



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL NO. 69 OF 2017

BETWEEN

BASE TITANIUM LIMITED.....APPELLANT

AND

THE COUNTY GOVERNMENT OF MOMBASA.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

(An appeal from the Judgment of the High Court of Kenya

at Mombasa (Muriithi, J.) dated 20th February, 2015

in

Petition No. 9 of 2015)

JUDGMENT OF THE COURT

[1] Under **Article 209** of the **Constitution**, a County Government is empowered to raise additional revenue to supplement the revenue allocated by the Commission on Revenue Allocation. In raising such revenue, a County is allowed to levy taxes, rates and impose charges for the services it provides. However, this power is subject to the qualification under **Sub-Article (5)** which stipulates:

“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.”

It is the said Sub-Article that forms the basis of the appeal before us.

[2] **Base Titanium Limited** (the appellant) is a registered holder of a special mining lease No. 23 (lease) issued by the Commissioner of Mines and Geology. Pursuant to the lease, the appellant is clothed with the right to mine and process titanium and zircon minerals from Kwale County. It is also authorised to export the processed minerals by sea. This entails the appellant ferrying the minerals from Kwale to the Mombasa Port by road.

[3] Upon the appellant’s trucks entering the **County Government of Mombasa** (the 1st respondent’s) jurisdiction on 17th June, 2014, the 1st respondent imposed a cess of Kshs.3000 on each truck. According to the appellant, it had no idea what the purpose of the cess was for but still paid the same under duress so as to not interfere with the shipment schedule and its contractual obligations to third parties. After seeking advice from its advocates, on the legality of the said levy, the appellant served the 1st respondent with a notice contending that the levied cess violated **Article 209(5)** hence, unconstitutional. The 1st respondent did not respond to the notice.

[4] Unyielding, the appellant sought further clarification on the appropriateness of the said cess from the Transition Authority who in turn sought the advice of the **Attorney General** (the 2nd respondent). The 2nd respondent held the same position as the appellant that the cess was unconstitutional. By a letter dated 11th September, 2014 copied to the appellant, the Transition Authority conveyed the 2nd respondent’s opinion to the 1st respondent. Further, on 12th September, 2014 the Cabinet Secretary, National Treasury wrote to the 1st respondent

informing it of that very position. Nonetheless, the 1st respondent did not heed to the foregoing and as per the appellant, it was left with no choice but to file a petition challenging the constitutionality of the cess. By the time the petition was filed, the appellant had thus far paid a total of Kshs.1,542,000 as at 31st December, 2014 which they sought to be refunded.

[5] The petition was premised on the grounds that the 1st respondent's action of levying cess on the appellant's trucks, violated the provisions of **Article 209(5)** of the **Constitution** by restricting not only the appellant's right to move its goods across the 1st respondent's County but also the appellant's freedom of movement; and infringed on the appellant's right to equal protection and benefit of the law as enshrined under **Article 27** of the **Constitution**. In addition, the 1st respondent exercised its powers in a manner that was oppressive and unfair contrary to **Article 47** of the **Constitution**. As a result, the appellant prayed for the following orders:

a) A declaration that the actions of the 1st respondent to charge the petitioner (appellant herein) cess in the sum of Kshs.3,000 per truck, or any sum at all, a condition for the petitioner to move its goods across the boundaries of the 1st respondent's county is unconstitutional, null and void.

b) A declaration that the 1st respondent has no mandate under the Constitution of Kenya to pass any legislation that restricts the petitioner's right of movement by imposing a tax or revenue to be paid by the petitioner as a condition for moving its goods across the 1st respondent's boundaries.

c) A mandatory injunction compelling the 1st respondent to refund to the petitioner the sum of Kshs.1,542,000 paid by the petitioner to the 1st respondent under duress as at 31st December, 2014 and/or any other additional sums that the petitioner has so paid to the 1st respondent from 1st January, 2015 as cess on trucks transporting goods across the 1st respondent's boundaries to the date of compliance with the mandatory injunction.

