



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**PETITION NO. 9 OF 2015**

**BASE TITANIUM LIMITED.....PETITIONER**

**VERSUS**

**THE COUNTY GOVERNMENT OF MOMBASA.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**THE PETITION**

1. The Petition involves a question of interpretation the power of a County Government to levy taxes or charges under Article 209 of the Constitution. By a PETITION dated 20<sup>th</sup> February, 2015 the Petitioner pleads its cause of action as follows:

**“CONTRAVENTION OF THE PETITIONER’S CONSTITUTIONAL RIGHTS BY THE RESPONDENTS**

*10.The Petitioner states that the Respondents have, and in particular, the 1<sup>st</sup> Respondent has, contravened or violated the Petitioner’s said constitutional rights under the constitution of Kenya as follows;*

*10.1 Contrary to the express provisions of Article 209(5) of the Constitution, the 1<sup>st</sup> Respondent, a public body has violated the Petitioner’s Constitutional right by exercising taxation or revenue-raising powers and impose a cess on the Petitioner’s trucks transporting the Petitioner’s processed mineral products, for the purpose of exportation, from Kwale County across the 1<sup>st</sup> Respondent’s County to Mombasa Port at the rate of Ksh.3000.00 per truck.*

*10.2 Contrary to the express provisions of Article 209 of the Constitution the 1<sup>st</sup> Respondent, a public body has unlawfully exercised powers that restrict and violate the Petitioner’s Constitutional right to move its goods under the SML across the 1<sup>st</sup> Respondents County boundaries.*

*10.3 Contrary to the express provisions of Article 39 of the Constitution that 1<sup>st</sup> Respondent, a public body has unlawfully exercised powers that restrict and violate the Petitioner’s Constitutional rights to freedom of movement across the 1<sup>st</sup> Respondent’s County boundaries.*

10.4 Contrary to the express provisions of Article 27 of the Constitution the 1<sup>st</sup> Respondent a public body has unlawfully exercised powers that restrict and violate the Petitioner's Constitutional rights to equal protection, and equal benefits of the law.

10.5 Contrary to the express provisions of Article 47 of the Constitution the 1<sup>st</sup> Respondent, a public body has unlawfully exercised powers that are oppressive and unfair to the Petitioner and which violate the Petitioner's Constitutional rights to fair administrative action that is lawful and reasonable."

2. The Petition is supported by a verifying affidavit of its General Manager (External Affairs and Development), Joseph Shwarz, sworn on the 29<sup>th</sup> February 2015 setting out the facts relied upon in the petition.

## **RESPONSE**

3. In a response entitled "1<sup>st</sup> RESPONDENT'S REPLY TO PETITION" dated 27<sup>th</sup> April 2015, the 1<sup>st</sup> Respondent set out its grounds of opposition to the petition at paragraphs 3-8 thereof and sought its dismissal with costs as follows:

### *"1<sup>st</sup> RESPONDENT'S REPLY TO PETITION DATED 24<sup>TH</sup> APRIL, 2015*

3. In answer to paragraph 10.1 of the petition the 1<sup>st</sup> Respondent denies violating Article 209(5) of the constitution of Kenya, 2010 or at all and contends that the Cess charged Motor Vehicles carrying goods or products of the Petitioner are legitimate charges in accordance with Articles 209 (3) and (4) of the Constitution.

4. The 1<sup>st</sup> Respondent further avers that the Kshs.3,000/= Cess charged per Truck is a uniform charge applicable to all commercial Trucks carrying goods weighing over seven (7) tonnes regardless of the nature of goods on board and the Petitioners products have not in any manner been specifically targeted to pay the said charges.

5. In response to paragraph 10.2 of the Petition the 1<sup>st</sup> Respondent denies imposing any restrictions against the petitioner as alleged or at all and further contends that there is no violation of Petitioner's rights to move its goods under Constitution or the special Mining License across its borders but contends that the said Constitutional right does not vitiate the 1<sup>st</sup> Respondents' rights to enable it provide basic services within its jurisdiction.

6. The 1<sup>st</sup> Respondent denies restricting or curtailing the Petitioner's freedom of movement across its boundaries of alleged in paragraph 10.3 of the Petition and contend that the said cess charges are not in any manner aimed at restricting movement but on the contrary it is meant to facilitate improvement of services within the 1<sup>st</sup> Respondent's jurisdiction.

