



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**

**CONSTITUTIONAL PETITION NO. 44 OF 2016**

**IN THE MATTER OF: ARTICLES 22, 23, 47, 159 & 165 OF THE CONSTITUTION OF KENYA;**

**AND**

**IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT, 2015, SECTIONS 7, 9 & 11 OF THE ACT**

**AND**

**IN THE MATTER OF: ALLEGED VIOLATION OF RULES REGARDING THE COLLECTION OF CESS FOR VEHICLES IN THE MOMBASA COUNTY**

**BETWEEN**

**TIMOTHY RUWA FONDO**

**T/A RUWA CARGO CONTRACTORS.....PETITIONER**

**AND**

**COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT**

**JUDGMENT**

1. By way of a Petition dated 6<sup>th</sup> September, 2016 and brought under Rules 9 & 10 of the Constitution of Kenya, 2010 (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, the Petitioner seeks the following orders:

**a) A declaration that the cess charged by the County Government of Mombasa was illegal.**

**b) A permanent injunction to restrain the Respondent from imposing the cess charges on the Petitioner's motor vehicle or any other motor vehicle on transit.**

**c) Costs of the Petition.**

The Petition is supported by the grounds set out therein and by the verifying affidavit of **TIMOTHY RUWA FONDO** sworn on 6<sup>th</sup> September, 2016.

2. The Petitioner is a Business Name incorporated under the Registration of Business Act, Cap 499 Laws of Kenya while the Respondent is the County Government of Mombasa established under Article 176 of the Constitution of Kenya, 2010 and the County Government Act.

3. The Petitioner alleges that he owns a prospecting license from the Ministry of Environment and Mineral Resources and utilizes it to harvest silica sand at Ramisi area of Msambweni District and the petitioner then sells the sand harvest to prospective buyers.

4. The Petitioner claims that on 20<sup>th</sup> and 21<sup>st</sup> August, 2017 his vehicle registration no. KCG 712J carried silica sand from Kwale County on transit to Nairobi following a purchase order **from ARM CEMENT** made on 8<sup>th</sup> August, 2016.

5. The Petitioner alleges when the aforementioned vehicle reached the Likoni Revenue barrier it was subjected to cess payment by the county government of Mombasa being Kshs. 2,300 each day.

6. The Petitioner further claims that the cess charges were contrary to the Mombasa County Finance Act which requires cess to be paid by all goods carrying vehicles entering Mombasa County and offloading in Mombasa County and not vehicles on transit.

7. It is the Petitioner's case that the cess charged on motor vehicle registration no. KCG 712J was illegal and contrary to the law.

### **Response**

8. The Respondent opposed the Petition by way of a replying affidavit sworn by **JIMMY WALIAULA** on 17<sup>th</sup> March, 2017.

9. The Deponent states that there exists the Mombasa County Finance Act 2016/2017 which provides that cess charges shall not apply to vehicles on transit. However, the deponent claims that he was informed by one of the Respondent's officers, **HAMISI SALA** who is in charge of the Likoni Revenue Barrier that some of the transporters who are not on transit fake documents to evade payment of cess thus the requirement that one has to produce documentation that the goods/cargo are on transit to other counties.

9. In this instance, the deponent alleges that on 19<sup>th</sup> August and 21<sup>st</sup> August, 2016, the Petitioner was transporting silica sand aboard his motor vehicle registration no. KCG 721J and on reaching the Likoni Barrier he was required to show documentation that the silica sand was on transit. The Respondent alleges that the Respondent, on both days, failed to provide the said documentation hence the motor vehicle was charged cess for the goods.

10. It is the Respondent's case that its action to levy cess on motor vehicle no. KCG 712J is not contrary to the Mombasa County Finance Act.

### **Applications**

11. Two applications were made by the Petitioner herein. The first is dated 6<sup>th</sup> September, 2017 and the Petitioner sought to have its motor vehicle no. KCG 712J allowed to transit through the County of Mombasa without being subjected to cess charges. This application was dismissed on 7<sup>th</sup> December, 2016 for want of attendance.

12. The second application is dated 6<sup>th</sup> June 2017 in which the Petitioner sought to set aside the order made on 22<sup>nd</sup> May, 2017 dismissing this application. The application was heard on 20<sup>th</sup> July, 2017 and the Respondent did not oppose the application thus the application was heard.

### **Submissions**

13. On 5<sup>th</sup> April, 2017 both parties agreed to canvass the Petition by way of written submissions. The Petitioner filed his submissions on 23<sup>rd</sup> February, 2017 while the Respondent filed its submissions on 15<sup>th</sup> September, 2017.

14. Mr. Were, learned Counsel for the Petitioner, submitted that Article 209 of the Constitution gives counties the mandate to impose taxes and other charges as Revenue and the counties may do so under the existing by-laws and directions. Counsel stated that in line with the above Article, the County of Mombasa enacted the Mombasa Finance Act 2016/2017. Part 71 of the Act provided for the payment of cess charges as follows:

**“to be paid by all goods carrying vehicles entering Mombasa county and offloading in Mombasa county and shall not apply for vehicles on transit.”**

15. Mr. Were submitted that the Petitioner was engaged in silica sand harvest and on 20<sup>th</sup> and 21<sup>st</sup> day of August 2016 its motor vehicle registration no. KCG 712J was on transit to Nairobi from Kwale following a purchase order by Athi River Mining Cement. The Applicant paid cess to the County of Kwale and on reaching the Likoni Barrier the county government of Mombasa also collected cess from the motor vehicle despite the fact that it was on transit.

