



**Milly Glass Works Limited v County Government of Mombasa (Constitutional
Petition E050 of 2022) [2024] KEHC 1597 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1597 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E050 OF 2022**

OA SEWE, J

FEBRUARY 8, 2024

**IN THE MATTER OF: ARTICLES 10, 19, 22, 23, 40
& 209 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF: MOMBASA COUNTY FINANCE ACT, 2021

AND

**IN THE MATTER OF: UNCONSTITUTIONAL & UNLAWFUL LEVYING OF OFFLOADING
FEES AT LIKONI, MTWAPA & MIRITINI REVENUE COLLECTION POINTS**

BETWEEN

MILLY GLASS WORKS LIMITED PETITIONER

AND

COUNTY GOVERNMENT OF MOMBASA RESPONDENT

JUDGMENT

- [1] The petitioner described itself herein as a leading glass container and tableware manufacturer based at Liwatoni area within the County of Mombasa. Its plant is situated at Mombasa/Block XLVIII/134 in respect of which it holds a lease for a term of eighty-one (81) years from the Kenya Railways Corporation. At paragraphs 4 to 8 of the Petition, the petitioner averred that it relies on feldspar and silica sand as raw materials for the manufacture of glass containers and tableware; and added that it obtains the silica sand from Kwale County while the feldspar is sourced from Kajiado County.
- [2] The petitioner further stated that, to harvest feldspar and silica sand, it pays such lawful taxes, fees and levies imposed by the County Governments of Kwale and Kajiado. In addition, the petitioner stated that it also recycles glass, which it then uses to manufacture new glass containers and tableware; and that for this purpose, it collects broken glass (cullet) majorly from the Nairobi City County



and Kilifi County. The petitioner further averred that, when transporting the feldspar, silica sand and cullet into Mombasa County, its lorries must go through three (3) revenue collection points established by the respondent at the Likoni Ferry, Mtwapa and Miritini, where it is required to pay cess, identified as offloading fees of Kshs. 3,400/= at Likoni Ferry and, Kshs. 2000/= at Mtwapa and Miritini, respectively.

- [3] The petitioner further deposed that, in exercise of its powers under Article 209 of the *Constitution*, the respondent has been enacting various Finance Acts; including the Mombasa County Finance Act 2021 which came into force on 22nd February 2021. The petitioner's cause for complaint was that, whereas the Act provided for the levying of cess on silica sand as Item 79 of the Schedule to the Act, feldspar and cullet were not similarly provided for; and therefore the cess charges collected from it for the period 2021-2022 had no legal basis. The petitioner further averred that the cess charges collected by the respondent have no relation whatsoever to any services rendered by the respondent.
- [4] The petitioner also took issue with the fact that the cess is levied at different rates for the three entry points to the County; and is therefore being applied arbitrarily. In the petitioner's assertion such arbitrary application amounts to a contravention of Articles 10, 40 and 209 of the *Constitution*. The petitioner also pointed out that the respondent has continued to ignore the decision of the Supreme Court in *Base Titanium Limited v County Government of Mombasa* [2021] eKLR in which it was held that cess charges levied by the respondent are unconstitutional. Hence, at paragraph 2, 34 and 35 of its Petition, the petitioner averred that it filed the Petition not only on its own behalf but also on behalf of members of the public who are affected by the respondent's revenue raising measures.
- [5] Accordingly, the petitioner prayed for the following orders against the respondent:
- (a) A declaration that the respondent's action of levying cess charges on the items listed under Item 79 of the Schedule to the *Mombasa County Finance Act 2021*, or as may be subsequently amended, is a violation of Articles 10, 40 and 209 of the *Constitution*;
 - (b) A declaration that the respondent lacks the legal power to levy cess charges on any item entering and being offloaded in the County of Mombasa, including but not limited to silica sand, feldspar and cullet, without offering a specific and identifiable service to the person offloading within the County;
 - (c) A permanent injunction restraining the respondent, its agents or servants from levying cess charges, or any charges to similar effect, on the petitioner's vehicles entering the County of Mombasa at Miritini, Likoni or Mtwapa revenue barriers, or at any other location whatsoever;
 - (d) Such other relief as the Court may deem necessary or appropriate under Article 23 of the *Constitution*.
- [6] The Petition was premised on the affidavit of the petitioner's Managing Director, Mr. Mohamed Rashid, sworn on 14th September 2022 and the documents annexed thereto. In essence, Mr. Rashid reiterated the averments set out in the Petition, namely, that it is a leading glass manufacturer based in Mombasa; and that its raw materials are sourced from outside the County of Mombasa; and therefore its trucks have to pass through the three barriers erected by the respondent at Likoni Ferry along the Likoni-Ukunda Road, at Mtwapa along the Mombasa-Malindi Road, and at Miritini along the Mombasa-Miritini Road.
- [7] It was further averred by the petitioner that, since the aforementioned roads are classified roads, the respondent has no basis for levying cess for their use. In particular, the petitioner deposed that:



