



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CORAM: D.S. MAJANJA J.**

**PETITION NO. 385 OF 2013**

**BETWEEN**

**CEREAL GROWERS ASSOCIATION.....1<sup>ST</sup> PETITIONER**

**HUGO WOOD.....2<sup>ND</sup> PETITIONER**

**AND**

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

**COUNTY GOVERNMENT OF NAIROBI.....2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF NYERI.....3<sup>RD</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MURANG'A .....4<sup>TH</sup> RESPONDENT**

**COUNTY GOVERNMENT OF TRANS NZOIA.....5<sup>TH</sup> RESPONDENT**

**COUNTY GOVERNMENT OF UASIN GISHU.....6<sup>TH</sup> RESPONDENT**

**COUNTY GOVERNMENT OF NANDI.....7<sup>TH</sup> RESPONDENT**

**COUNTY GOVERNMENT OF NAKURU.....8<sup>TH</sup> RESPONDENT**

**MINISTRY OF AGRICULTURE, LIVESTOCK & FISHERIES.....9<sup>TH</sup> RESPONDENT**

**MINISTRY OF DEVOLUTION AND PLANNING.....10<sup>TH</sup> RESPONDENT**

**THE NATIONAL TREASURY.....11<sup>TH</sup> RESPONDENT**

**AND**

**KAKUZI LIMITED.....INTERESTED PARTY/APPLICANT**

**RULING**

1. The application subject of this decision is the Notice of Motion dated 22<sup>nd</sup> June 2015 filed by the interested party. It is made under **Article 22(1)** and **50(1)** of the Constitution and **Rule 7** of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*. It seeks the following main prayer for determination:

*[4] THAT the levying of agricultural produce cess by the 4<sup>th</sup> Respondent pursuant to the County Finance Act 2013 or any other County Finance Act be declared illegal and or unlawful.*

2. The grounds of the application are set out on the face of the application and reiterated in the supporting affidavit of Denis K. Gitaka sworn on 22<sup>nd</sup> June 2015 filed in support of the application.

3. The application stems from a judgment in this matter dated 11<sup>th</sup> September 2014 by Lenaola J., in which he granted the following reliefs:

(a) *A declaration that unless there is a specific legal framework on the subject of the levying of agricultural produce cess, the actions of the 1-8<sup>th</sup> Respondents in continuing to levy/charge Agricultural Produce Cess or related tax without a supporting legal framework expressly violates the provisions of Article 210(1) of the Constitution that provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation.*

(b) *An order is hereby issued directing the 1-8<sup>th</sup> Respondents to stop the levying/charging of Agricultural Produce Cess or related tax in their areas of jurisdiction until such time as they would have enacted a supportive legal framework or until they produce evidence of such a legal framework within the next 30 days.*

(d) *The issues raised in the Petition would necessitate that although the Petitioners have partly succeeded, each Party should bear its own costs.*

(e) *Mention on a dated fixed by this Court to enable the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents comply with Order (b) above and for further directions.*

(f) *Each Party at liberty to apply.*

4. Following the decision, the 4<sup>th</sup> Respondent (“County Government of Murang’a”), sent the applicant two demand letters dated 13<sup>th</sup> May 2015 and 3<sup>rd</sup> June 2015 levying KShs. 30,742,920 being 1% of the applicant’s sales turnover for the years 2013 and 2014 respectively. The applicant contended that as at the date of the demand, the County Government of Murang’a had not complied with the judgment therefore the manner in which the cess imposed on agricultural produce by the **County Finance Act, 2013** was illegal.

5. On 24<sup>th</sup> June 2015, Mumbi Ngugi J., granted an order allowing the applicant to be enjoined to the proceedings, “*in so far as the 4<sup>th</sup> Respondent (County Government of Murang’a) is concerned.*”

6. The County Government of Murang’a opposed the application through the affidavit of Edwin Wangila Wakoko sworn on 20<sup>th</sup> July 2015. He deponed that following the judgment, the County Government of Murang’a enacted the **Murang’a County Finance Act** in compliance with the judgment.

7. When the matter came up for hearing, I directed the parties to address me and they did address me on whether the court can make the declaration sought in the application at this stage of the suit in view of the judgment made by Lenaola J.

8. Mr Gachuhi submitted that the court’s judgment was *in rem* and it stopped any of the respondents from levying agricultural produce cess within their jurisdiction and granted parties, “*liberty to apply*”. He further submitted that the liberty to apply clause recognized that when the judgment was drawn up, its working may involve matters on which it might be necessary to obtain a further decision of the court. The applicant contends that its rights were declared in the judgment and it has an interest in its enforcement since its application touches on the workings and validity of cess levied under the **Murang’a County Finance Act**.

