



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 8 OF 2017

IN THE MATTER OF FUNDAMENTAL BREACH BY NAKURU COUNTY

OF ARTICLE 209 AND 210 OF THE CONSTITUTION OF KENYA

OF ARTICLE 10 AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CROPS ACT 2013

THE FAIR ADMINISTRATIVE ACTION ACT

THE NAKURU COUNTY REVENUE ADMINISTRATION ACT

THE NAKURU COUNTY FINANCE ACT 2013

AND ALL OTHER ENABLING AND RELEVANT PROVISIONS OF LAW

BETWEEN

LAKE NAIVASHA GROWER GROUP.....1ST PETITIONER

KENYA FLOWER COUNCIL.....2ND PETITIONER

VERSUS

COUNTY GOVERNMENT OF NAKURU.....RESPONDENT

JUDGEMENT

1. The 1st Petitioner is described as a limited liability company registered in 1997 and represents and advances the interests of members/shareholders engaged in horticultural business in Lake Naivasha region in Nakuru County and whose members account for 70% of Kenya's gross annual horticultural exports as at 2016 and therefore a significant stakeholder in this major exchange earner for the country.

2. The 2nd Petitioner is a voluntary association of independent growers and exporters of cut flowers and ornamentals established in 1996 with the aim of fostering responsible and safe production of cut flowers in Kenya with due consideration of workers welfares and protection of the environment acting as a lead lobby for the interest of floriculture industry players and stakeholders and the focal point for the industry representation, promotion and compliance with pertinent local and international standards and laws deemed necessary to secure, expand and sustain markets and floriculture industry.

3. The Respondent is a County Government established under the Constitution of Kenya.

Petitioner's Case

4. According to the Petitioners, the former Naivasha Municipal Council (as it was then) sought to levy cess as a tax collected under Section 201 of the Local Government Act (Cap 265) as read with Section 192A of the Agriculture Act (Cap 318).

5. Upon the enactment of the Constitution of Kenya 2010, Article 209 made provisions on the power to impose taxes and charges, where the National Government were vested with powers to impose tax among others custom duties and other duties on import and export goods; while the County Government were authorized to impose property rates, entertainment taxes and any other tax that is authorized by an act of Parliament. Article 210 of the Constitution further provided that no tax or licensing fee would be imposed, waived or varied except as provided by legislation.

6. Additionally, the Crops Act No. 16 of 2013 was enacted for purposes of growth and development of agricultural crops and connected purposes and which provided for taxation of scheduled crops. The Act mirrored the provisions of Article 209 of the Constitution and provided that the National Government may impose among others custom duties and other duties on import of agricultural and aquatic products; while the County Government pursuant to the fourth schedule of the Constitution would impose fees for among other development and regulation of scheduled crop markets within the county.

7. Similarly the Agriculture and Food Authority Act No. 13 of 2013 was enacted which established the Agriculture and Food Authority which functions includes administering the Crops Act. Further the Act repealed the Agriculture Act (Cap 318) and the County Government Act No. 17 of 2012 repealed the Local Government Act.

8. It was averred that on or about November, 2013 the Respondent informed the Nakuru business community that the County assembly was developing a Finance Act and they were invited to meet the County assembly committee which the executive officer of the 1st Petitioner attended. That during the meeting it was expressed that a levy on flowers and export vegetables would be introduced at 1% of the turnover which was strongly opposed. The Petitioners aver that despite the strong opposition to the levy, the assembly members ignored their objections and passed the Nakuru Finance Act, 2013.

9. The Nakuru County Finance Act, 2013, repealed and enacted legislation relating to various County taxes and section 8 made provisions for produce cess while part III of the first schedule of the Act provided for horticultural cess. That in passing the Nakuru County Finance Act, 2016, the Respondent under **Section 29** provided for Agricultural Produce Cess which states:-

“Produce Cess- In respect of specified agricultural produce, Cess charges for the assessment year 2016/17, the rates of Cess charges have been specified in Part III of the First schedule to the Act. These are the same as laid down in the AFA Act 2016 & Crops Act 2013, For the purpose of computation of Cess charges due on cessable produce.”

