



Pwani Super Capacity Transporters Savings and Credit Co-operative Society Limited v County Government of Mombasa (Constitutional Petition 27 of 2019) [2020] KEHC 10491 (KLR) (23 January 2020) (Judgment)

Neutral citation: [2020] KEHC 10491 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION 27 OF 2019**

EKO OGOLA, J

JANUARY 23, 2020

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS PRACTICE AND PROCEDURE RULES 2013

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND THREATENED VIOLATION OF ARTICLES 10, 47, 174, 196, 201, 209(5)259 AND THE 4TH SCHEDULE OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: IRREGULAR AND ILLEGAL LEVYING OF CESS CHARGES BY COUNTY GOVERNMENT OF MOMBASA IN RESPECT OF NATURAL RESOURCES.

AND

IN THE MATTER OF: THE MOMBASA COUNTY FINANCE BILL, 2018

BETWEEN

PWANI SUPER CAPACITY TRANSPORTERS SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LIMITED PETITIONER

AND

COUNTY GOVERNMENT OF MOMBASA RESPONDENT

JUDGMENT

Introduction

1. The Petitioner is a co-operative society duly registered under the *Co-operative Societies Act*. Its members are engaged in the trade and business of quarrying stones and transporting the same to Mombasa County.



2. The Respondent is the County Government of Mombasa charged with the duty of running the regional government and administrative affairs in Mombasa County.

The Petitioners' Case

3. By the petition dated and filed herein on 18.3.2019 the Petitioner avers that under Article 209 of *the Constitution* and the County Government Act, the Respondent is authorized to enact legislations to impose taxes and pursuant to the said powers it enacted the Mombasa County Finance Bill, 2018. (Herein referred to as the bill)
4. The Petitioner states that it is involved in transportation of building blocks, ballast, and sand to and from Mombasa County. It holds all the relevant trade licenses and that the cess imposed by the Respondent is unreasonable as its operating costs militate against it making any kind of profit. Further, the Respondent has subjected the Petitioner to pay further cess charges of Kshs. 3,400/= previously being charged at Kshs. 1700/= for the offloading the aforementioned natural resources at Mombasa.
5. The Petition further states the Respondent has no right to levy any cess in respect of loading of natural resources and any such demands are unreasonable and unconstitutional on the account of the following:
 - a) No proper public participation was undertaken by the Respondent in respect of the intended imposition of the cess complained of in respect to loading of coral blocks, ballast, stone chips and sand in Mombasa County while enacting the Mombasa County Finance Act 2018 as required under Article 10,174,196 and 201 of *the Constitution* and Section 87 and 88 of the County Government Act, 2012 which provides for public participation.
 - b) That the cess charges levied by the Respondent under Section 6(a) (71) of the Bill are in conflict with Article 209(3) and the 4th Schedule of *the Constitution* since coral blocks, ballast, stone chips and sand are natural resources of the class known as minerals which under the said Schedule are within the domain of the National Government and no county has any power to levy any kind of taxation relating to such natural resources as the imposing of the said cess would prejudice national economic policies and economic activities across county boundaries.
 - c) The imposition of the cess tax in respect of natural resources as provided under Section 6(a) (71) has subjected the Petitioner to double jeopardy as it also pays for trade licenses and high taxation that threatens to destroy the Petitioner's chance of surviving in business.
6. Arising from above grievances, the Petitioners pray for the following orders:
 - a) A declaration that Section 6 (a) (71) of the Mombasa County Finance Bill, 2018 on cess tax in respect of loading of coral blocks, ballast, stone ships and sand is unconstitutional, null and void as no proper public participation was factored into the enactment of the Mombasa County Finance Bill, 2018 Act by the Respondent as required under Article 10,174,196 and 201 of *the Constitution* of Kenya, 2010 and Section 87 and 88 of the County Government Act, 2012 which provide for the principle of public participation.
 - b) A declaration that Section 6(a) (71) of the Mombasa County Finance Bill, 2018 is unconstitutional in as far as it purports to confer powers to the County Government of Mombasa to levy cess charges on all goods carrying vehicles entering Mombasa County and offloading in Mombasa County whereas such levies and/or taxes can only be imposed by the National Government.



