



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CONSTITUTIONAL PETITION NO. 17 OF 2014

In THE MATTER OF INTERPRETATION OF ARTICLES 174 (C), (F), 209 (5) AND 201 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OF SECTION 87 OF COUNTY GOVERNMENT ACT NO. 17 OF 2012

AND SECTION 132 (1) (2) AND (3) (A) (B) (C) & (D) OF PUBLIC FINANCE MANAGEMENT ACT NO. 18 OF 2012

AND

IN THE MATTER OF CLAUSE 4 AND FIRST SCHEDULE (B) (ON “FRESH CUT FLOWERS”) OF THE MERU COUNTY FINANCE ACT, 2014

BETWEEN

THE KENYA FLOWER COUNCIL.....PETITIONER

-VS-

MERU COUNTY GOVERNMENT RESPONDENT

JUDGMENT

1. By a petition dated 1st July 2014, the Petitioner sought for the following orders:

a. A declaration that Clause 4 under the First Schedule and more specifically relating to cess amount on Fresh cut Flowers, is inconsistent with Article 174 (c) (f) and 201 of the Constitution of Kenya 2010, Section 87 of the County Governments Act and Section 132 of the Public Finance Management Act 2012

b. A declaration that the decision by the Respondent to block/bar/or restrain movement of truck loaded with petitioners' floricultural products out of its jurisdiction is inconsistent with Article 209 (5) of the Constitution of Kenya 2010 and hence unconstitutional

c. SPENT

d. A permanent stay and/or stoppage of collection and/or remittance of flower cess by/to the County Government of Meru for fresh cut flowers meant for export until proper mechanism of collection and harmonization of cess is reached through consultation of stakeholders

e. Costs of the petitioner; and

f. Any other orders that this Honorable court may deem fit to grant in the circumstances

2. The Petitioner contends that the respondent passed legislation namely Meru County Finance Act 2014 without their involvement, yet it imposes a Cess tax of Kshs. 30 per carton on fresh cut flowers. The legislation was done without any consultation and public participation of stakeholders. Moreover, it is not clear what carton the Kshs 30 applies as there are different types, sizes and weight of cartons based on the

type, quality and destination of flowers for export. According to the Petitioner, without the involvement of expertise views there exist loopholes and uncertainties in the implementation of collection of Cess Tax by the respondent. The Petitioner accused the respondent of acting unilaterally without involving the other relevant stakeholders to participate in formulation of legislation thus, the respondent ignored the express and mandatory provisions of the Constitution **Articles 174 (c), (f) of the Constitution 2010 and Section 87 of the County Government Act No. 17 of 2012 and Section 132 (1) (2) (3) (a) (b) (c) (d) of the Public Finance Management Act 2012.**

3. The Petitioner stated that the intended actions will have adverse effect on the petitioner's members for once the products are packed they cannot be reopened. If they are they may not be exported as per the rules and procedure for export. More was stated; that the members of the Petitioner Council already remit export cess tax to Horticultural Crops Development Authority (HCDA) at the rate of Kshs. 0.30 per kilogram. Thus, it would be prudent for the respondent to first consult and harmonize the cess tax with what members pay to HCDA to avoid duplication or over taxation. They took the view that such harmonization is necessary because the proposed rate by the respondent is about 850% more than the existing rate charged by HCDA which is a drastic increase.

4. This petition was opposed vide the replying affidavit of Silas Gitonga Akubu sworn on 21/11/2014. He deposed that the respondent complied with the provision of **Article 174 (c) and 209 of the Constitution and Section 87 of the County Governments Act No. 17 of 2012** duly. They ensured that there was public participation before the proposed finance bill was enacted into law. Invitations were made through the local FM stations and daily nation. The petitioner's failure to attend and participate in public forums upon sufficient invitation, should only be blamed upon them and not the respondent. Besides, Respondent stated that, the allegation that the cut flowers would lose international appeal once seal is broken is untrue. Since the seal the petitioner is alluding to are the seals placed on the rear doors of the truck to prevent the cartons and/or cut flowers from being stolen or exchanged before getting to the airport, the respondent do not open the cartons but the trucks for purpose of ascertaining the number of cartons. The respondent stated that they together with the petitioner's representatives agreed on a system on where the former's officers would be verifying the number of cartons in each of their trucks which would be located less than a kilometer away from petitioner's members' farms.

