IN THE COURT OF APPEAL AT NAIROBI

(CORAM: GATEMBU, OCHIENG & MUCHELULE,

JJ.A.) CIVIL APPEAL NO. 530 OF 2019

BETWEEN

TATA CHEMICALS MAGADI LIMITED.....APPELLANT

AND

COUNTY GOVERNMENT OF KAJIADO.....RESPONDENT

(An appeal against the ruling and order of the High Court at Kajiado
(R. Nyakundi, J.) *dated 3rd May 2019 in*
Petition No. 2 of 2019)
****

JUDGMENT OF THE COURT

1. Tata Chemicals Magadi Limited, the appellant, is a soda ash manufacturer. It is Africa's largest soda ash manufacturer and one of Kenya's leading exporters. Pursuant to a lease dated 20th March 1928, the Government of the Republic of Kenya allowed the appellant to search for, excavate, extract and carry away all the Magadi deposits in two parcels of land, LR No. 1026/R and LR No. 3867, located at Lake Magadi and Lake Natron in what is now Kajiado County. LR No. 1026/R covered about 211,104 acres while LR No. 3867 covered about 11,678 acres. The appellant, in the Agreement, secured another lease, the railway lease, over LR No. 2341/R that covered about 2,209 acres.

2. About the year 1997, a dispute arose between the appellant and Olkejuado County Council, the precursor of the respondent, County Government of Kajiado, concerning the levying of rates by the Council over the premises leased to the appellant by the Government of Kenya. The dispute ended up in litigation, following which there was a settlement contained in the Agreement signed on 24th February 2004 between the parties. Under Clause 4:2 of the Agreement, the appellant was to pay an amount equal to the industrial rate of Kshs.50/= per acre for 50,000 acres, minus the 14,031 acres on which it was already paying industrial rates at the time of the Agreement. The appellant was required to, within two years, determine how much land it still required to enable part of the land it held to be surrendered to the Group Ranches. In the event that the appellant did not make the determination, the rates payable on the premises and the railway land would be deemed to be the charged rate at industrial rate, but subject to the **Rating Act (Cap. 267).**

3. In 2014, the respondent increased the industrial rate from Kshs.50/= to 120/= per acre. The appellant was facing financial difficulties. Several meetings were held to develop a payment plan for Kshs.20,325,130/= which was outstanding.

4. The respondent enacted the **Kajiado Finance Bills 2013/2014, 2015/2016, 2016/2017** and **2017/2018** which purported to levy and increase land rates in

respect of the

appellant's premises to Kshs.11,000/= per acre and Kshs.14,000/= per acre, respectively, per year. The appellant complained about the exponential increase which it said was going to paralyse its operations. This was because it was operating with negative net worth and had been kept going by line of credit from the parent company. The respondent went ahead and enacted the **Kajiado County Finance Bill 2018/2019** which prescribed land rates at Kshs.2,000/= per acre. The appellant contested these Bills. The Bills had not been gazetted in the Kenya Gazette. According to the appellant, these Bills could not take effect before gazettement. The other complaint was that these Bills and the proposed levies had been done without refence to the **Rating Act** and the **Valuation for Rating Act**. Further, that the Bills offended the provisions of the Constitution.

5. By letter dated 14th February 2018, the respondent demanded Kshs,17,448,485,646/= from the appellant being land rates and royalties for the period 2013 to 2018. The appellant wrote back to challenge the demand, and indicated that it had, among other things, been paying rates and royalties to the National Government and to the respondent. It stated that it had enjoyed a harmonious relationship and partnership with the respondent and that it had continued to contribute to the economic, social and infrastructural wellbeing of the people in the County and

beyond. By letter dated 13th November 2018, the respondent appointed Regional Business Connection to purportedly verify,

enforce and ensure that all debts payable to the respondent in form of rent, rates, cess, royalties, and licenses were paid. By letter dated 12th December 2018, the agent demanded payment of the Kshs.17,448,485,646/= from the appellant which was said to be in respect of land rates and royalties for the year 2013-2018. The appellant wrote back to challenge the demand.

6. The respondent went further to demand royalties on soda ash at the rate of Kshs.100/= per tonne. This was done under the **2018/2019 County Finance Act**. According to the appellant, this demand offended the **Mining Act 2016**, the Constitution and Clause 4 of the 2004 Agreement, as such royalty could only be paid to the national Government.