- (a) The Likoni-Ukunda Road is classified as A14, and is therefore falls under the category 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.
 - (b) The Mombasa-Malindi Road is classified as B8, meaning it 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.
 - (c) The Mombasa-Miritini Highway is classified as A109, meaning it has a classification similar to the Likoni-Ukunda Road.
- [8] Thus, the petitioner complained that, in spite of the decision of the Supreme Court in *Base Titanium Limited v County Government of Mombasa & Another* [2021] eKLR (hereinafter, “Base Titanium”) that it was unconstitutional for the respondent to charge cess for the use of the above roads, the respondent has continued to charge cess disguised as offloading charges in the *County’s Finance Act, 2021*. In this regard, the petitioner posited that beyond the personal and direct injury to the petitioner, the respondent’s actions, if unchecked, will continue to violate Articles 10 and 209 of the *Constitution*; and therefore that it is in the interest of justice that the reliefs sought in the Petition be granted as prayed or on such terms as the Court may consider just.
- [9] In response to the Petition, the respondent filed a Replying Affidavit sworn on 19th July 2023 by its Director in charge of Revenue, Mr. Affan Mohamed. He averred that the Petition is *res judicata* as a similar matter filed by the Petitioner disputing the payment of cess was dismissed in Mombasa High Court Petition No. 79 of 2014: *Milly Glass Works Limited & 3 Others v County Government of Mombasa & Another* [2021] eKLR. The respondent deposed that it is empowered by the *Constitution* under Article 209 thereof, to impose charges for the purpose of raising revenue and that it is within this mandate that its County Assembly enacted the *Mombasa County Finance Act, 2023*.
- [10] In response to the assertion by the petitioner that the payment receipts do not indicate the precise revenue stream or the exact reason for the payment, the respondent explained that it has an e-cess portal through which payments are made; and that upon making an application for payment e-receipts are issued indicating the purpose for payment. Thus, the respondent averred that the petitioner has failed to demonstrate how the charge or levy is inconsistent with Article 209(5) of the *Constitution*.
- [11] In a rejoinder to the respondent’s response, the petitioner filed a Supplementary Affidavit sworn on 26th September 2023 by Mr. Mohamed Rashid. It basically averred that the enactment of Mombasa County Finance Act 2023 does not affect the petitioner’s request for refund of monies levied under the *Finance Act 2021*, if the Court finds that the respondent had no such powers. The petitioner also denied that the Taib bin Nasser Road is a County road; and averred that even if it is, the charging of cess is unrelated to the use of a county road for which there is provision for charging toll. Hence, the petitioner reiterated its earlier averments and asserted that the respondent cannot generically collect cess for various services such as street lighting, sewerage, traffic flow or healthcare.
- [12] The Petition was urged by way of written submissions; to which end, the petitioner relied on its written submissions dated 25th September 2023. It proposed the following issues for determination:
- (a) Whether the Petition is *res judicata*;
 - (b) Whether the respondent has a lawful basis for levying the cess as it does;