Further **Section 30** of the Act provided for Horticultural Cess which provides:

“In respect of flower and vegetable farming for export for assessment year 2016/17, the rates of Cess have been specified in Part III of the First Schedule to the Act.”

10. Further the Respondent passed the Nakuru County Revenue Administration Act which provided for administration of revenue collection process for the County Finance Act and also created offences and penalties for failure to comply with the said Act.

11. The Petitioners averred that based on the said County legislation, the Respondent demanded horticultural cess and agricultural produce cess from the Petitioners, which demands contained penal consequences for non-compliance. Having received legal advice on the unconstitutionality of the County legislation, the Petitioners' members did not comply and as a result the Respondent preferred charges against the Petitioners' members for non-payment of cess.

12. According to the Petitioners, the Respondent has acted ultra vires its constitutional jurisdiction by levying the agricultural produce cess and the horticultural cess and that the County legislation is null and void and any enforcement of such laws erodes the sanctity of the Constitution.

13. The Petitioners' averred that levying the cess on the Petitioners members subjects them to double taxation as the members pay up to 40 different taxes, including export cess to the Horticultural Crops Directorate at the point of export at the rate of 30cents per kilogram, which double taxation adversely affects the viability of commercial operations in this vital economic sector.

14. The Petitioners contend that they have been subjected to unfair administrative action severely prejudicing the conduct of their business going against the constitutional principles of trade and undermines national economic policies.

15. As a consequence the Petitioners sought the following orders:-

i. A declaration that the Constitutional jurisdiction of the County Government in relation to the levying of taxes and charges and the raising of revenue at the County does not extend to levying of cess.

ii. A declaration that the Nakuru County Finance Act, 2016 and the Nakuru County Revenue Administration Act are unconstitutional to the extent to which they purport to levy cess on the Petitioner and therefore that the said items of legislation are null and void to the extent of inconsistency and unconstitutionality.

iii. A declaration that the Nakuru County Finance Act, 2016 and the Nakuru Administration Act are discriminatory as the legislation targets the growers only and the provisions relating to the imposition of horticultural cess are therefore unconstitutional.

iv. A declaration that the actions of the County Government of Nakuru amounts to charging custom duty and hence double taxation as the Petitioner already pays the same at the point of exit.

v. A declaration that the County Government have no rights to levy taxes on export or import goods as the said mandate is a preserve of the National Government as provided under the Constitution.

vi. An order of certiorari do issue quashing Section 29 and 30 of the Nakuru County Finance Act, 2016 as unconstitutional.

vii. A permanent injunction order do issue restraining the Respondent, its officers, servants or agents from imposing, charging or enforcing collection of any form of horticultural cess tax within the County contrary to the Constitution of Kenya.

viii. Or such other order(s) as this honourable court shall deem just.

Respondent's Case

16. The Respondent opposed the Petition by way of grounds of opposition dated and filed on 30th May, 2017 in which they stated:-

i. That under the provisions of the Fourth Schedule to the Constitution, County Governments have exclusive mandate over agriculture including crop and animal husbandry, livestock sale yards, county abattoirs, and animal disease control and fisheries. It therefore means that County Government are the centre of agricultural development with an enormous duty to create a framework that will transform the agricultural sector into a more commercially oriented and competitive sector capable of attracting and providing higher incomes and employment for citizens.

ii. That under Article 185(1) of the Constitution the County Assembly exercises the legislative authority of the County Government and therefore makes laws that are necessary and incidental to the exercise of the functions and powers of any County Government in relation to matters specified under the Fourth Schedule of the Constitution, including the levying of agricultural produce cess.

iii. That the Applicants have failed to adduce any evidence as to impute the unconstitutionality of the Nakuru Finance Act and the Revenue Administration Act in comparison to the Crops Act, 2013. In respect thereof, a National legislation would apply to:-

a) If it applies uniformly throughout Kenya and satisfies the conditions specified in Article 191(3).

b) Secondly, National Legislation would prevail if it is aimed at preventing unreasonable action by a County.

c) Thirdly, National Legislation would prevail if a County legislation is prejudicial to the economic, health or security interests of Kenya or another County ; and,

d) Lastly, in circumstances where the County legislation impedes implementation of national economic policy.