7. On 11th January 2019, the respondent, in bid to enforce the demand, closed down the operations of the appellant. It sent its security officers and police officers to enable the closure. The appellant had over 1000 employees and provided social amenities, including water, schools and hospitals to the community. It was required to supply and transport soda ash to the Port of Mombasa for loading and export by ships. All these were paralysed. Under **Article 209(5)** of the **Constitution**, the appellant contended that the taxation and other revenue-raising powers of the respondent could not be exercised in a way that prejudiced the national economic policies and activities across county boundaries or the national mobility of goods, services and capital.

8. These are the reasons that forced the appellant to file a constitutional petition before the High Court at Kajiado. The petition sought the following prayers.

> ***"1) This honourable court be pleased to declare that Kajiado County Finance Bills 2013/2014, 2015/2016, 2016/2017 and 2017/2018 were enacted contrary to the provisions of Articles 201, 209(3) and 209(5) of the Constitution and are therefore null and void.***
> ***2) This honourable court be pleased to declare that the Kajiado County Finance Bills 2013/2014, 2015/2016, 2016/2017, 2017/2018 were enacted contrary to the provisions of Article 196 and 201 of the Constitution and section 115 of the County Government Act and are therefore null and void.***
> ***3) This honourable court be pleased to grant an order of prohibition to prohibit the 1st and 3rd respondents by themselves or their servants, agents and or assigns from trespassing, entering, remaining on, closing, locking, blocking or in any manner whatsoever and howsoever interfering with the petitioner's premises, factories, gates and properties situated in Kajiado and Magadi in the County of Kajiado.***
> ***4) This honourable court be pleased to declare that any and all provisions of the Kajiado County Finance Acts in so far as they provide for the levying of royalties on soda minerals and in particular soda ash, by the Kajiado County are null and void for being contrary to Article 191 (2) and (3) of the Constitution.***
> ***5) This honourable court be pleased to***

quash the decisions and demands of the 1st

respondent contained in the letters dated 14th February 2018 and the demands made by the 1st respondent's agents in the letters dated 12th December 2018 and 19th December 2018 directing the petitioner to remit Kshs. 17,448,485,646/- to the 1st respondent on account of the alleged arrears of land rates royalties.

6) ***This Honourable Court be pleased to grant an order of prohibition to prohibit the First Respondent by itself or its servants, agents, and or assigns from levying royalties on soda ash by the Kajiado County Finance Acts;***
7) ***This Honourable Court be pleased to grant a permanent injunction restraining the First Respondent by itself or its servants, agents, and or assigns from demanding and collecting the sum of Ksh 17,448,485,646/-or any other amounts in respect of the alleged arrears of land rates and royalties for the period between 2013-2018 from the Petitioner;***
8) ***This Honourable Court be pleased to grant an order for general and punitive damages against the First and Third Respondent arising from loss of production due to their acts of shutting down and paralysing the Petitioner's operations from 11th January 2019;***
9) ***Such other orders as this Honourable Court shall deem just; and***
10) ***Costs of this Petition."***

9. Along with the petition was filed a notice of motion dated 22nd January 2019 seeking conservatory orders pending the hearing and determination of the motion and petition. Pursuant to a consent order issued on 25th January 2019, it

was agreed that

the respondent should not close or lock the appellant's premises and all businesses pending the hearing of the motion. Subsequently, the court issued further conservatory orders barring the respondent and the Inspector General of Police from trespassing and/or interfering with the appellant's premises, factories, gates and properties pending the hearing and determination of the petition. There was a further order restraining the respondent from demanding land rates and royalties in the sum of Kshs.17,448,485,646/=, or any other sum pending the determination of the petition.

10. In opposing the petition and motion, the respondent filed a notice of preliminary objection raising the following grounds:-

"1) The petition and the entire proceedings herein have been filed in contravention of the mandatory provisions of the arbitration clause, in clause 8.2 of the agreement between the petitioner and the 1st respondent.

2) The application, the petition and the entire proceedings herein are an affront to the constitutional mandate of the 1st respondent with regard to raising revenue viz, through the Kajiado County Finance Act, Act No. 1 of 2014, the enabling statute.

3) The petition and the entire proceedings are res judicata in view of the following matters, amongst others:-

4) By reason of the aforesaid provisions of the agreement and the law, the petition and the entire proceedings herein are premature, misconceived, incompetent and a complete

nullity.

