



REPUBLIC OF KENYA

IN THE HIGH COURT OF KEYA

AT MOMBASA

MISC. APPL. NO. 846 OF 2011 [JR]

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPY FOR JUDICAL REVIEW
BY COAST CALCIUM LIMITED**

AND

IN THE MATTER OF: THE BY-LAWS UNDER THE LOCAL GOVERNMENTS ACT

AND

IN THE MATTER OF: DUPLICATE IMPOSITION OF CESS

AND

COAST CALCIUM LIMITED.....APPLICANT

VERSUS

MUNICIPAL COUNCIL OF MOMBASA.....RESPONDENT

R U L I N G

(1) By a Notice of Motion dated 17/10/2011, the applicant Coast Calcium Ltd seeks orders that

a) An order of prohibition to the Town Clerk of the Municipal Council of Mombasa to prohibit him from levying cess when the Applicant have already paid the same to the County Council of Kwale.

b) An order of mandamus to protect the Town Clerk of Municipal Council of Mombasa directing him to perform his public duty in a manner which is not oppressive to the applicant by directing to impose illegal charges on him.

(2) The grounds upon which the reliefs are sought are set out in the Statement dated 11/10/2011 supported by the affidavit of Mohammed Kassam Ahmed sworn on the same date. The applicant's principal complaint is that the Respondent has in violation of the government circular letter dated 8/6/2007 levied cess for the applicants limestone produce for which the applicant's would already have paid cess at the local authority within whose jurisdiction the product is mined and has in addition threatened to increase the cess to Ksh 25 per bag or ksh.25000/- per lorry trip beginning the 1st

November 2011. The Applicant contends the cess charges are not payable and therefore seeks an order of prohibition to stop the Respondent from levying cess and for that amounts to the same thing, an order of mandamus directing the respondent to perform it's "public duty in a manner which is not oppressive to the applicant by desisting to impose illegal charges on him."

(3) I have considered the Government Circular letter of 8/6/2007 addressed by the Respondent Secretary Ministry of Local Government to all Municipal and County Councils and Provincial Local Government Officers. The circular is expressed to identify fees and charges considered to be inappropriate for purposes of encouraging economic growth at the local level in accordance with the Single Business Permit (SBP) Programmein 2000.

(4) Under paragraph 1.2 and 1.3 the circular letter of 8/6/2007 made the following provisions on cesses:

"1.2 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 or another.

1.3 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. Markets traders should be subject to market fees for the use of local authority facilities and Single Business Permit"

I consider that the circular letter of 8/6/2001 was issued pursuant to the Minister's power to approve and correct the imposition of fees and charges by local authorities under section 148(2) of the Local Government and which provides that:-

"S. 148(2). all fees or charges imposed by a local authority shall be regulated by by-laws, or if not regulated by by-law, may be imposed by resolution by the local authority with the consent of the Minister and shall consent may be given either in respect of specified fees or charges or may be given so as to allow a specified local authority to impose fees or charges by reduction in respect of a specified power and a particular matter".

(5) I find that the Respondent Municipal Council's power to levy charges for the applicants limestone produce is subject to the directions of the minister conveyed by the Permanent Secretary's Circular letter of 8/6/2007. In accordance with the Circular letter, while the council may levy transport **charges for the use of the ferry at Likoni and any market fees for use of any of its markets**, it is not entitled to levy cess on the transport produce during the transit of the limestone produce from Kwale County Council through the Respondent Municipal Council, when cess has already been paid by the applicant producer.

(6) Accordingly, an order of prohibition will issue to prohibit the Respondent Municipal Council from levying cess on the applicant's limestone produce from Kwale for which cess shall have been paid at Kwale County Council proof whereof the applicant must produce.

(7) The order for mandamus is vague as it does not point to the public duty to be performed by the Respondent Municipal Council. In view of the order for prohibition sought and granted the order of mandamus which is cast in negative terms is not shown to be necessary and I decline to make the order of mandamus in the terms sought by the applicant.

(8) For avoidance of doubt, it is clarified that the order of prohibition granted herein does not alter the Respondent Municipal Council's Power to levy transport/ferry charges for the applicant's use of the ferry facility at Likoni and for market fees for the use of any of its markets as authorizes by any by-laws or restrictions under section 148 of the Local Government Act Cap 265.

(9) Costs of the application to the applicant.

Dated and delivered at Mombasa this 23rd day of November 2011

EDWARD M. MURIITHI
JUDGE

In the presence of

.....for the Applicant
..... .For the Defendant
..... Court Clerk

EDWARD M. MURIITHI
JUDGE