



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CONSTITUTIONAL PETITION NO. 17 OF 2018**

**IN THE MATTER OF ARTICLES 1, 10, 174, 175, 176, 209 & 210**

**OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION**

**OF RIGHTS AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT**

**OF THE CONSTITUTION) PRACTICE AND PROCEDURE RULES, 2013**

**AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW**

**AND**

**IN THE MATTER OF THE MERU COUNTY FINANCE ACT, 2014**

**BETWEEN**

**H.YOUNG & CO. (E.A) LTD.....PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF MERU.....RESPONDENT**

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**J U D G M E N T**

1. On 13th June, 2018, the petitioner lodged a Constitutional Petition which was supported by the affidavit of Maurice Agola Kongo, their administration manager. The petition sought various declarations including a declaration that the respondent's demand for cess fees on road construction materials used by them namely, concrete, asphalt and murram ("the said materials") that are not cessable items under the Meru County Finance Act, 2014 is unlawful, unconstitutional and null and void; that the actions of the Respondent in continuing to levy Cess fees without a supporting legal framework violates the provisions of the Constitution; that a prohibitory injunction directing the Respondent to stop the levying of the said fees as well as a mandatory injunction to restrain them from continuing to levy the said Cess fees.

2. In its petition, the petitioner alleged that it had been engaged by the Kenya Urban Roads Authority (KURA) to undertake the construction of the Meru bypass road. That in executing the said works, they have been using the said construction materials. That under the Meru County Financial Act, 2014 ("the said Act"), the said materials are not listed as cessable items in Schedule 1.

3. Sometimes in the month of April 2018, the respondent demanded cess fees for the said materials. The petitioner failed to pay whereby the respondent impounded the petitioner's four (4) trucks. The petitioner contended that the levying of cess fees was unconstitutional and a violation of the petitioner's fundamental rights and freedoms.

4. The respondent filed its response to the petition on 27<sup>th</sup> June, 2018 supported by the affidavit of Francis Njenga Mungai sworn on 26<sup>th</sup> June, 2018. It contended that the petitioner had hitherto faithfully paid the taxable Cess in respect of the said materials. That by a letter dated

5<sup>th</sup> December, 2016, the petitioner had requested for review of the cess fees which the respondent declined. That having previously paid the said Cess, the petitioner was estopped from claiming that Cess was not payable.

5. It was the respondent's contention that paragraph B of the **First Schedule of the said Act** provided that transportation of sand/ballast is cessable. That concrete, murrum and asphalt fell under the category of sand/ballast whose transportation attracted Cess. That this was a mere revenue dispute which did not amount to a constitutional petition but a civil dispute which ought to have been filed before the lower court. 6. The petition was canvassed by way of written submissions. The petitioner submitted that, under **Article 175 (b) and 209 (3) of the Constitution**, the respondent is allowed to levy tax upon various items. That the **First Schedule to the Act** provides for payment of cess fees for transportation of sand and ballast. That the materials used by the petitioner in the construction of the Meru bypass was not one of the items that are considered cessable under the said Act. That the demand for cess was therefore unconstitutional as it was in breach of **Article 210 (1) of the Constitution of Kenya** which requires that taxation be legislated upon.

7. On estoppel, it was submitted that the receipts produced were for sand transport and another labeled miscellaneous which was a clear admission by the respondent that they charged for items which are not defined under the Act. Consequently, if tax had not been provided for in the law, it could not be levied. The cases of **Federation of Women Lawyers Kenya (FIDA) v Attorney General & another [2018] eKLR**, **Law Society of Kenya v Kenya Revenue Authority & another [2017] eKLR** and **Republic vs. Public Procurement Complaints, Review and Appeals Board & Another Ex Parte Kenya Airports Authority [2005] 1 KLR 628** were relied on in support of those submissions.

8. For the respondent, it was submitted that the petitioner had all along complied in paying cess in respect of extraction and transportation of all the construction material within Meru County. That the respondent was therefore estopped from contending that it should not pay the said cess. The fact that the petitioner had sought for review of Cess from Kshs.1000/- to Kshs.500/- was an acknowledgement that Cess was payable.

