



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 17 OF 2016

IN THE MATTER OF: ARTICLES 20, 21,22,23,40,47,48,50,159 & 259 OF THE CONSTITUTION

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 27,

40, 47 AND 209 (5) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE PUBLIC FINANCE MANAGEMENT ACT

BETWEEN

WELLS FARGO LIMITED.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....1ST RESPONDENT

HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

The Petition

1. The Petitioner, vide **Petition** herein dated 25th April, 2016 prays for the following Orders against the Respondents:-

- a. A declaration do issue that the Petitioner’s right not to be unlawfully deprived of property, protected by Article 40(2) of the Constitution, has been violated by the 1st Respondent by its action of impounding the Petitioner’s vehicles.
- b. A declaration do issue that the Petitioner’s Constitutional right to fair administrative action as guaranteed by Article 47 of the Constitution has been infringed by the 1st Respondent in threatening to impound its motor vehicles for the purported non-payment of a branding levy without issuing any prior Notice as required by law.
- c. A declaration that any bylaw imposing a levy or charge on corporate branded vehicles offends the provisions of Article 209(5) of the Constitution and is therefore unconstitutional and such bylaw be invalidated forthwith.
- d. A declaration that the arrest and prosecution of the Petitioner’s drivers in criminal case numbers M-2494/16 and M.2390/16 are invalid for being based on an unconstitutional bylaw of the County of Mombasa and be dismissed forthwith.
- e. The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of Justice.

2. The **Petition** is supported by **Affidavit of Lawrence Munyi** sworn on 25th April 2016. **Mr. Munyi** is the Hub Manager for Petitioner’s Mombasa office. The Petitioner claims that it operates a security business throughout the Republic of Kenya. As part of its business, the

Petitioner has a fleet of motor vehicles which are branded with its logo and trademark which it relies on to provide its various services.

The Response

3. The 1st Respondent opposed the **Petition** vide a **Replying Affidavit** sworn by **Ibrahim Basafa** on **9th June, 2016**. The deponent is the 1st Respondent's officer in charge of branding and advertisement. The deponent deposed that the 1st Respondent, by powers conferred upon it by **Article 185(1)** and **183(2)** of the **Constitution**, duly and lawfully enacted **Mombasa County Finance Act, 2015/2016**. In doing this, the 1st Respondent was fulfilling the provisions of **Part XI, Section 105(1)(f)** of the **County Government Act** which tasks the 1st Respondent with effective resource mobilization for sustainable development. Therefore, the charges levied by the 1st Respondent which include branding and storage fees that the Petitioner is complaining about are perfectly within the confines of **Articles 209** and **210** of the **Constitution**, which is the legal foundation for levying cess and other applicable charges.

4. The 1st Respondent states that it is true that the Petitioner is required to pay branding fees but failed to do so prompting the 1st Respondent's officers to impound its Motor Vehicles Registration **Nos.KBK 486X** and **KBP 894Y**. Consequently, the Respondent's drivers, **Januaris Katiku** and **Francis Chengo** were charged with displaying advertisement without authority contrary to **County by law 232(1)** as read with by **law 257** of the **Building Code, County Government (Adoptive) by-law, Building Orders 1968**.

5. Consequently, the 1st Respondent avers that it did not violate the provisions of **Article 47(2)** of the **Constitution** as alleged by the Petitioner because the 1st Respondent's actions were not arbitrary as they were sanctioned by the Constitution, the County Government Act, the County Finance Act and all other relevant legislation. Further the 1st Respondent states that the Petitioner was not condemned unheard as the two drivers who are its lawful agents were charged to enable criminal justice take its course where the Petitioner would have had the opportunity to defend itself against the charges leveled against its agents.

6. The 1st Respondent states that declaring the County Finance Act unconstitutional will violate the very Constitution that provides for enactment of legislation aimed at ensuring the smooth running of affairs of the Respondent as the Act does not hinder the mobility of goods and services as claimed except in instances where a corporate entity fails to pay branding fees as was the case with the Petitioner.

7. The 2nd Respondent did not file a response to the **Petition** but instead submitted on issues of law.

8. The Petitioner on **27th April, 2016** secured interim orders stopping the 1st Respondent from demanding any charges relating to branding of corporate vehicles and from impounding the Petitioner's motor vehicles until the hearing of Petitioner's application dated **25th April 2016**.

9. Having secured the above orders, the Petitioner went to sleep, and did not prosecute this Petition until the 1st Respondent filed application by way of **Notice of Motion** dated **17th April 2019** praying for the dismissal of the Petition for want of prosecution. The application for dismissal of Petition was dismissed through this Court's **Ruling** rendered on **5th May 2020**. The court at the same time directed parties to file submissions to the Petition.

