

# NANCY W. NJOROGE & COMPANY ADVOCATES

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DR. JOHN NJENGA NGETHE & OTHERS

30<sup>th</sup> November 2015

Date.....

JOHN MWANIKI  
C/O JEWEL CHEMISTS,  
ST JOHN MEDICAL CLINIC

DUNCAN MAINGI  
C/O JUBILEE MEDICAL CLINIC  
QUEBEC MEDICAL CENTRE

WILLIAM KIUNA GACHUHI  
C/O KENLANDS HEALTH SERVICES

Dear Sirs,

RE: NAKURU HCC JUDICIAL REVIEW NO 14 OF 2014

DR. JOHN NJENGA NGETHE & OTHERS =VS=COUNTY ASSEMBLY OF NAKURU & 2 OTHERS

The above case refers:-

Judgement was delivered on 25<sup>th</sup> November 2015 by Honourable Justice Ndungu on behalf of Her Ladyship Justice Abigail Mshila.

The court allowed our prayers for certiorari and quashed the county government's decision to levy Single Business permit from the members of the Medical profession.

The court also issued prohibitory orders prohibiting the County Government from implementing their decision to levy a Single Business permit from the members of the Medical profession.

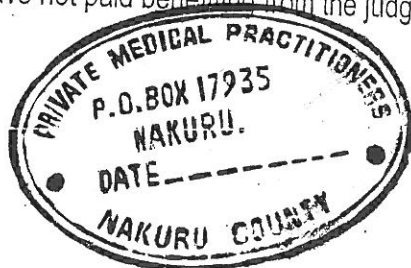
We do hereby give our final bill of Kshs 600,000/= (Six hundred thousand shillings only).

Kindly settle the above and pick copies of the judgement from our offices and ensure each of your members have a copy of it to prevent them being harassed by the County Government in the New Year 2016.

We emphasize that your members do pay our legal fees before accessing the signed copy of the judgement to prevent those who have not paid benefiting from the judgement.

Yours faithfully,

NANCY W. NJOROGE & CO  
ADVOCATES



*Please quote our reference when replying*

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAKURU  
JUDICIAL REVIEW NO. 14 OF 2014  
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW  
ORDERS OF PROHIBITION AND CERTIORARI  
AND  
IN THE MATTER OF THE MEDICAL PRACTITIONERS & DENTISTS  
ACT, CAP 253  
AND  
IN THE MATTER OF THE KENYA MEDICAL LABORATORY,  
TECHNICIANS & TECHNOLOGIST ACT NO. 10 OF 1999  
AND  
IN THE MATTER OF PHARMACY AND POISON BOARD ACT, CAP. 244  
AND  
IN THE MATTER OF THE NURSES ACT, CAP. 257  
AND  
IN THE MATTER OF THE CLINICAL OFFICERS COUNCIL  
(TRAINING, REGISTRATION AND LICENSING) ACT, CAP. 260  
AND  
IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012 (NO. 17  
OF 2012)  
AND  
IN THE MATTER OF ARTICLES 26, 43, 185, 191 OF THE  
CONSTITUTION  
AND  
IN THE MATTER OF THE NAKURU COUNTY FINANCIAL BILL  
AND

IN THE MATTER OF SINGLE BUSINESS PERMIT

BETWEEN

REPUBLIC.....

APPLICANT

AND

COUNTY ASSEMBLY OF NAKURU.....1<sup>ST</sup> RESPONDENT

NAKURU COUNTY EXECUTIVE OF HEALTH.....2<sup>ND</sup> RESPONDENT

NAKURU COUNTY GOVERNOR.....3<sup>RD</sup> RESPONDENT

INTERESTED PARTIES

1. NAKURU COUNTY SECRETARY
2. NAKURU COUNTY EXECUTIVE, FINANCE AND ECONOMIC PLANNING
3. NAKURU COUNTY HEAD OF TREASURY
4. NAKURU COUNTY HEAD OF REVENUES
5. NAKURU COUNTY LEGAL OFFICER
6. ENFORCEMENT OFFICER, NAKURU EAST AND WEST SUB COUNTIES
7. LICENSING OFFICER, NAKURU EAST AND WEST SUB COUNTIES
8. REVENUE COORDINATOR, NAKURU EAST AND WEST SUB COUNTIES