16. Mr. Were submitted that there was double payment of cess charges contrary to Article 109 of the Constitution. Counsel submitted that the Petitioner had established a prima facie case warranting the issuance of an injunction as the Petitioner had a right protected under the law and the right was violated. Counsel further stated that the Respondent had failed to act in accordance with Article 209 (4) (5) of the Constitution.

17. Mr. Mohamed, learned Counsel for the Respondent submitted that the Mombasa County Finance Act 2016/2017 does provide for the payment of cess. However, cess is not payable by vehicles on transit. Counsel contended that the Respondent found out that some transporters who were not on transit were faking documents to avoid payment of cess.

18. In order to ensure that cess is paid by transporters not on transit, Counsel submitted that the Respondent required transporters on transit to provide proper documentation to the relevant officers manning the revenue barriers. Counsel contended that the Petitioner herein failed to do so thus the Respondent levied cess charges upon the Petitioner.

19. Mr. Mohamed submitted that the Petitioner had brought this petition pursuant to the provisions of the Fair Administrative Act, 2015 while Section 9(2) of the Act provides as follows:

**“The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.”**

Counsel stated the Petitioner ought to have first exhausted the internal mechanisms for appeal and review before coming to this court.

20. Mr. Mohammed contended that the Petitioner has not meet the threshold of constitutional petitions as was provided in the case of **Anarita Karimi Njeru versus Republic [1976-1980] 1KLR 1972** as follows:

**“we would however again stress that 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 reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”**

### **Analysis and Determination**

21. I have carefully considered the Petition and the submissions by both parties. The issue that arises for determination is whether the cess charged by the county government of Mombasa is illegal and whether a permanent injunction should be granted to restrain the Respondent from imposing cess charges on the Petitioner’s motor vehicle and any other motor vehicle on transit.

### **Whether the cess charged by the county government of Mombasa is illegal**

22. Article 209(3) and (5) of the Constitution of Kenya provide as follows:

**(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.**

**(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.**

23. County governments are empowered by the aforementioned Article to impose taxes. It is by virtue of this Article that the County Government of Mombasa enacted the Mombasa County Finance Act 2016/2017. This Act provides at **ITEM 71- CESS CHARGES – ENTERING MOMBASA**. It goes on to state that the cess charges are only paid by all good carrying vehicles entering Mombasa County and offloading in Mombasa County and the said charge shall not be applicable to vehicles on transit.

24. The Petitioner from his pleadings and submissions does not contend that the county government of Mombasa is empowered to impose cess charges. The Petitioner, however, argues that cess is not payable by motor vehicles on transit.

25. On the other hand, the Respondent submitted that the Petitioner did not provide proper documentation to prove that suit motor vehicle was on transit.

26. A keen perusal of the petitioner’s list of documents shows copies of two receipts annexed. The receipts are from the Likoni Revenue Barrier issued on 21<sup>st</sup> August, 2016 and 19<sup>th</sup> August, 2016 for an amount of Kshs. 2,300 each day. The Petitioner has also annexed a copy of a purchase order from **ARM CEMENT LTD** based in Athi River dated 8<sup>th</sup> August, 2016.

27. The Petitioner has not indicated whether the said purchase order or any other documentation was provided to the officers manning the Likoni Revenue barrier so as to prove that indeed the suit motor vehicle was on transit. If the Petitioner had done so then the Respondent’s officers would not have levied cess charges on the motor vehicle. The Mombasa County Finance Act is clear that cess charges are not payable by vehicles carrying goods on transit. All the Petitioner needed to prove was that his vehicle was on transit.

28. Further, the Petitioner has not laid a basis for his claim that the imposition of cess charges by the Respondent is illegal. The Petitioner’s only reason is that his motor vehicle was charged cess yet it was on transit. This is not a sufficient reason. Hence, the imposition of cess charges by the County Government of Mombasa is legal.

### **Whether a permanent injunction should be granted to restrain the Respondent from imposing cess charges on the Petitioner’s motor vehicle and any other motor vehicle on transit**

29. Having found that the imposition of cess charges by the county government of Mombasa is legal and also that the Petitioner failed to provide the Respondent’s with documents to prove that his motor vehicle was on transit, a permanent injunction cannot issue.

30. Additionally, the Petitioner has not meet the conditions set out in the case of **Giella versus Cassman Brown [1973] EA 358** for the grant

of an injunction.

31. This being a constitutional petition the Petitioner has failed to demonstrate the rights complained of and how these rights have been infringed by the Respondent.

32. For the foregoing reasons, the Petition dated 6<sup>th</sup> September, 2017 is dismissed. Parties to bear own costs.

**Dated, Signed and Delivered in Mombasa this 20<sup>th</sup> Day of March, 2018.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Ngare holding brief M/S Wasuna for Respondent

Mr. Kaunda Court Assistant