



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E050 OF 2022

KENYA MEDICAL ASSOCIATION.....PETITIONER

VERSUS

NAIROBI CITY COUNTY GOVERNMENT.....1ST RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY.....2ND RESPONDENT

NAIROBI METROPOLITAN SERVICES.....3RD RESPONDENT

JUDGMENT

1. The Petitioner moved this Court by a Petition dated 2.2.22 seeking the following reliefs:

- i) *A declaration be and is hereby made that the actions of the Respondents in continuing to demand, insist upon, or ordering medical doctors to pay the fees, taxes and/or charges of Kshs. 15,000/= indicated at paragraph 1.5 (row 12) of the Schedule of the Nairobi City County Trade Licensing Act, 2019 legislated pursuant to section 9 thereof expressly violates the provisions of paragraph 7(b) of Part 2 of the Fourth Schedule of the Constitution and is therefore unconstitutional.*
- ii) *In the alternative to (i) above, a declaration that paragraph 1.5 (row 12) of the Schedule of the Nairobi City County Trade Licensing Act, 2019 enacted pursuant to section 9 of the Nairobi City County Trade Licensing Act, 2019 violates section 3 of the Nairobi City County Trade Licensing Act, 2019 and is illegal.*
- iii) *That the Honourable Court do issue an order of certiorari to remove into this Honourable Court and to quash the decision of the Respondents purporting to impose, demand, levy, charge, collect, retain or enforce by criminal prosecution or otherwise trade license fees and/or single business permit from doctors within Nairobi County.*
- iv) *That this Honourable Court do issue an order of prohibition to prohibit the Respondents from imposing, demanding, levying, charging, collecting, retaining*

or enforcing by criminal prosecution or otherwise trade license fees and/or single permit fees from doctors within Nairobi County.

- v) *The costs of and incidental to this petition be paid by the Respondents.*
- vi) *Any other Orders as the Honourable Court may deem fit/necessary to grant.*

2. The Petitioner a Notice of Motion of even date seeking similar orders in the interim.
3. The Petitioner is a company limited by guarantee and is the representative body of the medical profession to advise generally on health and medical matters and to safeguard the interests of its members who are medical practitioners in all the 47 counties of Kenya.
4. The Petition is supported by the affidavits sworn on 2.2.22 and 28.4.22 by Dr. Andrew Were Onyino, the President and Director of the Petitioner and the affidavit sworn on 28.4.22 by Hemanth Maddineni. The Petitioner's case is that throughout the years, its members have been practicing their profession peacefully without any requirement to have a single business permit/ trade licence. On or about 17.11.21 however, the Petitioner received a letter from one of its senior members, Dr. M. S. Rao, complaining that the 1st and 3rd Respondents' agents entered his offices, demanded the single business permit, abducted his son Hemanth Maddineni and held him at City Hall until payment for the single business permit was made and the same issued. Intimidation and harassment of medical doctors has continued into 2022 with the 1st and 3rd Respondents demanding single business permit/ trade license for the current year. The Petitioner contends that the demand by the Respondents is unlawful as its members being professionals who are regulated by an Act of Parliament are exempt from taking out licences from the Respondents. Further that the Fourth Schedule to the Constitution prohibits county governments from regulating professionals. The Petitioner's members may only undertake their business upon obtaining a valid licence from the Kenya Medical Practitioners and Dentists Council (the Council) established under Section 3 of the Medical Practitioners and Dentists Act. These licences are issued and renewed yearly upon payment of the sum prescribed by the Council which as at the date of filing the Petition was Kshs. 15,000/=.
5. The Petitioner further stated that Section 9 of the Nairobi City County Trade Licensing Act, 2019 as read with Schedule 1.5 is unconstitutional as it contradicts paragraph 7(b) of the Fourth Schedule of the Constitution, in so far as it levies single business permit fee on doctors. Schedule 1.5 is also ultra vires Section 3 of the Nairobi City County Licensing Act, 2019.
6. The Petitioners contend that the aforesaid demand by the Respondents on its members violates their economic right to make a living as well as their right to the protection and benefit of the

law. In addition, the enactment of schedule 1.5 of Nairobi City County Trade Licensing Act, 2019 in so far as it levies single business permit fee of Kshs. 15,000 on medical doctors is an abuse of power by the Respondent. Further, it goes against the dictates of Articles 10, 27, 40 and 43 of the Constitution. The Respondents' decision to impose and enforce payment of the single business permit is unreasonable and irrational.

