



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KABARNET**  
**CONSTITUTIONAL PETITION NO. 3 OF 2017**

**[Consolidating ELDORET CONSTITUTIONAL PETITION NO. 4 OF 2016]**

**BETWEEN**

**RAIPLY WOODS (K) LTD .....PETITIONER**

**VERSUS**

**BARINGO COUNTY.....1<sup>ST</sup> RESPONDENT**

**BARINGO COUNTY ASSEMBLY.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**THE KENYA FOREST SERVICE.....INTERESTED PARTY**

**AND**

**ELDORET CONSTITUTIONAL PETITION NO. 9 OF 2016**

**TIMSALES (K) LIMITED .....PETITIONER**

**AND**

**COUNTY GOVERNMENT OF BARINGO & 2 OTHERS.....RESPONDENTS**

**AND**

**THE KENYA FOREST SERVICE.....INTERESTED PARTY**

**JUDGMENT**

**INTRODUCTION**

1. This is a judgment on a consolidated petition incorporating Constitutional Petitions Nos. 4 and 9 of 2016 Eldoret which were transferred to this Court for hearing and disposal following the inauguration of the High Court at Kabarnet in January 2017. The first petition was filed on 24<sup>th</sup> February 2016 and the same amended on 10<sup>th</sup> October 2016 which is supported by an affidavit sworn by Philip Varghese, the deponent filed an amended petition on 11<sup>th</sup> October 2016. The second petition is dated 16<sup>th</sup> June 2016 and was filed as Eldoret High Court Constitutional Petition No.9 of 2016 *Timsales (K) Ltd. v. Baringo*

**County Government & others.** This petition is supported by an affidavit sworn by Jaswant Singh Rai on 16/06/2016. The petitioners filed a supplementary affidavit in support of the consolidated petition Kabarnet High Court Petition No. 3 of 2017 **Raijly Woods (K) Ltd & Another Vs Baringo County Government and 3 others.** The said petition and amended petition are opposed by the respondents who have filed response to amended petition and the 3<sup>rd</sup> and 4<sup>th</sup> respondents filed grounds of opposition dated 8<sup>th</sup> December 2016.

2. On 6<sup>th</sup> March 2017 the petitioners filed a supplementary affidavit in support of the consolidated petition now Kabarnet High Court Petition No.3 of 2017 **Raijly Woods (K) LTD & Another v. Baringo County Government & 3 others.** **The Petitioners** are limited liability companies which are involved in the trade and manufacture of forest produce and who are licensed by the Kenya Forest Service who is the owner of the state forests to procure forest produce as vested in section 4 of the Forest Act, 2005.

3. The Petitioners' cause of action is that the respondents have without constitutional and lawful authority levied cess on forest produce from state forests in Baringo County where the petitioners buy their logs. Their immediate cause of complaint is that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have increased the forest produce cess from Ksh 60,000 to Ksh 5,195,160.80. Despite Article 62(3) of the Constitution that vested state forests in the National Government, the County Assembly of Baringo has enacted the Baringo County Finance Act, 2015 which has increased the cess payable to the County yet they do not offer or provide the petitioner with any services in the course of its business. It is the petitioner's contention that the levying of cess is illegal as there is no constitutional or statutory basis for the same since there is no Act of Parliament that allows the 1<sup>st</sup> and 2<sup>nd</sup> respondents to impose the tax. Hence, it was urged, their actions are against the national values and principles of governance as envisaged under Article 10(2) of the Constitution. The petitioners state that the Constitution guarantees the right to equal protection and benefit from the law, freedom from discrimination, right to property, right to fair administrative action, consumer protection and to the environment all of which must be protected. The respondents have contravened articles 185(2) and 209 of the Constitution, when read together with section 132 of the Public Finance Management Act (PFMA) and sections 116-121 of the County Government Act (CGA), 2012 in particular section 116 of the County Government Act on delivery of services does not empower it to impose any taxes. The respondents had failed to abide by the advise by the Transition Authority in its advisory letter dated 4<sup>th</sup> December, 2015 addressed to all the 47 counties particularly paragraphs 3-8 on how to levy taxes.

#### **THE RELIEFS SOUGHT**

4. The petitioners seeks similar orders in the respective petitions, as follows:

##### **Petition No. 4 of 2016:**

*a. A declaration that the respondents actions are brazen, illegal, egregious discriminatory and violation of the petitioners constitutional rights.*

*b. A declaration that the actions of the respondents above have violated rights of the petitioner under the article 1,10,27,28,40,46,48,196 and 199 and 209 of the Constitution as read together with Sections 2, 4 and 20 of the Forests Act, 2005, Section 132 of the Public Finance Management Act, 2012 and Sections 116-121 of the County Governments Act 2012.*

*c. A declaration that Section 10 of the Second Schedule of the Baringo County Finance Act, 2015 violates the provisions of Articles 185(2) and 209 of the Constitution to the extent that it empowers the 1<sup>st</sup> respondent to levy Cess in respect of State forests owned and managed by the Kenya Forest Service within Baringo County.*

*d. An order of permanent injunction be issued to prohibit the County Government of Baringo from enforcing Section 10 of the Second Schedule of the Baringo county Finance Act, 2015 to levy Cess in respect of state forests owned and managed by the Kenya Forest Service within Baringo County.*

- e. THAT a declaration be issued to declare that the demand by Baringo County Government for payment of Cess by the Petitioner amounting to Kshs 1,266,822.96 as of 30<sup>th</sup> October, 2015 is illegal for being in violation of Articles 62(3), 185(2) and 209 of the Constitution read with Sections 2, 4 and 20 of the Forests Act, 2005, Sections 132 of the Public Finance Management Act, 2012 and Sections 116—121 of the County Governments Act, 2012.
- f. A declaration that the decisions by the respondents to enact and enforce a statute without involving the public or interested parties was contrary to the Constitution and the County Governments Acts, 2012 hence ultra vires.
- g. An order of certiorari to remove into this honorable court for the purpose of quashing the decision by the Respondents to levy additional cess amounting to double taxation.
- h. THAT a declaration be issued to declare that by dint of Articles 62(3), 185(2) and 209 of the Constitution the Baringo County Assembly has no power to enact a law providing for the levying of Cess in respect of forest produce from the State forests owned and managed by the Kenya Forest Service within Baringo County.
- i. THAT an order of prohibition be issued to restrain the 1<sup>st</sup> & 3<sup>rd</sup> Respondents from enacting a County Finance Act required by Sections 132 and 133 of the Public Finance Management Act, 2012 providing for levying of Cess in respect of forest produce from the State forests owned and managed by the Kenya Forest Service within Baringo County.
- j. THAT a declaration be issued to declare that the imposition of forest produce Cess by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents against the Petitioners in respect of forest produce from state forests owned and managed by the Kenya Forest Service within Baringo County violates the principle of fair taxation embodied in Article 201 of the Constitution.
- k. THAT declaration be issued to declare that the imposition of forest produce Cess by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents against the Petitioner in respect of State forests owned and managed by the Kenya Forest Service within Baringo County contravenes Article 209(5) of the Constitution which prohibits counties from exercising taxation and other revenue raising powers in a way that, inter-alia, prejudices national economic policies and economic activities across county boundaries.
- l. THAT a declaration be issued to declare that the imposition of forest produce Cess by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents against the Petitioner in respect of State forests owned and managed by the Kenya Forest Service within Baringo County contravenes Article 209(4) for levying a charge without providing any service to the Petitioner.
- m. THAT a declaration be issued to declare that the imposition of forest produce Cess by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents against the Petitioner in respect of State forests owned and managed by the Kenya Forest Service within Baringo County violates the Petitioner's right to equal protection of law protected by Article 27 of the Constitution for imposing a tax prohibited by Articles 62, 185(2) and 209 of the Constitution.
- n. THAT a declaration be issued to declare that within the meaning of Article 27 of the Constitution Section 10 of the Second Schedule of the Baringo County Finance Act, 2015 is null and void for being discriminatory against the Petitioner for imposing payment of Cess without providing any Service to the Petitioner in relation to the harvesting/procurement of forest produce from State forests in Baringo County owned and managed by the Kenya Forest Service.
- o. THAT a declaration be issued to declare that the imposition of Cess by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents against the Petitioner in respect of forest produce it has purchased from the Kenya Forest Service and detention of its trucks amount to a violation of the Petitioner's right to enjoy the

benefit of ownership of property and freedom from arbitrary deprivation of ownership and use of property.

p. THAT a declaration be issued to declare that the seizure/ detention of the petitioner's trucks in purported enforcement of Section 10 of the Second Schedule of the Baringo County Finance Act, 2015 violates the Petitioners right to fair administrative action enshrined in Article 47 of the Constitution.

q. THAT a declaration be issued to declare that the seizure and detention of the Petitioner's trucks by the First Respondent without a court order amounts to gross violation of the Petitioner's right to fair hearing protected by Article 50(3) of the Constitution.

r. An order for compensation of the Petitioner for the violation of its rights and freedoms under Articles 27, 40 and 47 of the Constitution.

s. An order for compensation of the Petition by the First Respondent for illegal detention of its trucks and consequential loss of user.

t. The petitioner be paid costs of the petition.

**Petition No. 9 of 2016:**

(a) THAT a declaration be issued to declare that Section 10 of the second Schedule of the Baringo County Finance Act, 2015 violates Article 185 (2) and 209 of the Constitution to the extent that it empowers the First Respondent to levy Cess in respect of State forests owned and managed by the Kenya Forest Service within Baringo County.

(b) THAT an order of permanent injunction be issued to prohibit the County Government of Baringo from enforcing Section 10 of the Second Schedule of the Baringo County Finance Act, 2015 to levy Cess in respect of State forests owned and managed by the Kenya Forest Service within Baringo County.

(c) THAT a declaration be issued to declare that the demand by Baringo County Government of payment of Cess by the Petitioner amounting to Kshs 1,266,822.96 as of 30<sup>th</sup> October, 2015 is illegal for being in violation of Articles 62(3), 185(2) and 209 of the Constitution read with Section 2, 4 and 20 of the Forests Act, 2005, Section 132 of the Public Finance Management Act, 2012 and Section 116 – 121 of the County Government Act, 2012.