EX-PARTE APPLICANTS

DR. JOHN NJENGA NGETHE & 117 OTHERS

JUDGMENT

1. The Notice of Motion dated 14<sup>th</sup> April, 2014 was filed pursuant to the leave granted by this court on 10<sup>th</sup> April 2014. The Ex-parte Applicants sought the following orders:

- (a) That this honourable court be pleased to issue Judicial Review Orders of Certiorari to remove into this court and quash the decision of the Respondents purporting to levy single business permit from the members of the medical profession;
- (b) That this honourable court be pleased to issue Judicial Review Orders of Prohibition to prohibit the Respondents from implementing their decision to levy from the members of the medical profession for Single Business Permit;
- (c) The costs of this application be borne by the Respondents; and
- (d) Any other relief that this honourable court may deem fit to grant.

#### THE EX-PARTE APPLICANTS' CASE

2. This application is supported by the Affidavit of the DR JOHN NJENGA NGETHE sworn in support of the Notice of Motion on 14<sup>th</sup> April 2015, the statement of facts dated 3<sup>rd</sup> April, 2014 and the Verifying Affidavit sworn on 3<sup>rd</sup> April, 2014. The 1<sup>st</sup> deponent acted on his own behalf and on behalf of the other applicants pursuant to the authority filed together with the application.
3. The Nakuru County Assembly enacted the Nakuru County Finance Act, 2013 which at Section 6 empowered the County to levy Single Business Permits on the businesses set out at part 700 of the II Schedule which operate within the County. These businesses included private health clinics, doctors surgeries, dentists, physiotherapists, psychologists and other health professionals.
4. The applicants are medical practitioners who include doctors, nurses, pharmacists, clinical officers and laboratory technologists who provide health care services within Nakuru County. They have moved this court challenging

the decision of the County Government requiring them to take out a Single Business Permit on the grounds that this decision is unconstitutional, unlawful and amounts to double taxation.

5. It was their case that as professionals, they are members of various professional bodies established by Statute as indicated hereunder;
  - (a) The doctors and dentists are members of the Medical and Dentist Board established under the Medical Practitioners and Dentist Act, Cap. 253
  - (b) The Pharmacists are members of the Pharmacy and Poison Board established under the Pharmacy and Poison Act, Cap. 254
  - (c) Nurses are members of the Nurses Council established under The Nurses Act, Cap. 257
  - (d) Laboratory Technologists are members of the Kenya Medical Technicians and Technologists Board established under the Medical Technicians and Technologists Act No. 10 of 1999.
  - (e) The clinical officers belong to the Council established under the Clinical Officers (Training, Registration and Licencing) Act. Cap. 260.
6. Their practice is regulated by these professional bodies to whom they pay licensing fees. The County Government cannot therefore purport to demand that they take out Single Business Permits or any other trade licenses because they do not have the capacity to regulate their operation as they don't have the regulatory mechanism. They also argued that this requirement imposes on them an unfair burden of extra fees which in turn hinders provision of medical services within the county.

7. The asked this court to quash this unlawful decision and prohibit the Respondents from implementing it.

### THE 1<sup>st</sup> RESPONDENTS' CASE

8. The 1<sup>st</sup> Respondent is the County Assembly of Nakuru. It filed a Preliminary Objection dated 15<sup>th</sup> July, 2014. The 1<sup>st</sup> Respondent raised 13 grounds which can be summarized as-

- (a) that the Applicants should have filed their cases through their relevant councils or representative bodies;
- (b) that issuing single businesses licences does not amount to regulating the profession;
- (c) that the Act was passed through a legislative process and any issues should have been raised at the legislative assembly;
- (d) that the petitioners have not exhausted the remedies at Section 88(1) of the County Government Act, 2012;
- (e) that the County Government is only precluded from regulating the profession not imposing single business permits on the Petitioners; and
- (f) that there are alternative remedies provided for.

### THE 2<sup>nd</sup> AND 3<sup>rd</sup> RESPONDENTS' AND INTERESTED PARTIES' CASE

9. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and the interested parties relied on the affidavit sworn by the Nakuru County Secretary and head of Public Service on 26<sup>th</sup> May, 2014.

