



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION NO. 52 OF 2019**

**JUDICIAL REVIEW**

**IN THE MATTER OF: AN APPLICATION BY BASE TITANIUM LIMITED**

**FOR ORDERS OF CERTIORARI AND PROHIBITION AND MANDAMUS**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**1. THE COUNTY GOVERNMENT OF MOMBASA**

**2. THE ATTORNEY GENERAL.....RESPONDENTS**

**BASE TITANIUM LIMITED.....EX-PARTE APPLICANT**

**RULING**

1. The Applicant’s case for Judicial Review orders is contained in the Notice of Motion dated 15/11/2019 and filed herein on 18/11/2019 pursuant to leave given by the court on 5/11/2019. The motion prays for the following orders:

- a. That an order of certiorari to forthwith remove to the High court and quash and annul the decision made by the 1st Respondent a public body to violate or interfere with the Applicant’s Constitutional right of movement and in particular to obstruct or stop the Applicant’s vehicle from using the public roads within Mombasa county.
- b. That an order of certiorari to forthwith remove to the High court and quash and annul the decision made by the 1st Respondent a public body to impose and collect a tax or a charge or levy described as offloading fees on the applicant’s mineral products delivered to the Applicant’s private storage facility located at Likoni in Mombasa County destined for export.
- c. That an order of certiorari to forthwith remove to the High court and quash and annul the legislation or decision made by the 1st Respondent a public body to impose and collect a tax or a charge or levy described as offloading fees on the Applicant’s mineral products in order to circumvent and/or disobey the decree or orders made by this honourable Court in Mombasa Misc. High Court Case No. 268 of 2015 Base Titanium Limited v County Government of Mombasa & Another
- d. That an order of mandamus to compel the 1st Respondent, a public body to refund to the Applicant all the sums of money unlawfully or illegally collected from the Applicant in breach of the law and/or of this honourable Court order or decree made in the said Mombasa Misc. High Court Case No. 268 of 2015 Base Titanium Limited v County Government of Mombasa & Another
- e. That an order of prohibition be directed to the 1st Respondent restraining the 1st Respondent from exercising powers against the Applicant that it does not have under the law and/or which are in breach of the judgment of this Honourable Court.
- f. That the costs of this application be provided for.

2. The motion is premised on the grounds set out therein and is supported by a Statutory Statement and Verifying Affidavit both filed on 5/11/2019.

3. The ex-parte Applicant states that it is a holder of a valid special mining licence and in exercise of its statutory and contractual rights under the said licence, it mines, processes mineral products in Kwale County and sells the processed mineral product to its overseas customers. It has also constructed a private facility at Likoni in Mombasa County where its finished products are offloaded and stored before they are shipped and guaranteed in bulk to their respective destination.

4. The ex-parte Applicant alleges that on the 26/10/2019, its trucks were stopped at the 1<sup>st</sup> Respondent's checkpoint situated at Shika Adabu, which is a boundary between Mombasa County and Kwale County by the 1<sup>st</sup> Respondent who demanded a sum of Kshs. 6,800.00 for each truck before they could use the said road to enter Mombasa County.

5. It is the ex-parte Applicant's case that it has a constitutional right to freedom of movement along national and public roads or urban roads as guaranteed under Article 39(1) of the Constitution and that according to the Kenya Roads Act 2007, the construction, management, maintenance, of National Roads, Urban Roads and Rural roads is a preserve of the Kenya National Highways Authority; Kenya Urban Roads Authority and Kenya Rural roads Authority and as regards prohibition of use of the said roads, Section 22(2) (e) of the said Act confers the aforementioned authorities the requisite jurisdiction. Consequently, the 1<sup>st</sup> Respondent has no powers at all under the above Statutes to exercise any control over the ex-parte Applicant in connection with the use of public roads or regulate the ex-parte Applicant's use of the said public roads.