(d) THAT a declaration be issued to declare that by dint of Article 62(3), 185 (2) and 209 of the Constitution the Baringo County Assembly has no power to enact a law providing for the levying of Cess in respect of forest produce from the State forests owned and managed by the Kenya Forest Service within Baringo County.

(e) THAT an order of prohibition be issued to restrain the 1<sup>st</sup> – 3<sup>rd</sup> Respondents from enacting a County Finance Act required by section 132 and 133 of the Public Finance Management Act, 2012 providing for levying of Cess in respect of forest produce from the State forests owned and managed by the Kenya Forest Service within Baringo County.

(f) THAT a declaration be issued to declare that the imposition of forest produce Cess by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents against the petitioner in respect of Forest produce from State Forests owned and managed by the Kenya Forest Service within Baringo County violates the principles of fair taxation embodied in Article 201 of the Constitution.

(g) THAT declaration be issued to declare that the imposition of forest produce Cess by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents against the Petitioner in respect of State forests owned and managed by the Kenya

Forest Service within Baringo County contravenes Article 209 (5) of the Constitution which prohibits counties from exercising taxation and other revenue raising powers in a way that, inter-alia, prejudices national economic policies and economic activities across county boundaries.

(h) THAT a declaration be issued that the imposition of forest produce Cess by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents against the Petitioner in respect of State forests owned and managed by the Kenya Forest Service within Baringo County contravenes Article 209 (4) for levying a charge without providing any service to the petitioner.

(i) THAT a declaration be issued to declaration that the imposition of forest produce Cess by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents against the Petitioner in respect of state owned and managed by the Forest Service within Baringo County violates the petitioner's right to equal protection of law protected by Article 27 of the Constitution for imposing a tax prohibited by Article 62, 185 (2) and 209 of the Constitution.

(j) THAT a declaration be issued to declare that within the meaning of Article 27 of the Constitution Section 10 of the second schedule of the Baringo County Finance Act, 2015 is null and void for being discriminatory against the petitioner for imposing payment of Cess without providing any service to the petitioner in relation to the harvesting/procurement of forest produce from state forests in Baringo County owned and managed by the Kenya Forest Service.

(k) THAT a declaration be issued to declare that the imposition of Cess by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents against the Petitioner in respect of forest produce it has purchased from the Kenya Forest Service and detention of its trucks amount to a violation of the Petitioner's Right to enjoy the benefit of ownership of property and freedom from Arbitrary deprivation of ownership and use of property.

(l) THAT a declaration be issued to declare that the seizure/detention of the Petitioner's trucks in purported enforcement of Section 10 of the Second schedule of the Baringo County Finance Act, 2015 violates the Petitioners right to fair administrative action enshrined in Article 47 of the Constitution.

(m) THAT a declaration be issued to declare that the seizure and detention of the Petitioner's trucks by the First Respondent without a court order amounts to gross violation of the Petitioner's right to four hearing protected by article 50(3) of the Constitution.

(n) An order for compensation of the Petitioner for the violation of its rights and freedoms under Article 27, 40, 47 and 50 of the Constitution.

(o) An order for compensation of the Petition by the First Respondent for illegal detention of its trucks and consequential proceedings be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

(p) Costs of the Petition and other incidental proceedings be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

5. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed their response to the consolidated Petition urging as follows:

a) The 1<sup>st</sup> and 2<sup>nd</sup> respondents are statutory bodies established under Article 176(1) and 185 of the Constitution and Article 209 (3) with section 132 of the Public Finance Management Act to raise revenue by imposing taxes to deliver adequate services to its constituents' and they can make laws as necessary for that purpose, such as the 2015 Baringo County Finance Act.

b) That the public, interested parties, stakeholders and also the petitioner herein was informed of the proposed finance bill so that they could raise queries, concerns and give their input . There were publications in **The Standard Newspaper** and **The Daily Nation**. Through this notification members of various sub counties attended the public forums in their respective meeting places.

Prior to the promulgation of the Constitution the petitioners paid monthly cess of Ksh60,000 to the 1<sup>st</sup> respondent.

c) The respondents aver that there was an increment in cess from ksh.500 per tonne to 1000 per tonne on the harvested trees upon the enactment of Baringo Finance Act. The amount is modest, reasonable, adequate and fair to enable it discharge its mandate by providing services to members of the public. The petitioners herein as at 30<sup>th</sup> October 2015 have arrears over Ksh 1,146,822.96 which they do not dispute. They have however continued to harvest the tress allocated to them without making any payment thus the respondents decided to seize and detain the petitioner's trailers in execution for purposes of levying distress. They have annexed invoices in the names of Raiply and Timsales Ltd, attendance list and various corresponding letters between the respondents and the petitioners. Whereas other loggers have complied with the new laws the petitioners are allegedly yet to comply.

d) The petitioners herein have brought the petition in court after the lapse of 90 days which is the requisite period within which to lodge a complaint in regards to violation of section 15 and 88 of the County Government Act. The petitioners have refused to pay revenue from 2014 thus if the orders sought herein by the petitioners is to frustrate the petitioners. The same is made in bad faith since it does not raise any cause of action, is incompetent, bad in law and an abuse of the court process.

### **SUBMISSIONS OF THE PARTIES**

6. The parties filed written submissions in support of their respective cases and subsequently made supplementary oral arguments highlighting these submissions. The petitioners framed the following issues for the court to determine:

- a. Whether Baringo County Government is empowered by the Constitution to charge cess on forest produce from state forests.
- b. Whether section 10 of the second schedule of the Baringo County Finance Act 2015 is consistent with the constitution.
- c. Whether Articles 62(3),185(2) and 209 of the Constitution bar the County Assembly of Baringo from enacting a law to provide for the levying of Cess in respect of forest produce for state forests.
- d. Whether the imposition of forest produce cess by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in respect of forest produce from state forests violates the principle of fair taxation embodied in Article 201 and contravenes Article 209(5) of the Constitution.
- e. Whether the imposition of forest cess has violated the rights and fundamental freedoms of the petitioners as protected by Article 27,40 and 47.
- f. Whether the petitioners should be compensated for violation of their rights and freedoms under Articles 27, 40, and 47.
- g. Whether the petitioners should be compensated for the detention of their trucks and loss of user.
- h. Who should bear the costs of the consolidated petitions?

7. The petitioners submit that prior to the promulgation of the 2010 Constitution on 27<sup>th</sup> August 2010 the Executive Authority vested in the president and the legislative power was in the National Assembly. At the local level the Local Government Act Cap 265 established authorities and defined their functions in public finance. Section 192A of the Agriculture Act empowered local authorities to charge cess on any kind of Agricultural produce. Although local authorities charged cess on forest produce there was no law

that authorized so. It's the deponents submission that the said cess was levied pursuant to the presidential directive.

8. The role of the courts in enforcing the laws was emphasized as the petitioners relied on various case-law. In ***Coast Calcium Ltd vs Municipal Council of Mombasa*** (2011) eKLR whereby a circular was issued pursuant to the Minister's power to approve and correct the imposition of fees and charges by the local authorities as seen in section 148(2) of the Local Government Act. Also in ***County Council of Wajir & Another vs Allabdulahi Ahmed Ex parte Republic*** (2014) eKLR the Court of Appeal upheld the decision of the High Court to the effect that Mandera County Council imposed cess on the miraa transported by the respondents was without legal authority. The Court held:

*“It is our considered view that once the local authority exercises the discretion and chooses to impose cess on an agricultural produce, the Minister for Agriculture must consent and then consult with the Minister for Local Government and if approval is granted, the cess can be imposed. We hold that a local authority cannot impose cess on an agricultural produce without consent of the Minister for Agriculture who must consult and obtain approval from the Minister for Local Government. Such consent, consultation and approval are mandatory before cess can be levied on an agricultural produce. From the foregoing, it is our considered view that the learned Judge did not err in law by finding that approval of the Minister for Local Government obtained upon consultation with the Minister for Agriculture is a mandatory requirement before cess can be imposed on an agricultural produce. The bylaw for Mandera County Council had not been approved by the Minister. The evidential burden to prove the existence of approval by the Minister shifted to the County Council of Mandera to demonstrate that approval had been obtained”.*

9. Upon promulgation of the 2010 Constitution, the devolved system of government was established and operationalized and, under Article 6 (2) of the Constitution, the government at each level is distinct and inter-dependent. Article 209 empowers the counties to impose specified types of taxes and charges and the Fourth Schedule of the Constitution sets out their respective functions and powers. The petitioners gave the importance of the devolved government relying on the Supreme Court decision in ***Senate & Another vs Hon. Attorney General & Another Advisory Opinion Reference No. 2 of 2013***, where Mutunga CJ held in relevant part as follows:

*“Given Kenya's history, which shows the central government to have previously starved decentralized units of resources, the extent to which the Constitution endeavors to guarantee a financial lifeline for the devolved units is a reflection of this experience and, more specifically, an insurance against recurrence. ....*

*Devolution is one important constitutional instrument for achieving this objective”.*

10. The Petitioners urge that it is the duty of the courts to ensure that since the establishment of the County Governments the powers vested on revenue raising is not curtailed or compromised provided it is within the law. This is seen in the case of ***Real Deals Limited & 3 Others v. Kenya National Highways Authority*** (2015) eKLR, where Odunga, J. held that “where a state donates power to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute under which it purports to exercise its authority”. It is the petitioners contention that where the law exhaustively provides for the jurisdiction of an executive body or authority, that body must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. They have to act in good faith and most importantly must operate within the law and exercise only those powers which are donated to it by the law or the legal instrument creating it. Therefore a court ought to quash a decision when an authority fails to adhere and observe the express provisions or legislative instrument by which an authority exercises jurisdiction to make a decision as seen in ***Pastoli vs Kabale District Local Government Council and others*** [2008] 2 EA 300.