- (c) Whether the petitioner is entitled to the reliefs sought.
- [13] On *res judicata* and its ingredients, the petitioner relied on [Joseph Kaguthi & 11 Others v Permanent Secretary Ministry of Interior & Coordination of Government & Another](#) [2021] eKLR and urged the Court to find that the doctrine was improperly invoked in this matter. The petitioner pointed out that Mombasa HCCC No 79 of 2014 challenged the [Mombasa County Finance Act, 2014](#); and therefore did not preclude a challenge to subsequent Finance Acts. The petitioner added that the budget making process is prone to challenge every single year because the duty to comply with the law remains the same every single year. In addition, the petitioner submitted that the grounds for challenge in Mombasa HCCC No. 79 of 2014 were public participation and prejudice to national economic policies; and therefore not the same as the grounds relied on herein.
- [14] In support of its assertion that the respondent has no lawful basis for levying the cess, the petitioner submitted that, whereas the respondent has powers to raise revenue under Article 209 of the [Constitution](#), that power must be exercised in accordance with the law. In particular, the petitioner contended that, since the Supreme Court had pronounced itself in [Base Titanium](#), and held that a county does not have the authority to charge cess, levy or tax where they do not offer anything in return, the practice ought to have stopped forthwith.
- [15] In response to the assertion by the respondent that Taib bin Nasser Road which the petitioner uses to access its factory is a county road, the petitioner urged the Court to note that no evidence was availed by the respondent in that regard, yet by dint of Section 4 of the [Mombasa County Roads Act, No. 8 of 2016](#) it is required to maintain a record of all roads declared by any law as a county road. The petitioner further argued that, even assuming the road was a county road, Sections 16, 17 and 18 of the [Mombasa County Roads Act](#) empowers the respondent to charge a fee known as toll for utilizing a county road; and not “cess” or “offloading fee” as is the case here.
- [16] Further to the foregoing, the petitioner took issue with the fact that the receipts issued by the respondent are marked “Miscellaneous”; which is one of the acts deprecated by the Supreme Court in [Base Titanium](#) in the following words:
- “Using the term “miscellaneous” to account for payment leads to ambiguity which goes against the spirit of Article 201 of the [Constitution](#). That word could refer to any number of things and it is essential that this form of opaqueness in accountability be discouraged. It is imperative that any payments to Counties must clearly state in precise, unambiguous words what the payments are for.”
- [17] Thus, the petitioner submitted that there is nothing in the 2021 [Finance Act](#) that empowers the levying of offloading fees on feldspar or cullet; and that this is why the respondent now wants the Petition to be determined on the strength of the 2023 Finance Act, which provides for feldspar and cullet at Items 447 to 450. In the premises, the petitioner prayed that its Petition be allowed and orders granted as prayed.
- [18] The respondent proposed similar issues for determination vide its written submissions dated 30th October 2023:
- (a) Whether this matter is *res judicata*;
- (b) Whether [Base Titanium Limited v County Government of Mombasa](#) is applicable to this matter;
- (c) Whether the petitioner ought to be granted the prayers sought.



- [19] On *res judicata*, the respondent made reference to paragraph 3 of its Replying Affidavit where reference was made to Mombasa High Court Petition No. 79 of 2014 and urged the Court to find that the issues raised herein are similar to the issues raised therein. Counsel for the respondent relied on Section 7 of the *Civil Procedure Act* and the cases of Nairobi HCCC No. 2340 of 1991: *Njangu v Wambugu & Another* (Unreported) and *Sri Ram Kaura v M.J.E Morgan* [1961] EA 462 in urging the Court to not allow the petitioner to twist this Petition into an appeal in respect of Mombasa High Court Petition No. 79 of 2014.
- [20] On whether *Base Titanium Limited v County Government of Mombasa* had similar facts and should apply to this matter, the respondent made reference to its Replying Affidavit in which it explained that the cess charge provides for several services to the respondent, including the maintenance of the county roads which the petitioner uses on a daily basis. The respondent further pointed out that it does not charge cess on goods in transit; which was the bone of contention in *Base Titanium*. Thus, the respondent urged for the dismissal of the Petition.
- [21] I have given careful consideration to the averments set out in the Petition, the Supporting Affidavit and annexures thereto. I have likewise paid attention to the respondent's assertions in its response together with the supporting documents. In the same vein, I have perused and considered the written submissions filed by learned counsel on behalf of the parties, including the authorities cited by them. It is indubitable that the petitioner is a manufacturer of glass containers and tableware; and that it operates from Mombasa/Block XLVIII/134 in Liwatoni area within the County of Mombasa.
- [22] The parties were also in agreement that, in its manufacturing, the petitioner uses silica sand, which it obtains from Kwale County, and feldspar from Kajiado County. In addition, the petitioner uses recycled glass (cullet) which it sources from Nairobi City County and Kilifi County. Hence, the petitioner's lorries must go through the 3 revenue collections points put in place by the respondent at Likoni Ferry, Mtwapa and Miritini where cess ranging between Kshs. 2,000/= and Kshs. 3,400/= was charged by the respondent during the period in question.
- [23] Thus, the pith of the petitioner's case in this Petition is that the respondent had no power to levy such fees because:
- (a) The respondent does not provide services to the petitioner at any of the three revenue barriers for it to be entitled to levy an offloading fee;
 - (b) The levy was imposed of feldspar and cullet, neither of which was provided for in the *2021 Finance Act*;
 - (c) Different sums are charged for cess at different revenue barriers, thereby converting it into an arbitrary levy.
- [24] On the other hand, the contention of the respondent is that the Petition is *res judicata*, the petitioner having filed Mombasa High Court Petition No. 79 of 2014 against the respondent in respect of the same issues. The respondent also contends that it has the constitutional mandate to charge cess for its services; granted that the petitioner uses Taib bin Nasser Road within the County to access its premises. Accordingly, the issues for determination are:
- (a) Whether the Petition is *res judicata*?
 - (b) Whether the respondent had any lawful basis for levying cess on the petitioner's lorries during the year 2021/2022 as it did; and,
 - (c) Whether the petitioner is entitled to the reliefs sought.