6. It is also the ex-parte Applicant's case that the 1<sup>st</sup> Respondent's actions are illegal, null and void, as the 1<sup>st</sup> Respondent lacks jurisdiction under the law to interfere with the Applicant's use of the above public roads.

7. The ex-parte Applicant states that it has initially successfully challenged the "offloading charges" by the 1<sup>st</sup> Respondent vide **Mombasa Misc. High Court Case No. 268 of 2015 Base Titanium Limited v County Government of Mombasa & Another**. However, to date, the 1<sup>st</sup> Respondent has refused to comply with the orders issued in the aforesaid suit and instead, the 1<sup>st</sup> Respondent has purportedly passed a legislation authorizing itself to charge the same offloading charges on the Applicant's property or goods and is currently demanding that the ex-parte Applicant pays for use of public roads within Mombasa County in order for the ex-parte Applicant to access its private loading facility in Mombasa County.

### **The Response**

8. The motion is opposed by the Respondent vide Grounds of Opposition dated 17/5/2020 and the affidavit of **Maryam Mbaruk** sworn on 15/6/2020. The Respondent's case is that this Court lacks jurisdiction to entertain the instant Application as it is inconsistent with Order 53 Rule 2 of the Civil Procedure Rules as the same is time barred, and that the instant Application is inconsistent with Order 4 Rule 1 (4) of the Civil Procedure Rules 2010 as the deponent of the Verifying Affidavit has no authority from the ex-parte Applicant.

9. It is also the 1<sup>st</sup> Respondent's case that it is empowered under Article 209 of the Constitution to raise revenue, and the collection of revenue is guided by the Mombasa County Revenue Administration Act, 2013 and the said Act under Section 3 establishes the office of the County Revenue Collector and under Section 4 of the Act, the functions and powers of the County Revenue Collector are outlined. The ex-parte Applicant has not stated where the decision by the 1<sup>st</sup> Respondent to charge "offloading fees" emanates from and has tendered no evidence to prove the violation of its right to freedom of movement.

10. The 1<sup>st</sup> Respondent avers that in order for it to meet its development needs and provide services to the residents of Mombasa County, it must collect revenue in terms of rates and especially cess fees and that the stopping of vehicles at the various barriers is to ensure compliance by respective entities and individuals in respect to the various levies imposed by the Annual Mombasa Finance Act.

### **Submissions**

11. With leave of Court, parties filed submissions, which I have considered. **Mr. Oyatsi** learned Counsel for the ex-parte Applicant submitted that the 1<sup>st</sup> Respondent actions are illegal for lack of jurisdiction as it is only legislation that can confer jurisdiction on the 1<sup>st</sup> Respondent to stop the Applicant from using public highways. Therefore, the decision made by the 1<sup>st</sup> Respondent is null and void.

12. Counsel further submitted that the 1<sup>st</sup> Respondent did not raise either a demand notice or an invoice to the ex-parte Applicant to explain the purpose of imposing of offloading fees for the mineral product to be offloaded at the ex-parte Applicant's private premises or yard. Consequently, the 1<sup>st</sup> Respondent's actions are illegal, irrational unreasonable and tainted with procedural impropriety.

13. It is Counsel's submission that the issue of the 1<sup>st</sup> Respondent's power to charge offloading fees or otherwise is Res-judicata having in fact been subject to previous litigation between the same parties in **Mombasa Misc. High Court Case No. 268 of 2015 Base Titanium Limited v County Government of Mombasa & Another** and the Court decided in the ex-parte Applicant's favour stating that the 1<sup>st</sup> Respondent had no such power or jurisdiction.

14. On his part, **Mr. Tajbhai** Learned Counsel for the 1<sup>st</sup> Respondent submitted that the ex-parte Applicant failed to discharge its burden of proof by failing to tender evidence to demonstrate that its motor vehicles were stopped or blocked from assessing roads within Mombasa County.

