



**Maxam Ltd v County Government of Kiambu (Petition
26 of 2019) [2023] KEHC 3616 (KLR) (2 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 3616 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
PETITION 26 OF 2019**

MM KASANGO, J

MAY 2, 2023

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLE 27,
40(1),(3),191(2),(3), 199(1), 201 AND 209(5) OF THE CONSTITUTION**

BETWEEN

MAXAM LTD PETITIONER

AND

COUNTY GOVERNMENT OF KIAMBU RESPONDENT

JUDGMENT

1. Maxam Limited, the petitioner has petitioned by an amended petition for orders that:
 - a. This honourable Court be pleaded to declare that the *Kiambu County Finance Act* 2020 was enacted contrary to the provisions of Article 201, 209(3) and 209(5) of the *constitution* and is therefore null and void.
 - b. This honourable Court be pleaded to declare that the *Kiambu County Finance Act* 2020 was enacted contrary to the provision of Article 196 and 201 of the *constitution* and Section 115 of the *County Government Act* and therefore null and void.
 - c. This honourable Court be pleaded to declare the Section 5(1),10(1) 20(1) and para 11(105) of schedule 1 and of the *Kiambu County Finance Act*, 2018 in so far as they provide for the levying of taxes on business domiciled outside Kiambu County are null and void for being contrary to Article 209 (5) of the *constitution*.



- d. This honourable Court be pleased to quash the decision of the first respondent contained in the letters dated 24th July, 2019 directing the petitioner to remit fees to the first respondent.
 - e. This honourable Court be pleased to grant an order of prohibition to prohibit the first respondent from levying fees of the distributorship, business permit, solid waste management fees, advertising and/or branding fees and other similar levies already paid in the County within which the petitioner is domiciled.
 - f. Such other orders as this honourable Court shall deem just.
 - g. Costs of this petition.
2. By the petition, Maxam described itself as a Limited Liability Company carrying on business as alcoholic beverage stockiest, distributor and/or supplier. That its main officers and warehouse is based in Nairobi County with nation-wide distribution licenses. Maxam owns a fleet of vehicles that it uses in the distribution and delivery all over the country.
 3. Petitioner's case is that the *Kiambu County Finance Act* was not published in the Kenya Gazette as required under Article 199(1) of the *constitution*. That it is therefore unconstitutional and the county's collection of any levies, fees and any taxation under that *Act* is equally unconstitutional. The petitioner challenges Section 5(1) of that *Act*, which section empowers an authorized officer to impound animals/goods for the purpose of enforcing the Act; it also challenges Section 10(1) of the *Act* which requires payment annual solid waste management service fees by persons operating business specified in the schedule of the *Act*; it also challenges Section 19(1) of the *Act* which requires one who advertises with a signage or any other manner of advertisement to obtain permit from the county; it also challenges Section 27(7) of the *Act* which requires payment of fees of one transporting any forest products or cash crops into or through the county; and challenges Part ii of Schedule 1 which provides for payment by the general traders and retail services providers.
 4. On 24th July, 2019 the petitioner's vehicle was impounded by the Government of Kiambu County and pursuant to the *Act* the County issued the petitioner with demand dated the same date demanding for pay for branding and advertising on the said vehicle, demanded also for payment for single business permit, large trader permit, shop, retail store or personal service and for solid management. In total, the County demanded payment from the petitioner Kshs.33,000 being for those permits and fee for the impounded vehicle. It is petitioner's contention these taxes are levied against it when it alleges it is not domiciled nor does it carry out business within Kiambu County. That therefore the imposition of business permits and other fees by Kiambu County, while the petitioner has paid the same to Nairobi County where it carries on its business, amounts to double taxation. The petitioner by its petition summarized its contention thus:

“That the petitioner continues to be aggrieved by the afore-stated provisions of so far as they (sic) impose upon the petitioner requirements to take out distributorship, business permit, solid waste management fees, advertising and/or for branding fees for traversing, delivery and distributing its products within Kiambu County yet its business is primarily domiciled in Nairobi County.”
 5. The petitioner alleged that the acts of Kiambu County violated its rights set out in Article 10 of the *constitution* by not applying the national value thereof in applying and interpreting the Act; by impounding the petitioner's vehicle and imputing license fees and permits arbitrarily contrary to



Article 40 of the constitution; by exercising its taxation and revenue raising powers contrary to Article 209(5) of the constitution thereby prejudicing national economic policies, economic activities across county boundaries or the national mobility of goods, services capital or labour; and imposing licenses and permits contrary to the principle of public finance which provides that the burden of taxation should be shared fairly.

