licensed medical practitioners. They are aggrieved by the government's decision of denying them priority in employment and deployment to public medical facilities and instead went for doctors from Cuba in violation of article 10 of the constitution, section 34, 36 (2) and 40 (2) of Citizenship and Immigration Act, and 17 of the Public Service (Values and Principles) Act.

6. The petitioners further contended that the respondents decision to recruit foreign medical practitioners was done without public participation and without considering them as direct stakeholders, through their registered welfare Association and union (interested parties herein), about the existence of citizens of Kenya who had comparable skills before recruiting foreigners and thereby violated Article 10 and 232(1) (d) of the constitution and section 11(1) & (2) of the Public Service (Values and Principles) Act.

7. It is further petitioners' case that the government of Kenya seeks to deploy Cuban doctors throughout the republic by offering them better packages than the packages offered to Kenyan medical practitioners with similar skills and proficiency which is a violation of their right to fair remuneration, right to equality and freedom from discrimination under Article 41(2) (a) and 27 of the constitution.

Petitioner's case in petition 46 of 2018

8. The petitioner contended that the respondents have violated the petitioner's rights by breaching Article 27, 36, 46 and 47 of the constitution by :

- i. Failure to uphold the constitution;
- ii. Failure to ably discharge their mandate without prejudicing the Kenya plastic Surgeons students;
- iii. Discriminating against the petitioners and infringing on their rights under the bill of rights; and
- iv. Breaching the petitioners consumer rights, freedom and entitlement to fair competitive platform with all other foreign doctors seeking employment within the country.

DEFENCE CASE

1st, 5th, 6th and 8th Respondents' case

9. The 1st, 5th,6th and 8th respondents contended that petition No.42 of 2018 is unsupported by facts because it is not supported by any affidavit. They further contended that the petitioners are bound by an existing collective agreement (CBA) with them and as such they are estopped from any claim on terms of their employment under Article 41 of the constitution.

They also contended that the petitioners' legitimate expectations cannot go beyond their CBA and that cannot extend to limit the constitutional powers of the two levels of government from agreeing to discharge their constitutional functions of provision of medical services. It is their case that there is no right of employment exclusive for Kenya citizens provided under the constitution and contended that the petitions are premised on brazen and unjustified discrimination against Cuban doctors contrary to Article 27(4) of the constitution which extends to cover foreigners.

10. They further contended that the conduct and rationale of foreign relations is within the exclusive constitutional remit of the executive arm of the government and it is non-justiciable under the doctrine of acts of state/political question doctrine consonant with the constitutional principle of separation of powers and as such the judiciary should exercise deference to the constitutional repository of the function. They

further contended that the specific terms of engagement of the Cuban doctors under an intergovernmental instrument is polycentric matters that merit judicial deference to the executive which is better placed to determine the same.

11. In addition they have contended that the impugned decision was made in the public interest in line with the right to the highest attainable standard of health, including the right to health care services under Article 43(1) (a) of the constitution. They viewed the petition as an attempt to advance private interest of a limited section of the society over that of the general public.

12. They further contended that this court lacks jurisdiction to hear and determine any dispute regarding the exercise of administrative discretion of either to issue or refrain from issuing immigration permits of whatever nature and cannot prohibit the exercise of that discretion as proposed by the petitioners herein. They also contended that the petitioners have not pleaded the particulars of the violation of their constitutional rights.

13. Factually, the Respondents have contended through a Replying Affidavit sworn by one Sicily K. Kariuki on 4th June, 2018, that the number of doctors practicing in Kenya is 2,691 which figure is very small *vis-a-vis* the entire Kenyan population of 45 million hence insufficient to address the needs of the Population; that the said deficiency in health care workers falls below the international standards as World Health Organization (WHO) recommends at least 1 doctor per population of 1000 whereas in Kenya the ratio is approximately 1:10,000; and that the foregoing state of affairs is worsened by concentration of the few available doctors in the urban areas leaving a large rural population without medical attention. In addition they contended that the training of health specialists is long, rigorous and costly and they have no power to determine areas of specialization of interested medical officers. They further contended that for the last 3 years the Government of Kenya has managed to train about 156 medical specialists and posted them in various counties, but in order to give full realization of Article 43(1) (a) of the Constitution, the Government of Kenya sought to collaborate with the Government of Cuba to supplement the provision of medical services to the Kenyan populace through inter-governmental memorandum of understanding and agreement which action is constitutional. They contended that the impugned intergovernmental agreement is for provision of specialized health services only in the specialized medical fields including critical care, orthopedic surgeons, plastic surgeons, nephrologists, urologists, neurosurgeons, family physicians, radiologists, general surgeons, oncologists, dermatologists and general cardiologists.

14. It is the respondents' case that, the decision to engage Cuban doctors was arrived at after proper consultation with county governments. They further contended that the Government of Kenya does not have a list of the unemployed doctors to enable them to respond to the allegation that there are doctors available to fill the positions being taken up by the Cuban specialists. They however averred that there exists many opportunities throughout the Republic of Kenya both in the public and private sector due to the doctor to population ratio. Finally they averred that the necessary work permits have already been issued to the Cuban doctors upon observance of the requisite procedures and as such the suit is overtaken by events.