iv. That the imposition of cess by the Respondent does not amount to double taxation since double taxation is defined in the Black's Law Dictionary, 6th Ed. as,

“The taxing of the same item or piece of property twice to the same person, or taxing it as the property of another person and again as the same property of another, but this does not include the imposition of different taxes concurrently on the same property or income (e.g federal and state income taxes), nor the taxation of the same property to different persons with different interests in it or when it represents different values in their hands....”

v. That in the enactment of the Nakuru County Finance Act and the Revenue Administration Act, the Petitioners/Applicants were participants thereof and their views were taken into consideration and cannot therefore allege that the Respondent is in breach of the fair Administrative Action Act.

vi. That the essence of consultation is the communication of genuine invitation to give advice and genuine receipt of the advice; to achieve consultation, sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice which was applied by the Respondent before the finance Act and the Revenue Administration Act were passed.

Submissions

17. The Petition proceeded by way of written submissions. The Petitioners submissions are dated and filed on 12th July, 2017 on the same date and the Respondent filed its undated submissions on 17th January, 2018.

Petitioners' Submission

18. It was the Petitioners submission that before any County Government can levy any taxes not expressly provided for in the Constitution of Kenya, Parliament must have passed enabling legislation. That previously, local governments had levied cess tax on agricultural and horticultural products under section 201 of the Local Government Act (Cap 265) as read with Section 192A of The Agriculture Act (Cap 318) however the two acts were repealed by the Local Government Act (No. 17 of 2012) and the Agriculture Food Authority Act (No. 13 of 2013) respectively and therefore there is currently no single national legislation in force that gives County Government authority to levy cess tax on agricultural and horticultural products.

19. It was also submitted that the Crops Act (No. 16 of 2013) provides structure for levies of scheduled crops, outlines the roles of the National and County Governments and recognizes the Agricultural Fisheries and Food Authority which is established by the Agriculture Food Authority Act.

20. The Petitioners submitted that the Nakuru Finance Act 2013 and 2016 which introduced Agricultural Cess and Horticultural Cess were in direct conflict with Article 209 and 210 of the Constitution and are therefore unconstitutional. The Petitioners relied on the case of **Robert N. Gakuru & Others vs Governor of Kiambu County & 3 others (2014) eKLR**.

21. It was further the Petitioners submission that the Petitioners members pay produce cess to the Horticulture Crops Directorate under the Agricultural Fisheries and Food Authority and that the Agricultural Fisheries and Food Authority and the Transitional Authority had warned and advised the County Governments against legislating on agricultural levies and cess tax as there was no legal basis.

22. The Petitioners submitted that their right to fair administrative action had been breached as the Respondent failed to carry out full and actual public participation in order to properly collect and consider the view and opinions of affected persons as they were not considered as the Petitioners' members were already subject to 40 different forms of levies and taxes and passing the subject pieces of legislation was discriminatory and subjected them to double taxation. The Petitioners relied on the case of **Glenister vs President of the Republic of South Africa and Others (CCT 48/10)[2011] (3) SA 347 (cc), 2011 (7) BCLR 651 (cc)**.

23. On conflict of interest the Petitioners submitted that Section 8 of the Nakuru County Finance Act 2013 and Sections 29 and 30 of the Nakuru County Finance Act 2016 were in conflict with Article 209 and 210 of the Constitution and further that the said County legislations were in conflict with the Crops Act, 2013 and the Agriculture Food Authority Act 13 of 2013.

24. The Petitioners sought that the petition be allowed in terms of the prayers sought therein.

Respondent's submissions

25. It was the Respondents submissions that the Fourth Schedule of the Constitution gave County Governments exclusive mandate over agriculture including crop and animal husbandry and therefore had a duty to create a framework that will transform the agriculture sector into a commercially oriented and competitive sector. It was further submitted that under Article 185(1) of the Constitution, County Assemblies exercise legislative powers of County Government and therefore make laws that are necessary and incidental to the exercise of the functions and powers relating to matters in the Fourth Schedule including levying of agricultural cess. They relied on the case of **Cereal Growers Association & Another vs County Government of Narok & 10 others [2014] eKLR** to back their position.

