



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL CASE NO. 5 OF 2012

ALI ABDULLAHI AHMED.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF MANDERA.....DEFENDANT

JUDGEMENT

1. This case was filed in 2012. Initially the defendants were Town Clerk County Council of Wajir, Town Clerk Council of Mandera and Town Clerk Town Council of Mandera. However, through a further amended plaint dated 21st May 2015, the Plaintiff Ali Abdullahi Ahmed brought the present proceedings against the County Government of Mandera in this Civil Suit that was filed way back in 2012. He stated that he was a businessman buying and transporting miraa from Meru County to Mandera town and that the defendant illegally and unfairly imposed charges or levies, or cess against him of Kshs.10,000/= per (miraa) vehicle per day since 2007 until September, 2011 when the **Hon. Justice A. O. Muchelule in Embu High Court Judicial Review Misc. Application No. 61 and 62 of 2010 and 20 of 2011** prohibited the defendant from acting in excess or absence of jurisdiction.

2. He stated also that the defendants appealed the above High Court decision to the Court of Appeal and **Martha Koome, Alnashir Visram** and **Otieno Odek JJA** upheld the decision of the High Court and held that the amounts levied by the defendant were illegal. He therefore claimed repayment of a total of Ksh.69,600,000/= being the amount of charges imposed against four miraa vehicles at Kshs.4,000/= per vehicle at Mandera Township market for 1,740 days; and Kshs.6,000/= per vehicle for four vehicles for Mandera County Council (Elwak) for 1,740 days, as the charges were raised contrary to the express provisions of the Agriculture Act (Cap. 318), the Income Tax Act and the Kenya Constitution. He alleged abuse of power and contravention by the defendant of the Local Government Act (Cap. 265) now repealed and the County Government Act of 2012, and thus asked for the following reliefs from this court –

- (1) Judgement that the plaintiff pursuant to equitable doctrine of tracing be allowed to recover Kshs.69,600,000/= from the defendant being money illegally collected by the defendant at the rate of Ksh.10,000/= per day from the plaintiff since 2007 until September 2011.**
- (2) In the alternative Kshs.69,600,000/= being cess fess or tax on miraa collected and held in trust by the defendant on behalf of the plaintiff.**
- (3) Interest at court rates on the above.**
- (4) Exemplary or punitive damages for exceeding, abusing and/or acting without authority.**
- (5) Costs of this suit.**
- (6) Any other relief that this court may deem fit to grant.**

3. Through an amended statement of defence dated 26th October 2015, the defendant replied to the averments of the plaintiff, and stated that the charges levied were authorized through by-laws of the County Council of Mandera and fixed to be paid by the plaintiff among other traders and approved by the then Minister for Local Government in accordance with (the Local Government Act) Cap. 265 and as such the plaintiff's claim was baseless, misleading and utterly incorrect. It was also contended that the findings of **Muchelule J in Embu High Court Misc. Application No. 62 of 2010 and No. 20 of 2011** were merely prohibitory in nature and could not form the basis of the claims set out in the further amended plaint of the plaintiff. It was also further claimed that the plaintiff could not trade for free (in Mandera) without paying lawful dues to the defendant and that the plaintiff was thus estopped from demanding refund of the monies which he had not proved, and after he had enjoyed services offered by the defendant including, garbage collection, and toilet and water services. It was also stated in the defence that the Court of Appeal set aside the entire ruling of **Muchelule J** and found that the only illegality established was the absence of by-laws approved by the Minister for Local Government which did not entitle this court to order retrospective recovery of any cess

already paid. It was also stated in the defence that the amount of Ksh.69,600,000/= allegedly paid by the plaintiff in a duration of less than two years, could not be proved as no particulars of the same were provided, and the plaintiff was put to strict proof thereof. The defendant thus sought that the plaintiff's case be dismissed with costs.

4. At the trial, the plaintiff called two witnesses. PW1 was himself and he stated that he was a miraa businessman transporting miraa from Maua to Mandera since 2007. In his operations he used four Pick Up vehicles to transport miraa, and in the process, he transported miraa on a daily basis from Maua to Mandera and was charged Kshs.6,000/= at Elwak, and also Kshs.4,000/= at Mandera for each Pick Up. According to him, the law did not authorize the levying of the said charges by the predecessor of the Mandera County Government. According to him, he paid the amounts from 2007 to 2011 when he heard about the coming into effect of a new law which required payment of only Kshs.6,000/= per Pick Up. He thus wanted to be refunded monies he paid per miraa vehicle to the predecessor of the defendant between 2007 and 2011 because such charges were illegal. He said however that some of the receipts for the payments made were destroyed by rain, and confirmed that all the receipts were not written in his name. He produced about thirteen (13) receipts which were in the names of drivers, and demanded to be paid a total of Kshs.69,600,000/=.