2nd and 7th Respondents' Case

15. The 2nd 7th respondents contended that the Government of Kenya signed an agreement with the Republic of Cuba on 25th April, 2018 wherein Government of Kenya was to accept 100 medical specialists from Cuba to be deployed in the counties. They further contended that the county Governments and the National Government under the auspices of the ministry of Health signed a memorandum of understanding (MOU) which: Government of Kenya will receive medical specialists from the republic of Cuba while Kenya will send 50 post graduate health workers for training in family medicine in the Republic of Cuba; that the County Governments will release the selected health workers for a period of 2 years to undertake post graduate training in family medicine in Cuba; and that the County Governments will retain the selected health personnel in the pay roll during the period of training to maintain continuous services and safeguard their pension rights.

16. They further contended that the Agreement is based on Cuba's willingness and capacity to offer specialized health services, training and capacity building services and it was necessitated by need in the counties especially the far flung areas which did not have enough specialists. They further contended that under the constitution, provision of health services is a function of the county governments and as such they took the impugned decision in line with Article 43 (1) of the constitution and international treaties and conventions ratified by Kenya all of which puts the obligation on the government to take legislative, policy and other measures towards achieving progressive realization of the right to the highest standard of health. They denied that the employment of the specialists will deny the local doctors opportunities. It is also the Respondent's contention that the Kenya Medical Practitioners and Dentists Board travelled to Cuba for the purpose of recruiting specialists and therefore the allegations that the doctors were not competitively sourced is untrue.

4th respondent's case

17. The 4th respondent contended that under section 13 and 14 of the Medical Practitioners and Dentists Act, Cap 253 laws of Kenya as read with Rule 5(2) of the Medical Practitioners and Dentists (Inspection and Licensing) Rules, 2014, she is empowered to license foreign nationals who have graduated from recognized medical schools. She further contended that there are approximately 1243 foreign doctors, mainly specialists, practicing in Kenya on temporary licenses and they are spread across the country in mission, government and teaching and referral hospitals.

18. She contended the country has a deficiency in the number of dentists and medical practitioners necessitating the need to take steps to ensure realization of universal health care. She contended that 63% of the retained specialist are practicing and based in Nairobi; That 6% of the retained specialists are practicing and based in Mombasa; 5% of the retained specialists are practicing and based in Eldoret (Uasin Gishu County); Only 20 of 47 counties have over 10 specialists; 27 counties have 10 or less retained specialists and 4 counties have no specialist at all.

Petitioners' submissions

19. Mr. Maloba for the Petitioners submitted that the government, through the 1st respondent has decided to employ and deploy Cuban doctors in public medical facilities in Kenya without following the legal procedure provided by the constitution and statutes. According to the counsel, the Petitions raises only two issues for determination which are:

a) Whether the impugned decision by the Government, through the 1st respondent, to hire Cuban doctors is in violation of constitutional provisions and the law

b) Whether the Petitioners are entitled to the reliefs sought

20. That section 34 of the Kenya Citizenship and Immigration Act provide that a person not a citizen of Kenya shall not enter and remain in Kenya unless they have a valid permit or pass which is issued under section 36(2) and 40 of the Act and the regulations under the Act. He submitted that the Regulation 20 applicable to the Cuban doctors and the permit to be issued is a class D permit which is issued when an employer applies in respect of a person who possess skills which are not available in Kenya.

He urged that under Regulation 14 the employer must show that he has taken steps to confirm that there is no Kenyan with such qualifications. The application is to be by Form 25 found in the first schedule of the Regulations.

21. Counsel further urged that the Petitioners are qualified medical practitioners and are specialists who hold the same skills as the ones held by the Cuban doctors and they are unemployed despite having the desire to work for the government. He contended that the 1st Petitioner is an Anesthetist Specialist while the 2nd petitioner is a qualified ENT surgeon but they have not been employed every time they applied on the ground that there was no vacancy.

22. He further urged that the petitioners' right to fair remuneration under Article 41 of the Constitution has been violated by the discriminatory terms of engagement. He contended that the Cuban doctors are entering the public service are entering in Job group S while a Kenya of equal qualification enters the Public Service at Job group P. The Respondent's affidavits do not offer a rebuttal on this allegation but throws the burden of proof back to the Petitioners.

23. Counsel submitted that the respondents breached Article 10 and 232 of the Constitution by not carrying out public participation by getting the views of all the stakeholders including the interested parties before making the decision to recruit the Cuban doctors. He concluded by contending that the Petitioners are questioning the process followed before recruitment of the foreign doctors and urged that, if the law was breached then the decision must be quashed.

