



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
MISC. CIVIL APPLICATION NO. 20 OF 2011 (JR)
IN THE MATTER OF AN APPLICATION BY ALI ABDULLAHI AHMED AND KUSO DAHIR
ALI FOR JUDICIAL ORDER OF PROHIBITION
AND
IN THE MATTER OF SECTION 148 OF THE LOCAL GOVERNMENT ACT
CHAPTER 265 LAWS OF KENYA
AND
IN THE MATTER OF MANDERA TOWN COUNCIL
AND
IN THE MATTER OF ALI ABDULLAHI AHMED AND KUSO DAHIR ALI

BETWEEN

REPUBLIC EX-PARTE

CLERK, TOWN MANDERA COUNCIL RESPONDENT

RULING

It does not appear to be in dispute that the *ex-parte* Applicants trade in miraa. They buy miraa from Meru/Maua County Councils and transport it by road through Wajir County Council and Mandera County Council to Mandera Town Council (the Respondent) where they sell it to customers. Cess is levied on the miraa at source. The *ex-parte* Applicants are being made to pay further cess when passing through Wajir and Mandera County Councils. At the Respondent's Council they pay kshs.4,000/= in cess per vehicle each time they land. The annexed receipts show they bring either 2 or 3 vehicles at a time and are therefore made to pay kshs.8,000/= of kshs.12,000/=.

Following leave, the *ex-parte* Applicants filed this motion seeking an order of prohibition to prohibit the Respondent from levying the cess which they content to be unfair and illegal. Their case is that the cess contravenes sections 148 and 202(3) of the Local Government Act (Cap.265), section 192A (2) (a) and (b) of the Agriculture Act (Cap.318) and Article 209(5) of the Constitution of Kenya, 2010. They further sought to rely on a Circular dated 8th June 2007 by the Permanent Secretary of the Ministry for Local Government which he sent to all local authorities and in which it was indicated as follows:

“1. Cesses

Cesses will continue to be charged by local authorities as tax on primary producers of agricultural, forestry or fishery produce in their areas of jurisdiction.

Cess may not however be levied on the transport of produce on which the cess has already been paid by the producer. Cess or any other fee of levy may not be charged for the transit of such produce through a local authority's area of jurisdiction from that of another.

Cess may not be charged at markets on produce delivered to the markets, where it has been paid elsewhere within the local authority's area of jurisdiction or to another local authority. Market traders should be subject to market fees for the use of local authority facilities and Single Business Permit."

The response by the Respondent was that the cess the Council levies has been provided for in its by-laws (the Town Council of Mandera (Miraa Fee) By-Laws, 1998 and Town Council of Mandera (Miraa Import Cess) By-Laws, 2009) which were made on 25th May 2009 and approved by the Minister for Local Government on 9th July 2009 (annextures "AHS1&2"). Under the By-Laws cess is payable per miraa vehicle for any miraa brought into the Council. It is an offence if payment is not made. The Council contends that there is nothing unfair or illegal in what it is doing by levying cess against the miraa that the *ex-parte* Applicants bring into its area of jurisdiction.

It is clear that under section 148 of the Local Government Act, a local authority may charge or impose fees and cess but such fees and cess has to be regulated by a by-law. There is no dispute that the cess in question is supported by a by-law which has the approval of the Minister for Local Government. However, under section 192A(1) of the Agriculture Act the Respondent was required, before imposing cess on the miraa, to seek the consent of the Minister for Agriculture. The Minister was required to consult with the Minister for Local Government before providing such consent. Under section 202(7) of the Local Government Act, the Respondent had no power to make a by-law that overrides or derogates from the provisions of the Agriculture Act. The result is that the by-laws on whose basis the Respondent imposed the cess derogated from the provisions of the Agriculture Act.

Prohibition is made to forbid a public body from acting in excess or absence of jurisdiction. I determine that the Respondent had no authority to levy cess on miraa in this case without the consent of the Minister of Agriculture. Consequently, the Respondent, either by himself, his agents and/or servants, is immediately prohibited from levying cess, fees or tax on miraa against the *ex-parte* Applicants. The application is allowed with costs.

DATED, SIGNED AND DLEIVERED AT EMBU THIS 19TH DAY OF SEPTEMBER 2011

**A.O. MUCHELULE
JUDGE**