



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 268 OF 2015

**IN THE MATTER OF: AN APPLICATION BY BASE TITANIUM LIMITED TO COMMENCE
JUDICIAL REVIEW PROCEEDINGS**

FOR ORDERS OF CERTIORARI AND PROHIBITION AND MANDAMUS.

AND

IN THE MATTER OF: COUNTY GOVERNMENT ACT OF KENYA

AND

**IN THE MATTER OF: IMPOSITION OF TAXES AND LEVYING OF CHARGES UNDER THE
COUNTY GOVERNMENT ACT.**

BASE TITANIUM LIMITED.....APPLICANT

VERSUS

1. THE COUNTY GOVERNMENT OF MOMBASA

2. THE ATTORNEY GENERAL.....RESPONDENTS.

RULING

1) The *ex parte* applicant by his Notice of Motion dated 19. 10. 2015, seeks orders that:-

(a) That an order of certiorari to forthwith remove to the High court and quash and annul the decision made by the 1st Respondent a public body to impose and collect a tax or a charge or levy described as offloading fees on the Applicant's mineral products delivered to the Applicant's private storage facility located at Likoni in Mombasa County and destined for export.

(b) That an order of mandamus to compel the 1st Respondent, a public body to refund to the Applicant all the sums of money unlawfully or illegally collected from the Applicant without any statutory basis and in breach of its own laws as offloading fees on the Applicant's mineral products delivered to the Applicant's private storage facility located in Likoni for export.

(c) That an order of prohibition be directed to the 1st Respondent restraining the 1st Respondent from exercising powers that it does not have under the law and/or which are in

breach of its own laws to impose a tax or levy or charge described as offloading fees on the Applicant's mineral products delivered to the Applicant's storage facility at Likoni and destined for export.

(d) That the costs of this application be provided for.

2) That Notice of Motion was filed pursuant to the leave of court granted on the 28.9.2015 pursuant to the *ex parte* Notice of Motion dated 24. 9. 2015. The application was founded on three grounds that the 1st Respondent acted without jurisdiction or in excess of its lawful jurisdiction when it purported to impose and collect taxes or charges upon the applicants mineral products; that in enforcing the said decision it was exercise powers alien to it as being contrary to the Constitution and its Finance Act, 2014. The second ground was that the impugned decision was oppressive, unfair and violated the applicants rights under Article 47 of the Constitution and lastly that the decision was such that no public authority applying itself to the relevant law and acting reasonably would have reached.

3) Those facts were amplified in the statement of facts and verified by the affidavit of JOSEPH SCHWARZ sworn before Mwangi P Githinji, Commissioner for Oath on 24. 9. 2015, which among other documents exhibited the schedule of levies charged and paid by the *ex parte* applicant between 10. 8. 2015 and 16/9/2015 in the sum of Kshs.6,687,800.

4) The application was opposed by the Affidavit of one JIMMY WALIAULA, the legal officer of the 1st Respondent. The thrust of the opposition was that the Constitution of Kenya permits the 1st Respondent to levy and charge charges for purposes of raising revenue to enable it provide services; that pursuant to the Constitution, the 1st Respondent enacted **COUNTY GOVERNMENT OF MOMBASA, FINANCE ACT, 2014** which at sections (*namely parts of the schedule*) **90** and **96** provide for levying of less charges and offloading fees in respect of goods or items within the County.

5) It is further contended that the said Act imposes offloading charges provided the same are offloaded within the County and that it matters not that the same originate for without the County; that it is irrelevant whether or not the goods are offloaded within in precincts of a private property and that there was no law barring the 1st respondent from levying the offloading charges. Lastly it was contended that the County Finance Act was validly and lawfully passed having been subjected to public participation.

6) Although served, the 2nd respondent did not file any papers neither did it participate at the hearing. When the parties appeared before Court on the 14. 10. 2015 it was directed that the application be canvassed by way of written submissions and that the parties appear before court to highlight the filed submissions.

