



H Young & Co (EA) Ltd v County Government of Kilifi & another (Petition E003 of 2022) [2024] KEHC 9914 (KLR) (29 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9914 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
PETITION E003 OF 2022**

SM GITHINJI, J

JULY 29, 2024

**N THE MATTER OF ARTICLES 1, 10, 174, 175,
209 & 210 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION
OF RIGHTS AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT
OF THE CONSTITUTION) PRACTICE AND PROCEDURE RULES 2013
AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW**

AND

IN THE MATTER OF THE KILIFI COUNTY FINANCE ACT, 2021

BETWEEN

H YOUNG & CO (EA) LTD PETITIONER

AND

THE COUNTY GOVERNMENT OF KILIFI 1ST RESPONDENT

KILIFI COUNTY ASSEMBLY 2ND RESPONDENT

JUDGMENT

- 1 By way of a Petition dated 16th May 2022 the Petitioner sought the following orders;
 - a. A declaration that the 1st Respondent’s demand for cess fees from the Petitioner for ballast under the Kilifi County Finance Act, 2021 is unlawful, unconstitutional, null and void.
 - b. A declaration that the administration, management, control and taxation of mining activities and the services appurtenant is the sole prerogative of the National Government.



- c. A declaration that the actions of the 1st Respondent in continuing to levy/charge cess fees for ballast without a proper legal framework expressly violates the provisions of *the Constitution* of Kenya.
- d. A declaration that the First Schedule to the Kilifi County Finance Act, 2021, in so far as the same relate to the imposition of cess on ballast is unlawful, unconstitutional, null and void ab initio.
- e. A prohibitory Injunction directing the 1st Respondent to stop the levying/ charging of cess fees for ballast in their area of jurisdiction.
- f. An order directing the 1st Respondent to refund the Petitioner Kshs. 180,600/- being sums paid subject of the receipt dated 26th April, 2022 as well as any other and/or further sums that shall be paid during the pendency of the Petition herein.
- g. Costs of this Petition.

The Petitioner's Case

- 2 In its Petition, it averred that it has been engaged to undertake construction of the Garsen-Witu- Lamu Road and the Petitioner in the construction of the said project is using ballast which is being excavated from the Petitioner's leased quarry sites within the 1st Respondent's County. That the Kilifi County Finance Act, 2021 contrary to *the Constitution* of Kenya, authorizes the 1st Respondent to charge cess for ballast which is classified as a natural resource.
- 3 It also averred that the 1st Respondent has demanded Kshs. 180, 600/- being cess payment for ballast to which the Petitioner contested through a letter of 28th July, 2021 calling for an amicable resolution of the dispute at hand noting the glaring contravention of the Law. In response vide a letter of 24th February, 2022, the Respondent asserted that it was not in contravention of the law by charging cess fees over ballast.
- 4 It further averred that upon settlement of the demand, the 1st Respondent issued the Petitioner with a receipt dated 26th April, 2022 referenced account of Ballast. According to it, royalties, if any, are over minerals and minerals are governed under the *Mining Act* and mining activities and their regulation are the sole preserve of the National Government and not the 1st Respondent. It stated that the property used as a borrow pit is privately owned and the owners of the property are liable to pay taxes to the 1st Respondent and that the land rent charges tax is covered under the impugned Act and by imposing cess over the product ballast amounts to double taxation. It was its assertion that the claim by the 1st Respondent for the payment of illegally levied cess fees was a ploy to intimidate and coerce the petitioner to pay to the 1st Respondent monies that were not due and owing.
- 5 The particulars of the 1st Respondent's violation of the Petitioner's fundamental rights and freedoms included the act of the 1st Respondent demanding payment of cess fees over ballast without a proper foundation, framework and/or basis and carrying on punitive actions intentionally to frustrate the petitioner's work within the County without a proper legal basis and/or framework.
- 6 The Petition was supported by the **affidavit** sworn by **MAURICE AGOLA KONGO** on the 16th day of May, 2022. He deposed that the Petitioner in the construction of the road was using ballast as a fill material and as it is, the ballast cannot be subject of cess from the 1st Respondent without existing authorizing legal framework from the national government. He also deposed that the Kilifi County Finance Act does not describe the service that the 1st Respondent County provides in exchange



for the fee demanded for cess for ballast. He stated that the Petitioner pays the land owner for use of his property and the ballast excavated and as such, imposition of cess over the ballast amounts to double taxation. He further asserted that there is no existing legislation by parliament empowering the 1st Respondent to impose taxes/cess on ballast and thus, the 1st Respondent's actions are illegal and without basis.