24. Professor Wangai associated himself with the submissions by Mr. Maloba but added that Article 235 creates the County Public Service Boards which must be guided by the principles under Article 232 of the Constitution. He further submitted that under Article 186 Health services is a devolved function to be handled by the County Governments which function includes recruitment, consequently the Constitution bars the national government from recruiting doctors for County governments.

25. The counsel submitted that at the heart of this Petition is Article 10 which binds all including the Government and it provides for national values which include patriotism. Professor Wangai submitted that it is not patriotic to hire foreigners when citizens are jobless. He further urged that, the process of creating positions and hiring Cubans is illegal and therefore the end result is bitter. He contended that the jobs were not offered out there and doctors were not called to apply and as such it is not possible to tell whether the skills are available locally or not. He stated that the allegation by the Respondents that the court cannot stop government policy is wrong as the court's duty is to stop illegal policy. He further submitted that the decision to recruit Cuban doctors is illegal and not backed by law. He observed that the Respondents' allegation that an advertisement was made in Cuba and not in Kenya is a contrary to the law just as the 4th respondent (the Board), a regulator, as opposed to the employer, travelling to Cuba to recruit doctors from people who had not applied.

26. The Counsel referred to the Attorney General's allegation that the petition violates the rights of Cubans which are protected by Article 27(4) of Kenyan Constitution and submitted that the Petitioners have no problems with Cubans being hired but contended that they are only concerned with the process followed to recruit them. He urged that the World Health Organisation Code of Practice requires that jobs should be advertised locally first and prayed that the Court finds that Article 10, 27, 41, 50, 232 and 235 of the constitution of Kenya and the citizenship and immigration Act were violated and prayed that the Court orders that the process be followed.

Interested parties submissions

27. Mr Washika for the 1st interested party associated himself entirely with the submissions of the Petitioners' counsels and added that any person who deems his right is threatened has the capacity to seek redress from the Court and that is what gives standing to the petitioners in Court. He urged that it is in the interest of Kenyans that their own is employed when there is a vacancy for which they qualify. It was Counsel's position that there are doctors qualified for the jobs being given to Cubans without any competition. He contended the qualifications of the Cuban doctors also needed to be investigated.

28. He submitted that under section 66 of the County Government Act, it is mandatory that an advertisement be made before recruitment. He observed that from the material on record, the Respondents have not exhibited that the advertisement was done. He urged that section 68 of the County Governments Act further provides that a record of applications and the register thereof shall be availed to anyone interested but in this case no such register was availed.

29. He affirmed that Article 43 (1) and 21(2) of the constitution provides for the right to the highest standard of healthcare and for provision of measures towards progressive realization of these rights and submitted that the petitioners are not against the said rights. He however contended that the petitioners are challenging the process followed in recruiting the Cuban doctors because in their view it was without legal backing.

30. Ms Karanja for the 2nd interested party also concurred with the submissions of the Petitioners but added that the impugned recruitment process violated Article 3(5), (6), 4(4) and 4(5) of the WHO Practice Code on the recruitment of foreigners which binds Kenya as a member state. She submitted that Article 3(5) of the code is clear that recruitment should be transparent, fair and sustainable, but in this case, she contended that the procedure followed to recruit the Cuban doctors is not clear as there was no advertisement made in respect of the

vacancies in issue and denied the Kenyan citizens the chance to apply. She therefore urged that there is no evidence to prove that Kenya lacks the required Specialists so as to justify the importation of the foreign doctors.

31. The counsel further submitted that the 2nd interested party who is major stake holder, was never invited to any discussion to give their views on recruitment of Cuban doctors to work in Kenya. She cited the South African case of **South African Airways (PTY) Ltd -v- Gideon Jacobus Jansen Van Vuuren & another, Case No: CA9/13** at page 18 where the court defined the right to fairness and equal dignity. The Counsel submitted that Kenyan doctors are qualified and the Respondents have not given any statistics to show that a census was done before importing doctors from Cuba, and that it was found that the skills being imported were lacking in Kenya.

Submissions for the 1st, 5th, 6th, and 8th respondents

32. Mr. Bitta learned state counsel submitted that this is a public law claim and as such proof of violation is mandatory. He contended that Petition No.46 of 2018 has not pleaded particulars to support the Petition while Petition No. 42 of 2018 is not supported by any evidence in the form of an affidavit. He relied on the case of **Mape Building & General Engineering-v- Attorney General & 3 others [2016] eKLR** To address the issue of pleadings and burden of proof.

33. He further submitted that Article 43 of the Constitution provides for health rights, which rights are an obligation of the State. He contended that the said obligation is shared between the national government and the county governments to give effect to those rights. He further contended that there is a shortage of specialist doctors and counties cannot give effect to the rights under Article 43 because after they advertised for local specialists they got no response. He also contended that the Cuban doctors will be in the Country for only 2 years.

