



Abdilah & 3 others v County Government of Wajir (Constitutional Petition E007 of 2023 & Petition E008 of 2023 (Consolidated)) [2025] KEHC 9986 (KLR) (9 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9986 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CONSTITUTIONAL PETITION E007 OF 2023
& PETITION E008 OF 2023 (CONSOLIDATED)**

JN ONYIEGO, J

JULY 9, 2025

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA
(SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS) HIGH COURT PRACTICE AND PROCEDURE RULES (2013)**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS UNDER ARTICLES 2(1), 3, 10, 22(1), 27(1), 39(1), 43,47(1)
AND (2) AND ART 196 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF ART 22 AND 23(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF COUNTY GOVERNMENTS ACT NO. 17 OF 2012

AND

**IN THE MATTER OF A CONSTITUTIONAL PETITION AGAINST ARBITRARY
INCREASE OF CESS RATES BY THE COUNTY GOVERNMENT OF WAJIR**

BETWEEN

**ALI ABDILAH 1ST PETITIONER
KUSO DAHIR 2ND PETITIONER
ABDULLAHI SHARUBU 3RD PETITIONER
ADAN YUNIS FARAH 4TH PETITIONER**

AND

THE COUNTY GOVERNMENT OF WAJIR RESPONDENT



JUDGMENT

Brief facts in respect of petition No. E007 of 2023;

1. Before this court is a petition dated 22.06.2023 filed by Wasuna & Co. Advocates. The petition seeks for orders that:
 - i. A declaration do issue that the petitioners' fundamental rights and freedoms under article 2(1), 3,10,22(1),23(1), 27(1),39(1),43,47(1) and (2) of *the constitution* of Kenya have been grossly violated by the County government of Wajir, the respondent herein.
 - ii. A permanent injunction do issue against the respondent, its agents, servants and/or representatives, acting under their instructions or otherwise from levying Kes. 20,000 or more and arbitrary increasing cess rates unjustifiably.
 - iii. A declaration do issue that the respondent has been illegally collecting Kes. 20,000/-from the petitioners and do order a compensation of the monies collected from the petitioners on the excess of Kes. 6,000 from the date of maiden collection of Kes. 20, 000/- as cess fees, to date.
 - iv. Costs of this humble petition be provided for.
 - v. Such other orders and/or directions this court may deem just and fit to grant.
2. The petition is premised on the grounds set out on the face of it and the annexed affidavit of Ali Abdillah sworn on 22.06.2023. It is founded on the fact that on 06.06.2022, the County Government of Wajir embarked on a plan to increase the cess rates and charge miraa truck transporters Kes. 20,000 per truck ferrying miraa through the county. That the respondent increased the cess rates arbitrarily, unlawfully and unfairly without stakeholders' engagement or public participation. It was averred that the respondent intend to further increase the same rates as they are not guided by county framework making them susceptible to reckless revision.
3. It was averred that the petitioners are business men and have been transporting miraa for the last 15 years. That the petitioners have been complying with the law by paying the cess rate of Kes. 6,000 dutifully and faithfully even with the increase. It was alleged that if the punitive and exorbitant cess is continually collected from them, the same shall drive them out of business. It was urged that if this court does not restrain the respondent vide a permanent injunction, the ease of doing business will be prejudiced and their economic rights sabotaged.
4. In response, Naema Ibrahim, the County Attorney through the firm of Gedi Advocates filed a replying affidavit sworn on 8.11.2023 opposing the petition. Counsel urged that the petition was flawed for non-joinder of the County Assembly of Wajir, the legally mandated constitutional body charged with the responsibility of passing any legislation concerning taxes.
5. It was deposed that on 23.09.2022, an appropriate advertisement was placed by the County Executive Committee member for Finance and Economic Planning in the Daily Nation newspaper, which is a newspaper of nationwide circulation inviting the public to air their views on the County Finance Bill of 2023. That the same advertisement was placed in the County website under Public Participation on County Budget estimates FY 2022/2023 – 2024/2025 and Finance Bill 2022. Additionally, the said advertisement was equally placed on the official county Facebook page showing the date, venue and time of the forums.