Submissions

5. This matter was canvassed by way of written submissions. The petitioner submitted that public participation is an integral part of legislative process which the respondent insufficiently conducted. That the paying of cess tax to the respondent will amount to double taxation as they already pay cess tax to HCDA, national government. Hence, paying again at county level as proposed in the Meru County Finance Act 2014 amounts to double taxation. This will heavily prejudice the economic activities across county boundaries. They relied on the case of **Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR** to support their case.

6. The respondent submitted that the public was allowed to fully participate in the making of the Meru County Finance Act 2014 for they invited the public through vernacular radio station and national wide newspaper. That the petitioner has not proved that the respondent failed to carry out public invitation and or participation. On the issue of double taxation, the respondent stated that agriculture is a devolved function of the county government and under **Section 5 (2) (a) of the County Government Act 2012 read together with Article 209 (3) (c) and Article 185 (2) of the Constitution of Kenya 2010** it may pass a law and levy tax on products within its jurisdiction. They relied on the case of **Law Society of Kenya v Attorney General & 2 others [2013] eKLR**.

ANALYSIS AND DETERMINATION

issue

7. The court has been called upon to determine **whether cess tax on fresh cut flowers imposed under the Meru County Finance Act is unconstitutional.**

Imposition of tax

8. **Article 209 of the Constitution** gives power to both the national and county government to impose taxes and charges. It states as follows:

“(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 governments 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.”

9. Needless to state that taxation is an act of exaction and must therefore, be provided in a statute. Article 210 of the Constitution embodies this principle in taxation and provides thus: -

210. Imposition of tax

(1) No tax or licensing fee may be imposed, waived or varied except as provided by legislation.

10. Accordingly, county governments may impose charges and taxes authorized by an Act of Parliament. Except, however, county legislation that imposes tax should not prejudice national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labor. Allegations have been made that the Respondent made a decision to block/bar/or restrain movement of truck loaded with petitioners’ floricultural products out of its jurisdiction. Such action or decision is inconsistent with Article 209 (5) of the Constitution of Kenya 2010 and therefore unconstitutional.

Public participation

11. Legislative mandate is delegated sovereign power of the people, and therefore, a public function: it should be undertaken in a manner that, *inter alia*, involves participation of the people. See **Article 174 of the Constitution** and **Section 87 of the County Government Act**. Section 87 states:

“Citizen participation in county governments shall be based upon the following principles—

(a) timely access to information, data, documents, and other information relevant or related to policy formulation and implementation;

(b) reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards;

...”

12. Hence, public participation is a key constitutional requirement- a peremptory obligation and command- where a county government undertakes any public function such as formulation and implementation of county legislation. Public participation is also one of the national values and principles of governance that binds and must be observed by all state organs, state officers, public officers and all persons whenever, *inter alia* they make or implement public policy decisions. See article 10 of the Constitution below: -

10. National values and principles of governance

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

13. Public participation should not, therefore, be treated as mere formality, but as a substantive principle of governance which should be adhered to with utmost seriousness. Thus, any process employed to facilitate public participation must be real-time, efficient, effective, comprehensive and measurable.

14. This was well elaborated by Odunga J. in the case of Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR where he held as follows:

“In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.”

15. The petitioner claims that before enacting the Meru County Finance Act the respondent failed to conduct sufficient public participation. The respondent on the other hand stated that they made an announcement on Daily Nation newspaper which they have evidenced, and also on vernacular radio stations. But, the petitioner stated that their members do not speak the local dialect hence making announcement in vernacular radio stations is insufficient.