9. Mr Gachuhi urged that the court should be guided by **Article 159** of the Constitution which requires the court to eschew technicalities in determining the issue. He maintained that **Article 22** of the Constitution empowered the court to grant any kind of relief for violation of a fundamental right or freedom. He pointed out that the County Government of Murang’a was not prejudiced as the court had all facts and arguments before it to make a determination. Counsel cited **Halsbury’s Laws of England (5<sup>th</sup> Edition, Vol. 12 para. 1165)** where the learned author states that the liberty to apply clause allows or permits persons having an interest under the judgment to apply to the court touching their interest in a summary way without again setting the case down for hearing. He also relied on the same finding in **Gateway Insurance Company Limited v Aries Auto Sprays [2011] eKLR**.

10. Ms Atuya, counsel for respondent, opposed the application on the ground that it was incompetent as the court had already rendered judgment and was *functus officio*. She pointed out that the County Government of Murang’a had the right to enact the relevant legislation following the judgment. She submitted that the effect of the application was to stop it from enjoying the fruits of its judgment and that the issues raised by the applicant were outside the scope of the judgment.

11. The resolution of this matter depends on the meaning and context of the phrase, “*liberty to apply*” in the judgment. I accept what Githinji JA., stated in **Gateway Insurance Company Limited v Aries Auto Sprays (Supra)** as follows:

*The meaning to be given to such a clause will largely depend on the context in which it is used. However, it was held in Cristel v Cristel [1951] 2 All E R 574 that such a clause cannot be used to alter or vary the agreement of the parties and that the clause meant that when the order was drawn up, its working might involve matters which it might be necessary to obtain a decision of the court.*

12. What then is the context of the case? The petitioners challenged the authority of County governments to levy cess on agricultural produce. The court held that:

[60] It is against the above background that I find that agriculture produce cess is a tax and being so, it must be imposed in accordance with law and must be anchored in an Act of Parliament or an Act of a County Assembly. To do otherwise would be in violation of **Article 209 (3) and 210(1) of the Constitution** and I so find.

13. Following the aforesaid finding, the court declared that County governments could not levy cess on agricultural produce unless it was anchored in national or county government legislation. As County governments had been levying cess, the court granted “order (b)” which restrained them from doing so until they enacted a legal framework or within 30 days of producing evidence of such a framework. It is against this background that the order for liberty to apply was made to enable each party to the suit, that is the County governments, make the necessary application to discharge restraining orders issued pending compliance.

14. My observation is fortified by the ruling of Lenaola J., dated 13<sup>th</sup> February 2015 in which he held as follows:

1. On 11<sup>th</sup> September 2014, I delivered a Judgment in which I partly ordered as follows;

*An order is hereby issued directing the 1-8<sup>th</sup> Respondents to stop the levying/charging of Agricultural Produce Cess or related tax in their areas of jurisdiction until such time as they would have enacted a supportive legal framework or until they produce evidence of such a legal framework within the next 30 days*

2. Subsequently, the following County Governments filed evidence of the fact that they had indeed enacted a Legal Framework to regulate the levying/charging of Agricultural Produce Cess: Narok, Nairobi City and Nandi.

3. The above being the case, it follows that the Judgment above no longer binds the said County Governments and to that extent the Judgment is hereby reviewed and any orders issued against the 1<sup>st</sup>, 2<sup>nd</sup> and 7<sup>th</sup> Respondents is hereby set aside. For avoidance of doubt the Judgment as against the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Respondents remains and is enforceable.

4. Orders accordingly.

15. The context of the judgment is that the matter in issue was whether the County governments could levy tax without statutory authority. The liberty to apply was the logical consequence of order (b) which was for the purpose of confirming whether County governments had enacted the legal framework for levying cess. The order was not intended to open an avenue for other parties to litigate the issue whether the legislation enacted by County governments is constitutional. All the judgment required was for County governments to enact legislation to support collection of agricultural produce cess and to return to the court if necessary for discharge of the injunctive orders.

16. I find and hold that the applicant’s case is a separate cause of action and is outside the scope of the judgment as it raises new issues concerning that legality of the **Murang’a County Finance Act** which must be agitated in a fresh and separate suit. The applicant’s application does not go towards implementation of the judgment.

17. Finally, the order under consideration stated that “*Each Party at liberty to apply*” which means that the parties referred to were the parties to the suit. Even though the applicant was made an interested party, this order merely enabled it to agitate its application. This application could not interpose the merger of the issues in the petition with the judgment by raising new and separate issues. Thus the application cannot be saved by **Articles 22 and 159(2)(d)** of the Constitution.

18. For the reasons I have set out, Notice of Motion dated 22<sup>nd</sup> June 2015 is struck out with costs to the 4<sup>th</sup> respondent.

**DATED and DELIVERED at NAIROBI this 23<sup>rd</sup> day of NOVEMBER 2018.**

**D.S. MAJANJA**

**JUDGE**

Mr Gachuhi instructed by Kaplan and Stratton Advocates for the petitioners.

Mr Atuya instructed Wairagu and Wairagu Advocates for the 4<sup>th</sup> respondent.