



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CONSTITUTIONAL PETITION NO. 4 of 2020

IN THE MATTER OF: ARTICLES 19, 20, 21, 22, 23, 165 AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: VIOLATION OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22,

23, 24, 40, 43, 47, 62(1) (F), 63(3), 93, 94(6), 109, 110, 124, 191, 199(1), 209, 258, 259

AND 260 OF THE CONSTITUTION OF KENYA AS WELL AS THE

FOURTH SCHEDULE THERETO

AND

IN THE MATTER OF: SECTIONS 87, 91 AND 104 OF THE COUNTY GOVERNMENT ACT NO.

17 OF 2020

AND

IN THE MATTER OF: SECTIONS 125(2) AND 207 OF THE PUBLIC FINANCE MANAGEMENT ACT OF 2012

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF: THE STATUTORY INSTRUMENTS ACT, 2013

AND

IN THE MATTER OF: THE WATER ACT, 2016

AND

IN THE MATTER OF: SECTIONS 6, 20, 136, 140 AND 183 OF THE MINING ACT, 2016

AND

IN THE MATTER OF: SECTIONS 9, 125, AND 147 OF THE ENVIRONMENTAL MANAGEMENT

AND CO-ORDINATION ACT

AND

IN THE MATTER OF: MACHAKOS MANAGEMENT OF QUARRYING ACTIVITIES ACT, 2016

AND

IN THE MATTER OF: MACHAKOS COUNTY FINANCE ACT, 2019

AND

IN THE MATTER OF: MACHAKOS FINANCE BILL, 2019

AND

IN THE MATTER OF: ALLEGED ENACTMENT BY THE COUNTY ASSEMBLY

OF MACHAKOS OFA LAW THAT IS INCONSISTENT WITH AND/OR

IN CONTRAVENTION OF THE CONSTITUTION

AND

IN THE MATTER OF: ALLEGED EXERCISE OF PARLIAMENTARY POWERS

AND AUTHORITY IN CONTRAVENTION OF THE CONSTITUTION

AND

IN THE MATTER OF: ALLEGED VIOLATION OF FUNDAMENTAL RIGHTS

AND FREEDOMS OF PERSONS ENGAGED IN THE BUSINESS OF

QUARRYING ACTIVITIES AND CONSUMERS OF THEIR SERVICES

BETWEEN

H YOUNG & CO (E.A.) LTD.....1ST PETITIONER

ARISTOCRATS CONCRETE LIMITED.....2ND PETITIONER

S S MEHTA AND SONS LTD.....3RD PETITIONER

ORBIT ENTERPRISES LIMITED.....4TH PETITIONER

KARSAN RAMJI & SONS LTD.....5TH PETITIONER

NATIONAL CONCRETE LTD.....6TH PETITIONER

TIP TOP CONSTRUCTIONS LTD.....7TH PETITIONER

IRUCHA INVESTMENTS LTD.....8TH PETITIONER

HALAI CONCRETE QUARRIES.....9TH PETITIONER

SHENGLI ENGINEERING CONST. CO LTD.....10TH PETITIONER

BIZROCK GROUP LTD.....11TH PETITIONER

SUPERSTONE (2006) LTD.....12TH PETITIONER

CHINA WU YI KENYA PRECAST CO LTD.....13TH PETITIONER

BLUE STONE LTD.....	14TH PETITIONER
KAY CONSTRUCTION CO LTD.....	15TH PETITIONER
KENYA BUILDERS & CONCRETE CO LTD.....	16TH PETITIONER
TOPSOIL ENG. (K) LTD.....	17TH PETITIONER
SHAJANAND CREATIVE LTD.....	18TH PETITIONER
EPCO QUARRIES LTD.....	19TH PETITIONER
SILVERSTONE QUARRY LTD.....	20TH PETITIONER
DM CONCRETE (K) LTD.....	21ST PETITIONER
VIRJI VISHRAM PATEL & SONS CO LTD.....	22ND PETITIONER
KIRINYAGA CONSTRUCTION (K) LTD.....	23RD PETITIONER
VERSUS	
COUNTY ASSEMBLY OF MACHAKOS.....	1ST RESPONDENT
COUNTY GOVERNMENT OF MACHAKOS.....	2ND RESPONDENT
ATTORNEY GENERAL.....	3RD RESPONDENT