7) Pursuant to those directions the *ex parte* applicant filed written submissions on the 30. 11. 2015 while the 1st Respondent did so on the 12.11. 2015.

Submissions by the parties

8) In their written submissions the parties largely reiterated their pleadings and did say little or make any attempt at interpreting the provisions of the law relied on. Equally no attempt was made to assist the court on whether there have been judicial pronouncements on the provisions relied on.

9) On its part, the 1st Respondent availed a copy of the Mombasa County Finance Act 2014 which has six sections and a schedule running into 139 parts. Save for section Part II (sections 4 & 5) which deal with property rates and rental charges, section 6 dealing with single business permits, there is section 2 which is worded as follows:

“Imposition, revision of taxes fees etc of the county, the Finance Bill 2014 seeks to prescribe the rates of taxes and charges for the assessment year 2014 – 2015; the rates at which taxes and other charges will be payable during the year 2014 – 2015 from properties, businesses, markets agricultural produce, outdoor advertisement vehicle parking, heritage sites county parks

directions, resolutions etc under the local government”

10) This to me is the only section that may be ambiguous as to the targeted areas of taxation. I however find that it does not permit levying of offloading charges on minerals.

11) My reading of the Act is that the schedules attached to the Act must have their foundation and justification in the statute. I hold the view that the schedules are but subsidiary to the Act and therefore must be grounded upon it.

12) I have anxiously read and sought to understand the Act and I have totally failed to lay my hand on where the charges christened as “*offloading charges*” could be grounded. I will hesitate to make this the fulcrum upon which this decision shall rest but I will come to it later.

Constitutional Justification for legislation by County Governments.

13) Arising from the principle of the Sovereignty of the people, the legislative duty is donated to elected representatives. For that reason Article

“A county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule.”

14) Having created a state organ called County Governments, the Constitution then designed duties and distributed the functions between the said organs and the National Government. Since ours is based on rule of law, the County Governments are bound to act within the law even when it comes to raising revenue for the operations.

15) It is therefore to my mind not in vain that the legislative power is geared towards making laws that are necessary or incidental to ***'the effective performance of the functions and exercise of the powers of the County government under the fourth schedule'***

It must equally be born in mind that the object and principles of devolution is to empower the people toward self governance coupled with enhanced participation in the exercise of power of the state in decision making as a way of vesting on the people the right to manage own unique and regional peculiar affairs to further their development.

16) It follows that a County government would on occasions have unique and peculiar circumstances that would require unique legislation informed by and based on the National diversity, climatic, and topographic conditions as well as economic conditions. It further follows that it would be wrong to impose a legislation of a County Government on an inhabitant or resident of another County. County legislation thus ought to be tailor made to serve its purposes.

17) Consequently when it comes to taxation, the Constitution grants power to the County Government to legislate on only three areas. The Constitution provides:-

Article 209 (3) & (4)

“(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”.

18) From the papers filed, it is not in dispute that the offloading charges disputed in these proceedings are neither property rates nor entertainment charges. That leaves the only other window to levy tax and charges to be as authorised to impose by an act of parliament and charges for the services they render.

19) At this juncture the questions that must be asked and answered is; which Act of parliament allows the 1st Respondent to impose the offloading fees? Secondly, what services does the 1st Respondent offer to necessitate being funded by the offloading charges.

20) I proceed from the point that the *ex parte* applicant having averred and contended that neither Constitution nor parliamentary enactment allows the 1st respondent to levy the charges, it became the duty of the 1st Respondent to point at the legal provision that donates to it the power to proceed as it has sought to proceed. At the end of the parties' address to court, nothing was pointed out to me towards discharging that duty. I say so well aware that the legal burden was at all times upon the *ex parte* applicant to prove his case. However I am also persuaded that unless in natural sciences one cannot positively prove a negative. Ours is a social science and I hold that once the *ex parte* applicant said no law exist, the evidential burden then shifted and fell upon the 1st Respondent to demonstrate that an authorization indeed existed in the law. I therefore find on the first question that there is no authorization under an Act of Parliament for the 1st Respondent to charge offloading charges.

