



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CONSTITUTIONAL PETITION NO. 17 OF 2014**

**IN THE MATTER OF INTERPRETATION OF ARTICLES 174(C) (f), 209(5) AND 201 OF THE  
CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF CONTRAVENTION OF SECTION 87 OF COUNTY GOVERNMENT  
ACT NO. 17 OF 2012**

**AND SECTION 132(1) (2) AND (3) (a),(b),(c) &(d) of PUBLIC FINANCE MANAGEMENT ACT  
NO. 18 OF 2012**

**AND**

**IN THE MATTER OF CLAUSE 4 AND FIRST SCHEDULE (B) (on “fresh cut flowers”) OF THE  
MERU COUNTY FINANCE ACT, 2014**

**AND**

**IN THE MATTER OF CONSTITUTIONAL PETITION BY:-**

**THE KENYA FLOWER COUNCIL.....PETITIONER**

**VERSUS**

**MERU COUNTY GOVERNMENT.....RESPONDENT**

**RULING**

1. The petitioner filed a petition on 1<sup>st</sup> July, 2014 and a Notice of motion dated 8<sup>th</sup> July, 2014 pursuant to Section 1A and 3A of the Civil Procedure Act and all other enabling provisions of the Law seeking the Orders inter alia; that an interim stay order do issue against the respondent to stop collection of fresh cut flower cess from petitioner’s members pending hearing and determination of the petition herein and or until proper mechanism of collection, a certain formula and harmonization of the said cess is realized and agreed upon; that an interim stay do issue against the respondent from impounding and or stopping of petitioner’s members trucks or in interfering with their movement out its jurisdiction and determination of the petition herein and the costs of the

application be provided for.

2. The application is based on ten(10) grounds on the face of the application and supportive affidavit sworn by Jane Ngige the Chief Executive Officer of the petitioner dated 3<sup>rd</sup> July, 2014 together with all the annexures thereto.
3. The respondent was opposed to the application. The respondent in opposing the application filed a replying affidavit dated 10<sup>th</sup> July, 2014.
4. The applicant through affidavit by Jane Ngige the Chief Executive Officer of the petitioner has deponed that the petitioner is a representative body of floriculture farmers/producers/ growers throughout the country with mandate and objective of promoting and protecting its members interest. That amongst the petitioners members are members based and operating their activity in larger Meru Region , who are aggrieved by the passing of a legislation by the respondent to impose cess tax on fresh cut flowers without seeking their participation as provided for under Articles 174(c) and 201(a) of the Constitution of Kenya, 2010, Section 87 of the County Government Act No.17 of 2012 and Section 132(3) (a),(b),(c) and (d) of the Public Management Act No. 18 of 2012. The petitioner's members are further aggrieved and apprehensive of the threat by the respondent to block their produce out of its jurisdiction in enforcement of cess paying, an action the petitioner averred expressly contravenes Article 209(5) of the Constitution of Kenya, 2010.
5. The petitioners further maintains that the action by the respondent will render its members to pay double taxation on the same product a practice that contravenes Article 201(b),(1) of the Constitution of Kenya, because its members are already paying cess to Horticultural Development Authority.
6. That before the respondent is allowed to levy the said cess it's supposed to harmonize cess amount to conform to what is legally allowed so as to avoid violating Article 201(b) (1) of the Constitution.
7. The petitioner further contends that the respondent has not put in place proper mechanism to enable it collect the said cess effectively without interfering with the laid down strict regulations by both the Kenya Civil Aviation Authority and the European Union as regards to horticultural exports. It is further contended by the petitioner that HCDA has a proper formula of collecting cess from horticultural exporters and the said mechanism does not jeopardize the laid down rules and procedures.
8. The petitioner points out that the quality fresh cut flowers that the respondent suggested to levy is not ascertainable and is ambiguous therefore any attempt to levy cess without jointly ascertaining with procession the exact quantity or volume cess is levied against will be invalid and against worldwide known principles of taxation as any levying and imposing of tax to any product must be uniform, certain and easily tabulated.
9. The petitioner further contended that as it stands the respondent has no proper mechanism to levy cess upon the petitioner's members and as such any attempt to levy cess without formulating proper mechanism and harmonizing the amount of cess to be levied putting into perspective the legally allowed cess taxable in relation to what HCDA levies, the respondent will be violating the law with impunity.
10. The petitioner contends that it has come to this court in good faith and the circumstances herein justify the grant of stay and/or the action of the respondent to collect cess or impound or stop petitioner's member's trucks until proper mechanisms are put in place inclusive consultations.
11. The respondent on the other hand opposed the application contending that the respondent in compliance with provisions of Article 209 of the Constitution of Kenya, 2010 and Section 87 of