10. It was argued that the decision to levy and charge Single Business Permit fees was premised on the devolvement to the County Government of the health function by Legal Notice No. 16 of 2013 as read together with Legal Notice 157 of 2013. Part 2 of Legal Notice 157 of 2013 specifically empowers the County the power to inspect and licence medical premises including reporting.
11. They also contended that the decision to levy for this permit does not amount to double licensing nor is it a regulation. The Acts cited by the applicants are not related but are in regard to professional control, that is, the training, registration, professional practice and discipline of the applicants.
12. The permit being imposed only related to the premises where the applicants carried out their practice and their intention was only to ensure that the applicants complied with the provisions of the Public Health Act.
13. Further it was contended that the Local Authorities which were in charge of Councils before the County Governments were established, also required the medical practitioners to take out Single Business Permits. Reference was made to Legal Notice No. 147 of 2008 and the Municipal Council of Nakuru's By-laws, 2004.
14. They therefore argued that this action was legal. In addition the regulatory Acts which have been relied upon by the Applicants require that in order to be issued with a license, a person must conform with the provisions of the Law. The Nakuru Finance Act, 2013, is one of the laws which the Applicants must comply with.



## SUBMISSIONS

15. The Applicants' Counsel relied on the written submissions filed on 9<sup>th</sup> December, 2014. Counsel submitted it is unfair and unjust to order the Applicants to pay fees to both the National and County Governments. The licensing fee is collected by the regulatory bodies on behalf of the National Government which then shares it with the County Government. The requirement to pay fees to both amounts to double taxation.
16. It was his submission that the County Government has no power or capacity to levy for a single business permit from the members of the medical profession who pay fees to other regulatory bodies.
17. Counsel also submitted that since the regulating statutes did not provide for a Single Business Permit, the Applicants could not be obligated to obtain one. It was Counsel's view that the intended illegal action of the county will hinder provision of health care within the county.
18. In reply to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and the Interested Parties' Replying Affidavit, Counsel submitted that Legal Notice No. 147 of 2008 which enabled the Nakuru Municipal Council to levy for the Single Business Permits on professionals was void. On the 1<sup>st</sup> Respondent's Preliminary Objection, the court was asked to determine this case on its merits without undue regard to technicalities.
19. Counsel relied on the decision of Emukule, J in High Court of Nairobi Misc. Application no. 782 of 2000, Republic vs The Municipal Council of Thika & Another ex-parte the Kenya Medical Association & 5 Others [U/R]



20. Counsel also submitted that the Legal Notice No. 157 of 2013 is null and void as it gives the County powers to inspect and license medical premises including reporting. That even Legal Notice 147 of 2008 was also null and void as it purported to override an Act of Parliament.
21. It was their submission that the decision to levy this charge on the ex-parte applicants is a gross violation of the law, it is ultra vires and due process was not followed as they were not invited to participate before the Finance Bill, 2013 was enacted. An objection was raised by Counsel for the 1<sup>st</sup> Respondent on the line of argument related to public participation as it had not been pleaded. The objection was sustained and Counsel directed to refrain from submitting on public participation as it had not been pleaded.
22. On the preliminary objection Counsel asked the court to look at the law and not the merits of the case.
23. The 1<sup>st</sup> Respondent's counsel submitted that the application is a gross misconception and misunderstanding of the process of demanding for a Single Business Permit. This was not a regulation and was a demand made on those already in practice. Counsel argued that the rationale for demanding for payment of this permit, is to enable the County Government raise revenue that will be used to provide services to the public.
24. Counsel also submitted that the Applicants' main ground for seeking the orders was that it was expensive for them to take out the permit. They did not show that the County acted UN-procedurally or contravened the Constitution. In addition, according to Counsel, this suit was premature as the Petitioners should have first presented their complaints to the County Assembly as provided for by Section 88(1) of the County Governments Act.

25. Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the County Government of Nakuru had authority to demand payment for the Single Business Permits by the Applicants. This is because legality of the Finance Act, 2013 had not been challenged nor had the Applicants cited any provision in it that is unconstitutional. While this substantive law remains in force, the Respondents and Interested Parties' actions cannot be faulted.
26. In addition Article 209 (1) and (3) (c), 209 of the Constitution authorize the county to impose taxes. The only limitation is found at Article 209 (5) which provides that the taxation and revenue-raising powers shall not be exercised in a way that prejudices national economic policies or economic activities across county boundaries or the national mobility of goods, services, capital or labour.
27. Counsel further submitted that the Single Business Permit was not a regulation of the Applicants' profession but rather a permission to the Applicants to operate business within the county. The sole intention of the Finance Act, 2013 was to raise revenue through imposition of tax. Counsel argued that the Applicants cannot ask to be exempted from this legislation simply because they are licensed under other Acts of Parliament. Counsel argued that the fees levied by the professional bodies are subscription fees and not taxes.
28. It was Counsel's view that the orders sought by the Applicants should not be granted because the wider public interest demands that the Applicants who also enjoy the services of the County pay taxes.

