



**H Young & Co (EA) v County Government of Lamu (Civil Appeal
E033 of 2021) [2024] KECA 359 (KLR) (22 March 2024) (Judgment)**

Neutral citation: [2024] KECA 359 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL E033 OF 2021
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
MARCH 22, 2024**

BETWEEN

H YOUNG & CO (EA) APPELLANT

AND

THE COUNTY GOVERNMENT OF LAMU RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Garsen (R. Korir, J.) delivered on 3rd June 2021 in Constitutional Petition No. 5 of 2019)

JUDGMENT

1. The appellant, H. Young & Co (E.A.) Ltd, a local company engaged in engineering, construction and infrastructure development in the Republic of Kenya, filed a suit against the respondent, The County Government of Lamu, seeking: i) a declaration that the Lamu County Finance Act is ambiguous in so far as the listed cessable items in the Fourth and Fifth Schedule are concerned; ii) a declaration that the respondent's demand for cess fees from the appellant for soil for the Garsen-Witu-Lamu road project, which is not a cessable item under the Lamu County Finance Act 2016 is unlawful, null and void; iii) a declaration that the actions of the respondent in continuing to levy or charge cess fees for soil being used in the construction of the Garsen-Witu-Lamu road project without any supporting legal framework expressly violates the provisions of *the Constitution*, which specifically provides that no tax or licensing fees may be imposed, waived or varied except as provided by legislation; iii) a Prohibitory injunction directing the respondent to stop the levying or charging cess fees for soil for the Garsen-Witu-Lamu road project in the area of jurisdiction until such a time as they would have enacted the supporting legal framework; and iv) a mandatory injunction directing the respondent to stop levying or charging cess fees for soil for the Garsen-Witu-Lamu road project in their area of jurisdiction until such time as they will have enacted a supporting legal framework.
2. The appellant's case was that it was contracted by the National Government to construct the Garsen-Witu-Lamu road with soil excavated from the respondent county to be utilised as fill material in



the construction. It claimed that, on 28th February 2018, the respondent through one of its officers, Ahamed Omar, wrote an email demanding payment of cess for murrum in reference to the soil used by the appellant in the construction of the road. On the same day, the appellant responded and stated that they were excavating soil and not murrum or hardcore stones as alleged, and that, in any case, they were not liable to pay the cess fees because murrum was not a cessable item under the Lamu County Finance Act. Further, the appellant stated that it did not engage in market sale of any goods listed under the Fifth Schedule to the Lamu County Finance Act, and that, therefore, it was not liable to pay cess. The respondent replied a year later on 18th March 2019 restating its claims for payment of cess.

3. The appellant's contention was that soil, murrum and hardcore stones are not cessable items under the Fourth and Fifth Schedules to the Lamu County Finance Act, 2016 and that the demand by the respondent for payment of cess lacked any legal foundation or basis contrary to the provisions of *the Constitution* and of the Lamu County Finance Act.
4. The appellant averred that the construction of the Garsen-Witu-Lamu road project was of national importance with far reaching benefits to the respondent's County, its environs and the country at large through job creation, improving of security and water networks and, in spurring economic growth among other benefits; that the respondent's acts of constantly harassing and threatening to detain its employees; and continually threatening it with dire consequences, including commencement of criminal proceedings, was detrimental to the road project and would attract consequences, including adverse financial impact on the Government of Kenya, and that the respondent's claim for payment of illegally levied cess fees was a ploy to intimidate and coerce the appellant to pay monies that were not due and owing, which was against the provisions of *the Constitution*.
5. In its response to the Petition, the respondent stated that, Ahmed Omar, the respondent's revenue officer, indeed demanded fees for the excavation and harvesting of soil and murrum around Witu area in Lamu, which demand was lawful under section 4 and 5 of the Lamu County Revenue Administration Act, 2015. On 18th March 2019, John Mburu, the County Secretary, also wrote to the appellant reiterating its position on payment for cess. The respondent clarified that murrum was a term used to refer to hardcore soil and that its action in charging the appellant cess or fees for extraction and excavation of murrum and soil was well within the provisions of Articles 209 and 210 of *the Constitution* and the Second Schedule to the Lamu County Finance Act, 2016. It stated that soil or sand harvesting and quarrying is taxable under items 1173 and 1174 of the Second Schedule to the Lamu County Finance Act, 2016 and that, therefore, the appellant was under a legal duty to pay the charges, and that wilful failure to pay was an offence under section 10 of the Lamu County Finance Act, 2016.
6. The respondent further averred that it was carrying out its constitutional duties as provided for under Article 209(3) and 210 of *the Constitution*, and was entitled to impose taxes; that the petition did not point to any infringement of *the Constitution*, and that the prayers sought by the appellant were not judicially tenable as the appellant was seeking to stop the respondent from carrying out its constitutional mandate.
7. Upon considering the matter, the trial Judge dismissed the suit, and hence this appeal.
8. The appellant was aggrieved by the decision of the High Court and filed this appeal on grounds that the learned Judge was wrong: in concluding that soil and murrum are one and the same material, and in finding that the respondent had the mandate to demand cess; by holding that the respondent can levy cess on murrum and soil without authority by an Act of Parliament; in failing to address all the prayers as sought in the Petition; and in awarding the respondent costs of the Petition in a public interest matter.