5. In cross-examination he admitted that he did not have a licence to transport miraa but maintained that he started his miraa transport business in January 2007 and continued to operate four (4) vehicles per day. He stated that he was the Chairman of the Miraa Business and used the said motor vehicles though he did not have their registration numbers, even though the vehicles belonged to himself and his brother. He also stated that he was not able to show all the receipts for the amount of Kshs.69,600,000/= which he was claiming, and agreed that some receipts were in the name of Ahmed and others in the name of Gideon but insisted that he was relying on those receipts for his claim. He stated that his claim was for a period of four (4) years at the rate of Kshs.40,000/= per day. He maintained that he suffered loss because the money paid was his, and agreed that currently he paid only Kshs.6,000/= per miraa vehicle in accordance with the existing law. He emphasized that during the period of his claim, there was no law authorizing charges.

6. In re-examination, he stated that the receipts bore the motor vehicle numbers, and that the Council issued the receipts in the name of respective motor vehicle drivers though he paid the money.

7. PW2 was Hassim Abdullahi a miraa vehicle driver, employed by the plaintiff from 2007 to 2011. It was his evidence that he transported miraa from Meru to Mandera using different vehicles and that they used to pay cess to the County Council of Mandera of Kshs.6,000/= at Elwak and also paid Kshs.4,000/= to the Mandera Town Council totaling Kshs.10,000/= per vehicle per day, though they did not know the law under which they paid the amount, which came from his employer the plaintiff.

8. In cross-examination, he stated that though the name that appeared in his witness statement was Hassim, his identify card and driving licence was in the name of Hessim. He admitted that the driving licence he had in 1992 was a duplicate and did not have the original. He did not know why the name in the police statement had different spellings. He said that he was given a duplicate driving licence on 13th September 2010 and that he did not have any document to show that he was a licenced driver in 2007. He also stated that his employment contract with the plaintiff was verbal. He did not know how much the plaintiff was claiming but maintained that such amount was contained in the receipts from the County Government of Mandera. He did not know that the plaintiff was claiming an amount of almost Kshs.70,000,000/=. He maintained however that he paid cess and gave the receipts to Ali the plaintiff. When shown receipts, one for Kshs.4,000/= dated 5th October 2007, and another dated 8th May 2011 for Kshs.6,000/= he said the two receipts were issued to him.

9. In re-examination, he stated that the total number of vehicles used was about eighteen (18) and the drivers were also eighteen (18). He confirmed that for the two (2) receipts which were in his name Hassim, he paid the amount indicated therein. He stated however that people generally called him Hassim.

10. That was the close of the plaintiff's case.

11. The defence called one witness DW1 Ibrahim Barrow Hassan, the County Executive Committee Member incharge of Finance and Planning in Mandera County. It was his evidence that he had seen the plaintiff's claim in the amended plaint, and was aware that the plaintiff traded between Meru and Mandera. He was not working for the County Government or County Council between 2007 and 2011 but had seen the plaintiff's claim and the rulings relied upon, specifically the ruling dated 19th September 2011 delivered by **Justice Muchelule**.

12. He stated that between 2007 and 2011, Mandera County Government did not exist, and at that time, there existed the Mandera Town Council and Mandera County Council, both of which charged cess.

13. On the rulings of **Muchelule J** dated 19th September 2011, he stated that the Judge said that there was no authority or approval from the Minister for Local Government to charge cess on miraa and according to him, from that day the Town Council of Mandera stopped charging cess on miraa.

14. He stated however that the County Government of Mandera filed an appeal and the Court of Appeal on 23rd March 2014 delivered a decision in Nyeri setting aside the ruling of the High Court and stated that the cess which was gazetted was lawful, and secondly that the cess levied by the Mandera County Council was illegal for lack of a by-law approved by the Minister for Local Government in accordance with section 148 and 206 (1) of the Local Government Act as read with section 192 (a) (3) of the Agriculture Act.

