



**H Young & Co (E A) Limited v County Government of Kwale & another (Constitutional Petition E011 of 2022) [2022] KEHC 12952 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 12952 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION E011 OF 2022  
JM MATIVO, J  
SEPTEMBER 21, 2022**

**BETWEEN**

**H YOUNG & CO (E A) LIMITED ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF KWALE ..... 1<sup>ST</sup> RESPONDENT**

**KWALE COUNTY ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner states that it had been engaged to undertake some road works from Mwache junction-tsunza Mteza Section in Kwale County using murrum excavated from leased quarry sites within the said County. Its grievance as I glean it from the Petition is that the 1<sup>st</sup> Respondent demanded Kshs 110,600/= being cess payment for the murrum which it contested vide its letter dated February 22, 2022 but the 1<sup>st</sup> Respondent through its officers clamped and impounded its trucks registration numbers KCR 175 P and KCM 336 A. The Petitioner paid the said sum under protest and it was issued with a receipt dated March 2, 2022.
2. The Petitioner's contestation is that Royalties, (if any) are levied on minerals which are governed by the *Mining Act*, a function it averred is regulated by the National Government. It avers that the owner of the property from where the murrum is excavated is liable to pay taxes to the 1<sup>st</sup> Respondent, hence, imposing cess over the said product amounts to double taxation. It contends that the said payment has no legal foundation and it is contrary to the *Constitution* and the *Mining Act*. As a consequence of the foregoing, the Petitioner prays for: -
  - a. A declaration that the 1<sup>st</sup> Respondent's demand for cess fees from the Petitioner for murrum under the Kwale Finance Act, 2014 is unlawful, unconstitutional and null and void.
  - b. A declaration that the administration, management, control and taxation of mining activities and the ancillary services is the sole prerogative of the national government.



- c. A declaration that the actions of the 1<sup>st</sup> Respondent in continuing to levy/charge cess fees for murrum without a proper legal framework violates the provisions of the Constitution of Kenya.
  - d. A declaration that the schedule to the Kwale County Finance Act in so far as the same relate to the imposition of cess on murrum is unlawful, unconstitutional, null and void *ab initio*.
  - e. A prohibitory injunction directing the 1<sup>st</sup> Respondent to stop the levying/charging of cess fees for murrum in their area of jurisdiction.
  - f. An order directing the 1<sup>st</sup> Respondent to refund to the Petitioner Kshs 110,000/= being sums paid subject of receipt dated March 2, 2022.
  - g. Costs of this Petition.
  - h. Any other relief or orders that this court shall deem just and fit to grant.
3. In opposition to the Petition, the 1<sup>st</sup> Respondent filed the Replying affidavit of a one Onduko Alex Thomas dated April 5, 2022. Its key highlights are :- (a) the Petition does not raise substantive constitutional issues; (b) Payment of the cess is in conformity with the Kwale County Finance Act, 2014 and the Kwale County Quarrying Act, 2016 (c) the imposition and collection of cess is founded on the Kwale County Legislation as required by Article 185(2) and 209(4) of the Constitution; (c) the constitutionality of the said legislations has not been challenged; (d) the cess charged under the Kwale County Quarrying Act, 2016 is on mineral transporters ferrying minerals specified in the schedule to the Kwale County Finance Act, 2014 which also provides the amount payable; (d) cess is a service charge on services provided by the 1<sup>st</sup> Respondent to the Petitioner and its is lawful; and (e) cess is imposed for using the roads but not on the mining activities.
  4. The Petitioner filed the supplementary affidavit of Maurice Agola Kong'o dated April 6, 2022 essentially disputing the 1<sup>st</sup> Respondents reply and replicating his earlier averments.
  5. The 2<sup>nd</sup> Respondent did not file any response to the Petition nor did he participate in these proceedings.
  6. Both parties filed written submissions. The Petitioner's counsel key highlights in his submissions are: - (a) that the schedule to the act makes no reference to murrum as measured in tones but as mining levies which refers to mining activities; (b) that the schedule the Act contradicts the parent act because it refers to levies over the mining of murrum; (c) section 8 of the Act does not make reference to any service but the goods/items. He cited the definition of tax at section 2 of the Act and in the Black's Law Dictionary and argued that the 1<sup>st</sup> Respondent is charging a tax on the murrum. Also, he cited Article 209 (3) of the Constitution and submitted that disputed tax is not a tax as contemplated under the said Article. Counsel submitted that no legislation empowers the 1<sup>st</sup> Respondent to charge tax on murrum and relied on *H young & Co (EA) Ltd v The County Government of Meru & Another* which held that there was no Act of Parliament as contemplated under the said Article permitting imposition of cess because section 5 (2) (a) of the County Government Act only allows counties to legislate for matters within their domain as per the Fourth Schedule of the the Constitution.
  7. Other key highlights of his submissions are that even if the court were to find that the tax imposed is on a service by the 1<sup>st</sup> Respondent, then as was held by the Supreme Court in Base Titanium Limited v County Government of Mombasa & Another, if a County Government can levy charges, it must do so in exchange for an amenity. Counsel submitted that there is no mention of murrum in part 2 of the fourth Schedule and that the Mining Act does not donate powers to counties to collect any levies in so far as mining is concerned which is a preserve of the National Governments. He cited Raiply Woods (K) Ltd & Another v Baringo County & 3 Others in which the court held that a law enacted by the County