11. The aggrieved tax payers have been protected from illegal and double taxation. This was established in ***Dickson Matei t/a Machete Auctioneers & 10 others v Nairobi County Government & another***

[2016] eKLR where Mumbi J. held that whilst the County Governments have a constitutional mandate to raise revenue they must bear in mind the provisions of Article 209 of the constitution. While County Governments do have the mandate to regulate trade development within their counties, they should be cognizant of the existing legislations on the same issues. Therefore the court has to appreciate the historical context and the value, provisions and principles of the 2010 constitution. This kind of method was recommended by Emukule J. in **Dileep Manibhal Patel & 3 others Vs Municipal Council of Nakuru & Another** (2014) eKLR where the Court held that the purposive construction of the Constitution is envisaged under Article 259 (1) (a) of the Constitution is the correct method of interpretation.

12. On whether the County Government is empowered by the Constitution to charge cess on forest produce from state forests the petitioners submit that Article 210 (1) of the Constitution provides that “No tax or licensing fee may be imposed, waived or varied except as provided by legislation”. Further, it is Article 202, 204, 209 and the fourth schedule of the Constitution that secures the distinction and interdependency of the two levels of governments. The County Government has been given its powers and functions. Thus, Article 187(2)(b) provides that “Constitutional responsibility for the performance of the function or exercise of the power shall remain with the government to which it is assigned by the Fourth schedule.

13. The petitioners contend that all forest on public land except forest on community land shall vest in and be held by the National Government and Article 69 (7) (f) provides that the state shall “work to achieve and maintain tree cover of at least ten percent of the land area in Kenya. Sections 2, 4(b) and 20 of the Forest Act, 2005 [repealed without changing this position by the 2016 Forest Conservation and Management Act] vests the ownership of the Government forests in the Kenya Forest Service and that Section 4 (i) of the Forests Act, 2005 provides that “the Kenya Forest Service (KFS) shall collect all revenue and charges due to the Government in regard to forest resources, produce and services”. In regard to this there is no law enacted in accordance with the Constitution that empowers Baringo County Government to charge cess on forest produce from state forests.

14. The petitioners urge that section 10 of the second Schedule of the Baringo County Finance Act 2015 is consistent with the Constitution. The petitioner argued that the Baringo County Finance Act 2015 provides inter-alia that cess in respect of logs shall be charged at the rate of Ksh 1000 per tonne. The legislative authority of a County is vested and exercised by the County Assembly but this has to be consistent with the fourth schedule. The County Government of Baringo had to ensure that it considered Article 209 and 210(1) of the Constitution. Under Article 209(3) of the Constitution levying of cess is not one of the taxes and charges that the 1<sup>st</sup> and 2<sup>nd</sup> respondents may impose. The laws enacted by the County Governments must relate to the functions and powers under the Fourth schedule.

15. The Petitioners cited **Robert N. Gakuru & Others v Governor Kiambu County & 3 others** [2014] eKLR where Odunga J. held that -

*“It is therefore clear that the County Assembly may only impose property rates and entertainment taxes unless otherwise authorized by an Act of Parliament and this position is emphasized by the provisions of Article 210(1) of the Constitution which expressly provides that no tax or licensing fee may be imposed, waived or varied except as provided by the legislation. County Governments are however empowered to impose charges on services they provide”.*

16. On the issue whether the imposition of forest produce by the 1<sup>st</sup> and 2<sup>nd</sup> respondents violates the principle of fair taxation imposed in Article 201 of the Constitution and contravenes Article 209(5) of the constitution, the petitioners contend that the division of the power to impose taxes and charges between national and County Government read with the Fourth schedule of the Constitution seeks to prevent double taxation and Article 187(2)(b) states that the constitutional responsibility for the performance of the function or exercise of the power shall remain with the government to which it is assigned by the Fourth Schedule.

17. The petitioner’s further submit that they have demonstrated that they pay royalties and charges to KFS

that is payable for the forest produce and services. The respondents have not given any evidence by way of depositions in an affidavit or documentary evidence to show that indeed they provide services to state forests or to the petitioners, thus imposition of cess for such forest produce is clearly unfair and amounts to double taxation. In the **Real Deals Limited case** (supra), Odunga J. warned against double taxation. Citing the **Blacks Law Dictionary** definition of “double taxation”, the learned Judge held that whereas the fee chargeable by the Authority in order to permit persons or bodies to erect structures etc on road or road reserve is not necessarily double taxation, to permit the respondents to charge monies in a manner that amounts to the control of outdoor advertisement clearly amounts to double taxation. The Petitioners also relied in **Medina Hospital Ltd. & 5 others vs County Government of Garrisa** [2015] eKLR where the Court held that the respondents in the case had not shown the applicants were not remitting taxes to the National Government and any other charge or levy towards another Government institution whether at the National level, amounts to double taxation. It was further contended that the Transitional Authority issued an advisory vide a letter dated 4<sup>th</sup> December, 2015 to all 47 counties on levying of taxes, user charges and fees.

18. It is the petitioner’s submission that they have demonstrated that roads maintenance by the County Governments is catered for through the Road Maintenance levy fund into which they are the major contributors and that they also build and maintain roads within forests in which they obtain their raw materials. That it’s for avoidance of double taxation issues that the Transitional Authority issued an advisory contained in a letter dated 4<sup>th</sup> December 2015 pertaining levying of taxes, user charges and fees. Especially paragraph 8 of the advisory states that –

*“In the absence of the policies and legislations, National and County Governments reserve no basis to levy any service charge or fees. It is important to note that Finance Acts are not core revenue raising legislations”.*

19. The petitioners further contended that the imposition of the forest produce cess by the 1<sup>st</sup> and 2<sup>nd</sup> respondents has violated their rights and freedoms as envisaged in Article 27, 40 and 47 of the Constitution. That the enactment and enforcement of the Baringo County Finance Act (BCFA) 2015 offended and violated their rights because Article 40 allows them to own and enjoy the benefit of ownership of the forest produce it had purchased and Article 27 prohibits the 1<sup>st</sup> and 2<sup>nd</sup> respondents from levying any tax or charge inconsistent with their authority under the Constitution and in detaining their trucks without compliance with Article 47 of the Constitution, the 1<sup>st</sup> Respondent had violated their right to fair administration action.

## **THE 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS’ SUBMISSIONS**

20. The respondents submit that the petition herein has been brought more than two years since the enactment of the Baringo Finance Act and upon the lapse of the 90 days for raising objections in violation of section 15 and 88 of the County Government Act. Section 15(1) provides that a person has a right to petition a county assembly to consider any matter within its authority, including enacting, amending or repealing any of its legislation. Section 88 of County Government Act provides that citizens have a right to petition the County Government on any matter under the responsibility of the County Government.

21. The respondents have relied in **Mombasa Petition No. 39 of 2014 as consolidated with petition Nos. 45, 61 and 63 of 2014. Diani Business Welfare Association and others Vs The County Government of Kwale** where it was said that though the procedure of petitioning the County Assembly section 15(1) or the Government (section 88) of the County Government Act is not a bar to an action, an action or petitions filed some three to seven months after the enactment of the Finance Act, may well be construed strictly against the petitioners as an abuse of the process of court. To allow petitions of this type is to constitute recalcitrant petitioners and citizens at large into a veto exercising block and defeat the very purpose of citizen participation, a civic duty in the governance of the county especially at the budget stage.”

22. The respondents further submitted that The Finance Act is the heart and soul of the Government both at the National and County levels and thus want of exercise of diligence is not curable by court petitions and to allow such petitions is to constitute recalcitrant petitioners and citizens at large into a veto exercising block and defeat the very purpose of citizen participation, a civic duty in the governance of the county especially at the budget stage. In ***Nakuru High Court Petition No. 30 of 2014, Nakuru County Human Rights Network (NAHURINET) vs Nakuru County Government*** whereby the court held that the procedure prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. The petitioners in this case cannot argue in the face of the clear provisions of the County Government Act that they by pass the legislation and come to this court by way of a constitutional provision. See also ***Nairobi Constitutional petition No. 283 of 2014 James Tinai Murete & Others vs County Government of Kajiado & Others.***

23. The respondents rely on Article 176 which creates the decentralized systems of devolved units in form of County Governments wherein they provide effective services to its constituents the respondents under section 132 of the Public Finance Management Act empowers the 1<sup>st</sup> respondent to raise revenue by imposing taxes in order to govern and deliver adequate service hence in enacting the Baringo Finance Act due process was followed. The public, interested parties and stakeholders including the saw-millers were informed in advance so that they could raise issues, queries in enacting the bill. There were various publications in ***The Daily Nation*** where by the public was invited to participate in the Bill. The respondents publicized the discussions on the bill by posting copies on the notice boards of every sub county and the contents uploaded on their website. They have relied on Nairobi Constitutional Petition No. 486/2013, ***Nairobi Metropolitan PSV Sacco Union Limited & 25 others vs County of Nairobi Government*** where the court held that –

“[I]t does not matter how the public participation was effected. What is needed in my view is that the public was accorded some reasonable level of participation”. See also Sachs J. in ***Minister of Health Vs New Clicks South Africa (PTY) Ltd.*** and Mombasa Petition No.39/2014 as consolidated with Petition nos.45, 61, and 63 of 2014, ***Diani Business Welfare Association and Other vs The County Government of Kwale.***

24. The 1<sup>st</sup> respondent under Article 176 of the Constitution is the successor of Baringo County and it only enhanced existing levies through the 2<sup>nd</sup> Respondent herein. The petitioner herein was supplied with invoices indicating how much was owed to the 1<sup>st</sup> respondent. The County Government Act repealed the Local Government Act thus provided for the enactment of legislation to provide for the charges in respect of the services offered hence the law could not have created a vacuum that would render it impossible for local authorities or with the new governance structures to collect revenue for the provision of services. They relied on Nairobi Petition No.562 of 2014, ***Fredrick Kirumba vs County Government and Another (2015) eKLR*** where the court stated that local authorities prior to the enactment of the legislation had the exclusive mandate to set and regulate.