5) Further, by reason of the aforesaid provisions, this honourable court has no jurisdiction to entertain the petition and the proceedings herein, which should therefore be struck out with costs to the 1st respondent."

11. In the replying affidavit sworn on behalf of the respondent, it was asserted that, subject to the lease, the appellant's premises comprising 224,991 acres were rateable property and subject to any future rates, taxes and penalties as provided in Clause 1.3 of the Agreement. Clause 1.3 thus allowed the respondent to change future rates without limitation. Subject to **section 5(1)(a)** of the **Rating Act**, the respondent in exercise of its powers, imposed new industrial and land rates at Kshs.5,000/= per acre as of 16th June 2008, as approved vide Gazette Notice No. 15416 dated 2nd December 2011. Subsequently, in 2014 the respondent fixed the industrial rates for mining companies at Kshs.14,000/= per acre for companies that owned more than 11 acres of land, pursuant to the provisions of the **Kajiado County Finance Act, No. 1 of 2014**. It was further contended that the appellant was in breach of the Agreement as it failed to furnish the respondent with a certificate to certify the numbers of metric tonnes of soda ash and all types of salts sold by the appellant to confirm the due payments from royalties, pursuant to Clause 2. It was reiterated that the respondent had both a constitutional and statutory mandate to collect rates on all rateable properties; including the premises whose outstanding rates were

Kshs.18,350,131,180/=.

12. The respondent denied that it had demanded royalties. This was because the appellant had failed to furnish it with a certificate certifying the number of metric tonnes of soda ash and all types of salts sold by the company in the preceding year to enable the respondent to confirm the due payments from royalties. With respect to the Finance Bills, the same went through public participation despite the appellant's memorandum in opposition. The Bills were eventually gazetted as per the law. The respondent further stated that the petition contravened the mandatory provisions of the arbitration clause. This was Clause 8:2 of the Agreement. It was contended that the entire petition was an affront to the constitutional mandate of the respondent to raise revenue vide the **Kajiado County Finance Act, No. 1 of 2014**. It was the respondent's case that the petition was *res-judicata* in view of **Kajiado Judicial Review Case No. 13 of 2016 *Anne Wanjiru Kingori & Others -vs- The Kajiado County Assembly & Others*** and **Kajiado Constitutional Petition No. 3 of 2015 *Lucy Wanjiru & Another -vs- The Attorney General & Another*** wherein it was established that courts of law ought not to curtail county governments from raising revenue and thus held that the **Kajiado County Finance Act, No. 1 of 2014,** was not unconstitutional.

13. The respondent's further case was that, within the 224,000 acres that the appellant had leased, there were several

activities

that needed control and regulation by it (the respondent). The activities included water and sanitation services; general business, bus park, plant and disease control; licensing and control of establishments that sell food to the public; control of pollution, noise pollution and other nuisances; cultural activities, public entertainment and public amenities; and animal control and welfare. It was on this account that it was asserted that the premises fell within the jurisdiction of the respondent under **Articles 185** and **186** of the **Constitution**, and thus the respondent could not be locked out from exercising its constitutional authority and obligation.

14. Lastly, it was the respondent's case that the **Rating Act** was not superior to the **Kajiado County Finance Act, 2014**, when it comes to rates payable by the property owners; that the **Rating Act** was an enabling **Act** which did not limit the powers of the County Assembly to impose rates.

15. In the judgment of the superior Court delivered on 3rd May 2019, the learned Judge found that the dispute between the parties herein arose from the Agreement between themselves and did not raise a constitutional question as applied in the case of ***Anarita Karimi Njeru -vs- The Republic [1976-1980] KLR 1272*** Case. Owing to the inherent powers of the High Court, the learned Judge proceeded to determine the petition.

16. As to whether the petition had been filed in contravention of the mandatory provisions of the arbitration clause, in **Clause 8.2** of the 24th February 2004 Agreement, it was held that the issues that the Petition had raised demonstrably went beyond the ambit of what was contemplated in the arbitration clause. Additionally, the validity of that Agreement in itself had been thrown into question by the appellant. That both parties had submitted themselves to the jurisdiction of the superior court. As such, the existence of the impugned clause is not a bar to the petition. As to whether the petition was *res judicata* the cases of **Kajiado Judicial Review Case No. 13 of 2016** and Kajiado **Constitutional Petition No. 3 of 2015,** the superior court held that the dispute was dissimilar as the appellant questioned the respondent's powers under **Article 209(3)** and the manner in which the said powers were exercised with respect to the **Kajiado County Finance Act, 2014**.