- Assembly must be in relation to the powers of County Government under the Fourth Schedule and where the County Government has no power or mandate over a matter under the Fourth Schedule, it has no power to make any law with regard to that matter.
8. Additionally, Counsel argued that since he has established that the 1<sup>st</sup> Respondent is not mandated by law to charge cess over murrum the Petitioner is rightfully entitled to a refund of the Kshs 110,600/= it paid to the 1<sup>st</sup> Respondent. He *Christine Mwigina Akonya v Samuel Kairu Chege* which underscored the standard of prove for special damages.
  9. Lastly, the Petitioner's counsel cited Section 27 of the *Civil Procedure Act* and argued that this Petition is brought in public interest under Article 22(2) and 258 (2) (c) of the *Constitution* and urged the court not to impose costs. (Citing *Dindi Oscar Okumu v Robert Pavel Oimeke & 5 others.*).
  10. The 1<sup>st</sup> Respondents counsel submitted that the Petitioner has not provided the particulars of the alleged violation or infringement or the manner in which the 1<sup>st</sup> Respondent has purportedly infringed its rights. (Citing *Anarita Karimi Njeru v Republic*). He also cited *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 Others* which following Anarita Karimi Njeru underscored the importance of defining the dispute to be decided by the court. He submitted that the Petitioner is not challenging the constitutionality of the Kwale County Finance Act, 2014 and the Kwale County Quarrying Act, 2016 which confers power to the 1<sup>st</sup> Respondent to levy the cess fees.
  11. He submitted that the 1<sup>st</sup> Respondent acted in accordance with the enabling law, that the power to charge tax or cess is derived from the legislations as read Article 209(3) and (4) of the *Constitution*. Citing the preamble to the Kwale County Finance Act No 1 of 2014 and The Kwale County Quarrying Act, 2016, he submitted that the two legislations were enacted to ensure the actualization of the 1<sup>st</sup> Respondent's functions as stated in Part 2 of the Fourth Schedule to the *Constitution*. He submitted that the quarrying is done within the 1<sup>st</sup> Respondent's jurisdiction and the roads used by the petitioner to transport the murrum are also maintained by the 1<sup>st</sup> Respondent, and, the cess fees charged by the 1<sup>st</sup> Respondent is a service charge payable for these services that are offered by the 1<sup>st</sup> Respondent. He relied on *Council of County Governors v Attorney General & 4 others* which held that the County governments are in charge of Class D, E, F, G and unclassified roads (County Roads), whilst the National government is in charge of Class A, B and C (National Trunk Roads).
  12. Additionally, the 1<sup>st</sup> Respondent's counsel submitted that the Petitioner mines the murrum at Lunguma area within Kwale County and transports it using the Lunguma-Mtedza Road to its work-site at the Mwache Junction, and the said road is an unclassified road within the 1<sup>st</sup> Respondent's jurisdiction. He cited *Base Titanium Limited v County Government of Mombasa & another* in which the court held that "under Article 209, a county is empowered to raise revenue and levy taxes, rates, or other charges, and under sub article (4), the 1<sup>st</sup> Respondent is authorized to impose charges for services provided which may include County transport which entails County roads; street lighting; traffic and parking; public roads transport; and ferries and harbors.
  13. In its supplementary submissions, the Petitioner's counsel reiterated that this Petition meets the tests of a constitutional Petition and he essentially replicated his earlier submissions.
  14. For starters, I will address the Petitioner's argument that this Petition is brought in public interest under Articles 22(3) and 258 (2) of the *Constitution* and therefore the court should not impose costs. Public interest litigation is not defined in any statute or in any act. In simple words, it means, litigation filed in a court of law, for the protection of "Public Interest." According to *Black's Law Dictionary*"Public Interest Litigation means a legal action initiated in a court of law for the enforcement of public interest