JUDGEMENT

1. The genesis of this case lies in the regulation, management, levy, taxes and or charges on quarrying, extraction and other mining activities in enforcement and or implementation and or execution of the Machakos County Management of Quarry Activities Act, 2016 and Part/Section 17 and 24 of the 3rd schedule and Section/Part 420,425, 430 and 495 of the 4th Schedule of the Machakos County Finance Act 2020. The Petitioners herein filed the instant petition in which they seek various orders which in principle seek to have the Machakos County Management of Quarry Activities Act, 2016 and Part/Section 17 and 24 of the 3rd schedule and Section/Part 420,425, 430 and 495 of the 4th Schedule of the Machakos County Finance Act 2020 declared inconsistent with cited provisions of the constitution. The Petitioners question whether the process leading to the introduction of Machakos County Management of Quarry Activities Act, 2016 and Part/Section 17 and 24 of the 3rd schedule and Section/Part 420,425, 430 and 495 of the 4th Schedule of the Machakos County Finance Act 2020 complies with the constitutional requirements for passing the said law and whether the decisions of the respondents to initiate, sign and table Machakos County Management of Quarry Activities Act, 2016 and Part/Section 17 and 24 of the 3rd schedule and Section/Part 420,425, 430 and 495 of the 4th Schedule of the Machakos County Finance Act 2020 contravened constitutional provisions.

2. The Petition was filed pursuant to Articles 19, 20, 21, 22, 23, 165(3)(b), (d) (i), (ii) & (iii) and 258 of the Constitution together with Articles 1, 2, 10, 24, 40, 47, 62(f), 93, 94(6), 100, 110, 124, 191, 199(1), 209, 259 and 260 as well as the Fourth Schedule thereto.

3. The petitioners seek the following orders in their petition as amended on 11.5.2020:

a) A declaration that the administration, management, control and taxation of mining activities including quarrying as well as the products thereof is the sole prerogative of the national government.

b) A declaration that the coordination, licensing and management of environmental activities and stock taking of the natural resources in Kenya and their utilization and conservation thereof is the sole prerogative of the National Government through the National Environment Management Authority.

c) A declaration that the Machakos County Management of Quarry Activities Act, 2016 in its entirety is inconsistent to and in violation of Article 62(1) & (3), 94(6), 185(2) as read with the 4th schedule and Article 209(3)(5) and 260 of the Constitution and as such is null and void ab initio.

d) A declaration that Part/Section 17 and 24 of the 3rd schedule and Section/Part 420,425, 430 and 495 of the 4th Schedule of the Machakos County Finance Act No. 1 of 2019 is inconsistent to and in violation of Article 62(1) & (3), 94(6), 185(2) as read with the 4th schedule and Article 209(3)(5) and 260 of the Constitution and as such is null and void ab initio.

e) A declaration that Part/Section 17 and 24 of the 3rd schedule and Section/Part 420,425, 430 and 495 of the 4th Schedule of the Machakos Finance Act 2020 is inconsistent to and in violation of Article 62(1) & (3), 94(6), 185(2) as read with the 4th schedule and

Article 209(3)(5) and 260 of the Constitution and as such is null and void ab initio.

f) An order declaring all or any other provisions in the Machakos County Management of Quarry Activities Act 2016, Machakos County Finance Act No 1 of 2019 and or the Machakos Finance Act 2020 that purports to regulate, manage, levy taxes and or charges in quarrying and other mining activities as well as Environment Management and Coordination inconsistent to and in violation of Article 62(1) & (3), 94(6), 185(2) as read with the 4th schedule and Article 209(3)(5) and 260 of the Constitution and as such is null and void ab initio.

g) A declaration that the 1st and 2nd respondents' failure to provide the petitioners with the Machakos County Finance Act 2020 is a violation of their right of access to information.

h) That the costs for this petition be borne by the Respondents.

i) Any other or further order or relief that this honorable court deems fit to grant.

4. The summary of the grounds in support of the petition were listed as: illegality; unconstitutional taxes; unlawful arrests and extortion and failure to conduct public participation and consultation.