[6] In response, the appellant filed a reply to the petition and an affidavit sworn by its Chief Officer in charge of the Finance Department, one Jonathan Nyongesa. The 1st respondent denied violating any provision of the **Constitution**. Jonathan deposed that the cess levied on the appellant's trucks was a uniform charge applicable to all commercial trucks carrying goods weighing over 7 tonnes in the County. The charge was not based on the nature of the goods and had not been specifically targeted against the appellant. The cess was lawful and minimal thus, could not be viewed as restricting the appellant's movement within the County. Besides, the 1st respondent was entitled to levy the cess as a means of raising revenue.

[7] Faced with the foregoing, the learned Judge (**Muriithi, J.**) in a judgment dated 21st February, 2017 resolved the dispute in the 1st respondent's favour. Stating the following in his own words:-

“The County Governments have under Article 209 (3) and (4) of the Constitution power to levy taxes and charges for services that they provide including road transport services. The cess charge imposed by the Mombasa County Finance Act, 2014 for “all goods carrying vehicles entering Mombasa County and offloading in Mombasa County” is not a tax or charge (sic) the mineral product of Titanium mined and transported by the Petitioner, and the charge is, accordingly, not barred by reference to Article 62 of the Constitution, which vests minerals as part of public land under the authority of the national Government. The Petitioner has not demonstrated how the imposition of the cess on the vehicles carrying its product into Mombasa prejudices the national interests of the provisions of Article 209 (5) of the Constitution. The Petition, therefore, fails.”

[8] It is that decision which has instigated this appeal which is predicated on the grounds that the learned Judge erred in-

i. Finding that the cess was a charge for services referred to ‘road transport service’ provided by the 1st respondent.

ii. Making a determination on issue(s) not pleaded thus infringing on the appellant's right to a fair hearing.

iii. Misapprehending the law with respect to implementation of Article 209(5) of the Constitution.

iv. Failing to hold that the imposition of the cess was unconstitutional.

[9] Mr. Oyatsi, learned counsel for the appellant, submitted that the case at hand was not determined on the basis of the pleadings on record. In his submission, the learned Judge erred in finding that the cess being collected by the 1st respondent was a road service charge. The same was a finding of fact which could only be established from the pleadings and/or from evidence adduced at the trial. There was no pleading or evidence adduced to that effect. Elaborating further, counsel argued that any revenue or tax collected by the 1st respondent is prescribed in the 1st respondent's Finance Act and of relevance was the **Mombasa County Finance Act, 2014**. There was no mention of ‘road service charge’ as a chargeable service under the said Act. Moreover, it was significant to note that the receipts issued by the 1st respondent upon payment of the cess did not make any reference to ‘chargeable service’ or ‘road service’ or the purpose for which it is levied. It therefore followed that the purpose of the cess in question was unknown.

[10] In any event, even if the cess in issue fell within the category of charges for services rendered by the 1st respondent as envisaged under **Article 209(4)** of the **Constitution**, which the appellant denies, the implementation of the same was subject to **Article 261** of the **Constitution**. **Article 261** which requires the 1st respondent to comply with the provisions of an Act of Parliament enacted in relation to the execution of **Article 209(4)**, that is, the **Public Finance Management Act, 2012**. **Section 161** thereof which stipulates:

“In imposing a tax or other revenue raising measure, a county government shall ensure that the tax or measure conforms to the

Article 209(5) of the Constitution and any other legislation, and before raising any tax or revenue raising measure under this Article, shall seek the views of the Cabinet Secretary and the Commission on Revenue Allocation.”

[11] According to counsel for the appellant, the 1st respondent never complied with the foregoing provision rendering the exercise of its power to levy cess not only illegal but unconstitutional. The learned Judge was also faulted for not taking into account the said provision as well as the views of the National Treasury on the cess in issue. If he had done so he would have arrived at a different conclusion. Counsel urged us to allow the appeal and to grant the prayers as pleaded in the petition dated 20th February, 2015.