15. **Mr. Tajbhai** submitted that this Court should take judicial notice that the Mombasa County Finance Act is enacted annually. Therefore,

**Mombasa Misc. High Court Case No. 268 of 2015 Base Titanium Limited v County Government of Mombasa & Another** challenged the 2015/2016 Mombasa County Finance Act and not Mombasa County Finance Act 2018/2019.

16. Counsel further submitted that the Applicant has not provided proof where the decision of the 1<sup>st</sup> Respondent to levy the offloading fees emanate from or proof indicating that they did make any payment of the levy termed as “*offloading fees*”.

17. On the issue of orders of *Mandamus* to compel the 1<sup>st</sup> Respondent to refund the ex-parte Applicant all the sums of money unlawfully or illegally collected from it as per the judgment in **Mombasa Misc. High Court Case No. 268 of 2015 Base Titanium Limited v County Government of Mombasa & Another**, Counsel submitted that the Applicant has not produced any document to show that they served the 1<sup>st</sup> Respondent or the 2<sup>nd</sup> Respondent with a Notice of the claim or a decree indicating the sum due and the Applicant has not provided a certificate of order against the Government which is a requirement under Section 21 of the Government Proceedings Act and Order 29 of the Civil Procedure Rules.

#### **Issues for Determination**

18. In my view, the main issue for determination is whether the Application merits the judicial review remedies of *certiorari*, *Mandamus* and prohibition sought by the ex-parte Applicant. In order to answer that broad question, I will address my mind to the following questions:

- a. **Whether the Application by the ex-parte Applicant is time-barred.**
- b. **Whether the circumstances herein warrant the granting of the orders sought;**

#### **Determination**

19. After considering the pleadings, submissions and arguments made by the parties, I find it prudent to first address a preliminary issue raised by the 1<sup>st</sup> Respondent through its Grounds of Opposition as to the Jurisdiction of this Court to adjudicate on the issues of *certiorari* raised in the substantive motion dated 15/11/2019. I am in this respect guided by **Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd (1989) KLR 1** where Justice Nyarangi JA (as he then was) held:

**“I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”**

20. The 1<sup>st</sup> Respondent argues that the instant application is time barred. In support of the said argument, the 1<sup>st</sup> Respondent Counsel cited Order 53 Rule 2 of the Civil Procedure Rules, 2010 which provides as follows: -

**“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by an act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”**

21. From the above provision, it is clear that to challenge any order, decision, or proceeding by way of Judicial Review orders of *certiorari* leave must be obtained within 6 months from the date of such decision. According to the 1<sup>st</sup> Respondent’s Counsel, the Application for *certiorari* cannot stand because the Mombasa County Finance Act 2018/2019 was published on 16/12/2018 and the ex-parte Applicant only moved this Court to quash the said decision in the Act on 5/11/2019, after almost one year. On the other hand, the ex-parte Applicant maintains that the decisions it is challenging were made in late October 2019, and the instant proceedings were filed in November 2019, well within the time limits provided for under order 53 Rule 2 of the Civil procedure Rules.

22. It is trite law that leave for *certiorari* must be sought before the end of 6 months from the date of the decision which is brought to be quashed, since, that leave is *sine quo non* the lodging of the substantive motion. It is that leave that confers on this court the jurisdiction to hear the substantive motion seeking for Judicial Review Orders of *certiorari*. That being the case, although there are other prayers for *mandamus* and prohibition which are not limited by the 6 months period within which leave should be brought, where the court finds that application for leave for orders of *certiorari* was not brought or filed within 6 months from the date of the impugned decision, then the court would not have the jurisdiction to hear and determine the Judicial Review prayers for *certiorari* and it would proceed to strike out that prayer and leave the other prayers which are properly on record. Leave to apply for *Certiorari* is so fundamental that without it, this court cannot hear and determine the prayer for *certiorari*.