or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected

15. Undeniably, the Petitioner in its own words states that it was engaged to undertake road works which included upgrading a road within Kwale County. The work entailed using murrum excavated from a leased quarry. It's admitted that the Petitioner was charged cess which it paid, albeit under protest to the tune of Kshs 110,600/=. The question is whether this Petition is brought by the Petitioner in its own capacity for its own benefit or whether the Petition has been brought for public interest. Again, was the Petitioner undertaking the said work for its own gain or profit, or, was it for public gain. Is there remuneration for the said work and if so, will the remuneration go to the public. But what is Public Interest Litigation?
16. Simply put, the question is whether this Petition is a *bona fide* public interest litigation or an aggrieved company pursuing its own commercial interests for its own benefit. While dealing with the question of "bona fides" of a Petitioner, especially in the case of a person approaching the court in the name of Public Interest Litigation, the Indian Supreme Court in *Ashok Kumar Pandey v State of West Bengal* stated: -

"Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often, they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs."
17. Following the above decision, the Supreme Court of India in *Dr Akhtar Hassan Khan v Federation of Pakistan* held that the Court has to guard against frivolous petitions as it is a matter of common observation that in the garb of Public Interest Litigation, matters are brought before the Court which are neither of public importance nor relatable to enforcement of a Fundamental Right or public duty.
18. Here at home in *Albert Ruturi, JK Wanywela & Kenya Bankers' Association v The Minister of Finance & Attorney General and Central Bank of Kenya* (the Ruturi case), a case which ushered in "a new dawn of Public Law," Justices Mbaluto and Kuloba J stated: -

"In constitutional questions, human rights cases, public interest litigation and class actions...any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused to a defined class of persons represented or for a contravention of the Constitution, or injury to the nation. In such cases the court will not insist on such a public spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception."



19. I had the benefit of addressing similar issues in several previous decisions among them *Jennifer Shamalla v Law Society of Kenya Interested Party Independent Electoral & Boundaries Commission & 11 others*. In the said cases I observed that public Interest Litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by public spirited persons and swift justice. But the profound need of this tool has been plagued with misuses by persons who file Public Interest Litigations just for the publicity and those with vested political (or personal) interests. The courts therefore, need to keep a check on the cases being filed and ensure the bona fide interest of the petitioner and the nature of the cause of action, in order to avoid unnecessary litigations. Vexatious and mischievous litigation must be identified and struck down so that the objectives of Public Interest Litigation aren't violated. The *constitution* envisages the judiciary as "a bastion of rights and justice.
20. In the above decision I stated that public interest litigation is a highly effective weapon in the armory of law for reaching social justice to the common man. It is a unique phenomenon in the Constitutional Jurisprudence that has no parallel in the world and has acquired a big significance in the modern legal concerns. This technique is concerned with the protection of the interest of a class or group of persons who are either the victims of governmental lawlessness, or social oppression or denied their constitutional or legal rights and who are not in a position to approach the court for the redress of their grievances due to lack of resources or ignorance or their disadvantaged social and economic position.
21. Former Chief Justice of India A S Anand cautioned the over use of Public Interest Litigation and emphasized "Care has to be taken to see that Public Interest Litigation essentially remains public interest litigation and is not allowed to degenerate into becoming political interest litigation or private inquisitiveness litigation. It is the duty of the court to see whether the petitioner who approaches the court has a bona fide intention and not a motive for personal gain, private profit or political or other oblique considerations. Considering the facts of this case, it is manifest that the Petitioner had been engaged to do some works; it was charged cess for the material it was using (is murrum), it paid but now it claims a refund. Three consequences flow for this scenario. One, it was undertaking private works for gain. This is apparent because from the Petition, there is nothing to suggest doing the work for free or pro bono to benefit the public. There is every indication that it was doing the work for private gain. Two, it is specifically seeking an order that the said sum be refunded. There is nothing to suggest that the refund will go to the public. Three, the road under construction is public road for use by the public. But that it how far it goes. The Petitioner was doing the work for its own profit. This takes out this Petition from the purview of public interest litigation. It's a private enterprise. No wonder the Petitioner is seeking to recover the money it paid and to stop bring charged cess.
22. I now address the Petition on merit. At this point it is important to refer to the Supreme Court decision in *Base Titanium v County Government of Mombasa & another* cited by the Petitioner. In the said case, the Apex Court addressing the facts before it which are similar to the issue at hand aptly answered the question "What were the circumstances in which a county government could charge cess, levy or tax?" as follows: -
  - a. Under the provisions of article 209 of the *Constitution*, a county was empowered to raise revenue and levy taxes, rates, or other charges. Additionally, under article 209(4), the 1<sup>st</sup> respondent was authorized to impose charges for services provided. The definition of the word service could include county transport which entailed county roads; street lighting; track and parking; public roads transport; and ferries and harbors, excluding the regulation of international and national shipping and matters related thereto comprised some of the functions and powers of county governments under