21) On the second question, if the charges are in respect of services provided by the 1st Respondent, it was submitted by the *ex parte* applicant that the Respondent provides no services in respect of the goods it seeks to impose offloading charges on. To that submission the Respondent was candid and forthright that it is not imposing the charges on account of services rendered. I therefore find that the only window through which the charges could have been imposed was under the provisions of Article 209 (3) 6 and that there is no authorisation by an act of parliament.

22) I would have stopped there but there is cited to me part 96 of the schedule to County Government of Mombasa Finance Act 2014 which provides:-

“OFFLOADING FEES (To be levied for offloading within Mombasa County and shall not apply if offloading is done in ones Private facilities (depot or warehouse) or For distribution within Mombasa County ie. Shops retailer and wholesalers etc levy shall apply) (to be charged at revenue barriers and within town in addition to the less fees (for those coming out of the country) To me that provision is indeed mouthful and may be intended to be equivocal. I however reach it to mean that offloading charges are to be levied for all goods coming out of the country if the same are intended for distribution to shops like retailers and wholesalers but not when discharged in Private facilities.”

23) I have said before that my reading of the text of that law, reveals no specific provision on which the offloading charges may be grounded. I shall treat the schedule, for what it is; a subsidiary to the substantive Act.

To find out if the schedule is properly /legally founded, the tests are:-

- (i) Does it fall within the scope and ambit of the power conferred by the statute to the delegate.
- (ii) Does the rules/regulation by delegate as framed to any extent, appear inconsistent with the parent legislation and
- (iii) Whether or not they infringe on any of the fundamental rights or other restrictions or limitations, imposed by the Constitution.

See **KENYA COFFEE PRODUCERS AND TRADERS ASSOCIATION & ANOTHER-VS-COFFEE BOARD OF KENYA & 2 OTHERS {2013}eKLR** quoting from **KRUSE -VS-JOHNSON {1898}2 QB 91.**

24) I have demonstrated that the power to legislate on taxation is donated to the 1st Respondent by Article 209 (3). I hold that the legislative power having been confined within the said parameters the purported legislation that, to me, falls outside the parameters was done without jurisdiction. I hold and find that being a creature of the Constitution, the 1st Respondent is bound under Article 2 to not only '*uphold but also respect and defend the Constitution*'. It cannot abrogate to itself powers in excess of those donated for it by its creator.

25) Additionally even if the Constitution allowed it to legislate as it purported to do, the legislation itself says the extent to which the offloading charges were to extend. It excludes goods brought from without the country and offloaded at private facilities.

26) It is the *ex parte* applicant's case which has not been challenged that the goods are offloaded at its warehouse for export purposes and are therefore transit goods. It thus follows that even if the legislation was to be in consonance with the donated powers, it would still not affect the *ex parte* applicant's goods.

27) I have come to the conclusion that there was no legal foundation for the 1st Respondent to legislate upon offloading charges on the applicants goods offloaded at its private premises, to impose such charges and to enforce the levy of such charges.

28) What remain for me, before I conclude, is to decide whether the *ex parte* applicant is entitled to all the remedies sought or any of them.

29) The three remedies of judicial review; certiorari, mandamus and prohibition as designed had special place and efficacy to provide. Note one would apply in all circumstance nor would one substitute the other. Each has a purpose and target.

30) Briefly, prohibition was available and designed to issue from the high court and directed at an inferior tribunal or body and forbidding it from continuing to continue acting in excess, or want of jurisdiction or contravention of the law of the land. It would equally target to correct departure from the rules of Natural Justice but would never be to correct the practice, course or procedure of such a body or tribunal or a wrong decision made on the merits. It is thus said that prohibition as opposed to certiorari looks at the future.

31) Certiorari on the other hand looks at the past and targets a decision already made by a body or tribunal in the absence of jurisdiction or in excess thereof or in breach of the rules of Natural Justice.