5. In support of the petition was an affidavit deponed by Eng. Joseph Schwarzman on 18.3.2020 as amended on 8.5.2020. He is stated to be the Chairman and Executive Officer of the 1st petitioner and with authority of the 1st petitioner as well as the other 21 petitioners to depone the affidavit. It was averred that the petitioners' businesses had been shut down due to what the deponent termed as unlawful harassment, extortion in the name of collection of unconstitutional taxes on the basis of an ungazetted Act that has also exposed the petitioners to double taxation as the petitioners were already subjected to permit charges and royalty payments under section 13, 21 and 183 of the Mining Act, 2016. It was averred by the deponent upon advice from his counsel on record that the Machakos County Management of Quarrying Activities Act 2016 that was enacted by the Machakos County assembly contained provisions that contravened section 13 and 21 of the Mining Act 2016. It was further averred that the enactment of the Machakos County Finance Act of 2020 by the Machakos County Assembly led to the introduction of a number of taxes and levies like annual quarry permits, annual quarry extraction fees, quarry cess for ballast and other crushed material, murram royalties, penalties in relation to the environment, building stone royalties, excavation of black cotton soil, penalty for excavating without approval, quarrying permit per acre and defying stop orders by the County officers that the deponent referred to as mischievous and usurp of the revenue collection prerogative of the National Government. It was also averred that the fees and levies were in contravention of Article 62(1), 62(3), 185(2) as read with the 4th Schedule and Article 209 of the Constitution.

6. According to the deponent, the tax burden by the impugned legislations was unfair, unsustainable, unfair, arbitrary, irrational, punitive, excessive and contravene principles governing taxation. The court was urged to allow the application.

7. On record is a further affidavit by the deponent dated 11.5.2020 where it was reiterated that there were illegal and arbitrary arrests that had been carried out on the petitioners' employees.

8. In response to the petition is an affidavit deponed on 26.7.2020 on behalf of the 1st respondent by Mbiuki Felix Gitari who is stated to be the clerk of the 1st respondent. It was averred that the 1st respondent in execution of their duty to pass laws set out to pass the Machakos County Finance Act 2019 after receiving the legislative proposal from the County Executive Committee member for finance and economic planning. It was averred that pursuant to Standing orders 116, 119 and 120 of the Machakos County Assembly standing orders, the Machakos county Finance Bill, 2019, Kenya Gazette Supplement No 12 (Machakos County Bills No. 7) was read for the first time on 4.12.2019 and committed to the Sectoral Committee on Finance and Revenue collection to facilitate public participation; that the assembly was satisfied that the public participation was conducted as evidenced by the public participation attendance lists marked MFG 4 and 5 and the recommendations thereto were adopted in the special sitting when enacting the bill as evidenced by the report marked MFG6. It was averred that the petitioners had no evidence of payment of royalties or of payment of other taxes and levies to the national government. It was averred that the due process was followed in enacting the *Machakos County Management of Quarry Activities Act, 2016 and the Machakos County Finance Act 2020* hence the court was urged to dismiss the petition.

9. In reply to the petition on behalf of the 2nd respondent is an affidavit deponed by Mike Senga on 20.4.2020 who is stated to be the head of revenue collection Machakos County. It was his averment that there is in existence, Machakos High Court Constitutional Petition No. 12 of 2019 that is challenging the same Act as the instant petition. It was pointed out that what was being currently enforced was the Machakos County Finance Act, 2020 that was assented on 6.2.2020 with the date of commencement being 20.2.2020. The deponent stated that it was incorrect that the petitioners had been arrested and detained and their quarries closed. It was the averment that the petitioners did not want to pay rates as regulated by the 1st respondent and have been filing petitions every year so as to frustrate the 2nd respondent from meeting its core mandate. It was averred that the 1st respondent is mandated to pass laws relating to payment of business permits, taxes and cess and other rates and it was not for the court to dictate which laws that the 1st respondent should issue. It was the argument of counsel that taxation laws were meant to benefit the people of Machakos, protect the environment and land rights as provided for under chapter 5 of the Constitution. According to the deponent, there was public participation as adverts were placed in the Daily Nation on 16.9.2019 as well as the Standard indicating when the public participation forums would be held and in addition the 2nd respondent wrote to the Kenya Association of Manufacturers informing them that the public participation forums would be conducted on 20.9.2019. It was pointed out that the 2nd respondent wrote to various companies including the 5th, 7th, 10th, 13th, 14th, 15th and 19th petitioners and various stakeholder forums were conducted as evidenced by the attendance sheets annexed and marked MK5a to i. The deponent averred that by dint of Chapter 12 Part 3 of the Constitution that deals with Revenue Raising Powers and Public Debt, the counties are mandated to raise revenue by imposing taxes, business licenses/permits and other forms of tax. The deponent cited Article 209(3) and 210(1) of the Constitution and averred that the legal basis of the Machakos County Management of Quarrying Activities Act 2016 was Article 210(1) of the Constitution; that the said law was legally sound and enforceable

