



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

PETITION NO. 1 OF 2018

MOGENI TEA FACTORY LIMITED.....PETITIONER

VERSUS

NYAMIRA COUNTY GOVERNMENT.....RESPONDENT

JUDGEMENT

The petitioner's prayers in the petition dated 31st January 2018 filed herein on even date are: -

“1. (Spent)

2. THAT the honourable court be pleased to issue an interim mandatory injunction directing the Defendant/Respondent by itself, its agents, servants, workmen and/or employees to release and/or deliver to the plaintiff/applicant motor vehicle Registration Number KAR 254Y and the computer weighing machine pending the hearing and determination of this application inter parties.

3. THAT pending the hearing and determination of this suit, the Defendant/Respondent by itself, its agents, servants, workmen and/or employees be restrained by way of temporary injunction from seizing and/or detaining the applicant's motor vehicles in the cause of their business and/or depriving and/or trespassing upon the goods of the plaintiff/applicant in whatsoever manner.

4. THAT a temporary injunction be issued restraining the respondent through its agents, employees and servants from demanding levies and charges not prescribed for in the Nyamira County Finance Act, 2016, pending the hearing and determination of the petition.

5. THAT costs of this application be provided for.”

Briefly the petitioner's case is that on 23rd January 2018 the respondent's employees (revenue officers) who had erected a road block along the road stopped and prevented twenty-four (24) lorries which were transporting fresh tea leaves for the petitioner. The said tea leaves had been purchased from different farmers and the lorries were on the way to deliver the tea to the factory when they were restrained at the road block and it was not until the petitioner reported the matter to Nyamira Police Station that they were released. It is also the petitioner's case that on 24th January 2018 the respondent's seized another of the petitioner's vehicle Registration No. KAR 254Y as it was taking tea to the factory. The petitioner adduced evidence that this particular vehicle (lorry) was towed and detained not just with tea but also a weighing machine which contained data of all the farmers from the area the lorry used to collect tea. The court heard that the employees of the respondent impounded the lorries on the pretext that they were not paying cess. In particular, the driver of motor vehicle KAR 254Y is said to have vexed the revenue officers because of his retort that cess was paid at the factory and they could not therefore collect it on the road. The court heard that the petitioner's officers made several attempts to have the vehicle released but the respondent's employees refused to do so. The petitioner led evidence that at the time the vehicles were impounded they had between them tea weighing 82,803 kilogrammes valued at Kshs. 5,133,225/=. It was contended that all that tea went to waste as a result of being scorched by the sun and consequently the petitioner incurred a loss of Kshs. 5,133,225/= being the cost of the tea, the cost of transport and wages.

It is the petitioner's contention that the seizure of the motor vehicles was illegal, arbitrary and unconstitutional. In his submissions Counsel for the petitioner contended that the actions of the respondent's employees violated the petitioner's right to property and fair administrative action provided in **Articles 40 (3) of the Constitution**. Counsel submitted that the petitioner is not authorized to collect tea cess. Counsel contended that **Section 17 (2) of the Crops Act** provides only for a trade licence but does not provide for collection of a tea cess. The petitioner adduced evidence and it is Counsel's contention that the petitioner indeed had a valid annual trading/manufacturing licence for which it had paid a fee of Kshs. 80,000/= and was therefore not liable to pay any other levy or tax more so cess. Counsel pointed out that under **Sections 7 and 17 (1) of the Crops Act** only the National Government can charge levies on scheduled crops such as tea. Counsel urged that levying of tea cess by the respondent was not sanctioned either by the Constitution or by an Act of Parliament. Counsel referred to **Article 209 (3) of the Constitution** which provides that:

“(3) 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.”

Counsel also referred to **Article 210 (1) of the Constitution** and **Article 209 (5)** which state: -

Article 210 (1)

“(1) No tax or licensing fee may be imposed, waived or varied except as provided by legislation.

Article 209 (5)

“(5) The taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour.”

Counsel contended that the levy demanded of the petitioner by the respondent was illegal and unconstitutional. He further contended that the road block mounted by the respondent on the highway for purposes of collecting the cess was also illegal. He stated that under **Section 69 (A) of the Traffic Act** only the Inspector General of Police has power to designate a place along a public road on which a police roadblock may be mounted. He submitted that under **Section 90 (2) of the Traffic Act** it is an offence to wilfully obstruct the free passage of persons or vehicles and that in so far as the respondent’s roadblock is not gazetted it is unlawful and it should be removed forthwith.

To support his submissions Counsel cited several cases where collection of cess was found to be illegal and unconstitutional namely: -

- **Raiply Woods (K) & another v Baringo County & 3 others [2017] eKLR** where Muriithi J held that the County Government of Baringo was not empowered by the constitution to levy tax on forest produce harvested from state forests as that was the province of the National Government which owns the said forests.
- **Eastern Produce Kenya Ltd & 3 others v County Government of Nandi & another [2019] eKLR** where Omondi J held: -

“36. From the foregoing, the petitioner’s assertion that the Nandi Cess Act is so far as it provides for levying of cess on tea (which is grown in over 10 counties), conflicts with National Legislation and is therefore invalid and unenforceable to the extent of that inconsistency.