26. The Respondent contended that Article 209 (4) of the Constitution gave County Government discretionary powers to impose charges for services and that the agricultural produce cess is a charge levied on purposes of raising revenue. That the 1st Schedule Part of the Agriculture Fisheries and Food Act, 2013, provided that administrative decisions of former institutions and made by the minister before the appointed date have effect as if directed by the authority or Cabinet Secretary under the Act. That the County Government Act Section 105(1) (f) includes effective resource mobilization for sustainable development which forms a basis for incorporation and implementation of revenue resource mobilization including collection of cess and other payments. That Section 108 of the County Government Act empowers the County Government to have County integrated plan including resource mobilization strategies to ensure adequate resources for county.

27. Further, the Respondent submitted that it exercised its mandate in passing the Nakuru County Finance Act 2016 and the Nakuru County Revenue Administration Act as a source of revenue as the Agricultural Produce Cess and the Horticultural Cess had been levied to generate income to enable the Respondent to provide services to the residents of the county. That the Petitioners were attempting to curtail the Respondent from executing its constitutional mandate. They cited the case of **Andrew Wasswa Atetwe t/a Kilimanjaro Auctioneers and 21 others vs the Mombasa County Government [2015] eKLR** and **Thuku Kiroro & 4 Others vs County Government of Muranga (2014) eKLR**.

28. On the issue of double taxation it was the Respondent's submission that imposition of cess did not amount to double taxation as defined in Black's Law Dictionary, 6th Edition and that Cess was defined as a tax or levy as defined in the Concise Oxford English Dictionary 11th Edition (2006) and in the Andrew Wasswa Atetwe case (*supra*).

29. On whether due procedure was followed in the enactment of the impugned statutes, the Respondents submitted that the Petitioners were participants and their views taken into consideration. They stated that the Petitioners had not adduced any evidence to show that they (Petitioners) sought in vain audience to raise their concerns with the relevant body or any correspondence or memoranda which were not received or rejected without consideration. It was the Respondents submission that it was not necessary that every person or professional be invited to a forum or a personal hearing to be given to every individual but that everyone is given a reasonable opportunity to be availed to reasonably put across their views for consideration. The Respondent relied on the case of **Minister of Health and Another vs New Clicks South Africa (pty) Ltd and Other 2006 (2) SA 311 (cc)** and **Consumer Federation of Kenya (COFEK) vs Public Service Commission Nairobi Petition 263 of 2013 [2013] eKLR**.

30. On whether the Petitioners are entitled to the orders sought, the Respondent averred that the burden of proving the unconstitutionality of a statute lay with the Petitioners as all statutes come with a presumption of constitutionality. Further, courts must be careful when suspending

the operations of statutes and statutory supervision as it would be interfering with the independence and supremacy of parliament in its constitutional duty of legislating as it should uphold the constitutional mandate of the constitutional organ mandated without due interference by the judicial branch. The Respondent relied on the case of **Thuku Kiroro & 4 others** (*supra*).

31. The Respondents further submitted that there was no discrimination as other agricultural producers were similarly affected and the contention that the Petitioners were discriminated against cannot be correct. It was additionally submitted that the petition did not state the nature of the alleged violation of the Petitioners rights and freedoms and has therefore not met the threshold in constitutional matters. They relied on the case of John **Kamau Mwangi & 3 Others vs Kenclaire limited & 6 others** [2014] eKLR; **Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 others** [2013] eKLR; and **Kemrajh Harrikisoon vs Attorney General of Trinidad and Tobago** [1979] 3 WLR 63.

Determination

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

- a) *Whether the Petition meets the required threshold for constitutional Petition.*
- b) *Whether Sections 29 and 30 of the Nakuru Finance Act 2016 are unconstitutional.*
- c) *Whether the orders sought should be granted.*

Whether the Constitution meets the required threshold

33. The issue of competency of the Constitution was set out in the case of **Anarita Karimi Njeru vs. Republic** [1976-80] KLR 1272 which laid out the principle that a person who alleges a violation of his constitutional rights and freedom must plead such allegation with a degree of precision was laid out. This principle of law has been reiterated severally and in the case of **Mumo Matemo v Trusted Society of Human Rights Alliance** [2013] eKLR the court stated:-

“The principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the constitution and the overriding objective. Principle under section 1A and 1B of the civil procedure Act (Cap 21) and Section 3A and 3B of the appellate Jurisdiction Act Cap 9.