17. With respect to whether the **Kajiado County Finance Act, 2014** and the subsequent Finance Bills had been properly enacted, the learned Judge, in agreeing with respondent, held that pursuant to the provisions of the **Interpretation and General Provisions Act, Cap. 2 Laws of Kenya** there had to be continuity in legislation and since the subsequent **Finance Bills** had not been gazetted, the **2014 Finance Act** was still applicable until another **Finance Act** was gazetted. Failure to gazette a County Bill did not render the legislation unlawful, as

the same was not rendered null and void, but was merely put in abeyance. The said **Act** was therefore applicable.

18. On the question of public participation, the learned judge, in concluding that public participation had been carried out, opined that the County Government's decision not to abide by and incorporate the recommendations made by the appellant in its memorandum did not render the **Act** itself unconstitutional.

19. On the question of the constitutionality of the imposition of rates and royalties by the respondent, the superior court held that it was not for the Courts to decide what an appropriate or right, or wise legislative provision was. That power fell squarely with the legislature, and in this case, the County Assembly, which casts policies into statutes. The Courts will only intervene if, in the face of the claims, a particular statute or part thereof contravenes the Constitution. It was thus held that the respondent had the mandate of legislating on the calculation of the rates payable with regard to the revenue it ought to raise.

20. In finding no correlation between the respondent's demand for rates and the appellant's alleged violation of its constitutional rights, the superior court observed that while there exists a valid dispute in payment of rates, the relationship between the parties herein was governed by a valid Agreement that had set out each party's respective

rights and obligations. A dispute arising out of such a relationship did not per se constitute a

constitutional question. It was further opined that the **Kajiado County Finance Act 2014** was properly in operation. The question on the validity of the impugned Act had been decided upon in ***Kajiado Judicial Review Case No. 13 of 2016 Anne Wanjiru Kingori & Others -vs- The Kajiado County Assembly & Others*** and ***Kajiado Constitutional Petition No. 3 of 2015 Lucy Wanjiru & Another -vs- The Attorney General & Another.*** The appellant thus had the burden to show actual or threatened infringement under the impugned statute. The same was partially proved. There was therefore no reason to strike down the entire statute merely because a portion of it threatens the property rights of the appellant.

21. Aggrieved by the above decision, the appellant proffered this appeal on sixteen (16) grounds, which we have been summarized as follows:-

    1) Whether the Kajiado County Finance Act 2014 was validly enacted and whether it conflicted with the Rating Act, Chapter 267 of the Laws of Kenya (now repealed) and the Valuation for Rating Act Chapter 266 of the Laws of Kenya (now repealed).
    2) Whether the judge erred in failing to consider the issues raised by the appellant in its petition as to whether the Kajiado County Finance Act and Bills were contrary to Articles 201, 209(3) and (5) of the Constitution of Kenya 2010.

3) Whether it was open to the judge in the High Court to determine which part of the lease was public land and therefore subject to Article 62(2) (f) and (n) of the Constitution of Kenya and which part was not being utilized.
4) Whether the land or a portion of the land which was subject of the lease issued to the appellant, was ratable.
5) Whether by reason of the conduct of the respondent, the
appellant's constitutional rights were violated.

22. When the appeal came up for hearing on the virtual platform on 1st April 2025, learned counsel Mr. Chacha Odera was present for the appellant while learned counsel Mr. Sankale and learned counsel Ms. Minik Larmoi were present for the respondent. Both parties had filed written submissions which they were allowed to highlight.

23. In support of the appeal, learned counsel Mr. Chacha Odera submitted that the learned Judge had erred in finding that the **Kajiado County Finance Act, 2014** had been validly enacted. It was submitted that while under **Article 185** of the Constitution the respondent had power through the County Assembly to enact legislation necessary for, or incidental to, effective performance of the functions and exercise of the powers of the County Government, and had powers to specifically legislate in regard to land rates, such

legislation was subject to existing national legislation. In regard to land rates,

the powers were subject to the **Rating Act** and the **Valuation for Rating Act**. Now that reference had not been made to the two pieces of legislation, there was no justification to levy either Kshs.5,000/= or Kshs.14,000/= per acre for the leased premises. It was submitted that under **section 5(1)(a)** and **(d)** of the **Rating Act**, as read with the provisions of the **Valuation for Rating Act**, there existed a mechanism through which the respondent could scientifically determine the payable rates. They also provided a mechanism by which a rate payer could challenge the applied rates, or the valuation thereof. In this case, the respondent had bypassed the existing legislation and imposed rates through the **Kajiado County Finance Act, 2014.** The appellant had been denied the opportunity to challenge the rates in question, and no valuation had been done before the rates were imposed.