34. On the issue of unequal pay contrary to Article 41 of the constitution, the counsel submitted that the Kenyan doctors voluntarily signed a Collective Bargaining Agreement (CBA) with the employer and they cannot now allege that there was legitimate expectation other than what is in the CBA and claim discrimination. He relied on the case of **National Bank of Kenya Ltd -v- Hamida Bana & 13 others (2017)eKLR** which discusses the doctrine of estoppel. He contended that there is no problem with differentiation of persons as section 34, 35 and 40 of the Citizenship and Immigration Act deals with differentiation of persons. He further contended that all the necessary approvals for the Cuban doctors were given by the government and Public Service Commission.

35. On the foregoing issue, the Counsel submitted that, this Court lacks jurisdiction to review government regulatory powers because that falls within the province of the High Court. He further submitted that the case before the court is one of foreign relations and the court cannot review the decision of the executive. He cited the case of **Mumo Matemu -v-Trusted Society of Human Rights Alliance & 5 others [2013]eKLR** where the Court of Appeal stated that where the constitution gives jurisdiction to an organ of state the other organs should exercise deference. The Counsel also submitted that the only test to apply in this case is reasonableness considering the fact that advertisements were done locally but no one applied and as such, the Petitioners have not proved that the impugned decision was unreasonable. In addition he urged that there is a binding Memorandum of Understanding between Kenya and Cuba under Article 2(6) of the Kenya Constitution which is in the public interest of 45 million Kenyans.

36. The counsel submitted that the Affidavits filed by some doctors who claimed to be unemployed are contestable because one of the doctors was employed in Kiambu and on 11.11.2017 when he was transferred to Thika Hospital he declined and deserted duty. He contended that it is such Conduct that informed the importation of services. He further contended that all the said doctors are certified and cannot claim to be unemployed.

37. On the interested party's submissions, the counsel submitted that interested parties are barred from pleading a new case and are bound by the pleadings of the Petitioners. He urged the Court to dismiss the petition with costs as public good overrides private interest.

Submissions for the 2nd and 7th respondent

38. Mr. Lawi for the 2nd Respondent submitted that the Petition No. 42 of 2018 is incompetent because it is not accompanied by an affidavit and the documents relied upon by the Petitioners should not be used in deciding the Petition. He further urged that the two Petitions have also not specified the violation of the Petitioners rights by the respondents. He further urged that prayer 2 in Petition 46 of 2018 is too wide as it seeks orders to restrain Cuban doctors and other foreign doctors from being licensed to work in Kenya, which orders will affect private institutions which are not parties to the suit and thereby paralyze their operations.

39. He submitted that the rights under Article 43 of the constitution applies to all citizens including those in rural and marginalized areas and further urged that by dint of Article 2 (6) of the constitution, all treaties and Conventions ratified shall form part of the law of Kenya. ICECPR and ACPHR provide that states shall take necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick. He therefore further urged that the Government of Kenya has a duty to protect the health of her citizenry and in a bid to do so she entered into an agreement with the government of Cuba on one hand, and between the National government and county governments on the other hand where it was agreed: that Government of Kenya will receive medical specialists from the republic of Cuba while Kenya will send 50 post graduate health workers for training in family medicine in the Republic of Cuba; that County Governments will release the selected health workers for a period of 2 years to undertake post graduate training in family medicine in Cuba; and, that County Governments will retain the selected health personnel in the pay roll during the period of training to maintain continuous services and safeguard their pension rights. He observed that the Petitioners have not opposed the said agreement on the issue of training nor have they claimed that there should have been public participation on that decision.

40. The Counsel further submitted that the County Governments do not have adequate doctors and relied on the statistics annexed by the 4th respondent's replying affidavit as the evidence that Tana River, Mandera, Marsabit and Wajir do not have a single specialist. He presented to the Court 4 sets of advertisements which were marked 'RA' for Tana River, 'RB' for Embu, 'RC' for Garissa and 'RD' for Kajjado dating as far back as 2014 and contended that the Petitioners have not proffered any proof that they applied for the aforementioned vacancies and denied an opportunity.

41. On the issue of Cuban doctors earning a higher salary than their Kenyan counterparts, the counsel submitted that the Kenyan doctors have a legally binding CBA with the national government whose term is four (4) years and as such they cannot back out of this agreement mid-way.

Submissions for 4th respondent

42. Mr. Munge for the 4th Respondent, the Kenya Medical Practitioners Board, submitted that some of the Board's functions as set out in the Act include registration and licensing of medical practitioners and health institutions. He further submitted that under section 13 and 14 of the Act, read with Rule 5(2) of the Medical Practitioners and Dentists (Inspection and Licensing) Rules, 2014, the Board is empowered to license foreign nationals who have graduated from recognized medical schools. He also submitted that there are approximately 1243 foreign doctors practicing in Kenya on temporary licenses, mainly specialists, spread across the country in mission, government and teaching and referral hospitals. He therefore urged that foreign practitioners are allowed to practice in Kenya by virtue of licenses issued under the Act.