7. The Petition is opposed *vide* a replying affidavit sworn on 28.3.22 by Abwao Erick Odhiambo for the 1st Respondent. He deposed that the Petition is fatally defective, incurably incompetent and devoid of merit as the same lacks preciseness as to the particular Articles of the Constitution that are alleged to have been infringed and the manner of infringement and thus ought to be dismissed. He stated that the Petitioner's averments and contestations raised in the Petition are anchored on misapprehension of the law and the Constitution. It was further deposed that the Nairobi City County Trade Licensing Act, 2019 was enacted following adequate public participation in line with the Constitution and Articles 10, 174, 209 and 201 and Section 87 of the County Government Act in particular, which require public participation before formulation of any county legislation. The 1st Respondent conducted sufficient public participation within the requirement of the law prior to the enactment of the said Act which was assented to on 16.5.19. During the 3 years the Act has been in operation the same has never been subject to any challenge before any court of competent jurisdiction and the Petitioner's members have been paying for the single business permit as demonstrated by Petitioner's annexures marked AWO-2. Hence the belated assault by the Petitioner is baseless and is only intended to frustrate the 1st Respondent's collection of revenue which is granted by Article 209(3) of the Constitution.
8. It was further averred that although the Petitioner claims to be pursuing the matter on behalf of its members being professional doctors, the payment receipts for single business permit annexed therein relates to pharmacies for instance Montel Pharmacy Limited which do not offer professional services but engage in selling of pharmaceutical products which is a trade and not a profession. Further, that as far as the doctors engage in pharmaceutical business together with their professional services, they are required to obtain the single business permit and that does not amount to regulation of the profession as prohibited by section 7(b) Fourth Schedule of the Constitution. The requirement of a single business permit for doctors running clinics together with pharmacies to obtain a single business permit does not amount to regulation of professionals. Further, that there is a thin line regarding the practice of pharmacy and laboratory *viz-a-viz* general trade due to the fact that any person can engage in such business for instance selling pharmaceutical products. It is not uncommon to find persons who are not pharmacists

but ordinary business persons running pharmacies through trained pharmacists and in those circumstances the 1st Respondent is entitled to levy the single business permit as there is no distinction between such practice and any other trade. It was further stated that there is a difference between the single business permit and professional licenses under the Nairobi City County Trading Act, 2019 and the regulation of the Petitioner's members under the Medical Practitioner's and Dentists Act. Further that the 1st Respondent is entitled to lawfully enforce the provisions of the Nairobi City County Trade Licensing Act, 2019 within the parameters of the Constitution and other relevant laws. He urged that the Petition be dismissed with costs.