6. She averred that members of the public were asked to submit their views through the email addresses provided through the office of the CEC member for finance and economic planning. The respondent deposed that forums were held as follows: Eldas Sub County at the Administrator's office on 03.09.2022, Wajir South Sub County at Habswein Community Library on 03.10.2022, Wajir East at the ICT Hall on 03.10.2022, Tarbaj Sub county on 03.10.2022 and Bute on 03.10.2022. That the foregoing consultative forums were undertaken in all the six sub counties of the respondent as shown.
7. It was deposed that the attendees signed by indicating their names, signatures, phone numbers and the various sectors that they represented and the same was manifested by the attendance lists annexed. Additionally, it was averred that attendees were given an opportunity to peruse the Finance Bill besides being taken through item by item. In the same breadth, she deposed that the Bill was thereafter introduced into the County Assembly where the County Finance, Budget and Appropriations Committee facilitated a public participation exercise on all the sub counties. That whereas the respondent has a duty to inform the public, be open, accountable and invite the stakeholders for public participation, it does not have the duty to compel the attendance of persons invited.
8. It was alleged that the miraa transportation department was not the only affected department and the increase was necessary considering the economic situation in the entire country. The respondent equally was of the view that this Honourable Court cannot direct the respondent on how to exercise its mandate of levying the cess and how to administer the same as there exist the principle of separation of powers. In the end, this court was urged to dismiss the suit herein with costs.

Brief facts in respect of petition No. E008 OF 2023.

9. Prior to the suits herein being consolidated, the 3rd petitioner filed Constitutional Petition E008 of 2023 seeking the following orders against the respondent:
 - i. That this Honourable Court do issue a declaration that the petitioners' fundamental rights and freedoms under article 2(1), 3, 10, 22(1), 23(1), 27(1), 39(1), 43, 47(1)(2) and article 196(1) (b) of *the constitution* of Kenya have been grossly violated by the County Government of Wajir, the respondent herein.
 - ii. That this Honourable Court issues a permanent injunction against the respondent, its agents, servants and/or representatives, acting under their instructions or otherwise from levying Kes. 35,000/- or more and arbitrary increasing cess rates unjustifiably.
 - iii. This Honourable Court do issue a declaration that the respondent has been illegally collecting Kes. 35,000/- from the petitioners and do order a compensation of the monies collected from the petitioners on the excess of Kes. 15,000 from the date of maiden collection of the cess fees, to date.
 - iv. That costs of this humble petition be provided for.
 - v. Any such other orders and/or directions this court may deem just and fit to grant.
10. The petition is also predicated on the fact that the respondent embarked on a plan to increase the cess rates and charge miraa truck transporters Kes. 15,000/- per truck when ferrying miraa through the county. That the respondent increased the cess rates arbitrarily, unlawfully and unfairly without stakeholder engagement and public participation. It was urged that if the punitive and exorbitant cess is continually collected from the businessmen, they shall be driven out of business and be unable to provide for their families. This court was thus urged to issue a permanent injunction against the respondent from levying Kes. 20,000/- or more on cess affecting miraa.



11. Petitions E007/2023 and E008 of 2023 were consolidated and Petition E007 of 2023 picked as the lead file as the subject matter is similar with a common respondent.
12. The court directed that the suit be heard by way of viva voce evidence wherein PW1, Ali Abdillah testified that he is a businessman dealing in the transportation of miraa and that he operates from Maua to the County Government of Wajir. That previously, from the year 2022 – 2023, they used to pay Kes. 10,000 in cess for miraa. That come the year 2023, cess was increased to Kes. 20,000 and 35,000 per truck from the fixed amount of Kes. 6000 through Wajir County to Mandera and Marsabit Counties respectively.
13. That the sudden shift was made without any formal advertisement or submission of memoranda made directly to the miraa in transit traders and there was no notice sufficiently communicated to the affected stakeholders. He decried the fact that whereas the respondent seeks to levy such punitive cess rates, there were no proper structures and infrastructures to aid their ease of doing business. That there existed no toilets, bathrooms and the few that exist, are dilapidated or out of use thus exposing them to infections. He reiterated that they mainly use the national road and not the county roads to warrant the respondent to levy such charges and neither do they use the respondent's facilities at all. On cross examination, he reiterated that at no given point were they involved in the decision to hike the cess amount and the same was wantonly and arbitrarily done.
14. On the other hand, DW1, Ali Sharrif Ibrahim, acting county director revenue collection officer testified that they do levy cess on traders. That the review of the fees and charges by the County Government of Wajir was conducted lawfully and in compliance with the applicable statutory requirements. He stated that the petitioners offload at Wajir before proceeding to Mandera and further, that they avoid the national roads and use the county roads which are in good condition.
15. It was his evidence that prior to the increase of the cess rates, the respondent conducted public participation leading to the new charges being put in place. Additionally, that the petitioners sell to small traders along the respondent's road and further, that cess is collected at the entry of the market. On cross examination, he stated that the respondent carried out public participation via physical meetings and the media. That the county's entry point to the market are on the highway and those are the places where cess collection is done. According to him, the cess is charged for the reason that the petitioners use the respondent's roads.