7. The 1<sup>st</sup> Respondent denies acting contrary to Articles 27 of the Constitution and reiterates that the said cess charges are applicable to all commercial Motor Vehicles carrying goods within the 1<sup>st</sup> Respondents jurisdiction without any discrimination whatsoever and that if anything it is the Petitioner that is demanding to be given preferential treatment by seeking to be exempted from payment of Cess that it applied equally to all Motor Vehicles carrying goods above a certain weight in accordance with the 1<sup>st</sup> Respondent Finance Act.

8. In answer to paragraph 10.5 of Petition the 1<sup>st</sup> Respondents denies the Petitioners allegations thereof and contends that he said Cess charges are very minimal fair and reasonable and it is therefore a misnomer to brand the same as oppressive or lacking any basic or law and that the said charges are legitimate in accordance with Article 109 (3) and (4) of the Constitution and other relevant statutory provisions.

**REASONS WHEREFORE** the 1<sup>st</sup> Respondent humbly prays that the petition dated 24<sup>th</sup> September 2014 be dismissed with cost.”

4. The 1<sup>st</sup> Respondent also filed a replying affidavit sworn by Jonathan Nyongesa, the Chief Finance – Finance Department in the County Government of Mombasa deponing to the facts of the case at paragraphs 3 and 4, significantly as follows:

**“3. The First Respondent has been levying cess charges to all goods carrying Motor Vehicles and the amount of Ksh.3,000/- is applicable to all Motor Vehicles whose weight exceeds seven (7) tones.**

**4. The said cess charges are levied without discrimination to all motor vehicles carrying goods of any category regardless of value thereof and therefore no consideration is given to the fact that the said goods happen to be minerals as the charges are [same] even if the goods are considerably less valuable so that for instance a Motor vehicle carrying over seven tones of building coral blocks, hardware or even farm produce attract the same rates as the petitioner’s goods.”**

5. Despite service, the 2<sup>nd</sup> Respondent did not enter appearance or file a response, although it was on the first court appearance represented by a Ms. Lutta.

### **SUBMISSIONS**

6. Counsel for the Parties – M/S Sharpley Barret & Co., Advocates for the Petitioner and M/S Madzayo Mrima & Jadi, Advocates for the 1<sup>st</sup> Respondent – filed written submissions, respectively dated 20<sup>th</sup> May 2015 and 29<sup>th</sup> June 2015, and 12<sup>th</sup> June 2015. At the hearing of the petition the Counsel – Mr. Oyatsi for the Petitioner and Mr. Kinyanjui for the 1<sup>st</sup> Respondent made supplementary oral submissions, and Judgement was reserved.

### **THE RESPECTIVE CASES OF THE PARTIES**

7. It was submitted for the Petitioner that the 1<sup>st</sup> respondent County Government was a creature of statute, which could only exercise powers conferred upon it under statute and it was therefore not authorised and, indeed was expressly prohibited, to levy charges for transportation of goods through the County, as follows:

*“The respondent has purported to exercise powers or rights that it does not have under statute. The 1<sup>st</sup> petitioner is purporting to exercise powers expressly prohibited by the Constitution. The legal effect of the 1<sup>st</sup> Respondent’s action is that all actions so taken are null and void, being contrary to the Constitution and the Statute. The 1<sup>st</sup> Respondent cannot obtain any benefit from such illegal actions which are void ab ignition. At the time of filing the petition, the amount unlawfully levied by the 1<sup>st</sup> respondent was Ksh.1,542,000/- as at December 2014. As at June 2015, the amount had increased to Ksh.2.589,000/- with additional charges which continue to be collected from the petitioner from July 2015 to the date of judgment.”*

8. In denying that the County Government of Mombasa has taken over a function of the national government and maintaining that Article 209 (5) of the Constitution did not bar the levy; that the charges are minimal, reasonable and targeted only to the tonnage of goods and not the particular items transported; and that the petition did not disclose prejudice under the sub- Article, Counsel for the Respondent submitted that -

*“The County Government has not acted in excess of powers granted by Statute. They are entitled as a County to levy charges and taxes because there is no way of raising revenue. [The] effect of Article 209 is to give power to impose taxes and charges. Article 209 (4) gives power to levy*