15. He wondered how the plaintiff initially claimed Kshs.22,620,000/= from County Council of Mandera, Town Council of Mandera as well as County Council of Wajir and Town Council of Wajir, only later to inflate the amount to Kshs.69,600,000/= and only against the Mandera County Government, while the initial claim against Mandera County Government was only Kshs.45,240,000/=. He stated that though the claim of the plaintiff was based on 1,740 days, the total amount claimed was far above the total for the days.

16. He clarified also that during the period under claim, Mandera Town Council only charged Kshs.4,000/= per day, while Mandera County Council charged Kshs.6,000/= per day per miraa vehicle.

17. He also stated that going by the ruling of **Judge Muchelule**, the vehicles used by the plaintiff were either two (2) or three (3) vehicles only. On the receipts which were produced by the plaintiff in court, he stated that the said receipts were for more than four (4) vehicles, which was not believable. According to him, the receipts produced by the plaintiff were for a total amount of Kshs.132,000/= only while the plaintiff was now wrongly claiming Kshs.69,600,000/=. He said that the decision of the Court of Appeal above only declared the charges by Mandera County Council illegal not those charged by Mandera Town Council. He also stated that cess collected was not refundable as services had already been rendered to the plaintiff and other members of the public, such as provision of cleaning and toilet services. He said that though the plaintiff said that the charges were unfair and oppressive, the Court of Appeal in their decision did not say so.

18. According to him also, the plaintiff was seeking to be paid money which belonged to the public and which he did not prove to have paid in the first place. Since local authorities had the mandate to collect taxes and render services such money was not refundable.

19. In cross-examination, he confirmed that he was aware that the plaintiff was a miraa trader but stated that he did not know the size of his business. His knowledge came from the reading of the judgement of the court at Embu that the plaintiff was a miraa trader. He confirmed that from Meru one had to pass Elwak before getting to Mandera town and that the two places were about 225Kms apart. He was aware that the County Government of Mandera was the successor of Mandera County Council and Mandera Town Council. He also confirmed that the plaintiff paid Kshs.6,000/= at Elwak and Kshs.4,000/= at Mandera town as cess which was a total amount of Kshs.10,000/= per vehicle per day.

20. According to him, the Court of Appeal said that Kshs.6,000/= collected at Elwak was illegal because the by-law used to collect the amount had not been approved by the Minister for Local Government.

21. Regarding his witness statement, he said that though he said four (4) local authorities were initially sued in this matter that could have been a mistake as it appeared that only three (3) local authorities were initially sued. In the amended plaint however, he agreed that only Mandera County Government appeared as the defendant because the cess relating to Wajir was determined by the Court of Appeal as legal. He stated that he was surprised that the original claim of Kshs.45,250,000/= had, without explanation, shot up to Kshs.69,600,000/=: and did not understand how the new amount was arrived at. He was aware of the receipts produced in the Embu High Court but was not aware if they were the same receipts produced herein. He agreed that even a turn boy could pay the cess and his name would appear in the receipt. According to him, since many people paid cess on miraa, the plaintiff should not be refunded because such would open a Pandora's box. He agreed that Elwak was a dropping point for miraa before the vehicles moved on to Mandera town.

22. In re-examination, he said that the plaintiff was a miraa trader but not a retail seller of miraa and according to him, the plaintiff operated about three (3) vehicle of miraa per day. He said that initially the claim against Wajir County Council was for Kshs.22,620,000/= and added to the claims against the other two original defendants it totalled Kshs.45,240,000/=. He confirmed that the Court of Appeal delivered its judgment on 23rd March 2014 and said that, at that time, the predecessors of the County Government of Mandera were not collecting cess on miraa. According to him, the plaintiff should have produced all the receipts for the claim of approximately Kshs.70,000,000/=: to support his claim.

23. That was the end of the defendants' evidence.

24. After the evidence of the plaintiff and defendants was closed, parties' counsel agreed to and filed written submissions, which they did not highlight, and I fixed a judgement date in the presence of Mr. Owuor for the plaintiff. I have perused and considered the written submissions of both parties counsel and the case authorities cited to me.

25. The submissions on both sides dwelt mainly on the interpretation of the two cases **Embu High Court Miscellaneous Application 61 and 62 of 2010 (JR)** consolidated and **Embu High Court Miscellaneous Civil Application No. 20 of 2011 (JR)**, all decided by **Muchelule J** on 19th September 2011, and the interpretation of the decision of the Court of Appeal in **Nyeri Civil Appeal No. 68 of 2012** arising from **Embu High Court Miscellaneous Civil Application 61 and 62 of 2010** delivered by the Court of Appeal on 23rd March 2014. The submissions also dwelt on proof of cess paid by the plaintiff through receipts, and whether cess if already paid could be refunded.