#### **ISSUES FOR DETERMINATION**

29. The following are the issues framed for determination;

Out of the 13 grounds raised in the Preliminary Objection, Counsel for the 1<sup>st</sup> Respondent only argued one point of law.

- (i) Whether the application herein was premature as the Applicant had not exhausted the dispute resolution mechanisms provided for by statute;
- ii) The other issue for determination is whether the County Assembly acted *ultra vires* when it passed the Finance Act, 2013 authorising the County to demand that the Applicants herein obtain a Single Business Permit in order to carry out their practice.

### **ANALYSIS**

#### **Whether the application herein is premature**

- 30 The 1<sup>st</sup> Respondent argued that the applicants should have first petitioned the Nakuru County Assembly before applying to this court to set aside the regulation. Counsel relied on Section 88 (1) of the County Government Act, 2012 which provides for the right of citizens to petition the County Government on any matter under its responsibility. Therefore, the Applicants should not be heard as they had not exhausted the mechanisms provided for determining this dispute.
- 31 In this application, the applicants have challenged the decision of the County Government to levy single business permits against them which they allege is unconstitutional, illegal and is outside the powers of the county.
- 32 Section 88(1) of the County Government Act does not provide for a mechanism for the applicants to challenge an unlawful decision of the county assembly. There is no authority created under that act with powers to

determine the legality of the legislation of the County Assembly and to make the relevant orders that would follow from this decision. It only provides that: a person may petition the county government on any matter that is within its responsibility.

33. The grievance of the Applicants can only be determined by this court in exercise of the powers conferred upon it by Article 165 (6) of the Constitution which vests in this court a supervisory jurisdiction over any person, body or authority exercising a judicial or quasi judicial function.
34. Accordingly, I find that this preliminary objection has no merit and it is overruled.

**Whether the Nakuru County Government's decision to levy single business permits on the applicants was illegal**

35. The County Governments are created by Article 176 (1) of the Constitution and consist of a county assembly and a county executive. Article 185 (1) vests the legislative authority in the county assembly and sub-article (2) gives the assembly powers to make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule.
36. The Fourth Schedule distributes the powers between the national and county governments. One of the functions and powers of a county government provided for under Part II at clause 7(b) is trade development and regulation including issuing trade licenses (excluding regulation of professionals).
37. This provision expressly precludes the county government from regulating members of a profession. Professionals are defined in the Black's Law Dictionary 4<sup>th</sup> Edition at page 1375 as follows;

- “1. A person, who is a member of a professional body due to the education and follows the prescribed mode and professional conduct;
2. A person who has mastered a high level of expertise in a subject, notion or field. It implies a special knowledge as distinguished from mere skill;
3. The term originally contemplated only theology, law and medicine but .....other vocation of science and learning also receive the name.”

38. I am satisfied that the applicants herein properly fall within the definition of professionals as they have special knowledge and are also regulated by a professional body.
39. Article 186 Constitution 2010 provides for the respective functions and powers of national and county governments and it states at sub article 3 that a function or power not assigned by the constitution or national legislation to a county government is a function or power of the national government.
40. To this end, the national government has enacted legislation that provides for the regulation and licensing of the applicants and set up the bodies that are mandated to enforce its provisions. The doctors and dentists are regulated by the Medical and Dentist Board established under the Medical Practitioners and Dentist Act, Cap. 253, the Pharmacists are regulated by the Pharmacy and Poison Board established under the Pharmacy and Poison Act, Cap. 254, nurses are regulated by the Council established under The Nurses Act, Cap. 257 and Laboratory Technologists are regulated by the Kenya Medical Technicians and Technologists Board established under the Medical Technicians and Technologists Act No. 10 of 1999 and clinical

officers are regulated by a Council established under the Clinical Officers (Training, Registration and Licencing) Act. Cap. 260.