*charges for services. Petitioner asserts that charges are illegal under Article 209 (5) of the Constitution. The Article does not outrightly bar the 1<sup>st</sup> respondent from imposing charges or taxes where the economic activity involves a cross-border provision of goods and services. The restriction is way the power is exercised. They should exercise the same in a way that is not prejudicial to the national interests. It is not an outright bar. The levies imposed are consistent with the Constitution and the County Government Act and an Act of the County Government has given legal effect to the activity.”*

9. Counsel for the Petitioner responded that on the principle of national mobility of goods in Article 209 (5) of necessity involves crossing the boundaries of counties and as such the petitioner’s goods as goods in transit are not subject to such levies, and in any event the petitioner’s goods are also covered by the exception in the sub-Article for economic activity across the boundaries of two counties. The petitioner's case is summarised in written submissions filed in reply to the 1<sup>st</sup> respondent's submissions as follows:

*“Petitioner’s submissions dated 29<sup>th</sup> June 2015 in response to the 1<sup>st</sup> Respondent’s submissions of 12<sup>th</sup> June 2015*

*4. Article 209(5) expressly prohibits the 1<sup>st</sup> Respondent from imposing taxes or exercising revenue raising powers in a way that prejudice national economic policies, economic activities across county boundaries or national mobility of goods, services, capital or labour.*

*5. The 1st Respondent admits that the said tax is imposed on the Petitioners trucks which are engaged in the transport of the petitioner’s mineral products from Kwale County across the two county boundaries.*

*6. This is an economic activity across the two county boundaries and is therefore excluded from taxation and other revenue raising powers by the 1<sup>st</sup> Respondent under the said express provisions of Clause 209(5) of the Constitution.*

*7. In addition, the transport or movement of mineral products from the Petitioner’s mineral site in Kwale County to Mombasa Port is a national mobility of goods in terms of the said Article 209 (5) of the Constitution.*

*8. Consequently, the Constitution itself expressly prohibits the 1<sup>st</sup> Respondent from exercising the said powers and/or imposing the said tax or charges.*

### **ISSUE FOR DETERMINATION**

10. With deference to Counsel for their submissions on other provisions of the Constitution and the law, the only issue for determination in this petition as alluded to in the beginning is whether levy by the County Government of Mombasa of a cess charge for transportation of the petitioner's goods through the County is constitutional within the power of the County Government under Article 209 of the Constitution. The broader question suggested by the 1<sup>st</sup> Respondent as to the general power of the County Government to make laws for imposition of cess charges on vehicles carrying goods within its administrative boundaries is implicit in the issue identified above.

### **DETERMINATION**

#### ***No taxation by County Government on Minerals***

11. At the outset, it is conceded and I agree that in view of Article 62 of the Constitution, which defines public land to include minerals and vests such land in the national government, there is no power in a county Government to levy a tax or other charge on the mineral product.

12. In that regard, the Hon. Attorney General and the Chairman of the Transitional Authority in their

letters, respectively dated 11<sup>th</sup> July 2014 and 11<sup>th</sup> September 2014 (copy of the former expressed to have been attached to the latter letter and copied to the petitioner) give the correct interpretation of the Constitution that **“the Constitution therefore does not mandate to impose any taxes or charges on minerals”** and that **“minerals fall under the domain of the national government, the management and administration of the mining of titanium falls within the mandate of the national government as well.”**

13. However, to extrapolate the interpretation to conclude that a levy charged on the vehicles that transport the titanium mineral, as with transportation any other goods, is prohibited by the Constitution is, in my view, erroneous. With respect, I do not accept that a charge on the **transportation** thereof, as a charge for road service provided by the County Government, is a charge on the **mineral** product itself, which is the province of the national government. The cess charges are on the vehicles transporting goods of any kind entering and off-loading in Mombasa, and are not a tax or charge on the product transported.

14. Therefore, the Court respectfully disagrees with the conclusion and advise given by the Hon. Attorney General in the aforesaid letter on the matter that –

**“CONCLUSION AND WAY FORWARD**

*From the forgoing therefore, the mining levy and **cess charges** imposed by the County Government of Kwale and Mombasa respectively **is unconstitutional.** This is because, as per Article 62 (f) all minerals are vested in the National Government and not the county government. Further because the power to impose taxes or charges [on] minerals has not been transferred to the County Government by the Constitution or any national law, the power still vests in the national government.”*