A. On Res Judicata:

[25] There is no gainsaying that *res judicata* is a plea that goes to the jurisdiction of the Court which, if successfully raised, has the potential of disposing of the entire suit; for Section 7 of the [Civil Procedure Act](#), Chapter 21 of the Laws of Kenya, does provide that:

“No Court shall try any suit or issue in which the matter in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title...and has been heard and finally decided by such Court.”

[26] The rationale for the doctrine was aptly captured by the Court of Appeal in [Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others](#) [2017] eKLR, thus:

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

[27] Accordingly, in [Kenya Commercial Bank Limited v Benjob Amalgamated Limited](#) [2017] eKLR, the Court of Appeal held reiterated the elements that must be proved for the plea to be successfully mounted. The Court of Appeal held:

The elements of *res judicata* have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed *res judicata* on account of a former suit;

- (a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

[28] In this instance, the responded was of the posturing that the issues raised herein are essentially the same issues raised in Mombasa High Court Petition No. 79 of 2014. Accordingly, I have perused and considered the Judgment of the Court (Hon. Emukule, J.) and note that the issues were defined thus by the Court:

From the above arguments by counsel for the Petitioners and the Respondents, the following issues are discernible –



- (1) Whether there was public participation in the enactment of the County of Mombasa *Finance Act 2013* and 2014;
- (2) Whether there was failure in the publication of the Mombasa County Finance Bill 2014 and when does a Bill become law;
- (3) Whether the collection of taxes by the County of Mombasa is legal/constitutional;
- (4) Whether such payments, if unconstitutional are refundable to the Petitioners;
- (5) Whether an order of refund would be prejudicial to the welfare of the residents of the County of Mombasa.

[29] It is plain then that the plea of *res judicata* was wrongly raised by the respondent considering the issues for determination. Moreover, it is manifest that, other than the petitioner, the suit involved other parties.

B. Whether the Respondent Had Any Lawful Basis for Levying Cess on the Petitioner’s Lorries During the Year 2021/2022 as It Did:

[30] As was conceded by the petitioner, the power of the respondent to levy the cess is not in question, for Article 209(3), (4) and (4) of the *Constitution* is explicit that:

- “(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.”

[31] Indeed, in *Base Titanium v County Government of Mombasa & Another* (*supra*) that the petitioner relied on to buttress its case, the Supreme Court made this aspect clear thus at paragraphs 25 and 29:

“Under the provisions of article 209, a county is empowered to raise revenue and levy taxes, rates, or other charges. Additionally, under sub article (4), the 1st respondent is authorized to impose charges for services provided...Consequently, we agree with the High Court and the Court of Appeal, only to the extent that County Governments have the mandate to charge levies for services rendered.”

[32] Nevertheless, the Supreme Court underscored the aspect of sub article (4) that such charges can only be imposed for services rendered by the respondent. Thus, the Supreme Court held:

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 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.

26. Taking that definition into account, a plain reading of that article reveals that the intention of article 209(4) of the Constitution, is to confer County Governments the discretionary powers to impose charges for services, more specifically, that they can charge or impose a payment in exchange of a public need or amenity.
27. To our minds, the insertion of the words ‘for services’ in article 209(4), are a qualification to the charge of the services. Whereas a County can levy charges, it must do so in exchange for an amenity. Put differently, a County does not have the authority to charge a cess, levy or tax where they do not offer anything in return.
28. Undoubtedly, Constitution permits County Governments to impose charges for the realization of its powers under the Fourth schedule. But that power does not go unchecked, in the spirit of harmonious interpretation of the Constitution, in enacting the law, County Governments must heed the provisions of article 209 (5) and ensure that the charges invoked will not be detrimental to national economic policies, economic activities across boundaries or the national mobility of goods, services, capital or labor.

