IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 90 OF 2016

BETWEEN

COUNTY GOVERNMENT OF KWALE......................APPELLANT

AND

KENYA AIRPORTS AUTHORITY...........................RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Mombasa (Emukule, J.) dated 12th July, 2016

in

Misc. Applic. No. 18 of 2016)

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JUDGMENT OF THE COURT

1. This appeal is against the exercise of the learned Judge's discretion in favour of the respondent granting judicial review remedies of *certiorari* and *prohibition*. Judicial review orders are discretionary in nature and whenever this Court is called upon to interfere with the exercise of judicial discretion, as in this case, it ought to be guided by the principles enunciated in ***Coffee Board of Kenya vs. Thika Coffee Mills Limited & 2 Others [2014] eKLR***. The Court ought not to interfere with the exercise of such discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice.

2. On 9th September, 2015, **Kenya Airports Authority** (the respondent) received a demand notice from the **County Government of Kwale** (the appellant) for land rates in respect of Kwale/Diani Beach Block/ 675 in the amount of Kshs. 43,221,310. As far as the respondent was concerned, the demand notice was illegal because the respondent's properties were exempt from imposition of taxes by County Governments.

3. Consequently, the respondent filed a Chamber Summons application seeking leave to apply for the judicial review remedy of *prohibition*. It is instructive to note that by its statement and verifying affidavit in support of the statement sworn by Victor Arika, the respondent's legal counsel the respondent's position was that the appellant had levied property rates against one of its facilities namely, Ukunda Airstrip situate on Plot Nos. 912,913 & 923 (herein after referred to as the three plots). The respondent had erected on the said property an aerodrome and a primary school hence, the property was exempted from such taxation by virtue of ***Section 27*** of the ***Valuation for Rating Act*** and ***Regulations 3 & 4*** of the ***Valuation for Rating (Public Land) Rules***. In addition, according to the respondent, having been established by the National Government to foster national economic policies, the imposition of the tax in question was contrary to ***Article 209 (5)*** of the ***Constitution***. As a whole, the decision to impose taxes on the respondent was not only irrational, illegal but also *ultra vires* the powers of the appellant under ***Article 209***, urged the respondent.

4. Pursuant to the *exparte* leave granted on 14th March 2013, the respondent vide a Notice of Motion filed on 21st March, 2016 sought *inter alia: -*

- ***An order of Prohibition do issue restraining the Kwale County Government and/or its agents from levying, imposing, demanding and/or recovering rates or any purported rates amounting to Kshs. 43,221,310/= allegedly imposed on the Kenya Airports Authority pursuant to Kwale County Finance Act and/or any future rates in respect of Ukunda Airstrip and/or aerodrome.***

- ***An order of Prohibition do issue restraining the Kwale County Government and/or its agents from levying, imposing rates on the facilities of Kenya Airports Authority contrary to the provisions of Article 209(5) of the Constitution.***

5. In response, the appellant through its Sub- County Revenue Officer, Mr. Robert Chaka Ndoro, deposed that the demand notice issued was in respect of Kwale/Diani Beach Block/ 675 and not the three properties alluded to by the respondent in its pleadings. The three plots belonged to third parties and not the respondent. Plot No. 912 belonged to Matano Fenesi & others, Plot No. 913 belonged to Suleiman Hamisi & others and Plot No. 923 belonged to Hamisi Matano & others. Therefore, the respondent lacked the *locus standi* to file the judicial review proceedings in respect of those properties.

6. Be that as it may, the appellant argued that all laws in force ought to be constructed with alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the current ***Constitution***. The rates levied against the respondent's property were in line with the ***Constitution***. Besides, the respondent had not exhibited the manner in which the said rates prejudiced national economic policies.

7. The appellant also attacked the respondent's application on the ground that it was not well suited. In its opinion, the respondent couldn't seek an order of *prohibition* against the demand notice without first seeking an order of *certiorari* to quash the decision contained thereunder.