10. The deponent took issue with the failure of the petitioners to furnish evidence that they were licensed under the Mining Act to carry the exploitation activities. It was pointed out that the 3rd schedule of the Machakos County Finance Act indicated that the same provided for a “business permit” to carry out their businesses within Machakos County and not licensing at all. It was further pointed out that the Water Act and the Environment Management and Coordination Act placed a duty on the County Governments to protect the environment by preventing pollution of the environment through formulation of policies that included payment of permits to carry out various activities such as those involved by the petitioners herein.

11. There is no indication of any response by the 3rd respondent.

12. Directions were issued that the petition be canvassed vide written submissions. Learned counsel for the petitioners vide submissions dated 29.6.2020 framed seven issues for determination. In respect of the 1st issue, it was submitted that section 22 of Part 1 of the 4th schedule of the Constitution as read with Article 185(2) and section 6 of the Mining Act No. 12 of 2016 under section 6 are to the effect that the national government has a mandate to protect the environment and further by dint of Article 62(1)(f) of the Constitution rocks are included in the definition of minerals. Counsel cited the case of **Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 Others (2017) eKLR** where it was observed that;

“Under Article 62 (1) (f) of the Constitution “all minerals and mineral oils as defined by law” are classified as public land and by Article 62 (3) they are vested in and are held by the national government in trust for the people of Kenya. The Commissioner is thus placed in a position of trust to execute the functions and exercise powers as a trustee for the people of Kenya”

13. It was the argument of counsel that Article 209(3) of the Constitution vests the county government with power to levy property tax, entertainment tax and any other tax imposed by an Act of parliament hence the county government had no jurisdiction to levy tax or charges in respect of natural resources including quarrying activities and products. It was pointed out that section 136 of the Mining Act relates to mining permits and section 140 and 183 of the same Act provides for payment of royalties to the national government, county government and community at a ratio of 70:20:10 respectively. Reliance was placed on the case of **Bumasutra SACCO Ltd v County Government of Nakuru (2016) eKLR** where it was observed that;

“I therefore find that the Respondent has no authority as purported in section 16 of the impugned Finance Act, to levy royalties in respect of the mining of sand, murrum, stone, ballast and pumice within the County of Nakuru”

14. Counsel challenged the averment that the Machakos County Management of Quarry Activities Act 2016 amounted to an act of parliament that was capable of bestowing taxation powers to the county government. It was the argument of counsel that quarrying and mining activities were not a trade and could not be subjected to trade licenses. Counsel posited that the quarry sector was governed by the Director of mines under the Mining Act, 2016. Counsel argued that the 2nd respondent could not levy cess tax as it had no constitutional basis by dint of Article 209 and 185. Reliance was placed on the case of **Truckers Association of Kenya & 2 others v County Government of Machakos [2020] eKLR** where it was stated that;

“128. Whereas both the national and county governments may impose charges for the services they provide, in this case the Respondent has not identified any services it is rendering in the activities in question.”

15. It was the argument of counsel that there ought to have been express power on the 2nd respondent to levy tax.

16. In respect of the 2nd issue it was submitted that the actions of the 2nd respondent usurped the prerogative of the National Environment Management Authority. Reliance was placed on the case of **Raiply Woods (K) Ltd & another v County Government of Baringo & 2 Others [2017] eKLR**

17. It was also submitted that double taxation is illegal and unlawful; reliance was placed on the case of **Truckers Association of Kenya & 2 others v County Government of Machakos [2020] eKLR**.