41. The Respondents argued that this was not a regulation and acknowledged that this was a power reserved to the various statutory boards or councils under which the applicants fall. Their arguments were that the statutory bodies issue professional licences that are concerned with the training and registration of the applicants and are a permission to carry out the practice. They argued that what was imposed by the county government is a trade licence that is, a permission to carry out business within the county.
42. They also argued imposition of this permit was only a means to collect revenue and that the county is empowered by Article 209 (4) of the Constitution donates the power to the national and county governments to impose charges for the services they provide. The applicants as members of this county who also enjoy the services offered to by the County Government should pay taxes for these services. In addition, it was argued that the County Government was simply following the footsteps of its predecessor, the Municipal Council of Nakuru which also levied business permits on the medical practitioners within the Municipality.
43. The defunct Municipal Council was at the time operating under a different regime of law and in particular the Local Government Act and the Trade Licencing Act which have since been repealed. The County Government is a devolved government established by the Constitution which then provides for its powers and functions. Its obligation is to act within the ambit of the powers prescribed by the established laws and the current system.

44. Reference is made to Republic vs The Municipal Council of Thika & Another ex-parte the Kenya Medical Association & 5 Others (supra), in the said case the court considered the legality of the decision of the Municipal Council of Thika to levy single business permits on medical practitioners. It found that the Trade Licencing Act, at Section 16 read together with the Second Schedule excluded members of the medical profession from the control of the Minister or Local Authority. According to the court,

*“where the primary law excludes the prescribed professions from the application of a trade licence, a local authority, whether by by-law or by resolution approved by the Minister cannot impose any other licence whether called a “business licence” or a “single business permit” other than those prescribed under the respective statutes regulating the practice of those prescribed professions”*

45. The court further held at page 24 that:

*“For the Council and the Minister of the Local Authority to overlook these clear provisions of the Medical Practitioners and Dentists Act, and the Rules thereunder, the provisions of the Trade Licencing Act, which place the 2<sup>nd</sup>-6<sup>th</sup> Applicants away from the purview of the Local Government Act, and being subject to and compliant with the provisions of the said Medical Practitioners and Dentists Act and Rules, it becomes a violation of the principle of fairness and legitimate expectation for the Council and Minister to subject the 2<sup>nd</sup>-6<sup>th</sup> to double jeopardy at the pain of prosecution, to payment of two parallel licences in respect of their professional practice as doctors and dentists.”*



46. I am persuaded by the above decision and also the decision of DULU J. in the case of **Medina Hospital Ltd and others Versus County Government of Garissa (2015) eKLR Misc. 2 of 2015**. The County Government of Nakuru has no power to regulate the trade of the applicants by requiring them to take out business permits by virtue of the Clause 7(b) Part II of the Fourth Schedule of the Constitution. The clause specifically excludes the regulation of professionals. The argument that this is not a regulation is not valid because it is in essence a permission to practice. It is not one that is provided for by the primary act which regulates the applicants.

### **FINDINGS AND DETERMINATION**

47. For the reasons stated above this court makes the following findings;
48. The Preliminary Objection is found lacking in merit and is overruled.
49. I find that Section 6 as read together with the Part 700 of the Second Schedule to be void in so far as it allows for the licencing of medical practitioners. This decision was made ultra vires to the powers of the county.
50. In addition, I find the respondents' actions to be unjust, unfair and unreasonable as the applicants are required to take out licences under the primary Acts and thereafter again subjected to a levy under the Finance Act passed by the County Assembly of Nakuru.
51. Accordingly, the Application dated 14<sup>th</sup> April 2014 seeking the orders of certiorari and prohibition in terms of prayers (a) and (b) are found to be meritorious and are hereby allowed and granted as follows;

(i) An Order of Certiorari to quash the decision of the Respondents purporting to levy single business permit from the members of the medical profession do hereby issue;

(ii) An Order of Prohibition to prohibit the Respondents from implementing their decision to levy single business permit from the members of the medical profession do hereby issue.

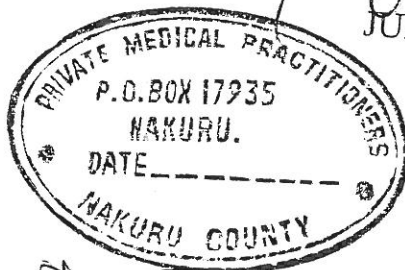
52. Costs follow the cause and the applicants shall have their costs.  
Orders accordingly.

Dated and Signed at Nyeri this 19<sup>th</sup> day of OCTOBER 2015.

JUDGE

Dated and Delivered at Nakuru this 25<sup>th</sup> day of November 2015.

JUDGE



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