8. Upon considering the application on merit, the learned Judge (Emukule, J.) by a ruling dated 12th July, 2016 held the respondent is an agency of the national government hence any land held by it was exempt from payment of land rates in line with ***Rule 4*** of the ***Valuation for Rating (Public Land) Rules***. The appellant ought to have sought contribution in lieu of the rates payable from the national government as provided under ***Section 23*** of the ***Rating Act***. The learned Judge in his own words concluded that-

> ***"There is no doubt that in terms of Article 209(5) of the Constitution, the Respondent has authority to impose rates. The imposition is limited by Article 209(5) that such tax do not prejudice the economic policies and activities of national government. (sic) Those policies as enacted in Rule 4 of the Valuation for Rates (Public land) Rules, exempt the applicant from payment of rates. The Demand Notice LA Name: KWALE GOVERNMENT, UPN 321-02350, BLOCK DIANI BEACH PLOT 675 for rates of Kshs. 43,221,310 is therefore illegal.***
>
> ***Though no order of certiorari was sought, the justice of the case requires the demand notice for payment of rates be quashed. There shall therefore issue an order to bring up to this court and to quash by order of certiorari, the said Demand Notice. There shall also issue an order of prohibition to prohibit the Government of the County of Kwale from demanding or issuing Demand Notices to Kenya Airports Authority for payment of the sum of Kshs. 43,221,310/= or any other sum in respect of Ukunda Airstrip and/or aerodrome, now in use or intended to be used for the said or ancillary purposes."***

9. It is that decision that triggered the appeal before this Court which is premised on 8 grounds which can be aptly summarized as follows: -

> ***a) The learned Judge erred in law and fact by disregarding evidence which he ought to have taken into account thus arriving at an erroneous decision.***
>
> ***b) The learned Judge erred in law and fact by holding that the respondent is exempted from payment of rates.***
>
> ***c) The learned Judge erred in law and fact by quashing the demand notice for payment of rates in respect of Kwale/Diani Beach Block/ 675 yet the dispute as per the respondent's pleadings was in respect of the three properties belonging to third parties.***
>
> ***d) That the learned Judge erred in fact and law by failing to find that the respondent lacked the requisite locus to institute the proceedings.***
>
> e) ***The learned Judge erred in law by finding that the remedy of certiorari was available to the respondent yet leave had not been sought for the said remedy.***

10. The appeal was disposed of by both written submissions and oral highlights by the parties' respective counsel. Mr. Kinyanjui together with Ms. Jadi appeared for the appellant while Mr. Wafula appeared for the respondent.

11. Mr. Kinyanjui submitted that it was clear from the respondent's own pleadings that the demand notice which was subject of those proceedings, had been issued with regard to the three properties and not Kwale/Diani Beach Block/ 675. Therefore, the learned Judge had no jurisdiction to make any orders in respect of Kwale/Diani Beach Block/ 675 let alone quash the demand notice of the said property. This is because leave had not been sought for such orders under ***Order 53(1) (1)*** of the ***Civil Procedure Rules*** and it was a departure from the respondent's pleadings. In buttressing this line of argument, reference was made to ***Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 others [2014] eKLR***, wherein this Court expressed: -

> "***As authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which the trial court may pronounce. The learned Judge, no matter how well intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score."***

12. Citing this Court's decision in ***Euton Njuki Makungo vs. Republic & 2 others [2014] eKLR***, he contended that the respondent lacked the requisite *locus standi* to institute judicial review proceedings with regard to the three properties for the simple reason that the plots

belonged to third parties.

13. It was submitted on behalf of the appellant that the respondent being a government profit making entity/corporation ought to pay rates for all its ratable properties. Expounding on that proposition, Mr. Kinyanjui submitted that the national government pays contribution in lieu of rates only in respect of entities which provide free services to the public and do not earn any profits from their operations like government hospitals and schools. Equally, ***Section 27*** of the ***Valuation for Rating Act*** provides in part;

> ***"27***
>
> ***1) No valuation for purposes of any rate shall be made in respect of any land which is used, or is bona fide intended to be used within a reasonable time, directly and exclusively for any of the following purposes-***
>
> ***…***
>
> ***Provided that nothing in this subsection shall apply to land used for profit or residential purposes other than those specified in paragraphs (a) and (d) of this subsection."***

He added that since time immemorial, the respondent had been paying rates to the defunct County Council of Kwale, the appellant's predecessor.

14. In the alternative, the appellant argued that even assuming the respondent was exempted from paying rates, such exemption would be restricted to areas specifically regarded as public areas namely, the aerodrome as defined under ***Section 2*** of the ***Kenya Airports Authority Act***. Further, the respondent by its verifying affidavit indicated its intention to erect a school on its property which clearly evidenced that such a school hadn't been constructed. As such, the learned Judge erred in finding that the property was exempt from rates on account of the school.

15. Mr. Kinyanjui submitted that the appellant was charging rates pursuant to the ***Valuation for Rating Act***, the ***Rating Act*** and the appellant's ***Finance Act***. The ***Finance Act*** was enacted pursuant to a process which was never challenged. It is the said Act that encompasses the decision to charge rates. That being the case, the demand notice could not properly speaking be quashed since it was a communication of the decision to charge rates under the ***Finance Act***. On those grounds, Mr. Kinyanjui urged the Court to allow the appeal.