Submissions

- 7 The Petitioner through the firm of Maina & Onsare Partners Advocates LLP filed submissions on the 29th day of November, 2023. Counsel identified several issues for determination; whether the 2nd Respondent is a necessary party to the proceedings, the nature of the demand by the 1st Respondent, whether the 1st Respondent can levy any form of tax over ballast, and whether the Petitioner is entitled to a refund of Kshs. 180, 600/-
- 8 On the 1st issue for determination, counsel relied on Article 185 of *the Constitution* which provision addresses the role of the County Assembly concerning legislation governing the devolved unit of Government. He relied on the decision of *Bustra Savings and Credit Co-operative Society Limited & another =vs= County Government of Tharaka Nithi County (2019)*. It was his submission that the legislative role belongs to the 2nd Respondent with a duty to ensure that the impugned piece of legislation is clear and complies with set constitutional and statutory provisions.
- 9 On the second issue of determining the nature of the demand by the 1st Respondent, counsel directed the attention of the court to the 1st Respondent's letter dated 8th February, 2022 submitting that the imposition of cess over ballast in the ensuing circumstances is under the Kilifi County Finance Act, 2021 and in the impugned Act, cess over ballast is found under the First Schedule at Part 1V –Water, Forestry, Environment & Natural Resources. That at page 30 under Natural resources (cess on natural resources) ballast is charged at Kshs. 120/- per tonne which clearly shows the nature of the charge i.e the charge is on the product Ballast and not any service appurtenant.
- 10 On whether the 1st Respondent can levy any form of tax over ballast, he submitted that Article 209 (3) is instructive that a County may impose property tax, entertainment tax and any other tax that is authorized by an Act of Parliament and therefore the tax imposed on ballast by the 1st Respondent under the Act is not compliant with the provisions of Article 209 (3) of *the Constitution*. According to him, there is no existing Act of Parliament empowering the Respondent to impose tax over ballast. He relied on the cases of *H. Young & Co. (EA) Ltd =vs= The County Government of Meru & Another in Constitutional Petition No. E003 of 2020*, *Robert N. Gakuru & Another =vs= Governor of Kiambu County & 3 others (2014) eKLR*, *Base Titanium Limited =vs= County Government of Mombasa & Another (2021) eKLR* and that of *Raiply Woods (K) Ltd & Another vs Baringo County & 3 others (2017) eKLR*.
- 11 On whether the Petitioner is entitled to a refund of Kshs. 180, 600/-, counsel was guided by the provisions of Section 107 of the *Evidence Act* and the case of *Christine Mwigina Akonya =vs= Samuel Kairu Chege (2017) eKLR*. Counsel further submitted that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him as was held in the case of *Republic =vs= Kenya Revenue Authority Ex Parte Cooper K- Brands Limited (2016) eKLR*. Finally, in an instance where the intention of the legislature is doubtful, the inclination of the court will always be against that construction which imposes a burden, tax or duty on the subject as was held in the case of *Keroche Industries Limited =vs= Kenya Revenue Authority and 5 Others Miscellaneous Civil Application No. 743 of 2006 eKLR*.



