REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.385 OF 2013

BETWEEN

CEREAL GROWERS ASSOCIATION…….....……1ST PETITIONER

HUGO WOOD.....2ND PETITIONER

AND

COUNTY GOVERNMENT OF NAROK.....……...…1ST RESPONDENT

COUNTY GOVERNMENT OF NAIROBI……2ND RESPONDENT

COUNTY GOVERNMENT OF NYERI…….…..…3rd RESPONDENT

COUNTY GOVERNMENT OF MURANG'A……...……..…4TH RESPONDENT

COUNTY GOVERNMENT OF TRANS NZOIA……..…5TH RESPONDENT

COUNTY GOVERNMENT OF UASIN GISHU..……..…6TH RESPONDENT

COUNTY GOVERNMENT OF NANDI……..…..7TH RESPONDENT

COUNTY GOVERNMENT OF NAKURU…….……..8TH RESPONDENT

MINISTRY OF AGRICULTURE, LIVESTOCK & FISHERIES…..9TH RESPONDENT

MINISTRY OF DEVOLUTION AND PLANNING……....10TH RESPONDENT

THE NATIONAL TREASURY……...11TH RESPONDENT

JUDGMENT

Introduction

1. The 1st Petitioner, the Cereal Growers Association, is a member-based farmers' organization registered in 1996. It claims that it brings together cereal farmers for collective action to ensure

sustained improvement of their farming enterprises. It also offers cereal farmers fully functioning business structures and business support services that grow their farming businesses and improve farmers' livelihoods. The 2nd Petitioner, Hugo Wood, is a Board Member of the 1st Petitioner and has been engaged in large scale wheat, maize and french beans farming for over 36 years.

2. The members of the 1st Petitioner through the latter, claim that they are dissatisfied with the mode, legality and use of agricultural produce cess which they have been paying to the Municipal, County and City Councils up to 4th March 2013 and subsequently to the 1st to 8th Respondents. They have thus filed this Petition claiming that the actions of the 1st to 8th Respondents in levying agricultural produce cess and related tax without a supporting legal framework violates the provisions of **Article 210(1)** of the **Constitution** that provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation.

3. Further, that the County Governments are violating the Constitution to the extent that they are charging agricultural produce cess in a discretionary and arbitrary manner in violation of **Article 209(5)** of the **Constitution** that requires that taxation and other revenue-raising powers of any County shall not be exercised in a way that prejudices the national economic policies and activities across County boundaries or the national mobility of goods, services, capital or labour.

4. In the Petition dated 25th July 2013, they thus seek the following orders;

"(a) A declaration that the actions of the 1-8th Respondents in continuing to levy/charge Agricultural Produce Cess or related tax without a supporting legal framework expressly violates the provisions of Article 210(1) of the Constitution that provides that that <u>no tax or licensing fee</u> may be <u>imposed</u>, waived or varied except as provided b legislation.

(b) An order directing the 1-8th Respondents to stop the levying/charging of Agricultural Produce Cess or related tax in their areas of jurisdiction until such time as they would have enacted a supportive legal framework.

(c) A declaration under the provisions of Article 10 of the Constitution that it is mandatory for the 1-8th Respondents to widely consult the public in the process leading to the preparation and enactment of any legal instrument to any form of taxation including the Agricultural Produce Cess.

(d) An advisory opinion to be issued to the Respondents to adopt administrative, policy, legal and regulatory mechanisms that will allow the development of legislation to levy Agricultural Produce Cess <u>in framework of maximum public/stakeholder participation.</u>

(e) An advisory opinion to be issued to the Respondents to adopt administrative, policy, legal and regulatory mechanisms that will allow the <u>transparent use</u> of Agricultural Produce Cess. For instance;

(i) Procurement of graders to improve County roads should be done in a system that is fair, equitable, transparent, competitive and cost effective.

(ii) The mode of collection of Agricultural Produce Cess should be streamlined. Corrupt employees should be fired.

(iii) The County Government should continuously engage stakeholders in the sector to give views on how to improve the use of Agricultural Produce Cess.

(f) An advisory opinion to be issued to the Respondents to adopt short-term, medium-term

and long-tern administrative, policy, and legal mechanisms to prevent double-taxation in the levying of Agricultural Produce Cess in accordance with Article 209(5) that provides that 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.

(g) There be no order as to Costs."

The Petitioners' Case

5. The Petitioners claim that agricultural produce cess is a form of tax on the movement of agricultural produce and applies to all farm agricultural produce, livestock and products marketed in all outlets managed by local authorities (now County Governments) and on transit within the Country. That the rate at which and how agricultural produce cess is administered is arbitrary and changes from time to time at the discretion of the respective County Government's sued in this Petition.

