



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
CONSTITUTIONAL PETITION NO. 29 OF 2019

IN THE MATTER OF: TAITA TAVETA COUNTY FINANCE ACT, 2018

BETWEEN

SAMRUDDHA RESOURCES (KENYA) LTD.....PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF TAITA TAVETA.....RESPONDENT

JUDGMENT

The Petition

1. At the heart of the petition herein dated 8/4/2019 is the Finance Act 2018 passed by the Respondent relating to the levy of various charges, taxes, licence fees and cess in respect of matters stated therein.
2. The Petitioner alleges to be engaged in inter-a-lia the licensed mining and export of iron ore from the Taita Taveta County. The Petitioner avers that the Respondent, County Government of Taita Taveta, has been levying a charge of Kshs. 150.00 per ton of iron ore, but that the said charge has been arbitrarily and unilaterally increased to Kshs. 1000.00 per ton. This purported increase by Kshs. 850.00 has been occasioned without any involvement by stakeholders, and indeed without any participation of all interested parties whatsoever, and even the reasons necessitating the increase have not been given.
3. The Petitioner avers that under the provisions of the Mining Act (No. 12 of 2016), every mineral in its natural state in, under or upon land in Kenya is the property of the Republic of Kenya and is vested in the National Government in trust for the people of Kenya and that the County Government, once it receives its share of royalties, cannot again purport to levy any further taxes on the mineral. The Petitioner avers that under Section 183 of the said Act holders of mineral rights are obliged to pay royalty to the government in respect of the mineral. That royalty is then distributed 70% to the National Government, 20% to the County Government and 10% to the community where the mining operations occur. Hence, the Petitioner avers, any further levy of monies in the form of taxation is tantamount to double taxation and goes against the national principles stipulated in Article 10 of the Constitution as well as Article 209 (5) of the Constitution.
4. The Petitioner further avers that any further levies of taxes by the Respondent is not only a gross abuse of the Respondent's powers and a violation of the Petitioner's rights under the constitution, but also amounts to unjust enrichment by the Respondent, while that conduct at the same time makes it virtually impossible for the Petitioner to profitably engage in the business of mining the iron ore. The Petitioner states that the proposed charge by way of cess is simply intended to stifle the Petitioner's business in which the Petitioner has heavily invested.
5. The Petitioner therefore prays for the following orders:
 - (a) A declaration that collection of cess by the Respondent for iron ore mined in Taita Taveta County is unlawful, unconstitutional and null and void;
 - (b) An injunction to restrain the Respondent, the County Government of Taita Taveta, from enforcing of levying cess for iron ore illegally and unlawfully under the Taita Taveta County Finance Act 2018;
 - (c) Any other or such other relief as this Honourable Court deems appropriate in the circumstances to grant; and
 - (d) Costs of and incidental to this petition.

6. The Petition is also supported by affidavit of Parag Pawar sworn on 8/4/2019 in support of the Notice of Motion of even date seeking for interim conservatory orders which were granted.

The Response

7. The Respondent did not file a response to the petition. However, they relied on their Replying Affidavit sworn on 3/7/2019 by Mr. Liverson Mughendi which was in response to the Petitioner's Notice of Motion dated 8/4/2019.

8. The deponent avers that he is the acting County Secretary to the Respondent and is well versed with matters raised in the petition. The Respondent's case is that this Court lacks the jurisdiction in view of the fact that the offensive Finance Act was enacted to apply within the local limits of Taita Taveta County, and that within Voi town is a High Court clothed with jurisdiction to preside over this matter. Further, the Respondent states that the Petitioner lacks a mining license to allege infringement of its rights. Lastly, the Respondent states that contrary to the Petitioner's contention, the offensive Finance Act does not impose tax on the material mined, but on transportation of the material; and that there was proper/satisfactory public participation before enactment of the offensive Finance Act.

Submissions

9. With leave of the court parties filed submissions which were briefly highlighted in court on 10/3/2020.

The Determination

10. I have carefully considered the petition and opposition to it. I have also considered the submissions of the parties. In my view the following issues arise for my determination:

- (i) Whether this court has the jurisdiction to hear and determine this petition.
- (ii) Whether the Petitioner is a licenced miner.
- (iii) Whether the cess levied by the Respondent is a tax on the mineral or whether it is a tax on service offered by the Respondent.
- (iv) Whether there was public participation before the charge of Kshs. 150.00 was increased to Kshs. 1000.00 by the Respondent.