43. The Counsel contended that the Country has a deficiency in the number of dentists and medical practitioners and thereby necessitating the need to take steps to ensure realization of universal health care. He relied the relying affidavit by Dr. Kioko the Director of Medical Services at the ministry of health who is also the Registrar of the 4th respond to set out statistics on the current health care workers shortage and their distribution, that is: 63% of the retained specialist are practicing and based in Nairobi; 6% of the retained specialists are practicing and based in Mombasa; 5% of the retained specialists are practicing and based in Eldoret (Uasin Ngishu County); Only 20 of 47 counties have over 10 specialists; 27 counties have 10 or less retained specialists; 4 counties have no specialist at all.

Re-joinder

44. Mr. Maloba for the Petitioners submitted that under Rule 11(2) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure rules, 2013*, it is not mandatory to file affidavits alongside the petition and that the Court has discretion, under Rule 10(3), to allow informal applications and excuse the failure to comply with strict rules of procedure. On the other hand he submitted that section 22(1) of the Kenya Citizenship and Immigration Act gives effect to Article 18 of the constitution and the impugned decision is denying that right.

45. The counsel contended that Article 2(6) of the constitution deals with Treaties and Conventions which are ratified and not the MOU referred to by the Respondents which has not been filed herein or proved to have been ratified. He further contended that, the policy relied on by the Government to employ the Cuban doctors has not been cited nor filed in Court and the Respondents have not denied that the Cuban doctors are getting better pay than Kenyan doctors. He urged that Section 5(5) of the Employment Act provides for equal pay for equal value of work done and contended that a CBA should not be a basis for discrimination and that the doctrine of proportionality is only realized if the law is followed. He prayed that the jobs be advertised before Cubans take them because there are Kenyan doctors who are ready to work anywhere in the country.

46. Professor Wangai in his rejoinder stated that the medical board is only mandated to vet qualifications and certify that one can practice medicine in Kenya but cannot talk of employment statistics as she has purported to do herein. In addition he submitted that, having a licence does not translate to mean employment for a doctor and urged that the Petitioners are representing many other doctors. He further contended that the adverts produced in Court by the respondents were very old and they were not seeking for specialists but just medical officers in job group M. Regarding the advert for specialist for Embu County dated February 2018, the counsel observed that it was seeking for specialists in job group Q while the Cubans are taking up the same positions in job group S. He further observed that the Cuban Specialists being sent to the Embu County are for different posts from those in the advertisement of February, 2018. He urged the court to apply the doctrine of proportionality and stop an illegality. He also prayed for advertisement of the 100 positions for Kenyans to apply.

ANALYSIS AND DETERMINATION

47. After careful consideration of the two petitions, affidavits, supporting documents and the rival submissions, the following are the main issues for determination in this dispute:

- a) Whether the this court has jurisdiction to hear and determine the petitions
- b) Whether the two petitions herein meet the competency threshold.
- c) Whether the decision of the respondents to employ Cuban doctors and deploy them to the public medical facilities in Kenya violated of the petitioners' rights and fundamental freedoms guaranteed under Article 10, 27 and 41 of the Constitution.
- d) Whether the reliefs sought should issue.

Whether the this court has jurisdiction to hear and determine the petitions

48. It was urged for the defence that the court lacks jurisdiction to determine the petitions because they raise the question of exercise of regulatory authority by the executive arm of the government under the Citizenship and immigration Act and the Medical Practitioners and Dentists Act. Although the matter was raised as a preliminary objection by Attorney General, the same was never pressed and only resurfaced during the submission by Mr. Bitta. In *Owners of Motor Vessel "Lilian S" – v- Caltex Oil (Kenya) ltd [1989]KLR 1*, the Court of Appeal held that:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is the obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it,

there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the view that it is without jurisdiction.

49. I have carefully considered the provisions of article 162 (2) and 165 (3) & (5) of the Constitution and several precedents which have emerged from our courts on the question of jurisdiction of this court . it is now well settled that this court has the same jurisdiction with the High Court when it comes to interpretation of the constitution under Article 165 (3) of the constitution when it comes to petitions involving Employment and Labour Relations contemplated under Article 162 (2)(a) of the constitution. In ***Petition 459 of 2011, Samson O. Ngoma – v- Public Service Commission & another*** Lenaola J (as he then was) held:

“It is my opinion that the industrial court has jurisdiction to hear and determine both disputes relating to employment and labour relations including those involving members of the Kenya police force where such violations arise in an employment context.”

50. In that regard the dispute before me involves employment and deployment of Cuban doctors in Kenya public medical facilities and granting of work permits and practicing certificates to facilitate them to get employment in the Public Service of Kenya. In my view it would wrong to say that the dispute does not concern employment and that stake holder in the medical labour relations like the interested parties should not invoke this court’s jurisdiction under article 162(2)(a) and 165(5) of the constitution which expressly limits the jurisdiction of the High Court thus:

“The High Court shall not have jurisdiction in respect of the matters-

(b) falling within the jurisdiction of the courts contemplated under Article 162 (2).”