6. The Petitioners further claim that the proceeds of agricultural produce cess were initially collected under **Section 201** of the **Local Government Act (Cap 265 Laws of Kenya)** as read with **Section 192A** of the **Agricultural Act (Cap 318 Laws of Kenya),** which had empowered local authorities to pass by-laws imposing payments of agricultural produce cess. That following the repeal of the **Local Government Act** by the **County Government Act** and the repeal of the **Agriculture Act** by **Section 41** of the **Agriculture, Fisheries and Food Authority Act of 2013**, the new Acts **(County Government Act and Agriculture, Fisheries and Food Authority Act)** do not contain legal and regulatory provisions that save the taxation regime contained in the **Repealed Local Government Act** and **Agriculture Act**. That at the moment therefore there is no legal basis for the levying of agricultural produce cess by County Governments and that **Article 210** of the **Constitution** prohibits levying of any tax unless it is provided for by legislation.

7. They also contend that the agricultural sector accounts for 24% of Kenya's Gross Domestic Product (GDP) and accounts for 60% of Kenya's export earnings and 45% of government revenue, and this is even so, despite the many factors that adversely affect the performance of agriculture such as soil fertility, technological advancement, weather etc as well as the legal system and Government policy. On the present legal and regulatory framework for the agricultural sector in Kenya, they claim that it is characterized by *inter alia* existence of outdated laws enacted prior to Independence, existence of many parastatals that play multiple overlapping functions and ambiguous roles, lack of a stable and enabling policy and poor enforcement of rules and regulations governing the sector.

8. That under the provisions of the **Fourth Schedule** to the **Constitution,** County Governments have exclusive mandate over agriculture including crop and animal husbandry, livestock sale yards, County abattoirs, and animal disease control and fisheries. It therefore means that County Governments are the center of agricultural development with an enormous duty to create a framework that will transform the agricultural sector into a more commercially oriented and competitive sector capable of attracting and providing higher incomes and employment for citizens. In that regard, the Petitioners argue that County Governments should boost productivity in the agricultural sector by providing smart subsidies which would encourage small scale and indeed all farmers to shift to high yield crop varieties, undertake research and encourage them to adopt new inputs which in the end would focus on building agriculture as the mainstay for the Kenyan economy.

9. They further claim that for Kenya to achieve sustainable agricultural development, it must enact a modern, efficient and harmonized legal and regulatory framework that will facilitate achievement of the desired outcomes and overall economic growth and development. That under **Article 185(1)** of the **Constitution** the **County Assembly** exercises the legislative authority of the County Government and therefore makes laws that are necessary and incidental to the exercise of the

functions and powers of any County Government in relation to matters specified under the **Fourth Schedule** to the **Constitution,** including the levying of agricultural produce cess. Further, that in passing that legislation, County Assemblies should set up proper structures to ensure maximum public participation.

10. The Petitioners thus claim that this court has jurisdiction to determine the constitutionality of the levying of agricultural produce cess and to issue an advisory opinion that will help the National and County Governments adopt short-term, medium-term and long-term regulatory interventions that will streamline the taxation regime in the agricultural sector, particularly the mode of charging, and use of agricultural produce cess. That the orders elsewhere set out above should therefore be granted as prayed.

The Respondents Case

11. The 3rd, 5th, 6th and 8th Respondents did not file any response(s) to the Petition nor did they participate in the proceedings in any way.

1st Respondent's case

12. The 1st Respondent, the County Government of Narok in response to the Petition, filed a Replying Affidavit sworn by Daudi Naisho, the Administrator of the said County Government, on 6th December 2013.

13. Mr. Naisho deponed that the Petitioners do not have the *locus standi* to bring the Petition in a representative capacity on behalf of all farmers in the named Counties as those farmers were not identified by name. Further, that the 2nd Petitioner has filed the Affidavit in support of the Petition without the authority of the 1st Petitioner. He also stated that the Petition is an abuse of the Court process as the matters raised herein do not fall within the scope of **Article 22(1)** of the **Constitution**. In addition, that the Petition does not satisfy the prerequisites for a Constitutional Petition as the Petitioners have not set forth with any degree of precision the manner in which the Constitution has been infringed.

14. On prayers (d), (e) and (f) requiring the issuance of advisory opinions, the 1st Petitioner claims that those are matters reserved for the Supreme Court and this Court has no jurisdiction under **Article 163(6)** to issue any such opinion**.** That an advisory opinion is exclusively reserved for the Supreme Court and is exercised at the request of the National Government, any state organ or any County Government with respect to any matter concerning County Governments. In any event, that the Petitioners have no legal standing to usurp the role of the National Government, state organs or County Government by seeking such advisory opinions.

15. On the issue of levying agricultural produce cess, the 1st Respondent contends that it has been levied so as to generate income to enable the Respondents provide services to residents of their respective Counties and is therefore a lawful undertaking.

16. That the Petition as filed contains suggestions and proposals and the Court cannot direct the Legislature or the County Assembly on what laws to make or what should be legislated upon. Further, that taxation matters are in a special category of legal proceedings and cannot be determined by way of a Constitutional Petition.