**Taxes and other charges by County Government under Article 209 (3) and (4)**

15. As shown below, County Governments do have authority to impose taxes **under Article 209 (3) and (4)** of the Constitution but in doing so are required to consider whether the tax will have any prejudicial effect to the matters set out in Article 209 (5). Article 209 of the Constitution is in the following terms:

**“209 (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.**

16. Article 209 (3) of the Constitution grants the County Government power to impose a tax that it is authorised to impose by an Act of Parliament. There was not demonstrated any **Act of Parliament**, as opposed to An Act of the County Government, that authorised the County Government to make a levy by way of cess charge on transportation of goods into the County. The 1<sup>st</sup> Respondent was wrong in its reliance of the sub-Article as authorising the imposition of the cess charge subject of the suit. Section 5 of the County Governments Act, 2012 only authorises taxes on the matter reserved to County Governments under Article 185 of the Constitution, and section 21 of the Act merely provides for the procedure of enacting money bills which include tax bills.

17. Article 209 (4) of the Constitution empowers the County as well as the national governments power to impose charges for the services they provide. I accept as urged by the 1<sup>st</sup> Respondent that facilities for road transport is one of the basic services **‘including garbage collection, parking facilities, street lighting, drainage and roads maintenance’ – “that members of the public including the petitioner expects to be provided by the 1<sup>st</sup> respondent.”** The word services is not defined in the interpretative Article 260 of the Constitution. However, the meaning of the word **service** as given in the **Concise Oxford English Dictionary** 11<sup>th</sup> ed. (2006) agrees with the 1<sup>st</sup> respondent’s submission in that the noun **service** is defined as-

***“a system supplying a public need such as transport, or utilities such as electricity and water.”***

18. Accordingly, I find that the County Government as with the National Government has under Article 209(4) of the Constitution authority to impose charges for services that they provide, and these include road transport service.

### ***Construction of Article 209 (5) of the Constitution***

19. Deconstructed to its constitutive elements, Article 209(5) of the Constitution is made of the following ingredients:

A recognition of ***“the taxation and other revenue-raising powers of a county”***

An injunction that the said powers of the 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.***

20. In plain language interpretation, the sub-Article (5) of Article 209 of the Constitution acknowledges the power of county governments to tax under Article 209 (3) and otherwise raise revenues including the service charges under Article 209 (4), with an injunction that the said power shall not be exercised in such a manner that will prejudice the interests set out therein. Accordingly, I respectfully reject the contention in the submissions by Counsel for the Petitioner that Article 209 (5) of the Constitution provides an automatic prohibition on the power of County Governments to levy tax or other charges, when he submits that ***“the Constitution itself expressly prohibits the 1<sup>st</sup> Respondent from exercising the said powers and/or imposing the said tax or charges.”*** The prohibition is, in my view, subject to demonstration of prejudice in terms of the sub-Article 5.

21. The County Governments are of course expected to analyse their proposed taxation or other revenue raising ventures for their effect on national economic policies, economic activities across county boundaries and national mobility of goods, services, capital or labour. This is understandable because the tax and revenue measures of a county should not adversely affect the larger national interests of factors of production (capital, labour) and economic development through commercial enterprise and trade facilitated through movement of goods and services, or cross-border economic activities which are carried out in counties other than the one levying the charge.

22. However, if the County Government does not so consider the effect of its taxation or it takes a different view of any adverse outcome of its measures, it is incumbent on a party who seeks court's intervention to enforce the injunction of Article 209 (5) of the Constitution to demonstrate that the tax measures adopted or contemplated will prejudice the national concerns of the Sub-Article. Mere citation of likely damage, injury, loss or adverse effect of imposed or threatened tax action will not suffice.

23. In addition, the petitioner cannot rely on the abstract statement by the Cabinet Secretary to demonstrate prejudice in this particular for purposes of Article 209 (5). The Cabinet Secretary for the National Treasury in his letter of 12<sup>th</sup> September 2014 who gives the correct interpretation of the matter when, apparently acknowledging that the County Governments may have power to impose a tax or other revenue raising measures, he advises that they should consider the effects of such tax measures on the economy, as follows:

*“More importantly, and as we have been advising County Governments, imposing such charges will worsen investment climate in your county and indeed in the entire country. Inevitably, this will discourage private investment flows to Kenya which we believe is a critical component of our strategy to grow the economy, create jobs and reduce poverty.”*

