



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARSEN**

**PETITION NO. 5 OF 2019**

**IN THE MATTER OF ARTICLES 1, 10, 174, 175, 176, 209 & 210 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF**

**THE CONSTITUTION) PRACTICE AND PROCEDURE RULES 2013 AND ALL OTHER**

**ENABLING POWERS AND PROVISIONS OF LAW**

**AND**

**IN THE MATTER OF THE LAMU COUNTY FINANCE ACT 2016**

**BETWEEN**

**H YOUNG & CO. (E.A) LTD.....PETITIONER**

**VERUS**

**THE COUNTY GOVERNMENT OF LAMU.....RESPONDENT**

**JUDGMENT**

1. The Petitioner is described as a limited liability company operational for over sixty-seven years. It is a local company which has been engaged in engineering construction and infrastructure development in the Republic of Kenya.

2. The Respondent is a County Government of Lamu established under the Constitution of Kenya and the subject county where the Petitioner is carrying out a road construction project.

**Petitioner's Case**

3. The Petitioner states that it has been contracted by the National Government to construct the Garsen-Witu-Lamu road, and; that it uses soil excavated from the Respondent County as fill material in the construction.

4. That on 28<sup>th</sup> February 2018, the Respondent through one of its officers, Ahamed Omar, wrote an email demanding payment of cess for murrum in reference to the soil used by the Petitioner in the construction of the road. That on the same date, the Petitioner responded by way of letter stating that they were excavating soil and not murrum or hardcore stones as alleged by the Respondent and that in any case, they were not liable to pay the cess fees because murrum was not a cessable item under the Lamu County Finance Act. Further, the Petitioner stated that it did not engage in market sale of any goods listed under the Fifth Schedule of the Lamu County Finance Act and was therefore not liable to pay cess.

5. That the Respondent replied a year later on 18<sup>th</sup> March 2019 restating the claims for payment of cess.

6. The Petitioner contends that soil, murrum and hardcore stones are not cessable items under the Fourth and Fifth Schedules of the Lamu County Finance Act 2016 and that the demand by the Respondent lacks legal foundation or basis and is an affront to the provisions of the Constitution and the Lamu County Finance Act.

7. The Petitioner averred that the construction of the Garsen-Witu-Lamu road project was a project of national importance with far reaching benefits to the Respondent's County, its environs and the country at large through job creation, improving of security and water networks and, spurring economic growth among other benefits.

8. The Petitioner asserted that the Respondent's acts of constantly harassing and threatening to detain its employees; and continually threatening it with dire consequences including commencement of criminal proceedings was extremely detrimental to the road project and would attract consequences including adverse financial impact on the government of Kenya.

9. That the Respondent's claim for payment of illegally levied cess fees was a ploy to intimidate and coerce the Petitioner to pay monies that were not due and owing which was against the provisions of the Constitution which provide that there must be a legislative basis for levying tax.

10. As a consequence the Petitioner sought the following orders:-

***i. A declaration that the Lamu County Finance Act is ambiguous in so far as the listed cessable items in the Fourth and Fifth Schedule are concerned.***

***ii. A declaration that the Respondent's demand for cess fees from the Petitioner for soil for the Garsen-Witu-Lamu road project which is not a cessable item under the Lamu County Finance Act 2016 is unlawful, unconstitutional and null and void.***

***iii. A declaration that the actions of the Respondent in continuing to levy/charge cess fees for soil being used in the construction of the Garsen-Witu-Lamu road project without supporting legal framework expressly violates the provision of the Constitution of Kenya as reproduced hereinbefore and which specifically provides that no tax or licensing fees may be imposed, waived or varied except as provided by legislation.***

***iv. A Prohibitory Injunction directing the Respondent to stop the levying/charging of cess fees for soil for the Garsen-Witu-Lamu road project in the area of jurisdiction until such a time as they would have enacted a supporting legal framework.***

***v. A Mandatory Injunction directing the Respondent to stop the levying/charging of cess fees for soil for the Garsen-Witu-Lamu road project in their area of jurisdiction until such a time as they would have enacted a supporting legal framework.***

***vi. Costs for the Petition.***

***vii. Any further reliefs or orders that this Honourable court shall deem just and fit to grant.***

## **Respondent's Case**

11. The Respondent opposed the Petition by way of Answer and Response to the Petition dated and filed on 14<sup>th</sup> May, 2019.