17. The Narok County Government also claimed that the present legal and regulatory framework for the agricultural sector in Kenya does not violate the Petitioner's rights and the issues raised in the Petition should be dealt administratively and are not matters for the Courts. That under **Article 209(4)** of the **Constitution**, County Governments are conferred discretionary powers to impose charges for services and powers to raise revenue and the agricultural produce cess is a charge for raising revenue and does not in any way prejudice national economic policies as alleged by the

Petitioners. That in fact it is not clear whether the Petitioners seek to challenge the constitutionality of levying agricultural produce cess or whether they are seeking to enforce the Agricultural Sector Development Strategy 2010-2020.

18. The 1st Respondent then urged the Court to dismiss the Petition for lack of conclusive evidence to support the Petitioners' contentions since the Court has no evidence to determine the issues raised. That the Petition is in any event meant to pervert the course of justice in favour of an individual, Hugo Wood, and should be dismissed with costs.

The 2nd Respondent's case

19. The 2nd Respondent, the County Government of Nairobi opposed the Petition through its Grounds of Opposition dated 7th May 2014 where it also adopted the Affidavit of Daudi Naisho sworn on 6th December 2013 and the 7th Respondent Affidavit sworn on 19th March 2014. It also filed Supplementary Grounds of Opposition dated 16th June 2014. Its Grounds of Opposition read as follows;

> "***(1) That the 2nd Petitioner (or the Petitioners if at all) has selectively presented to the Court the Laws of Kenya [and] specifically no reference has been made to-***

a. ***The County Governments Public Finance Management Transition Act, No.8 of 2013, (Section 22).***
b. ***Nairobi City County Finance Act, No.2 of 2013, (Section 22).***
c. ***Provisional Collection of Taxes and Duties Act, Cap 415.***

> ***(2) That the 2nd Petitioner (or the Petitioners if at all) seeks orders not available or flowing from this Court [and] specifically advisory opinions(s).***
>
> ***(3) That the 2nd Petitioner (or the Petitioners if at all) has/have not demonstrated any authority to institute this action on behalf of Cereal Growers Association members.***
>
> ***(4) That the Petition by the 2nd Petitioner (or the Petitioners if at all) is an academic endeavor constructed by subjective opinions, diminutive on legal substance and merit demonstrated by paragraphs 27 to 30, 32 to 35, 42 and 43 of the Petition.***
>
> ***(5) That no facts have been provided to demonstrate on the excesses of the taxes imposed on the 2nd Petitioner (or the Petitioners if at all) amounting to a constitutional breach and warranting the attention of this Court.***
>
> ***(6) That no decisive factors have been presented demonstrating that the 2nd Petitioner (or the Petitioners if at all) have and continue to be adversely exposed to the CESS regime beyond the public, other subject of this tax (including horticulture, cash crop firm, ranchers).***
>
> ***(7) That no decisive factors have been presented why the 8 specific Counties out of 47 Counties have been subject to this constitutional action.***
>
> ***(8) That the 2nd Petitioner (or the Petitioners if at all) has made wild allegations including alleged corruption without factual or empirical data in support.***
>
> ***(9) That in addition to the contents of paragraph 8 above this is not an appropriate forum to determine the matter of alleged corruption.***
>
> ***(10) That the Supporting Affidavit and Annextures attached have no nexus to the 2nd***

Respondent.

(11) That the facts proclaimed in the Petition inclined towards a private grievance between the 2nd Petitioner and the 1st Respondent and as such the 2nd Respondent is not a necessary party. And further grounds to be adduced at the hearing."

The 4th Respondent's case

20. The 4th Respondent, the County Government of Murang'a, opposes the Petition through its Grounds of Opposition dated 12th March 2014, and they read as follows;

"(1) That the Petition is a sham, an abuse of the Court process, misconceived, frivolous and totally devoid of merit.

(2) That the Petition does not demonstrate any violation of any law by the 4th Respondent.

(3) That the Court does not have jurisdiction to grant the orders sought in the Petition.

(4) That the Petition is discriminatory and malicious against the 4th Respondent.

(5) That the Petition is speculative, consists of mere generalities and seeks to curtail the provision of services by the devolved units of governance."

The 7th Respondent's Case

21. The 7th Respondent, the County Government of Nandi, in reply to the Petition filed a Replying Affidavit sworn by George Tarus, the County Attorney on 19th March 2014.

22. Mr. Tarus deponed that the Cess on agricultural produce helps in raising revenue for the Counties to be used in important infrastructure development projects including roads which in turn benefit farmers. That the levying of agricultural produce cess does not in any way discourage production but promotes general public good and cess levied has never been excessive or punitive.