24. But this is a general and abstract view of likely effect of taxation by counties. It is supported by any concrete scientific study or analysis of cost, effect magnitude and impact on the parameters on the national interest concerns set out in Article 209(5). With respect, I take the view that a specific complaint by a specific petitioner against a levy of cess charges imposed on all vehicles carrying goods into the County of Mombasa should, in line with the provisions of Article 209 (5), have been supported by a demonstration of the **prejudice** suffered or likely to be suffered or impacted on *“the national economic policies, economic activity across counties and national mobility of goods, services, capital or labour”*. I do not consider it sufficient to show the loss incurred by the petitioner as a result of payment of the charges as evidenced by the copies of receipts attached to the Petition and the supplementary bundle thereof produced at the hearing with consent of the counsel for the 1<sup>st</sup> respondent. Unless, it were demonstrated that the amount of tax or cess charge was prohibitive to the continued conduct of the petitioner's business as to affect its decision to invest in the country and lend credence to the Cabinet Secretary's forecast of loss of investment flow in the country.

### **Evidence before the Court**

25. On the evidence before the Court, the petitioner has not demonstrate to the Court that the imposition of the cess charge of Ksh.3000/- per 7-ton lorry load has adverse effect in a manner that *“prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour”* as contemplated under Article 209 (5) of the Constitution. The burden of proof of the fact of prejudice lies with the petitioner who, in accordance with sections 107 and 108 of the Evidence Act, would desires the court to give judgment as to legal liability of the 1<sup>st</sup> respondent, which is dependent on the existence of facts of prejudice which he asserts and who would fail if no evidence is received in the matter.

26. In the verifying affidavit the Petitioner merely claims that the cess charges are oppressive and unfair to the petitioner and a violation of its constitutional rights , as follows:

**“28 The said administrative actions are oppressive and unfair to the Petitioner.**

29 It is evident from the above conduct that the 1<sup>st</sup> Respondent is determined to continue to disobey the Constitution of Kenya, and **violate the Petitioner's rights without any legal basis at all.**

27. The petitioner did not adduce evidence to support the complaint on breach of Article 47 of the Constitution on the right to fair administrative action as alleged in the Petition.

### **The Cess Charge**

28. The County Government of Mombasa Finance Act 2014 at section 90 provides for the levy of transport cess in the following terms and rates:

#### **“90. CESS CHARGES – ENTERING MOMBASA**

*(To be paid by **all goods carrying vehicles entering Mombasa County and offloading in Mombasa County.** Shall not apply for **vehicles on transit**)*

698. Pick-ups - 1000.00      500.00

699. Canters/lorry below 7 tonnes - 2000.00      1,000.00

**700. Over 7 tonnes - 3000.00      2,000.00**

*[showing current and proposed charges]*

29. It is clear that the charge is on vehicles carrying goods entering and off-loading in Mombasa County without discrimination as to the nature of goods ferried, with an exception only for **vehicles in transit.** The exception is similarly not on consideration of the goods carried but the **vehicles** on transit. A vehicle may well transit through the County carrying goods that are not **transit goods.**

30. Having found that County has constitutional authority under Article 209 (4) to levy charges for the transportation of goods through the County regardless of the nature of the goods, there cannot be a basis for holding that the imposition of the charge is a breach of the petitioner's constitutional right of movement under Article 39 of the Constitution.

### **CONCLUSION**

31. The County Governments have under Article 209 (3) and (4) of the Constitution power to levy taxes and charges for services that they provide including road transport services. The cess charge imposed by the Mombasa County Finance Act, 2014 for **“all goods carrying vehicles entering Mombasa County and offloading in Mombasa County”** is not a tax or charge the mineral product of Titanium mined and transported by the Petitioner, and the charge is, accordingly, not barred by reference to Article 62 of the Constitution, which vests minerals as part of public land under the authority of the national Government. The Petitioner has not demonstrated how the imposition of the cess on the vehicles carrying its product into Mombasa prejudices the national interests of the provisions of Article 209 (5) of the Constitution. The Petition, therefore, fails.

### **ORDERS**

32. Accordingly, for the reasons set out above, the Petition dated 20<sup>th</sup> February 2015 is dismissed with costs.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 21<sup>st</sup> DAY OF February 2017.**

**ERIC OGOLA**

**JUDGE**

**Appearances:**

M/S Sharpley Barret & Co. Advocates for the Petitioner

M/S Madzayo Mrima & Jadi Advocates for the 1<sup>st</sup> Interested Party