



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CONSTITUTIONAL PETITION NO. 7 OF 2018

(FORMERLY KISII HIGH COURT CONSTITUTIONAL PETITION NO. 6 OF 2018)

IN THE MATTER OF ARTICLES 2(1) & (4), 10, 22(1), 23(1) & (3), 176, 185(1),

191 (2), 199 (1), 209 (4) & (5), 210, 258 OF THE CONSTITUTION OF KENYA, THE FOURTH SCHEDULE PART 2 (7)

AND

**IN THE MATTER OF THE KISII, MIGORI, NANDI, HOMABAY, BUSIA, WEST POKOT, BUNGOMA, ELGEYO
MARAkwET, BARINGO AND MACHAKOS COUNTY GOVERNMENT FINANCE ACTS**

AND

IN THE MATTER OF SECTION 120 OF THE COUNTY GOVERNMENTS ACT, 2012

AND

IN THE MATTER OF SECTION 5 OF THE STATUTORY INSTRUMENTS ACT, 2013

BETWEEN

UNITED MILLERS COMPANY LIMITED.....PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF KISII.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF MIGORI.....2ND RESPONDENT

THE COUNTY GOVERNMENT OF NANDI.....3RD RESPONDENT

THE COUNTY GOVERNMENT OF HOMABAY.....4TH RESPONDENT

THE COUNTY GOVERNMENT OF BUSIA.....5TH RESPONDENT

THE COUNTY GOVERNMENT OF WEST POKOT.....6TH RESPONDENT

THE COUNTY GOVERNMENT OF BUNGOMA.....7TH RESPONDENT

THE COUNTY GOVERNMENT OF ELGEYO MARAKWET.. 8TH RESPONDENT

THE COUNTY GOVERNMENT OF BARINGO.....9TH RESPONDENT

THE COUNTY GOVERNMENT OF MACHAKOS.....10TH RESPONDENT

THE COUNTY ASSEMBLY OF KISII.....	11 TH RESPONDENT
THE COUNTY ASSEMBLY OF MIGORI.....	12 TH RESPONDENT
THE COUNTY ASSEMBLY OF NANDI.....	13 TH RESPONDENT
THE COUNTY ASSEMBLY OF HOMABAY.....	14 TH RESPONDENT
THE COUNTY ASSEMBLY OF BUSIA.....	15 TH RESPONDENT
THE COUNTY ASSEMBLY OF WEST POKOT.....	16 TH RESPONDENT
THE COUNTY ASSEMBLY OF BUNGOMA.....	17 TH RESPONDENT
THE COUNTY ASSEMBLY OF ELGEYO MARAKWET.....	18 TH RESPONDENT
THE COUNTY ASSEMBLY OF BARINGO.....	9 TH RESPONDENT
THE COUNTY ASSEMBLY OF MACHAKOS.....	20 TH RESPONDENT
THE COUNTY GOVERNMENT OF NAROK.....	21 ST RESPONDENT
THE COUNTY ASSEMBLY OF NAROK.....	22 ND RESPONDENT
THE COUNTY GOVERNMENT OF KAKAMEGA.....	23 RD RESPONDENT
THE COUNTY GOVERNMENT OF MERU.....	24 TH RESPONDENT
THE COUNTY GOVERNMENT OF BOMET.....	25 TH RESPONDENT
THE COUNTY ASSEMBLY OF BOMET.....	26 TH RESPONDENT

AND

THE COUNTY GOVERNMENT OF KISUMU.....	1 ST INTERESTED PARTY
THE COUNCIL OF GOVERNORS.....	2 ND INTERESTED PARTY
THE HONOURABLE ATTORNEY GENERAL.....	3 RD INTERESTED PARTY
KENYA ASSOCIATION OF MANUFACTURERS.....	4 TH INTERESTED PARTY

JUDGMENT

The Petitioner, **UNITED MILLERS LIMITED** is a limited liability company, that was incorporated in Kenya, and whose registered office is located in Kisumu.

1. The Respondents are the County Governments of all the 47 Counties in Kenya, as well as all the 47 County Assemblies in Kenya, with the exception of the County Government of Kisumu.
2. The Petition has cited 4 Interested Parties, who are the County Government of Kisumu; The Council of Governors; The Honourable Attorney General and the Kenya Kenya Association of Manufacturers.
3. It is the Petitioner's case that it has at all material times taken out all the Trading Licences required by law, to enable it carry on Operations within Kisumu County.
4. After manufacturing products within Kisumu County, the Petitioner has sold the same to its customers who are located throughout the country. However, the Petitioner categorically states that the sale of its products is wholly undertaken within Kisumu County.
5. After making sales within the Kisumu County, the Petitioners delivered the products to traders in various parts of the country.