25. In addition to this in Mombasa High Court petition No.52 of 2014 ***Andrew Waswa T/a Kilimanjaro Auctioneers and 21 others vs Mombasa County Government*** and in ***Thuku Kiroro & 4 Others Vs County Government of Murang'a*** [2014] eKLR where the court held the County Governments have to be encouraged and not restrained to deliver on their devolved functions as long as they are *intra vires* the Constitution and the applicable statutes.

26. The respondents submit that the increase on cess from Ksh 500 to Ksh 1000 is at the discretion of the 1<sup>st</sup> respondent. The said amount is modest, reasonable, adequate and fair to enable the 1<sup>st</sup> respondent to adequately discharge its mandate and provide services to the members of the public including maintenance of county roads within Koibatek forest and Kamara forest. The petitioners herein are reluctant tax payers who have avoided tax for long and failed to remit taxes. As at 30<sup>th</sup> October 2015 the outstanding and accumulated revenue was over Ksh.4,955,160 for Raiply Woods and Ksh 1,266,822 for Timsales Limited. Section 11 of the Baringo County Revenue Administration Act empowers the 1<sup>st</sup> respondent to seize and detain any property for purposes of levying distress and raise the requisite taxes.

27. The respondents cited the case of Nairobi Constitutional Petition No.486 of 2013, **Nairobi Metropolitan PSV Saccos vs County of Nairobi Government**, the Court held that “*this court cannot enter into the arena of deciding what fee is reasonable, convenient or proper to be levied. This court would only intervene if the petitioners had demonstrated that in charging the parking fees the respondents have violated the existing law or acted in contravention of the law*”. In view of the above they urge the court to dismiss the petition with costs. In the Constitutional Court of South Africa in the case of **Doctors for life International vs The speaker National Assembly**, the Court explained the importance of public participation as follows:

*“The International law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all, it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation”.*

28. The same position was held in **Minister of Health vs New Clicks South Africa (PTY) Ltd** where **Sachs J.** held as follows:

*“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinitive 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 issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. It cannot be expected of the law maker that a personal hearing will be given to every individual who claims to be affected by regulations that are being made. What is necessary is that the nature of the concerns of different sectors of the public should be communicated to the law-maker and taken into account in formulating the regulations.”*

### **THE 3<sup>RD</sup> AND 4<sup>TH</sup> RESPONDENTS’ SUBMISSIONS**

29. In the eyes of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents only two issues arise for determination, namely, whether there was *public participation* in the enactment of Baringo County Finance Act, 2015; and whether the Provisions of Baringo County Finance Act 2015 on **levying of cess** is *ultra vires*. The Respondents submit that The Baringo County Finance Act was enacted pursuant to Article 185, 186 and 209 of the Constitution as well as sections 116,132, and 137 of the County Government Act, 2012 and section 132 of the Public Management Act. Section 10 second schedule is informed by part 2 section 10 of the fourth schedule of the Constitution in respect to implementing National Government policies on natural resources and environmental conservation hence lawful and that the Baringo County Finance Act passed the test of public participation as dictated under the Constitution and other laws including settled judicial decisions.

30. Citing Article 185 (1) of the Constitution that the legislative authority of a county vest in its county assembly, they further submit that Article 183(2) a county assembly is mandated to make laws that are necessary thus the 1<sup>st</sup> and 2<sup>nd</sup> respondents were within the jurisdiction to enact the Baringo County Finance Act 2015. Public participation was essential in enacting the bill and Article 174(c) requires public participation in exercise of state powers. In **Robert N. Gakuru vs Governor, County of Kiambu**, supra, the Court held that public participation ought to be real and not illusory and ought not be treated as a mere formality for purposes of fulfillment of the constitutional dictates. See also the case of **Milly Glass Works Limited & 3 others vs County Government of Mombasa & 2 others** (2016) eKLR, where Emukule, J. in holding that the petitioners therein had been granted opportunity but failed to participate in the budget proposal stage before making the Finance Act famously declared as follows:

*“The Finance Act is the heart and soul of the Government both at the national and county levels. Any delay in its implementation constitutes a serious challenge to the provision of services of the citizens or constituents of the county. That is why for instance under Article 222 of the Constitution moneys may be withdrawn before the budget proposals are approved by the National*

*Assembly, and even certain levies and taxes take effect immediately from midnight of the day the budget proposals are read. Exercise of diligence is not curable by court petitions. To allow petitions of this type is to constitute recalcitrant Petitioners and citizens at large into a veto exercising block and defeat the very purpose of citizen participation, a civic duty in the governance of the county especially at the budget stage.”*

31. The 3<sup>rd</sup> and 4<sup>th</sup> respondent’s submit that it is a constitutional and statutory mandate of counties to raise revenue through taxation Article 209(3) Article 206(4) empowers both national and County Governments to impose charges for the services they provide It is the responsibility of every county to ensure that services essential to access, maintenance and provision of water, collection and disposal of refuse generated by harvesting, supply and sale of logs. Further that under Part 2 section 10 of Fourth Schedule of the Constitution it is the responsibility of counties **to implement National Government policies on natural resources and environmental conservation, including soil and water conservation and forestation**. The only way the 1<sup>st</sup> respondent could discharge this function, it was urged, is by raising revenue from logging and transportation cess and by questioning this mandate, the petitioners are attempting to curtail Baringo County from executing its constitutional mandate contrary to court decisions in **Andrew Wasswa Atetwe t/a Kilimanjaro Auctioneers & 21 others vs The Mombasa County Government** where the court held that “taxes, levies, cess or by whatever name called , paid to the county authorities go into a pool or fund from which payments are made and in return residents of the counties get the benefit of clean water, ancillary facilities and maintenance thereof” and **Thuku Kiroro & 4 others vs County Government of Murang’a** (2014) eKLR, where it was 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.**”*

They submit that the petitions be dismissed with costs.

### **PETITIONERS’ REPLY TO THE RESPONDENTS’ CASES**

32. In response to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents pleadings and submissions the petitioners submit that a County Government and its agencies are enjoined by section 116 (1) of the County Government Act 2012 to deliver services within its jurisdiction but Article 209(3) does not allow the 1<sup>st</sup>and2<sup>nd</sup> respondents to enact a; law to levy cess on forest produce from state forests. In addition to this the County Governments did not inherit the revenue raising powers of the defunct local governments unless the Constitution or national legislation expressly states. In **Cereals Growers Association & Another vs County Government of Narok & 10 others** [2014] eKLR Lenaola, J. (as he then was) held that since agriculture produce cess is a tax, it must be imposed in accordance with the law and must be anchored in an Act of Parliament or an Act of a county Assembly as to do otherwise would be a violation of Article 209(3)and 210(1) of the Constitution which authorizes them to impose entertainment tax and any tax as authorized by an Act of parliament. The learned Judge said that -

*“Weighing the rival arguments and to my mind, it is clear that under Article 209(3) of the Constitution, a County Government has powers to impose entertainment tax and any other tax as authorized by an Act of Parliament. Undoubtedly, Article 209(4) of the Constitution therefore confers County Governments with legislative discretionary powers to impose charges for services rendered. In my view therefore and reading the provisions of Article 209(3) and 209(4) of the Constitution, the County Government may impose an entertainment tax as it is constitutionally provided for but then any other tax or charge that may be imposed by the County Government must be provided for under an existing Act of Parliament. I say so because in my view a charge is a form of tax. Black’s Law Dictionary, 8<sup>th</sup> Edition defines the term ‘tax’ as follows:*

*“A monetary charge imposed by the government on persons, entities, transactions or property to yield revenue”*

**Article 210(1) has then made it clear that no tax can be imposed or waived unless it is provided for by legislation....**

33. The petitioner's submit that a tax must be imposed based on legislation and administered in accordance with a certain legal framework thus tax cannot be an administrative decision. Section 23 of the County Government Public Management Transition Act no. 8 of 2013 provides:

“For avoidance of doubt, until a new law relating to imposition of rates and charges is enacted, County Governments, urban areas and cities may, with necessary modifications, continue to impose rates and charges under the law for the time being in force in relation thereto”.

The petitioners submit that the 1<sup>st</sup> and 2<sup>nd</sup> respondents cannot enact any law to levy cess on account of the Fourth schedule.

34. In response to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' Grounds of Opposition dated 8<sup>th</sup> December 2016 the Petitioners contend as follows:

a) Part 2 section 10 of the sixth schedule read with provisions of the Forests Act , 2005 does not entitle the County Government of Baringo to levy cess in order to engage in afforestation and sections 24 and 38 of the Forests Act, 2005 gives out the role of the local authorities in forest matters especially the local authority is responsible for the protection and management of all forests and woodlands under its jurisdiction, and shall ensure that forests are managed on a sustainable basis in accordance with an approved management plan.

b) On the other hand, Section 21 of the Forest Conservation and Management Act (FCMA) 2016 sets out the forestry functions of the County Governments which include:

i. county committee member shall supervise the implementation of national policies on forest management and conservation;

ii. shall prepare an annual report for the cabinet secretary on the activities of the County Government in relation to this act and any national policies on forest management and conservation;

iii. shall promote a forestation activities in the county.

iv. may advise and assist communities and individuals in the management of community forests or private forests and enter into joint management agreements with communities or individuals for the management of community forests or private forest.

v. Consequently, the County Governments could generate revenue under section 20 of the FCMA by using some of their public land to establish and manage forests. They do not have to engage in double taxation on state forests which comprise only a small fraction of public land within Baringo forest.

vi. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have not shown any nexus between the cess it is levying and the role under Part 2 section 10 of the Fourth Schedule. If at all they do discharge any said role it does not require them to raise any money. Sections 25, 27 and 28 of the FCMA gives various roles. Section 27 establishes a trust fund whose object is to nurture, promote and support innovations in forest conservation and development including the support of community forestry programmes, reforestation and afforestation programmes etc. Section 28 of the FCMA consists of the Trust Fund which contains monies which has been appropriated by parliament for purposes of the fund or one that has been received through grants, bequests, endowments and other gifts.

vii. The petitioners further rely on the case **Real Deals Limited** (supra) where Odunga J in declaring that section 49(3) of the Kenya Roads Act does not confer upon KENHA the power to levy charges

or exercise any control over outdoor advertisements on Road Reserves and contend that it is the same scenario with this instant case. It is the mandate of the National Government through the Forest Service to manage state forests and to impose taxes and charges. The 1<sup>st</sup> and 2<sup>nd</sup> respondents should not be allowed to impose cess under the guise of collecting revenue for the county.

