



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO. 7 OF 2018

EASTERN PRODUCE KENYA LTD.....1ST PETITIONER

SIRET TEA COMPANY LTD.....2ND PETITIONER

KIBWARI PLC.....3RD PETITIONER

KENYA TEA GROWERS ASSOCIATION.....4TH PETITIONER

VERSUS

COUNTY GOVERNMENT OF NANDI.....1ST RESPONDENT

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

RULING

1. The 1st-3rd petitioners are involved in intensive agricultural farming focusing on tea, whilst the 4th petitioner is an association which promotes the common interests of all its members who are engaged in cultivation and manufacture of tea in Kenya. The genesis of this petition arises from the 2nd respondent enactment of the **Nandi County Cess Act 2017** which first came into operation on 10th April 2017 and was amended by the **Nandi County Finance Act, 2018**.

2. The **Cess Act** imposes **Cess Levy** on any agricultural product grown, produced or in transit within **Nandi County**. **Schedule 2 of the Cess Act, amended by Section 16 of the Finance Act**, provides that **Tea Cess** shall be paid at **1%** of the market price.

3. The 1st Respondent (**COUNTY GOVERNMENT OF NANDI**) sent a letter to the 3 petitioners to remit **Cess** to the **County Revenue**. The Petitioner contends that no Act of Parliament authorizes the 1st Respondent to levy Cess maintaining that **Article 209 (3)** of the Constitution of Kenya provides that the 1st Respondent may only levy property rates, entertainment taxes and taxes authorized by an Act of Parliament.

4. The petitioners state:

i. That tea is a scheduled crop under section 7 and the first schedule of the Crops Act No. **16 of 2013**

ii. Under Section 17(1) of the Crops Act, only the National Government can charge levies on scheduled crops.

iii. By levying Cess on tea, a scheduled crop, the first Respondent's Cess Act is in conflict with the Crops Act.

iv. The demand to pay 1% of the market price for Tea Cess is unclear, uncertain and ambiguous.

v. The imposition of tea cess on the tea sector in Nandi will have a harmful economic effect on the tea industry in Nandi County as it will increase the cost of production of tea.

5. The imposition of Agricultural Cess is described as being contrary to **Article 209(5)** of the Constitution which provides that 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.

6. Further, that Article 201 of the Constitution provides that one of the principles of public finance is that the burden of taxation should be shared fairly.

7. The petitioner prays that :

a. The Court declare that **Nandi County Cess Act 2017** was enacted contrary to the constitution **Articles 201,209(3) and 209(5)** and therefore null and void.

b. The Court declare that **Sections 3& 4** of the **Nandi County Cess Act 2017** is null and void in so far as it provides for the levying of Cess on **Scheduled crops** and in particular Tea contrary to **Article 191(2) and (3) of the Constitution of Kenya**.

c. The Court do quash the 1st Respondents decision in the letter of 13.03.2018 demanding that the petitioners remit tea Cess to the County Revenue.

d. A permanent injunction to issue restraining the 1st Respondent from demanding and collecting any tea cess from the Petitioners

8. The petition was supported by the affidavit of **DENIS GITAKA** the legal manager of the 1st Petitioner, who reiterates that the provisions in the Nandi County Cess Act are in conflict with the Constitution.

9. In response to the petition, the 1st Respondent states that under **Article 185(1) of the Constitution**, the Nandi County Assembly has authority in exercising legislative authority of the county government to make laws that are necessary and incidental to exercise functions of the County Government in relation to matters under the fourth schedule of the Constitution including levying Cess on Agricultural products.

10. Additionally, the Nandi County Government accepts that it enacted the Act in contention which was later amended by the County Finance Act 2018. The Nandi County Government as mandated by Law has also set up structures to ensure public participation in the implementation of Nandi County Cess Act 2017 and that the intended Cess is imposed so as to generate revenue to enable the Nandi County government to provide adequate service to the residents of the county.

11. The Respondent cites the various Acts and the Articles in the Constitution of Kenya which he says authorize the levy Cess. The Respondent further avers that the Petitioners have not shown how levy of 1% on Tea Cess will affect or prejudice the economic interest or the National Economic Policy.

12. The 1st respondent states that Section **17(2) of the Crops Act, 2013** gives them the mandate to levy Cess on tea for purposes of improvement of the Tea sector and that there was no economic interest or the National Economic Policy. They deny that the law is harmful to the Economic activities of the County or National Economic Policies of Kenya.

