



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**MISC CASE NO. 2 OF 2015**

**1. MEDINA HOSPITAL LIMITED**

**2. HABIB PHARMACY LIMITED**

**3. GARISSA MOTHER AND CHILD HEALTH CARE**

**4. MANHAL INTEGRATED ACADEMY**

**5. ABU- UBAYDA ACADEMY**

**6. MNARA BOYS HIGH SCHOOL.....APPLICANTS**

**V E R S U S**

**COUNTY GOVERNMENT OF GARISSA.....RESPONDENT**

**RULING**

This is an application for Judicial review orders brought by way of Notice of Motion dated 16th March 2015. The application was brought under Article 23, 27,47,50,191 and 196 of the Constitution of Kenya 2010. It was also brought under Section 87, 91 and 120 of the County Government Act as well as Section 13 of the Medical Practitioners and Dentists Act, Section 6 and 9 of the Pharmacy and Poisons Act and Section 3 and 17 of the Nurses Act. The prayers are as follows:-

1. That the court issue an order of certiorari to remove into the High Court for the purpose of quashing Brims Code No. 710,715,720,725,730,735 and 740 contained in part xii of the Garissa County Finance Act 2014 Gazetted on 2nd December 2014 on the Garissa County Gazette Supplement No. 7.
2. That the Court issues a Declaration that Brims Code No. 710,715,720,725,730,735 and 740 contained in part xii of the Garissa County Finance Act 2014 Gazetted on 2nd December 2014 of the Garissa County Gazette Supplement No. 7 are in breach of Section 13 of the Medical Practitioners and Dentist Act Cap 253, Section 6 and 9 of the Pharmacy and Poisons Act Cap 244, and the Education Act.
3. That costs of the application be awarded to the applicants.

The application was grounded on a Statutory Statement. It was also filed with a verifying affidavit sworn

by Bashir Abdisalam the proprietor of Habib Pharmacy Ltd the 2nd applicant.

In the statutory statement all the six applicants are described. The reliefs sought and the grounds on which the reliefs are sought were also described. In verifying affidavit it is deponed inter alia that the County Government of Garissa had gazetted the subject notice and had already sent demand notices for the revised business permits which would expose the applicant to jeopardy. That the fees demanded were exorbitant and were not consonant with the services rendered by the respondent. That the applicants were not consulted during drafting and processing as well as debating the intended fees.

The applicants filed a further affidavit sworn by the same deponent on 12th May 2015. Under this affidavit, it was deponed that under the Pharmacy and Poisons Act Cap 244, Food, Drugs and Chemical Substances Act Cap 254, and the Medical Practitioners and Dentists Act Cap 253, the applicants paid 41,000/= for licenses to operate Hospitals or Clinics, 15,000/= as licenses to practice, 4,000/= for membership to the Kenya Pharmaceutical Association, 5,000/= for premises registration certificates, 5,000/= for licenses to operate a Pharmacy and inspection. It was deponed that the gazettment by the respondent exposed the applicants to double taxation as they were demanding between 50,000/= and 100,200/= from the applicants as additional taxes. That the said demands were a violation of fair business practice, oppressive and meant to put them out of business.

The respondent opposed the application by filing a replying affidavit sworn by Abdi Hakim Sheikh Daib a County Executive Committee member in charge of Finance and Economic Planning of the respondent. It was deponed in the said affidavit that the respondent was not asking the applicants to pay for professional licenses but had only asked them to pay trade licenses for operating business within the respondent's jurisdiction. It was also deponed that under Schedule 4 part 2 of the Constitution of Kenya 2010, functions and powers of Government had been devolved to County Governments. That the respondent was not seeking to regulate the applicants' professional mandate as that was a function of the respective professional bodies. That extensive public participation occurred before the taxation law was approved and implemented. It was lastly deponed that in any event the law challenged was about to expire in two month's time and the applicants would have an opportunity to participate in the formulation of the next Garissa County Finance Acts.

