



**Baringo County Government & another v RaiPLY Woods (K) Limited & 3 others  
(Civil Appeal 66 of 2018) [2023] KECA 196 (KLR) (17 February 2023) (Judgment)**

Neutral citation: [2023] KECA 196 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 66 OF 2018  
AK MURGOR, DK MUSINGA & RN NAMBUYE, JJA  
FEBRUARY 17, 2023**

**BETWEEN**

**BARINGO COUNTY GOVERNMENT ..... 1<sup>ST</sup> APPELLANT**

**BARINGO COUNTY ASSEMBLY ..... 2<sup>ND</sup> APPELLANT**

**AND**

**RAIPLY WOODS (K) LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**KENYA FOREST SERVICE ..... 2<sup>ND</sup> RESPONDENT**

**TIMSALLES (K) LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

*(An appeal from the Judgment and Orders of the High Court of Kenya at Kabarnet (Muriithi, J.) dated 28th July 2017 in High Court Constitutional Petition No. 3 of 2017 (formerly Eldoret High Court Petition No. 4 of 2016) consolidated with High Court Petition No. 9 of 2016)*

**JUDGMENT**

**Judgment of DK Musinga, (P).**

1. This is an appeal which in its very nature delves into the functions and powers of the National Government vis-a-vis those of the County Governments under the Constitution of Kenya, 2010, the (Constitution) as relates to the issue of taxation as a means of raising revenue.
2. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are limited liability companies involved in the trade and manufacture of forest produce. In their two separate constitutional petitions filed at the High Court in Eldoret and later transferred and consolidated before the High Court at Kabarnet, they raised various complaints regarding violations of their rights under the Constitution by the appellants.



3. The genesis of the dispute which is primarily between the 1<sup>st</sup> and 2<sup>nd</sup> appellants on the one part and the 1<sup>st</sup> and 2<sup>nd</sup> respondents on the other is a letter dated October 30, 2015 which was said to have been authored by the Director of Finance of the 1<sup>st</sup> appellant, informing the respondents as well as other manufacturers of forest produce of substantial increase of cess fees/levies in relation to forest products. The provisions relating to the new fees were contained in section 10 of the Second Schedule of the Baringo County Finance Act, 2015; a new legislation that had been enacted by the 2<sup>nd</sup> appellant. The 1<sup>st</sup> appellant vide a letter dated February 4, 2016 instructed the Baringo County Ecosystem Conservator to stop issuance of logging permits to the respondents.
4. The complaint by the respondents was, inter alia, that this arbitrary increase of cess on forest produce from Kshs 60,000/= per month to Kshs 5,195,160/= per month was effected without consulting key stakeholders, who included the respondents.
5. The 1<sup>st</sup> and 2<sup>nd</sup> respondents also sought to challenge the constitutionality of Baringo County Finance Act, 2015 as relates to levy of cess on forest produce by the 1<sup>st</sup> appellant vis-à-vis the provisions of Article 62(3) of the Constitution which vests State forests to the National Government. The enactment of the Baringo County Finance Act, 2015 was also said to have offended the provisions of both Articles 209 (3)(c) and Article 210 (1) of the Constitution as there was no Act of Parliament in place authorizing the levying of cess of forest produce from State forests. Other provisions of the Constitution that the appellants were alleged to have contravened included Articles 10, 27, 28, 40, 46, 185(2) and 199.
6. The salient reliefs sought in the consolidated petitions included a declaration that the appellants' actions were brazen, illegal, egregious, discriminative and in violation of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' constitutional rights; a declaration that the actions of the appellants had violated rights of the 1<sup>st</sup> and 2<sup>nd</sup> respondent under Article 1, 10, 27, 28, 40, 46, 48, 196, 199 and 209 of the Constitution as read together with sections 2, 4 and 20 of the Forests Act, 2005, section 132 of the Public Finance Management Act, 2012 and sections 116 to 121 of the County Government Act, 2012; a declaration that section 10 of the Second Schedule of the Baringo County Finance Act, 2015 violates the provisions of Articles 185(2) and 209 of the Constitution to the extent that it empowers the 1<sup>st</sup> appellant to levy cess in respect of State forests owned and managed by the 4<sup>th</sup> appellant within Baringo County; an order of permanent injunction to prohibit the 1<sup>st</sup> appellant from enforcing section 10 of the Second Schedule of the Baringo County Finance Act, 2015 to levy cess in respect of state forests within Baringo County; a declaration that the demand by the 1<sup>st</sup> appellant for payment of outstanding cess is illegal for being in violation of Article 62(3),185(2) and 209 of the Constitution; a declaration that by dint of Article 62(3),185(2) and 209 of the Constitution the 2<sup>nd</sup> appellant has no power to enact a law providing for the levying of cess in respect of forest produce from State forests within Baringo County; an order of certiorari to remove into the High Court for the purpose of quashing the decision by the appellants to levy additional cess amounting to double taxation; an order for compensation of the 1<sup>st</sup> and 2<sup>nd</sup> respondents for violation of their rights and freedoms under the Constitution, and an order for compensation for the illegal detention of their trucks loaded with forest produce and the consequential loss of user.
7. The appellants in their response to the consolidated petitions argued that under the provisions of Article 209(3) of the Constitution as read together with section 132 of the Public Finance Management Act, they are authorized to raise revenue by imposing taxes and they can make laws as necessary for that purpose such as the Baringo County Finance Act, 2015.