13. In a replying affidavit by the Acting Country secretary, he states that there is no conflict between the **Crops Act No. 16/2013** and **Nandi County Cess Act 2017** on Cess imposed on Tea as alleged by the Petitioners.

14. That under Section 17(1) of the Crops Act No. 16/2013 the National Government is mandated to collect Tax from scheduled crops as follows:

a. Income Tax

b. V.A.T

c. Custom Duty

d. Excise Duty

15. The said section 17(2) of the crops Act No. 16/2013 empowers the Nandi County Government to impose levies for purpose of Crops;

a. Development of the Crops and;

b. Regulation of markets among others

16. The Respondent points out that the County Government of Nandi only levied less in accordance with **Section 17(2) of the Crops Act** and not **Section 17(1)** of the said Act.

17. He states that the petitioner's right to their production of Tea or their Tea Farms or ownership of the Tea plantations has not been violated. He added that the courts were trying to direct the county government so as to direct them on how to perform their administrative and legislative functions.

18. The Respondents maintain that:

i. There is no evidence that the **Nandi County Cess Act 2017** will prejudice the implementation of other National Economic Policies

or mobility of good services, capital or labour within the National or County Government.

ii. There is no evidence to show that the Act will prejudice National Mobility of goods and services across the county.

iii. There is no evidence that the Agricultural Tea Cess imposed by the Nandi County Government pursuant to section 3 of the Nandi County Cess Act 2017 will prejudice economic activities across County or boundaries or any other National economic policy by government. No evidence has been provided by the Petitioners to show this.

19. Further, that the Act is not in contravention of Article 47(1) – Fair Administrative Action or Article 209(5) of the constitution- Power to impose taxes and charges.

20. The petitioners submit that the Cess Act is unconstitutional based on grounds that;

a. They contravene Article 209 of the Constitution;

In regard to this, they state that the 1st Respondent was only allowed to impose tax, other than entertainment and property taxes by an Act of Parliament. They state that this would mean that the 1st respondent is not allowed to tax except where an Act of Parliament or a law made under authority conferred by an Act of Parliament has authorized.

b. In so far as it provides for levying of Cess on tea, it conflicts with national legislation and is therefore invalid.

21. The petitioners fault the Respondents reference to Section 17(2) of the Crops Act No. 16 of 2013 to justify their decision to levy Cess upon the tea farmers, contending that that the said Act and section only allows a County Government to impose fees not Cess.

22. The Petitioners distinguished the definitions of a fee (a charge or payment for labour/ services especially professional services) being different from Cess (an assessment or tax) drawing from Blacks Law Dictionary to explain that what the County government is permitted to impose is fees not cess. Additionally, the Petitioners aver that the Cess Act is a county legislation and not a national legislation and therefore cannot fall under Article 209 (3) of the Constitution of Kenya 2010.

23. The petitioner maintains that tea is a scheduled crop under Section 7 and the 1st Schedule of the Crops Act No. 16 of 2013, and under Section 17(1) of the Crops Act, only the National Government can charge levies on scheduled crops. That just because the Cess Act provides for payment of cess on various products including timber and log cess does not stretch it to cover tea as timber is not a scheduled crop under the Crops Act. It is also pointed out that even with such provision, the High Court in **RAIPLY WOODS (K) & ANOR V BARINGO COUNTY & 3 OTHERS [2017] eKLR** already found that levying of cess on timber by county governments is unconstitutional. In any case where a county law conflicts with a national law, then **Article 191 (2) of the Constitution** prescribes that national legislation would prevail if it applies uniformly throughout the country and prevents unreasonable action by a county that would be prejudicial to the economic interest of the country or impede the implementation of national economic policy.

24. They submit that Section 3 of the Cess Act is also unconstitutional and is not anchored on any Act of Parliament as was fortified in the case of **BASE TITANIUM LTD V COUNTY GOVERNMENT OF MOMBASA & ANOR [2018] eKLR** which held that:

“Article 209 (3) of the Constitution grants the County Government to impose a tax that it is authorized to impose by an Act of Parliament...as opposed to an Act of the County Government, that authorized the County Government to make a levy of cess charge on transportation of goods into the county”

25. Their conclusion is that the Nandi Cess Act in so far as it provides for levying of Cess on tea (which is grown in over 10 counties), conflicts with National Legislation and is therefore invalid and unenforceable to the extent of that inconsistency.