Petitioners' submissions

16. At the close of the respondent's case, the court directed parties to file their written submissions. Consequently, the petitioners filed theirs dated 04.03.2025 wherein two issues for determination were raised as follows:
 - i. Whether the purported public participation exercise for the Wajir County Finance Bill (2023 – 2024) was equally applicable to miraa traders plying a national trunk road.
 - ii. Whether the petitioners are entitled to compensation of the excess of the illegal cess levied in violation of the court order dated 09.10.2023.
17. On the first issue, the petitioners submitted that vide article 10 of *the constitution*, the concept of public participation is given credence as a fundamental principal value of governance in the public structure and therefore, the respondent is equally expected to facilitate the same. Counsel further made reference to article 196(b) of *the constitution* which also demands of the counties to advertise and communicate the intention of the county executive by advertising the said public participation exercise in the local



- dailies and using sufficient communication in doing so to enable the public be aware of the county proposals in the then proposed Wajir County Finance Bill (2023 -2024).
18. That in this case, the petitioners' journey starts from Maua, Kina, Garbatulla, Eldas, Modogashe, Habaswein, Lagbolol, Lehele and to Wajir town (offloads for stall traders then proceeds to Tarbaj, Kutulo Wajir, Kutulo Mandera, Dabacity, Elwak, Lafey, Fino, Arbiyah, Umar Jilo and finally to Mandera Town. That the said road is a national trunk and the respondent has no business collecting cess from the petitioners, who are passersby as part of the users of the road.
 19. It was urged that in regards to the Wajir County Finance Act (2024), the said Act only applies to the residents of Wajir County and in this case, the small stall traders and not passersby like the petitioners. To support the foregoing, reliance was placed on the case of *Base Titanium Limited vs The County Government of Mombasa & Another, Petition No. 22 of 2018* where the court held that:

“Further, article 186(1) states that the powers and functions of the National Government and the County Governments, respectively, are set out in the Fourth Schedule and finally, under article 187(2)(b) of *the constitution*, the constitutional responsibility for the performance of the functions or exercise of the power remain with the government to which it is assigned by the Fourth Schedule”.
 20. Counsel contended that it was not demonstrated that indeed public participation was carried out before the new amounts were introduced. That the respondent produced before this court, public participation attendance forms for Wajir County Finance Bill (2022 - 2023) and attaching a county assembly report for 2023 – 2024 thereby attempting to equate the two as being results of a fair, constitutional public participation exercise. To that end, support was drawn from the case of *Kaps Parking Limited & Another vs County government of Nairobi & another [2021] eKLR* where the court held that public participation must be adequate and sufficient, including factoring in unique circumstances of the people you intend to conduct the exercise with.
 21. On the second issue, it was urged that despite this court directing that the respondent revert to the previous charges pending the hearing and determination of the suit herein, the respondent in outright disobedience of the same continued to charge the new rates. That as a result of such violation, the petitioners have lost money.
 22. It was contended that for every truck that the respondent levied Kes. 20,000/- after the court order, there was an illegal profit of Kes. 10,000/- to the respondent. The same was equal to Mandera bound trucks that from every Kes. 35,000/- levied after the court order from the initial Kes. 15,000/-, an illegal profit of Kes. 20,000/- was transmitted to the county government. The petitioners relied on the case of *T.N. Gadavarman Thiru Mulpad vs Ashok Khot & Another [2005] eKLR* where it was held that:

“Disobedience of this court’s order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law...”
 23. This court was therefore urged to allow the petitioners’ prayers as sought.