8. The appellants further argued that there was sufficient public participation of both the public and relevant stakeholders and that the amount chargeable was modest, reasonable and fair in the circumstances.
9. The learned trial judge vide judgment dated July 28, 2017 made several findings, parts whereof are reproduced as hereunder:
  - ' 41. Article 210 of the Constitution provides for the first principles espoused in the old adage 'no taxation without representation' so that taxation is authorized by law made by the representatives of the people in Parliament,'
  50. The 1<sup>st</sup> and 2<sup>nd</sup> respondents (the 1<sup>st</sup> and 2<sup>nd</sup> appellants herein) did not demonstrate any Act of Parliament within the meaning of Article 209(3)(c) of the Constitution which authorized the imposition of the tax on forest produce from State forests. They merely relied on the provisions of the County's Finance Act, the Baringo County Finance Act, 2015.
  52. It is an indubitable truth that the County Government has no constitutional authority to levy any taxation on forest produce in State forests both for the reason of ownership of such forests and by the reason of constitutional allocation of functions under Article 186 and the Fourth Schedule of the Constitution.
  58. Accordingly, the Court finds that the County Government has no constitutional authority to levy any tax or charges on the forest produce since forests as part of environment and natural resources is the province of the National Government.'
10. Accordingly, the learned trial judge issued various orders in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, including a declaration that the 2<sup>nd</sup> appellant has, by reason of Articles 62(3), 185(2) and 209 of the Constitution no authority to enact a law providing for the levying of cess in respect of forests produce from State forests within Baringo County; a declaration that section 10 of the Second Schedule of the Baringo County Finance Act, 2015 violates the provisions of Article 185(2) and 209 of the Constitution to the extent that it empowers the 1<sup>st</sup> appellant to levy cess in respect of State forests within Baringo County; a declaration that the proposed cess violates the principle of fair taxation under Article 201 (b) (i) of the Constitution; an order of a permanent injunction to restrain the 1<sup>st</sup> appellant from making any demand for cess or recovering any arrears on cess from the 1<sup>st</sup> and 2<sup>nd</sup> respondents; award of Kshs 3,000,000/= to each of the respondents as general damages to be paid by the 1<sup>st</sup> appellant for breach of the respondents constitutional rights.
11. Aggrieved and dissatisfied with entire decision of the trial court, the appellants appealed to this Court. Their Memorandum of Appeal dated May 24, 2018 contains 10 grounds of appeal. They fault the learned judge for, inter alia, failing to find that the appellants have the power to impose and enhance taxes previously levied by the defunct Baringo County Council; failing to find that forest cess was not being introduced by the impugned Act but was being enhanced; holding that the appellants lacked legal framework for imposing taxes on forest exploitation in the absence of national legislation; misinterpreting the provisions of Articles 209 and 210 of the Constitution; unreasonably depriving the appellants millions of revenues and depriving the local community all the benefits arising from exploitation of forests within Baringo County; awarding punitive and unreasonable damages to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.