9. The Petition is also opposed by the 2nd Respondent vide a replying affidavit sworn on 3.3.22 by Gavin R Castro. He deposed that the Petition is mischievous, *res judicata*, misconceived, devoid of merit and ought to be dismissed in the first instance as it is an abuse of court process. He averred that the Respondents are acting within the powers bestowed upon the County Assembly under Articles 209(3)(c) and 185 of the Constitution, to enact laws and such laws including those for levying taxes and charges. Further that under the Fourth Schedule of the Constitution, among other functions devolved to the county government is trade development and regulation which include trade with the exclusion of professionals. The Nairobi City County Trade Licensing Act, 2019 empowered the 1st and 3rd Respondents to demand and collect single business permits/trade licenses and to regulate trade within Nairobi City County. The actions are therefore backed by legislation and presumed to be constitutional.
10. According to the 2nd Respondent, the Petitioner has not demonstrated how the said levy imposed on them is prejudicial to the national economic policies and economic activities across county boundaries. Further that the Nairobi City County trade Licensing Act, 2019 has not been challenged in any court of law nor declared unconstitutional. As such there is no doubt on the presumption of it being constitutional. Additionally, they denied the Petitioner's contention of double taxation and deposed that Section 3 of the Nairobi City County Trade Licensing Act, 2019 only applies to persons who trade or have businesses within Nairobi County with the exception of professionals.
11. The 2nd Respondent contended that the Petitioner has misled the Court in alleging that the 1st and 2nd Respondents have imposed single permit fees on doctors while in factual sense, the only evidence tendered is a deposit slip from Co-operative Bank in respect of a pharmacy known as Montel Pharmacy Limited. No other evidence was tendered to show that medical practitioners other than pharmacists were subjected to the levy. Further that the issue is *res judicata* as the same were settled in Petition No. 21 of 2019 Gideon Ndambuki Munyao & 13 others versus

County Government of Machakos & another (2020) eKLR. Additionally, no evidence has been tendered to show that Mr. S.M. Rao is a member of the professed profession or that the son of the complainant was one of the members of the professions which have been exempted to pay for trade licenses; no evidence of harassment, intimidation, arrest and allegations of violations of rights. He urged the court to dismissed the Petition with costs and grant orders to allow the R raise revenue for implementation of its devolved functions.

12. Despite service, the 3rd Respondent did not file any response to the Petition.
13. In a supplementary affidavit of 28.4.22, Andrew Were Onyino reiterated his earlier averments. He further stated that the contention by the 1st and 2nd Respondents that the only evidence tendered relates to Montel Pharmacy Limited is an attempt to hoodwink this Court as he has exhibited an invoice and the single business permit issued to OM Shanti Clinic which is operated by Dr. M. S. Rao. It was further stated that the said Montel Pharmacy Limited is not owned by Dr. M. S. Rao as a search at the companies' registry shows that it is located at Tarvel House Mama Ngina Street within the CBD and the owners are Anne Njeri Hunja and George Gakaara Hunja. Further that the Respondents started harassing the doctors in 2021 despite the Nairobi City County Trade Licencing Act being passed in 2019 which exempted professionals in Section 3. The Petition has been necessitated by the Respondents' harassment of doctors since 2021, especially by the 3rd Respondent, which was formed on 9.3.2020.
14. In his supplementary affidavit, Hemanth Maddineni (Hemanth), a son of the complainant, Dr. M S Rao deposed that his father is the proprietor of OM Shanti Clinic situated at South C Shopping Centre. He averred that on or about 30.6.21 at 11.30 am people from the 1st and 3rd Respondents went to the premises and harassed his father for a single business permit. He intervened when he saw his father being physically pushed out of his office. In spite of protests, the officers insisted that the single business permit must be obtained. Hemanth was then escorted by people in combat fatigues and guns into the back of a lorry which had over 20 people and taken to City Hall Annex mezzanine level room 12. There demand was again made for payment of Kshs. 15,000/= for the single business permit. He was issued with an invoice for Kshs. 15,000/- in the name of OM Shanti Clinic. In spite of intervention from Dr. Kigodu, the Petitioner's secretary General and Dr. Fredrick Ouma Oluga, the 3rd Respondents' Chief Officer for Health, he still had to pay the amount demanded. He was escorted by a guard to an *mpesa* agent Patmut Co Dot Angeki Enterprises City Hall, where he withdrew the money and was escorted back to room 12. The guard took the money and the invoice, went to make payment and he came back with a receipt and invoice and asked him to follow him. Upon

payment, the receipt issued to him was in the name of Montel Pharmacy Limited instead of OM Shanti Clinic. His protests were met with the threat of being taken to court the next morning and was coerced to accept the receipt in the wrong name. He was then given a single business permit and thereafter freed. Hemanth further deposed that the said Montel Pharmacy Limited is neither known to them nor owned by his father. A CR12 search shows it is located at Tarvel House Mama Ngina Street and the owners are Anne Njeri Hunja and George Gakaara Hunja.