Hearing of the application proceeded by way of written submissions.

On the same day of filing their further affidavit which was 12 May 2015, the applicants counsel Odera Osiemo and Company Advocates filed written submissions.

Counsel emphasized that the applicants were operating as professionals. The respondent had moved in secrecy without the participation of the applicants to impose taxes and thus ended up breaching the laws applying to practice of Pharmacies, Hospitals, Doctors, Dentists and Nurses which were governed by written law. Counsel stated that Private Hospitals, Clinics, Nurses, Doctors and Pharmacists pay for licenses to the National Government under the law. They were thus already taxed to operate Private Hospitals or Clinics, Licence to practice, Premises Registration fees, License to operate a Pharmacy, inspection of Premises fees, Membership fees to the Kenya Pharmaceutical Association which were imposed through written law. Therefore in counsel's view, the charges now being imposed by the County Government amounted to double taxation. In addition Section 120(b)(d) of the County Government Act required that users of the County Services be treated equitably. Counsel argued that the respondent did not even own incinerators which would assist the applicants in disposing of used or expired medical items and that the applicants had to make their own arrangements for such services at a fee with the Provincial General Hospital at Garissa. Counsel submitted that the charges recommended by the respondent were not commensurate with the services rendered by the respondent

to the applicants.

With regard to Educational Institutions, the applicants claimed that these were controlled by the Education Acts and Regulations made there under. They could not thus be subjected to additional taxation by the respondents.

Counsel submitted that the action of the respondent of imposing taxes without involving them contravened the provisions of Article 47(1) of the Constitution which required fair administrative actions by all public institutions. Counsel submitted further that the Gazette Notice on the levies in question was in conflict with national laws and Article 191(2) of the constitution provides that where there is a conflict between County Government and National Government legislation, then the National legislation shall prevail. In counsel's view, since the Gazette Notice directly affected the lives and businesses of the applicants, they should have been involved in the making of such levies. They were ignored during that process and as such the respondent should not be allowed to impose and demand the taxes from the applicants.

The respondents filed their written submissions through counsel Musyoki Mogaka & Co. on 25th June 2015. A summary of the application was highlighted. It was also emphasized that the National Government and the County Government were inter independent, and that Article 176(1) of the Constitution has devolved functions to the County Government.

Counsel relied on the advisory opinion of the Supreme Court in the case of **Speaker of Senate and another versus Speaker of the National Assembly and Others supreme court reference No. 2 of 2013**. Counsel also relied on the case of **Nairobi Metropolitan PSV Sacco Union Ltd and 25 Others –vs - County Government of Nairobi and Others – Nairobi Civil Appeal No. 42 of 2014** in which the court of appeal held that the Constitution conferred powers on County Governments to enact legislation for effective performance of the devolved functions.

Counsel emphasized that the Constitution clearly delimited the mandate of the National and County Government. The regulation of Health Facilities, Pharmacies as well as educational facilities under Schedule 4, was the mandate County Governments. Counsel emphasized that where health facilities fell exclusively within a County, the Regulation was the exclusive mandate of the County Government which was effected through legislation enacted by the County Assembly in line with Article 185(1) of the Constitution.

Counsel added that the contention that the applicants were not consulted before the legislation in contest was enacted was unsubstantiated and unjustified as all stake holders within the County were involved without limitation. Counsel contended lastly, that the Finance Act 2014 was about to expire and that the petitioners will therefore have an opportunity to fully and actively participate in the next Finance Bill.

I have considered the application, documents filed and the authorities cited to me.

This is an application for certiorari as well declaration. Declarations are not the traditional orders granted in Judicial Review proceedings under Order 53 of the Civil Procedure Rules and Section 8 and 9 of the Law Reform Act (Cap 26). The Constitution of Kenya 2010 Article 23 has however expanded the scope of Judicial Review orders, where the claim hinges on contravention of constitutional rights. These proceedings having been brought inter alia under Article 23 of the constitution in my view the court has jurisdiction to consider the order for declaration, in addition to certiorari. I note that the respondent has also not challenged the regality of request for an order of declaration.