16. Opposing the appeal, Mr. Wafula claimed that the appeal turned on whether the respondent is an asset or property of the national government; if so, whether it is obligated to pay taxes to the County Government. He submitted that the answer to the foregoing lay with the construction of several Articles of the ***Constitution***. Rehashing the canons of constitutional interpretation, he stated that the ***Constitution*** ought to be interpreted firstly, in conformity with the principles set out under ***Articles 259 & 159(2)*** of the ***Constitution***; secondly, a purposive and liberal interpretation ought to be adopted; and thirdly, provisions of the ***Constitution*** must be read as an integrated whole without any one particular provision destroying the other rather each sustaining the other.

17. In as much as a County Government has powers to impose taxes and other charges as stipulated under ***Article 209 (3)*** of the ***Constitution*** for purposes of raising revenue, such power is limited under ***Article 209(5)***. Paying attention to the extent of the limitation, Mr. Wafula submitted that ***Article 1(4)*** of the ***Constitution*** recognizes two levels of government, *to wit*, the national level and the county level. Apart from characterizing the two levels as distinct and inter-dependent, ***Article 6(2)*** of the ***Constitution*** also enjoins them to conduct their mutual relations on the basis of consultation and cooperation. The manner of such cooperation is delineated under ***Article 189*** of the ***Constitution***. He contended that based on the foregoing, the ***Constitution*** does not envisage the two levels as having power to impose taxes on one another.

18. Mr. Wafula argued that without a doubt the respondent was a state organ. In his view, this was because, first, it is established under the ***Kenya Airports Authority Act*** and is managed through the Ministry of Transport which is headed by a Cabinet Secretary who is a state officer. It followed that by extension the respondent was a state institution. Second, for purposes of performing its function or core business of offering services, the national government through legislation established institutions like Kenya Urban Roads Authority, Kenya Revenue Authority and the respondent amongst others. Therefore, the respondent is a national institution run by the national government for purposes of national economic policies and delivery of services to people.

19. Explaining why the County Government could not tax a state organ, he stated that if for any reason these national state institutions were wound up, all their profits, if any, would go to the consolidated fund. The said revenue being revenue raised at the national level would then be shared equally between the two levels of government in accordance with ***Article 202(1)*** of the ***Constitution***. Thus, it would be absurd for the national government having shared the revenue as herein above demonstrated to pay taxes to the devolved government. Such a scenario went against the spirit of ***Articles 209(5), 6(2), 189 & 202 (1)*** of the ***Constitution***. Moreover, the national government does not tax revenue raised by County Governments.

20. In a brief rejoinder, Ms. Jadi submitted that the issue at hand had nothing to do with the interpretation of the Constitution. The onus lay with the respondent to demonstrate the prejudice caused in imposing such rates which it failed to do.

21. Having considered the record, submissions by counsel the following issues fall for consideration:-

- ***What is the scope of the court's jurisdiction in judicial review proceedings?***
- ***Did the respondent have locus to institute the judicial review proceedings?***

- ***Did the learned Judge err in issuing the orders in question?***

- ***Is the respondent supposed to pay land rates for it's airstrip in Ukunda?***

22. It is worth repeating for the umpteenth time that the function of the High Court sitting in judicial review proceedings is not to determine an appeal or otherwise consider the merits of the decision by a public body but rather to undertake a consideration of the manner in which the decision was made. In ***Municipal Council of Mombasa vs. Republic, Ex parte Umoja Consultants Ltd. [2002] eKLR***, this Court held as follows:

> ***"Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review".***

23. Further, Lord Green M.R. in the often cited case of ***Associated Provincial Picture House vs. Wednesbury Corporation [1914] 1 KB 222*** remarked as follows:

> ***"Decisions of person or bodies which perform public functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no such person or body properly directing itself on a relevant law and acting reasonably could have reached that decision."***

24. It is clear from the foregoing as was observed by this ***Court Captain (Rtd) Charles Masinde vs. Augustine Juma & 8 others [2016] eKLR*** that-

> ***"It is therefore important to remember in every case that <u>the purpose of judicial review remedies are to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question</u>." Emphasis added.***

25. In line with the unique nature of judicial review proceedings, leave of the court pursuant to ***Order 53(1)(1)*** of the ***Civil Procedure Rules*** is required before such proceedings can be instituted. The import of such leave was succinctly put by Waki J. (as he then was) when he stated in ***Republic vs. County Council of Kwale & another ex parte Kondo & 57 others [1998] 1 KLR (E&L)*** that :

> ***"The purpose of application for Leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived … Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially"***

See also ***Polycarp Wathuta Kanyugo & 2 Others vs. The County Government Of Kirinyaga [2014] eKLR***. This Court emphasized as much in ***Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8*** that;

> ***"The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers…"***

26. It follows therefore that the golden thread running through the aforesaid authorities among others is that leave to commence judicial review proceedings is not granted as a matter of course or as a mere formality. Even though at the leave stage the applicant is not expected to go into the depth of the intended application for judicial review, the applicant must satisfy the court that he or she has a *prima facie* arguable case which merits further investigation by the court.