15. Parties filed their written submissions which I have duly considered. The issues that arise for determination are:

- i) Whether Paragraph 1.5 (Row 12) of the Schedule of The Nairobi City County Trade Licensing Act, 2019 violates the provisions of paragraph 7(b) of Part 2 of the Fourth Schedule of the Constitution and Section 3 of the Nairobi City County Trade Licensing Act, 2019.
- ii) Whether the reliefs sought should be granted.

Whether Paragraph 1.5 (Row 12) of the Schedule of The Nairobi City County Trade Licensing Act, 2019 violates the provisions of paragraph 7(b) of Part 2 of the Fourth Schedule of the Constitution and Section 3 of the Nairobi City County Trade Licensing Act, 2019.

16. It is the Petitioner's case that doctors meet the definition of profession as provided under Section 2 of The Nairobi City County Trade Licensing Act, 2019 (the Act). Accordingly, Paragraph 1.5 (Row 12) of the schedule to the Act is inconsistent with Section 3 of the Act is thus void.

17. The Respondents are in agreement that doctors and all other members of the Petitioner are professionals who are regulated not by county governments but by their association and are exempt from paying business permits and trade licence. The Respondents however contended that doctors who engage in trade like pharmacists who buy and sell drugs/goods from the counter are traders who should pay single business permits like all other traders. The Respondents submitted that while professional bodies regulate members of their profession and provide annual licences, the Respondents issue trade licences to traders who carry on business. The Respondents contended that under Article 209 and the Fourth Schedule of the Constitution a county may impose such tax as is authorised by an Act of Parliament. Further that pursuant to Article 185 which bestows power on a county to enact laws, the 2nd Respondent enacted the Act which empowered the Respondents to demand and collect the single business permits or trade licences within Nairobi City County.

18. Article 209(3) of the Constitution empowers a county to impose taxes as follows:

A county may impose—

- (a) *property rates;*
- (b) *entertainment taxes; and*
- (c) *any other tax that it is authorised to impose by an Act of Parliament.*

19. Article 185(2) provides:

A county assembly may 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.

20. It is not in doubt that the 2nd Respondent has the power to enact such laws as are necessary for the effective performance of the functions devolved to the county government under the Fourth Schedule of the Constitution. In exercise of the powers conferred upon it by the above provision therefore, the 2nd Respondent enacted the Act which expresses itself to be an Act of the Nairobi City County Assembly to provide for grant of trade licences within Nairobi City County and for connected purposes.

21. Section 9(1)(e) of the Act provides that an application for a trade licence shall be accompanied by the application fee prescribed in the First Schedule. Paragraph 1.5 of the First Schedule prescribes the licence fee payable in respect of private Education, Health and Entertainment. Row 12 thereof provides that a fee of Kshs. 15,000/= is payable in respect of:

Health clinic/ doctor's surgery/ doctor/ dentistry/ physiotherapist/ psychologist or other health professional office with no overnight accommodation available.

22. The question before this Court is whether the said Paragraph 1.5, Row 12 of the First Schedule to the Act is inconsistent with the provisions of Section 3 of the Act and Section 7(b) of Part 2 of the Fourth Schedule of the Constitution.

23. Fourth Schedule of the Constitution provides for the distribution of functions between the national government and the county governments. Section 7 of Part 2 of thereof provides that the functions and powers of the county are:

Trade development and regulation, including—

- (a) *markets;*
- (b) *trade licences (excluding regulation of professions);*
- (c) *fair trading practices;*
- (d) *local tourism; and*

(e) *cooperative societies.*

24. Section 3 of the Act is couched in terms similar to Section 7(b) of the Fourth Schedule as follows:

This Act shall apply to all persons who trade or have businesses in Nairobi with the exemption of professions.