[33] Needless to say that the Base Titanium was filed in respect of Mombasa County Finance Act of 2014; and that since then several such Acts have been passed by the respondent’s County Assembly. Nevertheless, the ratio decidendi endures and is binding on this Court. I accordingly agree with the submission by counsel for the petitioner that for the respondent to continue charging cess, it must demonstrate not only that the impost is provided for in its Finance Act but also that there is a reciprocal amenity or amenities for which the levy is imposed.

[34] In the Schedule to the Mombasa County Finance Act 2021, there was provision for charging cess for silica sand under Cess Charges Category 79 Item 677 of Kshs. 3,400/=; which is what the petitioner was charged at the Likoni Ferry. The question to pose then, is what service was the charge in respect of. The contention of the petitioner was that the impost was in respect of use of the Likoni-Ukunda Road. It explained that this is a national road, classified as A14 and is therefore a highway that forms a strategic route and corridor connecting international boundaries. Hence, it falls under the mandate of the National Government; and therefore the respondent had no business levying cess for its use.

[35] Indeed, in the Base Titanium, the Supreme Court was explicit in this regard at paragraphs 39 and 40 of its Judgment that:

39. It is not in dispute that to access the Port, the appellant must use the Likoni-Ukunda Road which the Kenyan road system identifies as an A14 road. Going by the background and network system explained in detail above, that road, A14 falls directly into the category of a national road. That category falls directly under the mandate of KeNHA and the National government which is in charge of its development, rehabilitation, management and maintenance. In this matter, we note that the County Government has not clarified how the



charge meets the categories it sets out in Item 90 of the [Mombasa County Finance, 2014](#). They have not stated if they provide street lighting, parking or maintenance of the road accessed by the petitioners. While the superior courts were in agreement with them that the charge was a ‘road service’ charge, we are of a contrary opinion, as the 1st respondent did not illustrate how such road services are provided.

40. Further, having established that it is not a county road, it is then improper for County Government of Mombasa to levy a charge for road service for the same road that vests in the National Government.

[36] In the instant matter though, the respondent explained, at paragraph 5 of its Replying Affidavit that:

- (a) The petitioner uses Mombasa County Roads, including Taib Bin Nassir Road to access its premises situated at Liwatoni;
- (b) The petitioner enjoys street lighting all the way from Miritini, Shanzu and Likoni to their depot in town;
- (c) The petitioner has and attracts a floating population as some of its employees come from the neighbouring Counties and thus strain the limited resources in terms of sewerage, traffic flow and use of other county facilities including healthcare; and,
- (d) The petitioner enjoys county traffic marshalling as they start their journey from Miritini, Shanzu and Likoni barrier all the way to Liwatoni.

[37] I am therefore satisfied that sufficient justification was made by the respondent for the imposition of the Kshs. 3,400 cess on the petitioner during the period in question. As for offloading of cullet and feldspar from Kajiado, Nairobi City and Kilifi, there is absolutely no provision for the charges imposed on the petitioner during the period 2021/2022. Category 76 of the cess charges payable at cess collection points for all goods offloaded within Mombasa County, including private facilities or depots or warehouses, has no such items.

[38] This must be why the respondent introduced its [Finance Act for 2023](#) by way of its Supplementary Affidavit. It is noted that in that Act, a category of charges identified as “34. Offloading-Flat Rates” was introduced, which provides for scrap metal/cullet (broken glass)/feldspar as Items 447 to 450. The inescapable conclusion is therefore that, during the period 2021/22 there was no basis for the respondent to levy the charges of Kshs. 2,000/= on the petitioner’s lorries that brought feldspar and cullet into the County of Mombasa.

[39] Article 210 of the [Constitution](#) is explicit that:

“No tax or licensing fee may be imposed, waived or varied except as provided by legislation.”

[40] It suffices therefore to reiterate the viewpoint taken by Hon. Lenaola, J. (as he then was) in [Cereal Growers Association & Another v County Government of Narok & 10 Others](#) [2014] eKLR that:

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](#), 8th 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.