12. At the hearing of this appeal, Mr Kibii, learned counsel was present for the appellants while Mr Kibe, learned counsel appeared on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Mr Odongo, learned State counsel appeared on behalf of the Attorney General and the Kenya Forest Service, the 3<sup>rd</sup> and 4<sup>th</sup> respondents respectively.
13. Highlighting the written submissions of the 1<sup>st</sup> and 2<sup>nd</sup> appellants dated June 4, 2021, Mr Kibii submitted that under the provisions of Article 209(3) of the Constitution, the 1<sup>st</sup> appellant is authorized to raise revenue to finance its operations and services by levying and imposing property rates, entertainment taxes and any other taxes authorized by an Act of Parliament. Further, that Article 209(4) as read with section 21 of the County Government Act gives power to the 1<sup>st</sup> appellant to impose charges for services rendered. It was submitted that 1<sup>st</sup> respondent was authorized to charge cess for the purpose of maintenance of, inter alia, road infrastructure within the county which the respondents use in ferrying forest produce. The decision of this Court in Base Titanium Ltd v County Government of Mombasa and Another [2018] eKLR was cited in support of the argument that the 1<sup>st</sup> appellant had constitutional authority to impose charges for services that they provide and that these include transport services.
14. It was also submitted that contrary to the finding of the trial court, the 1<sup>st</sup> appellant was not introducing cess but was merely enhancing the existing levies through the impugned legislation. According to the appellants, the question of the constitutionality of the cess therefore ought not to have arisen. Several decisions of the High Court such as Mombasa Petition No 39 of 2014, Diani Business Welfare Association and Others vs The County Government of Kwale; Fredrick Kirumba v County Government of Kiambu and another [2015] eKLR; and Andrew Waswa T/A Kilimanjaro Auctioneers & 21 Others v Mombasa County Government & another [2015] eKLR were cited in support of this argument.
15. As regards the question of public participation during the enactment of the impugned legislation, it was submitted prior to the passage of the impugned legislation, the 2<sup>nd</sup> appellant had invited the public and all relevant stakeholders to submit their views. For this reason, the 2<sup>nd</sup> appellant could not be said to have violated the provisions of Articles 10 and 118 of the Constitution.
16. Finally, on the issue of the general damages awarded to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, it was submitted that the damages were inordinately high, excessive and punitive; and that the damages ought to have been compensatory and not punitive as held in Gitobu Imanyara and 2 Others v Attorney General [2016] eKLR. See also Miti Breweries & Distillers Co Ltd v Attorney General and 2 others [2018] eKLR.
17. On his part, Mr Odongo for the Attorney General and the Kenya Forest Service substantially supported the appellants' submissions. He submitted that under the Fourth Schedule of the Constitution, County Governments are vested with powers to deal with conservation of forests. This power is reiterated under section 21 of the Forest Conservation and Management Act, 2015. It was submitted that in order to conserve forests, County Governments are required to enact legislation under Article 185(2) so as to give effect to the conservation function. According to Mr. Odongo, it is upon this basis that the appellants enacted the impugned legislation which was said to align properly with Article 209(4) of the Constitution. In sum, he submitted that the appellants were justified in enacting the impugned legislation.
18. Mr Kibe highlighted the 1<sup>st</sup> and 2<sup>nd</sup> respondent's written submissions dated June 11, 2021. He submitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were duly licensed by the Kenya Forest Service, (the 4<sup>th</sup> respondent), to harvest forest produce from State forests pursuant to the latter's mandate under section 4 of the Forest Act, 2015. It was submitted that pursuant to the provisions of Article 62(3) of the Constitution and section 2 of the Forest Act, 2015, State forests are vested in the National Government



- and not County Governments and it is the 4<sup>th</sup> respondent who had the mandate to collect all revenue and charges due to the National Government in regard to forest resources, produce and services.
19. Counsel further submitted that the appellants lacked legal framework for imposing taxes on forest exploitation in the absence of an enabling Act of Parliament. Additionally, that contrary to the allegation that the levied cess was to be utilized by the 1<sup>st</sup> appellant to maintain roads on which the 1<sup>st</sup> and 2<sup>nd</sup> respondents transport the forest produce, the 1<sup>st</sup> appellant did not avail any evidence to show that it indeed maintains any of those roads as alleged.
  20. Regarding the damages that were awarded for breach of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' constitutional rights, Mr Kibe submitted that the learned judge awarded Kshs 1,000,000/= for each breach of constitutional right, which is not excessive, considering that their two trucks and trailers were unlawfully detained for a considerably long period of time. He urged the Court not to disturb the award.
  21. In sum, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the learned judge made a sound interpretation of the provisions of Articles 209 and 210 of the Constitution and therefore there was no basis whatsoever for overturning the trial court's decision.
  22. The mandate of this Court in a first appeal is to re-appraise the evidence that was before the trial court as well as the judgment and arrive at its own independent decision. See *Selle v Associated Motor Boat Company Limited* [1968] EA 123; *Kenya Ports Authority v Kuston (K) Limited* [2009] 2 EA 212.
  23. In this appeal, there are three main issues that commend themselves to us for determination. The first issue relates to the constitutionality of the Baringo County Finance Act, 2015 and more specifically section 10 of the Second Schedule thereof. The second issue is the authority and/or power (if any) that is bestowed upon County Governments to levy cess on forest produce from forests within their areas of jurisdiction and which are owned by the State. The third one relates to the award of damages for violation of constitutional rights.
  24. Article 186 of the Constitution as read together with the Fourth Schedule of the Constitution delineates the different functions and powers between the National and County Governments. Article 186(3) specifically provides that: 'a function or power not assigned by the Constitution or national legislation to a county is a function or power of the national government.' What this means therefore is that a County Government cannot either assign or arrogate to itself any functions or powers beyond those assigned to it under the Constitution or national legislation as enacted by Parliament from time to time.
  25. The Constitution in the Fourth Schedule assigns the National Government the function of 'protection of the environment and natural resources with a view to establishing a durable and sustainable system of development' Under the same Schedule, the County Governments are assigned the function of implementation of specific national government policies on natural resources and environment conservation including soil and water conservation and forests.
  26. What is in focus in this appeal is the constitutionality of the levy of cess on forest produce as provided for in the Baringo County Finance Act, 2015. 'Cess' is defined in the Black's Law Dictionary, 9<sup>th</sup> Edition as: 'An assessment or a tax.' There can be no doubt therefore that cess is a form of tax.