12. The Respondent stated that, Ahmed Omar, the Respondent's revenue officer, wrote to the Petitioner on 28<sup>th</sup> February 2018 demanding fees for the excavation and/or harvesting of soil and murrum around Witu area in Lamu. That the same was a lawful demand under section 4 and 5 of the Lamu County Revenue Administration Act, 2015. That on 18<sup>th</sup> March 2019, John Mburu, the County Secretary, further wrote to the Petitioner reiterating its position on payment of cess.

13. The Respondent stated that murrum was a term used to refer to hardcore soil and that its action in charging the Petitioner cess/fees for extraction and/or excavation of murrum and soil was well within the provisions of Article 209 and 210 of the Constitution of Kenya 2010 and the 2<sup>nd</sup> Schedule of the Lamu County Finance Act 2016. That soil and/or sand harvesting and quarrying is taxable under items 1173 and 1174 of the Second schedule of the Lamu County Finance Act 2016.

14. That the Petitioner was under a legal duty to pay charges/cess and that wilfully failing to do so was an offence under section 10 of the Lamu County Finance Act, 2016.

15. The Respondent further averred that it was carrying out its constitutional duties as provided for under Article 209 (3) and 210 of the Constitution of Kenya which empowers it to impose tax. That the petition did not point to any infringement of the constitution and was misconceived, scandalous and an abuse of the court process. The Respondent stated that the prayers sought by the Petitioner are not judicially tenable as the Petitioner seeks to stop the Respondent, a constitutional body, from carrying out its lawful mandate. They prayed that the petition be dismissed.

## **Submissions**

16. Parties agreed to canvass the petition through written submissions. The Petitioners' submissions are dated 13<sup>th</sup> February 2020 and were filed on 14<sup>th</sup> February 2020 on the same date and the Respondent submissions dated 10<sup>th</sup> March 2020 were filed on 18<sup>th</sup> March 2020.

## **Petitioners' Submissions**

17. In its submissions, the Petitioner reiterated that it uses soil for the construction of the Garsen-Witu-Lamu road project and not murrum as claimed by the Respondent. That the Oxford Advanced Learner's Dictionary 9<sup>th</sup> Edition 2017 defined hardcore as pieces of stone, while murrum was defined as reddish soil and that soil was the top layer of the earth. The Petitioner faulted the Respondent for using the term murrum to refer to hardcore stones.

18. The Petitioner admitted that the Lamu County Finance Act 2016 made provision for the charging of cess. That under section 2 of the Act cess is defined as fees charged for goods specified in the Fourth Schedule while section 7 provided that goods listed in the Fifth Schedule shall be charged cess/market fees. The Petitioner contended that soil was not identified as a cessable item in the Fourth and Fifth Schedule.

19. It was further submitted that the Respondent had at paragraph 7 of its Answer and Response to the Petition, stated that soil and/or sand harvesting was taxable under items 1173 and 1174 of the Second Schedule of the Lamu County Finance Act 2016. It was the Petitioner's argument that the Second Schedule of the Act referred to permit/license fees and not cess as claimed by the Respondent.

20. It was the Petitioner's contention that the Lamu County Finance Act 2016 was poorly drafted and that the court could not aid or correct a defect in legislation as stated in **Federation of Women Lawyers Kenya (FIDA) vs Attorney General & others [2018] eKLR**. The Petitioner urged the court to apply the literal rule of construction in interpreting the provisions of the Act, as it was plain and unambiguous. On this, the Petitioner relied on the matter of **Law Society of Kenya vs Kenya Revenue Authority & another [2017] eKLR**.

21. Lastly, the Petitioner submitted that the Respondent's act of demanding cess fees on soil was in contravention of Article 210 of the Constitution in so far as the Lamu County Finance Act 2016 did not provide for cess fees on soil. The Petitioner abandoned its prayer for mandatory injunction stating that it was included erroneously. It prayed that the petition be allowed with costs.