section 5 Part 2 of Schedule Four to the Constitution. The intention of article 209(4) of the Constitution was to confer county governments the discretionary powers to impose charges for services, more specifically, that they could charge or impose a payment in exchange of a public need or amenity.

- b. The insertion of the words ‘for services’ in article 209(4) of the Constitution were a qualification to the charge of the services. Whereas a county could levy charges, it had to do so in exchange for an amenity. Put differently, a county did not have the authority to charge a cess, levy or tax where they did not offer anything in return.
  - c. The Constitution permitted county governments to impose charges for the realization of its powers under the Fourth schedule. But that power did not go unchecked, in the spirit of harmonious interpretation of the Constitution, in enacting the law, county governments had to heed the provisions of article 209(5) of the Constitution and ensure that the charges invoked would not be detrimental to national economic policies, economic activities across boundaries or the national mobility of goods, services, capital or labor.
23. Importantly, the Supreme Court was emphatic that under Article 209 of the Constitution, a county is empowered to raise revenue and levy taxes, rates, or other charges, and also, the County Government under article 209(4) was authorized to impose charges for services provided. This statement of the law from the Apex court confirms that the 1<sup>st</sup> Respondent is legally ordained to levy the cess in question.
  24. The Petition as drawn has manifest shortcomings. The Petitioner is essentially aggrieved by the provisions of County Legislation(s) which impose a levy. Its argument is that it creates what it calls double taxation. It is argued that the levy imposed violates Articles of the Constitution. The Petition argues that the levy charged is without legal foundation. It invites the court to find that cess charged under the Kwale County Finance Act, 2014 is unlawful. This invitation is an oxymoron. It’s a contradiction of terms. There is in place county legislations providing for taxation. Ironically, the Petitioner is not challenging the legality or constitutional validity of the said legislations. The power to impose the cess flows from the said legislation. The cess charged is expressly provided for under the county legislation(s). Ironically, the Petitioner now urges the court to find that the cess is unlawful. One wonders how a court of law properly directing its mind to the law can declare the cess illegal while the law creating it is unchallenged.
  25. The Petitioner seeks a declaration that regulating mining activities is a function of the national government. Before this court is a narrow question of a county government charging cess for a service rendered, namely transport. Imposing cess for services rendered is a function of the County Government. (See the Supreme Court in *Base Titanium v County Government of Mombasa & another*)
  26. The Petitioner at prayer (c) of the Petition alludes to absence of legal framework and invites the court to so find. This is a truly misleading statement. The Petitioner has severally mentioned two key county legislations which govern the said charges. How can it turn around and suggest absence of legal framework. That alone extinguishes prayer (c) of the Petition.
  27. Additionally, at prayer (e) prays for a writ of prohibition. The writ of Prohibition arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not



to do something in contemplation. However, as stated above, the illegality of the levying cess has not been established nor has it been established that the 1<sup>st</sup> Respondents acted illegally or in excess of their powers nor has the decision to impose cess been shown to be illegal, irrational or a nullity.

28. The Petitioner invites the court to order that the sum of Kshs 110,000/= it paid be refunded. However, the Petitioner having failed to establish the illegality of the cess paid, the plea for a refund is totally unmerited and far-fetched and unavailable.
29. In view of my analysis of the facts, the law and the conclusions arrived at herein above, it is my finding that this Petition fails. Accordingly, I hereby dismiss the Petitioner's Petition dated March 8, 2022 with no orders as to costs.

**SIGNED, DATED AT MOMBASA THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2022**

**JOHN M MATIVO**

**JUDGE**

**SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2022**

**OLGA SEWE**

**JUDGE**