Procedure is also a hand maiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The principle in Anarita Karimi Njeru (Supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extract of this principle”.

34. I have perused the Petition together with the supporting affidavit and it is quite clear and leaves no doubt that the Petitioners are claiming that the County legislations by the Respondent contravenes the provisions of Article 209 and 210 of the Constitution. I find no basis for the Respondents’ submission that the Petition lacks clarity. **Whether the Section 29 and 30 of the County Finance Act, 2016 are unconstitutional.**

35. The Petitioners alleged that the said County legislation is unconstitutional as there is no requisite national legislation granting them powers to levy Agricultural Produce Cess and Horticultural Cess as the Local Government Act and the Agriculture Act were repealed. On the other hand the respondent has alleged that it is constitutionally mandated to impose charges for services and further has the legislative authority to make laws that are necessary and incidental to exercise of its functions.

36. County Governments have been vested with the powers to make legislation under **Article 185 (2)** of the **Constitution** which states:-

“A County assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the County government under the Fourth Schedule.”

Section 5 of the **County Government Act No. 17 of 2012** gives effect to **Article 185 (2)** of the **Constitution**:-

Specifically **Section 21 (4)** of the **County Government Act** provides for the implementation of bills for purposes of taxation and states:-

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

- (a) taxes;
- (b) the imposition of charges on a public fund or the variation or repeal of any of those charges;
- (c) the appropriation, receipt, custody, investment or issue of public money;
- (d) the raising or guaranteeing of any loan or its repayment; or

(e) matters incidental to any of those matters”

Part II of the **Fourth schedule of the Constitution** provides for functions of the County Government and **section 1** provides for agriculture which includes crop and animal husbandry.

It is under these provisions that the Respondent passed Section 29 and 30 of the Nakuru County Finance Act, 2016 which have been reproduced elsewhere above in this judgment.

37. However in enacting legislation, a County Government cannot overlook the provisions of the Constitution governing the enactment of other laws. The principles of constitutional interpretation dictates that no one provision can be read alone. In the Court of Appeal cited the case of **South Dakota V North Carolina 192 US, 268 (1940) L ED**, in which the US Supreme Court said at page 465 which stated thus:-

“Elementary rule of constitutional construction is that no one provisions of the constitution is to be segregated from all others to be considered alone, but all provisions bearing on a particular subject are to be brought into view and to be so interpreted as to effectuate the general purpose of the instrument”.

Similarly in the case of *In the Matter of the Kenya National Commission on Human Rights, Supreme Court Advisory Opinion Reference No. 1 of 2012; [2014] eKLR* the Supreme Court pronounced itself as:

“But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances.”

38. Looking at the constitutional provisions as regards taxation; **Article 209** of the Constitution provides:-

(1) Only the national government may impose—

a. income tax

b. value-added tax;

c. customs duties and other duties on import and export goods; and

d. excise tax

(2) An Act of Parliament may authorise the national government to impose any other tax or duty, except a tax specified in clause (3) (a) or (b).

(3) A County may impose—

a. property rates

b. entertainment taxes; and

c. any other tax that it is authorised to impose by an Act of Parliament.

(4) The National and County Government may impose charges for the services they provide.

(5) The taxation and other revenue-raising powers of a County shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour.

Article 210 (1) of the Constitution provides:-

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

39. Legislation has been defined to include County Legislation as provided under **Article 260** of the Constitution which states:-

“legislation” includes—

(a) an Act of Parliament, or a law made under authority conferred by an Act of Parliament; or

(b) law made by an assembly of a County Government, or under authority conferred by such a law.”

40. It is not in doubt that County Governments have legislative discretion to impose charges for services rendered under Article 209 (4) and in my view with a holistic interpretation of the Constitution, Article 210 (1) was meant to regulate such charges where County Governments shall not impose charges that they have not provided for in their County legislation. It appears that the discretion does not extend to imposing of taxes.