23. He stated that there exist legislative provisions that sanction levying of fees and levies by the County Government and that the provisions of the **Agriculture, Fisheries and Food Authority Act, 2013, 1st Schedule Part 8,** provides that the administrative decisions made by a former institution or made by the Minister before the appointed date have effect as if directed by the Authority or Cabinet Secretary under the Act. Further, that the **County Government Act** provides for county planning principles under **Part XI, Section 105(1) (f)** which includes effective resource mobilization for sustainable development and that this principle forms the basis for the incorporation and implementation of revenue raising processes including cess collection and other payments. Further, that **Section 108** of the **County Government Act** empowers County Governments to develop a County integrated plan which includes a resource mobilization framework and therefore the imposition of cess taxes on agricultural produce is one of the resource mobilization strategies used by the County Governments to ensure adequate resources for the County. He contended that if the levying of cess on agricultural produce is discontinued, then it would have negative effects on the County Government development plan.

24. He also claimed that County Governments have followed the law in levying the cess taxes and that they have not in any way breached the provisions of **Article 209(5)** of the **Constitution** in levying cess tax as alleged by the Petitioners and the Petition should be dismissed with costs.

The 9th, 10th and 11th Respondents' Case

25. The 9th, 10th and 11th Respondents filed joint written Submissions dated 14th March 2014. They submitted on the Petition as follows;

26. That subsidiary legislation made under any Act is not repealed by virtue of the repeal of the Act or part of the Act and such subsidiary legislation remains in force unless it is inconsistent with the repealing Act or until it has been repealed by subsidiary legislation issued or made under the provisions of the repealing Act. They thus claimed that the regulations and orders made under the **Repealed Agriculture Act** on fees and charges including agricultural produce, are still in force as if they had been issued under the **Agriculture, Fisheries and Food Authority Act of 2013** and that regulations made under the repealed **Local Government Act** continue to apply irrespective of the repeal of the said Act.

27. Further, that County Governments are empowered by **Articles 209** and **210** of the **Constitution** to impose taxes and charges as revenue raising measures and they may do so under existing by-laws, directions etc and such by laws are not inconsistent with **Articles 209** and **210** of the **Constitution** or the **County Governments Act.** In addition, that by dint **Section 7(1)** of the **Sixth Schedule** to the **Constitution** such by-laws shall be construed with the alterations, adaptations, qualifications and exceptions as are necessary to bring them into conformity with the Constitution and the **County Governments Act, 2012** and other legislation on devolved Government.

28. They also claimed that **Section 23** of the **County Governments Act** and the **Public Finance Management Transition Act of 2013** authorize County Governments to impose rates and charges with necessary modification until a law relating to imposition of rates and charges is enacted. That the revenue raising measures approved by the Minister for Local Government continue being in force until the new budgets of the decentralized units have been approved by the relevant County Assemblies as provided for in the **Public Finance Management Act.**

29. In addition, they submitted that all County Assemblies have enacted Finance Acts for example the Nairobi County Finance Act, Kiambu County Finance Act etc providing for revenue raising measures and the Schedules to these Finance Acts provide for the items to be taxed and the amounts thereof. Further, the County Governments have saved the defunct local authorities by-laws on taxes, duties, rates and charges provided for in the by-laws through their respective Finance Acts. They gave as an example in that regard, **Section 2(2)** of the **Nairobi City County Finance Act, 2013** and they also claimed that by the **County Governments Finance Acts,** all by-laws, directions, resolutions, orders and authorizations on or relating to financial management including taxes, fees and charges issued and given by the local authorities subsisting or valid before the cessation of the application of the **Local Government Act** shall be deemed to have been given or issued under the authority of the respective County Assemblies.

30. They thus submitted that there was in fact and existing a legal and statutory basis for levying of cess by the County Governments and the same was in compliance with **Articles 209** and **210** of the **Constitution.**

31. It was also the submission of the 9th, 10th and 11th Respondents that this Court is not the appropriate forum for determination of the Petition on the matters raised and relating to legislative and policy matters as those are issues best addressed through legislative and executive mechanisms. They claimed therefore that the Court lacks jurisdiction to issue legislative or policy statements/directives on the issues subject of the Petition. Further, that the **Constitution** at **Article 10** and **Article 196(1)(b)** provides for public participation of the members of the public in legislative and other business of the County Assemblies, and therefore the Petitioners should, in exercise of their right of public participation, direct their views or opinions to the appropriate authorities dealing with legislative and policy matters.

32. Lastly, it was their contention that this Courts lacks jurisdiction to give the advisory opinions sought by the Petitioners in prayers (d) (e) and (f) of the Petition as it is the Supreme Court that is vested with jurisdiction to give such advisory opinions and on this issue they claimed that the

Petitioners lacked the *locus standi* to seek such an advisory opinion as it is only the National Government, State organ or any County Government that may seek such an advisory opinion from the Supreme Court. They therefore urged the Court to dismiss the Petition with costs for the above reasons.

Determination

33. It will be recalled that the issue of this Court's jurisdiction was attacked on the basis *inter alia* that this Court cannot issue prayers (d), (e) and (f) of the Petition as they seek advisory opinions on matters concerning County Governments which are matters reserved for the exclusive jurisdiction of the Supreme **under Article 163(6)** of the **Constitution** and further, that an advisory opinion is exercised at the request of the National Government, any State organ or any County Government with respect to any matter concerning a County Government.