25. Article 159(2)(e) of the Constitution enjoins this Court in the exercise of its judicial authority, to protect and promote the purposes and principles of the Constitution. To this end, Article 259 of the Constitution requires that the Court interprets the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance. The Constitution must therefore be interpreted broadly, liberally and purposively and as integrated whole (see Center for Rights Education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR).
26. In the interpretation of an Act of Parliament, the first principle observed is the general presumption that an Act of Parliament is enacted in conformity with the Constitution as affirmed by the Court of Appeal of Tanzania in Ndyanabo vs. Attorney General [2001] EA 495.
27. Likewise, the case of Isaac Robert Murambi v Attorney General & 3 others [2017] eKLR on the said principles noted as follows:
- A statute should be construed according to the intention expressed in the statute itself as confirmed in the Court of Appeal case County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR when it stated that:*
- The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore, the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context..."*
28. In Zachary Olum and Anor v Attorney General (Constitutional Petition 6 of 1999) [2000] UGCC 3 (06 June 2000) the Court opined that
- To determine the constitutionality of a section of a statute or Act of Parliament, court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the court has to go further and examine the effect of its implementation. If either its*

purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional.

29. Further the case of Council of County Governors v Attorney General & another [2017] eKLR highlighted another significant principle as follows:

A law which violates the Constitution is void. In such cases, the Court has to examine as to what factors the court should weigh while determining the constitutionality of a statute. The court should examine the provisions of the statute in light of the provisions of the Constitution. When the constitutionality of a law is challenged on grounds that it infringes the constitution, what the court has to consider is the "direct and inevitable effect" of such law. Further, in order to examine the constitutionality or otherwise of statute or any of its provisions, one of the most relevant consideration is the object and reasons as well as legislative history of the statute. This would help the court in arriving at a more objective and justifiable approach.

Thus, the history behind the enactment in question should be borne in mind. Thus any interpretation of these provisions should bear in mind the history, the desires and aspirations of the Kenyans on whom the Constitution vests the sovereign power, bearing in mind that sovereign power is only delegated to the institutions which exercise it and that the said institutions which include Parliament, the national executive and executive structures in the county governments, and the judiciary must exercise this power only in accordance with the Constitution."

30. In Kenya Human Rights Commission v Attorney General & Another [2018] eKLR the court stated;

47. *There is a general but rebuttable presumption that a statute or statutory provision is constitutional and the burden is on the person alleging unconstitutionality to prove that the statute or its provision is constitutionally invalid. This is because it is assumed that the legislature as peoples' representative understands the problems people they represent face and, therefore enact legislations intended to solve those problems. In Ndynabo v Attorney General of Tanzania [2001] EA 495 it was held that an Act of*

Parliament is constitutional, and that the burden is on the person who contends otherwise to prove the country.”