41. On the issue of taxes it is clear that the County may impose property rates and entertainment taxes but any other tax that may be imposed by the County Government must be provided for under an existing Act of parliament. The question that needs to be answered then is whether cess is a charge or a tax. **Black Law's Dictionary, 9th Edition at page 258** defines cess as:- **"An assessment or a tax."** Further, in the case of **Andrew Wasswa Atetwe t/a Kilimanjaro Auctioneers & 21 others vs The Mombasa County Government**, the court held that cess by any other name would mean a tax or levy, which definition was similarly held by the Respondent. However the Respondent claimed that Agricultural Produce Cess as levied was a charge rather than a tax as claimed by the Petitioners.

42. In order to determine whether the Respondent contemplated the Cess as a tax or a charge, I have had to look at the Nakuru County Finance Act, 2016. The Act has defined the term charges under **Section 2** which reads:-

"Other fees and charges" means charges for services provided including but not limited to, parking fee, game park entry fees under the County Government powers and functions in part 2 of the forth schedule of the Constitution of Kenya as devolved in legal gazette notices from time to time."

The Act has further defined the term taxes thus:-

"Taxes" means property tax and entertainment tax as relates to the County shall be as contemplated under Article 209 of the Constitution and provided for under relevant County Legislations."

43. Further **Section 26** of the Act provides that fees and charges are for service offered by the county and states:

"This section sets out the fees and charges for services provided by the County Government (other than trade license fees, liquor license fees and taxes). The charges under this section are for services provided by the County Government and they are contained in Schedule III, IV & V of this Act. This section does also provide for the amendment of legislation that impose fees and charges for services by way of varying the amounts of those fees and charges set out in the relevant legislations."

Taxes are found under **PART II** of the Act and the only taxes envisaged are Property Taxes and Entertainment Taxes. On the other hand, OTHER FEES AND CHARGES are found in **PART IV** of the Act where the Agricultural Produce Cess and Horticulture Cess are provided for.

44. The question that arises is what services the Respondent provides so as to charge cess. A further look at the Finance Act, 2016 shows that the Respondent is levying charges for the standardization of packaging of agricultural produce as provided for under **Section 42** of the Act as read with the provision titled **Maximum Weight of Agricultural Produce** in the Act. Further the cess as levied enables the Respondent to prevent anti-evasion of county revenue under provisions of **General Anti-Evasion Measures** under the Act and similarly to control county markets. The unit of measure and maximum weight in Kilograms of each unit of measure is provided for in the **Fourth Schedule** of the Respondent's Finance Act titled **Maximum Threshold Weight of Agricultural Produce**.

45. Counties have the mandate to levy charges for development of agricultural crops and development and regulation of the scheduled crops market under **Section 17 (2)** of the **Crops Act, 16 of 2013** while **Section 42** of the Agriculture and Food Authority Act, 13 of 2013 provides for the measure of weight of agricultural produce.

46. It is clear from a reading of the above provisions that the Respondent never intended the Cess to be a tax but rather to be a charge for the measure of weight to regulate scheduled crop markets within the County as mandated under the law. As stated earlier County Governments have been empowered to levy charges for services they provide as long as the charges are provided for in County legislation. This position was clarified in **Africa Rafiki Ltd & 2 others v Nairobi City County Government & 3 others [2015] eKLR** where Lenaola J (as he then was) pronounced thus:-

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

47. It is not in doubt that Agricultural Produce Cess is a charge/fee for the regulation of scheduled crops within the County's markets and is therefore within the Respondent's function to levy the cess. Further the said cess has been provided for in the Nakuru County Finance Act, 2016 as required by the Constitution and therefore Section 29 of the Act does not offend the provisions of the Constitution.