34. In that regard, and as I understand it, Jurisdiction, in any matter coming up before a Court, is a fundamental issue that must be resolved at the beginning of any decision. It is the fountain from which the flow of the judicial process originates and that position is clear from the words of Nyarangi, J.A. in ***Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd. [1989] KLR 1 14.***

35. As to what amounts to an advisory opinion, the Supreme Court in ***Re the Matter of the Interim Independent Electoral Commission, Sup. Ct. Const. Appl. No. 2 of 2011***; stated as follows;

> ***"…we consider that such an opinion, in the context of Article 163(6) of the Constitution, means legal advice rendered by the Court to the public body or bodies seeking the same, by virtue of scope created by law. Since such an opinion does not flow from any contest of rights- claims, or claims disposed of by regular process, it does not fall in the class of judgment, or ruling, or order, or decree."***

36. The jurisdiction to give an advisory opinion as stated the the Supreme Court above is provided for under **Article 163(6)** of the **Constitution** which stipulates that;

> ***"The Supreme Court may give an advisory opinion at the request of the National Government, an State organ, or any County Government with respect to any matter concerning County Government."***

Regarding the appropriateness of a question as an advisory opinion, The Supreme Court in ***Re the Matter of the Interim Independent Electoral Commission, (supra)*** stated as follows;

> ***"(1) For a reference to qualify for the Supreme Court's Advisory-Opinion discretion, it must fall within the four corners of Article 163(6): it must be 'a matter concerning County Government.' The question as to whether a matter is one 'concerning County Government' will be determined by the Court on a case-by-case basis.***
>
> ***(2) The only parties that can make a request for an Advisory Opinion are the National Government, a State organ, or a County Government. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as intervener (interested party) or as amicus curiae.***
>
> ***(3) The Court will be hesitant to exercise its discretion to render an Advisory Opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court….***
>
> ***(4) Where a reference has been made to the Court, the subject matter of which is also pending in a lower Court, the Court may nonetheless render an Advisory Opinion if the Applicant can demonstrate that the issue is of great public importance and requiring***

urgent resolution through an Advisory Opinion….”

37. I am duly guided and it is thus clear to my mind that the jurisdiction to render an advisory opinion is in the exclusive mandate of the Supreme Court as can be seen from the provisions of **Article 163(6)** of the **Constitution**. That being my finding, there is nothing else to say in respect of prayers (d), (e) and (f) of the Petition as I must now down my judicial tools in regard to that aspect of the Petition – See **Re Motor Vessel Lollian “S” (supra).**

38. I now turn to consider the substantive issues raised in the Petition before me and in that regard, it was the 1st Respondent’s contention that the Petitioners do not have the *locus standi* to bring the Petition in a representative capacity on behalf of all farmers in the respective Counties as those farmers were not identified by name. Further, that the 1st Petitioner has not been duly authorized to file the Petition on behalf of the members of the 1st Petitioner and the 2nd Petitioner has filed a Supporting Affidavit without the authority of the 1st Petitioner.

39. My answer to the 1st Respondent is simple. I do not see anything wrong with the Petition as it is. The provisions of **Article 22(2)** as read together with **Article 258 (2)** of the **Constitution** establishes who can institute Court proceedings for enforcement of the Constitution as follows;

a. **a person acting on behalf of another person who cannot act in their own;**

b. **a person acting as a member of, or in the interest of, a group or class of persons;**

c. **a person acting in the public interest; or**

d. **an association acting in the interest of one or more of its members.**

It is therefore clear that the Petitioners have the *locus standi* to institute this Petition on behalf of all the farmers and also not necessary for the 2nd Petitioner to obtain the authority of other cereal farmers before bringing forth any Petition to this Court.

40. As to the issue that the Petition is an abuse of the Court process as it raises matters that do not fall within the scope of **Article 22(1)** of the **Constitution** and further that the Petition does not satisfy the prerequisites for a Constitutional Petition as was set out in the celebrated case of ***Annarita Karimi Njeru v Republic (1976-1980) EA 14,*** I am clear in my mind that the Petitioners have filed this Petition claiming that the provisions of **Article 209** and **210** of the **Constitution** have been violated. They have in my view set out with some degree of precision how the said provisions have been violated by the named County Governments and Assemblies and elsewhere above, I have summarized their case in that regard. I have seen no arguments regarding any alleged violation of the Bill of Rights and that is all to say in that regard.

41. Having expressed myself as above, and looking at the Petition again, and as I have stated at the outset, there is only one issue left for determination in respect to prayers (a) and (b); whether a legal framework exists for levying agricultural produce cess, and as a corollary to that issue, whether there is a violation of **Articles 209** and **210** of the **Constitution**.