Submissions

10. The Petitioner filed submissions on **22nd August 2016**, and additional submissions on **7th July 2020**. The 1st Respondent filed submissions on **16th September 2016**, and final submissions on **7th July 2020**. The 2nd Respondent files submissions on **20th September 2016** and on **23rd September 2016**.

11. The submissions were **orally highlighted** in court on **11th November 2020**.

Determination

12. I have carefully considered the Petition, the opposing Affidavit and submissions of parties. In my view, the issue for determination is whether the suit interest still subsists in light of the fact that the County of **Mombasa Finance Act 2015/2016** being challenged is no longer in operation.

13. **Mr. Omino**, Learned Counsel for the Petitioner, submitted on this issue, stating that while it is true the relevant finance year has now come to an end, the nature of the complaint is still in the current **Finance Act**; and that in any event, **prayer No.(c)** in the Petition is a continuing prayer.

14. On his part, **Mr. Makuto**, Learned Counsel for the 2nd Respondent submitted that a Petition cannot be filed to take care of future events. Counsel submitted that the subject matter of the Petition herein has been overtaken by events in the current Finance Act. Counsel also submitted that the Petition does not seek any orders against the Attorney General and so the Petition should be dismissed in any event.

15. **Miss Nyagah**, Learned Counsel for the 1st Respondent submitted that the County Government has the jurisdiction to impose branding levy on motor vehicles within its jurisdiction, and therefore, the challenged Finance Act is constitutional.

16. In my view, it matters not whether the Finance Act under challenge is no longer operational. What is relevant is the complaints before the court, and the state of the law when the complaint was raised. This is so because, there could be liabilities accrued arising from the breach of law which was applicable then. Those liabilities must still be addressed with regard to the provision of the law as it was then. In my view, the Court will have to determine the following issues;

Issues for Determination:

1. Whether the levying of branding fees is constitutional?
2. Whether the Petitioner's fundamental rights and freedoms have been violated?

1. Whether the levying of branding fees is constitutional?

17. The Petitioner alleges that the by-law imposing branding levy on corporate vehicles violates the provisions of **Article 209(5)** of the Constitution.

Article 209(4) & (5) of the **Constitution of Kenya, 2010** provides as follows;

(4) The national and county governments 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.

18. Clearly, the Constitution empowers the County government to impose charges for services that they provide. County transport falls under the ambit of the County Government under the **Fourth Schedule** of the **Constitution of Kenya 2010**. Consequently, **Article 183(2)** of the **Constitution** empowers the County to make necessary laws for effective performance of the powers and functions provided for under the Fourth Schedule of the Constitution. Consequently, the Respondent invoked its legislative authority provided for under **Article 183(2)** of the **Constitution** and implemented the **Mombasa County Finance Act 2015/2016** which provides an annual fee of **Kshs.15,000/=** for vehicle branding. Therefore, the Respondent in enacting the **County Finance Act** acted in accordance with the Constitution. In **Andrew Wasswa Atetwe t/a Kilimanjaro Auctioneers & 21 Others...Vs... Mombasa County Government & Another [2015]Eklr**, the Court stated as follows:-

“The trade licensing fee is paid for trading in the County. In this regard, I agree with the decision of the court in Thuku Kiroro & 4 Others..Vs.. County Government Of Muranga [2014]eKLR, where the court held:-

“Moreover, where a statute or the constitution for that matter, has expressly delegated specific functions, duties or responsibilities to particular organs, state or otherwise, this court will be hesitant to intervene and curtail these organs’ efforts to execute their statutory or constitutional mandates, it is the duty of this court to interpret the constitution in a purposive rather than a restrictive manner (emphasis mine). As far as devolution is concerned, the County Governments must be encouraged, and not restrained to deliver on their devolved functions as long as they are intra vires the constitution and the applicable statutes.”

19. In **Base Titanium Limited...Vs...The County Government Of Mombasa & Another [2017]eKLR**, the Court held that:-

“....I do not consider it sufficient to show the loss incurred by the petitioner as a result of payment of the charges as evidenced by the copies of receipts attached to the Petition and the supplementary bundle thereof produced at the hearing with consent of the counsel for the 1st respondent. Unless, it were demonstrated that the amount of tax or cess charge was prohibitive to the continued conduct of the petitioner’s business as to affect its decision to invest in the country and lend credence to the Cabinet Secretary’s forecast of loss of investment flow in the country”

20. The burden of proof in demonstrating that the branding levy imposed by the 1st Respondent would hinder movement of goods lies on the Petitioner. The averment by the Petitioner that levying of charges would affect movement of goods throughout the 47 Counties was not proved.