35. In conclusion, the Petitioners urge the Court to declare section 10 of the Baringo County Finance Act, 2015 to be inconsistent with the Constitution for the following reasons:

- a) Cess charges on forest produce do not fall within the category of taxes that a County may impose under Article 209 (3) of the constitution.
- b) Pursuant to Article 209 (3) (c) of the Constitution Parliament has not enacted any law empowering Baringo County to levy cess on forests produce.
- c) For purposes of Article 209 (4) of the Constitution there is no service that Baringo County Government offers the petitioner in connection with state forests owned and managed by the KFS that would entitle it to impose cess.
- d) If at all Baringo County does not have reliable sources of revenue to enable it govern and deliver services then it can petition the National Government to increase allocation to it or to enact appropriate legislation envisaged by Article 209(3) of the Constitution.

#### **ISSUES FOR DETERMINATION**

36. The issues for determination in the Petition appear to me to be as follows:

- a) Whether the County Government has constitutional authority to levy taxes on forest produce in state forests.*
- b) Whether the Baringo County Finance Act, 2015 makes a levy of cess on forest produce as a charge for roads service.*
- c) Whether the levying of cess on forest produce amounts to Double taxation.*
- d) Whether the petitioners' constitutional rights to equal protection of law, property and fair administrative action, respectively under Articles 27, 40 and 47 of the Constitution, have been violated by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.*
- e) Whether the petitioners are entitled to the reliefs sought.*

#### **DETERMINATION**

##### *General Principles*

37. At the outset, the principle of strict compliance with statutory procedure for resolution of disputes is inapplicable in this matter. The petitioners are not required to petition the County Government under sections 15 and 88 of the County Government Act, 2012 to challenge the constitutionality of an Act of its County Assembly. The two decisions cited by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, namely, Nairobi Constitutional petition No. 283 of 2014 *James Tinai Murete & Others vs County Government of Kajiado & Others*. and *Nakuru County Human Rights Network (NAHURINET) vs Nakuru County Government and Another, Nakuru High Court Petition No 30 of 2014*, concerned petitioners challenge appointments to County Governments and the question that arose was the applicability of section 77 of the County Government Act which provides for appeal to the Public Service Commission for all disputes. As Mumbi Ngugi, J. held in the former, after considering the latter, the petitions were really challenges on the merits of the appointments rather than on the procedure for therefor and -

*“While couched as a constitutional petition for vindication of alleged violation of rights, this petition calls for an inquiry into the merits of the decision of the respondents, an examination of the facts, the qualifications of the persons recruited, their ethnicity and, if found to be an appropriate criteria, their clan origins. This can properly only be done by a body hearing the appeal from the decisions made, and in my view, the body best placed to make such enquiries is the Public Service Commission. It is for this reason, I believe, that the legislature placed appeals and disputes with respect to appointments in counties with the Public Service Commission.”*

38. Emukule, J’s statement in ***Diani Business Welfare Association and others v County Government of Kwale*** [2015] eKLR that -

*“Though the procedure of petitioning the County Assembly (section 15(1)) or the Government (section 88) of the County Assembly Act is not a bar to an action, an action or petitions filed some three to seven months after the enactment of the Finance Act, may well be construed as an afterthought, and unless good grounds are given for such delay, will be construed strictly against the Petitioners as an abuse of the process of court.”*

assumes a valid exercise of the enactment of the Finance Act, the very authority which is under challenge in the consolidated petitions herein. The answer to the dispute herein is therefore not to the question whether the petitioners will be forgiven for their delay in invoking the statutory procedure under section 15 and 88 of the County Government Act, 2012 but rather to the issue whether, as identified by the 3<sup>rd</sup> and 4<sup>th</sup> respondents, the exercise of power to legislate taxes on forest produce was unconstitutional and ***ultra vires***.

39. In the present petitions, the challenge is on the constitutionality of the enactment of the law on taxation of the forest produce from state forests consideration being called upon for the interpretation of the allocation of functions between the National Government and the County Government under Article 186 and the Fourth Schedule of Constitution. This is clearly a matter for the constitutional interpretation jurisdiction of the High Court under Article 165 (3) (b) and (d) and 258 of the Constitution.

40. It is a well-accepted judicial policy for upholding constitutional mandate to the constitutional organ to whom it is vested without undue interference by the judicial branch of the government. I respectfully note among such decisions the case cited by the Respondents - ***Thuku Kiroro & 4 others vs County Government of Murang’a*** (2014) eKLR, where it was 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.**”*

In this case, therefore, the Court only need require the Respondents to show the constitutional mandate to tax forest produce from state forests in the Baringo County, and lee way must be given to levy such tax and in such amounts as, in its discretion, the County Government considers appropriate.

***“No taxation without representation”***

41. Article 210 of the Constitution provides for the first principles espoused in the old adage “*no taxation without representation*” so that taxation is authorised by law made by the representatives of the people in Parliament, as follows:

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

42. I respectfully agree with Lenaola J. (as he then was) in ***Cereals Growers Association & Another vs County Government of Narok & 10 others***, supra, that –

**“[A] tax must be imposed based on legislation and administered in accordance with a certain legal framework and to my mind therefore, tax cannot be an administrative decision. It is a legal function.”**

I, therefore, reject the submission by the Respondents that imposition of cess by the Baringo Finance Act, 2015 is valid as it is only an increase to previously charged cess by the County Council. No tax may be administratively imposed is the consequence of the principle of no taxation without representation.

43. There is no contest that an Act of the County Assembly is **Legislation** within the meaning of the Constitution. Article 260 of the Constitution defines legislation to include a law made by a County Assembly as follows:

**“legislation”** includes—

(a) an Act of Parliament, or a law made under authority conferred by an Act of Parliament; or

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

44. The County Government has under Article 185 (2) of the Constitution a general power to makes laws for the **“effective performance of the functions and exercise of the powers of the County Government under the Fourth Schedule.”** In exercising this general power, however, a County Government cannot disregard constitutional provisions governing the promulgations of the particular type of laws. This is the consequence of harmonious interpretation of the Constitution. The general power to make laws is, however, not unchecked; it is not a power to make **any law** whatever, in the discretion of the County Government through its Assembly. It is power to make law as a means to the end of **effective performance of the functions and exercise of the powers of the County Government under the Fourth Schedule**. Accordingly, the law enacted by the County Assembly must be in relation to the powers of County Government under the Fourth Schedule. If the County Government has no power over a matter under the Fourth Schedule, then it has no power to make any law with regard to that matter.

45. Moreover, on the principle of harmonious interpretation the Constitution, it cannot be correct for a County Government to purport to exercise of its legislative power under Article 185 (2) of the Constitution as a standalone power and make any law providing for taxation without regard to the constitutional provisions on taxation matters. When it is desired by a County Government to make a law to provide for taxation, that law must comply with the constitutional provisions on enactment of law for the imposition of tax under Article 209 of the Constitution set out above. I would respectfully agree with Mumbi Ngugi, J. in ***Dickson Matei t/a Machete Auctioneers & 10; others v Nairobi County Government & another*** [2016] eKLR, that **“While the County of Nairobi and all other County Governments have the constitutional mandate to raise revenue, they must bear in mind the provisions of Article 209.”**

46. As regards the type of tax in issue in the petitions before Court, ***The Concise Oxford English Dictionary***, 11<sup>th</sup> Edition (2006) defines “cess” as follows:

**“Cess n. (in Scotland, Ireland and India) a tax or levy.”**

47. Accordingly, I would agree that cess by any other name would mean a tax or levy, as in ***Andrew Wasswa Atetwe t/a Kilimanjaro Auctioneers & 21 others vs The Mombasa County Government***, supra. It is incontestable also that the County Governments have power to levy taxes for the provision of services for the County.

48. However, Article 209 of the Constitution provides for a County Government’s power to impose tax as follows:

209 (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 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.*

49. When considering the levy of tax on quarry stones by Kiambu County Government in **Robert N. Gakuru and Others vs Governor Kiambu County and 3 Others, Petition No 532 of 2013**, Odunga, J., rightly in my view, held as follows:

***“[81] It is therefore clear that the County Assembly may only impose property rates and entertainment taxes unless otherwise authorized by an Act of Parliament and this position is emphasized by the provisions of Article 210 (1) of the Constitution which expressly provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation. County Governments are however empowered to impose charges on services they provide. Such service would include parking and market fees. However to levy charges on the stones quarried unless authorized by an Act of Parliament or any services rendered by the County Governments towards that end would be clearly illegal.”***

50. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not demonstrate any Act of Parliament within the meaning of Article 209 (3) (c) of the Constitution which authorised the imposition of the tax on forest produce from state forests. They merely relied on the provisions of the County’s Finance Act, the Baringo County Finance Act 2015.

51. The central question before the Court, therefore, is whether the levy of cess on forest produce in state forests by the County Government of Baringo through the Baringo County Finance Act 2015 was done with constitutional authority of Article 209 of the Constitution.

***Whether the County Government has constitutional authority to levy taxes on forest produce in state forests***

52. It is an indubitable truth that the County Government has no constitutional authority to levy any taxation on forest produce in state forests both for the reason of ownership of such forests and by reason of constitutional allocation of functions under Article 186 and the Fourth Schedule of the Constitution. As regards ownership of state forests, Article 62 (1) (g) as read with 62 (3) vests the ownership of government forests in the National Government as follows:

**62. (1) Public land is—**

**(g) government forests** other than forests to which Article 63 (2) (d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;

**62. (3) Public land classified under clause (1) (f) to (m) shall vest in and be held by the National Government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.**

[Article 63 (2) (d) (i) of the Constitution referred in Article 62(1) (g) relates to Community land consists of **community forests**, grazing areas or shrines, and has no relevance here.]