(i) Whether this court has the jurisdiction to hear this matter

11. The Respondent submitted that on the place of suing, Rule 8 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the "Rules") is instructive that **"every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place."** According to the Respondent, the cause of action occurred in Voi County. The subject minerals is mined in Kishushe in Voi County, and transportation occurs within the same County. The Respondent submitted that the proper forum for instituting this suit is Voi, not Mombasa. Mr. Bwire, learned Counsel for the Respondent submitted that one way to explain this doctrine is to say that where there is evidence that a party has filed a suit in "a wrong Court" in bad faith or in a manner that signals forum shopping, the prudential doctrine counsels that the Court should decline to assume jurisdiction. In cases where the court in which the case was filed is a seriously inappropriate forum, and the filing smirks of bad faith the Court should even dismiss the suit *ex debito justitiae*. Applying the test of "substantial connection", Mr. Bwire submitted that no reasons have been advanced behind filing this suit in Mombasa, and on this count alone the suit should be dismissed.

12. Mr. Khagram, learned Counsel for the Petitioner did not respond to the issue of jurisdiction, but merely stated that the Petitioner has its registered office and place of business in Mombasa and are entitled to file the petition in Mombasa.

13. This is an easy matter to dispose off. Under Order 8 rule 2 the place for filing a suit can be a place where the Plaintiff resides. The court in deciding the best place for filing suit will no doubt consider the convenience for witnesses for both parties. It is to be noted that these proceedings are carried out by affidavit evidence, and so there is no undue difficulty imposed on any witnesses. Even Counsel in this matter appearing for both parties are from Mombasa. However, more importantly, the registered place of business of the Petitioner is care of **P. O. Box 41323-80100, Mombasa-Kenya, B7, Marble Arch, Moyné Drive Nyali, Mombasa-Kenya.**

14. From the foregoing I see no bar to the Petitioner filing this petition in this court. This court has the jurisdiction to hear and to determine this petition.

(ii) Whether the Petitioner has a mining licence

15. Mr. Bwire submitted that under this head is the validity of the licenses held by the Petitioner, and whether, going by the nature of the activities undertaken by the Petitioner, the Petitioner is legally before the Court. Put differently, is the Petitioner deserving of the Court's protection? Mr. Bwire drew this Court's attention to paragraph 3 of the Supporting Affidavit where Mr. Pawar states that the Petitioner is **"...engaged in the business of mining, extracting and trading in iron ore which is extracted from a quarry in Kishushe, Taita-Taveta County...for some years now"**. In support of this position, the Petitioner has annexed, SJ-2 which comprise amongst others, the Mineral Dealer's (Trading) License (hereinafter the **"Mineral Dealer's License"**) Registration No. **DTL/2018/0231**. A cursory glance at the said license reveals the following: -

- (a) The License expired on 31st December, 2018 and has never been renewed; and

(b) The Petitioner was granted the right to exclusively buy and sell, including exporting the iron ore.

16. Mr. Bwire submitted that Section 159 of the Mining Act, 2016 (the “**Act**”) is clear that a person shall not engage in mineral dealings, either as principal or agent, except and in accordance with a mineral dealer’s license or a mineral dealer’s permit. The Mineral Dealer’s permit is only issued to the Kenyan citizens and where body corporate, 60% of the shareholding in such corporate body must be Kenyan citizens. See Section 164(1) of the Act. Further, the Act provides that the holder of the Mineral Dealer’s License shall not export minerals but shall have the right to buy and sell locally. Section 161 thereof is clear that a mineral dealer’s licence shall expire on the thirty-first day of December of the year in which it is issued. Mr. Bwire further submitted that the Mining (Dealings in Minerals) Regulations, 2017 (hereinafter the “**Regulations**”) under Regulation 11(1) provides that a mineral dealer’s license shall be renewed “**not later than thirty (30) days before the expiry of the license.**” Where one is a holder of a Mineral Dealer’s License, Section 162(a) of the Act places on such holders, various obligations which includes *inter alia*, not to deal in minerals otherwise than in accordance with the conditions set out in the license, which provision is echoed in the Regulation 16(2)(c) of the Regulations. Counsel submitted that the Petitioner is inviting this Court to protect a right and activities clouded with illegalities for the reasons that: -

(a) On the Petitioner’s own admission, the Petitioner engages in the business of “*mining, extracting and trading in iron ore*” from Kishushe, while no evidence has been led to demonstrate to the Court that the Petitioner is a mineral right holder. The Petitioner is not even a mining licensee and/or permit holder to carry out mining activities within Kishushe;

(b) While the Act is clear that the holder of a Mineral Dealer’s Permit can only buy and sell minerals locally without exporting, the Petitioner not only deals in iron ore without a valid Mineral Dealer’s License, but also exports the same without the mineral export license;

(c) The Petitioner is a holder of a mineral dealer’s license Registration **No. DTL/2018/0231** which License had long expired back on 31st December, 2018 and has never been renewed and if at all, no evidence has been placed before the Court that the Petitioner had applied for renewal of the said license. Consequently, the Petitioner is dealing in minerals illegally and/or without a valid license.