24. The respondent made reference to Gazette notice at page 394 of the Record of Appeal in which the then responsible Minister had granted approval to the rates as from 16th January 2008. The Minister had purported to act under **section 5(1)(a)** of the Rating Act. However, the appellant submitted that the rates had not been determined in accordance with the two **Acts**. Secondly, the Gazette Notice had classified the appellant as a mining company. It was pointed out that, the Agreement entered into during the colonial times, and which was subsequently renewed, was on the basis that the appellant was mining Magadi soda ash.

Under **Article 62** of the Constitution,

it was argued, minerals were vested in the National Government. County governments had no power to levy a tax or other charge on the mineral product of the appellant. There was a national legislation, the **Mineral Act**, which provided for minerals and their taxation. It was submitted that the **Kajiado County Finance Act, 2014** contradicted both **Article 62** and the **Mineral Act**, and was therefore unconstitutional.

25. The appellant further submitted that the superior court had erred in failing to find that the **Kajiado County Finance Act, 2014** and the Bills were contrary to **Articles 201, 209(3)** and
(5) of the **Constitution**. **Article 209(3)** empowers the respondent to impose property rates, while **Article 209(5)** provides that the powers of the respondent shall not be exercised in a way that prejudices national economic policies or the national mobility of goods, services, capital or labour. Both the **Rating Act** and the **Valuation for Rating Act** (both now repealed) provided for safeguards to check on the exercise of this power. In the instant case, it was submitted, there were no was such safeguards.

26. In opposing the appeal, learned counsel Mr. Sankale summitted that the **Rating Act** and the **Valuation for Rating Act** were pieces of legislation that were in force before the effective date of the **Constitution**; that the **Rating Act** was an enabling **Act** and neither was it

restrictive in its purpose nor regulatory on the powers of the County Assemblies to impose rates.

Therefore, it was submitted, these **Acts** could not supersede the provisions of a county legislation in the event of a conflict.

27. With respect to the imposition of levies, it was submitted on behalf of the respondent that the premises were rateable pursuant to the definition of rateable owner under the **Rating Act** and the **Valuation for Rating Act**, which included public land for a term of not less than 25 years. That, under **Article 209(3),** the respondent was mandated to impose property rates, entertainment rates, and any other tax authorized by an **Act** of Parliament. Under **section 70** of the **Government Lands Act** (repealed), the appellant herein had an obligation as a lessee of government land to pay rent, royalties, taxes, rates, charges, duties assessments or outgoings as may be imposed, charged or assessed upon the buildings. Under **Article 209(3),** it was further argued, the appellant, was obligated by both the Constitution and the statutes to pay rates to the respondent. It was submitted that pursuant to the signed Agreement, the premises were rateable, and that the appellant had agreed to pay rates at an industrial rate. It was on the basis of the Agreement that the respondent had enacted the 2014 legislation which had imposed industrial rates for mining companies at Kshs.14,000/= per acre for companies owning more than 11 acres of land.

28. Learned counsel Ms. Minik Larmoi pointed out that the lease

did not exempt the appellant from paying land rates; that the

rates in question were in respect of the land and not the minerals being mined.

29. There was the question whether or not the leased premises were public land, and, if so, whether they would be the subject of rates. According to the appellant, citing **Article 210(1)** of the **Constitution**, the premises were public land whose lease was for the purposes of mining; that they were subject only to taxation, rates and levies by the national government, and not the respondent. According to the respondent, the appellant was a rateable owner under **Article 209(3)** of the **Constitution**, even as the premises were public land for a term not less than 25 years. The respondent's counsel submitted that the appellant had, in any case, been paying rates under the Agreement. It could not turn around to argue that it was exempted. The appellant's case, in rebuttal, was that the payments it had been making to the respondent were on voluntary basis.