18. Learned counsel further submitted that there was failure to conduct meaningful public participation when enacting the Machakos County Finance Act 2020 as there was passage of untenable laws, no access to information to show what was discussed in the meetings, lack of inclusivity in the public participation program hence the said Act was void ab initio. It was the argument of counsel that the denial of access to the Machakos county finance Act 2020 amounted to infringement of the petitioners’ right to access to information. The court was urged to grant the petitioners the cost of the petition.

19. In response, learned counsel for the 1st respondent in their submissions dated 28.7.2020 submitted that the 1st respondent did not introduce tax on mining activities but were merely enhancing transitional provisions. Counsel pointed out that the Machakos County Management of Quarrying Activities Act 2016 was enacted four years prior and the petitioners are precluded from challenging the same. It was submitted that the 1st respondent acted within its mandate.

20. Learned counsel for the 2nd respondent vide submissions filed on 6.7.2020 framed three issues for determination being firstly; whether there was public participation before enactment of the Machakos County Finance Act 2020 and the Machakos County Quarrying Services Act, 2016; Secondly whether the 3rd schedule, Part 17 of the Machakos County Finance Act 2020 is unlawful and unconstitutional and whether the petitioners are entitled to the orders sought.

21. In respect of the 1st issue, it was submitted, that there was adequate participation that met the threshold of the law. Counsel relied on the adverts placed in the Standard, Taifa Leo, the invitation notices and the comments made by the attendees. In placing reliance on Article 196

and 201 of the Constitution as well as section 88 and 89 of the County Governments Act it was submitted that there was nothing unconstitutional with the Machakos County Finance Act, 2020.

22. In respect of the 2nd issue, counsel submitted that the petitioners were not involved in mining activities but in quarrying activities and that the Machakos County Finance Act 2020 was authorized within the provisions of Article 209(3)(c) and 209(4) of the Constitution. It was pointed out that business permits are compulsory for every trader who does business in any part of the country and that by dint of section 21 of the County Governments Act, counties had power to impose taxes so long as there was a legal framework passed by the counties. Cited was the case of **Base Titanium Limited v County Government of Mombasa & another [2018] eKLR**. It was the strong argument of counsel that the Machakos County Finance Act 2020 is not unconstitutional.

23. According to counsel, the court could not direct the respondent as to how to levy taxes and reliance was placed on the case of **Cereal Growers Association & another v County Government of Narok & 10 others [2014] eKLR** that challenged cereal produce tax and it was stated that;

“But I must state in passing and I am generally in agreement with the Respondents that this Court cannot direct the 1st – 8th Respondents County Assemblies on how to exercise their mandate of levying agriculture produce cess and how to administer the same. In their wisdom as the law making bodies of each County, they must legislate having taken into consideration public views, their policies as well as the revenue intended to be raised. It is not the place of this Court to direct them on how to carry out any of those administrative or legislative functions - See Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v Nairobi County Government & 3 Others Petition No. 486 of 2013 and Okiya Omtatah Okoiti & Another v Attorney General & 3 Others Petition No. 593 of 2013.”

24. It was submitted that the Machakos County Finance Act did not impose charges on minerals since in the 1st schedule of the Mining Act, 2016, ballast and building stones were not classified as minerals. It was the argument of counsel that the petitioners did not deal with minerals. It was reiterated that the petitioners had not demonstrated how they were being subjected to double taxation.

25. I have considered the pleadings that are the subject of this judgement, the responses thereto and the submissions made on behalf of the parties.

26. From the outset, I do wish to take judicial notice of the fact that the Machakos County Finance Bill, 2019 was passed into law and therefore some prayers may have been overtaken by events. I also take judicial notice of the Machakos County Finance Act, 2020 that was assented on 6.2.2020 with the date of commencement being 20.2.2020.

27. Article 23 grants the High Court power to uphold and enforce the bill of rights. A public authority will be found to have acted unlawfully and or unconstitutionally if it has made a decision or done something: without the legal power to do so (unlawful on the grounds of illegality); or so unreasonable that no reasonable decision-maker could have come to the same decision or done the same thing (unlawful on the grounds of reasonableness); or without observing the rules of natural justice (unlawful on the grounds of procedural impropriety or fairness).