- c) A declaration that Section 6(a) (71) of the Mombasa County Finance Bill, 2018 is unconstitutional and irregular as it offends the provisions of Article 209(5) of the Constitution of Kenya, 2010. As such, the same be declared null and void.
 - d) A declaration that the respondent has acted in a Wednesbury Unreasonable manner by passing the Mombasa County Finance Bill, .2018 which contains unreasonable provisions and in particular Section 6 (a) (71) of the Mombasa County Finance Bill, 2018 which provisions results to subjecting the Petitioner to double taxation. As such, the said provision of the County Act should be quashed.
 - e) A conservatory order to restrain the Respondent whether by themselves, their agents, employees and or servants from implementing Section 6(a)(71) of the Mombasa County Finance Bill,2018 whereby the Respondent is illegally charging the Petitioner taxes by way of cess for the quarrying stones that the Petitioner quarries and transports from Kilifi and Kwale Counties to Mombasa County.
 - f) The honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of Justice.
 - g) Costs of the Petition be awarded to the Petitioner.
7. The petition is premised on the affidavit sworn on the 18.3.2019 by Crispus Waithaka who is the Petitioner’s Chairman.

The Respondent’s case

- 8. The Respondent has opposed this petition through a Replying Affidavit sworn on 10.4.2019 by one Said Abdalla a Revenue officer of Mombasa County.
- 9. The Respondent asserts that the cess is levied on goods emanating from other Counties for purposes of being offloaded in Mombasa and Revenue barriers have been set up on several parts of Mombasa County. Transporters of cargo transiting through Mombasa County are required to provide documentation showing that the goods are on transit failure to which the goods attract cess because it is believed that the goods are destined for offloading in the Mombasa County.
- 10. The Respondent avers that a County is entitled to levy charges in order to operationalize its functions and services. It has cited Article 209(4) and 210 of the Constitution, which empowers it to impose the levy and other charges applicable at the County level and payment of an operation licence enables the Petitioner to conduct business within Mombasa County but does not preclude them from paying cess whenever goods are brought from other counties into Mombasa.
- 11. The Respondent avers that there was public participation as members of the public and stakeholders were invited to give their views on the Finance Act 2018 and due process of the law was followed before the bill became law. A copy of a newspaper advertisement and related correspondences was annexed and marked “SA-1”
- 12. The Respondent contends that the Petitioner being a corporate entity is not in any way excluded from paying cess fees and Article 210 of the Constitution provides that no tax or licensing may be varied or waived except as provided by legislation

Submissions

- 13. The petition was canvassed through written submissions, which were orally highlighted in Court.



Petitioners Submissions

14. Mr. Gikandi Learned Counsel for the Petitioner submitted that the levy under Section 6(a) (71) of the bill is unconstitutional as it is not authorized under Article 209 of *the Constitution* and that any other tax not contemplated under Article 209(3), (4) and (5) should be authorized by an Act of parliament. Counsel further stated that he agreed with the Respondent's submission that Article 185(1) of *the Constitution* gives the County legislative authority. However, that does not give the County Assembly power through an Act of its Assembly to levy charges outside the legislative framework. For authority, Counsel cited the decision in Robert N. Gakuru & Another vs. Governor Kiambu County & 3 others [2014] eKLR.
15. Mr. Gikandi further submitted that the Respondent lacks powers to impose levies for building materials extracted from outside Mombasa County. It is only when the materials are traded in a Mombasa market that the Respondent can charge levy on the said materials and Section 209 of *the Constitution* provides that levies should not be so unreasonable as to make it impossible for traders to make a profit. He submitted that the Petitioner is paying cess from the County of origin of the natural resources and paying the same cess during offloading in Mombasa which amounts to double taxation.
16. On public participation, Mr. Gikandi submitted that no proper public participation took place prior to the enactment of the Act as the issuance of a single public notice via the daily nation on the 29.8.2018 was not adequate and did not qualify as a proper public participation as required under *the Constitution*. Counsel relied on Robert N. Gakuru & Another vs. Governor Kiambu County (supra).

Respondent's Submissions

17. M/s. Kisingo Learned Counsel for the Respondent submitted that Article 209(3) of *the Constitution* provides that the County Government can impose any other tax that is allowed by an Act of parliament. This Act of parliament is the County Government Act. Provided there is a proper public participation, there can be no challenge to the levies. For authority, Counsel cited the case of Milly Glass Works Limited & 3 others vs. County Government of Mombasa & 2 others [2016] eKLR.
18. Counsel further submitted that the only goods exempted from cess are goods on transit and that there is no evidence to show that cess is being levied on the Petitioner's goods. Reliance was placed in the case of Base Titanium Limited vs. County Government of Mombasa & another [2018] eKLR.