42. The Petitioners allege in the Petition that the 1st to 8th Respondents are levying agricultural cess without the requisite legislation granting them powers to do so as the **Local Government Act** and the **Agriculture Act** which provided for the levying of agricultural produce cess have since been repealed without saving the provisions that imposed the said cess. They thus claim that the Respondents actions are unconstitutional, illegal and unlawful as they offend the provisions of **Articles 209 (3)** and **210 (1)** of the **Constitution.**

43. **Article 209 (3)** of the **Constitution** provides that a County Government may impose the following taxes;

a. ***Property rates***
b. ***Entertainment taxes, and***
c. ***Any other tax that it is authorized to impose by an Act of Parliament***

Article 210(1) of the **Constitution** is to the effect that**;**

> ***"no tax or licensing fee may be imposed waived or varied except as provided by legislation."***

44. Looking at the provisions of **Article 209(3)** and **210(1)** together, it is clear that a tax, levy or charge can only be charged if it is provided for under the law. In the present Petition, it is not contested by either party that agricultural produce cess was imposed under the **Repealed Local Government Act** and the **Agricultural Act**. The question therefore is whether there is any provision in any law presently providing for the levying of agricultural produce cess.

45. According to the Petitioners, no framework exists for levying the cess but the Respondents contend otherwise. Firstly, under **Article 209(4)** of the **Constitution**, County Governments are conferred with discretionary powers to impose charges for services and the agricultural produce cess is a charge levied for purposes of raising such revenue. Secondly, the provisions of the **1st Schedule Part 8** to the **Agriculture, Fisheries and Food Authority Act, 2013** provides that administrative decisions made by a former institution and made by the Minister before the appointed date have effect as if directed by the Authority or Cabinet Secretary under the Act. Thirdly, the **County Government Act** provides for county planning principles under **Part XI** of **Section 105(1) (f)** thereof which includes effective resource mobilization for sustainable development and this principle forms the basis for the incorporation and implementation of revenue raising processes including cess collection and other payments. Fourthly, **Section 108** of the **County Government Act** empowers County Governments to have a County integrated plan which includes a resource mobilization framework and the imposition of cess taxes on agricultural produce is one of the resource mobilization strategies used by the County Governments to ensure adequate resources for the County. Further, under **Section 24** of the **Interpretation and General Provisions Act,** subsidiary legislation made under any Act is not repealed by virtue of the repeal of the Act or part of the Act. That such subsidiary legislation remains in force unless it is inconsistent with the repealing Act or until it has been repealed by subsidiary legislation issued or made under the provisions of the repealing Act. They thus contend that the regulations and orders made under the **Repealed Agriculture Act** on fees and charges including agricultural produce are still in force as if they were issued under the **Agriculture, Fisheries and Food Authority Act of 2013** and also that the regulations made under the repealed **Local Government Act** continue to apply irrespective of the repeal of the said Act. Lastly, that **Section 23** of the **County Government Act** and the **Public Finance Management Transition Act** of **2013** authorizes County Governments to impose rates and charges with necessary modification until a law relating to imposition of rates and charges is enacted. In that regard they claimed that the revenue raising measures approved by the Minister for Local Government continue being in force until the new budgets of the decentralized units have been approved by the relevant County Assemblies as provided for in the **Public Finance Management Act.** To sum up, they claimed that County Governments have in their respective cases enacted **County Finance Acts** that have provided for the levying of agricultural produce cess.

46. Weighing the rival arguments and to my mind, it is clear that under **Article 209(3)** of the **Constitution**, a County Government has powers to impose entertainment tax and any other tax as authorized by an Act of Parliament. Undoubtedly, **Article 209(4)** of the **Constitution** therefore confers County Governments with legislative discretionary powers to impose charges for services rendered. In my view therefore and reading the provisions of **Article 209(3)** and **209(4)** of the **Constitution**, the County Government may impose an entertainment tax as it is constitutionally provided for but then any other tax or charge that may be imposed by the County Government must be provided for under an existing Act of parliament. I say so because in my view a charge is a form of tax. **Black's Law Dictionary, 8th Edition** defines the term **'tax'** as follows;

"A monetary charge imposed by the government on persons, entities, transactions or property to yield revenue"

Article 210(1) has then made it clear that no tax can be imposed or waived unless it is provided for by legislation. But where then is the legislation providing for levying of agricultural produce cess?

47. Agricultural produce cess was previously levied under the provisions of **Section 192A (1)** of the **Agricultural Act** which stated as follows;

> ***"A local authority may, with the consent of the Minister given after consultation with the Minister for the time being responsible for local government, by by-laws impose a cess on any kind of agricultural produce, and may in the by-laws make such incidental provisions as is necessary or expedient, and the cess shall form part of the Local authority's revenue."***

Section 201 of the **Local Governments Act** then gave the local authorities general powers to make by-laws and it is within this power that the local authorities made by-laws imposing agricultural produce cess.