31. It is evident that some of the functions and powers of the county government in this case the Nairobi City County, are trade development and regulation including trade licenses (excluding regulation of professions). Clearly, the Nairobi City County Government does not have the jurisdiction to regulate professions. Any law therefore passed by the County Government to govern trade development and regulation may not include professions.
32. While Article 260 of the Constitution does not define “profession”, Section 2 of the Nairobi City County Trade Licensing Act, 2019 defines “profession” *to mean a paid occupation governed and regulated by a professional body which involves prolonged training and a formal qualification*. Section 3 of the Medical Practitioners and Dentists Act establishes the Kenya Medical Practitioners and Dentists Council which is a professional body that governs and regulates doctors as provided for under Section 4 of that Act. The Bachelor of Medicine and Bachelor of Surgery Core Curriculum Guidelines issued by the Council provide that the programme leading to qualification as a medical doctor extends over a period of not less than 6 years. Further that the units/credits system provides that the programme will be weighted 220 units in 6 years. The National Guidelines for Internship Training of Medical and Dental Officer Interns, 2019 also provide that every medical officer intern shall be required to undergo an internship programme for a period of 12 months and an additional 1 calendar month of paid leave. It leaves no doubt in one’s mind that this is the prolonged training envisaged by the definition of a profession in Section 2 of the Nairobi City County Trade Licensing Act, 2019. Accordingly, the medical profession fits into the definition of profession that is exempt from regulation by county governments.
33. The Respondents assertion that the requirement of a single business permit for doctors running clinics together with pharmacies to obtain a single business permit does not amount to regulation of professionals is negated by the wording in Row 12, Paragraph 1.5 of the First Schedule. Row 12 provided that a trade licence/business permit fee of Kshs. 15,000/= is payable in respect of *Health clinic/ doctor’s surgery/ doctor/ dentistry/ physiotherapist/ psychologist or other health professional office with no overnight accommodation available*.
34. The issue of professions being exempt from regulation have been the subject of many a court case. Indeed, this Court will only be reiterating what has been stated by other Courts previously. In the case of Republic v Kisii County Assembly & 4 others Ex parte John Aboko

Kumenda & another; Kisii County Secretary & 2 others (Interested Parties) [2021] eKLR

the court stated:

20. *The ex-parte applicants are both medical doctors and are without doubt medical professionals. The functions of medical doctors are regulated by the Medical Practitioners and Dentists Council, Act. They pay their fees to the Medical Practitioners and Dentists Council and are issued with annual practising licences authorizing them to practice medicine.*
 21. *Since medical doctors are professionals, it follows that the county governments are not permitted to regulate them or charge levies for single business permits from them. This has been emphasized in a multitude of judicial authorities.*
35. And in the case of **Dickson Matei t/a Machete Auctioneers & 10; others v Nairobi County Government & another [2016] eKLR** the court had this to say about Section 7 of the Fourth Schedule to the Constitution:
31. *The first question to address is whether, as the petitioners allege, they are “professionals” and therefore covered under the exception in paragraph 7(b) of the Fourth Schedule. As submitted by the respondents, a professional is a person who is a member of a professional body due to the educational qualification and follows the prescribed moral and professional code of conduct. The Oxford English Dictionary defines a profession as a “Paid occupation, especially one involving training and a formal qualification [treated as sing, or a body of people engaged in a profession.” In Black’s Law Dictionary, a profession is defined as:*
 - “1. A vocation requiring advanced education and training; esp. one of the three traditional learned professions – law, medicine, and the ministry.
“Learned professions are characterized by the need of unusual learning, the existence of confidential relations, the adherence to a standard of ethics higher than that of the market place, and in a profession like that of medicine by intimate and delicate personal ministrations. Traditionally, the learned professions were theology, law and medicine; but some other occupations have climbed, and still others may climb, to the professional plane”
 2. Collectively, the members of such a vocation.”
 32. *Thus, and as is evident from the view of the Court in the case of Okenyo Omwansa George and Another vs Attorney General and 2 Others (supra), a profession presupposes a course of academic, professional and ethical training,*

as well as exposure for a period of time to such high professional and ethical standards through working for senior colleagues in the profession. There is no argument or suggestion by the petitioners that this is the case with the business of auctioneers, and I am therefore unable to find that they fall within the exception in paragraph 7(b) of Part 2 of the Fourth Schedule.

36. The Respondents repeatedly stated that they are empowered by statute to demand and collect single business permits/trade license and to regulate trade within the County. They therefore argued that their actions which the Petitioner complains of are backed by statute, which statute ought to be presumed constitutional. To buttress their contention, they cited the case of Kenya Pharmaceutical Association & another v Nairobi City County and the 46 other County Governments & another [2017] eKLR in which Mativo, J. (as he then was) stated:

35. In conclusion, I find that functions of County Governments include Trade Development and regulation (Excluding regulation of professions). As stated earlier, pharmacy is a profession but to the extent that it also involves selling of pharmaceutical products, it is a trade as opposed to professions such as law and architecture which render services only. By being asked to pay Trade licenses for their business premises, the County Governments cannot in any manner be said to be regulating or controlling the profession.