37. Moreover, levying cess in this way would subject the tea farmers to double taxation which is unfair. In my opinion the County Government has not been empowered to levy the cess on tea and therefore the petition be and is hereby allowed.”

Counsel reiterated that the cess demanded by the respondent is unconstitutional and urged this court to determine the petition in favour of the petitioner and grant it the prayers sought. Counsel urged that the petitioner suffered damage as a result of the violation of its rights and it thus entitled to an award of damages. He tabulated the special damages as follows: -

“61. In the circumstances the Petitioner suffered loss and damage in the nature of Special damages of Kshs. 6,800,220/= set out as follows: -

(a) Tea CESS unlawfully demanded and paid.....Kshs. 552,600/=.

(b) Value of 82,803 kilograms that perished or went to waste.....Kshs. 4,048,220/=

(c) Expected income from the seizure and detention of motor vehicle Registration No. KAR 254 Y,3,000 kilograms of green tea leaves and uncollected green tea leaves due to unavailable computer weighing machine (Revenue lost by the Company)Kshs. 2,200,000/=

Total..... Kshs. 6,800,220/=”

He proposed exemplary and aggravated damages of Kshs. 10,000,000/= and punitive damages of Kshs. 2,000,000/=. Counsel also urged this court to award the costs of the petition to the petitioner.

On its part the respondent called witnesses who conceded that they in fact erected barriers on the road and that they blocked the petitioner’s vehicles from passing for refusing to pay cess due to the respondent. They stated however that motor vehicle Registration No. KAR 254Y

was impounded by the police after its driver left it on the road after causing trouble at the roadblock. In his submissions Counsel for the respondent submitted that the respondent levies cess on all vehicles carrying goods that enter and conduct business within Nyamira County and that it matters not that the transporter is ferrying tea produce or other goods. Counsel contended that such levy is sanctioned by **Articles 209 (4) of the Constitution**. Counsel also referred to **Articles 210 (1) and 185 (2) of the Constitution** which provide: -

Article 185 (2)

“(2) 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.”

Counsel also referred to **Sections 5 (1) and (2) of the County Government Act** that state: -

“(1) A county government shall be responsible for any function assigned to it under the Constitution or by an Act of Parliament.

(2) Without prejudice to the generality of subsection (1), a county government shall be responsible for—

- (a) county legislation in accordance with Article 185 of the Constitution;**
- (b) exercising executive functions in accordance with Article 183 of the Constitution;**
- (c) functions provided for in Article 186 and assigned in the Fourth Schedule of the Constitution;**
- (d) any other function that may be transferred to county governments from the national government under Article 187 of the Constitution;**
- (e) any functions agreed upon with other county governments under Article 189(2) of the Constitution; and**
- (f) establishment and staffing of its public service as contemplated under Article 235 of the Constitution.”**

Counsel also referred to **Section 21 (4) of the County Government Act** which provides for the implementation of bills and which states: -

“(4) For the purposes of this Act, “money Bill” means a Bill that contains provisions dealing with—

- (a) taxes;**
- (b) the imposition of charges on a public fund or the variation or repeal of any of those charges;**
- (c) the appropriation, receipt, custody, investment or issue of public money;**
- (d) the raising or guaranteeing of any loan or its repayment; or**
- (e) matters incidental to any of those matters.”**

Relying on the case of **Base Titanium Ltd v County Government of Mombasa & another [2017] eKLR**, Counsel submitted that the County Government has legislative discretion to impose charges for services rendered. Counsel submitted that pursuant to **Article 209 (4) of the Constitution** the respondent passed the **County Finance Act 2016** which provides for collection of service charge for transportation of goods and it cannot be faulted for doing so. Counsel disputed that doing so amounted to double taxation. Referring to the prayers sought by the petitioner Counsel contended that parties are bound by their pleadings and stated that the petitioner did not seek for any specific damage. Counsel also submitted that the accountant upon whose report the petitioner relied was not a qualified accountant and the report cannot therefore stand. In regard to the roadblocks mounted by the respondent, Counsel submitted that it is done in consultation with the Kenya National Highway Authority and that moreover the impugned roadblock was mounted on a class C road and not a national highway. Counsel urged this court to dismiss this petition with costs to the respondent and stated that the respondent wishes to rely on the following cases and legislation: -

- 1. Nyamira County Finance Act 2016.**
- 2. The case of Nairobi Metropolitan PSV Saccos Union Ltd & others v Homay General & others Petition No. 593/2013 (citation not supplied).**
- 3. Pwani Super Capacity Transport Saving and another Count (sic) government of Mombasa [2020] eKLR.**
- 4. Cereal Flowers Association & another v County Government of Narok & 10 others [2016] eKLR.**

I have considered the evidence adduced by the parties, the rival submissions, the cases cited and the law. This court is called to determine whether the act of the respondent’s employees to stop and demand payment from the vehicles transporting tea to the petitioner’s factory and

to impound the vehicles when the demand was not met amounts to a violation of the petitioner's right guaranteed under **Article 40 (3) of the Constitution**. The court shall also determine whether the petitioner is entitled to the reliefs sought.