Competency threshold

51. The competency threshold was established by the High Court of Kenya in ***Anarita Wairimu Njeru –v-Republic [1979]eKLR*** where it was held 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 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 provision said to be infringed, and the manner in which they are alleged to be infringed.”

52. The petitioners in Petition 42 of 2018 set out the provisions of the constitution violated including Article10 read with 232 (1)(d) on National values, Article 27 and 41 (2) on protection from discrimination and right to fair remuneration. They further explained how their rights in the said provision were violated. In summary, they have pleaded in paragraph 25 to 32 that they were denied priority in the recruitment of the 100 specialist to work in the public medical facilities in Kenya, and further, denied the right to public participation through the interested parties herein before the decision to recruit the Cuban doctors was reached which is contrary to the principles of democracy, equality, equity, inclusiveness, participation of the people and social justice. They have further pleaded that the respondents violated the said constitutional provisions by breaching the provisions of section 34, 36(2) and 40 (2) of Kenya Citizenship and Immigration Act, and section O.1 of the public service commission code of regulations endorsed under section 17 of the Public service (Values and Principles) Act No.1A of 2015, all of which regulate the issuance of work permits to foreigners who possess skills which are not available within the country. In addition they pleaded under paragraph 33 to 35 of the petition that the Cuban doctors are going to get better terms of service including higher pay for equal value of work than Kenyan doctors of comparable skills contrary to the principles of equality and equity.

53. On the other hand the basis for petition No.46 of 2018 was given as follows:

“i. Failure by the Respondents to uphold the Constitution.

ii. Failure by the respondents to ably discharge their mandate without prejudicing the Kenyan plastic Surgeon students.

iii. Discriminating against the petitioners and infringing on their bill of rights.

iv. Breaching the petitioners consumer rights, freedom and entitlement to fair competitive platform with all other foreign doctors seeking employment within the country.

v. Breaching Article 27, 41, 46, and 47 of the petitioners rights under the constitution”

54. In ***Mumo Matemu –v Trusted Society of Human Rights Alliance &5 Others [2013] e KLR*** the court Appeal upheld the principle established by ***Anarita Karimi Njeru case*** and proceeded to dismiss the petition on ground of failure to plead the case with precision. The court held that :

“(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims.

(43) The petition before the High court referred to Articles 1,2,3,4,10,19,20 and 73 of the constitution in the title. However, the

petition provide little or no particulars as to the allegations and the manner of the infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organ ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further paragraph 4 of the petition alleged that the Government of Kenya had overthrown the constitution, again without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect to the spirit of the Constitution and the rule of law, again without any particulars.”

55. Applying the foregoing standard, I am of the view that the petitioners in petition No. 42 of 2018 reasonably met the basic minimum requirements of a constitutional petition under rule 10 of the “Mutunga rules of procedure 2013”. They pleaded with some measure of precision the provision of the constitution which were violated, and the manner in which they were violated by the impugned decision by the respondents. They have also pleaded how, as a result of the said breach their rights and those of their colleagues stands to be infringed. It cannot be denied that the petition has set out the issues for litigation and the defence has been able to understand and respond to the same both by pleadings and submissions. Consequently, I find that the said petition has met the competence threshold set out by *Anarita Karimi Njeru case*.

56. However, I have formed the opinion that petition 46 of 2018 has not met the said competency threshold and it must fail. Like in *Mumo Matemu –v- Trusted Society of Human Rights Alliance & 5 Others [2013] e KLR*, the petitioner has made general and broad allegations of violation without specifying the precise provision of the constitution violated and enumerating the particulars of the manner of the alleged infringement. Such pleading falls below the required threshold of a constitutional petition and it is prejudicial to the defence because it does set out the issues for litigation and adjudication to enable the opposing party to respond adequately.

57. In addition to foregoing deficiency, I agree with the respondent’s that the framing of the prayer 2 in Petition 46 of 2018 was so wide that if allowed it would affect all foreign medical practitioners working in Kenya whether in the private sector or public service. In my own estimation, the drafting of the said petition was not the epitome of precise pleading and despite the provision and the spirit in Article 22 and 159 of the constitution and rule 10(3) of said Mutunga Rules of procedure 2013, which gives the court wide power to excuse procedural defects.

Violation of Article 10, 27 & 41 of the constitution

58. The petition No. 42 of 2018 is not supported by any affidavit and as such, the respondents prayed that it be dismissed for being unsupported by evidence. The petitioners’ counsel submitted that under rule 11(2) of *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules)*, a petition need not be supported by an affidavit but if the petitioner wishes to rely on a document to support the petition, he can annex it to the petition. The petition before the court has not annexed any document as exhibit and as such I agree with the defence that it is not supported by evidence. The court will therefore limit the petitioners’ case to the legal arguments pressed by their counsel, the undisputed facts pleaded and facts advanced by the interested parties in their affidavits. One the undisputed fact is that the state through the county governments have an obligation to give effect to the right to the highest attainable standard health which includes health care services as guaranteed under Article 43(1)(a) of the constitution. It is also not in dispute that the government has an obligation to take legislative as well as policy measures to ensure progressive realization of the said right to its citizens. Finally, it is not in dispute that the law in Kenya allows foreign doctors to work in the country and that indeed, there are 1243 foreign doctors currently working in Kenya both in the private and public service. In addition, the petitioners, and the interested parties for that matter, are not opposed to Cuban doctors working here save that they are challenging the procedure followed to recruit them into the public service.