Respondent’s submissions

24. The respondent also filed written submissions dated 16.03.2025 urging in regards to two issues as follows:



- i. Whether the Wajir County Finance Act 2023 was taken through adequate public participation.
 - ii. Whether the petitioners have provided accurate evidence for compensation as per the attached receipts.
25. Touching on the first issue, the respondent submitted that the Act was subjected to public participation in line with *the constitution* and The *Public Finance Management Act* and the County Government Act, 2012. That what amounts to public participation has been the subject of numerous judicial pronouncements. That in the case of Commission for the Independence for the Implementation of *the constitution* vs Parliament of Kenya & Another [2013] eKLR, the court stated that:
- “What matters is that at the end of the day a reasonable opportunity is afforded to members of the public and any interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case”.
26. The respondent urged that it first placed an advertisement on the Daily Nation newspaper which is a paper of nationwide circulation which informed the public on the County Finance Bill and asked the public to air their views. In the same breadth, it was urged that the respondent proceeded to place a similar advertisement on the county website and their official Facebook Page.
27. It was contended that the advertisement informed the public on how to submit their written memoranda and also informed them on the dates and venues for consultative forums that were to be held throughout the county where the bill would be discussed further. According to the respondent, the said forums were held in all sub counties and the interested members of the public who attended aired their views and the same were taken into consideration before the bill was debated and consequently passed into law.
28. Counsel relied on the case of Diani Business Welfare Association & Others vs The County Government of Kwale [2015] eKLR where the court held that:
- “It does not matter how public participation was effected. What is needed in any view is that the public was accorded some reasonable level of participation...it is an indictment against the petitioners that they would choose to ignore an important civic and constitutional duty to shape the financial and budgetary policy, the implementation of which would affect them in terms of revenue measures and the utilization of that revenue...For all these reasons, I am satisfied that there was a public participation, and the petitioners ignored to present their views during public participation stage of the budget proposals. They were granted an opportunity and they failed to take advantage thereof”.
29. That the respondent did everything that was required of it and it would be very unfair and highly prejudicial for the Honourable court to hold otherwise. That the blame lies on the petitioners who failed to participate when given a chance to do so.
30. It was submitted that an invite letter dated 20.11.2023 was sent to the petitioners namely Ali Abdillah, Kuso Dahir and Abdullahi Sharubu as evidenced in the list of documents dated 17.02.2025 and their decision not to attend the public participation cannot be faulted on the respondent. That the said decision was not arbitrary as the respondent took into account several considerations like: the mode of transport where the miraa transfers used land cruisers for transportation and the respondent charged Kes. 15,000/- for a land cruiser bound for Wajir and Kes. 6,000/- from a land cruiser bound for



Mandera. That these charges were based on the size and capacity of the land cruisers. However, as the traders shifted to using a 10-ton lorry for the transportation of miraa, the county reviewed the fees to reflect the larger transportation of miraa.

31. In the same breadth, it was contended that the petitioners use the county roads as opposed to the national roads which are murrum in nature. That the alleged B9 road as stated by Ali is a rough road hence the preference of the traders to use the well tarmacked roads belonging to the respondent.
32. On the second issue, it was urged that in as much as the petitioners demand from the respondent an amount of Kes. 4,776, 000/-, the respondent denies owing the same to them. That the receipts annexed herein do not support the same. In the end, this court was urged to dismiss the petition herein with costs.

Analysis and determination.

33. Having carefully considered the petition herein, the arguments and written submissions of the parties, the authorities cited in support thereof, it is my view that the issues falling due for determination are:
 - i. Whether the Wajir County Finance Act 2023 was taken through adequate public participation.
 - ii. Whether the cess charge imposed by the Wajir County Government upon each of the petitioners' truck was a charge on services as contemplated under Article 209 of *the Constitution*.
 - iii. Whether the reliefs sought can issue.
34. The crux of the petitioners' case is the contention that there was no public participation conducted as contemplated under article 10 of *the Constitution* which underscores national values and principles of governance which are binding on all state organs, state officers, public officers and all persons whenever any of them applies or interprets this constitution, enacts, applies or interprets any law or makes or implements public policy decisions.
35. On the other hand, the respondent averred that there was sufficient public participation and therefore, the Wajir County Finance Act 2023 Act met all the considerations as required by the law. Additionally, that the doctrine of separation of powers prohibits this court in finding that the new cess rates were introduced arbitrarily.
36. Before I embark on the substantive issues, I wish to respond to the claim by the respondent that this court has no jurisdiction to interfere with the work of the county government the same being an independent body. It is trite that under Article 165(3) of *the constitution*, the high court has unlimited jurisdiction in criminal and civil matters subject to clause 5. From this provision, there is no doubt that the high can question acts of a county government if tainted with unconstitutionality.
37. If the finance bill or Act in question is in breach of any constitutional provision, the high court cannot sit back and watch under the guise of the doctrine of separation of powers. In that regard, I find comfort in the holding in the case of Margaret Lorna Kariuki & Another vs County Assembly of Embu & Another; National Forum for County Assemblies (Interested Party) [2019] eKLR, where the court stated that;

“20. The Supreme Court in *Speaker of the Senate & Another v Attorney General & 4 Others*, Reference No. 2 of 2013; [2013] eKLR signalled that it would be reluctant to question parliamentary procedures, as long as they did not



breach *the Constitution*. In reference to Article 109 of *the Constitution*, which recognizes that Parliament is guided by both *the Constitution* and the Standing Orders in its legislative process, ...”