17. Counsel further submitted that even where the Court were inclined to find and hold that the Mineral Dealer’s permit held by the Petitioner is valid and so its activities, the (illegal) Mineral Dealer’s permit was issued to the Petitioner whose shareholding does not correspond to 60% Kenyan citizenship as provided under Section 164 of the Mining Act. In the Replying Affidavit, Liverson Mughendi has annexed LM-1, the Certificate of companies’ search which shows that out of the Petitioner’s six (6) shareholders, some of whom double as directors, not even a single shareholder is a Kenyan citizen. Mr. Bwire submitted that this begs the question as to how the Petitioner obtained the Mineral Dealer’s License with its current shareholding, even if for argument sake, the said licence was valid.

18. I have considered the Respondent’s submissions on the issue of the said licence. Firstly, this court notes that these are very serious allegations which the Respondent has decided to raise in submissions. I have noted that the Respondent did not file a response to the petition. It is only through a substantive response that the Respondent can purport to challenge the Petitioner’s legal status. In the absence of such a response, it must be taken on the face of pleadings that the Respondent had no issue with the Petitioner’s legal status, and so it shall not be an issue at the stage of submissions. I hasten to add further, that if the Respondent knew all along that the Petitioner was not a licenced miner, why did the Respondent engage in trade with the Petitioner, and why did they want to levy taxes upon an illegal entity? It is the finding hereof that the Respondent’s submissions on the issue of Petitioner’s legal status is, at this stage of proceedings, misplaced and the allegations of illegalities are accordingly dismissed.

(iii) Whether the cess levied by the Respondent is a tax on the mineral or whether it is a tax on service offered by the Respondent.

19. Mr. Bwire submitted that Article 209 (3) & (4) vests the Respondent with the powers to impose levies for the services they provide. In this case, county road maintenance is a service provided by the Respondent for which it has the constitutional mandate to charge for the service. In compliance with Article 209(4), the Respondent enacted the Taita Taveta Finance Act, 2018 which *inter alia*, provided that the cess charged on iron ore was increased from the previous Kshs. 150, to 1, 000.00. per ton. Counsel submitted, with my concurrence, that the Petitioner at paragraph 4 of the Petition, seems to challenge the alleged “unilateral increase of cess from Kshs. 150.00 to Kshs. 1, 000.00” and acknowledges paying cess at Kshs. 150.00. At paragraph 9, however, the Petitioner seems to dispute paying cess to the Respondent on grounds that since it pays royalties to the National government under Section 183 of the Mining Act, it should not make any additional payments and that further charges by the Respondent whether by cess or taxes upon it falls outside the Respondent’s mandate. Mr. Bwire submitted that collection of cess, like any other taxes and charges levied by the Respondent is founded under Article 209 (3) & (4) of the Constitution. Counsel submitted that the Fourth Schedule of the constitution places various functions on the Respondent, amongst them maintenance of the County roads. This is the basis upon which the Respondent levies cess on the transportation of the iron ore which charge is uniformly levied against all persons within the County. Counsel submitted that any submission to the contrary requires the Petitioner to prove illegality, as required under Section 108 of the Evidence Act, Cap 80 Laws of Kenya.

20. I have considered this submission. From the outset, the Respondent was clear that the cess was charged on the transportation of the iron ore by the Petitioner. This seems to be correct, and I say so for the following reasons: (i) The description column of the offensive act is clear that

“**description of fees charged on service**” where iron ore is charged Kshs. 1, 000.00 per ton, having been increased by Kshs. 850.00 and not on the mineral; [see the Petitioner’s annexure SJ-1 at pg. 26]

(ii) From the Petitioner’s own annexed receipts, the Respondent clearly indicates that the charges are calculated from the number of tons of iron ore “**transported**”; and

(iii) Where the Petitioner paid for royalties for the iron ore, the receipts as attached have clearly shown this, as “**royalty on iron ore**” (see Pg. 41-44 & 48 of the Petitioner’s Application)