C. On whether the Petitioner is Entitled to the Reliefs Sought:

[41] Article 23(1) of the *Constitution* gives the Court the jurisdiction, in accordance with Article 165, to hear and determine petitions for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Accordingly, sub-article (3) is explicit that:

In any proceedings brought under Article 22, a court may grant appropriate relief, including—

- a. a declaration of rights;
- b. an injunction;
- c. a conservatory order;
- d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- e. an order for compensation; and
- f. an order of judicial review.

[42] It is now settled that what amounts to appropriate relief depends on the nature and circumstances of the case. Hence, *Law Society of Kenya vs. Attorney General & another; Mohamed Abdulahi Warsame & another (Interested Parties)* [2019] eKLR Hon. Chacha, J. held that an appropriate relief should be an effective remedy for purposes of enforcing the *Constitution*, human rights and the rule of law. He relied on *Fose vs. Minister of Safety and Security* [1997] (3) SA 786(CC) 1997(7) BCLR 851 wherein it was held that:

“(19) Appropriate relief will in essence be relief that is required to protect and enforce the *Constitution*. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the *Constitution* are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.”

[43] Similarly, in *Hoffmann v South African Airways (CCT17/00)* [2000] ZACC 17, it was held that:

“(45) The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore,



in determining appropriate relief, "we must carefully analyse the nature of the constitutional infringement, and strike effectively at its source".

[44] As pointed out at paragraph 5 herein above, the petitioner prayed for the following orders against the respondent:

- (a) A declaration that the respondent's action of levying cess charges on the items listed under Item 79 of the Schedule to the [Mombasa County Finance Act 2021](#), or as may be subsequently amended, is a violation of Articles 10, 40 and 209 of the [Constitution](#);
- (b) A declaration that the respondent lacks legal power to levy cess charges on any item entering and being offloaded in the County of Mombasa, including but not limited to silica sand feldspar or cullet, without offering a specific and identifiable service to the person offloading within the County;
- (c) A permanent injunction restraining the respondent, its agents or servants from levying cess charges, or any charges to similar effect, on the petitioner's vehicles entering the County of Mombasa at Miritini, Likoni or Mtwapa revenue barriers, or at any other location whatsoever;
- (d) Such other relief as the Court may deem necessary or appropriate under Article 23 of the [Constitution](#).

[45] Having found that the petitioner was lawfully charged cess for the offloading of silica sand to its plant at Liwatoni, prayer [a] of the Petition is untenable. Similarly, the petitioner's prayer for a permanent injunction restraining the respondent, its agents or servants from levying cess charges or any charges to similar effect on the petitioner's vehicles entering the County of Mombasa or on any vehicle entering Mombasa at Miritini, Likoni or Mtwapa revenue barriers or at any other location whatsoever, is unwarranted for two reasons. First, it must be taken into account that the [Finance Act 2021](#) provided for numerous other items for which lawful charges were made by the petitioner, including the impost on the petitioner for delivery of silica sand at its Liwatoni plant. Secondly, the Mombasa County Finance Act 2021 was thereafter repealed by the Finance Act 2022; which has in turn been supplanted by the [Finance 2023](#). A permanent injunction is hardly the appropriate remedy in the ever-changing fiscal environment.

[46] With regard to costs, it is notable that, at paragraphs 25 to 33 of its Petition, the petitioner adverted to the public interest nature of this Petition. It thereafter proceeded to set out, at paragraphs 34 and 35, the injury caused or likely to be caused to the public at large if the alleged violations by the respondent were to be left unchecked. In [Feisal Hassan & 2 others v Public Service Board of Marsabit County & another](#) [2016] eKLR it was held:

- “3. In constitutional litigation, the principle of access to the court must, consistently with the public importance and interest in the observance and enforcement of the Bill of Rights in the [Constitution](#), override the general principle that costs follow the event, unless it can be shown that the petition was wholly frivolous, or that petitioner was guilty of abuse of the constitutional court process by say filing a constitutional petition on matters that do not raise purely constitutional issues and which properly belonged to other competent courts or tribunals, and which should, therefore, have been filed and competently disposed of by those other courts or tribunals. However, a petitioner for constitutional enforcement need not present a case that must succeed and it cannot therefore, be taken against him that his petition is eventually lost if it otherwise meets the public interest criteria.