27. From our perusal of the record, it is quite clear that the respondent sought leave to apply for an order of *prohibition* restraining the appellant or its agents from levying and/or recovering rates totaling to Kshs. 43,221,310 or any future rates imposed in respect of Ukunda Airstrip which as per its pleadings is situated on the three plots. Consequently, as rightly pointed out by the appellant, the learned Judge could only exercise his discretion with respect to the demand notice (if any) issued as against the three properties and not Kwale/Diani Beach Block/ 675. This is because firstly, leave was not sought in respect of the demand notice over Kwale/Diani Beach Block/ 675. Secondly, it is trite law that pleadings, particularly in an adversarial system such as ours, are binding not only on the parties but on the court as well (***See***

Malawi Railways Ltd. vs. Nyasulu [1998] MWSC 3 as cited with approval by this Court in ***Kenya Airports Authority vs. Mitu-Bell Welfare Society & 2 others [2016] eKLR***).

28. Having expressed ourselves we as herein above, we must now address the issue as to whether the respondent had *locus standi* to institute the judicial review proceedings on the footing of the three plots. Insisting that it lacked the requisite *locus*, the appellant placed reliance on ***Euton Njuki Makungo vs. Republic (supra)*** wherein this Court remarked;

> ***"No person can deal with the land of another unless that person is the duly authorized representative of the registered proprietor.***
>
> ***…***
>
> ***We find that the appellant not being a duly authorized representative of the registered proprietor had no locus standi to initiate judicial review proceedings in relation to the suit property."***

29. It is not disputed that the three properties in question do not belong to the respondent herein, and that they belong to individuals who have been named in these proceedings. It is not in dispute either that there was no demand notice issued by the appellant in respect of the said three plots. The respondent did not demonstrate what interest it has in the three properties. It is evident therefore that the respondent lacked the requisite *locus* to file the judicial review proceedings in question.

We further note that the only demand notice that was issued was in respect of **Kwale/Diani Beach Block/ 675** which was not subject of the proceedings in question. Similarly, the learned Judge had no basis for issuing an order of *certiorari* quashing the demand notice for Kwale/Diani Beach Block/ 675 since leave for such an order was never sought or granted obtained. It is trite that Judicial Review proceedings under Order 53 of the Civil Procedure Act cannot lie absent the leave of Court allowing a party to file them. Leave is a pre requisite which is mandatory and cannot be wished away. For that reason, the Judge's order granting certiorari gratuitously has no basis in law and must be vacated.

30. Last but not least, is the respondent exempted from paying property rates to the appellant? The starting point would be to examine the powers of the respondent as a County Government to impose rates. Upon promulgation of the current ***Constitution***, the devolved system of government was established and operationalized with each level of government being distinct and inter-dependent. ***Article 175 (b)*** of the ***Constitution*** envisages that County Governments shall have reliable sources of revenue to enable them govern and deliver services effectively. One avenue of raising revenue both at the National and County level is delineated under ***Article 209*** of the ***Constitution*** as follows:-

> ***"209***
>
> ***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 authorize 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; 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.***
>
> ***5) <u>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</u>." Emphasis added.***

31. Of relevance to this case is the interpretation of the provisions in relation to County Governments and in particular ***Article 209(5)***. We bear in mind that the ***Constitution*** must be interpreted holistically as expounded by the Supreme Court ***in the Matter of the Kenya National Commission on Human Rights, Supreme Court Advisory Opinion Reference [2014] eKLR*** thus,

"But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances."