## **Respondent's submissions**

22. The Respondents submitted that prayer (a) in the petition was untenable, as it does not relate to the dispute before court as the Fourth Schedule of the Lamu County Finance Act 2016 relates to land based fees while the Fifth Schedule relates to fees & charges for markets service/cess. That the dispute before court was whether the materials excavated by the Petitioner were chargeable and or cessable items. That the items excavated by the Petitioner which include murrum (a term used to refer to hardcore stones) and soil in Witu and Hindi regions for the construction of the Garsen-Witu-Lamu Road are found within the Second Schedule of the Lamu Finance Act, 2016 and specifically items 1173 and 1174, and not within the Fourth and Fifth Schedules of the Act as alleged by the Petitioner. The Respondent submitted that the Petitioner was bound by its pleadings and that courts were not allowed to frame issues on their behalf as held in **Daniel Otieno Migore vs South Nyanza Sugar Co. Ltd [2018] eKLR**.

23. The Respondent submitted also that the Petitioner was excavating soil and murrum (a term used to refer to hardcore stones) for construction of the Garsen-Witu-Lamu road. That the Lamu County Finance Act 2016 was clear and unambiguous that the materials extracted by the Petitioner are chargeable items under items 1173 and 1174 of the Second Schedule. Further, that items 1175-1201 provides for payment of royalties/cess for transportation inter alia of hardcore stones.

24. Further, the Respondent submitted that section 4 of the Lamu County Finance Act 2016 required persons carrying out business listed in the Second Schedule to apply for a license from the county offices and that any person who contravened the provision committed an offence which under section 10 of the Act would be liable to pay a fine or to imprisonment or both. The Respondent argued that irrespective of the benefits of the construction of the Garsen-Witu-Lamu road, the Petitioner was obligated to pay taxes when they fell due and that the refusal by the Petitioner was an offence and an illegality and should not be allowed to profit or gain from such illegality.

25. The Respondent contended that the petition as drafted did not raise any constitutional issues. That Article 209 (3) and 210 of the Constitution gave the County Government discretionary powers to impose charges including cess charges levied under the Second Schedule. The Respondent strongly argued against a prohibitory injunction stating that the same would prevent the Respondent as a constitutional body from carrying out its lawful mandate. The Respondent prayed that the petition be dismissed with costs.

## **Determination**

26. I have read and considered the pleadings and the written submissions by both parties. Two issues lend themselves for my determination:-

*i. Whether the Lamu County Finance Act 2016 provides for levying of cess on soil and murrum.*

*ii. Whether the orders sought should be granted.*

## **Whether the Lamu County Finance Act 2016 provides for levying of cess on soil and murrum.**

27. The Constitution empowers County Governments to impose specified taxes and any other taxes as may be authorised by an Act of Parliament. **Article 209** of the Constitution provides:-

(1) ....

(2) ...

*(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 Government may impose charges for the services they provide.*

*(5) ....*

28. **Article 185 (2)** of the Constitution vests County Governments with the powers to make legislation to impose taxes and licensing fees. It provides:-

*“A County assembly may 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.”*

29. **Article 210 (1)** of the Constitution provides:-

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

30. **Section 5** of the **County Government Act No. 17 of 2012** provides:-

*“(1) A County government shall be responsible for any function assigned to it under the Constitution or by an Act of Parliament.*

*(2) Without prejudice to the generality of subsection (1), a County government shall be responsible for—*

*a. county legislation in accordance with Article 185 of the Constitution;*

*b. ....*

*c. functions provided for in Article 186 and assigned in the Fourth Schedule of the Constitution;*

*d. ....”*

31. Further **Section 21 (4)** of the Act provides for the implementation of bills for purposes of taxation. It provides:-

*“For the purposes of this Act, “money Bill” means a Bill that contains provisions dealing with—*

*(a) taxes;*

*(b) the imposition of charges on a public fund or the variation or repeal of any of those charges;*

*(c) the appropriation, receipt, custody, investment or issue of public money;*

*(d) the raising or guaranteeing of any loan or its repayment; or*

*(e) matters incidental to any of those matters”*

32. From the above Constitutional and legislative provisions, it is clear that taxation is not the preserve of the National Government and that the County Government may impose taxes within the confines of Article 209. Article 210 (i) of the Constitution makes it unlawful for the government to impose any tax or licensing fee without first passing the relevant legislation. It is also clear that under Article 209 (4) both the National Government and County Government are allowed to impose charges for the services they render.