53. Article 185 of the Constitution empowers the County Governments through their County Assemblies to make laws for the performance of functions and exercise of powers of the County Government under the Constitution, as follows:

“**185.** (1) The legislative authority of a county is vested in, and exercised by, its county assembly.

(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.***”

54. Article 186 of the Constitution demarcates the respective powers of the national and County Governments by providing as follows:

“**186.** (1) *Except as otherwise provided by this Constitution, the functions and powers of the National Government and the County Governments, respectively, are as set out in **the Fourth Schedule.***”

55. Clearly, the County Assembly has no power to legislate for functions and powers which it does not have under the Fourth Schedule of the Constitution. Under section 22 Part 1 of the Fourth Schedule of the Constitution the responsibility for state forests lies with the National Government as follows:

“22. Protection of the **environment and natural resources** with a view to establishing a durable and sustainable system of development, including, in particular—

(a) fishing, hunting and gathering;

(b) protection of animals and wildlife;

(c) water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and

(d) energy policy.”

56. The County Government has with respect to forests only a role in implementing policies by the National Government, under section 10 of Part 2 of the Fourth schedule as follows:

“10. Implementation of **specific National Government policies** on natural resources and environmental conservation, including—

(a) soil and water conservation; and

(b) **forestry.**”

57. Although the 3<sup>rd</sup> and 4<sup>th</sup> Respondents cited this section as authority for the County Government to levy cess of forest produce, no specific National Government policies as to levying of taxation on forest produce which the County Government could have sought to implement was demonstrated. The Court must, therefore, reject this justification of the cess on forest produce.

58. Accordingly, the Court finds that the County Government has no constitutional authority to levy any tax or charges on the forest produce since forests as part of **environment and natural resources** is the province of the National Government.

59. In their response to the Amended Petition dated 31<sup>st</sup> October 2016, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents based their opposition on the general power to raise revenue for provision of services to the people of the Baringo County, as follows:

1. "The 1<sup>st</sup> and 2<sup>nd</sup> respondents aver that being statutory bodies established under Article 176(1) and 185 respectively of the Constitution are mandated under Article 209(3) thereto as read with section 132 of the Public Finance Management Act to raise revenue by imposing taxes in order to govern and deliver adequate services to its constituents under section 116 of the County Government Act and legislative authority.

2. That in discharge of its statutory mandate under article 185(2) of the Constitution enabling it to legislate and make laws necessary for effective functioning of the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent enacted Baringo County Finance Act 2014 and 2015 upon following due process."

60. The respondents did not, and I think properly so, contest that County Governments had no authority to levy taxes on forest produce. They instead asserted a general power to raise revenue for purposes of providing service to their constituents and grounded this levy as a charge for road services.

61. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent did not point to a law in the Local Government Act which was repealed by the County Government Act 2012 authorising a levy or cess on forest produce. There could only have been an administrative order for the levy of such cess, because section 192A of the Agricultural Act only applied to cess on agricultural produce. As held above, there can be no taxation by administrative fiat. The savings by section 24 of the Interpretation and General Provisions Act of subsidiary legislation under a repealed law before the repealing law make new subsidiary law does not avail the Respondents.

62. The question then becomes whether the Baringo County Finance Act, 2015 made provision for levy of cess on forest produce as a road service charge.

***Whether the Baringo County Finance Act, 2015 makes a levy of cess on forest produce as a charge for roads service***

63. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent justified the levy on forest produce as merely an increment on previous levies charged by its predecessor the Baringo Council, as follows:

"5A. The 1<sup>st</sup> and 2<sup>nd</sup> respondents aver that prior to the promulgation of the Constitution the petitioner paid monthly Cess and or levies of Ksh. 60,000 (sixty thousand) to the 1<sup>st</sup> respondent's predecessor, Baringo County Council, under the Local Government Act and the By-laws thereto.

5B. The 1<sup>st</sup> and 2<sup>nd</sup> respondents aver that the 1<sup>st</sup> respondent as established under article 176 of the Constitution is the successor of Baringo County Council and inherited both assets and liabilities of the aforesaid defunct authority and has merely enhanced existing levies, as admitted under paragraph 9 of the amended petition, through the 2<sup>nd</sup> respondent payable by the petitioner as contemplated under the 4<sup>th</sup> Schedule of the Constitution(**Annexed herein and marked "JK 5A & B" are copies of invoices**).

6. The respondents here aver that the statutory charge of Kshs. 500/= per tone for logs has been in force since 2014 upon enactment of Baringo Finance Act whereas the 2015 Finance Act increases the aforesaid amount to Kshs 1,000/- (**Annexed herein and marked "JK 6" is a copy of letter dated 19<sup>th</sup> March 2015**).

**7. The 1<sup>st</sup> respondents herein avers that the 2014 Finance imposed a statutory charge of Ksh. 500/- per tone of harvested logs which amount has hence been increased to Ksh. 1,000/- which increment is modest, reasonable, adequate and fair to enable it adequately discharge its mandate and provide services to the members of the public and to maintain county roads maintained used by the petitioner to wit soy mining a, Mlango Moja, Arama and Kaptim Roads within Narasha Forest, Tomboroa, Seguton and Chemowon Roads within Chemususu Forest, Solian and Sabatia Roads within Koibatek Forest and Kamara Road within Kamara Forest.**

8. *The 1<sup>st</sup> Respondent avers that before its creation revenue and or cess of Ksh. 60,000/= per month initially paid by the petitioner to the defunct municipal council was way below the market which led the respondent to exercise its legal right to generate revenue through legislation through the 2<sup>nd</sup> respondent, statutory body mandated by law to do legislation and meet the unique needs of the constituents of the 1<sup>st</sup> respondent and facilitate service delivery.”*

64. There is internal contradiction in the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ argument on the levy of cess on forest produce to enable it provide for road service along the named roads. Firstly, the charge is either a service charge or charge on the forest produce. Secondly, if it were a charge for use of the roads it ought to be a toll charged on all users of the said roads who may not necessary be loggers. Thirdly, the use to which the levy is put namely the maintenance of county roads does not justify unauthorised imposition of tax on forest produce which is the responsibility of the National Government. Finally, the respondents did not, as they should have, being a matter within their special knowledge, demonstrate that they had expended any monies in the construction and maintenance of the roads against the assertion by the Petitioners that they had maintained their own roads within the forests.

65. In accordance with Article 209 (4) of the Constitution, County Governments have power, as with the National Government, **“to impose charges for the services they provide.”** In the case of ***Base Titanium Limited v. The County Government of Mombasa and Anor.***, Mombasa HC Petition No. 9 of 2015, this Court considered Article 209 of the Constitution with regard to powers of the County Government to levy tax and particularly for services and held as follows:

#### **“DETERMINATION**

##### ***No taxation by County Government on Minerals***

11. *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.*

12. *In that regard, the Hon. Attorney General and the Chairman of the Transitional Authority in their letters, respectively dated 11<sup>th</sup> July 2014 and dated 11<sup>th</sup> September 2014 (copy of the former expressed to have been attached to the latter letter and copied to the petitioner) give the correct interpretation of the Constitution that **“the Constitution therefore does not mandate to impose any taxes or charges on minerals”** and that **“minerals fall under the domain of the National Government, the management and administration of the mining of titanium falls within the mandate of the National Government as well.”***

13. *However, to extrapolate the interpretation to conclude that a levy charged on the vehicles that transport the titanium mineral, as with transportation 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, as 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.*

14. *Therefore, the Court respectfully disagrees with the conclusion and advise given by the Hon. Attorney General in the aforesaid letter on the matter that –*

#### **“CONCLUSION AND WAY FORWARD**

*From the forgoing therefore, the mining levy and **cess charges** imposed by the County Government of Kwale and Mombasa respectively **is unconstitutional**. This is because, as per Article 62 (f) all minerals are vested in the National Government and not the County Government. Further because the power to impose taxes or charges [on] minerals has not been transferred to the County*

Government by the Constitution or any national law, the power still vests in the National Government.”

**Taxes and other charges by County Government under Article 209 (3) and (4)**

15. As shown below, County Governments do have authority to impose taxes **under Article 209 (3) and (4)** of the Constitution but in doing so are required to consider whether the tax will have any prejudicial effect to the matters set out in Article 209 (5). Article 209 of the Constitution is in the following terms:

“209 (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 authorize 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 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.”**

16. Article 209 (3) of the Constitution grants the County Government power to impose a tax that it is authorized to impose by an Act of Parliament. There was not demonstrated any **Act of Parliament**, as opposed to An Act of the County Government, that authorized the County Government to make a levy by way of cess charge on transportation of goods into the County. The 1<sup>st</sup> Respondent was wrong in its reliance of the sub-Article as authorizing the imposition of the cess charge subject of the suit. Section 5 of the County Governments Act, 2012 only authorizes taxes on the matter reserved to County Governments under Article 185 of the Constitution, and section 21 of the Act merely provides for the procedure of enacting money bills which include tax bills.

17. Article 209 (4) of the Constitution empowers the County as well as the National Governments power to impose charges for the services they provide. I accept as urged by the 1<sup>st</sup> Respondent that facilities for road transport is one of the basic services **‘including garbage collection, parking facilities, street lighting, drainage and roads maintenance’** – **“that members of the public including the petitioner expects to be provided by the 1<sup>st</sup> respondent.”** The word “services” is not defined in the interpretative Article 260 of the Constitution. However, the meaning of the word **service** as given in the **Concise Oxford English Dictionary** 11<sup>th</sup> ed. (2006) agrees with the 1<sup>st</sup> respondent’s submission in that the noun **service** is defined as-

**“a system supplying a public need such as transport, or utilities such as electricity and water.”**

18. Accordingly, I find that the County Government as with the National Government has under Article 209(4) of the Constitution authority to impose charges for services that they provide, and these include road transport service.”