30. This being a first appeal, it is the duty of this Court to reconsider and re-evaluate the evidence on record in order to come to its own independent conclusions. That mandate is provided under **Rule 31(1)(a)** of the **Court of Appeal Rules, 2022**. It is our duty to review both questions of fact and questions of law that were decided by the superior court, with the responsibility to reverse or affirm the findings (see ***Gitobu Imanyara & 2 Others -vs- Attorney***

***General* [2016] KECA 557 (KLR)).**

31. Upon considering the evidence on record, the memorandum of appeal and the rival submissions, we are tasked to determine whether the respondent's demand for the appellant to pay Kshs.17,448,485,646/= in land rates and royalties arears for 2013-2018 was lawful; whether the imposition of the rates and royalties by the respondent on the appellant upon the leased premises was within the obtaining statutes and were constitutional; and whether, by the imposition and the conduct of the respondent, the constitutional rights of the appellant had been infringed.

32. It is common ground that on 20th March 2028 the Kenya Colony and Protectorate entered into a lease with the appellant in respect of Lake Magadi and other lands for the working of soda deposits. The premises were all that piece of land situated at Lake Magadi in the Maasai Province by measurement of 211,110 acres, and all that land situated at Lake Natron in the Maasai Province measuring 11,364 acres. The term of the lease was 99 years, and the consideration was payment of rent and royalties. The appellant was allowed to search for, dig, get, win and carry away all the Magadi soda deposits –

> ***"together also with full and free liberty and right to access Guaso Nyiro and all reasonable facilities for obtaining and leading water therefrom or thereto for the purposes of operations and other purposes of the demised premises."***

There was also the railway lease that covered about 2,209 acres. The railway was used to transport soda ash to Mombasa Port for export, and also used to import whatever material that the appellant required for its operations. The appellant invested in the social and economic well-being of the people in the neighborhood. It developed infrastructure. The effects of these investments were felt all the way to Mombasa.

33. In 1997 the respondent's predecessor begun pressing the appellant for the repayment of land rates. An agreement was signed on 24th February 2004 for nominal rates (land rates and industrial rates), with the understanding that within two years the rates would be subjected to the **Rating Act** to determine what was payable. The respondent subsequently enacted various Finance Bills which culminated in the **Kajiado County Finance Act, 2014** that unilaterally determined the rates per acre of the leased premises. By 2018, the demanded rates were the Kshs.17,448,485,646/=. When the payment was not made, the respondent got an agent to demand. Finally, the respondent got its security and police officers to enter into the premises of the appellant and, as it were, close down all its operations.

34. It is not disputed that under **Article 185** of the **Constitution** the respondent was responsible for County legislation. Under **Article 209(3)** and **(5**), the respondent could levy property rates, entertainment taxes and any other

tax authorized to impose by an Act of Parliament, except that the taxation and

other revenue-raising powers could not be exercised in a way that prejudiced national economic policies, economic activities across the county boundaries or the national mobility of goods, services, capital or labour. It is clear to us that, all things being equal, the revenue raising conduct by the respondent contravened **Article 209(5)** in so far as the operations of the appellant were paralysed to force it to pay the amount in question.

35. We have looked at the Colonial Lease and the Further Lease of 7th December 2004. They were between the appellant and the Government of Kenya. The lease was extended to 2053. In both leases, the respondent was not a contracting party. The land rates and royalties were reserved and payable to the Government of Kenya. We believe that the reason why the "land rents and royalties" were reserved for the National Government was because the leases granted the appellant –

> ***"full, free and uninterrupted rights. to search for, dig, get and carry away all the Magadi deposit."***

36. The Further Lease reserved for the National Government –

> ***"all mines, minerals and mineral substances including precious stones and all coins, treasure relics, contingencies and other similar things lying in or under the demised premises other than the Magadi Deposit."***

Under **Article 62(1)** of the **Constitution**, public land includes all minerals and mineral oils; and all rivers, lakes

and other

water bodies as defined by an **Act of Parliament**. Under **Article 62(3)** of the **Constitution**, public land classified under **Article 62(1(f)** –

> ***"shall vest in and be held by the National Government in trust for the people of Kenya."***

37. In the case of ***County Government of Kwale -vs- Kenya Airports Authority [2017] eKLR***, the dispute involved rates demanded by the County Government from the Kenya Airports Authority for properties including Ukunda Airstrip. The Court of Appeal was emphatic that –

> ***"....a County Government would not only be acting ultra vires in imposing rates on exempted properties but would also be in contravention of Article 209(5) of the Constitution."***

Under the **Rating Act** and the **Valuation for Rating Act**, Kenya Airports land, Kenya Railways Corporation land and Kenya Ports Authority land, for instance, are exempted from payments of rates.