6. Each of the Respondents is said to be compelling the Petitioner to take out various Trade Licences, for the delivery of products within their respective jurisdictions.
7. The kind of licences which the Respondents have demanded are for;
- (a) **Branding vehicles;**
 - (b) **Single Business Permit;**
 - (c) **Distribution**
8. The Petitioner operates a fleet of 280 trucks, which operate along different routes, within the country.
9. Whenever any of the said vehicles was traversing the jurisdiction of any of the Respondents, the said Respondent would impound such vehicle if the Petitioner had not obtained the licences demanded.
10. It was the Petitioner's case that the decision by the Respondents, to demand payment for licences to enable the Petitioner's vehicles distribute its products within each respective county, amounted to double taxation.
11. In any event, the Petitioner reasons that the Respondents were not offering services to it, which would warrant the levy of any fee. It was the understanding of the Petitioner that the Respondents could only demand that the Petitioner should take out a licence in respect to each county where they operated, if the Respondents were providing services to the Petitioner's motor vehicles, as Contemplated in the Fourth Schedule to the Constitution.
12. The Petitioner submitted that the actions of the Respondents were detrimental to National Economic Interests and National Economic Policies, because they curtail the free mobility of goods, services, capital and/or labour across the borders of the counties. Therefore, the Petitioner deems the actions in issue as constituting a violation of **Article 209 (5) of the Constitution**
13. Following the regular impounding of their vehicles by the authorities in several counties, the Petitioner has had to institute proceedings in order to have the said vehicles released.
14. One such case was **UNITED MILLERS LIMITED Vs NANDI COUNTY GOVERNMENT, CIVIL SUIT NO. 189 OF 2016**. Even though the court issued orders barring the County Government from impounding the Petitioner's vehicles, that Order was only in relation to that particular financial year. The explanation for the limited application of the Order is that every financial year, both the Central Government and the County Governments pass new legislations. Therefore, when the court issues an order in relation to a particular legislation, the order would automatically lapse when a subsequent piece of legislation comes into play.
15. It is therefore understandable why it could be an expensive and a never-ending exercise to have the Petitioner challenge the Finance Acts passed by each County Assembly, every year.
16. On the other hand, by lumping together the Counties and then collectively challenging their respective Finance Acts, suggests that the said pieces of legislation were either uniform or identical.
17. The Petitioner did not demonstrate to the court that the impugned legislations were identical, or that their provisions were so uniform that one judicial pronouncement would have a similar impact in respect of the said provisions, across all the Finance Acts in the respective Counties.
18. But save for the County Government of Narok , none of the Respondents denied the Petitioner's contention that each of them was levying **DISTRIBUTION OR SINGLE BUSINESS PERMITS** upon the Petitioner, on account of the fact that the Petitioner's vehicles were conveying products to business outlets which were located within each such county.
19. In Narok County, they are levying **CESS** on the agricultural products; in particular Wheat and Maize which the Petitioner sources from there.
20. Therefore, Narok County invited the court to make a clear distinction between Cess on produce sourced from that county, and Distribution or Single Permit/Fee/Licence which is levied by other counties.
21. Nonetheless, Narok County pointed out that it charges a **TRANSPORT LEVY** for each vehicle; but such levy is charged once, in any financial year.
22. In a nutshell, Narok appears to have chosen a path that is not trodden by other County Governments.

Gazettement

23. The Petitioner had asserted that the Respondents were relying upon legislation that had not yet been gazetted.
24. Regrettably, that generalized assertion was not backed by evidence. If anything, the Respondents demonstrated that each of their

respective Finance Acts had been gazetted.

25. Insofar as any County legislation had not been published in the Gazette, it will not take effect, as **Article 199 (1)** of the **Constitution** expressly stipulates thus;

“County Legislation does not take effect unless published in the Gazette.”

26. That provision is so clear that nobody needs to ask the court to declare it through a judgment or any other pronouncement. **Double Taxation**

27. The Petitioner submitted that the Distribution Fee, (by whatever name they are called) constitutes Double Taxation.

28. It was pointed out that the Petitioner pays all the requisite fees within Kisumu County, where their products are manufactured or produced.