the County Government Act, very elaborately ensured that the public in all its nine Constituencies were invited to give their views over the proposed Finance Bill and that indeed the public did attend and participated in the public forum at Timau Social Hall Buuri Constituency where the applicants members farms are situated.

12. The respondent further contended that it is too late in the day for the applicants to seek to challenge the new Finance Act 2014 and specifically on the issue of cess payable of Ksh.30 per carton.
13. The court has carefully considered the application, affidavit in support and annexures. It has also considered the respondent's replying affidavit as well as vital submissions by counsel for the applicant and counsel for the respondent and all relevant provisions of law relied upon by the parties in support of their opposing positions.
14. Section 87 of the County Government Act provides the principles upon which citizen participation in County Governments shall be based on. In the instant petition it has been contended by the respondent the public attended a public forum at Buuri Constituency where applicant's members farms are situated and that the applicant and its members were well informed and that failure to participate in the public forum can only be blamed on them and not the respondents. A cursory perusal of the minutes of the Finance and Ward Bill (Budget Appropriation) held on at Buuri at Timau Social Hall on 17<sup>th</sup> February, 2014 does not indicate whether the applicants were represented at the meeting nor whether they were informed. There is in other words disagreement between the applicant claiming they were not represented and/or invited whereas the respondent states otherwise. That is an issue to be determined at the time of hearing of the petition which can't be determined at the interlocutory stage as by doing so would amount to determining the petition before hearing full arguments from both sides.
15. Having considered the applicant's application and affidavits in support and the respondents response and the nature of the claim and issues raised by the applicant I am satisfied that the applicants application raises a prima facie case with probability of success and that if the application is not granted the applicant stands to suffer irreparable loss and damage which may not be adequately compensated by way of damages. That if the application is granted the respondent shall not be prejudiced as they have been, as per their submission only bear recording the number of cartons on transit and awaiting to be paid at the 31<sup>st</sup> day of the succeeding year. That the respondent counsel submitted that the respondent has not been impounding or stopping petitioner's members trucks or interfering with their movement out of their jurisdiction. This fact was admitted by the petitioner's counsel who also admitted that no fresh cut flowers cess was being collected from the petitioner's members but the respondent was threatening to do so.
16. The upshot is that the petitioner's application dated 3<sup>rd</sup> July, 2014 is merited. The same is granted in the following terms:-
  - a. ***There be interim stay against the respondent stopping the respondent from collection of fresh cut flowers cess from the petitioner's members pending hearing and determination of petition herein and/or until proper mechanisms of collection, a certain formula and harmonization or the said cess is reached and agreed upon.***
  - b. ***That an interim stay be and is hereby issued against the respondent restraining the respondent from impounding and/or stopping the petitioner's members trucks or in any way interfering with their movement out of its jurisdiction save for the purpose of inspecting and ascertaining the number of cartons and prepare record in triplicate or duplicate as cases may be and may have the same signed by the petitioners members agents if he feels like doing so. The inspection should be carried out speedily and without harassment of the petitioner's members and the truck be released immediately after inspection and in the best interest for all pending hearing and full determination of the petition herein. Costs shall be in the cause.***

**DATED, SIGNED AND DELIVERED AT MERU THIS 8<sup>th</sup> DAY OF OCTOBER, 2014.**

**J. A. MAKAU**

**JUDGE**

**Delivered in Open Court in presence of:**

1. Mr. Ondidi for petitioner/applicant
2. Miss Thibaru for the respondent

**J. A. MAKAU**

**JUDGE**