



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 33 OF 2014

IN THE MATTER OF: ARTICLES 2, 40, 109, 110, 174, 201, 2013 AND 2010 OF THE CONSTITUTION OF KENYA 2010;

AND

IN THE MATTER OF: THE PUBLIC FINANCE MANAGEMENT ACT NO. 18 OF 2012

AND

IN THE MATTER OF: THE COUNTY GOVERNMENT PUBLIC FINANCE MANAGEMENT ACT NO. 8 OF 2013 (NOW EXPIRED)

BETWEEN

CHABLIS LIMITED.....PETITIONER

AND

COUNTY GOVERNMENT OF MOMBASA.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

The Petition

1. By a Petition dated 26th May, 2014, supported by affidavit of Richard Sunza Reuben Mitindi sworn on 22nd May, 2014 the Plaintiff prays for the following orders:

(i) A declaration that the demand by the 1st Respondent from the Petitioner of Kshs. 250,000/= for a Single Business Permit dated 22nd April, 2014 is a breach of Articles 40(3) and 210 (1) of the Constitution of Kenya and thus null and void.

(ii) A declaration that all other demands for payment of licences/permits, levies, charges and rates made by the 1st Respondent to residents, businesses and visitors to the 1st Respondent from 1st October, 2013 and all payments received by the said 1st Respondent for licences/permits, levies, charges and rates during the said period are in breach of Articles 40 (3) and 210 (1) of the Constitution of Kenya and thus null and void.

(iii) An order compelling the 1st Respondent to refund to the payers/depositors all payments for licences/permits and rates received by the said 1st Respondent from 1st October, 2013.

(iv) Cost of this petition be borne by the Respondents.

2. The Petitioner runs a gaming premises within the Central Business District of Mombasa in the name and style of “**Casino Roco**”, while the Respondent is the County Government of Mombasa.

3. The Petitioner’s case is that prior to the coming into force of the County Government the Petitioner was obliged by the defunct Municipal

Council of Mombasa to take out various licences among them fire fighting, conservancy and inspection. A Single Business Permit from the defunct Municipal Council of Mombasa costs Kshs. 50,000/= which the Petitioner obtained. The immediate former parliament enacted a law called County Government Public Finance Management Act in 2013 which provided inter alia that until the coming into force of any Act by County Government the rates and charges due on services to be applied upon residents were those that had been approved vide the repealed Local Government Act. Under Article 2(4) of the Constitution of Kenya any law that is inconsistent with the Constitution is invalid and null and void to the extent of the inconsistency. The Petitioner avers that the County Government Public Finance Management Act came to an end on 30th September 2013 and by then there was no Act that was in operation within the Municipal Council of Mombasa to govern payment of taxes and rates with the Mombasa County Government. Articles 174 and 175 of the Constitution of Kenya makes provision for the objects and principles of devolution which are among others the following:-

(i) To promote democratic and accountable exercise of power.

(ii) To give self governance to the people and enhance the participation of the people in the exercise of powers of the state in making decisions that affect them.

(iii) To recognize the right of communities to manage their own affairs and to further their development.

(iv) To promote social and economic development and the provision of proximate, easily accessible services.

(v) To enhance checks and balances.

4. Articles 109 and 110 of the Constitution makes provision as to what taxes and charges that a county government can levy which are expressly and exclusively as follows:-

(i) Property rates,

(ii) Entertainment taxes

(iii) A tax authorized by an act of parliament

(iv) Charges for services rendered

5. Article 110 of the constitution provides that no tax or licensing fee may be imposed except as provided by legislation. No other charges and or taxes can be levied by the County Government other than those provided for in the Constitution of Kenya. The Petitioner's case is that under the repealed Local Government Act, Cap 265 laws of Kenya, the Petitioner was obligated to make payment to the defunct Municipal Council of Mombasa for water and sewerage, public health, firefighting and signage. The petitioner's landlord/Lessor was obliged to and did pay to the defunct City Council of Mombasa land rates, water and sewer fee for the leased premises as provided for in the lease. The petitioner was also obliged to and did pay to the lessor service charge over and above the rent for the premises as provided for under the lease agreement. The Petitioner avers that a County Government as it is now under the Constitution of Kenya can only charge entertainment Tax and Rates which must be hinged and or anchored on a specific legislation and not lumped together in a "Finance Act". A County Government other than the taxes aforesaid, can only levy charges on specific services that it offers and not on anything under the sun. The Petitioner states that the 1st Respondent is now unlawfully demanding from the petitioner Kshs. 257,500/= allegedly for a single Business Permit for the year 2014. Article 201 of the Constitution of Kenya provides that there shall be openness and accountability, including public participation in financial matters, that public money shall be used in a prudent and responsible way and financial management shall be responsible. The Petitioner states that there is nothing to show that before raising its fees and levies by upto 200% the 1st Respondent invited the members of the public to discuss the proposed increment as required by Article 201 of the Constitution. Any purported increment without involving the public is thus unconstitutional. The demand by the 1st Respondent to the Petitioner of Kshs. 257,500/= for a Single Business Permit in December 2013 is unlawful and constitutes a deprivation of the property of the petitioner for among other reasons that:-

(a) From 1st October 2013 there has been no law put in place by the 1st Respondent upon which the 1st Respondent would levy charges and taxes.