26. The first issue is whether taxes or cess once paid can be refunded. In my view, any levies or taxes collected illegally can be refunded, unless the collector and the claimant agree to a workable formula of compensation for the same. On this, I fully agree with the reasoning of **PJO Otieno J in Mombasa High Court Misc. Civil Application No. 265 of 2015 – Based Titanium Ltd vs County Government of Mombasa & Another [2016] eKLR** where the learned Judge stated –

“42. In that perspective it would be defeatist to say that since there is no statutory obligation to refund, the 1st respondent may as well sit pretty with what it has, in the opinion of the court, taken from the exparte applicant contrary to law. To meet the substantive interests of justice and the law, I direct that to decline an order for restitution would be to condone arbitrary deprivation of property and therefore bless a violation of an exparte applicant's right under Article 40 of the Constitution. That must be obviated by an order of mandamus directing the 1st respondent and commanding it to effect a refund of all the sums it has levied and collected from the exparte applicant...”

27. The second issue is with regard to the proof of the amount. This is a case for refund of an amount of Kshs.69,600,000/= as cess, fees or tax on miraa collected by the defendant or defendant's predecessor illegally. It is basically a claim for a liquidated amount. As has been stated by courts over and over again, such claims have to be specifically pleaded and proved. This position was restated in the case of **Capital Fish Kenya Ltd vs Kenya Power & Lighting Co. Ltd [2016] eKLR** a decision of the Court of Appeal cited by counsel for the defendant herein.

28. For such a claim to succeed, the plaintiff has to demonstrate to the court how that claim arose as well as the amount or amounts involved. This being a civil case, the standard of proof is on the balance of probability, which means that weighing the evidence of the plaintiff as against the evidence of the defendant, which one is more believable than the other.

29. In the further amended plaint dated 21st May 2015, the plaintiff gave the particulars of his claim under paragraph 3 of the plaint as follows-

“3. At all material times the plaintiff is and/or was carrying on interalia business of miraa between Nairobi, Central, Eastern and North Eastern Provinces within the Republic of Kenya.

(a) That in the course of buying and transporting miraa from Meru County to Mandera town the defendants jointly and severally made the plaintiff to pay illegal, and/or unfair charges, levies and/or cess of Kshs.10,000/= per vehicle per day since 2007 untill September 2011 when Honourable Justice A.O Muchelule (Mr.) in Judicial Review Misc. Application Nos. 61 and 62 of 2010 and 20 of 2011 Embu prohibited the defendants from acting in excess or absence of jurisdiction.

(b) That despite the said ruling by Hon. Justice A. O. Muchelule (Mr.) referred to above the defendants continued to levy cess on miraa being transported by the plaintiff.

(c) That the defendants appealed to the decision of Hon. Justice A. O. Muchelule at the Court of Appeal and Judges Martha Koome, Alnashir Visram and Otieno Odek upheld the decision of the High Court and held that the amount being levied by the defendants were illegal.

(d) The said daily collection, charges, levies and/or cess by the defendants for 1740 days amounts to 69,600,000/= (Kshs.10,000 x 1740 days x 4 vehicles) as particularized hereunder –

Point of collection	Amount	No. of vehicles	No. of days
Mandera Township (Mandera market)	Kshs.4000	4	1740
Mandera County Council (Elwak)	Kshs.6000	4	1740
Total			Kshs.69,600,000

(e) Further and/or in the alternative the said sum of Kshs.69,600,000/= is refundable by the defendants jointly and severally to the plaintiff as money had and received by the defendants to the use of the plaintiff.”

30. The above amounts had to be proved through evidence. In his evidence, the plaintiff admitted that from the time that the Court of Appeal rendered its decision, no further cess of Kshs.6,000/= was levied.

31. The plaintiff has relied heavily on the decision above of **Justice Muchelule** and the decision of the Court of Appeal to support his case. He has produced some receipts. He called only one witness as a driver, and has not given the registration numbers of the vehicles he used. He claimed some receipts were destroyed by rain.