32. In our view, a County Government is empowered to impose property rates and such power is qualified to the extent that it should not be exercised in a manner that is prejudicial to the national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour. This much was succinctly put by Murithi & Ogola JJ. in ***Base Titanium Limited vs. The County Government Of Mombasa & another [2017] eKLR*** as follows:-

"In plain language interpretation, the sub-Article (5) of Article 209 of the Constitution acknowledges the power of county governments to tax under Article 209 (3) and otherwise raise revenues including the service charges under Article 209 (4), with an injunction that the said power shall not be exercised in such a manner that will prejudice the interests set out therein. Accordingly, I respectfully reject the contention in the submissions by Counsel for the Petitioner that Article 209 (5) of the Constitution provides an automatic prohibition on the power of County Governments to levy tax or other charges, when he submits that "the Constitution itself expressly prohibits the 1st Respondent from exercising the said powers and/or imposing the said tax or charges."The prohibition is, in my view, subject to demonstration of prejudice in terms of the sub-Article 5."

33. The power to impose property rates by County Governments is enforced through the provisions of ***Rating Act*** and ***Valuation for Rating Act*** both of which according to ***Paragraph 7*** of the ***Sixth Schedule*** of the ***Constitution*** are to be construed with necessary alterations, adaptations, qualifications and exceptions in order to bring them into conformity with the ***Constitution***. In addition, the County Governments enact their respective ***Finance Acts*** which regulate the issues of taxation in the Counties.

34. Looking through the ***Rating Act*** and the ***Valuation for Rating Act*** there are two categories of properties exempted from taxation by County Governments. One is in relation to Government land where the national government makes contribution in lieu of rate payable as per ***Section 23 (1)*** of the ***Rating Act*** which provides:-

"23

1) There shall be paid to the rating authority—

a) by the Government in respect of Government land; and

b) by the community in respect of Land vested in the Community or any officer or authority of community, an annual contribution in lieu of any rates levied under this Act for each and every financial year."

Furthermore, ***Rule 3*** of the ***Valuation for Rating (Public Land) Rules*** stipulates that-

"3

1) For the purposes of assessing the contribution in lieu of rates payable to a local authority in respect of Government land under the Rating Act (Cap. 267), the valuer shall prepare a draft public land valuation roll, which shall be separate from, but at the same time of valuation as, the valuation roll of rateable property in the area of the local authority.

2) The draft public land valuation roll shall comprise all public land within the area of the local authority which would, if it were not public land, be rateable property (but not land excluded from the roll under rule 4), and shall distinguish between—

a) land of the Government;

b) land of the Kenya Railways Corporation;

c) land of the Kenya Posts and Telecommunication Corporation;

d) the Kenya Ports Authority;

e) the Kenya Airways Corporation;

f) Kenya Airports Authority.

35. The other is where by virtue of the use of the property, it is exempted from imposition of rates and also the national government is not obligated to make a contribution in lieu of the rates payable. This category is demonstrated under ***Rule 4*** of the ***Valuation for Rating (Public Land) Rules***-

" 4. Public land shall not be included in a draft public land valuation roll, or be liable to any contribution in lieu of rates, if it is being directly and exclusively used for any of the under mentioned purposes—

a) museums, art galleries, and ancient monuments (including Fort Jesus at Mombasa);

b) botanical gardens and arboreta;

c) veterinary quarantine areas and outspans;

d) all State Houses and all President's Lodges;

e) aerodromes within the meaning of the Civil Aviation Act (Cap. 394) and the Kenya Airports Authority Act (Cap. 395) which are managed and controlled by the Kenya Airports Authority, excluding areas used for passenger reception or the handling or storage of goods, the offices of airline companies or agencies, immigration and customs offices and premises, restaurants, lounges, bars, shops, hangars, workshops, posts and telecommunications installations and stores, police stations, animal holding grounds, freight sheds and dumps;

…"

Based on the foregoing, 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***.

The appellant urged that the properties can be separated so that rates are paid for places like the lounges, reception areas, restaurants etc to the exclusion of other installations such as runways. In our view however this would lead to absurdity as the appellant might one day decide to close the check in areas, lounges etc, in case of default. How then would the passengers be processed? How would they access the airplanes? Our view is that it is not possible to separate one airport into parts with some parts being ratable and others being exempt. We agree with the learned Judge that Airports fall under Rule 4 of the Public Land Rules cited earlier.

36. In the end, for reasons given above this appeal succeeds only to the extent that the learned Judge erred in granting orders of certiorari which were not asked for and without the requisite leave. We however are satisfied with his finding that no land rates are ratable in respect of Ukunda airstrip. Given the circumstances of this case, the order on costs that commends itself to us is that each party should bear its own costs.

Dated and delivered at Mombasa this 12th day of October, 2017

ALNASHIR VISRAM

……………………………….

JUDGE OF APPEAL

W. KARANJA

……………………………

JUDGE OF APPEAL

M. K. KOOME

………………………………..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

<u>DEPUTY REGISTRAR</u>