38. Going back to **Article 62** of the **Constitution**, as read with both the **Mining Act, 2016** and the **Mining Act** (now repealed), mining activities are regulated by the National Government. Under both the **Mining Act** (repealed) and the **Mining Act, 2016** the holder of the mineral right shall pay royalty to the National Government, and it is the Cabinet Secretary who shall prescribe the rate of royalties payable.

39. In the replying affidavit sworn by Francis Sakuda on behalf of the respondent, he deponed that the respondent had not demanded the payment of royalties from the appellant. He stated in paragraph 19(iv): -

> ***"I verily belief that the allegations on demand for royalties is either a deliberate or reckless falsehood under oath."***

However, the **Kajiado County Finance Act, 2014** provided for charges of royalties in respect of soda ash and other minerals. Further, in the demand to the appellant, there was reference to royalties. The reference to tax in the form of royalties in the **Kajiado County Finance Act, 2014**, and the demand for the same in the Kshs.17,448,485,646/= claim, offended both the **Mining Act** and **Article 62(1)** and **(3)** of the **Constitution**.

40. Assuming that all the premises leased from the National Government by the appellant were not public land, and were rateable properties, the determination of the land rates payable was under the since repealed **Rating Act** and the **Valuation for Rating Act**. The **Acts** mandated a formal process for valuing properties, including the creation and maintenance of a valuation roll, which was essential for determining fair rates based on the property's value. The legislations ensured legal compliance, fairness and transparency in land rating, as the laws provided a uniform framework for valuation, public participation, and

establishment of valuation rolls. They

allowed landowners to object to valuations and ensure their interests were considered. Lastly, the **Acts** prevented arbitrary taxation and ensured accountability in revenue collection for public service.

41. Through the evidence before the learned Judge, there was no indication that when the respondent asked for the payment of land rates from the appellant this was as a result of a determination under the **Rating Act** and the **Valuation for Rating Act**. Without the rates having been determined under the **Rating Act** and the **Valuation for Rating Act**, we find that the demand made to the appellant was arbitrary and illegal. Further, **Article 201** of the **Constitution** commanded as follows:-

> ***"The following principles shall guide all aspects of public finance in the Republic—***
>
> ***(a) there shall be openness and accountability, including public participation in financial matters;***
>
> ***(b) the public finance system shall promote an equitable society, and in particular—***
>
> ***(i) the burden of taxation shall be shared fairly;***
>
> ***(ii) revenue raised nationally shall be shared equitably among national and county governments; and***
>
> ***(iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalized groups and areas;***

(c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;

(d) public money shall be used in a prudent and responsible way; and

(e) financial management shall be responsible, and fiscal reporting shall be clear."

42. The respondent did not put in place an open and accountable framework for determining the payable land rates, and the appellant as a landowner was not provided with an open and objective framework that allowed it the opportunity to challenge whatever rates that the respondent was proposing that it pays. **Article 201** of the **Constitution** was breached.

43. In conclusion, we determine that:-

(a) the appellant was not obliged to pay the Kshs.17,448,485,646/= as demanded by the respondent because the land rates had not been determined in compliance with the **Rating Act**, the **Valuation of Rating Act Articles 201** and **209(3)** and **(5)** of the **Constitution**;

(b) the demand of Kshs.17,448,485,646/= that related to royalties was not payable under the **Mining Act** and **Article 62** of the **Constitution**; and

(c) the respondent's closure of the operations of the appellant breached the appellant's lease Agreement with the National Government, breached **Article 209(5)** of the

Constitution,

and infringed on the appellant's constitutional right to property under **Article 40**.

44. For these reasons, we allow the appeal. The judgment dated 3rd May 2019 by the High Court of Kenya at Kajiado (R. Nyakundi, J.) is hereby set aside, and the petition dated 22nd January 2019 is allowed in terms of prayers, 1, 3, 4, 5, 6 and 7.

45. Each party will bear its own costs of the proceedings before the High Court and of the appeal.

46. Following the untimely death of the Hon. Mr. Justice Fred Ochieng prior to delivery of this judgment, and the remaining members of the Court being unanimous, this judgment is delivered in accordance with **Rule 34(4)** of the **Court of Appeal Rules**.

Dated and delivered at Nairobi this 24th day of October 2025

S. GATEMBU KAIRU, C.Arb, FCIArb.

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.