48. On the issue of Horticultural Cess levied under Section 30 of the Nakuru Finance Act, the Act clearly states that the cess is in relation to flowers and vegetables for export. Article 209 (1) (c) of the Constitution clearly and expressly provides that only the national government may impose custom duties and other duties on import and export. One only has to look at what is clearly stated in a taxing Act as was held in **Republic v Kenya Revenue Authority Ex Parte Universal Corporation Ltd [2016] eKLR JR. Misc. Civil Application No. 460 OF 2013** where the court quoted with approval the case **Cape Brandy Syndicate vs. Inland Revenue Commissioner [1921] 1 KB 64**, which held that:-

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

49. Further **Section 17 (2)** of the Crops Act as reproduced hereinabove only mandates the County Government to regulate scheduled crops market within the County. Flowers and vegetables for export are meant for international markets and the taxation regime in respect of such exports is not under the jurisdiction of the County Government.

50. Additionally, the Horticultural Crops Directorate as established under Agriculture, Fisheries and Food Authority by their letter dated 5th October, 2015 (Petitioners EX ‘4’) wrote to all the County Government and advised that they are not allowed to charge duties on export and import as it was the mandate of the National Government through the Authority and doing so would amount to double taxation. The advice issued by the Authority is binding as it is the mandate of the Authority to advise both the National and County Governments on agricultural levies as provided for in **Section 4 of the Agriculture and Food Act No. 13 of 2013**. its functions under **Section 4 (e)** is to:-

“advise the national government and the County governments on agricultural levies for purposes of planning, enhancing harmony and equity in the sector.”

51. It follows therefore that the Respondents’ action in charging Horticultural Cess as per Section 30 of the Nakuru Finance Act, 2016, is ultra vires its mandate in the Constitution and hence the provision is illegal and therefore null and void to the extent of the inconsistency.

52. On the contention that the process of enacting the Nakuru Finance Act failed to include public participation, it was the Petitioners contention that their views were not considered when passing the Nakuru Finance Act. They claimed that the bill was passed in haste without taking their views into consideration. I have carefully considered the pleadings and submissions on this issue. It is not evident from the material placed before me that there was no public participation. I agree with the holding in **Republic vs. County Government of Kiambu Ex Parte Robert Gakuru & Another [2016]** where the court stated that:-

“Therefore the mere fact that particular views have not been incorporated in the enactment does not justify the court in invalidating the enactment in question. As was appreciated by Lenaola, J in Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others Petition No. 486 of 2013, public participation is not the same as saying that public views must prevail.”

53. From the above it is trite that public participation does not necessarily require that the views of the public are taken but rather that their views were considered and where not considered it would not justify the court finding the provisions or enactment unconstitutional. It is trite that what is required for public participation is the fact that there was reasonable opportunity given to the public to participate. The Petitioners have not adduced any evidence to show that their views were not considered or that they were not given reasonable opportunity to participate. Therefore Petitioners claim that their right to fair administrative action was infringed fails.

Conclusion

54. As held hereinabove, the County Governments have a mandate to provide services for the people of the County and in so doing they may raise revenue by levying fees, charges and licensing fees within their area of jurisdiction which have to be provided for in legislation. I therefore find that Agricultural Produce Cess as provided for in the Nakuru County Finance Act is a charge and therefore Section 29 is Constitutional.

55. On the other hand County Governments cannot purport to charge taxes not provided for by an Act of Parliament and further cannot levy taxes which are a preserve for the National Government. It is trite that any law that is inconsistent with the Constitution is illegal and is void as clearly stated in **Article 2(4)** of the **Constitution**. In this regard I find that section 30 of the Nakuru Finance Act, 2016 is unconstitutional and therefore null and void to the extent of the inconsistency.

56. The following orders shall therefore issue:-

i. A declaration that Section 30 of the Nakuru County Finance Act, 2016 is unconstitutional to the extent to which it purports to levy horticultural cess on the horticultural exports.

ii. A declaration that the County Government cannot levy, import and export tax on horticultural products as the said mandate is a preserve of the National Government as provided under the Constitution.

iii. An order of certiorari do issue quashing Section 30 of the Nakuru County Finance Act, 2016 for its unconstitutionality.

iv. Each party shall bear their costs.

Orders accordingly.

Judgement signed

.....

R.LAGAT KORIR

JUDGE

Judgment delivered, dated and signed at Nakuru

This 12th day of February, 2019

.....

JANET MULWA

JUDGE

In the presence of:

.....**Court Assistant**

.....**For the 1st Petitioner**

.....**For the 2nd Petitioner**

.....**For the Respondent**