Violation of Article 10 – National Values and principles of governance

59. The petitioners contended that the decision of the Government of Kenya to employ and deploy Cuban doctors in public medical facilities in Kenya violated the national Values and Principles of governance by failing to give the petitioners and other qualified citizens priority over the Cubans as required by section 34, 36(2) and 40(2) of the Citizenship and immigration Act and section 11 (1) & (2) and 17 of the Public Service (Values and Principles) Act. The petitioners contended that the recruitment was done without inviting their views through the interested parties who represent their welfare and that of other medical practitioners. According to them, had their views been sought or a census done, the respondents would have established that there were Kenyans with the skills being imported from Cuba. They submitted that the impugned decision was not patriotic and it was done in breach of express statutory provisions, government policy and the World Health Organization Practice Code on recruitment of foreign medical practitioners which is binding on Kenya.

60. The petitioners urged that under section 36 (2) of the Citizenship and Immigration Act, permits are to be issued in the manner provided in section 40(2) of the Act. The latter provision requires that an application for permit shall be made in the prescribed manner. That procedure is enacted vide regulation 20 and it is by filling of Form 25 set out in the first Schedule. Note 1 on part I of the Form states:

“It is the Government Policy that the economy of Kenya should be manned by trained and competent citizens. Permits are issued to foreign nationals with skills not available at present on the Kenya labour market, only on the understanding that the effective training programmes are undertaken to produce trained citizens within a specified period.”

61. The foregoing note is in line with section O.1 of the Public service Code of Regulations 2006 which provides:

“(1) It is the policy of the Government not to employ non-citizens even on temporary posts if there are citizens with the required qualifications available. No action should be taken to employ a non-citizen in any capacity without the prior approval of the permanent Secretary/ Director of Personnel Management.

(2) In applying for the permission to employ a non-citizen, the authorized officer should confirm that there is no citizen with the required qualifications available for appointment and the candidate has complied with the provisions of the Immigration Act and regulations therein. If the permanent secretary/ Director of personnel management agrees to the appointment of non-citizen, it

will still be necessary to obtain the approval of the Public Service commissions of Kenya.”

62. Article 3.5 of the WHO Code of Practice provides that:

“International recruitment of health personnel should be conducted in accordance with the principles of transparency, fairness and promotion of sustainability of health systems in developing countries... All aspects of the employment and treatment of migrant health personnel should be without unlawful distinction of any kind.”

63. In supporting the petition, the 1st interested party (KMPDU) urged that the Cuban doctors were recruited to work in the county medical facilities without advertising the vacancies as required under section 66 of the County Government Act and there is no record of the applications made and register kept as required under section 68 of the same Act. They further urged that the impugned decision was not only against the law but also against the public interest which is in having their own given priority in employment to the public service.

64. The respondents did not deny the foregoing government policy as provided in our law, but they contended that all the approvals contemplated by the law were sought and obtained in respect of the Cuban doctors and the agreement between Kenya and Cuba has provided for training of 50 Kenyan doctors in Cuba in compliance with the said government policy and the regulations. They further contended that Rule 5(2) of the Medical practitioners and dentists (inspections and licensing) Rules 2014 permits the licensing of foreign medical and dental practitioners to perform specific work or works in specific institutions in Kenya. They also contended that there over 1243 foreign doctors working in Kenya both in the private and public institutions. They further urged that they conducted public participation from the stake holders and the 4th respondent verified the competence of the Cuban doctors.

65. The burden of proof remains with the petitioners to prove the alleged violation of the National values and the principles of governance set out in Article 10 of the Constitution in relation to failure to give priority to the petitioners in government jobs, failure to carry out public participation and failure to conduct recruitment of foreign doctors in accordance with the principles of transparency and fairness. The affidavit evidence by the respondents that the recruitment doctors in Cuba was competitive and verified by the 4th respondent has not been rebutted by the petitioners because they never filed any affidavit or annexed any documentary evidence to the petition to challenge the said contention.

66. However, after considering the Replying Affidavits by the Interested Parties, I am persuaded that, herein Kenya the exercise was shrouded with mystery at least going by the replying affidavits by the two interested parties which supported the petition. The interested parties are the trade union representing medical practitioners and dentists in Kenya and the welfare associations of the said practitioners respectively, and they were never invited to give their views on the matter of importing medical specialists. The interested parties further contended that the vacancies for the medical specialists were never advertised by the respective County Public Service Boards as required under section 66 of the County Government Act before the impugned decision. It was further urged that whatever advertisement were they done were not for specialist doctors and could not be the basis for the impugned decision. The respondents have produced some evidence to prove that from 2014, advertisements were done by several County Public Service Boards but they did not attract specialist doctors. They however did not produce any evidence to prove that they engaged the interested parties to get their views on the need for importing medical specialists from Cuba.