29. The finished products are sold to customers who are found all around the country.

30. It is those customers of the Petitioner who then sell the products in their respective counties, where each such a customer was based.

31. In order to be permitted to sell the products in any county, the customer was required to take out all licences, in terms of the legislation applicable in that county.

32. It was the reasoning of the Petitioner that it should not be compelled to pay fees to any of the counties at which their products were sold, because those who were making sales in each of the said counties were already licenced to make the sales.

33. In the case of **KENYA PHARMACEUTICAL ASSOCIATION & ANOTHER Vs NAIROBI CITY COUNTY & THE OTHER 46 COUNTY GOVERNMENTS, CONSTITUTIONAL PETITION NO. 97 OF 2016**, Mativo J. had a look at the meaning of double taxation. This is what the learned Judge said;

“What is the definition of double taxation?

Double tax is the taxing of the same invoice twice.

I do not think that payment of trade licence to the Respondents and professional licence fees to the professional body amounts to double taxation.”

34. The Cambridge Dictionary defines double taxation as;

“A situation in which two or more governments charge tax on the same income or property.

Developers complained that the factory faces double taxation, by the state and federal governments.”

35. In my understanding, if the respective County Governments were charging tax or licence fees more than once, in respect to the same income or property, that would be tantamount to double taxation.

36. The counties are saying that each is only charging a fee for time when any vehicle was distributing products within that specific county.

37. The Petitioner does not pay Distribution Fees to the County Government of Kisumu. Therefore, when the Petitioner is required to pay Distribution Fees in a county other than Kisumu, there is no double taxation.

38. Each county only levies Distribution Fees when the Petitioner’s vehicle was passing through its territory and was distributing products to those who had bought such products.

39. In a strict sense, the fee charged by one county cannot be said to constitute double taxation upon the Petitioner when the Petitioner is required to pay another Distribution fee in another county.

40. But I hasten to add that there is a very thin line between a situation in which different governments, (whether Central or County or two separate Counties) impose a levy or tax on the same income or property; and where the tax is linked to the territory where the vehicle is passing through, in the process of effecting distribution.

41. I will revert to this issue later. **Public Participation in enacting County Legislation**

42. The Petitioner cited the decision of **ADRIAN KAMOTHO NJENGA & NATIONAL ASSEMBLY OF KENYA; JUDICIAL SERVICE COMMISSION & 2 OTHERS, PETITION NO. 259 OF 2018**, as backing the proposition that the legislative process ought to be a true reflection of the public participation, so that the product is owned by the public.

43. It is well settled that when the views of the public are taken into account by the legislators at the time when they were enacting laws, the public would deem such laws as being legitimate, as the laws would be responsive to them.

44. In order for the public to feel that their views had been taken into consideration, it is important that any persons who may be interested in giving their views, should be accorded sufficient time to prepare their representations on the Bill.

45. In this case, there is no specific claim by the Petitioner, that any particular County Assembly had either given inadequate notice to interested parties, or had completely disregarded the views which the Petitioner had made available on the relevant Finance Act.

Can County Assemblies Formulate Other Alternatives to collect Revenue, so as not to curtail Intra-County Trade?

46. The Petitioner expressed its appreciation of the fact that the devolved units need to generate revenue, in order to be able to sustain their affairs.

47. However, the Petitioner submitted that the generation of revenue should be pursued in a way that would enhance, rather than curtail the National Economic Interest.

48. The Petitioner drew this court's attention to the draft **National Policy to Support the Enhancement of County Governments' Own-Sourced Revenue**, dated February 2019.

49. Chapter 4 contains the Policy Interventions, intended to regulate the introduction of Taxes, Fees and Charges by County Governments, including waivers and variations which will improve policy coordination countrywide.

50. **Clause 4.1.1.** reads as follows;

“..... The regulatory process prescribed here aims to address challenges related to County Governments' revenue-raising measures, including multiplicity of fees and charges and inefficient revenue administration.”

51. The draft National Policy recognizes the existence of multiplicity of fees and charges.

52. Whereas double taxation is a situation where 2 or more governments charge tax on the same income or property, multiplicity of fees or charges is a recognition that the individual fees or charges charged by any one government (whether County or National) could be legitimate and different from other fees or charges, however the number of such fees and charges makes it too expensive for the person required to pay them.