[12] Rising on his feet to oppose the appeal, Mr. Kinyanjui, learned counsel for the 1st respondent, contended that the issue of the road service charge had been raised in the 1st respondent’s reply to the petition. Therefore, the appellant’s contention that it was not aware of the basis of the cess fell flat on its face. He went on to state that contrary to the appellant’s allegation, the burden of proof lay with the appellant to establish that the cess was not justifiable in law. The learned Judge correctly found that the appellant had not established the constitutional violations alluded to with respect to the cess in question. In that regard, we were referred to **Section 108** of the **Evidence Act**.

[13] The cess levied against the appellant was provided under the **County’s Finance Act, 2014** as charges for all the vehicles carrying goods that were entering and offloading at the County of Mombasa. Specifically, the charges appear as item 90 in the Schedule to the Finance Act. The fact that the receipts issued by the 1st respondent were categorized as miscellaneous income by itself could not invalidate the payment made by the appellant. Furthermore, the Fourth Schedule of the **Constitution** which distributes functions between the National and County Government mandates the County Government with the function of county transport which includes management and control of County roads and public transport among others. This clearly demonstrates that a County is entitled to levy charges in order to operationalise the said functions or services. All in all, the cess levied was a legitimate charge under **Article 209(4)** of the **Constitution**.

[14] We have considered the record, submissions by counsel as well as the law. This being a first appeal, we take cognizance that our primary role is to re-evaluate, re-assess and re-analyze the evidence before the trial court and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See this Court’s decision in **Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2EA 212**.

[15] It is trite that parties are bound by their pleadings and the issues for determination in a suit generally flow from the pleadings. A court can only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court’s determination. See **Gandy vs. Caspair [1956] EACA 139** and **Galaxy Paints Co. Ltd vs. Falcon Guards Ltd [2000] 2 EA 385**. Be that as it may, a court may also base its decision on an unpleaded issue if during the course of the trial the issue was so germane that it was left for the decision of the court and it would defeat the course of justice if it was left undetermined. An issue is deemed to have been left for the court’s decision when a party addressed the court and led evidence on it and the other side had an opportunity to address it though not pleaded See **Vyas Industries vs. Diocese of Meru [1976] eKLR** and **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 others [2014] eKLR**.

[16] We understood the appellant’s contention in this regard to be that none of the parties had pleaded or led evidence to the effect that the cess in issue was a road service charge. Having perused the parties’ pleadings on record, we find ourselves disagreeing with this contention by the appellant. This is because under Paragraph 4 of the 1st respondent’s reply to the petition they did allude to the fact that the cess charged was in respect of a road service charge even though not in those specific words. The said paragraph read:

“The 1st respondent further avers that Kshs.3000 cess charged per truck is a uniform charge applicable to all commercial trucks carrying goods weighing over seven (7) tonnes regardless of the nature of the goods on board and the petitioners products have not in any manner been specifically targeted to pay the said charges.” [Emphasis added].

[17] Moreover, the issue of whether the cess charged was a road service charge was raised in the parties’ submissions to the trial court. On one hand, the appellant submitted that the cess was not a charge on services provided by the County as contemplated under **Article 209(4)** of the **Constitution**. On the other, the 1st respondent claimed that the cess was imposed in line with the County’s **Finance Act, 2014** which set out the revenue raising measures of the County. The cess in question was in respect of charges imposed on all vehicles carrying goods entering and offloading in Mombasa. The same presupposed a charge in respect of road services offered by the 1st respondent.

[18] Regarding the Constitutionality of the levy charged, in our considered view, the appellant’s case was plainly predicated on two issues namely, that the 1st respondent had no power to levy the cess in question and that in the alternative, if it did have such power, the same was exercised contrary to the **Constitution**. In determining whether or not the 1st respondent had the power to levy the cess in question the starting point would be a consideration of **Article 209 (3) & (4)** which provide:

“3. A county may impose-

(a) property rates;

(b) entertainment taxes; and

(c) any other tax that it is authorised to impose by an Act of Parliament.

