



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CONSTITUTIONAL PETITION NO. 57 OF 2018

KAKUZI PLC.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF MURANG'A.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. The core of the dispute is whether under the **Murang'a County Finance Act 2013** (hereafter *the Act*), the county can impose a *cess levy* for agricultural crops that are grown, produced, processed in the county or under transit.
2. The petitioner is a public company listed on the Nairobi Stock Exchange. Pursuant to the Act, the county government (the 1st respondent) issued a demand dated 20th April 2019 for consolidated cess of Kshs 81,440,430. The figure is based on 1% of the petitioner's turn over for the years 2013 to 2017.
3. The petitioner's case is that the Act has neither been *published* in the *Kenya Gazette* as required by **Article 199 (1)** of the **Constitution** nor is there an Act of Parliament authorizing the levy as required by **Article 209 (3)**. It is contended that the county's demand runs counter to the **Crops Act** and contravenes **Article 191** of the **Constitution**.
4. Pending the hearing of the petition, the petitioner prays for a *conservatory order* to stay *implementation* of the impugned Act in so far as it provides for the levy on agricultural products. It also craves a temporary injunction to restrain the 1st respondent from demanding or collecting the cess.
5. Those matters are set out at length in separate *Notices of Motion* dated 14th December 2018 and 25th April 2019; and, two depositions sworn on even dates.
6. The applications are contested. There is a replying affidavit sworn on 4th July 2019 by Thomas Gakahu, the county's revenue officer. The 1st respondent also lodged *grounds of opposition* on 8th May 2018.
7. The retort is on a five-strand: Firstly, that the Act is constitutional. Secondly, that the county is empowered to collect the levy by dint of **Article 209 (3)** of the **Constitution**; section 12 of the **Crops Act**; and, the **Murang'a County Finance Act 2013**. Thirdly, that the publication of the latter Act in the *Murang'a County Gazette Supplement* satisfies Article 199 (1). Fourthly, that the petitioner is less than candid about the crops it grows in Murang'a or whether they are *scheduled crops*. For instance, the petitioner grows avocados, macadamia and timber forests. The county's position is that those crops invite a cess levy. Fifthly, it is contended that the grant of a conservatory order or injunction would mean that the petitioner avoids paying any levy to Murang'a or any other agency.
8. The Attorney General (the 2nd respondent) has not entered an appearance.
9. The petitioner filed skeleton submissions and a list of authorities on 4th July 2019. On 11th July 2019 I heard further arguments by learned counsel for the petitioner and the 1st respondent.
10. The main petition is *pending* for hearing. I *cannot* comment on the merits of the action at this stage. That will be the true province of the trial court.
11. To succeed in an application of this nature, the applicant must show that it has a *prima facie* case with a likelihood of success; that unless the *conservatory order* is granted the applicant will suffer *serious prejudice*; or, that the main petition will be rendered *nugatory*. See generally **Flemish Investments Limited v Town Council of Mariakani**, Mombasa High Court Case 459 of 2010 [2012] eKLR, **Giella v**

12. In addition, the court must carefully weigh the *public interest*. There is a long line of authorities on that aspect including *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others* Supreme Court of Kenya, Petition No 2 of 2013 [2014] eKLR, *Centre for Rights Education and Awareness & 7 others v Attorney General*, High Court, Nairobi, Constitutional Petition No. 16 of 2011 [2011] eKLR, *British American Tobacco Kenya Ltd v Cabinet Secretary for the Ministry of Health & 2 others* High Court, Nairobi, Constitutional Petition No. 143 of 2015 [2015] eKLR, *Flemish Investments Limited v Town Council of Mariakani* [supra] and *Marius Wahome Gitonga v Kenya National Highways Authority*, Eldoret, High Court Petition 16 of 2015 [2015] eKLR.

13. The convergence of principles applicable in granting an ordinary *injunction* and a *conservatory order* were succinctly captured by the Supreme Court in *Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 others* [supra]. The distinguishing feature relates to *public interest*. The court must bear in mind the inherent *merit* of the case *versus* the *public interest*. The learned judges of the Supreme Court had this to say-

“[86].*Conservatory orders*’ bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. *Conservatory orders*, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the applicant’s case for orders of stay. *Conservatory orders*, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes”

14. Applying these principles in the instant case, I find as follows. The petitioner freely concedes that it cultivates, packs and markets avocados and macadamia nuts in the county. It also purchases avocados from small scale farmers in Murang’a. The produce is exported to the Far East, Europe and the United States.

15. In addition the company grows forests, processes timber and rears livestock. It also provides agricultural extension services to local farmers. In some other parts of the country like Nandi County, the company farms tea.

16. Like I have stated, the main petition remains unheard. But I can safely state the following. **Article 199(1)** of the **Constitution** provides that county legislation does not take effect unless published in the *Gazette*.

17. Learned counsel for the 1st respondent submitted that the word *gazette* is not defined by the **Constitution**. That is not true because **Article 260** defines it as “the *Kenya Gazette* published by authority of the National Government or a supplement to the *Kenya Gazette*”.