38. Similarly, the court in the case of *The Council of Governors and Others vs The Senate* Petition No. 413 of 2014 had this to say:

“this Court [is] vested with the power to interpret *the Constitution* and to safeguard, protect and promote its provisions as provided for under Article 165(3) of *the Constitution*, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that *the Constitution* has either been violated or threatened with violation. In that regard, the Petition before us alleges a violation of *the Constitution* by the Respondent and in the circumstances, it is our finding that the doctrine of separation of power does not inhibit this Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of *the Constitution*. In fact the invitation to do so is most welcome as that is one of the core mandates of this Court”.

39. I wish now to address the question of public participation. The question of public participation was the subject of deliberation in the Supreme Court Petition No. E031 of 2024 as consolidated with Petition No. E032 & E033 of 2024 the court while relying on a decision by the Constitutional Court of South Africa in *Mogale and Others vs Speaker of the National Assembly and Others* (CCT 73/22) [2023] ZACC 14 at paragraph 37, stated that; there are three factors that ought to be considered in determining whether the process adopted by a duty bearer in facilitating public participation was reasonable. The Court held thus:

“In determining whether conduct has been reasonable in the context of public participation the following factors are of particular importance:

- a) What Parliament itself has determined is reasonable, and how it has decided it will facilitate public involvement;
- b) The importance of the legislation and its impact on the public; and
- c) Time constraints on the passage of a particular bill, and the potential expense.” [Emphasis added]

[Also see Petition No. E031 of 2024 as consolidated with Petition No. E032 & E033 of 2024 of the Supreme Court of Kenya]”.

40. In the same breadth, The Supreme Court in the case of *British American Tobacco Kenya, PLC* (formerly *British American Tobacco Kenya Limited vs Cabinet Ministry for Health & 2 Others*, Petition No. 5 of 2017, stated that:

“We would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the 45 governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line with this Court's mandate under Section 3 of the *Supreme Court Act*, we would like to delimit the following framework for public participation:

Guiding Principles for public participation:



- i. As a constitutional principle under Article 10(2) of *the Constitution*, public participation applies to all aspects of governance.
- ii. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- iii. The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
- iv. Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to ‘fulfill’ a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
- v. Public participation is not an abstract notion; it must be purposive and meaningful.
- vi. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
- vii. Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
- viii. Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the 46 peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
- ix. Components of meaningful public participation include the following: a. clarity of the subject matter for the public to understand; b. structures and processes (medium of engagement) of participation that are clear and simple; c. opportunity for balanced influence from the public in general; d. commitment to the process; e. inclusive and effective representation; f. integrity and transparency of the process; g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.

41. With the above legal framework on public participation, I will now proceed to consider whether the Act in question is unconstitutional for lack of public participation in the process leading to its enactment.

42. The petitioners urged that the respondent increased the cess rates arbitrarily, unlawfully and unfairly without stakeholders’ engagement or public participation. It was averred that in as much as they have a group chair person in charge of miraa, the respondent did not communicate to him or to the stakeholders on the impending public participation meeting given the unique nature of their business model and the fact that their members are illiterate. Additionally, that the respondent was expected to facilitate public participation to obtain the public views regarding any proposal expected to be made by the respondent.