Although developed in the realm of protection and enforcement of rights and fundamental freedoms, the principle applies with the same force in general constitutional litigation for interpretation and enforcement of the Constitution. Indeed, the rights of access to court under Article 22 and 258 of the Constitution for the enforcement, respectively, of the Bill of Rights and the other parts of the Constitution are in the same terms.”

[47] The petitioner relied on Consumers Federation of Kenya (COFEK) v Kenya Commercial Bank & Another [2021] eKLR in urging the principle that costs be borne by the respondent. Having found that there was no basis for the levying of charges by the respondent in respect of feldspar and cullet transported by the petitioner from Kajiado, Nairobi and Kilifi Counties, it would only be fair that the petitioner’s costs be borne by the respondent; and I so order.

[48] It is also worth noting that, although in its Supplementary Affidavit, the petitioner made reference to its “...request for a refund of monies levied under the Finance Act 2021...” no such prayer was made in its Petition. It is trite that the Court can only award such reliefs as have been sought in the parties’ pleadings. Hence, in Kenya Airports Authority v Mitu-Bell Welfare Society & 2 Others [2016] eKLR, the Court of Appeal, while discussing this point, cited with approval, the following excerpt from an article by Sir Jack Jacob entitled “The Present Importance of Pleadings” published in [1960] Current Legal Problems, at page 174:

As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

[49] Moreover, a claim for refund, being a claim in the nature of special damages, ought to have been specifically pleaded and proved; which was not done. While discussing the propriety of an award of damages in constitutional petitions, the Court of Appeal, in the case of Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others (Civil Appeal 243 of 2017) [2021] KECA 328 (KLR) (17 December 2021) (Judgment), stated: -

“ 16. ...that an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case, and can indeed be granted as compensation for proven loss.



17. Special damages on the other hand are awarded for losses that are not presumed but have been specifically proved and that can be quantified, such as out-of-pocket expenses or earnings lost during the period between the injury and the hearing of the action. The attendant common law rules of proof are also applicable, in the absence of specific rules that regulate awards of compensation in constitutional petitions. It is trite under common law in this regard that special damages must be specifically pleaded and proven. This Court is guided by the reasons why special damages must be pleaded and proved as set out in DB. Casson and IH. Dennis, Odgers: *Principals of Pleading and Practice in Civil Actions in the High Court of Justice* at pp. 170 to 171:

“Special damage, on the other hand, is such a loss as the law will not presume to be the consequence of the defendant’s act, but which depends in part, at least, on the special circumstances of the case. It must therefore always be explicitly claimed on the pleadings, and at the trial it must be proved by evidence both that the loss was incurred and that it was the direct result of the defendant’s conduct. A mere expectation or apprehension of loss is not sufficient. And no damages can be recovered for a loss actually sustained, unless it is either the natural or probable consequences of the defendant’s act, or such a consequence as he in fact contemplated or could reasonably have foreseen when he so acted. All other damage is held remote.”

18. Likewise, in the English case of *Perestrello e Companhia Ltda vs United Paint Co. Ltd.*, [1969] 3 All ER. 479 Lord Donovan held as follows at pp. 485-486.:

Accordingly, if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing a payment into court. The limits of this requirement are not dictated by any preconceived notions of what is general or special damage but by the circumstances of the particular case. “The question to be decided does not depend upon words, but is one of substance” (per Bowen LJ., in *Ratcliffe v. Evans* ([1892] 2 QB. 524 at 529)). The same principle gives rise to a plaintiff’s undoubted obligation to plead and particularize any item of damage which represents out-of-pocket expenses, or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as . . . “special” in the sense that fairness to the defendant requires that it be pleaded. The obligation to particularize in this latter case arises not because the nature of the loss is necessarily unusual, but because a plaintiff who has the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such calculation possible.”

[50] It is plain then that a refund is not within the range of appropriate reliefs awardable in this matter. In the result, the Petition succeeds in part and orders are hereby granted as follows:

- (a) A declaration be and is hereby made that the respondent lacked the legal power to levy cess charges on feldspar or cullet that were offloaded by the petitioner at its plant on Land Reference



No. Mombasa/Block XLVIII/134 in Liwatoni area in the County of Mombasa during the period 2021/2022.

(b) Cost of the Petition to be borne by the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 8TH DAY OF
FEBRUARY, 2024**

OLGA SEWE

JUDGE