The Determination

19. From the pleadings and submissions, the following are the issues that arise for determination:
 - i. Whether the fees/cess charged by the Respondent on the Petitioner and other transporters are legal.
 - ii. Whether there was proper and sufficient public participation in the enactment of Section 6(a) (71) of Mombasa County Finance Act 2018.
 - (i) Whether the cess/fees charged by the Respondent on transporters are legal.
20. In order to determine this issue a look at Section 6(a) (71) of the impugned Act will provide an understanding into the basis of cess/fees collected by the Respondent.

Section 6(a) (71)



71. Cess Charges - Entering Mombasa			
(To be paid by all goods carrying vehicles entering Mombasa County and offloading in Mombasa County. Shall not apply for vehicles on transit)			
523.	Pick ups	500.00	500.00
524.	Canters/lorry below 7 tonnes	1,000.00	1,000.00
525.	Over 7 tonnes	1,500.00	1,500.00
526.	20ft container and over	2,000.00	2,000.00

21. The Petitioner avers that coral blocks, ballast stone chips, and sand are natural resources of the class known as minerals, which under the fourth Schedule are within the domain of the National Government, and no County has any power to levy any kind of taxation relating to such natural resources.
22. This Court adopts the reasoning in *Bustra Saving and Credit Co-operative Society Limited & another vs. County Government of Tharaka Nithi County* [2019] eKLR where it was held as follows:

“A look at the list of what constitutes "minerals" as per the list given in the 1st schedule include minerals like diatomite, Fluorite, Phosphates, Precious stones (diamond, rubies) , rare minerals etc. The quarry stones or quarry products like the one specified in Part I of 9th Schedule of the impugned Act, certainly are not included. I am therefore not persuaded by the Petitioner’s contention that Respondent has charged fees on a product that is within the armpit of National Government. Quarry stones, murrum, quarry chips and other quarry products are not in my view minerals governed under the *Mining Act* No.12 of 2016. Furthermore Tharaka Nithi County Finance Act 2018 does not state that the Act is based on the minerals being transported. It does not attempt to regularize even the amount being transported. It only states that the cost to be paid by transporters is pegged on the type of vehicle used for transport. It would be extrapolating the objects and purpose of the *Mining Act* too far in my view, if one was to conclude that quarry stones, hardcore and other quarry products like quarry chips fall within the meaning of "minerals" in the *Mining Act* 2016. It is clear that under the Mineral Act, one has to acquire prospectors license, mining, permit among other requirements under the *Mining Act* to prospect or mine minerals in Kenya. Those requirements do not apply to mining or production of quarry stones, murrum or quarry chips. Parliament when enacting the *mining Act* certainly never intended to include quarry stones, murrum or quarry chips as part of "minerals" within the meaning of that Act and more so as can be seen in the First Schedule of the Act the same are missing in the list provided.”

23. From the foregoing, I find and hold that coral blocks, ballast stone chips, and sand are not minerals as contemplated under the first schedule of the *Mining Act* No. 12 of 2016. Therefore, they do not fall within the realms of the National Government. As a result, the Respondent is not acting ultra vires in levying cess on the said goods.



24. This Court also finds that the Respondent is levying cess on all goods carrying vehicles entering Mombasa County and offloading in Mombasa County. Therefore, it matters not whether the transporter is ferrying "natural resources" or even farm produce to various markets within Mombasa County. The cess levy imposed by the Respondent on transportation of goods within its jurisdiction as envisaged under Article 209 (4) of *the Constitution* and is legitimate so long as it is a service charge backed by the necessary County legislation.

What legislation mandates the Respondent to levy cess?

25. Legislation has been defined to include County Legislation as provided under Article 260 of *the Constitution* which states: -

“legislation” includes--

- (a) an Act of Parliament, or a law made under authority conferred by an Act of Parliament; or
- (b) law made by an assembly of a County Government, or under authority conferred by such a law;”

26. Looking at the Constitutional provisions as regards taxation, Article 209 of *the Constitution* provides: -

“(1) Only the national government may impose—

- a. income tax
- b. value-added tax;
- c. customs duties and other duties on import and export goods; and
- d. excise tax

(2) An Act of Parliament may authorise the national government to impose any other tax or duty, except a tax specified in clause (3) (a) or (b).

