



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISC. CIVIL APPL. NOS. 61 & 62 OF 2010 (JR) (CONSOLIDATED)

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 COUNTY COUNCIL OF WAJIR

AND

IN THE MATTER OF ALI ABDULLAHI AHMED AND KUSO DAHIR ALI

BETWEEN

**REPUBLIC.....EX-PARTE
CLERK, COUNTY COUNCIL OF WAJIR.....1st RESPONDENT
CLERK, COUNTY COUNCIL OF MANDERA.....2ND RESPONDENT**

R U L I N G

The *ex-parte* Applicants trade in miraa. They buy the produce from Meru County Council and transport it by road through Wajir and Mandera County Councils (the Respondents). The Councils are each levying cess on each vehicle that transports miraa through its administrative jurisdiction. Their argument is that the *ex-parte* Applicants are using roads maintained by the Councils and that this cess is what is used to fund such maintenance. It is claimed that this cess is the only source of income to the Councils.

The Clerk to the County Council of Wajir filed a replying affidavit to which he annexed a copy of the County Council of Wajir (Miraa Import Cess) By-Laws, 2008 duly approved by the Minister for Local Government on 19th December 2008. He stated that this is the basis upon which he is levying cess on miraa that is brought into the Council's area of jurisdiction. The by-law was made under the Local Government Act (Cap.265). The Clerk to the County Council of Mandera swore a replying affidavit to say that the cess the Council is levying is legal and justifiable under the Local Government Act. He swore that the Council has a by-law in place to authorize the cess, but did not annex a copy of the same. It was the contention of the *ex-parte* Applicants that no such by-law is in existence and therefore that the levying of cess on their miraa was illegal. They went on to claim that if any such by-law exists, the same contravenes the provisions of section 148 of the Local Government Act and section 192A of the Agriculture Act (Cap.318).

The *ex-parte* Applicants, following leave, seek the judicial review order of Prohibition to prohibit the Councils from levying any miraa cess against them.

Once the *ex-parte* Applicants swore that the County Council of Mandera had no by-law in place to authorize the levying of cess on miraa within its jurisdiction, it fell on the Council to exhibit any such by-law. If the Council did not exhibit then it must be found that it did not have such a by-law. Under section 148 of the Local Government Act cess charged or imposed by the Council has to be authorized and regulated by a by-law which has to be approved by the Minister for Local Government. The action by the Council to levy cess on the miraa without a by-law which had been approved was done without jurisdiction.

Regarding the County Council of Wajir, there is an approved by-law. However, under section 192A(1) of the Agriculture Act, such by-law was supposed to be made with the consent of the Minister for Agriculture who was to consult with the Minister for Local Government. The Council had no power to make the by-law without such consent. Under section 202(7) of the Local Government Act, the Council had no power to make a by-law to override or derogate from the provisions of the Agriculture Act.

The result is that the imposition of cess on the *ex-parte* Applicants miraa was without legal authority. The County Councils of Wajir and Mandera are hereby prohibited from levying cess, fees or tax on the *ex-parte* Applicants miraa. The Councils will pay the costs of these applications.

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

A.O. MUCHELULE

JUDGE