66. In its conclusion, this Court in **Base Titanium**, supra, made the crucial distinction between cess for services and cess for minerals in the case as follows:

**““CONCLUSION**

31. The County Governments have under Article 209 (3) and (4) of the Constitution power to levy taxes and charges for services that they provide including road transport services. The cess charge imposed by the Mombasa County Finance Act, 2014 for **“all goods carrying vehicles entering Mombasa County and offloading in Mombasa County”** is not a tax or charge the mineral product of Titanium mined and transported by the Petitioner, and the charge is, accordingly, not barred by reference to Article 62 of the Constitution, which vests minerals as part of public land under the authority of the National Government. The Petitioner has not demonstrated how the imposition of the cess on the vehicles carrying its product into Mombasa prejudices the national interests of the provisions of Article 209 (5) of the Constitution. The Petition, therefore, fails.”

67. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent herein did not prove that the levy of cess the subject of this petition was a charge for services within the meaning of Article 209(4) of the Constitution, as they were required to do by section 112 of the Evidence Act. Section 112 of the Evidence Act provides as follows:

**112. Proof of special knowledge in civil proceedings**

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

68. The Petitioners contended relying of the particulars of section 10 of the Second Schedule of the Baringo County Finance Act, 2015 which makes provision for cess within and outside the County for timber, logs and poles, among other forest products that the cess was a tax on forest produce which is the province of the National Government. If the County Government sought to show that the cess in fact a charge for roads services, that is a particular fact within its special knowledge, and it was required by section 112 of the Evidence Act to prove that fact. In the absence of such proof, the Court must accept the petitioner’s case that the cess in question is a charge on forest produce as indicated in section 10 of 2<sup>nd</sup> Schedule of the Act, which, in relevant part, is in the following terms:

“Section 10 of Second Schedule of the Baringo County Finance Act, 2015

**10.0 ENVIRONMENT AND NATURAL RESOURCES.**

10.1 Permits Item Description	Unit of Measure	Charges in KSH.
Permit to cut trees		
Hire of tractor mower	Per Acre	3,000
Sale of wood (0-1/4 Tonne)	Per bundle	50
Sale of Fire Wood (Per Tonne)	Per tonne	1,500

Mature tree	Per tree	4,000
<b>Cess within the County</b>		
<b>Timber</b>	<b>Per ton</b>	<b>250</b>
<b>Logs</b>	<b>Per ton</b>	<b>1000</b>
<b>Poles</b>	<b>Per ton</b>	<b>200</b>
<b>Cess outside the County</b>		
Timber	Per ton	250
Logs	Per ton	1000
Poles	Per ton	200

***Whether the levying of cess on forest produce amounts to Double taxation***

69. As the Court has found that the taxation by way of cess is a charge on forest produce rather than a service charge, having paid for royalties to the National Government for the harvesting of forest produce, the levying of cess on the same forest produce must be deemed as a double taxation: the petitioners are twice paying charges for the same forest product to the two levels of government and it would amount to double taxation, in the strict sense of the words as defined by Black’s Law Dictionary, 8<sup>th</sup> ed. (2004) – “*the imposition of two taxes on the same property during the same period and for the same taxing purpose.*”

70. If, as contended by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the claim to authority to levy cess on the forest produce is that the County Government has provided **roads service** to the petitioner, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents must demonstrate that the charges relate to County Roads as distinguished from roads for which vest in the National Government in terms of Article 62 (1) (h) of the Constitution being “**all roads and thoroughfares provided for by an Act of Parliament.**”

71. If the County Government were to levy a charge for road service for the same roads that vest in the National Government and for which the Petitioners have paid for their maintenance through the Kenya Roads Board Fund from the proceeds of the Roads Maintenance Levy Fund among other monies received by the Board in terms of section 31 of the Kenya Roads Board Act, 2012, it would clearly be double tax for the same service. The Petitioners will have paid for their timber the **road transport levy** under the Roads Maintenance Levy and also under the **County roads service** levy.

72. Such taxation offends the principle of fair taxation under Article 201(b) (i) of the Constitution.

73. Moreover, it would appear that the Baringo Finance Act, 2015 has charges on transport properly so called payment for road service charge. There is separate provision for levy of transport charges showing service charges for lorries, trailers and other vehicles as shown in section 6 of the 2<sup>nd</sup> Schedule of the Baringo Finance Act, 2015, there are charges on transport and infrastructure as follows:

**“6.0 TRANSPORT AND INFRASTRUCTURE**

6.1. Vehicles/motor bicycle/Tuk tuk Charges Registration Fees	Within County. Charges in KSH.
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Taxis	Once	300
<b>Trailers/Lorries</b>	Once	1,000
Matatu	Once	500
Tuktuk/Motor Bikes	Once	100
Seasonal tickets		
Tuk Tuk /Motor Bikes Kabarnet Town	Monthly	450
Tuk Tuk /Motor Bikes Eldama Ravine Town	Monthly	350
Tuk Tuk /Motor Bikes Mogotio,Marigat,Kabartonjo and Chemolingot Town	Monthly	300
All other areas apart from the above	Monthly	250
Taxis	Monthly	1,000
Matatu (1 – 7 seater) Single Terminus	Monthly	1,200
Matatu (7 – 14 seater) Single Terminus	Monthly	1,500
Matatu (1 – 7 seater) County Sticker	Monthly	2,000
Matatu (7 – 14 seater) County Sticker	Monthly	2,500
Minibus (25 - 42 seater)	Monthly	3,000
Buses (43 - 62 seater)	Monthly	4,000
Breakdown Vehicles	Monthly	1,500
Pick-ups	Monthly	500
<b>Lorries</b>	<b>Monthly</b>	<b>1,500</b>
<b>Trailer</b>	<b>Monthly</b>	<b>5,000</b>

74. To be sure, as shown above, however, quite apart from the Response of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to the Amended Petition, the impugned provision of the Act itself, that is section 10 of the 2<sup>nd</sup> Schedule of the Baringo County Finance Act 2015, does not pretend to levy cess for **roads service**. The cess in issue in the consolidated petitions was purely a charge on the **forest produce** harvested in the County, and the County Government has no constitutional authority to levy such charge.

75. Accordingly, the Court finds that the 2<sup>nd</sup> Respondent has without constitutional authority legislated on taxation of forest produce in contravention of the division of functions and powers between the national

and County Governments as set out in Article 186 of the Constitution and the Fourth Schedule of the Constitution. For this reason, section 10 of the 2<sup>nd</sup> Schedule of the Baringo County Finance Act, 2015 is declared unconstitutional and any action by the 1<sup>st</sup> respondent in purported implementation of that law is invalid in terms of Article 2 (4) of the Constitution.

***Whether the petitioners' constitutional rights to equal protection of law, property and fair administrative action, respectively under Articles 27, 40 and 47 of the Constitution, have been violated by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents***

76. The petitioners are entitled to equal protection and benefit of the law in terms of Article 27 (1) of the Constitution which provides as follows:

*“27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.”*

77. In legislating and acting on a law, without the authority of the Constitution, for the levy of cess on forest produce to the detriment of the petitioners who are required to pay illegal taxes, the 1<sup>st</sup> and 2<sup>nd</sup> respondent have breached the petitioners' right to the benefit and protection of the law from illegal action to their detriment.

78. The right to protection of property includes the right under Article 40 (3) of the Constitution that

*“40 (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—*

*(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or*

*(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—*

*(i) requires prompt payment in full, of just compensation to the person; and*

*(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.”*

79. Having acquired, for valuable consideration and having paid all lawful charges and royalties therefor, the forest produce the subject of the petitions, the petitioners were entitled the enjoyment of their property in the forest produce without unlawful interference by the State through national or County Government. Their such enjoyment was hampered by the 1<sup>st</sup> respondent action in detaining for purposes of levying distress for levy of cess which was unconstitutionally legislated and consequently, their constitutional right to property was violated.

80. Article 47 (1) and (2) of the Constitution provides for the right to fair administration as follows:

*“47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*

***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

*(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—*

*(a) provide for the review of administrative action by a court or, if appropriate, an independent*

*and impartial tribunal; and*

*(b) promote efficient administration.”*

81. The action by the County Government in detaining the petitioners' vehicles for purposes of levying distress for unpaid cess was likely to adversely affect the property rights of the petitioners. At the very least the respondent should have given the Petitioners adequate notice in writing to pay up or face distress. Apart from the invoices for cess attached to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's answer to the Amended Petition, there was demonstration of any fair process before the action of distraining for cess was carried out by seizure and detention of the Petitioners' trucks.

82. The Fair Administrative Action Act, 2015 which is enacted under Article 47 (3) to give effect to the constitutional right provides at section 4 thereof as follows:

*“4. (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.*

*(2) Every person has the right to be given written reasons for any administrative action that is taken against him.*

**(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**

**(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**

*(b) an opportunity to be heard and to make representations in that regard;*

*(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;*

*(d) a statement of reasons pursuant to section 6;*

*(e) notice of the right to legal representation, where applicable;*

*(f) notice of the right to cross-examine or where applicable; or*

*(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.*

**(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-**

*(a) attend proceedings, in person or in the company of an expert of his choice;*

**(b) be heard;**

*(c) cross-examine persons who give adverse evidence against him; and*

*(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.*

*(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.*

*(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.”*

83. Even though the Respondents cited the Baringo County Revenue Act, 2016 as authority for their action to seize and detain property of tax defaulters, the same could not take away the constitutional right to fair administrative action. The Court was not supplied with a copy of such County legislation but the same cannot override the National Act of Parliament in the Fair Administration Act, 2015, which is a statute of general application giving effect to ‘norms and standards’ of the right to fair administrative action because, under Article 191 (1) and (2) of the Constitution, the national legislation prevails as follows:

*“191. (1) This Article applies to conflicts between national and county legislation in respect of matters falling within the concurrent jurisdiction of both levels of government.*

***(2) National legislation prevails over county legislation if—***

*(a) the national legislation applies **uniformly throughout Kenya** and any of the conditions specified in clause (3) is satisfied;”*

84. Accordingly, the Court finds that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have by their acts violated the petitioners’ rights under article 27 (1), 40 and 47 of the Constitution.