(b) The County Government Public Finance Management Transition Act no. 8 of 2013 which had kept alive the provisions of the repealed Local Government Act upon which any County Government would levy charges and taxes came to a natural death on 30th September 2013.

6. Accordingly, the Petitioner states that all other demands for any payment made by the 1st Respondent to residents, businesses and visitors to the 1st Respondent from 1st October 2013 were unlawfully made and all payments received by the said 1st Respondent during the said period were unlawfully received and ought to be given back to those that paid for them.

The Response

7. The petition is opposed through an affidavit sworn by **Hamis M. Mwaguya** on 23rd April, 2015. The Respondent denies all allegations in the petition and avers that Sections 23 of the County Governments Public Finance Management Transition Act (No. 9 of 2013) provides that:

“For the avoidance of doubt until a new law relating to imposition of rates and charges is enacted, County Governments,

urban areas and cities may, with necessary modifications, continue to impose rates and charges under the law for the time being in force in relation thereto”

8. The 1st Respondent states that the petition is actuated by malice aimed at avoiding payment of revenue properly and lawfully collectable by the Respondent.

Submissions

9. Parties filed submissions which I have considered. The main issues for consideration are:

- (i) Whether there was public participation preceding the enactment of the County of Mombasa Finance Act, 2013 and 2014.
- (ii) Whether there is in place a legislation the basis of which the 1st Respondent can levy taxes and charges as required by Article 209 (3) of the Constitution.

10. Article 209 (3) allows a County Government to impose –

- (a) property rates;
- (b) entertainment taxes; and
- (c) any other tax that it is authorized to impose by an Act of Parliament.

11. It is the Petitioner’s contention that there is no legislation allowing the 1st Respondent to demand Kshs.250,000 for a single business permit for the year 2014, and that being so, such demand is therefore unconstitutional.

12. In rebuttal, the 1st Respondent submitted that under Article 175 of the Constitution of Kenya (“**the Constitution**”) as read with Section 116 of the County Governments Act (No. 17 of 2012), the 1st Respondent is obliged and expected to “**. . . have reliable sources of revenue to enable them to govern and deliver services effectively . . .**”. So much that the collection of revenue by the 1st Respondent is not only constitutional but also lawful to enable it govern and deliver services effectively to the people of Mombasa County. Secondly, the 1st Respondent submitted that the issue of the constitutionality and public participation of the Mombasa County Finance Act, 2013 and Mombasa County Finance Act, 2014 was ably dealt with by Hon. Emukule (as he then was) in the case of **Milly Glass Works Limited & 3 others vs. County Government of Mombasa & 2 others [2016] eKLR** when he found both legislations constitutional and stated that:

“For those reasons, I find and hold that Item 86 of the County of Mombasa Finance Act 2013 is not unconstitutional. Having come to the above conclusion on the question of the constitutionality of the said item 86, I find no ground for considering the question of refund of any payments made by the Petitioners to the Respondents. The Finance Bill 2014 having been enacted into Finance Act, 2014, the orders of injunction sought against its enactment are now superfluous. In summary, I find and hold that there was both facilitation and public participation in the enactment of the County of Mombasa Finance Act 2013 and 2014..”

13. The Learned Judge in this matter quite extensively delved on the following issues which present themselves in the Petition before this Court:-

- (a) whether there was public participation in the enactment of the County of Mombasa Finance Act, 2013 and 2014;
- (b) whether there was failure in the publication of the Mombasa County Finance Bill 2013 and 2014 and when does a Bill become law;
- (c) whether the collection of taxes by the County of Mombasa is illegal/constitutional; and
- (d) whether such payments, if unconstitutional are refundable to the Petitioners.

14. I have had a quick glance at the prayers sought in the Petition. In my view these prayers have been under the circumstances, not only settled by the holding in the ***Milly Glass case*** above but also overtaken by events. There is nothing more for the parties herein to litigate on and for this Court to make a finding when the two statutes under question have long lived their existence with a new County Finance Act in place for the 2018 financial year for payment made under the two statutes under interrogation.

15. Arising from the foregoing it is the finding of this court that the petition before the court lacks merit. It is dismissed. Parties to bear own costs.

Dated, Signed and Delivered at Mombasa this 1st day of April, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Ms. Mwaizi holding brief Muturi for Petitioner

Mr. Mwakisha holding brief Khagram for 1st Respondent

Ms. Kiti for 2nd Respondent

Mr. Kaunda Court Assistant