16. As I stated earlier, and this was stated by Odunga J. (supra), legislation which imposes taxes and levies for the county governments carry greater burden in ensuring that sufficient public awareness of the intended law and its contents is conducted so as to ensure satisfactory public participation. In this petition, public awareness of the intended legislation was done by a single newspaper advertisement, and announcement in vernacular radio stations. The petitioner stated that its members do not speak the local language and that the announcements were not sufficient for purposes of public participation. It bears repeating and I take the view that sufficient public participation entails employing such processes or systems or methods that are effective and comprehensive as to ensure the public in general and the residents of the county in particular are adequately made aware of the intended law and its contents and implication as well as the manner of participation in the process so as to elicit and enlist their participation in the process of formulation and enactment of the intended law. One advertisement in the local daily newspaper and vernacular radio station is not enough considering the law in question is on imposition of taxes and charges. In addition, not all intended audience speak or understand the vernacular language of Meru. Accordingly, the systems or mechanisms employed by the county government of Meru to facilitate public participation herein were severely restricted and could not achieve meaningful or satisfactory public participation in the formulation, enactment and implementation of the law herein which imposed cess taxes and levies on the petitioner.

17. The Petitioner also complained that its members already remit export cess tax to Horticultural Crops Development Authority (HCDA) at the rate of Kshs. 0.30 per kilogram. And, that, it would be prudent for the respondent to first consult and harmonize the cess tax with what members pay to HCDA to avoid duplication or over taxation. According to the Petitioner, the proposed rate by the respondent is about 850% more than the existing rate charged by HCDA which is a drastic increase. The Respondent argued that they are empowered by the Constitution and statutory law to impose tax and levies on agricultural produce within their jurisdiction. I entirely agree. However, the issues raised by the Petitioner on the danger of creating heavier burden of taxation or duplication of taxes on fresh-cut flowers are important considerations in taxation. Such shared revenue-raising area may create aspects of absurd duplication which may give rise to a heavier burden of taxation on the petitioner. This would certainly violate the core of the canon on equality and equity in taxation which demands that tax should be imposed in such manner that its burden is borne on the basis of equal sacrifice by taxpayers. Similarly, such eventuality would offend principles of public finance which aim at promoting equitable society, in particular that the burden of taxation is shared fairly. See **Article 201(b)(i) of the Constitution.**

18. The Constitution is alive to the fact that the burden of taxation should be shared fairly, as the national and county government raise revenue through imposition of taxes and charges. This is to avoid double taxation or creating a heavier burden of taxation on concerned taxpayers. Therefore, there is absolute necessity of a mechanism that does not produce unnecessary duplication of taxes and one that averts creation of unduly heavy burden of taxation on particular category of taxpayers. These issues should be addressed through effective public participation where also taxation expertise involvement is tapped. I hope the process the county government employs in the formulation and implementation of law to impose cess on fresh-cut flowers will yield results desired of the Constitution and tax regime.

19. Implementation of the said law as well as the method of collection of the cess is a major issue in these proceedings. The mechanism of implementation of the tax and the law should be addressed in public participation. Questions raised are quite substantial and make sense in light of export rules and regulations. The explanation given by the Petitioner on likelihood of injury to the merchandise and acceptability in the market are not a trifle. Much more evaluation is necessary.

20. It is now clear the path the court is taking. However, I note from the prayers that the petition targets and is limited to *Clause 4 in the First Schedule and more specifically in relation to cess amount on Fresh cut Flowers*. I will, therefore, issue orders that are specific and appropriate to the petition. In the upshot, I order: -

a. A permanent stay of collection of flower cess by and remittance of flower cess to the County Government of Meru for fresh cut flowers meant for export until proper mechanism of collection and harmonization of cess thereto is reached through consultation of stakeholders.

b. A declaration that the decision by the Respondent to block/bar/or restrain movement of truck loaded with petitioners’

floricultural products out of its jurisdiction is inconsistent with Article 209 (5) of the Constitution of Kenya 2010 and therefore unconstitutional.

c. Given the nature of these proceedings, each party shall bear own costs of the petition.

Dated, signed and delivered in open court at Meru this 11th day of December, 2019

F. GIKONYO

JUDGE

M/s Nelima for Situma for petitioner

Mutegi for respondent – Igweta holding brief

F. GIKONYO

JUDGE