32) On its part mandamus is a command by the High Court directed at an inferior tribunal or body, a person or public corporation enjoined to perform from a public duty and directing such corporation person, tribunal or body to perform a public duty imposed by a statute where such a corporation, person, tribunal or body has failed to perform statutorily imposed duty. It seeks to ensure that justice is done and comes in handy where there is a remedy which when employed may be less efficacious, convenient, beneficial and effective. Mandamus will however not apply where the duty sought to be performed is in discretionary nor would it issue if the duty is general so as to direct the style and ways of performing a general duty. The public duty as imposed by a statute must be specific precise and unambiguous.

33) Having briefly stated when and on what basis each of the three public law remedies would issue, my next task would be to apply those tenets to the facts before me and the law relied upon to support request for the remedies.

34) My decision finally is that there was no jurisdiction in the 1st Respondent to impose or seek to enforce the regulations towards levying offloading charges. What then follows is that the 1st Respondent ought not be allowed to persist with what has no support in law.

35) To remedy this situation is ordered that the decision already made be and is hereby called for purposes of its being quashed and the future is protected from calling upon the court to issue another order once an attempt is made at the perpetuation, should anybody appear hell bent towards that

direction. That can only be done by an order forbidding such future transaction against the law.

36) I see, on the basis of the foregoing, no need to hesitate in granting orders of Certiorari and Prohibition in terms of prayers 1 & 3 of the notice of motion dated 19th October 2015.

37) I have found it however not very clear or open ended when it comes to the questions of the orders of mandamus sought to direct that the 1st respondent do refund to the *ex parte* applicant all sums collected pursuant to the decision the court has declared contrary to the law of the land.

38) I encounter this difficulty from the premise that, mandamus would issue to compel the performance of specific public duty.

39) In the matter before me it has not been demonstrated in what way a refund of inappropriately collected taxes becomes a duty of the 1st Respondent. I therefore ask; Is there a statute imposing such duty?

40) I am not in doubt at all that no statutory obligation has been established. However I am equally not in doubt that as a state organ the 1st respondent is enjoined to respect, uphold and defend the dictate, of the Constitution that it shall only enforce legally and constitutionally underpinned actions. Where it is proved to have acted badly and against these dictates, then procedural technicalities must take a back seat and the demand for substantive justice given the leeway to reign supreme. This court exercises judicial power as a delegate of the sovereign, the people of Kenya. When adopting and enacting the constitution 2010, they did so and chose the rule of law as style of their governance for themselves and for future generations.

41) Any attempt at circumventing or sidestepping those values and principles of the Constitution must be shunned and reparations made in accordance with the wishes of the people. One of the values of our constitution is the sanctity of private property of whatever nature.

42) In that perspective, it would be defeatist to say that since there is no statutory duty/obligation to refund, the 1st Respondent may as well sit pretty with what it has, in the opinion of the court, taken from the *ex parte* applicant contrary to the 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 the *ex parte* applicant's rights under Article 40. That must be obviated by an order of mandamus directed at 1st respondent and commanding it to effect a refund of all the sums it has levied and collected from the *ex parte* applicant pursuant to part 96 of the County Government of Mombasa Finance Act 2014 and described as offloading charges levied on the *ex parte* applicant's minerals mined in Kwale County and offloaded at the private premises in Mombasa County for purposes of export.

43) The *ex parte* applicant having succeeded in the application entirely I award to it the costs of the application as against the 1st Respondent. I make no orders as to costs against the 2nd Respondent for it has demonstrated lack of interest in the matter and there was never a demonstration that it took part in the promulgation or the legislation of the impugned regulations. Equally it did not at any time oppose the application. The court takes the review that it conceded the application in pursuit of good governance and fidelity to the law for which it must be recommended.

44) It is so ordered.

Dated, signed and delivered at Mombasa this 04th day of March 2016.

P.J.O.OTIENO

JUDGE