The application or Notice of Motion, is not headed in the traditional way of bringing judicial review applications. The format recognized under the Civil Procedure Rules is to bring the main motion in the name of the Government or Republic as the applicant. This application is however brought in the names of the six applicants. The County Government of Garissa is the respondent. Again the respondent has not challenged the format of the application. In addition Article 159(2)(d) of the Constitution of Kenya 2010 requires courts not to be unduly reliant on technicalities of procedure, but to strive to administer substantive justice as much as possible. I thus find nothing wanting with the format of the present application.

Orders of certiorari are granted against public institutions or public officers when they act beyond their powers, or act without any powers at all, or they act illegally, or they act without following the principles of natural justice including fair hearing to those affected by the orders. I have been referred to a number of court case decision. I agree with the findings of those courts. County Governments have powers to make laws, they have powers to levy taxes within the law.

The complaint against the respondents is that they acted illegally and that they did not have powers to impose the levies or taxes they purport to impose. The Constitution requires that some functions of Government be devolved. The result is that there are two layers of Government since 2010 when our Constitution was passed. There is the National Government with its own functions and mandate to raise taxes. Some of the taxes levied by the National Government are transmitted to the County Governments. The County Governments also have powers to levy taxes, in areas where the services fall within the County and where there are no similar taxes imposed by the National Government.

The taxes imposed herein by the respondent relate mainly to the practice of medicine and Medical Institutions such as Hospitals and Pharmacies. These taxes relate to the operations of the institutions for the services they render. The County Government appears to be licensing them to operate within the local limits of jurisdiction of the County. The applicants have however stated that they are already paying license fees to practice and operate to the Central Government. Thus they should not be taxed by the County Government, firstly because the County Government does not mandate to tax them on that aspect and secondly, because that would amount to double taxation. Thirdly they claim that they were not involved in debating the taxes to be imposed as is required by the Constitution. They relied on the applicable laws, and annexed documents to show that they have been paying for registration and renewal of licences to the National Government.

The respondent argues that the Constitution has devolved services and functions to the County Government. As such, they have powers to regulate and impose taxes for those businesses. They stated that they do not have powers to regulate professional practice for practitioners. They also stated that the applicants and others were fully involved in debating the imposition of taxes for the 2014 -2015 financial year. In case however the applicants were not fully involved, then they will have an opportunity next time as the financial year was ending in June 2015.

I have weighed both sides of arguments.

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.

With regard to Educational Institutions, the applicants have not demonstrated what annual charges the national Government levies on these institutions. The applicants have only filed documents of certificates of registration of schools. Registration of an institution is not the same thing as an annual license. Registration is an acceptance that an institution is in the official records to operate legally. In my view therefore, schools are not in the category of Doctors, nurses, Hospitals, Clinics and Pharmacies. It is my considered view that the County Government may choose, subject to public participation, to levy reasonable taxes for operation of the schools within the County. I will thus not grant certiorari orders.

With regard to the declaration sought, it follows that the declaration will only relate to the medical related complaints. It does not cover the schools, and academies, as I have found that the County Government could levy reasonable annual taxes for operations of private schools and academies as I have not been shown any annual licences that the said schools or academies obtain from the National Government on payment of fees.

In conclusion I issue certiorari orders with respect to medical practice and medical facilities as requested. I similarly issue the declaration requested in respect of the same aspect. I however decline to issue the requested orders with regard to educational institutions.

As this is a public interest matter and the applicants are related and some have not been successful, I will not issue any orders as to costs.

Dated and signed at Garissa this 9<sup>th</sup> July 2015.

**GEORGE DULU**

**JUDGE**



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