9. During the virtual hearing, learned counsel for the appellant, Mr. Onsare, submitted that the conclusion reached by the High Court that murrum and soil are one and the same thing was erroneous. It was argued that the two items are distinct with unique properties and that, if the intention of the drafters of the Act considered the two as one and the same, then nothing would have been easier than to include express words of general application.
10. Counsel further submitted that, by dismissing the Petition, the High Court condoned the levying of cess on murrum and soil by the respondent without the authority of an Act of Parliament as mandated by Article 209(3) (c) of *the Constitution*; that the High Court justified the respondent's illegal imposition of cess over the disputed items under item Nos. 1173, 1174, 1175 to 1201 listed under the Second Schedule to the Act, which covers permit and license fees, and thereby allowing for cess to be charged under the Second Schedule. Yet the Act provides that cessible goods could only be charged under the Fourth and Fifth schedules.
11. Counsel submitted further that the Fourth and Fifth Schedules to the Act do not include murrum and soil as amongst the cessible items, and that the charges for cess under the Second Schedule are not referred to by section 2 or 7 of the Act; and that, since there was no legislation or Act of Parliament that empowered the respondent to levy cess on either murrum or soil, it had no right to demand that the appellant pay cess for the murrum or soil excavated for the construction of the road.
12. On her part, Ms. Oloo, learned counsel for the respondent, submitted that, having appreciated the definition of murrum as a type of soil, the court was right in holding that the two can in some instances refer to one and the same material; and that it was upon the appellant to prove to the court that the type of soil it was excavating within Lamu County is not one that is found within the geographical location of the respondent as alleged in their letter dated 28th February 2018. Counsel submitted that the respondent did not act outside the legal framework when levying cess for the soil being used in the construction of the Garsen -Witu -Lamu Road.
13. On costs, counsel submitted that no basis has been laid to demonstrate that the discretion of the High Court was not exercised judiciously; that the Petition was not filed in good faith, and that it was clear that it was filed for the appellant's personal and private gain and, therefore, the award of costs was proper.
14. This is a first appeal and, as held by the Court of Appeal for East Africa in *Peters vs. Sunday Post Limited* [1958] EA 424:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”
15. Having considered the record, the grounds of appeal and the written and oral submissions by counsel for the parties, the main issue for determination is whether the Lamu County Finance Act, 2016 provides for levying of cess on soil and murrum, and whether the learned judge rightly found that the respondent was entitled to levy cess on the excavation of murrum for the construction of the Garsen-Witu-Lamu road.
16. At the outset, we consider it important to set out the relevant provisions of *the Constitution* and legislation on the charging of taxes and levies by the County government.



17. Article 260 of *the Constitution* empowers the County government to enact legislation. It states:

“legislation” includes--

- a. an Act of Parliament, or a law made under authority conferred by an Act of Parliament; or
- b. law made by an assembly of a County Government, or under authority conferred by such a law;”

18. Regarding taxation, *the Constitution* specifies under Article 209 that:

“(1) Only the national government may impose—

- a. income tax
 - b. value-added tax;
 - c. customs duties and other duties on import and export goods; and
 - d. excise tax
2. An Act of Parliament may authorise the national government to impose any other tax or duty, except a tax specified in clause (3) (a) or (b).
 3. A County may impose—
 - a. property rates
 - b. entertainment taxes; andSUBPARA c.
any other tax that it is authorised to impose by an Act of Parliament.
 4. The National and County Government may impose charges for the services they provide.
 5. The taxation and other revenue-raising powers of a County shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour.”