4. The national and county governments may impose charges for the services they provide.

[19] Based on the foregoing, we concur with the learned Judge that the cess levied by the 1st respondent was in line with **Sub- Article 4** which empowers a County Government to impose charges on services rendered. We particularly agree with the following observations by

the learned Judge:

“Article 209 (4) of the Constitution empowers the County as well as the national governments power to impose charges for the services they provide. I accept as urged by the 1st Respondent that facilities for road transport is one of the basic services ‘including garbage collection, parking facilities, street lighting, drainage and roads maintenance’ – “that members of the public including the petitioner expects to be provided by the 1st respondent.” The word services is not defined in the interpretative Article 260 of the Constitution. However, the meaning of the word service as given in the Concise Oxford English Dictionary 11th ed. (2006) agrees with the 1st respondent’s submission in that the noun service is defined as-

‘a system supplying a public need such as transport, or utilities such as electricity and water.’

Accordingly, I find that the County Government as with the National Government has under Article 209(4) of the Constitution authority to impose charges for services that they provide, and these include road transport service.”

[20] Furthermore, the said cess was levied in accordance with item 90 of the schedule to the *Mombasa County Act, 2014* which delineated the application of the levy as follows:

“To be paid by all goods carrying vehicles entering Mombasa County and offloading in Mombasa County...”

[21] We are clear in our minds and it is necessary to state here that the cess in issue was not in respect of the minerals being ferried but the vehicles carrying goods into the 1st respondent’s jurisdiction. The 1st respondent was categorical in that respect. If the charge was in respect of the minerals then it would have been unconstitutional since under *Article 62* of the *Constitution* the same is exclusively under the preserve of the National Government. The learned Judge appreciated this much when he pronounced himself as follows:

“In that regard, the Hon. Attorney General and the Chairman of the Transitional Authority in their letters, respectively dated 11th July 2014 and 11th September 2014 (copy of the former expressed to have been attached to the latter letter and copied to the petitioner) give the correct interpretation of the Constitution that ‘the Constitution therefore does not mandate to impose any taxes or charges on minerals’ and that ‘minerals fall under the domain of the national government, the management and administration of the mining of titanium falls within the mandate of the national government as well.’

...

With respect, I do not accept that a charge on the transportation thereof, as a charge for road service provided by the County Government, is a charge on the mineral product itself, which is the province of the national government. The cess charges are on the vehicles transporting goods of any kind entering and off-loading in Mombasa, and are not a tax or charge on the product transported.”

[22] As for the cess being in violation of the *Constitution*, it is common ground that a party who alleges violation or threatened violation of the *Constitution* is required to set out the particular provisions violated and also demonstrate the manner in which the offending party violated or threatens to violate the provisions in issue. Our position is fortified by this Court’s sentiments in *Bethwell Allan Omondi Okal vs. Telkom (K) Ltd (Founder) & 9 Others [2017] eKLR* thus:

“The appellant also failed to not only cite the articles of the Constitution he felt the respondents offended, but also failed to show the manner in which the respondents violated them. It is not enough to mention perceived violations of the Constitution in generalities as the appellant has done in his petition. Even the provisions of Section 1A and 1B of the Civil Procedure Act and Section 3A and 3B of the Appellate Jurisdiction Act cannot be invoked in his aid.” [Emphasis added]

[23] The case before us is no different, the appellant cited various provisions which the 1st respondent had allegedly violated but fell short of demonstrating the manner in which the 1st respondent violated the same. It was not sufficient for the appellant to rely on the letters from the Transition Authority and Cabinet Secretary, National Treasury to demonstrate the alleged violation. Neither was it enough to rely on the payments made to substantiate its claim. More cogent evidence was required to demonstrate that the cess had violated *Article 209(5)*. In that, it hindered the movement of the appellant’s goods and/or was prejudicial to national economic policies or it was simply illegal as it was not provided for under the Constitution and the County Finance Act.

[24] In the absence of the above, and for the detailed reasoning provided, we find this appeal lacking in merit and is hereby dismissed. The matter being a public interest matter we make no orders as to costs.

Dated and delivered at Mombasa this 5th day of July, 2018

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR