



Mumias West Health Care & another v County Government of Kakamega; Rural & Urban Private Hospitals Association of Kenya (Interested Party) (Constitutional Petition E017 of 2024) [2025] KEHC 2194 (KLR) (31 January 2025) (Ruling)

Neutral citation: [2025] KEHC 2194 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CONSTITUTIONAL PETITION E017 OF 2024
AC BETT, J
JANUARY 31, 2025**

BETWEEN

MUMIAS WEST HEALTH CARE 1ST PETITIONER

DANIEL KASSAMANI WANGULU 2ND PETITIONER

AND

THE COUNTY GOVERNMENT OF KAKAMEGA RESPONDENT

AND

RURAL & URBAN PRIVATE HOSPITALS ASSOCIATION OF KENYA INTERESTED PARTY

RULING

1. This ruling arises from an application dated 18th December 2024 in which the 1st Petitioner made the following prayers:-
 - a. That this application be certified urgent and service thereof be dispensed with in the first instance.
 - b. That pending the hearing and determination of this application, this Honourable Court be pleased to grant unconditional interim injunction restraining the Respondent by itself, servants, employees and or any other person acting on its behalf from utilizing, accessing, destroying and/or disposing the Petitioner’s confiscated professional equipment.
 - c. That pending the hearing and determination of this Application, a conservatory order does issue staying the move by the Respondent to impose Single Business Permit fees on the Petitioner.



- d. That pending the hearing and determination of this Application, the Respondent be compelled to release and produce the Petitioner's confiscated professional equipment.
 - e. That a date for inter-parties hearing for this Application be granted.
 - f. That the cost of this Application be provided for.
2. The application is supported by an affidavit sworn by Daniel Kassamani Wangulu, a Clinical Officer and is premised on Articles 20, 22, 23, 40, 43, 47, 50 and 258 of *the Constitution*.
 3. The 1st Petitioner which is a healthcare facility managed by the 2nd Petitioner and licenced by the Medical Practitioners and Dentists Council for the year 2024 avers that on 17th October 2024, a revenue officer from the Respondent confiscated its medical equipment on the ground that it did not have a single business permit from the Respondent and and the Respondent has continued to detain the said medical equipment as a result of which the facility remains closed to date.
 4. In response, the Respondent filed a preliminary objection is on the following grounds:
 - a. That the Petition is Res judicata by virtue of the issues therein having been determined on merit by a court of competent jurisdiction in Kenya Association of Private Hospitals Vs Mombasa County Government & Another (2024) eKLR.
 - b. That the doctrine of issue estoppel bars the Petitioner from litigating on the issues of the issuance of a single business permit by the Respondent which issue was litigated on and conclusively determined in Kenya Association of Private Hospitals Vs Mombasa County Government & Another (2024) eKLR.
 - c. That this Honourable Court is functus officio and consequently lacks the jurisdiction to determine this petition; as held by the Court of Appeal in Telkom Kenya Limited Vs John Ochanda (Suing on his own behalf and on behalf of 966 former employees of Telkom Kenya Limited)(2014) eKLR where the finality as to the proceedings, merits and decision in a matter, a court becomes functus officio so that any issues of grievance can only be dealt with by escalation to another court on appeal, this court is functus officio by having made its judgement in Kenya Association of Private Hospitals Vs Mombasa County Government & Another (2024) eKLR.
 - d. That this honourable court has no jurisdiction to determine the Constitutionality of a single business permit by the Respondent to the Petitioner as sought in prayer (a) of the said petition as it is functus officio.
 - e. That as held in Owners of Motor Vessel Lilian S Vs Caltex Oil Kenya Ltd (1989) KLR 1 where the court lacks jurisdiction, it must down its tools, this is a suitable case for this honourable court to down its tools.
 5. The Respondent also filed a replying affidavit sworn by Engineer Joseck Maloba, the Chief Revenue Officer of the Respondent in which he admitted the Respondent's demand for a single business permit from the 1st Petitioner and averred that the demand was lawful as it was based on Section 8 , 13 and 24 of the Kakamega County Finance Act 2024 which authorizes the Respondent to levy annual single business permit fees on health care facilities.
 6. The Interested Party, which is a non-profit organization that represents private healthcare facilities was enjoined to the suit by the Petitioners. They filed an affidavit sworn by Dr. Brian Lishega in support of the application. According to them, there have been several matters involving several other counties,



some of which have been determined, others pending, which raised the same issues as those raised by the Petitioners herein.

7. The Interested Party's position is that it is unjust, unfair and unreasonable for the County Government to levy single business permit fees on medical practitioners and hospitals. They further argue that it is unconstitutional to deny medical practitioners the right to carry out their practice freely having been licenced by the Kenya Medical Practitioners and Dentists Council.

Analysis

8. I will first deal with the preliminary objection as it goes to the jurisdiction of this court to hear and determine this petition.

9. What constitutes a preliminary objection was elucidated in the case of Mukisa Biscuit Manufacturing Company –Vs- West End Distributors Limited [1969] EA where it was held as follows:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court on a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

10. Similarly, the Court in the case of Oraro v Mbaja [2005] eKLR 141, held as follows on the nature of preliminary objection:-

“A preliminary objection is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection; anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

11. In Hassan Ali Joho & Another vs. Suleiman Said Shabhal & 2 Others [2014] eKLR, the Supreme Court stated as follows:

“...a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.”

12. It therefore follows that for a preliminary objection to succeed, the Applicant must raise pure points of law and where there exist conflicting facts that are up for determination, a preliminary objection cannot be upheld.

13. From the grounds of opposition raised by the Respondent herein, I find that the preliminary objection does raise crucial points of law that need to be determined.

14. Having considered the petition, the application, the Respondent's preliminary objection and the relevant legal provisions, I note that the issues for determination are:-

- a. Whether the Petitioner's Petition is Res judicata?



- b. Whether this court is functus officio?
- c. Whether this court has jurisdiction to determine the constitutionality of the issuance of a single business permit by the Respondent to the Petitioner?
- d. Whether the Petitioner's application is merited?

I. Whether the Petitioner's Petition is Res judicata

15. It is the Respondent's contention that the Petition is res judicata since the issues therein have been determined on merit by a court of competent jurisdiction in Kenya Association of Private Hospitals Vs Mombasa County Government & Another (2024) eKLR.

16. Section 7 of the Civil Procedure Act states as follows: -

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

17. In Black's Law Dictionary, ninth Edition res judicata is defined as:-

- i. An issue that has been definitively settled by judicial decision;
- ii. An affirmative defence barring the same claim or any other claim arising from the same transaction, or series of transactions and that could have been- but was not-raised in the first suit”.

18. The Court of Appeal in the case of Nicholas Njeru v Attorney General & 8 others [2013] eKLR cited with authority the case of James Katabazi and 21 Others -vs- The Attorney General of the Republic of Uganda EACJ and stated: -

“For the doctrine of Res judicata to be applied:

The matter must be ‘directly and substantially’ in issue in the two suits, The parties must be the same or parties under whom any of them claim, litigating under the same title; and The matter must have been finally decided in the previous suit”

19. Additionally, the court in Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR set the following criteria to determine whether a suit is res judicata and held:-

“In order to rely on the defence of res judicata there must be:

- i. a previous suit in which the matter was in issue;
- ii. the parties were the same or litigating under the same title.
- iii. a competent court heard the matter in issue;
- iv. the issue has been raised once again in a fresh suit.”

20. The Respondent argues that the Petitioner's petition is res judicata. However, the matter on which it bases its argument on is not a matter that was between the same parties as in the instant petition.



This therefore does not meet the threshold of res judicata as envisioned under Section 7 of the Civil Procedure Act and in the authorities cited above.

21. Consequently, I find that the Petitioner's petition is not res judicata.

II. Whether this court is functus officio

22. The doctrine of 'Functus Officio' was discussed by the Court of Appeal in the case of *Telcom Kenya Ltd –Vs- John Ochanda* [2014] eKLR as follows: -

“Functus Officio is an enduring principle of law that prevents the re-opening of a matter before a Court that rendered the final decision thereon.”

23. Similarly, the Supreme Court in *Raila Odinga –Vs- IEBC & 3 Others Petition No. 5 of 2013* the Supreme Court of Kenya cited with approval the case of *Jersey Evening Post Limited v Al Thani* (2002) JLR, and held as follows: -

“...A court is functus officio when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available...”

24. The Supreme Court also cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832 which reads: -

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

25. The Respondent herein contends that since the question of the constitutionality of the issuance of a single business permit was addressed to finality by the court in the case of *Kenya Association of Private Hospitals Vs Mombasa County Government & Another* (2024) eKLR, this court is functus officio in that regard. The Respondent further argues that the doctrine of estoppel bars the Petitioner's petition from being entertained by this court.

26. It is understood that the Respondent's claim is that there already is an existing and binding precedent on the constitutionality of the issuance of a single business permit by County Governments by a court of competent jurisdiction and thus this court should desist from engaging the Petitioner herein.

27. The doctrine of functus officio, as expressed in the authorities cited above, is designed to ensure the conclusiveness of a certain court's decision. It is coined to bar decision makers from going back and altering decisions that they have already rendered. The doctrine does not however bar courts with competent jurisdiction from determining matters on merit simply because such a matter has been the subject in another case where the court rendered its decision.



28. The court in the case of World Explorers Safaris Limited v Cosmopolitan Travel Limited & another [2021] eKLR expressed itself thus:-

“Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.”

29. It follows that precedent, especially by a court of concurrent jurisdiction, cannot oust the jurisdiction of another court to determine a matter on merit nor can it render functus officio another court of competent jurisdiction. Moreover, there are other courts of concurrent jurisdiction as shall be demonstrated hereunder, that have held a contrary view from the view that was held by the court in the case of Kenya Association of Private Hospitals v Mombasa County Government & Another (supra).

30. In my considered view, decisions of courts of concurrent jurisdiction are only persuasive and where another court is of a different persuasion, based on evidence and the law, that court is not barred from rendering a differing decision as only decisions of court of higher jurisdiction have a binding authority. It has not been submitted by the Respondent that the Court of Appeal has rendered a decision concerning the issues in dispute herein.

31. In the premises, I find that the Respondent’s ground that this court is functus official fails.

III. Whether this court has jurisdiction to determine the constitutionality of the issuance of a single business permit by the Respondent to the Petitioner

32. The Supreme Court in Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 others (2012) eKLR while discussing the issue of jurisdiction rendered itself as follows:

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.... Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

33. The jurisdiction of the High Court is granted by Article 165 of *the Constitution* as follows:-

“(3) Subject to clause (5), the High Court shall have-

a. Unlimited original jurisdiction in criminal and civil matters;



- 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;
 - d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - i. the question whether any law is inconsistent with or in contravention of this Constitution;
 - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - iv. a question relating to conflict of laws under Article 191; and
 - e. any other jurisdiction, original or appellate, conferred on it by legislation.”
34. The jurisdiction to determine any matter relating to constitutional powers of State organs in respect of County Governments is explicitly donated to this court by Article 165 of *the Constitution*. What the Petitioner seeks in the petition is a determination on the constitutionality of the Kakamega County Finance Act 2024 requiring medical practitioners and hospitals to take out single business permit at a fee from the County Government of Kakamega, the Respondent herein.
35. I find that this matter falls within the ambit of the jurisdiction of this court.

IV. Whether the Petitioner’s application is merited

36. There have been several decisions made by courts of equal jurisdiction to the effect that the imposition of a single business permit upon medical practitioners and hospitals is unconstitutional. These are:-
- i. Nakuru Judicial Review No. 14 of 2014 – Republic v. County Government of Nakuru & 3 others ex parte Dr. John Njenga Ngethe & others
 - ii. Garissa Misc. Case No. 2/2015 – Medina Hospital Ltd & 6 others v. County Government of Garissa [2015] eKLR
 - iii. Peter Ndungu Mbugua & 39 others v. County Assembly of Nyandarua & 2 others [2018] eKLR
 - iv. Misc. 2 of 2015 Mama Nursing Home Kabaru & 3 others v. County Government of Migori
 - v. Judicial Review No. 2/2021 – Republic v. Kisii County Assembly & 4 others ex parte John Aboko Kumenda & another [2021] eKLR
 - vi. Petition No. E050 of 2022 – KMA v. Nairobi City County Government & 2 others [2023] KEHC 489 (KLR)



37. The common thread in all these matters is the finding that any County Government's Finance Act that seeks to levy a single business permit fee against medical practitioners who are already taxed for their practicing licences by the National Government is in violation of *the Constitution*.

38. In the case of *Medina Hospital Ltd & 5 others v. County Government of Garissa* (supra), the court held as follows:-

“The respondent has not stated that the fees listed by the applicants were not being paid to the National Government. In my view, those levies or licensing fees were paid to the Government by the applicants as the certificates annexed documents issued by Government Institutions such as the Registrar Medical Practitioners and Dentist Board. It cannot thus be said that the annual license to operate as a Medical Practitioner, a Hospitals or a Pharmacy has not been issued by Government. Consequently any other charge or levy towards another Government institution, whether at the National or County level, amounts in my view to double taxation. This is irrespective of the passage of the new Constitution of Kenya 2010. The two levels of Government should, between themselves, determine who among them should license and regulate medical practice. Once one level of Government takes taxes and licenses the operation, the other level cannot levy licence fees. I find and hold that it is wrong for the time being for the County Government (the respondent) to also levy licence fees to medical practitioners and hospitals, clinics and pharmacies. I will grant certiorari orders.”

39. In *Republic v. Kisii County Assembly & 4 others ex parte John Aboko Kumenda & another* (supra), the Respondents argued that whereas County Governments are prohibited from charging regulatory fees from professionals, trading licences are the preserve of the County Government. The court held as follows:-

“As I have already held above, devolved units are prohibited from imposing levies for services provided by medical professionals. The demand by the respondents that various medical facilities operate with a single business permit is therefore ultra vires Clause 7(b), Part 2 of the Fourth Schedule, of *the Constitution*.”

40. The said court reiterated that County Governments are not permitted by law to, levy single business permit on members of the medical profession and proceeded to state as follows:-

“It is my considered view, that medical practitioners practicing their professions are exempt from levies by County Governments. However, in instances where they engage in the bartering goods or services that do not come within the meaning of a profession, they are obliged to pay any levies, charges or fees prescribed by County Governments.”

41. The Respondent has not disputed the averment by the 2nd Petitioner that he operates a health care facility. There was no allegation that the Petitioner's medical practice extends to other services that would be said to constitute a trade. According to the 2nd Petitioner, he provides medical services to members of the public. He has exhibited licences proving that he is a medical professional. In the circumstances, the 2nd Petitioner falls under the category of professionals whose services are regulated by the National Government through the Kenya Medical Practitioners and Dentists Council.



42. I am alive to the holding in *Nyawabo v. Attorney General* [2001] EA 485 as quoted in the case of *Simon Kioko Kitheka & 18 others v. County Government of Machakos & 2 others* [2018] eKLR as thus:-

“In interpreting *the Constitution* the court would be guided by the general principles that there is a rebuttable presumption that legislation is constitutional hence the onus of rebutting the presumption rests on those who challenge their legislation ...”

43. However, I must consider the public interest that this matter entails and the fact that there are several past decisions by courts of concurrent jurisdiction holding that the imposition of single business levy on members of the medical profession is a violation of *the Constitution*. I must also take into account the fact that any order by this court would have wider ramifications on both the County Government of Kakamega and medical practitioners within Kakamega County as submitted by the Interested Party. I must carefully weigh where the balance of convenience lies.

44. Mr. Otao for the Respondent submitted that the principle of proportionality tilts in favour of the Respondent. On his part, the 2nd Petitioner argued that the matter is one that involves the rights of the public to access healthcare. This position was buttressed by the Interested Party who urged the court to consider the fate of the many other private medical practitioners who are affected by the impugned Finance Act. It was its argument that priority should be the rights of the public and other persons who are likely to be affected by the impugned Act. It cannot be gainsaid that the 2nd Petitioner and his fellow medical professionals also have a constitutional right to earn a living and a legitimate expectation not to be subjected to double taxation. According to the Interested Party, there are conservatory orders in place in another similar matter being *Nairobi Petition No. 189 of 2021 Rupha v. Mombasa County & 46 others*.

45. In *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others* [2014] eKLR the Supreme Court stated as follows:-

“Conservatory orders bear a more decided public law connotation: for these are orders to facilitate orderly functioning within public agencies, as well as to uphold adjudicatory authority of the court in the public interest. Conservatory orders, therefore, or not, unlike interlocutory injunctions, ... To such private-party issues as the “prospects of irreparable harm occurring during the pendency of the case; or a high probability of success” in the applicants case for orders of any stay. Conservatory orders consequently should, be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant cases.”

46. Being guided by the above cited authority of the highest court of the land, and the principles espoused therein, I am persuaded that the application dated 18th December 2024 is merited. The upshot is that the application is allowed and orders issued as follows:-

- a. That pending the hearing and determination of this Petition a conservatory order is hereby issued staying the implementation of the Kakamega County Finance Act 2023 enabling the County Government to levy single business permit fees on the Petitioner and other members of the Interested Party.
- b. That the Respondent is hereby ordered to produce and release the Petitioner’s confiscated equipment forthwith.
- c. Costs shall be in the cause.



DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 31ST DAY OF JANUARY 2025.

A. C. BETT

JUDGE

In the presence of:

Mr. Wanyundi for the Petitioners

Mr. Otao holding brief for Mr. Esuchi for Respondent

Mr. Kanyange for Interested Party

Court Assistant: Polycap