27. Article 185 (2) of the Constitution vests County Governments with the powers to make legislation to impose taxes and licensing fees. It provides that: -
- ' 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.'
28. The authority of the National and County Governments to impose tax and the attendant rules is found under, inter alia, Article 210(1) of the Constitution which provides that: -
- ' No tax or licensing fee may be imposed, waived or varied except as provided by legislation.'
29. On the other hand, section 5 of the County Governments Act No 17 of 2012 provides that:
- ' (1) A County government shall be responsible for any function assigned to it under the Constitution or by an Act of Parliament.
2. Without prejudice to the generality of subsection (1), a County government shall be responsible for-
- a. County legislation in accordance with Article 185 of the Constitution;
- b. .
- c. Functions provided for in Article 186 and assigned in the Fourth Schedule of the Constitution;
- d. .'
30. The legislative authority of a county must, in our view, be read against the provisions of Article 209 regarding power to impose taxes and charges. Article 209(3) specifically gives County Governments power to impose various charges and taxes. The provision reads as follows:
- ' 209(3) A county may impose:
- a. Property taxes;
- b. Entertainment taxes: and
- c. Any other tax that is authorized to impose by an Act of Parliament.'
31. Our interpretation of the provisions of Article 209 of the Constitution is that taxation is not the preserve of the National Government. The County Government may, too, impose taxes but within the confines of Article 209.
32. In the present case, as rightly held by the learned trial judge, the appellants did not demonstrate any Act of Parliament envisaged under Article 209(3)(c) of the Constitution that authorized the imposition of the cess levy on forest produce from State forests. This did not only go against the provisions of Article 209(3)(c) but also offended the provisions of Article 210(1) of the Constitution. In this regard, therefore, I am persuaded that in the absence of an Act of Parliament, the Baringo County Finance Act, 2015 is, to the extent that it attempts to introduce the levying of cess on forest produce, illegal and unconstitutional.