43. On the other hand, the respondent submitted that an invite letter dated 20.11.2023 was sent to the petitioners namely Ali Abdillah, Kuso Dahir and Abdullahi Sharubu as evidenced in the list of documents dated 17.02.2025 and their decision not to attend the public participation cannot be faulted on the respondent. Further, that consultative forums were undertaken in all the six sub counties of the respondent. Additionally, it was urged that the new charges were introduced by the Act after conducting public participation and that it is not true that only the miraa business was affected.
44. To buttress the foregoing, counsel for the respondent urged that on 23.09.2022, an appropriate advertisement was placed by the County Executive Committee Member for Finance and Economic Planning in the Daily Nation Newspaper, County's website and the official County Facebook page. That whereas the respondent has a duty to inform the public, be open, accountable and invite the stakeholders for public participation, it does not have the duty to compel the attendance of persons invited.
45. This court has independently perused the annexures by the respondent and specifically, the advertisement on Daily Nation Friday, September 23, 2022, which reads, 'The County Government of Wajir is in the process of finalizing the budget estimates for the medium term 2022/2023 to 2024/2025'. The same listed various sub counties, venues, dates and time when the said process was to be conducted. Further, it was annexed to various annexures listed as exhibit GAA3 to GAA7 showing the people who were allegedly in attendance of the meeting in the different sub counties of the respondent, their contact numbers together with their signatures. In the same breadth, it was annexed by the respondent in reference to a report on the Act, marked as Exhibit GAA 8. In my view, the respondent's allegation was corroborated by the annexures marked as GAA3 to GAA8.
46. A look at the petitioners' suit reveals that the same is founded on the fact that on 06.06.2023, the respondent embarked on a plan to increase the cess rates and charge miraa truck transporters Kes. 20,000 per truck ferrying miraa through the county. Additionally, that the said action grossly violated the rights of the petitioners. From the petition, it listed several articles allegedly violated by the respondent but of importance to note is the fact that it was not outlined with reasonable degree of precision how the alleged rights were violated. [See Anarita Karimi Njeru vs Republic [1979] KLR 154].
47. Having already stated that the petitioners averred that the respondent started collecting the new cess rates as from 06.06.2023, the supporting affidavits annexed notes the start dates as at 06.06.2022. In determining when the respondent commenced levying the new rates, this court has perused the receipts annexed by the petitioners.
48. From a receipt dated 25.03.2023, this court notes that the petitioners paid an amount of Kes. 6,000.00/- to the respondent and another receipt dated 07.06.2023, where the petitioners also paid to the respondent an amount of Kes. 20,000.00/-. The shift from Kes. 6,000.00/- to Kes. 20,000.00/- shows that the correct date when the new rates were effected is 2023 hence not 2022 as stated in the supporting affidavits annexed on the petitions.
49. The above notwithstanding, it is also not lost to this court that the contestation by the petitioners is pegged on the allegation that the annexed public participation meetings are for the Wajir County Finance Act 2022 in the year Financial year 2022 – 2023 and not the 2023 – 2024 to which the petitioners have contested. Additionally, that the said Act should only apply to the miraa traders based at Wajir hence not the petitioners.



50. It is important to note that a new financial year begins at the beginning of the month of July of the financial year. It therefore follows that when enacting a new Act, the person or body concerned ought to get and/or involve the persons concerned prior to the enactment of the new Act intended.
51. In this case, it was outright that for the respondent to bring the changes referred to by the petitioners, the collection and/or public participation ought to have been carried out prior to or in the year 2022 or early 2023. Having perused the annexures marked as GAA3 to GAA8, it is my humble view that in regards to the guidelines issued by the Supreme Court in the BAT case(supra), the bear minimums of a public participation process was met by the respondent
52. In as much as the petitioners argue that their chairman or the stake holders were not informed, the respondent annexed a letter dated 20.11.2023 allegedly sent to the petitioners namely Ali Abdillah, Kuso Dahir and Abdullahi Sharubu amongst others. In as much as only the petitioners raised the issue of non – public participation, well still, the writing of the said letter in my view must have been an afterthought by the respondent. But be it as it may, it is my honest view that the petitioners are playing double standards for the reason that on one hand, they claim they were not involved in the process of public participation leading to the increment of the cess rates and on the other hand, that the said Act only ought to apply to the people and miraa traders of Wajir.
53. As already noted elsewhere in this judgment, indeed the process forming the enactment of the Act, is clear that the people concerned, being the public miraa traders included, were informed of the intention by the respondent to enact the Wajir County Finance Act 2023. As such, the said Act is found to have been properly enacted. In the same breadth, following the Supreme Court decision in the case of British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited vs Cabinet Ministry for Health & 2 Others (supra), one of the guidelines listed is that:
- Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the 46 peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
54. As such, I find that indeed, there was public participation prior to the enactment of the Wajir County Finance Act 2023 which led to the increment of the cess rates. Similar finding was made in a related petition being Garissa High Court Petition No. E006 of 2023 where this court found that there was public participation in respect to the 2023 Wajir County Government finance Bill.
55. The next question to answer is; whether the cess charge imposed by the County Government of Wajir upon each of the Appellant’s truck was a charge on services as contemplated under Article 209(4) & (5) of *the Constitution* of Kenya.
56. The petitioners urged that they are businessmen dealing in the business of transportation of miraa from Maua town in the County of Meru to Mandera via Wajir County. That in their course of business of transportation, they have been transporting miraa through the county of Wajir and in doing so, have been paying a fixed fee of Kes. 6,000 to the County Government of Wajir.
57. The bone of contention in this suit is whether the cess charged by the respondent upon the petitioners’ truck is a charge on a service as contemplated under Article 209(4) and (5) of *the Constitution*.
58. Article 209 stipulates as follows: Power to impose taxes and charges
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. ...
 3. ...
 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.
59. Article 185(2) of *the Constitution* of Kenya confers a County Government with the Legislative Authority to 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. Additionally, article 186 (1) states that the powers and functions of the National government and the County governments, respectively, are as set out in the Fourth Schedule. Finally, under Article 187 (2) (b) of *the Constitution*, constitutional responsibility for the performance of the functions or exercise of the power shall remain with the government to which it is assigned by the Fourth Schedule.
60. It is the petitioners’ case that the road that they use is a national trunk and the respondent has no business collecting cess from the petitioners, who are passersby. Additionally, that in regards to the Wajir County Finance Act (2024), the said Act only applies to the residents of Wajir County and in this instance, the small stall traders hence not passersby as petitioners. In the same breadth, that there exist no toilets, bathrooms and the few that exist, are dilapidated or out of use thus exposing them to infections. The witness reiterated that they mainly use the national road hence not the county roads to warrant the respondent to levy such charges and neither do they use the respondent’s facilities at all.
61. Conversely, the respondent was of the view that the petitioners use the county roads as opposed to the national roads which are murrum in nature. That the alleged B9 road as stated by Ali is a rough road hence the preference of the traders to use the well tarmacked roads belonging to the respondent.
62. Under the provisions of Article 209, it is outright that a county government is empowered to raise revenue and levy taxes, rates, or other charges. Additionally, under sub article (4), the respondent herein is authorized to impose charges for services provided. So then, what is the meaning of the word ‘services’ for purposes of application within the meaning of Article 209(4) of *the Constitution*? The Supreme Court in the case of Base Titanium Limited vs The *County Government of Mombasa* 7 *Another, Petition No. 22 of 2018* stated that:

“The word ‘service’ as provided in the Oxford Dictionary of English 3rd Edition 2015 is “a system that provides something that the public needs, organized by the government or a private company”. This may include for County transport which entails County roads; street lighting; traffic and parking; public roads transport; and ferries and harbors, excluding the regulation of international and national shipping and matters related thereto comprise some of the functions and powers of County Governments under Schedule Four Part 2, Section 5”.



63. Armed with the above definition, it is safe to state that the respondent herein ought to levy cess on persons including the petitioners if they use their services. To this end, the respondent has stated that they charge the said cess for the reason that the petitioners use its roads and markets.
64. In the same breadth, in a case where the petitioners simply use the national government roads, then it would be imperative that the respondent does not charge them as they are simply road users for roads not maintained by the county government. In High Court Petition no 472 of 2014, Council of County Governors vs Attorney General & 4 others [2015] eKLR the Court clarified that County governments will be in charge of Class D, E, F and G (County Roads), whilst the National government is in charge of Class A, B and C (National Trunk Roads). That Court decision resulted in a subsequent [Legal Notice No. 2 of 2016](#), which clearly brought out the road network management system in the Country.
65. The foregoing notwithstanding, Kenya National Highways Authority hereinafter KeNHA, is responsible for the development, rehabilitation, management, and maintenance of all National Trunk Roads comprising Classes S, A, and B roads. Class-S Road is defined as a highway that connects two or more cities and carries safely a large volume of traffic at the highest speed of operation; Class A Road is defined as a highway that forms a strategic route and corridor connecting international boundaries at an identified immigration entry and exit points and international terminals such as international air or sea ports; and finally a Class-B Road, which is a highway that forms an important national route linking national trading or economic hubs, County Headquarters and other nationally important centres to each other and to the National Capital or to Class A roads.
66. From the above, it is outright that there is a distinction between national roads and county roads. While national roads are maintained solely by the national government through KeNHA, county roads are maintained by the respective counties in collaboration with the other authorities. Ultimately, a county government is not allowed or authorized to levy any service charge, tax or cess on any person or motor vehicle using or plying on a national government road maintained by the national government. Use of such roads is taxed through other approved methods inter alia fuel levy hence county governments have no business imposing their own taxes on roads they do not maintain.
67. Imposition of road blocks on a national road by county governments for purposes of collecting cess is unlawful. A county government should only confine itself to revenue collection along roads classified as county government roads. If one is transporting bananas on a national road direct from Busia to Mandera passing through multiple counties inter alia; Kakamega, Bungoma, Uashingishu, Kericho, Nakuru, Kiambu, Nairobi, machakos, Kitui, Garissa, Wajir and eventually Mandera, will such a transporter be charged cess by all those County governments? The answer is no.
68. It will amount to double taxation and bad business. In such a scenario, only the destination County that is supposed to charge. In other words, transporters on transit to Mandera passing through a national road to Mandera through Wajir or any other county should not be charged unless they decide to do business along the way.
69. The question that I therefore need to determine is, what is the classification of the road used by the trucks transporting the petitioners' miraa in the instant case.
70. My review of the petitioners' case vis a vis that of the respondent is that, it is clear that in as much as the petitioners ultimate destination is Mandera County, they pass by Wajir County. While passing, it was not denied that they sell to the small traders of Wajir County. My view is further compounded by the fact that PW1 testified that the respondent has not provided toilets, bathrooms and the few that exist, are dilapidated or out of use thus exposing them to infections. To that end, I am convinced that