37. Similarly, in the case of Gideon Ndambuki Munyao & 13 others v County Government of Machakos & another [2020] eKLR where the court stated;

I wish to associate myself with the above decision of Mativo J. As long as the petitioners continue to sell drugs and not services unlike their counterparts like medical doctors, lawyers etc. they must be prepared to pay the business permit fees required of them. The practice has always been that it is doctors who prescribe medicine to their clients who then proceed to the chemist to purchase the drugs from the pharmacist. The pharmacist plays no role at all in offering services of attending to patients and prescribing drugs other than selling his or her goods at the counter.

38. The evidence on record herein shows that Dr. M. S. Rao is a professional medical practitioner, operating Om Shanti Clinic. There is exhibited, a general practice licence dated 31.10.2020 from the Kenya Medical Practitioners and Dentists Council indicating that the said doctor is duly licenced to practice in Kenya for the period ending 31.10.21. There is no evidence that Dr. M. S. Rao operates a pharmacy at his clinic to warrant the need for a single business permit.

39. A careful reading of the exhibited single business permit issued by the 1st Respondent indicates that the same is for a medical clinic and that Dr. M. S. Rao, was licenced to *engage in the activity/business/profession of occupation of health clinic/doctor's surgery/doctor/dentistry/physiotherapist/psychologist or other health professional office with no overnight accommodation available*. This is clearly contrary to the provisions of Section 7(b) of Part 2 of the Fourth Schedule of the Constitution and Section 3 of the Nairobi City County Trade Licensing Act, 2019. Accordingly, there was no legal justification for the 1st Respondent to compel the doctor pay for a single business permit.

Whether Paragraph 1.5 (Row 12) of the Schedule of the Nairobi City County Trade Licensing Act, 2019 violates section 3 of the Nairobi City County Trade Licensing Act, 2019

40. The Schedule to the Act was enacted pursuant to Section 9 thereof, which provides for application for a licence by all persons trading or conducting business in Nairobi County. Notably, Section 3 of the Act exempts professions. It provides as follows:

This Act shall apply to all persons who trade or have businesses in Nairobi with the exemption of professions.

41. The Schedule lists the various categories of trades and business that require licences and the fee payable in respect thereof. Row 12 of Paragraph 1.5 of the Schedule lists the following category:

Health clinic/doctor's surgery/doctor/dentistry/physiotherapist/psychologist or other health professional office with no overnight accommodation available.

The licence fee payable is indicated as Kshs. 15,000/=.

42. It is trite that the schedule to any Act of Parliament must be consistent to the Act itself, failing which it shall be of no effect. In the case of Wavinya Ndeti v Independent Electoral & Boundaries Commission (IEBC) & 4 others [2014] eKLR the Court of Appeal stated:

[10] It is an established principle of construction of statutes that no subsidiary legislation shall be inconsistent with the provisions of an Act (See section 31(b) of the Interpretation and General Provisions Act – Cap 2 Laws of Kenya). A subsidiary legislation cannot repeal or contradict express provisions of an Act from which they derive their authority.

43. The Schedule in question derives its authority from Section 9 of the Act which provides for application for licences. Section 3 of the Act expressly exempts professions from paying for trade licenses or single business permits. Row 12 of Paragraph 1.5 of the Schedule lists various

categories of health professionals as liable to pay a trade licence/single business permit fee of Kshs. 15,000/=. This being the case, the impugned Row 12 of Paragraph 1.5 of the Schedule clearly contradicts and is inconsistent with Section 3 of the Act, from which the Schedule derives its authority. Where there is inconsistency between a schedule to an Act of Parliament and the Act itself, the Act prevails. It follows therefore that Section 3 of the Act which stipulates that the Act does not apply to professions, prevails over Row 12 of Paragraph 1.5 of the Schedule, which purports to include health care professionals as a category from which payment for trade licence is to be demanded.