48. The two Acts above were repealed post 2010 and regarding by-laws and any subsidiary legislation passed under them, **Section 24** of the **Interpretation** and **General Provisions Act,** provides as follows;

> ***"when an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder".***

As can be seen this provision saves subsidiary legislation issued or made under an Act when that Act is repealed and it is also clear that there is no subsidiary legislation in force as regards the levying of agricultural produce cess. I say so because the agricultural produce cess as can be seen above is levied under the provisions of **Section 192A(1)** of the **Agricultural Act** *(which has since been repealed).* I have combed the **Agricultural Act** and there is indeed no subsidiary legislation reproduced therein in regard to agricultural produce cess. Indeed the Schedule to the subsidiary legislation is in certain terms that it does not reproduce the by-laws made under **Section 192A (1).** That being the case, I must now examine the current legal framework to determine whether there is any law providing for imposition of agricultural produce cess.

49. The starting point would be the provisions of the **1st Schedule Part of Agriculture, Fisheries and Food Authority Act 2013.** The preamble to this Act states as follows;

> "***An Act of Parliament to provide for the consolidation of the laws on the regulation and promotion of agriculture generally, to provide for the establishment of the Agriculture, Fisheries and Food Authority, to make provision for the respective roles of the national and county governments in agriculture excluding livestock and related matters in furtherance of the relevant provisions of the Fourth Schedule to the Constitution and for connected purposes"***

The Act came into force on 17th January 2014. **Section 45** thereof repealed the **Agriculture Act (Cap 318 Laws of Kenya).**

50. The Respondents contend that the **First Schedule** and **Part 8** of the **Agriculture, Fisheries and Food Authority Act** saves the administrative decisions made by a former institution and made by the Minister under the **Repealed Agriculture Act** before the new Act and such decisions have the effect as if directed by the Authority or Cabinet Secretary under this Act. For avoidance of doubt

this Section provides as follows;

> ***"The administrative decisions made by a former institution or by the Minister which are in force immediately before the appointed day shall, on or after such day, have force as if they were directions made by the Authority or the Cabinet Secretary under this Act."***

51. I have already stated elsewhere above that a tax must be imposed based on legislation and administered in accordance with a certain legal framework and to my mind therefore, tax cannot be an administrative decision. It is a legal function and **Part 8** of the **First Schedule** to the **Agriculture, Fisheries and Food Authority** would thus not be applicable in the circumstances.

52. I must now then consider the import of the provisions of **Section 23** of the **County Government Public Finance Management Transition Act No. 8 of 2013** which provides that;

> ***"For avoidance of doubt, until a new law relating to imposition of rates and charges is enacted, County Governments, urban areas and cities may, with necessary modifications, continue to impose rates and charges under the law for the time being in force in relation thereto."***

53. The **County Government Public Finance Management Transition Act** was enacted pursuant to the provisions of **Section 15** of the **Sixth Schedule** to the **Constitution** which makes provision for devolution of functions from the National Government to County Government. The Preamble to this Act states that it is;

> ***"An Act of Parliament to provide for, pursuant to section 15 of the Sixth Schedule of the Constitution, a framework for establishment and functions of Transition County Treasuries; the transition county budget process; transition revenue raising measures and expenditures for county governments; responsibilities of transition county accounting officers and receivers of revenue and for connected purposes"***

54. It is therefore clear from the above that County Governments have powers to raise revenue and in that regard, they will also continue to raise revenue under the law being in force at the time before the new laws are enacted by the County Government for imposing taxes. This then takes me back to where I began; was there any law governing the imposition of agricultural produce cess at the commencement date of the Act i.e. 25th January 2013? Given that the **Agriculture Act** and **the Local government Act** were repealed, it simply follows that there was no law in place governing taxation of agricultural produce cess and accordingly **Section 23** of the **County Government Public Finance Management Transition Act** would not apply.

55. Having expressed myself as above, I now turn to consider the arguments made under the **County Governments Act**; that **Section 23** of the **County Government Act** authorizes County Governments to impose rates and charges. I have in that regard looked at the provisions of **Section 23** of the **County Government Act** and that Section does not deal with the issue of powers of the County Governments to impose taxes but has made a provision for publication of a Bill in the Kenya Gazette. The **County Government Act** at **Section 21** is the one that deals with the legislative powers of the County Assemblies. The Section states as follows;

"21. (1) A County Assembly shall exercise its legislative power through Bills passed by the County Assembly and assented to by the governor.

(2) A Bill may be introduced by any member or committee of the County Assembly, but a money Bill may be introduced only in accordance with sub-section (4).

56.

In the case of a Money Bill, the County Assembly may proceed only in accordance with the recommendation of the relevant committee of the County Assembly after taking into account the views of the County executive committee member responsible for finance.

(3)

For the purposes of this Act, "Money Bill" means a Bill that contains provisions dealing with—

(a) taxes;

(b) the imposition of charges on a public fund or the variation or repeal of any of those charges;

(4)

(c) the appropriation, receipt, custody, investment or issue of public money;

(d the raising or guaranteeing of any loan or its repayment; or

(e) matters incidental to any of those matters."