23. In **Municipal Council of Mombasa v. Republic &Umoja Consultants Ltd Civil Appeal No 185 of 2001** it was held as follows: -

**“Where a decision is made and its making has been made known to the respondents who did not challenge the same within 6 months of its being made by way of certiorari to have it moved into the High Court and be quashed, it is not open for them to seek to have the appellant prohibited from implementing the decision as an order of prohibition would normally issue to stop or pre-empt a contemplated action where such contemplated action is either outside the jurisdiction of the decision-maker, or where the decision maker has evinced an intention to act contrary to law.”**

24. In this case, the decision being challenged was made vide Gazette Notice published on 16/12/2018. These proceedings were commenced on 5/11/2019, more than 10 months after the decision. The purpose for Gazette Notice was dealt with in **Catholic Diocese of Moshi v Attorney General [2000] 1 EA 25 (CAT)**, where it was held that the whole objective behind such publication is to bring the purport of the order concerned to the notice of the public or persons likely to be affected by it, thereby making the legal maxim “ignorance of the law does not excuse” more rational.

25. From the foregoing, this Court finds and holds that there was no procedural impropriety on the part of the 1<sup>st</sup> Respondent since publishing the Mombasa County Finance Act in the Kenya Gazette was adequate, and there is no obligation placed upon the 1<sup>st</sup> Respondent to either raise a demand notice or invoice or any document to the ex-parte Applicant in order to explain the purpose or the nature of the revenue that it intended to collect from the ex-parte Applicant. Further, it is trite that before the enactment of the Mombasa County Finance Act 2018/2019, there was public participation which the ex-parte Applicant as a resident of Mombasa County whose operations were bound to be affected by the said Finance Act was expected to participate in and to give its view on the said Act before its enactment.

26. From the foregoing, this Court finds that the Application for leave in this case, filed on 5/11/2019, was clearly out of time. Although leave was granted ex-parte, this Court notes that leave to seek *certiorari* orders was granted because it was not brought to the attention of this Court that the decision of the 1<sup>st</sup> Respondent being challenged was the “*offloading fees*” contained in Mombasa County Finance Act 2018/2019 published on 16/12/2018. If it was brought to the attention of the Court that the decision complained of had been made vide the Mombasa County Finance Act 2018/2019, perhaps the court would not have granted leave. The instant Application is therefore time barred in relation to any orders of *certiorari* to quash the decision on “*offloading fees*” made vide Mombasa County Finance Act 2018/2019 published on 16/12/2018 as the Application was made after six months from the date of the said decision, and no Application to enlarge time for filing the Application for leave to apply for *certiorari* orders under **Order 53 rule 2 of the Civil Procedure Rules** was made. This Court therefore has no jurisdiction to grant any leave to bring judicial review proceedings to quash the said decision.

### **Whether the circumstances herein warrant the granting of the orders sought**

28. On the orders of *mandamus*, the Court of Appeal in **Republic v Kenya National Examinations Council ex parte Gathenji & 8 Others Civil Appeal No 234 of 1996**, citing with approval, Halsbury’s Law of England, 4<sup>th</sup> Edn. Vol. 7 p. 111 para 89 stated:

**“The order of mandamus is of most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”**

28. In this case, the ex-parte Applicant herein has moved this Court to compel the satisfaction of a judgement already decreed in its favour in **Mombasa Misc. High Court Case No. 268 of 2015 Base Titanium Limited v County Government of Mombasa & Another**. The 1<sup>st</sup> Respondent argues that the Application is inconsistent with Section 21 of the government proceedings Act and Order 29 of the Civil Procedure Rules 2010 since no document has been produced to show that they were served with a notice of the claim or a decree indicating the sum due and no certificate of order as against the government has been served, which is a requirement in fulfilment of Civil debts as against the Government.

29. Section 21 of the Government Proceedings Act provides as follows as regards the requirements to be met in the enforcement of orders as against Government in civil proceedings:

**“(1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:**

**Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.**

**(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.**

**(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:**

**Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.**

(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.”

(5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.”