21. In my view, it is clear that cess was charged on the transportation of the mineral, and not on the “mineral”. In **Base Titanium Limited vs. County Government of Mombasa & another [2018] eKLR**, a case relied upon by all parties herein, the Court of Appeal observed as follows:

“Article 209 (4) of the Constitution empowers the County as well as the national governments power to impose charges for the services they provide. I accept as urged by the 1st Respondent that facilities for road transport is one of the basic services ‘including garbage collection, parking facilities, street lighting, drainage and roads maintenance’ – “that members of the public including the petitioner expects to be provided by the 1st respondent.” The word services is not defined in the interpretative Article 260 of the Constitution. However, the meaning of the word service as given in the Concise Oxford English Dictionary 11th ed. (2006) agrees with the 1st respondent’s submission in that the noun service is defined as-

‘a system supplying a public need such as transport, or utilities such as electricity and water.’

Accordingly, I find that the County Government as with the National Government has under Article 209(4) of the Constitution authority to impose charges for services that they provide, and these include road transport service.”

The Court went further to state that:

[21] We are clear in our minds and it is necessary to state here that the cess in issue was not in respect of the minerals being ferried but the vehicles carrying goods into the 1st respondent’s jurisdiction. The 1st respondent was categorical in that respect. If the charge was in respect of the minerals then it would have been unconstitutional since under Article 62 of the Constitution the same is exclusively under the preserve of the National Government.

22. It is the finding hereof that the cess levied herein was not a tax on the mineral but a charge for the transportation of the mineral, an act which was lawful and correct.

(iv) Whether there was public participation before the charge of Kshs. 150.00 was increased to Kshs. 1000.00 by the Respondent.

23. As to whether there was public participation before the cess was increased from Kshs. 150.00 to Kshs. 1000.00, the learned Counsel for the Respondent submitted that the Replying Affidavit sworn by Mr. Liverson Mghendi stated that there was public participation. In annexure LM-2, the Respondent informed the Court that prior to the enactment of the Finance Act, 2018 it organized for public participation in all the sub-counties to wit; Taveta, Mwatate, Wundanyi and Voi. The exercise was done in various fora including public *barazas*, mosques and churches, vernacular radio broadcasting stations including the Respondent’s websites. Annexure LM - 3 was adduced in proof. Over and above, the Respondent deposed that it held various stakeholder forums which were attended by various businessmen and professionals across the County.

24. However, the Petitioner at paragraph 5 of the petition pleaded lack of public participation before the said levy was increased from Kshs. 150/= to Kshs. 1,000/=. In the alleged public participation there is no evidence that the Petitioner was involved or was even aware of the process. This Court is aware of the position taken by **Sachs J in Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC)** where it was held *inter alia*:-

“...being involved does not mean that one’s views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government...”

25. However, public participation must have its own targeted audience. If it targets miners, information must reach the miners. It is not enough that villagers were called into a baraza where a charge or levy was increased from Kshs. 150/= to Kshs. 1,000/= when the real players were not involved. For effective public participation to have taken place, a schedule of players in the mining industry in the area should have been annexed, showing how they were served with notices of public participation, whether they attended, and what they said. Where one is dealing with international miners, the audience for public participation cannot be restricted to those who attend public barazas, local church, mosques or those who listen to vernacular radio broadcasting. An increment of a levy from Kshs. 150/= to Kshs. 1,000/= is a massive increment which cannot be done unilaterally and arbitrarily without stakeholder participation and it appears that this is actually what happened in this matter.

26. This court is of the view that there was no adequate public participation before the levies were increased. The Petitioner seriously stood to be prejudiced by the increase from Kshs. 150.00 to Kshs. 1,000.00. The Petitioner’s view, or those of similar groupings, ought to have been taken into account. Besides, increment of Kshs. 850.00 appears arbitrary and quite excessive. Mr. Bwire submitted that there is already a new Finance Act of 2019 under which the said cess is now charged at Kshs. 500.00. Without this court vindicating this new charge, it is itself a clear indication that the charge of Kshs. 1000.00 was arbitrary and excessive.

27. The Petitioner is therefore hereby restored to the previous charge of Kshs. 150.00 which shall apply for the period covered by the Finance Act 2018 under reference, and if the Petitioner has during the period covered by the said Finance Act 2018 paid more than Kshs. 150/=: the Respondent shall forthwith refund the excess paid.

28. Costs of the petition shall be for the Petitioner.

Dated, Signed and Delivered at Mombasa this 4th day of May, 2020.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Ondego for Petitioner

Mr. Muliro for Respondent

Mr. Kaunda court Assistant