6. The petition was opposed by the county government of Kiambu through the replying affidavit of its solicitor Daniel Kirathe.
7. He deponed that Article 185(1) and (2) of the constitution of Kenya, 2010 vested legislative authority of county in the county assembly. That the county enacted its finance Act for imposition of fees, charges, licenses, rents or rates for services as provided under Articles 209 and 210 of the constitution. That contrary to the petitioner's contention, the Finance Act had been gazette as required by Article 199(1) of the constitution. The deponent faulted the petitioner for failing to prove that the goods were impounded were in transit or that the petitioner's vehicle was simply traversing the Kiambu County. The deponent, while attaching newspaper's cutting advertising public participation confirmed that the county complied with Article 196 of the constitution, stated that the Finance Act received public participation.

Analysis And Determination

8. The petitioner filed its petition on 2nd August, 2019. That petition sought the declaration of unconstitutionality of the Kiambu County Finance Act 2018. By the time this petition was heard, the said Act had been repealed. The petitioner at its request was granted leave on 13th June, 2022 to amend its petition to plead the new law. The amendment to the petition, that was brought forth reflected the changed law, that is the Finance 2020. The sections and schedules challenged by the unamended petition remained the same in the Finance Act 2020. The order of leave to amend the petition required the petitioner to serve the county government with the amended petition. My perusal of the court file does not reveal an affidavit evidencing such service. There is doubt that service of the amended petition was served as ordered. Consequently, where need be, I shall make allowance of that non-service of the amended petition to the submissions filed by the county government. I shall bear that uncertainty in mind.
9. Having considered the petition and the replies and the parties submissions, I find that the following are the issues that arise for determination:
 - a. Is the Kiambu Finance Act unconstitutional by virtue of it not getting legislative backing as provided under Article 199(1) and/or by not receiving public participation as required by Article 196(b) and section 115 of the County Government Act.
 - b. Should an order of prohibition issue to prohibit the county government from levying fees of distributorship, business permit, solid waste management fees advertising and/or branding fees when such fees have been paid to Nairobi County.
10. Petitioner's contention that the Finance Act was not gazetted is in error. The Kiambu County Finance Act 2020 was gazette on 14th December, 2020 by special issue of the Kenya Gazette Supplement No. 15 (Kiambu County Act No. 6).
11. Further, that Act has Parliament legislative backing by Section 132 of the Public Finance Management Act which section provides:-

“Submission and consideration of the revenue raising measures in the county assembly:



1. Each financial year, the County Executive member for finance shall, with the approval of the County Executive Committee, make a pronouncement of the revenue raising measures for the county government.
 2. The County Executive Committee member for finance shall, on the same date that the revenue raising measures are pronounced, submit to the county assembly the County Finance Bill, setting out the revenue raising measures for the county government, together with a policy statement expounding on those measures.”
12. Further, the [County Government Act](#) under Section 21, the counties are directed on how to exercise their legislative powers amongst, others, by introducing a money Bill. Sub-section 4 of that Section details what provisions the money Bill should deal with, that is, taxes; imposition of charge on a public fund or variation or repeal of those charges; the appropriation, receipt, custody, investment or issue of public money; or matters incidental to any of those matters.
 13. It follows that the [Kiambu County Finance Act](#) has the Parliamentary legislative backing and to that extent, has met the constitutional requirements of Article 199. The [Public Finance Management Act](#), in tandem with the [constitution](#) empowers the county to impose permit fees, license fees, rates, rents and other charges in order to raise revenue required to finance county operations.
 14. The county, by its replying affidavit proved that the enactment of the Finance Act was preceded by invitation for public participation. The advertisement for public participation, attached to the replying affidavit relate to invitation for public participation for the [Finance Act](#) 2018. There is no evidence for invitation to public participation for the [Finance Act](#) 2020 but this is where I will give allowance to the county for there is no evidence proving they were served with the amended petition; which amendment challenged the [Finance Act](#) of 2020. The invitation to public participation was in a newspaper with national circulation.
 15. The need for public participation has variously considered as was in the case [Bumasutra Saving And Credit Co-operative Society Ltd v County Government Of Nakuru](#) (2016) eKLR thus:-

“On the first question, it is beyond contention that by dint of articles 196, 201 and Sections 87 - 89 of the [County Governments Act](#) that county governments are obligated to facilitate public participation and involvement in legislative process and other business.