(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.

(4) The National and County Government may impose charges for the services they provide.

(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.”

27. . Article 210 (1) of *the Constitution* provides: -

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



28. County Governments are vested with the powers to make legislation under Article 185 (2) of the Constitution which states: -

“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.”

29. Section 5(2) (a) of the County Government Act No. 17 of 2012 gives effect to Article 185 (2) of the Constitution as it provides:

“5(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) ...”

30. . Section 21 (4) of the County Government Act provides for the implementation of bills for purposes of taxation and states: -

“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”

31. The issue of cess levy took center stage in the case of Base Titanium Ltd vs. County Government of Mombasa & Another [2017] eKLR where the court made the following observations:

“At the outset, it is conceded and I agree that in view of Article 62 of the Constitution which defines public land to include minerals and vests such land in the National Government, there is no power in a County Government to levy a tax or other charge on the mineral product. However, to extrapolate the interpretation to conclude that a levy charged on the vehicles that transport the titanium minerals, as with transportation of any other goods is prohibited by the constitution is in my view erroneous. With respect, I do not accept that a charge on the “transportation” thereof, a charge for road service provided by the County Government, is a charge on the “mineral” product itself, which is the province of the National Government. The cess charges are on the vehicles transporting goods of any kind entering and off-loading in Mombasa and are not a tax or charge on the product transported.”



32. From the foregoing, it is not in doubt that County Governments have legislative discretion to impose charges for services rendered under Article 209 (4), the only way to impose taxes is via County legislation, and in this case, it is the County Finance Act, 2018. This court is of the considered view that the Respondent cannot be faulted for levying cess fees or service charge on transporters ferrying natural resources into their area of jurisdiction.

33. The Petitioner also alleged that they are double taxed as they pay annual revenue to the County Government where the natural resources are sourced from, only to be subject to cess levy while offloading the natural resources in Mombasa County. What is a double taxation was defined in the case of Kenya Pharmaceutical Association and others vs. Nairobi City County and the 46 other County Governments Pet.97/2016 to mean:

“What is the meaning of double taxation? Double taxation is the taxing of the same income twice.”

34. I find and hold that the tax or charge on the stone is not the same as that of transportation and it is not the same as that which the owners of the stone are charged. The tax under challenge is for doing business in the Respondent’s County of transporting Coral stone etc. So far, the Petitioners have not demonstrated that they are taxed twice on the same income.

Whether there was public participation in the enactment of Section 6(a) (71) of the Mombasa County Finance Act.

35. The question of public participation in legislative processes applies both at the National level (Parliament) and the County level (County Assembly). At the County level this principle was appreciated in *Doctors for Life International vs. Speaker of the National Assembly and others* (CCT 12/05) [200] 2 ACC 11, 2006 (12) BCLR 1399 (CC) 2006(6) SA 416 (CC) as hereunder;

“If legislation is infused with a degree of openness and participation. this will minimize dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law making process is to ensure that the legislators are aware of the concerns of the public. And if the legislatures are aware of those concerns. This will promote legitimacy and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible accountable and responsive. And this enhances our democracy...”

36. Public participation is provided under in Article 174 of *the Constitution* as one of objects of devolution. It provides:

Article 174, “The objects of the devolution of government are:

- (a). ...
- (b). ...
- (c) To give power of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
- (d)

37. Article 196 of *the Constitution* provides:

“(1) A County Assembly shall:



- (a) Conduct its business in an open manner, and hold its sittings and those of its committees, in public and
 - (b) Facilitate public participation and involvement in the legislative and other business of the Assembly and its committees.
- (2) A County Assembly may not exclude the public, or any media from any sitting unless in exceptional circumstances. The speaker has determined that there is a justifiable reason for doing so”

38. Article 201 of *the Constitution* also provides for public participation in financial matters. It reads:

“The following principles shall guide all aspects of public finance in the Republic: -

- (a) There shall be openness and accountability, including public participation in financial matters.
- (b) ...”

39. Section 115 of the County Government Act 2012 provides:

“(a) Public participation in the county planning processes shall be mandatory and be facilitated through mechanisms provided form part VIII of this Act.”