19. Article 210 (1) of *the Constitution* provides that, “No tax or licensing fee may be imposed, waived or varied except as provided by legislation.” In this regard, County Governments are vested with power to make legislation under Article 185(2) of *the Constitution* which states:

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

20. Section 5(2) (a) of the County Government Act gives effect to Article 185(2) of *the Constitution*.



21. Section 21(4) of the County Government Act provides for the implementation of bills for purposes of taxation and states:

“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;
- 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”

22. The Supreme Court had this to say in the case of Base Titanium Limited vs. County Government of Mombasa & another (Petition 22 of 2018) [2021] KESC 33 (KLR):

“Under the provisions of article 209, a county is empowered to raise revenue and levy taxes, rates, or other charges....

Undoubtedly, *the Constitution* permits County Governments to impose charges for the realization of its powers under the Fourth schedule. But that power does not go unchecked, in the spirit of harmonious interpretation of *the Constitution*, in enacting the law, County Governments must heed the provisions of Article 209 (5) and ensure that the charges invoked will not be detrimental to national economic policies, economic activities across boundaries or the national mobility of goods, services, capital or labor.”

23. Hence, the above provisions empower a county government to enact legislation. Under sub-article (3) (c) of Article 209 of *the Constitution*, the county government can impose any “...tax that it is authorised to impose by an Act of Parliament”. Article 210(1) is unequivocal that “No tax or licensing fee may be imposed, waived or varied except as provided by legislation.” In other words, for the county government to impose a tax or levy, such tax or levy can only be imposed through legislation.

24. On whether the respondent could impose cess on the appellant for extraction of soil and murrum, the appellant’s complaint is that the Lamu County Finance Act, 2016 does not provide for charging of cess on soil or murrum, and that the respondent’s action of demanding that it pay cess was unlawful and unconstitutional because the listed cessable items in the Fourth and Fifth Schedule did not include these materials.

25. On the other hand, the respondent claimed that section 4 as read with the Second Schedule to the Act provides for charging of cess and royalties on soil and murrum (which it referred to as ‘hardcore’), and that it was within its mandate to demand payment from the appellant. The respondent relied on items 1173, 1174 and 1175 to 1201 of the Second Schedule to support the claim for payment of cess.

26. In determining that the Lamu County Finance Act empowered the respondent to levy cess on the appellant’s extraction of soil or murrum, the trial Judge stated thus:

“From the definitions above, it is abundantly definite that license fees is not the same as cess or royalty. Both have however been provided for under the Second Schedule of the Lamu



County Finance Act and are therefore chargeable depending on the type of business and items”.

27. From the arguments advanced by both parties, it becomes apparent that, in order to determine whether or not cess was payable, it is essential for the provisions of the County Finance Act to be construed to enable us ascertain whether the respondent’s demands for payment of cess were in conformity with the law and therefore constitutional.

28. In the case of *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others*, Supreme Court Petition No. 26 of 2014 [2014] eKLR, the Supreme Court pronounced that a purposive interpretation should be given to Constitutional provisions and statutes so as to reveal the intention of the statute. The Court observed that:

“In *Pepper vs. Hart* [1992] 3 WLR, Lord Griffiths observed that the “purposive approach to legislative interpretation” has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:

“The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.”

29. The afore-cited case is unequivocal that in construing *the Constitution* and the ensuing legislation, courts are enjoined to adopt a purposive approach so as to give true effect to the legislation. That said, in the case of *Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd and others*, [1987] 1 SCC 424, on interpretation of legislation, the court discussed the text and context thus:

“Interpretation must depend on the text and the context. They are the basis of interpretation. One may well see if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual”.

30. In the case of *Swedish Match Ab & Another vs. Securities & Exchange Board, India & Anor* the Supreme Court of India held that where the words of a statute are absolutely clear and unambiguous, recourse cannot be resorted to the principles of interpretation other than the literal rule.

31. In the same vein, in *Prakash Nath Khanna vs. C.I.T.* 2004 (9) SCC 686, the same Court observed that the language employed in a statute is the determinative factor of the legislative intent. The legislature is presumed to have made no mistake. The presumption is that it intended to say what it has said. Assuming there is a defect or an omission in the words used by the legislature, the Court cannot correct or make up the deficiency. Likewise, in the case of *Van Buren vs. United States*, 593 U.S. (2021), the US Supreme Court held that, when a statute includes an explicit definition, the Court must follow that definition even if it varies from that term’s ordinary meaning.