9. It was further submitted, that the court should employ the maxim of *ejusdem generis rule* in interpreting the said Act. That this was a mere revenue dispute which could not amount to a constitutional petition. The cases of **Coast Calcium Limited v County Government of Mombasa [2017] eKLR** and **Lipisha Consortium Limited & another v. Safaricom Limited [2015] eKLR** were relied on in support of those submissions.

10. The issues for determination are **whether this petition meets the threshold of a constitutional petition** and **whether the Meru Finance Act, 2014 provides for the levying of cess on concrete, asphalt and murrum.**

11. This court is conferred with jurisdiction to hear any question regarding the interpretation of the Constitution. This is provided for under **Article 165 (3) of the Constitution** which provides:-

**“3. Subject to clause (5), the High Court shall have—**

**(a) unlimited original jurisdiction in criminal and civil matters;**

**(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;**

**(c) ...**

**(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—**

**(i) the question whether any law is inconsistent with or in contravention of this Constitution;**

**(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;**

**(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and**

**(iv)...”**

12. It was the respondent's contention that the dispute between the parties was a mere revenue dispute which did not amount to a constitutional claim. On the other hand, the petitioner alleged that its rights under the constitution had been violated.

13. It was the petitioner's contention that the respondent had impounded its vehicles with threats of detainment for refusal to pay Cess fees. That the respondent had imposed Cess fees on materials that were not cessable under the said Act.

14. It is clear from the petition that, the petitioner had alleged that its right to property had been infringed. That the impoundment of its vehicles without any legal backing was an infringement of its constitutional right to property. That the imposition of Cess fees without a backing legislation was contrary to **Article 210 of the Constitution.**

15. To my mind, these two issues are constitutional. They touch on the bill of rights, the issue of right to private property and the right not to be taxed without an enabling legislation. In this regard, I reject the respondent's contention that this is a mere revenue dispute which raises no constitutional issues.

16. In any event, the petitioner clearly set out in the petition the rights that it alleged had been infringed, the provisions of the Constitution that are alleged to be breached and the manner in which they were allegedly being breached by the respondent. To my mind, the petition satisfied the test laid down in the case of **Anarita Karimi Njeru v. Republic [1979] eKLR** on what constitutes a constitutional petition.

17. The second issue is whether the **Meru Finance Act, 2014** provides for the levying of cess on concrete, asphalt and murrum. The legislature is clothed with the duty to make the law while the role of the judiciary is to interpret that law. The courts bridge the gap of what the law is and what it is intended to do since the statute cannot be referred back to the legislature for interpretation. Once the legislature has enacted a law, it becomes *functus officio*.

18. In their role as the guardians and interpreters of the law, the courts are supposed to be well guarded. In the case of the **Federation of Women Lawyers Kenya (FIDA) v Attorney General & another [2018] eKLR** Mativo J. stated:-

***“It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot legislate itself.”***

19. In **Nelson Andayi Havi v Law Society of Kenya & 3 others [2018] eKLR** the Court held:

***“There are numerous rules of interpreting a statute, but without demeaning the others, the most important rule is the rule dealing with the statutes’ plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive”.***

20. In this regard, all that the court does is to seek the intention of the legislature and to enforce it. This can be discerned from the plain meaning of the words used or the explanations given by the legislature in the statute itself, such as, in the preamble.

21. **Section 2 of the Meru County Finance Act, 2014** provides:-

***““cess” means fees charged for goods specified in the first schedule’.***

22. I have looked at the **First Schedule to the said Act**. Under **paragraph B**, there is a charge of KShs.1,000/- for transportation of **sand/ballast**. The respondent contended that the construction materials used by the petitioner, to wit, **concrete, murrum and asphalt** fall under the category of sand and ballast. The respondent invited the court to apply the *ejusdem generis rule* and hold that the said material are part of sand and ballast.

23. The respondent gave definitions of the construction materials used by the petitioner and invited the court to hold the said materials are one and the same as sand and ballast. I note that the **said Act** has neither defined sand nor ballast.

24. According to the **Oxford Advanced Learner’s Dictionary, Oxford University Press, 8<sup>th</sup> Edn, 2015**, the following are the various definitions given to the said terms: -

a) **Sand:** ***“a substance that consists of very small fine grains of rock. Sand is found in beaches, deserts, etc”***

b) **Ballast:** ***“a layer of stones that makes a strong base on which a road, railway/railroad, etc, can be built”.***

c) **Asphalt:** ***“a thick black sticky substance used especially for making the surface of roads”.***

d) **Concrete:** ***“building material that is made by mixing together CEMENT, sand, small stones and water:”***

e) **Murrum:** ***“a type of reddish soil that is often used to make roads in Africa”***

25. From the foregoing definitions, one thing that sticks out is that, all of them are substances used for construction. However, the said terms do not refer to one and the same substance. They are different and they consist of their own specific /unique properties. They are different from each other. Accordingly, sand and ballast is not the same as asphalt, concrete and/or murrum.

26. The court was invited to apply the *ejusdem generis rule* in interpreting paragraph B. The question therefore is whether the use of the words sand/ballast in **paragraph B** of the **First Schedule to the said Act**, are general or specific words in terms of the definition of *ejusdem generis rule*.

27. **Garner A. Bryan, Black’s Law Dictionary (9<sup>th</sup> Edition Thomson Reuters 2009) at page 594** has defined *ejusdem generis rule* as: -

***“A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items on the same class as those listed. For example, in the phrase horses, cattle, sheep, pigs, goats,***

*or any other farm animals, the general language or any other farm animals –despite its seeming breadth- would probably be held to include only four-legged, hooved mammals typically found on farms, and thus would exclude chickens”.*

28. What the court has to discern is, whether the intention of when legislating the **Meru Finance Act, 2014**, the County Assembly of Meru had the intention of levying Cess on Asphalt, Concrete and Murrum. Looking at the **First Schedule to the Act**, the legislature was as exhaustive as possible. It tried to capture as many taxable items as possible. It referred to items by its own name. Asphalt, concrete and murrum are not synonyms for sand or ballast. If it was the intention of the legislature to levy Cess on all road construction materials, it should have either set out all those materials exhaustively in paragraph B, or should aforesaid used such general words as, **‘and other construction materials’** immediately after the word, **‘ballast’**.

29. My view therefore is that, reading the words sand/ballast to include *asphalt, concrete and murrum* would be reading into the statute words or terms or materials that were not there. It would be adding into the statute things that were not included or not intended all together. If it was intention of the legislature to include them, nothing would have been easier than either to include them expressly or use words of general application to enable the court include them on the application of the **ejusdem generis rule**. Accordingly, the **ejusdem generis rule** is inapplicable for lack of use of general words as aforesaid.

30. The fact that the petitioner had been paying Cess as contended by the respondent, but denied by the petitioner, cannot right a wrongful act. Tax must be authorized by law. The principle of estoppel cannot be raised against a statute, leave alone the Constitution. Let the County Government of Meru go back to its legislature and amend the **First Schedule to the said Act** if it wishes to levy Cess legally on those construction materials. In **Henry Muthee Kathurima v Commissioner Of Lands & another [2015] eKLR** the court stated: -

***“It is our view that estoppel cannot be used as shield to protect unlawfully acquired property; estoppel cannot be used to circumvent Constitutional provisions and estoppel cannot override express statutory procedures; there can be no estoppel against a statute.”***

31. Consequently, I am of the view and so hold that the **Meru Finance Act 2014** has not provided for levying of cess on concrete, asphalt and murrum.

32. In this regard, the petition has merit and is hereby allowed as prayed. This being a Constitutional matter which raised genuine constitutional issues of public interest, I will not make any order as to costs

**DATED** and **DELIVERED** at Meru this 18<sup>th</sup> day of October, 2018.

**A. MABEYA**

**JUDGE**