30. Ogola J in **Abdallah A. Hassan v County Government of Mombasa [2020] eKLR** observed:

“...9. In this case, the Applicant did not exhibit evidence showing that there was a prior demand for performance. No demand notice was annexed to the application. One cannot talk of a refusal to pay if there is no evidence of prior demand for the payment. There is no evidence that the Certificate of Taxation and Decree annexed to the application were served upon the Respondent prior to filing this application. It was a serious omission for the Applicant to fail to avail evidence of prior demand to the Respondent to comply with the decree. On the test of what constitutes a reasonable time to comply before Mandamus can issue, it is not possible to compute the time in absence of a prior demand to comply.

10. Mandamus can only issue where it is clear that there is wilful refusal or implied and or unreasonable delay. In the absence of a demand this Court cannot tell whether the Respondent has refused to settle the decree. Therefore, there is no basis at all for the Court to grant the order of Mandamus.”

31. Applying the above principles to this case, I find and hold that the Judicial Review Application herein does not meet the threshold for grant of Judicial Review remedy of *mandamus*, as the provisions of section 21 of the government Proceedings Act, Cap 40 Laws of Kenya have not been complied with. I find the application premature.

#### **Whether the orders of prohibition can issue**

32. The ex-parte Applicant argues that the power to charge offloading fees or otherwise is Res -judicata having in fact been subject to previous litigation between the same parties in **Mombasa Misc. High Court Case No. 268 of 2015 Base Titanium Limited v County Government of Mombasa & Another** and the Court decided in the ex-parte Applicant 's favour stating that the 1st Respondent had no such power or jurisdiction. The 1<sup>st</sup> Respondent on its part argues that this Court should take judicial notice that the Mombasa County Finance Acts are enacted annually, that is every financial year there is a new Act and that the 1<sup>st</sup> Respondent enacted the Mombasa County Finance Act 2018/2019 following due process and legislative authority vested upon the Mombasa County Assembly as per Article 185 of the Constitution of Kenya.

33. Having gone through the finding of this Court in **Mombasa Misc. High Court Case No. 268 of 2015 Base Titanium Limited v County Government of Mombasa & Another**, it is noteworthy that the ex-parte Applicant then relied on the Mombasa County Finance Act 2014 while challenging the jurisdiction of the 1<sup>st</sup> Respondent to collect “offloading fee” because the 1<sup>st</sup> Respondent acted *contra-stature* by levying a charge on offloading done in one’s private facility when it had in fact vide Part 96 of the schedule to the Mombasa County Finance Act clearly exempted the offloading done in one’s private facility.

34. Be that as it may, this Court is in consonance with the 1<sup>st</sup> Respondent’s submission on the fact that the Mombasa County Finance Acts are enacted annually, that is, every new financial year comes with a new Finance Act. Accordingly, this Court finds that each Mombasa County Finance Act enacted every new financial year is *sui generis* in relation to the revenue to be raised and the avenues to be pursued in order to raise the said revenue. Therefore, the ex-parte Applicant 's argument that the issue of “offloading fees” is settled and that the 1<sup>st</sup> Respondent lacks jurisdiction to levy cess “offloading fees” in this Court’s view is misguided and as a result, the orders of prohibition cannot issue against the 1<sup>st</sup> Respondent.

35. In conclusion, this Court has since established that Counsel for the ex-parte Applicant had initially filed a **Petition 9 of 2015** against the Respondent seeking interpretation of the power of a County Government to levy taxes or charges under Article 209 of the Constitution, and alleging that the 1<sup>st</sup> Respondent, a public body has unlawfully exercised powers that restrict and violate the Petitioner’s Constitutional rights to freedom of movement across the 1st Respondent’s County boundaries thereby violating its right to freedom of movement guaranteed under Article 39 of the Constitution. It is noteworthy that this instant Application is grounded on similar grounds as those raised in **Petition 9 of 2015** save for the issue of management of public roads that has been raised in this instant Application.