33. In **Africa Rafiki Ltd & 2 Others V. Nairobi City County Government and 3 Others [2015] eKLR** Lenaola J. (as he then was) interpreted the above provisions thus:-

*“The above provisions of the law are plain and straightforward and require no more than a literal interpretation; that under Article 209 (3) of the Constitution, a County Government has powers to impose property and entertainment tax. It also has powers to impose any other tax that has been authorised by an Act of Parliament. Undoubtedly, Article 209 (4) of the Constitution also confers County Governments with discretionary powers to impose charges for services rendered but such a charge can only be imposed to the extent that is provided in an existing legislation.”*

34. In the present case, the Petitioner alleges that the Lamu County Finance Act 2016 does not provide for charging of cess on soil or murrum or hardcore terming the action of the Respondent in demanding such cess unconstitutional. On the other hand, the Respondent has alleged that Section 4 as read with the Second Schedule of the same Act provides for charging of cess and royalties on soil and murrum (which it refers to as hardcore) and that it is within its mandate to demand the same from the Petitioner.

35. Undoubtedly, the Lamu County Finance 2016 makes provision for charging of cess. **Section 2** of the Act defines cess as ***'fees charged for goods specified in the fourth schedule.'***

**Section 7(1)** of the Act further provides that:-

***The goods listed in the fifth schedule shall be charged cess/market fees at the rate specified in the schedule.***

The Fourth Schedule is titled 'LAND BASED FEES' while the Fifth Schedule is titled 'FEES & CHARGES FOR MARKET SERVICES/CESS'.

36. While the Fifth Schedule of the Act does provide for cess on both murrum and sand at item 1396 and 1407 of the Fifth Schedule, it is clear that the cess being charged is a market fee which would not apply to the Petitioner unless the Petitioner was engaged in the business of selling sand or murrum. This is the position that the Respondent seemingly adopts as the Respondent states quite clearly that the cess it sought to recover from the Petitioner was under item 1173, 1174 and 1175-1201 of the Second Schedule (as read with section 4) of the Act.

37. This raises the question whether the Second Schedule of the Lamu County Finance Act 2016 provides for levying of cess as argued by the Respondent.

**Section 4** of the Act provides that:-

***(1) A person shall not carry out any of the business listed in the second schedule within the County without a valid license/permit***

***(2) A person who intends to carry out any of the business listed in the second schedule shall apply for a license from the County offices.***

***(3) A person applying for a license under sub-section (2) shall be charged a fee specified in the second schedule depending on the size and the location.***

***(4) A person who contravenes any of the provisions of this section commits an offence.***

38. A reading of the Second Schedule shows that it provides for permit/license fees chargeable on different businesses. It also provides for royalties and cess specified in items 1175 to 1201.

39. In interpreting a tax statute one only has to look at what is clearly stated in a taxing Act as was held in **Republic v Kenya Revenue Authority Ex Parte Universal Corporation Ltd [2016] eKLR** where the court quoted with approval the case of **Cape Brandy Syndicate vs. Inland Revenue Commissioner [1921] 1 KB 64**, where it held that:-

***"In a taxing Act one has to look merely at what is clearly stated. There is no room for any intendment. There is no equity about tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used"***

40. **Blacks Law's Dictionary, 9th Edition** defines cess

as:- ***"An assessment or a tax."***

While license fees is defined as:- ***"Monetary charge imposed by a government authority for the privilege of pursuing a particular occupation business or activity."***

On the other hand, royalty is defined as:- ***"A payment in addition to or in place of an upfront payment...Royalties are often paid per item made, used or sold or per time lapse."***

And haulage royalty is defined as:- ***"A royalty paid to a landowner for moving coal via subterranean passage under the landowners land from a mine coal located on an adjacent property. Payment is calculated at a certain amount per ton."***

41. In **Andrew Wasswa Atetwe t/a Kilimanjaro Auctioneers and 21 Others Vs. The Mombasa County Government (2015) eKLR** the court held that ***"cess by any other name would mean a tax or levy."***

42. From the definitions above, it is abundantly definite that license fees is not the same as cess or royalty. Both have however been provided for under the Second Schedule of the Lamu County Finance Act and are therefore chargeable depending on the type of business and items.