40. The courts have weighed in on the aspect of public participations in law making process. In Republic vs. County Government of Kiambu Ex- parte Robert Gakuru & Another [2016], as cited by the Petitioner herein, Odunga J made the following useful observations:

“In my view public views ought to be considered in the decision making process and as far as possible the product of the legislative process ought to be a true reflection of the public participation so that the end product bears the seal of approval by the public. In other words, the end product ought to be owned by the public. This position public participation is attained both quantitatively and qualitatively. The County Assemblies ought to do whatever is reasonable to ensure that as many of their Constituencies in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous ...”

41. The question then is, whether the impugned Section 6(a) (71) of the Mombasa County Finance Act was subjected to public participation. At paragraph 9 of the petition, the Petitioner states that there was no proper public participation as contemplated under Article 10,174,196 and 201 of *the Constitution* and Section 87 and 88 of the County Government Act, 2012 as no notices were carried out either in local dailies, local radio stations and local television stations sensitizing the Petitioner and other members of public of the intended imposition of cess in respect of loading of coral blocks, ballast, stone chips and sand.

42. The Respondent on its part stated that there was public participation as the public had been invited to give its views on the Mombasa County Finance Act. A copy of the newspaper advertisement made on the 29.8.2018 was annexed together with a letter dated 31.7.2018 which demonstrated that a stakeholders’ workshop had been held and their input captured in the finance bill for the year 2018/19.



43. Majanja J in *Commissioner for the Implementation of the Constitution vs. Attorney General & 2 others*, [2013] eKLR expressed himself as follows:

“The National Assembly has a broad measure of discretion in how it achieves the object of public participation. How this is affected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public. Indeed, as Sachs J observed in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at para. 630, “The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

44. Similarly, in *Diani Business Welfare Association and Others vs. The County Government of Kwale* [2015] eKLR where the Court at Paragraphs 45, 46 and 51 found and held:

“it does not matter how public participation was effected. What is needed in my view is that the public was accorded some reasonable level of participation.....it is an indictment against the Petitioners that they would chose to ignore an important civic and constitutional duty to shape the financial and budgetary policy, the implementation of which would affect them in terms of revenue measures and the utilization of that revenue...For all these reasons, I am satisfied that there was public participation, and the Petitioners ignored to present their views during public participation stage of the budget proposals. They were granted opportunity and they failed to take advantage thereof.”

45. Facilitation of public participation implies offering the public sufficient information about the bill under concern and allowing them sufficient time to give their responses. In *Doctor’s for life International vs. The Speaker National Assembly and Others* (supra) the court held that-

“Without the knowledge of the fact that there is a bill under consideration, what its objective is and when submissions may be made, interested persons who wish to contribute to the lawmaking process may not be able to participate and make such contributions.”

46. In this case, the Respondent informed the members of the public and the stakeholders of the Finance Bill 2018/2019 by way of an advertisement in the Daily Nation Newspaper on the 29.8.2018. The Respondent also informed the members of the public that the draft Bill could be downloaded from the Respondent’s website. The Petitioner states that this was not adequate public participation on the matter. In my view however, and going by above authorities, what amounts to public participation will vary depending on the circumstances of each case. A court called upon to determine the constitutionality or otherwise of a legislation based on public participation must consider the nature of the impugned Act, and the population that it affects. In this particular case, while the impugned section of the Finance Act affects all the residents of Mombasa County, only the Petitioner has come to challenge it. The inference is that other sections of the society affected by it are satisfied. It is however, the undiluted right of the Petitioner to come to court. The court in its decision must consider the impact of declaring a section of the law unconstitutional.

47. While the Petitioner may not have been very happy with the level of public participation which the Respondent undertook, this court is satisfied that in the circumstances there was adequate public participation in the promulgation of the said legislation. More fundamentally, however, County Finance Act has only a functional period or validity of one year. Soon another Finance Act will come



into force. The Petitioners should seek to have greater participation in the next Finance Act rather than seeking to invalidate a legislation which is already outdated. For avoidance of doubt, however, this court finds and holds that there was adequate public participation in the promulgation of the statute under reference.

48. For the foregoing reasons the petition herein is dismissed. Parties to bear own costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD DAY OF JANUARY, 2020.

E. K. OGOLA

JUDGE

In the presence of:

Ms. Tum holding brief Gikandi for Petitioner

Ms. Ombuga holding brief Kisingo for Respondent

Mr. Kaunda Court Assistant