Analysis and Determination

- 12 I have considered the pleadings and submissions by the Petitioner, I have gone through the entire file and I have noted that despite being represented, the Respondents have not filed any response to the Petition as well as submissions. I have also noted that despite being granted several opportunities to file both the response and the submissions, the said timelines were not adhered to whether intentionally or otherwise. The Respondents ought to have assisted this court with full and accurate explanations of all the facts relevant to the issue by responding to the petition and not displaying this laid-back attitude that is noticeable and of concern.
- 13 Be that as it may, the following are the issues that arise for determination:
1. Whether there exists an Act of Parliament empowering the Respondent to impose tax over ballast
 2. Whether the Petitioner is entitled to a refund of Kshs. 180,600/- from the 1st Respondent.
- 14 The Petitioner in this Petition contends that it had been engaged to undertake construction of the Garsen-Witu- Lamu Road and in the construction of the said project is using ballast which is being excavated from the Petitioner's leased quarry sites within the 1st Respondent's County. According to the petitioner, the Kilifi County Finance Act, 2021 contrary to *the Constitution* of Kenya, authorizes the 1st Respondent to charge cess for ballast which is classified as a natural resource.
- 15 The 1st Respondent demanded from the Petitioner Kshs. 180, 600/- being cess payment for ballast. Royalties, if any, are over minerals and minerals are governed under the *Mining Act* and mining activities and their regulation are the sole preserve of the National Government and not the 1st Respondent. In any event, the property used as a borrow pit is privately owned and the owners of the property are liable to pay taxes to the 1st Respondent and that the land rent charges tax is covered under the impugned Act and by imposing cess over the product ballast amounts to double taxation.
- 16 This being a Constitutional Petition, the starting point ought to be Article 23 which grants the High Court power to uphold and enforce the bill of rights. A public authority will be found to have acted unlawfully and or unconstitutionally if it has made a decision or done something: without the legal authority to do so (unlawful on the grounds of illegality); or is so unreasonable that no reasonable decision-maker could have come to the same decision or done the same thing (unlawful on the grounds of reasonableness); or without observing the rules of natural justice (unlawful on the grounds of procedural impropriety or fairness). In the case of *Cortec Mining Kenya Limited vs= Cabinet Secretary Ministry of Mining & 9 Others* (2017) eKLR it was observed that;
- “Under Article 62 (1) (f) of *the Constitution* “all minerals and mineral oils as defined by law” are classified as public land and by Article 62 (3) they are vested in and are held by the national government in trust for the people of Kenya. The Commissioner is thus placed in a position of trust to execute the functions and exercise powers as a trustee for the people of Kenya”
- 17 The *Mining Act* 2016 of Kenya is the primary law that governs mining in Kenya. The said Act defines a mine as "mine" - when used as a noun, includes an excavation or system of excavations made for the purpose of, or in connection with, the extraction of minerals or mineral products, and includes an open-cast pit, quarry and any area where a mineral is won by dredging, brine pumping, evaporation or other means; and when used as a verb, means the carrying out of a mining operation. Article 209(3) of *the Constitution* vests the County Governments with power to levy property tax, entertainment tax



and any other tax imposed by an Act of parliament hence the county government has no jurisdiction to levy tax or charges in respect of natural resources including quarrying activities and products. Section 136 of the *Mining Act* on the other hand relates to mining permits and Section 140 and 183 of the said Act provides for payment of royalties to the national government, county government and community at a ratio of 70:20:10 respectively.

18 As it is, quarrying and mining activities are not a trade and cannot be subjected to payment of cess on ballast. The quarry sector is governed by the Director of mines under the *Mining Act*, 2016. The 1st respondent cannot levy cess tax as it lacks constitutional basis by dint of Article 209 and 185. I am guided by the case of *Truckers Association of Kenya & 2 others =vs= County Government of Machakos* (2020) eKLR where it was stated that;

“ 128. Whereas both the national and county governments may impose charges for the services they provide, in this case the Respondent has not identified any services it is rendering in the activities in question.”

19 Further, going by the decision in the case of *Bumasutra SACCO Ltd =vs= County Government of Nakuru* (2016) eKLR it was observed that;

“I therefore find that the Respondent has no authority as purported in section 16 of the impugned Finance Act, to levy royalties in respect of the mining of sand, murrum, stone, ballast and pumice within the County of Nakuru”

20 As it is, the Petitioner in the construction of the road was using ballast as a fill material and as such, the ballast cannot be subjected to cess from the 1st Respondent without existing authorizing legal framework from the national government. In my view, the Kilifi County Finance Act does not describe the service that the 1st Respondent County provides in exchange for the fee demanded for cess for ballast. In my analysis, Section 2 of the Act on taxes does not mention Part IV which has made provision for natural resources. I find that in the absence of clear statutory authority for collecting cess on ballast, it was unlawful for the 1st Respondent to demand the same from the Petitioner and to receive it.

21 In the end, I am therefore satisfied that ballast and other crushed material are governed by the *Mining Act* 2016 and in the prevailing circumstances the 1st Respondent cannot levy cess over ballast. I therefore, find that the Petition has merit and the same is allowed in terms of Prayers (a), (b), (c), (d), (e) and (f).

Costs goes to the Petitioner.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 29TH DAY OF JULY, 2024.

S.M. GITHINJI

JUDGE

IN THE PRESENCE OF; -

Mr Onsere for the Petitioner.

Mrs Makobo holding brief for Mr Malobo for the Respondent.

S.M. GITHINJI

JUDGE



29/7/2024