44. Public participation is a vital component of participatory democracy and in particular, the legislation process in the devolved governments (Articles 10 & 174 of the [constitution](#)). Lenaola J observed in *Nairobi Metropolitan PSV Sacco Union Limited case* (supra) that:-

“The issue raised by the Petitioners as to whether they were involved in the enactment of the impugned legislation are not idle. I say so because the [constitution](#) has established a state in which the [constitution](#) is the supreme law and is binding upon the legislature, the executive and all organs of the State. The Preamble of the [constitution](#) sets the achievable goal of the establishment of a society that is based on democratic values, social justice, equality, fundamental rights and rule of law and has strengthened this commitment at Article 10(1) of the [constitution](#) by making it clear that the national values and principles of governance



bind all state organs, state officers, public officers and all persons whenever any of them enacts, applies or interprets any law or makes or implements policy decisions. Article 10(2) of the constitution establishes the founding values of the State and includes as part of those values, transparency, accountability and participation of the people. It is thus clear to me that the constitution contemplates a participatory democracy that is accountable and transparent and makes provisions for public involvement. Consistent with this, Article 174 (c) of the constitution provides for the principles of devolved government and has given powers to the people to enhance self governance and enhance their participation in decisions that affect them. Clearly, the making of county laws by members of County Assembly is, in my view, an essential part of public participation.”

16. The next issue to determine is whether some sections of the Finance Act contravene the constitution. The Finance Act under Section 10(1) provides that a person operating business specified under Part 1 of the Second Schedule shall pay annual solid waste management service fee. This is one of the fees demanded from the petitioner.
17. Section 20(1) of the Finance Act requires one who displays advertisement or signage or any other advertisement as specified in Part VII of the Fourth Schedule shall apply for permit from the county government.
18. Schedule 1 Part 11 of the Finance Act requires distributors amongst others, to large traders, shop, retail store to pay an annual license to the county.
19. The petitioner contends that its business premises are located within Nairobi County. The petitioner attached evidence of payment for licenses and permits to the Nairobi County, which licenses and permits are demanded by Kiambu County. It is for that reason the petitioner terms the demand by Kiambu County as double taxation. Although the petitioner argued that the payments required by Kiambu County are not permitted under the Fourth Schedule of the constitution, I dare say the petitioner is wrong. Under the Fourth Schedule, some of the functions the county governments are authorized to undertake are control of outdoor advertising, liquor licensing, to regulate fair trading practices. I therefore find and hold the licensing and permit fees demanded by Kiambu County comply with the Fourth Schedule.
20. Although the petitioner sought to argue that the demand for those fees by Kiambu County contravenes Article 201(b) (i) which provides that the burden of taxation shall be shared equitably, I find that argument not convincing. The Finance Act of Kiambu County requires those who do trading within the county to pay the necessary fees. Although the petitioner in the affidavit of the petitioner’s director, stated that it had its vehicle impounded while it traversed the County of Kiambu, the officer of Kiambu County deponed that the vehicle was impounded while the driver was delivering merchandise at a supermarket within the county. Such activity is covered under Part 11 Code 105 of the First Schedule of the Finance Act. The petitioner did not respond to the deposition of the Kiambu official but that notwithstanding, and it is very telling the petitioner seeks in this petition orders of prohibition to prohibit Kiambu County levying fee for its distribution within the county. There is tacit admission, therein, that the petitioner does carry on distribution business within Kiambu County. If the petitioner carries on business activities in Kiambu and Nairobi Counties, it implicitly suggests that demand for it to pay taxes and levies by both Counties does not amount to double taxation as required by the Finance Acts of both counties. It does not amount to double taxation when the petitioner



carries out business activities in both counties. The basis of payment of those fees is not the residential address of the business entity but rather, the business activities and where that business is undertaken. Further, even as I consider this matter, there is absolutely no evidence of the petitioner's business residential address. It remained a bare statement, without documentary evidence, made under oath (in an affidavit) by the petitioner's director that the petitioner carried out business in Nairobi. The burden of proof, for what it is worth, which lies on the petitioner was not shifted at all. The petitioner did not prove to required civil standards that the petitioner is a resident of Nairobi County. That is why I reach a conclusion that there is no evidence that the Kiambu county's demand locked out the petitioner from accessing opportunities within Kiambu County, as it alleges.

21. In the end bearing the above, I find no basis for declarations sought by the petitioner.

Disposition

22. In sum, I find that the petitioner failed to prove its case. This petition therefore is hereby dismissed with costs to the County Government of Kiambu.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 2ND DAY OF MAY, 2023.

MARY KASANGO

JUDGE

In the presence of:

Coram

Court Assistant: - Mourice/Julia

Gladys Gichuki & Associates Advocates for the Petitioner: - Present

For the County Government of Kiambu:- N/A

Court

Judgment delivered virtually.

MARY KASANGO

JUDGE