33. The above finding brings into focus the authority (if any) which the 1<sup>st</sup> and 2<sup>nd</sup> appellants have with regards to State owned forests. The Constitution under Article 62(1)(g) defines 'public land' to include 'government forests other than forests to which Article 63(2)(d)(i) applies, government game reserves water catchment areas, national parks, government animal sanctuaries, and specifically protected areas.'
34. The exception contemplated under Article 63(1)(d) is community land which is either lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities; or lawfully held as trust land by county governments. The exception does not apply to the forest in question.
35. Article 62(3) provides that public land classified under clause (1)(f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission. This therefore means that the forests in question are government forests within the meaning of Article 62(1)(g) and are under the exclusive management and control of the National Government.
36. Under the Fourth Schedule of the Constitution, the protection of the environment and natural resources is a function assigned to the National Government. County Governments are assigned the specific function of implementation of specific National Government policies on natural resources and environmental conservation, including soil and water conservation, and forestry. I agree with the findings of the learned trial judge that this cannot be the basis for levying of cess on forest produce by the 1<sup>st</sup> and 2<sup>nd</sup> appellants. Indeed, the appellants and more so the 1<sup>st</sup> appellant did not demonstrate specific national government policies as to levying of cess on forest produce which they sought to implement. It follows, therefore, that was not a function either of the 1<sup>st</sup> or of the 2<sup>nd</sup> appellant. By invocation of the provisions of Article 186(3) of the Constitution, the only logical conclusion I can make in the circumstances is that the appellants arrogated unto themselves constitutional powers and functions that are a preserve of the National Government.
37. Having held as above, who then has the authority to manage State forests and collect revenues therefrom? I make reference to the relevant provisions of The Forest Act, 2005 which was the Act applicable when the Baringo County Finance Act, 2005 was being promulgated. Under section 4 of the said Act, the 4<sup>th</sup> respondent is bestowed with the mandate of formulating policies and guidelines regarding the management, conservation and utilization of all types of forests in the country. Under section 4(j), the 4<sup>th</sup> respondent has the mandate of collecting all revenue and charges due to the Government in regard to forest resources, produce and services. The Forest Act, 2005 was repealed by The Forest Conservation and Management Act, 2016 which under section 8(c) mandates the 4<sup>th</sup> respondent to receive and consider applications for licenses or permits in relation to forest resources.
38. It is clear to me that the 4<sup>th</sup> respondent was the entity bestowed with powers under the Forest Act, 2005 to collect revenue and charges on forest produce on behalf of the National Government. There is evidence that the 1<sup>st</sup> and 2<sup>nd</sup> respondents paid various revenue to the National Government through the 4<sup>th</sup> respondent as a result of which they were allowed to harvest forest produce from State forests. It follows, therefore, that that the levy on cess introduced by the appellants through the Baringo County Finance Act, 2015 subjected the said respondents to double taxation on the same produce. This, in my view, goes against the principle of fair taxation envisaged under Article 201 (b)(i) of the Constitution.
39. The 1<sup>st</sup> appellant has attempted to justify the levying of cess for purposes of maintaining the road infrastructure within the county which the 1<sup>st</sup> and 2<sup>nd</sup> respondents use for transportation of the forest produce. I disagree with that argument. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are licensed companies within the country, meaning that they pay various forms of taxes such as VAT to the National Government.



Additionally, when they fuel their various trucks, there is a fuel levy that is paid directly to the National Government for purposes of road maintenance. If I were to accept the argument by the 1<sup>st</sup> appellant, the question that arises is: If the levy is intended for road maintenance, why is it not levied on other motorists who use roads within Baringo County? There is simply no legal justification or authority for the levying of cess by the 1<sup>st</sup> appellant on the forest produce. In any case, I agree with the findings of the learned trial judge that the 1<sup>st</sup> appellant did not lead any evidence to show that it maintains any of the alleged roads. In the absence of evidence to the contrary, I agree with the views expressed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the mandate of maintaining the alleged roads is bestowed on the Kenya Rural Roads Authority (KeRRA) pursuant to the provisions of the [Kenya Roads Act, 2007](#).

40. Regarding the quantum of damages for breach of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' constitutional rights, the appellant's counsel submitted that the learned judge erred in law in failing to exercise his discretion judiciously and thereby awarded inordinately high and punitive damages of Kshs 3,000,000/= to each of the two respondents.
41. In making that award, the learned judge stated at paragraph 92 of his judgment:
  - ' 92. For the loss in general damages for breach of constitutional rights to equal protection of law, right to property and right to fair administrative action, the court being mindful that the damages are to be met from tax payers' money, awards a modest figure of Kshs 1,000,000/- for each breach of constitutional right.'
42. It is trite law that an appellate court will not disturb an award of general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate of such damages. See *Butt v Khan* [1977] KAR 1. It was not demonstrated that the learned judge exercised his discretion arbitrarily or injudiciously. Violation of a constitutional right should not be treated as a petty infraction of the law. Constitutional rights are protections and liberties that the supreme law of this country guarantees each person and must therefore be accorded the highest regard by all. It is evident that the trial court considered the amount of the damages it awarded as 'modest.' I am not persuaded that the award should be disturbed.
43. In the upshot, I am of the considered view that this appeal is bereft of merit. As Murgor, JA agrees, it is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
44. This judgment has been delivered in accordance with rule 34(4) of the [Court of Appeal Rules, 2022](#), Nambuye JA having ceased to hold office by virtue of retirement.

### **Judgment of Murgor, JA**

45. I have had the advantage of reading in draft the judgment of Musinga, JA. I am in full agreement with his reasoning and conclusions and, therefore, have nothing useful to add.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**D. K. MUSINGA, (P).**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