#### ***Whether the petitioners are entitled to the reliefs sought***

85. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the response to the Amended Petition objected to the Petitions on the ground of delay in challenging the Baringo Finance Act, 2015 as follows:

*“15 The petition herein has been brought more than 2 years upon enactment of 2014 Finance Act and upon lapse of the 90 days for raising objections in so far as the 2015 Finance Act violation of s.15 and 88 of the County Government Act.*

*16 The respondents herein aver that the petitioner did not exercise its right under section 15 of the County Government Act, the above notwithstanding.*

*17 The 1<sup>st</sup> respondent herein avers that the petitioner herein is a vexatious litigant who has refused to remit revenue from 2014 thus depriving it of its undisputed right of generating revenue in order to discharge its constitutional mandate and render adequate services to its constituents.*

*18 The respondents herein aver that the petition herein is an afterthought merely calculated at frustrating the 1<sup>st</sup> respondent in its efforts to raise revenue.*

*19 The respondents aver that grant of prayers sought shall highly prejudice the 1<sup>st</sup> respondent whose functions shall be crippled for lack of revenue.”*

86. In his ruling of 7<sup>th</sup> April 2016 on application for conservatory orders in Petition No. 4 of 2016 herein, Kimondo, J. found that the Petitioner therein had been guilty of laches and held as follows:

*“21. Under section 15 and 88 of the County Government Act, objections to the impugned Act should have been presented within 90 days. The present motion was only presented to court on 25<sup>th</sup> February, 2016. The delay from the time of passage of the 2014 Acts has not been explained by the petitioner. As a general rule, when delay is established, unless it is well explained, it is deemed to be inexcusable. See *Ivita v. Kyumbu* [1984] KLR 441. **I therefore find that there has been undue laches. That in turn prejudices the grant the discretionary remedy sought at this stage by the petitioner.** For all the above reasons, the prayers in the notice of motion dated 25<sup>th</sup> February 2016 to stay implementation of the Baringo County Finance Act 2015 are dismissed.”*

87. However, the learned judge would agree that if the Baringo County Finance Act, 2015 was found, upon full trial, to have been made, without constitutional authority, provisions for levying of cess tax on

forest produce, and the respondents levied and distrained for such cess, the said law and the respondent's acts in implementation thereof would have to be declared null and void and invalid to the extent of their inconsistency with the Constitution in terms of Article 2 (4) of the Constitution, which provides as follows:

*“2(4) Any **law**, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any **act or omission** in contravention of this Constitution is invalid.”*

88. For same reason of supremacy of the Constitution, no person or organ - private or state organ - may exercise state authority contrary to the Constitution and their such action is void, as decreed by Article 2 (2) of the Constitution in the following clear words:

***“2.(2) No person may claim or exercise State authority except as authorised under this Constitution.”***

89. For this reason, the Respondents' objection to the suits on the grounds that the Petitioners had delayed in challenging the County's Finance Act, that there had been public participation in the promulgation of the law and that the Petitioners had paid previous amount of the same levy must be rejected. Once an act is unconstitutional, it cannot, in my respectful view, be validated by any acquiescence, waiver or laches in challenging it on the part of an aggrieved person, nor can there be *estoppel* against enforcement of constitutional rights. This must be the true meaning of the supremacy of the Constitution. In addition, public participation no matter how wide the consultation, cannot validate an unconstitutional exercise of authority. Consequently, having found that the 2<sup>nd</sup> Respondent's legislation was ultra vires its authority under the Constitution, this Court need not, and does not, determine whether or not there was adequate public participation in the process leading to the enactment of the Baringo County Finance Act, 2015.

90. The Petitioners demonstrated that their trucks had been detained in purported enforcement of the cess under the Baringo Finance Act, 2015. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not deny the seizure of the trucks, which they justified as having been authorised by the Baringo County Revenue Act, 2016.

91. It is obvious that in detaining the petitioner's vehicles loaded with forest produce which they had acquired from the state forests, the 1<sup>st</sup> respondent occasioned the petitioners loss in both general damages and special damages. Special damages are ascertainable and it a rule of pleading that special damages must be specifically pleaded and proved. The Petitioners did not specifically plead their loss of user or any other special damage claims as adverted to in the prayer for *“compensation of the Petitioner by the First Respondent for illegal detention of its trucks and consequential proceedings be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents”*, which are in the nature of special damage, and the Court, therefore, rejects the prayer for special damages.

92. For the loss in general damages for breach of constitutional rights to equal protection of law, right to property and right to fair administrative action, the Court, being mindful that the damages are to be met from taxpayers money, awards a modest figure of Ksh.1,000,000/- for each breach of constitutional right.

### **Conclusion**

93. This Court agrees with the principle of purposive interpretation of the Constitution that where a mandate is given there will be power to do such things are necessary for the performance of realisation of such as mandate well as a harmonious approach so that different articles of the Constitution are read as complementing each other rather than ousting the authority of either provisions. The County Governments have a mandate to provide services for the people of the County and in so doing they may raise revenue by levying tax within their area of jurisdiction.

94. However, in levying such tax the County Governments may only levy such tax as it is constitutionally empowered to do. It is the Court's finding that the County Governments are not empowered by the

Constitution to levy tax on forest produce harvested from state forests; that is the province of the National Government which owns the said forests.

95. In levying such tax called cess for timber, logs, poles and other forest produce under section 10 of the 2<sup>nd</sup> schedule of the Baringo Finance Act, 2015 and in implementing by distraining the Petitioners log loaded trucks to enforce the payment of such levy, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have acted unconstitutionally and the Petitioners are entitled to appropriate relief for the contravention of their constitutional rights.

**ORDERS:**

96. Accordingly, for the reasons set out above, the Court makes the following orders in the Consolidated Petitions herein, namely, Amended Petition No 4 of 2016 dated 10<sup>th</sup> October 2016 and Petition No. 9 of 2016 dated 16<sup>th</sup> June 2016, respectively, both formerly filed in the High Court of Kenya at Eldoret:

**1. A Declaration that the Baringo County Assembly has, by reason of Articles 62(3), 185(2) and 209 of the Constitution, no authority to enact a law providing for the levying of Cess in respect of forest produce from the State forests owned and managed by the National Government through the Kenya Forest Service within Baringo County.**

**2. A Declaration that Section 10 of the Second Schedule of the Baringo County Finance Act, 2015 violates the provisions of Articles 185 (2) and 209 of the Constitution to the extent that it empowers the 1<sup>st</sup> respondent to levy Cess in respect of State forests owned and managed by the National Government through Kenya Forest Service within Baringo County.**

**3. A Declaration that the imposition of forest produce Cess by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents against the Petitioners in respect of forest produce from state forests owned and managed by the National Government through Kenya Forest Service within Baringo County violates the principle of fair taxation under in Article 201 (b) (i) of the Constitution.**

**4. An Order of Prohibition to prohibit the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from acting upon the provision for the levying of Cess on forest produce from state forests owned and managed by the National Government through the Kenya Forest Service under section 10 of the 2<sup>nd</sup> Schedule of the Baringo Finance Act 2015 or its successor.**

**5. An Order of Permanent Injunction to restrain the 1<sup>st</sup> Respondent from making any demand for cess or recovering from the Petitioners any arrears of cess on forest produce from state forests pursuant to section 10 of the Second Schedule of the Baringo County Finance Act, 2015.**

**6. An order for the refund to the Petitioners of monies deposited into Court as a condition for the grant of the conservatory order herein pending the determination of the Petition.**

**7. An award to each Petitioner the sum of Ksh.3,000,000/- as general damages to be paid by the 1<sup>st</sup> Respondent County Government for breach of the petitioners' constitutional right to equal protection of the law, right to property and right to fair administrative action under, respectively, Articles 27 (1), 40 and 47 of the Constitution.**

**8. The Petitioners' prayers for an order for compensation of the Petition by the First Respondent for illegal detention of their trucks and consequential proceedings be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents is declined.**

97. As there was no evidence that, in seeking to levy distress for unpaid cess, the County Government was motivated by malice, ill-will or anything but genuine attempt to implement the provisions of the

Baringo County Finance Act, 2015 which the Court only now declares to be invalid to the extent of the levy of cess on forest produce, there shall be no order as to costs.

98. It is needless to state the County of Baringo is at liberty in future Acts of the County Assembly to levy tax or charges for any roads service or of other transport service in and through the County by road users such as the petitioners in accordance with Article 209 (4) of the Constitution. I would also echo, the gratuitous suggestion by Odunga, J. in **Robert N. Gakuru & Others v Governor Kiambu County & 3 others** [2014] eKLR that -

*“I must however stress that County Governments are under Article 175(b) of the Constitution entitled to have reliable sources of revenue to enable them to govern and deliver services effectively. However this entitlement must be exercised in accordance with the Constitution and the law and where the existing legislation is not adequate for the purposes of ensuring the efficient governance and delivery of services the County Government ought to petition the National Government to increase allocation to them or enact appropriate legislation to enable them carry out their constitutional mandate as required under Articles 190(1), 202 and 203 of the Constitution.”*

99. Because of the resultant loss of revenue which could have been used in the provision of services to the people of the County, it is not without regret that I hold that the 1<sup>st</sup> respondent County Government of Baringo where this Court is situate has no constitutional authority to impose a tax called **cess** or by any other name for the forest produce harvested from state forests in the County. However, as there is no authority under the Constitution for the County Government to make a levy on forest produce from state forests, the supremacy of the Constitution must prevail over any noble desires to raise revenue for the provision of services in the County. The respondents must only act within their constitutional authority.

100. The Court is grateful to counsel for their exposition of the law in their submissions filed and made before the Court.

**DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF JULY 2017.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES**

Mr. Kibe Mungai with Mr. Juma Kiplenge & Ms. Muriithi for the Petitioners

Mr. Kibii for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Mr. Odongo for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.