18. I am also alive that the **County Governments Act** defines a *County Gazette* as a *Gazette* published by the authority of the County Government or a *supplement* of such a *Gazette*. The 1st respondent freely conceded that the impugned Act was published as a *Special Issue* of the *Murang’a County Gazette Supplement No. 8*.

19. Some courts faced with a similar situation have held that **Article 199(1)** of the **Constitution** imposes a *mandatory* obligation to publish all county legislation in the *Kenya Gazette* or a *supplement* to the *Kenya Gazette*. See *James Gacheru Kariuki & 3 others v Attorney General & 11 others*, Nairobi, High Court Pet. 56 of 2016 [2017] eKLR. Lenaola J (as he then was) held the view that it is only through such publication that county legislation can gain legitimacy.

20. **Article 2 (4)** of the **Constitution** decrees that any law that is *inconsistent* with the Constitution is invalid to the extent of such inconsistency. I say so very carefully without making a finding in the matters the subject matter of this petition. The court will at the hearing of the main petition decide whether the impugned Act is unenforceable merely for want of publication in the *Kenya Gazette*.

21. **Article 209 (3) (c)** of the **Constitution** permits a county to levy property rates; entertainment taxes; and, *any other tax* that it is authorized to impose by an Act of Parliament. The 1st respondent’s case is that sections 12 and 17 of the **Crops Act 2016**, a national legislation, empower the county to levy the cess.

22. I am also cognizant that our Constitution recognizes the *two levels* of government: national and county governments. It is also not lost on me that **Article 209 (4)** of the **Constitution** empowers both the national and county governments to impose *charges* for services.

23. At paragraph 11 of the affidavit of Dennis Gitaka and in paragraph 23 of the petition the petitioner *claims* that it is paying cess to the *Horticulture Crop Directorate* (HCD) for avocados. But the invoices attached (exhibit DG-6) are only for the months of March, April, May, August and September 2018 whereas the disputed cess is for the period 2013 to 2017. Furthermore, the invoices and receipts do not show the crops or fruits covered by the cess paid to HCD. Was it for avocados or other products grown and transported through Murang’a for example?

24. Assuming the cess paid to HCD is a global sum for all horticultural crops produced by the petitioner in Kenya, there is a real question whether the cess of 1% demanded by the county amounts to double taxation. If on the other hand it is *not* paying such cess, then obviously, the petitioner would *avoid* taxation or charges if a conservatory order is granted. In that scenario, a conservatory order would *not* be in the public interest.

25. I agree that a blanket 1% cess levy based on the annual turnover of the company *may* be unreasonable. For instance the petitioner grows tea in Nandi County and there is no evidence it does so in Murang’a. But the 1st respondent deposes that the petitioner grows macadamia and processes timber products in Murang’a. It remains doubtful whether avocados, pineapples or fruits are *scheduled crops*? Section 12 as read with section 17 of the **Crops Act 2016** *seems* to contemplate a levy for cess. Again I say so very carefully without making a finding.

26. Although the petitioner seeks a conservatory order “*only so far as it provides for the levy on agricultural products*”, such an order would have wider ramifications beyond the parties. It is also conceded that the impugned Act has since been replaced by the **Murang’a County Finance Act No. 5 of 2018** published in the *Kenya Gazette*.

27. I have weighed the *merits* of this case *against the public interest*. I am not persuaded that the petition will be rendered *nugatory* if a conservatory order is not granted. Applying the principles I set out for grant of *conservatory orders*; and, mirrored against the available evidence, I decline to grant a conservatory order. That prayer is hereby *dismissed*.

28. However, I find the petitioner has made out a *prima facie* case for grant of a *temporary injunction*. Besides the facts I set out earlier, the county is purporting to apply the impugned Act *retroactively*.

29. For instance, the demand of 13th May 2015 for Kshs 13,843,750 is for the year ended December 2013. There is a further demand dated 3rd June 2015 for Kshs 16,899,170 for the year ended December 2014. The impugned Act only came into force on 12th May 2014. The latest demand of Kshs 81,440,430 is for *consolidated cess* for the years 2013 to 2017.

30. Unless an injunction issues, there is a real risk of enforcement of the levy including but not limited to *imprisonment* of the officers of the petitioner. Like I stated, the petitioner is a public company listed on the Nairobi Stock Exchange. I have not heard the 1st respondent to say that the petitioner is incapable of paying damages if the petition is lost.

31. To avoid the ends of justice from being defeated, I will grant a prohibitory injunction pending the hearing of the petition.

32. My final orders are as follows-

i) That the prayer for a conservatory order is dismissed.

ii) That an injunction is hereby issued restraining the 1st respondent from demanding and collecting the consolidated cess of Kshs 81,440,430 for the years 2013 to 2017 until the hearing and determination of this petition.

iii) That the petition shall be heard on *priority*.

iv) That costs shall abide by the judgment in the main petition.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG’A this 18th day of July 2019.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Ms. B. Kilonzo holding brief for Mr. Kahura for the petitioner instructed by Kaplan & Stratton Advocates.

Mr. M. Warima holding brief for Mr. Kimwere for the 1st respondent instructed by Kimwere Josphat & Company Advocates.

No appearance by the 2nd respondent.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.