32. One the decision of the High Court presided over by **Muchelule J** related to a case between **Ali Abdullahi Ahmed** (the plaintiff herein) and **Kuso Dahir Ali** as applicants against the Clerk of the Town Council of Mandera. It was **Miscellaneous Application No. 20 of 2011 (JR)** and a decision in the matter was rendered by the High Court on 19th September 2011 with the court stating that the charges of Ksh.4,000/= cess per miraa vehicle levied by the defendant for 2 or 3 vehicles were illegal.

33. In **Miscellaneous Application No. 61 and 62 of 2010 (JR)at Embu**, the parties were still **Ali Abdullahi Ahmed** and **Kuso Dahir Ali** as applicants and the respondent were Clerk County Council of Wajir and County Council of Mandera. The same High Court found that the imposition of cess on miraa, was without legal authority and that both the County Councils of Mandera and Wajir were prohibited from levying cess, fees or tax on the exparte applicants Miraa.

34. The plaintiff came to this court in 2012. However, an appeal was lodged in the Court of Appeal from the decision in **Misc. Application 61 and 62 of 2010** from which a decision was delivered by the Court of Appeal on 23rd March 2014 at Nyeri. The appellants were the Clerk County Council of Wajir and Clerk County Council of Mandera and the respondents were **Ali Abullahi Ahmed** and **Kuso Dahir Ali**.

35. The Court of Appeal concluded its judgement as follows-

“24. For the foregoing reasons, our re-evaluation of the evidence on record and interpretation of the relevant provisions of law lead us to set aside in entirety the ruling dated 19th September, 2011 and substitute in its place the following orders-

(i) Cess imposed on miraa by the County Council of Wajir pursuant to Legal Notice No. 113 dated 5th September 2008 and the County Council of Wajir (Miraa Import) cess by-law, 2008 is legal.

(ii) Cess imposed on miraa by the County Council of Mandera is illegal for want of a by-law that has been approved by the

Minister for Local Government pursuant to the provisions of section 148 and 206 (1) of the Local Government Act as read with section 192 (A) (3) of the Agriculture Act.

(iii) This appeal being partially successful, each party shall bear its/his own costs.”

36. It follows therefore that the decision made against Mandera Town Council in **Miscellaneous Application No. 20 of 2011 Judicial Review at Embu** still stands, as the cess was illegal because the Minister for Agriculture did not approve the same.

37. With regard to cess charged by Wajir County Council under Legal Notice 113 of 5th September 2008, such was lawful. However, the cess charged by County Council of Mandera was illegal because there was no by-law approved by the Minister for Local Government. In effect therefore, both the charges that were levied against the plaintiff by the predecessors of the Mandera County Government on miraa were illegal, and if proved were recoverable.

38. The plaintiff, if he paid the charges was required under the law of evidence to prove his claim on the balance of probabilities. He has produced very few receipts and has not bothered to serve a notice on the County Government of Mandera to produce the counterfoils of the receipts which were issued to him or to his drivers, and which he claimed to have been destroyed by rain. This court cannot assume the number of vehicles he operated every day. He brought only one driver to testify on his behalf instead of bringing the various drivers who operated his vehicles for that long period. He did not even give a list of the vehicles, though he said he operated his business with his brother who did not testify. His advocate in submissions has also not highlighted the receipts produced.

39. In my view, the plaintiff has not proved on the balance of probability, his claim for the amount of Ksh.69,600,000/=. He has only proved the amount for the receipts he has produced in this court. His explanation that some receipts were lost in the rain does not hold water as he has never either brought a police abstract or any document or evidence from anybody in authority, such as a Meteorological officer or a chief to confirm that indeed such a report of loss of receipts was made to him or her of destruction of such important documents that were meant to be relied upon in the court of law by rain.

40. Consequently, I find that what the plaintiff has proved is the claim for the receipts in the plaintiff's further list of documents dated 10th February 2018 and filed in this court by Wasuna & Co. Advocates, amounting to Kshs.182,000/= which is the amount I will award him.

41. Though the plaintiff has claimed exemplary or punitive damages against the defendant for abusing authority no evidence has been tendered to support this claim. The claim is therefore dismissed.

42. I thus enter judgement for the plaintiff for the total of the receipts annexed to the plaintiff's further list of documents amounting to Kshs.182,000/= which should be refunded to him by the defendant with costs. I award interest to the plaintiff on the amount of award above at court rates from today till payment in full.

Dated and delivered at Garissa this 8th November, 2018.

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George Dulu

JUDGE