



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME, & OTIENO - ODEK, J.J.A.)**

**CIVIL APPEAL NO. 68 OF 2012**

**BETWEEN**

**CLERK, COUNTY COUNCIL OF WAJIR ..... 1<sup>ST</sup> APPELLANT**

**CLERK, COUNTY COUNCIL OF MANDERA..... 2<sup>ND</sup> APPELLANT**

**AND**

**ALLABDULAHI AHAMD AND KUSO DAHIR ALI .....RESPONDENTS**

**REPUBLIC ..... EX-PARTE**

*(An appeal from the Ruling and Order of the High Court of Kenya at Embu (Muchelule, J.) dated 19<sup>th</sup> September, 2011*

**in**

*H.C. Misc. Civil Applications Nos. 61 and 62 of 2010 (JR) Consolidated)*

**JUDGMENT OF THE COURT**

1. This appeal arises from a judicial review application whereby the respondent's ex parte applicants sought prerogative orders of certiorari and prohibition to issue against the appellants directing the Clerks of Wajir and Mandera County Councils to stop levying illegal and or unfair taxes in the form of cess on "miraa" obtained from Meru County Council whenever the said "miraa" is transported through the administrative jurisdictions of Wajir and Madera Country Councils respectively.

2. The background is that the respondents have been trading in "miraa" as a source of income generating business between Meru, Wajir and Mandera County Councils. In the course of buying and transporting "miraa" from Meru County Council via Wajir County Council to Mandera County Council, the appellants enforce cess payments upon the respondents both in Wajir and Mandera County Councils respectively. It is the respondents' case that the cess levied by Wajir and Mandera County Councils are not known in any written law and are illegal and amount to unfair/triple taxation; that there are no by-laws in place that have been approved by the Minister for Local Government; that Wajir and Mandera County Councils have no right to collect the cess charges in the absence of approved by-laws. The respondents' case is that under **Section 148** of the **Local Government Act, (Cap 265 of the Laws of Kenya)** all fees and charges imposed by a

local authority is to be regulated by by-laws and if not regulated by by-law, then such charges can only be imposed by resolution of the local authority with the consent of the Minister for Local Government. It is the respondent's submission that in the instant case, the consent of the Minister for Local Government was never obtained by Wajir and Mandera County Councils to levy cess on "miraa" that was being transported from Meru County Council. The respondents contend that the cess levied by Wajir and Mandera County Councils are arbitrary and contrary to **Section 148** of the **Local Government Act** and further contrary to a circular dated 8<sup>th</sup> June, 2007, by the Permanent Secretary, **Ministry of Local Government Circular MLG No. 12/2007** which abolished and or declared the levying of the said cesses inappropriate.

3. In reply and opposition to the issuance of the prohibitory orders, the appellants state that the levying of cess on the respondents has been done legally and in accordance with by-law titled "miraa" (Import Cess) which permit the Councils to levy cess on "miraa" that is transported within the administrative jurisdiction of Wajir and Mandera County Councils. That in respect of both Wajir and Mandera County Councils, the cess is utilized for maintaining the roads; that the cess was approved by the Permanent Secretary vide his letter **Ref: MLG/2536-98 (5)** dated 22<sup>nd</sup> December, 2008, and approved vide **Gazette Notice No. 2620** dated 13<sup>th</sup> March, 2009. That the cess levied is not arbitrary and is human, fair and reasonable.

4. Upon hearing and parties, the High Court (*Muchelulue, J.*) in a ruling delivered on 19<sup>th</sup> September, 2011, held that the imposition of cess by the appellants on the "miraa" transported by the respondents was without legal authority. In arriving at his decision, the learned judge stated that both Wajir and Mandera County Councils had no power to make the by-laws without consent from the Minister for Local Government as well as consent from the Minister for Agriculture. Having found that the relevant Ministerial consents were not obtained, the High Court issued prohibitory orders restraining Wajir and Mandera County Councils from levying cess, fees or tax on the respondents' "miraa". This ruling is the subject of the instant appeal.

5. The appellants in their memorandum of appeal have raised several grounds as follows:

***(i) That the learned Judge erred in law and fact in holding that the approved by-laws of the County Councils of Wajir and Mandera were made without consent of the Minister for Agriculture.***

***(ii) The learned Judge erred in law and fact and failed to take cognizance of Legal Notice No. 113 dated 5<sup>th</sup> September 2008 (Legislative Supplement No.40).***

***(iii) That the Judge erred in law and fact in holding that the approved by-laws were made in derogation of section 202(7) of the Local Government Act when such said section does not exist in the Act.***

***(iv) That the Judge erred in disregarding the provisions of Section 201 of the Local Government Act which gives County Councils the power to make by-laws and he further misdirected himself in interpretation that Section 192A of the Agriculture Act overrides Section 201 of the Local Government Act.***

***(v) The Judge erred in finding that the imposition of cess on respondents was illegal.***

***(vi) The Judge erred in law and fact in prohibiting the County Councils of Wajir and Mandera from levying cess, fees or taxes on the respondents and misapprehended the facts, evidence and submissions before him thereby arriving at a wrong decision.***

6. At the hearing of this appeal, learned counsel Mr. S. G. Thuo holding brief for learned counsel Mr. Abdi Hassan appeared for the appellants while learned counsel Ms C.W. Nderitu holding brief for Mr. F. E. Wasuna appeared for the respondents.