67. The first interested party, KMPDU, produced a schedule of unemployed doctors totaling to 1683 out of which 171 are specialist doctors. The said schedule could have been an item for discussion with the respondents in a stakeholders meeting before the recruitment of the Cuban doctors by dint of the aforesaid public Service Code of regulations. Suffice it to say, however, and for purposes of this petition, that the said schedule is not conclusive evidence that there are 100 unemployed Kenyan medical specialists with comparable qualifications required to filled all the vacancies given to the Cubans. The schedule does not give the names of the said specialists and their qualifications to rebut the respondents' denial of their existence in Kenya. To that extent the petitioners have not discharged their burden of proving that their rights or the rights of other specialist doctors were infringed by the impugned decision.

68. As regards failure to comply with the WHO Code of Practice, I am of the view that the provisions therein are meant to protect the migrant doctors from unfair labour practices by the host countries by giving the inferior terms of service. Consequently I find that the said code was wrongly cited herein and unless the Cuban doctors or any other immigrant doctors were complaining of unfair labour practices, the interested parties herein have no business waiving the said code to the respondents.

69. After considering all the materials presented to the court by the contestants, I find that the failure to seek the views of the petitioners through the interested parties, who are direct stakeholders, and the failure to locally advertisement for the medical specialists before making the impugned decision was ***an aspect*** of failure to carry on public participation which is part of our national values and principle of governance under Article 10 of the constitution. Its violation has the effect of denying ***deserving Kenyans*** employment in their own country in favour of foreigners. I believe that is why the government has taken the burden of formulating policies and statute laws to ensure that citizens are given priority in the local job market which is good for a robust and sustainable economy. However, as observed herein above, the schedule produced by the union is not conclusive evidence to prove that the impugned decision violated the law and the government policy.

70. The foregoing brings in the question of balancing between the private right to employment of the petitioners and the public interest of all the people of Kenya. Assuming that there are Kenyan with the skills and are willing to fill the vacancies given to the Cuban doctors, I would still imagine that the public interest is in favour of the impugned decision which is based on the obligation of the state to give effect to the right to the highest attainable standard of health as enshrined under Article 43 (1)(a) of the constitution. The statics exhibited by the respondents is prove enough that specialist medical staff is urgently needed upcountry where even junior Kenyan medics are not attracted despite public advertisements. The foregoing finding that the public interest is in favour of the impugned decision, and further that the petitioners have not proved that indeed there existed enough medical practitioners with comparable skills as those possessed by the recruited Cuban doctors and are willing to take the jobs given to the latter, I decline to find that the impugned decision violated article 10 of the constitution.

Violation of article 27 and 41- freedom from discrimination and unfair remuneration.

71. The petitioners alleged that, in making the impugned decision the respondents violated the article 27 of the constitution which protection every person from discrimination, and Article 41 which provides the right to fair remuneration to every worker. In this case the petitioners contended that the respondents have employed Cuban doctors on superior terms of service than their Kenyan counterparts of comparable qualifications. The said terms include entry point at job group S as opposed to job Group P for Kenyan counterparts. The respondent neither denied nor admitted the alleged different terms of service, but they contended that there is nothing wrong with employees being treated differently based on certain considerations. It is the defence case that the applicants are bound by a valid CBA negotiated by their union and they cannot jump out of it before its term ends. In addition they have contended that such decision was polycentric and founded on diplomatic functions which a constitutional remit to the executive arm of the government and which the court should exercise deference.

72. Once again, the burden of proof lies with the petitioners to prove the alleged discrimination by adducing evidence to substantiate the alleged violation. At the risk of repeating myself, the petitioners have not tendered any iota of evidence to prove the alleged disparity in the terms of service between the Cuban doctors and their Kenyan counterparts. On that ground of lack of evidence alone, the alleged violation of Article 27 and 41 fails. Otherwise I don't think that the respondents can hide themselves under the veil of diplomacy or the doctrine of separation of powers to violate the constitution and evade the supremacy of the same constitution which grants courts the final say in interpreting the constitution *vis a vis* other laws and exercise of any authority under the constitution.

Conclusion and disposition

73. In view of the finding herein that petition 46 of 2018 fell short of the competence threshold, that is to say, lacking precision in material particulars, I proceed to dismiss it.

74. On the other hand, the petition No. 42 of 2018 is dismissed for lack of sufficient evidence to prove that the respondents violated National Values and the principles of governance by recruiting Cuban doctors to work in Kenya and that it discriminated Kenyan doctors.

75. The petitions were in the nature of public litigation and for that reason I direct that each party bears his or her own costs the suit.

Dated, Signed and Delivered at Nairobi this 19th day of June, 2018

ONESMUS N. MAKAU

JUDGE