Whether the reliefs sought should be granted

44. In prayers (iii) and (iv), the Petitioners seek judicial review orders which would follow as a consequence of a positive finding in respect of prayers (i) and (ii). Having found as I have, that the actions of the Respondents are unconstitutional, as are the legal provisions pursuant to which the actions were done, it follows that judicial review orders would issue.
45. In this regard, I am guided by the holding in the case of Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR where the Court of Appeal stated:

That now brings us to the question we started with, namely, the efficacy and scope of mandamus, prohibition of certiorari. These remedies are only available against public bodies such as the Council in this case. What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY'S LAW OF ENGLAND, 4th Edition, Vol.1 at pg.37 paragraph 128. When those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the results of an examination. The question is how, not whether, that power is to be exercised. If the Council of prohibition would be ineffectual against the conviction because such an order would not quash the conviction. The conviction could be quashed either on an appeal or by an order of certiorari. The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making

of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition.

46. The 2nd Respondent opposed the prayer for judicial review and advanced the argument that the Petitioner ought to have brought an application by way of judicial review.
47. The Constitution, empowers a court considering an application for Enforcement of Bill of Rights, to grant an appropriate relief. Article 23(3) provides as follows:

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

- (a) a declaration of rights;*
- (b) an injunction;*
- (c) a conservatory order;*
- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;*
- (e) an order for compensation; and*
- (f) an order of judicial review.*

48. An appropriate relief that a court may grant could be a declaration of rights, an injunction, a conservatory order, a declaration that a law is invalid, an order for compensation and yes, an order for judicial review. As such, the argument that this Court cannot grant an order for judicial review and that the Petitioner ought to have filed judicial proceedings is indicative of a misapprehension of the import of the concept of appropriate relief under Article 23(3).

49. In the result and in view of the foregoing, the Petition succeeds and the following orders ensue:

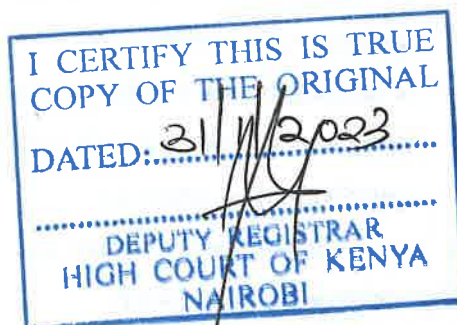
- i) A declaration be and is hereby made that Paragraph 1.5 (Row 12) of the Schedule to the Nairobi City County Trade Licensing Act, 2019 expressly violates the provisions of Section 7(b) of Part 2 of the Fourth Schedule of the Constitution and Section 3 of the Nairobi City County Trade Licensing Act, 2019 and is illegal and unconstitutional.
- ii) A declaration be and is hereby made that the actions of the Respondents in continuing to demand, trade licence or single business permit fees as indicated in Paragraph 1.5 (Row 12) of the Schedule of the Nairobi City County Trade Licensing Act, 2019 expressly violates the provisions of Section 7(b) of Part 2 of the Fourth

Schedule of the Constitution and Section 3 of the Nairobi City County Trade Licensing Act, 2019 are illegal and unconstitutional.

- iii) An order of prohibition be and is hereby issued to prohibit the Respondents from imposing, demanding, levying, charging, collecting, retaining or enforcing by criminal prosecution or otherwise trade license fees and/or single business permit fees from doctors within Nairobi County.
- iv) The Petitioner shall have costs.

DATED and DELIVERED in NAIROBI this 27th day of January 2023

M. Thande
M. THANDE
JUDGE



In the presence of: -

M. Malebe

for the Petitioner

for the 1st - 3rd Respondents

for the 4th Respondent

Carlos

Court Assistant