53. In the circumstances, the draft policy intervention suggests that the regulatory process be guided by, inter alia, the following principle;

(c) County taxes, fees and charges should be levied at the source or destination of transportation of goods in question (including within the same County):”

54. In the light of the draft **National Policy to Support the Enhancement of County Governments' Own-Source Revenue**, it does appear that there are possible alternatives that County Assemblies could formulate to collect revenue without giving rise to a multiplicity of fees and charges.

55. However, I appreciate that that issue was not raised in the Petition. It was an issue which came up in the final submissions.

56. In any event, I am alive to the fact that it is not the function of the court to decide on the appropriateness of legislation. I share the following view, as was expressed by Lenaola J. (as he then was), in **NAIROBI METROPOLITAN PSV SACCOS UNION LIMITED & 25 OTHERS Vs COUNTY OF NAIROBI GOVERNMENT & 3 OTHERS, PETITION NO. 486 OF 2013;**

“56. I wholly agree and must emphasize that it is not for the Courts to decide what is an appropriate or right or wise legislative provision. That power falls squarely with the legislature, and in this case, the County

Assembly, which casts policies into statutes.

The Courts will only intervene if in the face of the claims, a particular statute or part thereof contravenes the Constitution.”

57. The reason for limiting the role of the court in determining the

constitutionality of a statute or of a part of such statute has been ably explained in the following words, which were stated by the Court in **OLUM & ANOTHER V ATTORNEY GENERAL OF UGANDA [2002] 2 E.A 508**, at page 518;

“To determine the constitutionality of a section of a statute or Act of Parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the court has to go further and examine the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional.”

58. But the Court must always bear in mind the presumption of constitutionality of a statute, as the legislature is deemed to be aware of the needs of the people, and that therefore, when enacting statutes the legislature will have taken into account the needs and wishes of the people.

59. The County Assembly of Bomet has asked the court to suspend its decision in this case until the draft **National Policy to Support the Enhancements of County Governments Own-Source Revenue** comes into force.

60. I acknowledge that the proposed Policy document is still in draft form. Therefore, it is not enforceable.

61. However, the Court cannot abdicate its responsibility of adjudication, to await the Policy.

62. **Article 209 (5)** of the Constitution stipulates as follows;

“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 the county boundaries or the national mobility of goods, services, capital or labour.”

63. Therefore, if the Petitioner was able to demonstrate that either the taxation or other revenue-raising powers of the County Governments were being exercised in a way that prejudices economic activities across the County boundaries, or prejudices the national mobility of goods, services, capital or labour, the court would be obliged to declare the exercise of such powers as unconstitutional, regardless of the fact that the same had not yet been incorporated into formal National Economic Policies.

64. In my understanding of the Petition before me, it is not challenging the effect of the implementation of the legislation passed by the Respective County Assemblies.

65. The Petitioner has a problem with the legislation which enables each county to charge a Distribution Fee, whenever any vehicle belonging to the Petitioner enters the jurisdiction of such county, for purposes of delivery of goods which the Petitioner had sold to its customers within the said county.

66. As I have already held, each respective Distribution Fee is charged by a different County, in respect to distribution of goods within its territory. Therefore, in a strict sense, such fees do not constitute Double Taxation.

67. Yet it cannot be denied that if the Petitioner has to pay “*Distribution Fees*” at every county, whenever the Petitioner’s vehicle ventures into the county for the purposes of delivery of products which the Petitioner had already sold; and which in turn the traders already licenced within the county would sell to consumers, there arises an issue of multiplicity of taxation or of charges.

68. In a manner of speaking, it is not each separate piece of legislation passed by the respective County Assemblies, that is unconstitutional; the Petitioner appears to be complaining about the cumulative implementation of the various Finance Acts, across the county boundaries.

69. It does appear to me that the Petitioner might have a legitimate complaint, about multiplicity of Distribution Fees. It probably makes the cost of products more expensive to the ultimate consumers, especially if such consumer buys the product at a county that is far-off from the county where the product is manufactured or produced.

70. Perhaps that is why the draft policy which is intended to support the County Governments to enhance their Own-Source Revenue suggests that County Taxes, fees and charges should be levied at Source or at the Destination of transportation of the goods in question.

71. Meanwhile, the Petition, as drawn cannot lead to the Petitioner’s desired goal, noble though they may be.

72. Accordingly, the Petition is dismissed.

73. However, I make no order as to costs, as this was a legitimate Public-Interest litigation.

DATED, SIGNED and DELIVERED at KISUMU This 15th day of April 2020

FRED A. OCHIENG

JUDGE