57. It is thus clear that County Assemblies have powers to enact laws imposing taxes. But where is the law enacted and imposing agriculture produce cess? The 9th, 10th and 11th Respondents submitted that the County Governments have enacted Finance Acts e.g the **Nairobi County Finance Act, Kiambu County Finance Act** which provide for revenue raising measures and have saved the defunct local authorities by-laws on taxes, duties, rates and charges provided for in the by-laws through their respective Finance Acts.

58. It is instructive to note that none of the 1st to 8th Respondents availed their Finance Acts to the Court for scrutiny on the issue whether they have imposed tax on agricultural produce or not. The answer by the 9th, 10th and 11th Respondents that **County Governments Act** has enacted **Finance Acts** which impose agricultural produce cess was general and not one provision was even tabled in Court in that regard. But I also note that I was referred to the provisions of **Section 2(2)** of the **Nairobi City County Finance Act 2013** which has made provisions for levying of taxes. This Section states that;

> ***"2(2) For the greater certainty, the taxes, fees and charges applicable and payable to the government of the City County of Nairobi at the commencement of this Act, but which are not included in the Schedule to this Act, shall continue to apply under the existing by-laws of the defunct City Council of Nairobi until such by laws are specifically repealed or replaced by county legislation".***

It is therefore clear that the Nairobi County has the legal framework for imposing taxes and it is irrelevant as to whether the particular item for taxation is mentioned in the **Finance Act** or not so long as it was previously levied by the defunct Nairobi City Council.

59. The above being case with Nairobi County, I do not know the situation with the other Respondents. I am not even sure that they have enacted their respective Finance Acts. My independent research on that issue however led me to the **Nakuru County Finance Act No. 3 of 2013** but I do not know the situation as it regards the 1st, 3rd, 4th, 5th, 6th and 7th Respondent save that the 7th Respondent claimed that it charges the agricultural produce cess based on Legal Notice No. 5769 of 2009 Vol. CXI No. 46 which came into effect on 1st July 2009. I have seen the said Gazette Notice and my thoughts on it are clear; A gazette notice is not a legal framework through which a tax would be levied. It is at the very least a medium of communication between the Government and the people and must be based on a certain legal decision under a clear law. That is all to say in that regard.

Conclusion

60. It is against the above background that I find that agriculture produce cess is a tax and being so, it must be imposed in accordance with law and must be anchored in an Act of Parliament or an Act of a County Assembly. To do otherwise would be in violation of **Article 209 (3)** and **210(1)** of the **Constitution** and I so find.

61. But I must state in passing and I am generally in agreement with the Respondents that this Court cannot direct the 1st – 8th Respondents County Assemblies on how to exercise their mandate of levying agriculture produce cess and how to administer the same. In their wisdom as the law making bodies of each County, they must legislate having taken into consideration public views, their policies as well as the revenue intended to be raised. It is not the place of this Court to direct them on how to carry out any of those administrative or legislative functions - See ***Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v Nairobi County Government & 3 Others Petition No. 486 of 2013 and*** **Okiya Omtatah Okoiti & Another v Attorney General & 3 Others Petition No. 593 of 2013.**

62. Looking at the Petition again, and as I have stated elsewhere above, I have no evidence on the situation with regard to the direct imposition of agricultural cess with the other Counties save for Nairobi City County which has a general provision with regard to taxes. The responses to that extent were general, unhelpful and unclear. In that context therefore and in the interests of justice. The appropriate reliefs in the specific circumstances of this Petition are as follows;

> ***"(a) A declaration that unless there is a specific legal framework on the subject of the levying of agricultural produce cess, the actions of the 1-8th Respondents in continuing to levy/charge Agricultural Produce Cess or related tax without a supporting legal framework expressly violates the provisions of Article 210(1) of the Constitution that provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation.***
>
> ***(b) An order is hereby issued directing the 1-8th Respondents to stop the levying/charging of Agricultural Produce Cess or related tax in their areas of jurisdiction until such time as they would have enacted a supportive legal framework or until they produce evidence of such a legal framework within the next 30 days.***
>
> ***(d) The issues raised in the Petition would necessitate that although the Petitioners have partly succeeded, each Party should bear its own costs.***
>
> ***(e) Mention on a dated fixed by this Court to enable the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Respondents comply with Order (b)above and for further directions.***
>
> ***(f) Each Party at liberty to apply."***

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11TH DAY OF SEPTEMBER, 2014

ISAAC LENAOLA

JUDGE

<u>In the presence of:</u>

Kariuki – Court clerk

Miss Kamau for 1st Respondent

Mr. Tanui holding brief for Mr. Wanyama for Petitioners

Mr. Terer for 7th Respondent

<u>Order</u>

Judgment duly read. Mention on 13/10/2014.

ISAAC LENAOLA

JUDGE