32. With regard to statutory interpretation in Kenya, is this Court in the case of County Government of Nyeri & another vs Cecilia Wangechi Ndungu [2015] eKLR held:

“Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors.”

33. In the case of the Commissioner of Domestic Taxes (Large Taxpayers Officers) vs. Barclays Bank of Kenya Ltd NRB CA Civil Appeal No. 195 of 2017 [2020] eKLR, this Court observed:

“There is no doubt in our minds that the decisions in *Adamson v Attorney General* [1933] AC 247, *Cape Brandy Syndicate v. Inland Revenue Commissioners* [1920] 1 KB 64, *T. M. Bell v. Commissioner of Income Tax* [1960] EA 224, *Republic v. Commissioner of Income Tax ex parte SDV Transami* [2005] eKLR and the first judgment represent a correct statement of the law, namely strict construction of tax legislation, so that the tax demand must fall within the terms of the statute without ambiguity. If there’s any ambiguity in the legislation, it is not to be rectified by considerations of intendment, but by amending the legislation. However, determination of whether there is clarity or ambiguity in the legislation or whether a tax demand is precise and within the terms of the legislation, is not an abstract or pedantic exercise. It must be based on the evidence and the circumstances of each case. We agree with the majority of this Court in *Stanbic Bank Ltd v. Kenya Revenue Authority* [2009] eKLR that meaning of words should not be strained so as to find ambiguity”.

34. Guided by the afore cited authorities on interpretation of statutes, we take to mind the fact that, under the Lamu County Finance Act, the definition of cess is provided under section 2 of the Act, which specifies that “cess” means fees charged for goods specified in the Fourth Schedule”.

35. Under section 6(1), there is also reference to the Fourth Schedule and provides that:

“Plots or stalls leased or rented out by the County shall be charged monthly/annual rent at the rate specified in the Fourth Schedule”.

- (2) the rent chargeable under subsection one shall be due
 - a. in case of a plot on the first day of January every year.
 - b. in case of a stall/house on the first day of every month.
3. a person who occupies a stall referred to in subsection one may be evicted by the County If he/ she fails to pay the rent payable for three consecutive months.
4. Any amount of plot rent that remains outstanding after 31st March shall be charged a penalty of two percent per month, compounded.



5. The County shall repossess the plot if a person fails to pay the rent for more than three years”.
36. Section 7(1) also provides for levying of cess/market fees for goods listed in the Fifth schedule at the rate therein specified. Sub section (2) states that a person who fails to pay the cess commits an offence.
37. The pleadings are clear that the respondent has demanded the payment of cess by the appellant. In a letter dated 18th March 2019 from John Mburu, the County Secretary and Head of Public Service Board, titled “...Payment For Cess Fees For Extraction Of Murrum To County Government Of Lamu”, there is no doubt that the respondent’s demands are in respect of cess.
38. Accordingly, section 2 is clear. It expressly defines “cess” as, “...fees charged for goods specified in the Fourth Schedule”. We are therefore enjoined to adopt a literal interpretation of the provision, and to construe section 2 as meaning that cess is only to be imposed to the items in the Fourth Schedule. A consideration of the Fourth Schedule indicates that it relates to Land based fees for various categories of items being: Land Levy per acre per annum; Land/Building Approval fees; Inspection fees (measured per sq. ft); Lamu Mainland Government Houses; Lamu Island Government Houses. So that only the items indicated are liable to levying of cess. Our examination of the schedule does not disclose that soil or murrum extraction is included.
39. In effect, if we understand the appellant’s complaint within the context of the provisions of the Lamu County Finance Act correctly, and if only goods specified in the Fourth Schedule attract cess, and in view of the fact that soil or murrum have not been included in the schedule, then it follows that they are not cessible items.
40. Further consideration of the Act shows a reference to the Fourth Schedule in section 6. This provision refers to the leasing or renting of plots or stalls by the County government. Since the provision does not make reference to charging of cess on soil and murrum, then it can be concluded that soil and murrum are cessible items under this provision.
41. In other words, when a literary interpretation of the definition of cess under section 2 is construed, what is clear is that the provision limits the charging of cess to goods in the Fourth Schedule. Yet, the schedule does not make any reference to soil or murrum for construction. So that, in so far as section 2 as read with the Fourth Schedule are concerned, because soil and murrum have not been included as cessible items under the Fourth Schedule, they are not cessible items within the context of section 2 of the Lamu County Finance Act.
42. However, the matter does not end there. Section 7 makes reference to charging of cess and market fees. It provides that the goods listed in the Fifth Schedule shall be charged cess/market fees at the rate specified in the schedule. However, a consideration of the goods listed in the Fifth Schedule shows that it includes fees and charges for market services, market produce, including, vegetables and fruits. Also included in the schedule are grains, meat, milk, seafood, and other food items. Once again, there is no reference to road construction materials, such as soil or murrum. In effect, even if cess were to be chargeable under the Fifth Schedule, which cannot be the case owing to the definition under section 2 since they are not among the items included under that schedule, they are not capable of attracting cess.
43. The above notwithstanding, the respondent’s argument is that their demand for cess for extraction of the construction materials is provided for under the Second Schedule to the Act, which is concerned with permit/license fees for different businesses; and that the schedule also allows for payment of royalties and cess. But more specifically, that construction materials are liable to cess under items Nos.