36. In **petition 9 of 2015**, a judgment was delivered on 21/2/2017, while the ruling in **Mombasa Misc. High Court Case No. 268 of 2015 Base Titanium Limited v County Government of Mombasa & Another** was delivered on 4/3/2016. The ex-parte Applicant has failed or neglected to inform this Court that the issue of “offloading charges” between it and the 1<sup>st</sup> Respondent has been determined by the Court of Appeal and currently stands settled.

37. In **Petition 9 of 2015**, this court held:

“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.

#### **Construction of Article 209 (5) of the Constitution**

19. Deconstructed to its constitutive elements, Article 209(5) of the Constitution is made of the following ingredients:

A recognition of “the taxation and other revenue-raising powers of a county”

An injunction that the said powers of the County “shall not be exercised in a way that prejudices -

national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour.

20. In plain language interpretation, the sub-Article (5) of Article 209 of the Constitution acknowledges the power of county governments to tax under Article 209 (3) and otherwise raise revenues including the service charges under Article 209 (4), with an injunction that the said power shall not be exercised in such a manner that will prejudice the interests set out therein. Accordingly, I respectfully reject the contention in the submissions by Counsel for the Petitioner that Article 209 (5) of the Constitution provides an automatic prohibition on the power of County Governments to levy tax or other charges, when he submits that “the Constitution itself expressly prohibits the 1<sup>st</sup> Respondent from exercising the said powers and/or imposing the said tax or charges.” The prohibition is, in my view, subject to demonstration of prejudice in terms of the sub-Article 5.

21. The County Governments are of course expected to analyse their proposed taxation or other revenue raising ventures for their effect on national economic policies, economic activities across county boundaries and national mobility of goods, services, capital or labour. This is understandable because the tax and revenue measures of a county should not adversely affect the larger national interests of factors of production (capital, labour) and economic development through commercial enterprise and trade facilitated through movement of goods and services, or cross-border economic activities which are carried out in counties other than the one levying the charge...

31. The County Governments have under Article 209 (3) and (4) of the Constitution power to levy taxes and charges for services that they provide including road transport services. The cess charge imposed by the Mombasa County Finance Act, 2014 for “all goods carrying vehicles entering Mombasa County and offloading in Mombasa County” is not a tax or charge the mineral product of Titanium mined and transported by the Petitioner, and the charge is, accordingly, not barred by reference to Article 62 of the Constitution, which vests minerals as part of public land under the authority of the national Government. The Petitioner has not demonstrated how the imposition of the cess on the vehicles carrying its product into Mombasa prejudices the national interests of the provisions of Article 209 (5) of the Constitution. The Petition, therefore, fails.

38. The ex-parte Applicant being dissatisfied with the finding in Petition 9 of 2015, filed **Civil Appeal 69 of 2017** to challenge the decision of this Court. However, this Court’s decision was upheld by the Court of Appeal. In **Peter George Antony D’Costa vs V. A. G & Another [2013]** the court, commenting on the need to honour the process of court, observed as follows per Majanja J:

“the process of the court must be used properly, honestly and in good faith and must not be abused, this means that the court will not allow its function as a court of law to be machinery for being used as a means of vexation or oppression in the process of litigation and where there is an abuse of court process there is a breach of petitioners fundamental rights as the petitioner will not receive a fair trial, and that it’s the duty of the court to stop such abuse of the justice system.”

39. Taking into account all the circumstances of this case, this Court has come to a conclusion that the instant Application lacks merit and is otherwise an abuse of the Court process as the issues raised in **Petition 9 of 2015** have now been camouflaged into a judicial review Application and presented to this court as fresh issues for determination.

40. The Application dated 15/11/2019 is dismissed with costs.

**Dated, Signed and Delivered at Mombasa this 6<sup>th</sup> day of October, 2020.**

**E. K. OGOLA**

**JUDGE**

Ruling delivered via MS Teams in the presence of:

Ms. Muhonja holding brief Mr. Oyotsi for Applicant

Mr. Tajbhai for 1<sup>st</sup> Respondent

Ms. Peris Court Assistant