28. The issues for determination are:

a) whether or not the process leading to introduction of Machakos County Management of Quarry Activities Act, 2016 and Part/Section 17 and 24 of the 3rd schedule and Section/Part 420,425, 430 and 495 of the 4th Schedule of the Machakos County Finance Act 2020 was consultative and inclusive;

b) whether or not the Machakos County Management of Quarry Activities Act, 2016 and Part/Section 17 and 24 of the 3rd schedule and Section/Part 420,425, 430 and 495 of the 4th Schedule of the Machakos County Finance Act 2020 took into account the Mining Act and the Constitution; and

c) Whether the decisions in enforcement and or implementation and or execution of Machakos County Management of Quarry Activities Act, 2016 and Part/Section 17 and 24 of the 3rd schedule and Section/Part 420,425, 430 and 495 of the 4th Schedule of the Machakos County Finance Act 2020 contravenes the basic structure of the Constitution.

29. With regard to the first issue, the Petitioners' position was that the participation process was not consultative or inclusive. In support of this allegation, the petitioners challenged the attendance lists that were relied upon by the 1st respondent and submitted that the process was not consultative as the participation was not representative. I will stay my resolution of this issue in view of what I consider weightier concerns that shall be addressed in issue b and c; in my view the rule of law that is the sole function of this court is beyond the element of public participation. I do point out however that the Petitioners did not however challenge the process of the Machakos County Quarrying Services Act, 2016 at the time. They instead waited for a period of more than four years before filing their petition alleging that the participation process was not consultative or inclusive. By that time, the said process had come to end as the Machakos County Quarrying Services Act, 2016. Be that as it may, Article 23 of the Constitution empowers any person to petition the Constitutional Court where it is alleged that an Act of Parliament contravenes the Constitution and despite the fact that the petitioners lost the opportunity to challenge the Machakos County Quarrying Services Act, 2016 because of tardiness on their part, it does not regularize the process undertaken to have the same become law or the effect of the said Act.

30. In respect of the 2nd and 3rd issues, it is the case of the petitioners that the decisions to pass the impugned laws are illegal and that the actions carried out in pursuance of the same ought not to stand. It suffices to cite the dictum in the Zambian case of **Roy Clarke v Attorney General the Supreme Court of Zambia, Appeal No. 96A/2004** in which the Supreme Court *inter alia* stated that a decision is illegal if:

"(i) It contravenes or exceeds the terms of power which authorises the making of the decision; or

(ii) It pursues an objective other than that for which the power to make the decision was conferred,"

31. The 1st respondent's case is that they exercised legislative powers that were within the law and that they followed the due process in line with the Standing orders 116, 119 and 120 of the Machakos County standing orders. The Indian case of **R. Sudarshana Babu v/s State of Kerala and Others; ILR 1983 Kerala 661'** dealt with this issue in the following terms:

" The Indian Constitution conceives the judiciary and legislature as different organs of the State having independent specified functions. Just as it is within the power of the legislature to exercise all functions conferred on it, there are functions conferred on the judiciary by the Constitution which it is expected to perform in accordance with the Constitution. Immunity from action would be desirable if proper functioning is to be secured and such immunity has been conferred on the legislature by Article 194, as read with Article 212 of the Constitution, while immunity of the judiciary from discussion by the legislature has been conferred by Article 211. True democratic spirit calls for mutual respect by these institutions, and avoidance of trespass....."

32. In another Indian case of **Hem Chandra Sengupta and Others v/s Speaker Legislative Assembly of West Bengal & others; AIR 1956 Cal. 378.** where the court in resolving the issue whether court process could be used to stall an internal process of the Assembly held *inter alia*:

"The courts could not at that stage seek to regulate the procedure of the House, and arrogate to itself the powers of the Speaker. If, however, a law was passed or a resolution adopted or a motion carried, which was not in accordance with the Constitution, such a law, resolution, or motion could be declared invalid by the court."