1175 to 1201 where reference is made to levying cess on hardcore stone, ballast stones, ballast and quarry stones.

44. In relation to the Second Schedule, though, the Act is clear. Under section 2, it is specifically provided that cess is limited to the goods listed in the Fourth Schedule. The definition of cess does not make reference to the Second Schedule. What this means is that cess cannot be levied on items other than those listed in the Fourth Schedule. In effect, the County government's demand for payment of cess on items outside the Fourth Schedule is unenforceable since such items are not cessable. The county government in this case seeks to levy cess on soil and murrum, which are not part of the items included in the Fourth Schedule, and which are not liable to attract any cess.
45. For the avoidance of doubt, we take the liberty to interrogate the definition of "cess" as provided by other County Finance Acts. For instance, under section 2 of the Nyamira County Finance Act, "cess" is defined as tax or fees chargeable on goods under section 7. Section 7 of the same Act provides: "The County Executive Committee member may by order published in the Gazette waive or vary any fees or charges payable under this Act in accordance to the criteria developed under section 159 of the [Public Finance Management Act](#)".
46. Under the Murang'a County Finance Act, "Cess" means all taxes and or levies imposed under this Act and payable to the County government of Muranga. As can be discerned from the above legislation, the definition of cess may be widely construed unlike the definition under the Lamu County Finance Act.
47. Having regard to the literal interpretation of section 2 of the Lamu County Finance Act, the demand issued to the appellant for payment of cess did not conform to the provisions of the Act because the cess demanded was not specified under section 2 as read with the Fourth Schedule to the Act. Accordingly, the respondent had no authority under which to levy such tax. To do so was to act contrary to the requirements of [the Constitution](#) and the law. What this means is that, since soil or murrum are not included within the items specified in the Fourth Schedule, any demand for payment of cess by the respondent on soil or murrum was unlawful and unconstitutional.
48. In view of the foregoing, by concluding that the appellant was liable to pay cess under the 2016 Lamu County Finance Act, the learned Judge misdirected herself and, by so doing, reached the wrong conclusion. Consequently, it becomes necessary to interfere with that decision.
49. In sum, we find that the appeal is merited and is hereby allowed. The judgment of the High Court dated 3rd June 2021 is hereby set aside and substituted therefor:
 1. A declaration that -
 - i. the respondent's demand for cess fees from the appellant in respect of soil for the Garsen-Witu-Lamu road project, which is not a cessable item under the Lamu County Finance Act, 2016, and is therefore unlawful, unconstitutional, null and void; and
 - ii. the actions of the respondent in continuing to levy or charge cess fees for soil used in the construction of the Garsen-Witu-Lamu road project without any supporting legal framework expressly violates the provision of [the Constitution](#); and
 2. A Prohibitory Injunction is hereby issued to stop the respondent from levying or charging cess fees for soil for the Garsen-Witu-Lamu road project in the area of its jurisdiction until such time as they have enacted the supporting legal framework;



3. A mandatory injunction is hereby issued to stop the respondent from levying or charging cess fees for soil for the Garsen-Witu-Lamu road project in their area of jurisdiction until such time as they have enacted the supporting legal framework.
4. Costs of the appeal be paid to the appellant. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF MARCH, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