Article 209 (1) of the **Constitution** sets out the taxes that can only be imposed by the National Government as: -

- (a) **Income tax;**
- (b) **Value-added-tax;**
- (c) **Customs duties and other duties on import and export goods; and**
- (d) **Excise tax.**

Sub-article (3) provides that a county may impose: -

- (a) **Property rates.**
- (b) **Entertainment taxes; and**

a) Any other tax that it is authorized to impose by an Act of Parliament. (Emphasis mine).

The county governments also have power under Article 209 (4) to impose charges for the services they provide. It is clear from the above articles of the Constitution that county governments have power to levy certain taxes and charges except that they cannot levy those reserved for the National Government in **Article 209 (1)**. The power to levy fees and charges is also subject to the counties putting in place legislation to authorize them to do so. The only stricture to that power is provided in **Article 209 (5)** of the **Constitution** which states: -

“(5) The taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour.”

It is the respondent's contention that the cess it levied was sanctioned by **Articles 209 (3) & 185** of the **Constitution**. Counsel for the respondent contended that there was in place an Act of Parliament which provided for the cess for which the petitioner's lorries were impounded. The Act referred to is the **Nyamira County Finance Act**. I have perused that Act and noted that the same is described as **an Act to provide for the imposition of variation of fees, charges, licences, rents or rates for services pursuant to Article 209 and 210 of the Constitution of Kenya**. The **Nyamira County Finance Act, 2016** which is the Act which was exhibited in court is described as an **“Act of the County Assembly to provide for the imposition and amendment of certain taxes, charges, fees and licences and matters incidental thereto.”** Section 7 of the Act empowers the Executive Committee Member **“to by order published in the Gazette waive or vary any fees or charges payable under the bill in accordance to the criteria developed under Section 159 of the Public Finance Management Act.”** It is clear therefore that the Nyamira County (respondent) has in place an Act of Parliament as provided in **Article 209 (3) (c)** of the **Constitution** which authorizes it to impose taxes in addition to property rates and entertainment taxes. The respondent contends that the cess demanded from the petitioner is but charges provided in the **Nyamira County Finance Act, 2016**. Section 2 of the Act defines cess as tax or fees chargeable on goods under **Section 7** of the **Nyamira County Finance Act**. The **Nyamira Finance Act, 2016** has schedules which the respondent contend provide for the charges imposed upon the petitioner. The said charges refer to **“Tea leaf hawking/transporting.”** It is evident from the schedule that the charges are not a cess or tax on tea as such but on the **transportation** of the tea leaves within the county. The cess demanded is neither an income tax, value added tax, customs or excise tax but a charge for the transportation of tea. In the same schedule are charges for transport of ballast and sand which are also charged per day or month. I am therefore of the humble view that the facts of this case are distinguishable from those of **Eastern Produce Kenya Ltd & 3 others v County Government of Nandi & another (supra)** and **Raiply Wood (K) Ltd & another v Baringo County & 3 others (supra)** where the counties purported to tax the crops, a tax which is the preserve of the National government. It transpired during the hearing of this case that the motor vehicles the subject of this petition did not in fact belong to the petitioner but were lorries it hired from third parties to transport tea sourced from various farmers to its factory. Clearly the owners of those lorries or the petitioner itself were liable to pay the charges imposed by the respondent for transportation of the tea leaf within the county and if they did not do so then the respondent was entitled to put in place mechanisms to ensure that payment was made. It was not alleged that the imposition of the charges by the respondent were done in a way that prejudiced national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour.

Having found that the cess imposed upon the petitioner is a charge sanctioned by the **Nyamira Finance Act** as provided under **Article 209 (3) of the Constitution** I am not persuaded that the rights of the petitioner were violated. Counsel for the petitioner did not persuade this court that the manufacturing licence included fees for transportation of the tea to the factory or that there was another charge levied for transportation of the tea to the factory and hence the imposition of the cess amounted to double taxation.

As for the mounting of the roadblocks the respondent submits that it has consulted the relevant public body and that it erects the roadblocks with their blessings. The petitioner other than asserting that the roadblock is unlawful did not adduce evidence to support the allegation. In the premises I find that the petition has no merit and accordingly dismiss it with costs to the respondent. It is so ordered.

Judgement signed, dated and delivered Electronically at Nyamira via Microsoft Teams this 25th day of March 2021.

E. N. MAINA

JUDGE