33. In view of the above authorities, the petitioners were of the view that the Machakos County Management of Quarry Activities Act, 2016 and Part/Section 17 and 24 of the 3rd schedule and Section/Part 420,425, 430 and 495 of the 4th Schedule of the Machakos County Finance Act 2020 to the extent that they introduced taxes and levies like annual quarry permits, annual quarry extraction fees, quarry cess for ballast and other crushed material, murrum royalties, penalties in relation to the environment, building stone royalties, excavation of black cotton soil, penalty for excavating without approval, quarrying permit per acre and defying stop orders by the County were in contravention of Article 62(1), 62(3), 185(2) as read with the 4th Schedule and Article 209 of the Constitution.

34. I have had a look at the impugned provisions of the law as well as the case of **Truckers Association of Kenya & 2 others v County Government of Machakos [2020] eKLR.** Without reinventing the wheel, I have the following to state on the levies envisaged in the impugned laws. However, before I proceed, I wish to point out that ballast and crushed material are referred to as extractives. According to the **World Bank Extractive Industries Review Advisory Group, Final Report: Striking a Better Balance: The World Bank Group and Extractive Industries (September 17, 2004)** literature on natural resources often limits "extractive projects" to those industries which are involved in the extraction of non-renewable, non-living resources, in particular gas, oil and mineral resources, such as gold, silver, copper, mercury, platinum, lead, tin, zinc, iron, arsenic, carbon, sulphur and antimony.

35. At a sub-regional level, **The African Commission's State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries and the Environment (the State Reporting Guidelines)** vouch for an expansive understanding of extractive industries equating the same to natural resources. Paragraph 13 provides: *The term 'extractive industries' refers broadly to the operations by private or State actors, usually at a commercial scale, of mining or extraction of natural resources for economic gain.*

36. The Mining Act 2016 of Kenya is the primary law that governs mining in Kenya. The said Act defines a mine as "mine" - *when used as a noun, includes an excavation or system of excavations made for the purpose of, or in connection with, the extraction of minerals or mineral products, and includes an open-cast pit, quarry and any area where a mineral is won by dredging brine pumping, evaporation or other means; and when used as a verb, means the carrying out of a mining operation and includes tailing;*

37. I am therefore satisfied that ballast and other crushed material are governed by the Mining Act 2016. I note that section 136 of the Mining Act governs issuance of permits to conduct mining and Article 62(1)(f) of the Constitution defines public land as (f) all minerals and mineral oils as defined by law; "mineral" in the Mining Act 2016 means a geological substance whether in solid, liquid or gaseous form occurring naturally in or on the earth, in or under water, in mine waste or tailing and includes the minerals specified in the First Schedule but does not include petroleum, hydrocarbon gases or groundwater;.

38. Other relevant laws that govern mining include the Water Act 2016, the Environment Management and Coordination Act 1999, the Public Health Act CAP 242 and the activities would be subject to relevant bye laws in the respective counties relating to land use and regulation and public health.

39. Under Article 62(3) of the Constitution, *Public land classified under clause (1)(f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.* This position was reiterated in the case of **Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 Others (2017) eKLR**

40. The import of the provisions of the law are that regulation of mining is still a function of the national government and therefore the following aspects that are introduced by the Part/Section 17 and 24 of the 3rd schedule and Section/Part 420,425, 430 and 495 of the 4th Schedule of the Machakos County Finance Act 2020:

a) annual quarry permits,

b) annual quarry extraction fees,

- c) quarry cess for ballast and other crushed material,
- d) murrum royalties, penalties in relation to the environment,
- e) building stone royalties,
- f) excavation of black cotton soil,
- g) penalty for excavating without approval,
- h) quarrying permit per acre and
- i) defying stop orders by the County

are indeed in contravention of Article 62(1)(f) and 62(3), 94(6), 185(2) as read with the 4th schedule and Article 209(3)(5) and 260 of the Constitution. The same purport to create obligations to make payments that are already covered by national laws. However, the conflict is a call to action to reform the fiscal regime governing the mining sector so as to ensure that the national and county government get their fair share and at the same time avoid what would amount to tax injustice. See **Philip Daniel, Brenton Goldsworthy, Wojciech Maliszewski, Diego Mesa Puyo and Alistair Watson, "Evaluating fiscal regimes for resource projects," in The Taxation of Petroleum and Minerals: Principles, Problems and Practice, ed. Philip Daniel, Michael Keen and Charles McPherson, (Oxford: Routledge, 2010), 202.** See also **James Otto, "The Taxation of Extractive Industries," in Extractive Industries: The Management of Resources as a Driver of Sustainable Development, ed. Tony Addison and Alan Roe, (Oxford: Oxford University Press, 2018), 288 and 292-293.**