26. The Respondents refute that the Petitioners have established an arguable prima facie case because no specific right breached was expressly pleaded and the violations demonstrated.

27. The respondents state that it is necessary to generate revenue to be able to discharge its functions and discharge its duties to the public. It is on this basis that the **Nandi County Cess Act** was enacted in 2017 and amended by the **Nandi County Finance Act 2018**.

28. The respondents insist that the legislation has complied with Article 10 of the Constitution of Kenya 2010 of public accountability, inclusivity and public participation.

29. Moreover, that the petitioners shall oversee the use of the revenue collected in discharging the functions based on section 14 of the **Nandi County Cess Act No. 2 of 2017**.

30. They argue that the court has no mandate to interfere with the legislative functions of the assembly. They additionally stated that the application by the petitioners is belated as it was brought over 1 year from the time the laws came into operation on **10th Aril 2017 (Nandi County Cess Act)** and over 5 months since enactment and assent of **Nandi County Finance Act 2018**. He states that it failed to meet the requirement to bring Judicial review orders without unreasonable delay as provided in the Fair Administrative Action Act, 2015.

31. They submit that no conflict exists between National laws (i.e. the Crops Act 2013) and County laws. They added that the petitioners needed to demonstrate prima-facie constitutional violations which they have failed to do, saying the presumption is that the Act is

constitutional until the contrary is proved.

32. The respondents argue that the petitioners have not exhausted the remedial measures of a citizen petition as provided for in the County Government's Act – sections 89 & 90. They state that the court is not seized of jurisdiction to grant conservatory orders as it has no jurisdiction to exercise Judicial Review based on **Section 9(2) of the Fair Administrative Action Act, No. 4 of 2015**.

33. Article 191 provides that in the event of any conflict of laws, national legislation prevails if it applies uniformly throughout Kenya and prevents unreasonable action by a county that would be prejudicial to the country's economic interest.

34. The learned justice E. Muriithi in the case of **RAIPLY WOODS (K) LTD & ANOTHER V BARINGO COUNTY & 3 OTHERS [2017] EKLK** states thus;

“This Court agrees with the principle of purposive interpretation of the Constitution that where a mandate is given there will be power to do such things are necessary for the performance of realization of such a mandate as well as a harmonious approach so that different articles of the Constitution are read as complementing each other rather than ousting the authority of either provisions. 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 tax within their area of jurisdiction. However, in levying such tax the County Governments may only levy such tax as it is constitutionally empowered to do. It is the Court's finding that the County Governments are not empowered by the Constitution to levy tax on forest produce harvested from state forests; that is the province of the National Government which owns the said forests.”

35. I cannot begin to re-invent the wheel- the Court of Appeal re-confirmed the position in **BASE TITANIUM [supra]** already found that levying of cess on timber by county governments is unconstitutional. In any event Tea unlike timber, is specifically being a scheduled crop under section 7 which highlights the first schedule of the Crops Act No. 16 of 2013 means that tax is levied on it from the National Government.

36. From the foregoing, the petitioner's assertion that the Nandi Cess Act in so far as it provides for levying of Cess on tea (which is grown in over 10 counties), conflicts with National Legislation and is therefore invalid and unenforceable to the extent of that inconsistency has merit.

37. Moreover, levying Cess in this way would subject the tea farmers to double taxation which is unfair. In my opinion the County Government has not been empowered to levy the Cess on Tea and therefore the petition be and is hereby allowed

38. Orders are as follows :-

- a. The Nandi County Cess Act 2017 was enacted contrary to the constitution Articles 201 (b) (1) and 209(5) and therefore null and void.
- b. The Court declares that Sections 3& 4 of the Nandi County Cess Act 2017 are null and void in so far as they provide for the levying of Cess on Scheduled crops and in particular Tea contrary to Article 191(2) and (3) of the Constitution of Kenya.
- c. The 1st Respondents decision in the letter dated 13.03.2018 demanding that the petitioners remit tea Cess to the County Revenue be and is hereby quashed
- d. A permanent injunction is granted restraining the 1st Respondent from demanding and collecting any tea cess from the Petitioners
- e. I make no orders on costs

DELIVERED, SIGNED AND DATED THIS 2ND DAY OF MAY 2019 AT ELDORET

H. A. OMONDI

JUDGE