43. A related issue in this petition is whether the Petitioner uses soil, murrum and/or hardcore in carrying out the construction of Garsen-

Witu-Lamu road. In the correspondence exchanged between the Petitioner and Respondents annexed to petition, the Respondent through a letter dated 18<sup>th</sup> March 2019 signed by its County Secretary makes a claim for cess/fees for extraction of murrum which he states was a term used locally to refer to hardcore stones and cess payable per trip which was dependent on the mode of transport.

44. The Petitioner's response through a letter dated 28<sup>th</sup> February 2018 authored by their corporate Affairs Officer Namwakira Andrey Adelheid to the demand was that they were not liable to pay cess as they were not engaged in market sale of murrum and also that they were not excavating murrum which was not available in the Respondent's area.

45. The Petitioners further stated that they were excavating and using natural soils which was not cessable. In the supporting affidavit, sworn by Maurice Agola Kongo, the Petitioner's Administrative Manager, the Petitioners admit excavating soil for use in the construction of the road but contest that the same was cessable. At paragraph 14, he states that ***"they were not liable to pay the respondent any cess fees as alleged as murrum was not provided in the Lamu Finance Act as a cessable item."***

46. Neither party was of assistance to the court on the type or definition of the materials used in the construction as understood in the construction industry. The Petitioner insisted that it was excavating and using soil while the Respondent insisted that the Petitioners were using murrum. I therefore turned to the dictionary definition of the said materials.

The concise Oxford Dictionary 12<sup>th</sup> Edition defines soil as:- ***"The upper layer of the earth in which plants grow or a dark brown material typically consisting of organic remains, clay and rock particles."***

Hard core is defined as:- ***"broken bricks and rubble used as a filling or foundation in building."***

While the online Oxford Learners Dictionary defines murrum as:- ***"a type of red soil that is often used to make roads in Africa."***

47. From the limited definitions above, I am persuaded that the term murrum is a type of soil and therefore the two may in some instances refer to one and the same material. The overlap is evident from the Petitioner's own averment that they were unwilling to meet the Respondent's demand "as murrum was not a cessable item." It was upon the Petitioner to demonstrate to the court that the soil which they admit to have excavated was different from murrum for which they were being charged and which in their view was not subject to cess.

48. In conclusion therefore I have found no evidence that the Fourth and Fifth Schedule of the Lamu County Finance Act is ambiguous in so far as it provides for charging of cess fees for items listed in the Schedule. Prayer 1 of the Petition cannot therefore be granted. I have also come to the finding that the Second Schedule of the Lamu County Finance Act 2016 does provide for license/permit fees as well as cess and royalties for items listed under Nos. 1173, 1174, 1175 – 1201. It is therefore lawful for the Respondent to charge license/permit fees and royalties/cess from the Petitioner under the Second Schedule of its Finance Act when due and owing.

49. In the upshot the Petition has no merit. It is dismissed with costs. The interim orders are discharged.

50. Orders accordingly.

**JUDGMENT DELIVERED, DATED AND SIGNED THIS 3RD DAY OF JUNE, 2021.**

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**R. LAGAT-KORIR**

**JUDGE**

**In presence of:**

**Kiprotich – Court Assistant**

**Ms. Ngui holding brief for Mr. Onsare – For the Petitioner (Virtually linked) and in the absence of the Respondents.**

**Judgment emailed to the parties: [donsare@wmoadvocates.com](mailto:donsare@wmoadvocates.com) and [mauricekilonzo@yahoo.com](mailto:mauricekilonzo@yahoo.com)**