41. I have had a look at the Machakos County Management of Quarry Activities Act, 2016 and it is stated to be *AN ACT of the County Assembly of Machakos to regulate quarrying activities; to ensure sustainable exploitation and utilization of quarries; to provide for raising of revenue from quarrying activities; to provide for equitable sharing of the accruing benefits; and for connected purposes.* Section 3 of the Act states that *The object and purpose of this Act is to provide for a legislative framework for regulating quarrying activities and in particular to-* (a) designate quarrying exploitation areas and timelines for undertaking quarrying and related activities; (b) provide for the institutional framework for management and regulation of quarrying activities; (c) provide for the protection of the environment from harmful effects of quarrying activities and related activities; (d) provide for rehabilitation of quarrying sites; (e) provide for benefit-sharing and investing back to the community part of the revenue collected from quarrying activities; and (f) provide for public participation in the management of quarrying activities. A look at the purpose and intention of the Act is evidently a contravention of Article 62(1)(f) and 62(3), 94(6), 185(2) as read with the 4th schedule and Article 209(3)(5) and 260 of the Constitution and as such the same ought not to have seen the light of the day. The same was adequately catered for by national legislation namely the Mining Act.

42. I also note that the 3rd respondents have opted not to file a response to the instant petition, whether by design or otherwise. When the Attorney General appears in a case as a legal practitioner or as a party, his or her role is not that very much different from that of any other legal practitioner or party. The state authorities are all there to assist the court in reaching the correct result and thereby help to improve standards in public administration and not as a poster boy to decorate the petition. In **R v Lancashire County Council ex p. Huddleston [1986] 2 All ER 941** Lord Donaldson MR rendered himself as follows:

"... The analogy is not exact, but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done and why they have done it, but are not partisan in their own defence, so should be the public authorities. It is not discreditable to get it wrong. What is discreditable is a reluctance to explain fully what has occurred and why... But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands".

29. The duty of candour gives rise to a responsibility to the state authorities to be open and honest in disclosing the facts and information needed for the fair determination of the issue: see **Secretary of State for Commonwealth Affairs v. Quark Fishing Ltd [2002] EWCA Civ1409**. The duty extends to documents/information which will assist the claimant's case and/or give rise to additional (and otherwise unknown) grounds of challenge: see **R v Barnsley Metropolitan Borough Council ex p. Hook [1976] 1 WLR 1052**.

30. The 3rd respondent ought to assist this court with full and accurate explanations of all the facts relevant to the issue by responding to the petition and not displaying this laid back attitude that has been noted. The input of the 3rd respondent was crucial as it could have helped to present its standpoint regarding the national legislation namely the Mining Act and whether the County Governments were entitled to purport to levy fees, charges and taxes within their counties over quarry activities. I am satisfied that the petitioners have been prejudiced by the actions of the respondents in purporting to carry out levies, charges, cess, licences, and other taxes under the impugned Act yet there is in existence a national legislation namely the Mining Act. The respondents have not convinced me that they have acted lawfully towards the petitioners who feel that they have been held by the neck through the impugned legislation. This court must rise to the occasion and come to their aid by granting the orders sought excluding prayer (iv) which had been overtaken by events following the passage of the Machakos County Finance Act 2020. Suffice to add that even the said Act was not supplied to the petitioners despite repeated requests to that effect.

31. In the result, it is my finding that the petitioners petition as amended on 8.5.2020 has merit. The petition is allowed in terms of prayers (i), (ii), (iii), (v), (vi), and (vii). This being a public interest litigation, I order each party to meet their costs.

It is so ordered.

Dated and delivered at **Machakos** this **8th** day of **October, 2020**.

D. K. Kemei

Judge