indeed the petitioners use the respondent's roads and markets while selling miraa to the small scale traders of Wajir County.

71. It is also clear that the said selling and buying by the small scale traders can only happen in a market set up. As already noted, the respondent can levy charges on the users of its services but, the said services must measure to the value charged and/or levied. Conversely, the respondent does not have the authority to charge a cess, levy or tax where it does not offer anything and/or service in return.
72. The next issue is whether the county government properly imposed the tax now termed as punitive. It is worth noting that chapter 5 of *the constitution* speaks about the form, content and timing of the budgets. Specifically, article 224 of *the constitution* on the County Appropriation Bills, provides that:
On the basis of the division of the Revenue Bill passed by parliament under article 218, each county government shall prepare and adopt its own annual budget and appropriation Bill in the form, and according to the procedure, prescribed in an Act of Parliament.
73. Article 220(1)(a) of *the Constitution* stipulates that estimates of revenue and expenditure are mandatory elements of the budgets of both the National and County Government. The provision provides as follows:
“(1) Budgets of the national and county governments shall contain—
a. estimates of revenue and expenditure, differentiating between recurrent and development expenditure; ...”
b. ...”
74. Similarly, the Supreme Court in Petition NO. E031 of 2024 as consolidated with Petition NOS. E032 & E033 of 2024 held that:
173. ...it is evident to us that the estimates of revenue are not required to be presented in an Appropriation Bill. The preparation and tabling of the estimates of revenue before the National Assembly, precede the preparation and tabling of the Appropriation Bill. Further, and in line with Sections 37 and 39 of the PFM Act, it is only after the National Assembly has considered and approved the estimates of revenue and estimates of expenditure that an Appropriation Bill and any other relevant Bills, required to implement the budget and assented to by the 30th June is prepared, tabled, and approved.
75. From the above, it is clear that the process of coming up and/or determining the amounts payable to the respondent is not under the purview of this court but an independent process altogether. Therefore, the act of the respondent increasing the previous amounts payable from Kes. 6,000.00 and 15,000.00 to Kes. 20,000.00 and 35,000.00/- respectively is mundane to this court noting that public participation was properly done. Additionally, the respondent through DW1 stated that the changes were brought about as a result of the fact that the petitioners use their roads and further, that the petitioners shifted from using small vehicles to lorries hence the capacity of the vehicles.
76. Having already noted that the respondent had both the constitutional and statutory power to impose tax/cess for the services they provide albeit punitive, this court has no power to vary the same as that will amount to interference with an independent body's constitutional and statutory mandate. It is not for the courts to determine on whether a certain tax is reasonable or not unless unconstitutionally imposed or in breach of a constitutional provision.
77. Similar position was taken in the South African case of National Treasury & 5 Others vs Opposition to Urban Tolling Alliance & 4 Others [2012] ZACC 18 where the Constitutional Court stated that:



(93) It is undisputed that in July 2007 the Cabinet approved the Gauteng Freeway Improvement Project and the concomitant basis for its finding, e-tolling, after extensive investigation and a report to it on the issue. It is national executive and treasury policy not to use fuel levy type funding for these kinds of projects. None of this was, or could be, attacked on review in this court. The playing field for the contestation of executive government policy is the political process, not judicial one.’

78. Having held as above, it follows that the excess payment that the court had suspended through a conservatory order would have been recovered from the petitioners upon failure of this petition. To that extent, the issue of compensation is overtaken by events. This court cannot order for refund of the excess cess collected by the county government and then immediately order for recovery of the same. Accordingly, it is my finding that the petition herein does not meet the threshold for grant of the orders sought. Consequently, the two petitions are hereby dismissed with no order as to costs. The conservatory orders in place are hereby lifted.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF JULY 2025

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J. N. ONYIEGO

JUDGE