2. Whether the Petitioner's fundamental rights and freedoms have been violated?

21. It is trite law that for the Court to grant a relief of violation of rights and freedoms, then the same must be precisely pleaded. This position was taken in **Godfrey Paul Okutoyi (Suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya)...Vs...Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association (Being sued on behalf of Kenya Bankers Association) & Another [2018]eKLR**, where the Court held:-

“... It is now an established principle of law that anyone who wishes the court to grant a relief for violation of a right or fundamental freedom, must plead in a precise manner the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it. This was stated in the case of Anarita Karimi Njeru v Republic (No.1)-[1979]KLR 154 where the Court stated;

“ if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important(if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.” (see also Meme v Republic & another [2004] 1 KLR 637)

22. The Petitioner alleges that the impounding of its Motor Vehicles was conducted without notice as required by **Article 47(2)** of the

Constitution and that the same deprived them of their property as provided under **Article 40(2)** of the **Constitution**. The Petitioner however did not raise any issues with the fact that there was public participation prior to enactment of the **County Finance Act 2015/2016**. This is to mean that they were well aware of the existence of the Finance Act, the charges levied and consequences of failure to pay those charges. If at all they had any objection to the branding fees, they ought to have raised the same during public participation.

23. In **Milly Glass Works Limited & 3 Others...Vs...County Government of Mombasa & 2 Others [2016]eKLR**, the Applicants just like in the case herein contended that the **Mombasa Finance Bill 2014** was unconstitutional because it offended the mandatory provisions of **Section 22, 23** and **24** of the **County Government Act**. The Court stated:-

36. The national values and principles require participation of the people in the enactment of the law. Those values are possible under Article 10, are expanded and reiterated by Article 174 of the Constitution that sets out objects of devolution, and such objects are to be achieved through facilitation of public participation and involvement in the legislative and other business of the assembly and its committees. Besides a county assembly is prohibited by Article 196(2) from excluding the public, or any media, from any sitting unless in exceptional circumstances the Speaker has determined that there are justifiable reasons doing so.

37. The Petitioners herein are all major players and captains of industry in Kenya and in particular in the County of Mombasa. As well managed corporate entities they are expected to have in their Management Boards, a Committee or Committees on corporate communication whose functions would include keeping abreast in particular, with legislative proposals which would affect not only their investment, but their operations generally. Such committee or department would not have missed the publication of the County of Mombasa Finance Bill 2014. It would also not have missed the publication in the Star Newspaper that the public meeting which was scheduled for 9th October, 2014 had been postponed to 14th October, 2014 and the time and location duly indicated.

38. It seems to me also and it behooves entities such as the Petitioners through their Communication Departments or Committees of the Board to take note of communication or announcements by County Governments of all proposed legislation. In my humble view, the duty imposed upon every citizen under Article 3 of the Constitution to respect, uphold and defend the Constitution, includes the duty and obligation to be involved and participate in any legislative activity both at the national and county level. Such involvement and participation enhances both elective and participatory democracy.

24. It is the finding hereof that the Petitioner did not require any other notice save for the knowledge of the existence of the **Mombasa County Finance Act 2015/2016**. It is trite law that ignorance of the law is no defence. The Petitioner was aware of the fact that the **County Finance Act** required them to pay branding fees. They never objected to the said Act. They cannot now purport to object to the objectives of that Act. Therefore, there can be no place for submitting that the Petitioner's fundamental rights and freedoms were violated by the 1st Respondent's actions.

3. Whether the impounding of the Petitioner's vehicles was justified.

25. The Petitioner's drivers **Januaris Katiku** and **Francis Chengo** were charged with Displaying Advertisement without Authority contrary to County by-law 232(1) as read with by-law 257 of the Building Code, County Government (Adoptive) by-law Building Orders 1968. As at the year **2016**, the by-laws were still in force and valid. Hence why the Petitioner's drivers were charged under the by-laws.

By-law 257(2) of the **Building Code, 1968** provides as follows;

“Any person who is guilty of an offence under these bylaws shall be liable to a fine not exceeding two thousand shillings or imprisonment for a term not exceeding six months or to both such fine and such imprisonment and if the offence is of a continuing nature, to a further fine not exceeding twenty shillings for every day or part thereof during which such offence shall continue but in any event the aggregate of any such fine imposed shall not, in the case of any one continuing breach of the bylaw exceed two thousand shillings”

26. It is not the duty of this Court at this stage to find whether or not the charges were proper. It is enough that the Petitioner's agents were charged in a court of law and given an opportunity to reply to the charges.

27. In the upshot, it is the finding hereof that the Petition before the court lacks proof. The same is dismissed with costs to the Respondents.

DATED, SIGNED and DELIVERED at MOMBASA on this 17th day of DECEMBER, 2020.

E. K. OGOLA

JUDGE

Judgment delivered in chambers via MS Teams in the presence of:

Mr. Omino for Petitioner

Mr. Mekuti for 2nd Respondent

M/S Nyaga for 1st Respondent

NOTE:

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.