7. Counsel for the appellants elaborated on the grounds of appeal emphasizing that the High Court erred in law in finding that consent of the Minister for Agriculture was mandatory under **Section 192A** of the **Agriculture Act** and that the said consent was not obtained by the appellants prior to passing by-laws and imposition of cess on “*miraa*” transported through their administrative area of jurisdiction. Counsel submitted that the wording in **Section 192A** of the **Agriculture Act** is discretionary to the extent that discretion is vested upon the County Council to seek or not to seek consent of the Minister. It was submitted that it is the local county council that has discretion to seek consent and it is not mandatory under **Section 192A** of the **Agriculture Act** for the consent of the Minister to be obtained. It was further submitted that the learned Judge erred in citing and relying on **Section 202 (7)** of the **Local Government Act** which section does not exist in the said Act. Counsel submitted that the learned Judge erred in misapprehending the evidence before him as there was no proof of derogation from the provisions of the **Local Government Act** yet the Judge held that derogation had been proved.

8. The respondents in opposing the appeal supported the findings by the High Court. Counsel submitted that whereas the Judge cited the provisions of **Section 202 (7)** of the **Local Government Act**, this was a typographical error as the correct provision from the record of proceedings is **Section 202(3)** of the **Local Government Act**. On the issue that consent of the Minister for Agriculture and Local Government were required, it was submitted that by circular dated 8<sup>th</sup> June, 2007, the Permanent Secretary of the Ministry of Local Government made it clear that county councils should not impose cess. For the respondents it was submitted that **Section 192A** of the **Agriculture Act** requires that cess from “*miraa*” should be remitted to the District Roads Committee and should not be used by county councils for maintenance of roads. It was submitted that the Judge did not err and the appellants did not seek consent of the Minister for Agriculture or Local Government as they knew what they were doing was arbitrary and illegal.

9. Counsel for the appellants urged this Court to find that the Circular from the Permanent Secretary being relied upon by the respondents was a document unknown in law and of no legal effect; that **Section 192A** of the **Agriculture Act** is clear that cess should be used to maintain roads; that the cess to be remitted to the District Roads Committee does not relate to “*miraa*” but relates only to tea and coffee.

10. On our part we have considered submissions by counsel and the record of appeal as well as the judgment of the High Court. This is a first appeal and we are enjoined by law to re-evaluate the evidence on record and arrive at our own independent conclusions. The learned Judge in arriving at the decision to issue prohibitory orders against the appellants expressed himself as follows:

***“Once the ex-parte applicants swore that the County Council of Mandera had no by-law in place to authorize the levying of cess on miraa within its jurisdiction, it fell upon the Council to exhibit any such by-law. If the Council did not exhibit then it must be found that it did not have such a by-law. Under Section 148 of the Local Government Act cess charged or imposed by the Council has to be authorized and regulated by a by-law which has to be approved by the Minister for Local Government. The action by the Council to levy cess on the miraa without a by-law which had been approved was done without jurisdiction.*”**

***Regarding the County Council of Wajir, there is an approved by-law. However, under section 192A (1) of the Agriculture Act, such by-law was supposed to be made with the consent of the Minister for Agriculture who was to consult with the Minister for Local Government. The Council had no power to make the by-law without such consent. Under Section 202 (7) of the Local Government Act, the Council had no power to make a by-law to override or derogate from the provisions of the Agriculture Act. The result is that the imposition of cess on the ex-parte applicants’ miraa was without legal authority”.***

11. We now consider the ground of appeal that the Judge erred in citing and relying on **Section**

202 (7) of the **Local Government Act** which section does not exist. Counsel for the respondent submitted that reference to **Section 202(7)** of the **Act** was a typographical error. We were referred to the record of proceedings wherein it is reflected that the respondents submitted that “**Section 202(3)**” of the **Local Government Act (Cap 265)** is what allowed the local authority to make by-laws. We have examined the Local Government Act and we are satisfied that **Section 202(7)** does not exist. We have also examined the record of appeal and note that reference is made to **Section 202(3)** of the **Local Government Act**. We have read the provision of **Section 202 (3)** of the said **Act** and we agree with counsel for the respondent that it was a typographical error for the Judge to cite **Section 202(7)** instead of **Section 202(3)** of the **Act**. It is our considered view that this typographical error did not go to the root or form the *ratio decidendi* for the final decision and determination by the Honourable Judge.

12. A critical issue for our consideration and determination is whether the consents from the Minister for Local Government and Minister for Agriculture are required before the appellants could impose cess on “*miraa*” transported within their areas of administrative jurisdiction. To answer this question, the relevant provisions of the **Local Government Act (Cap 265)** and the **Agriculture Act (Cap 318)** are considered.

13. **Section 202** of the **Local Government Act (Cap 265)** provides as follows:

**“202 Restrictions on making by-laws**

**(1).....**

**(2) .....**

**(3) *Nothing in this Act contained shall be deemed to empower a local authority to make by-laws overriding or derogating from the provisions of any other written law for the time being in force in Kenya*”.**

14. **Section 204** of the **Local Government Act** provides as follows:

**“204 Submission of by-laws for approval.**

**(1) *After any by-law has been made by a local authority under this Act it shall be submitted to the Minister for his approval.***

**(2) *Every by-law submitted for approval under subsection (1) of this section shall be accompanied by:***

**(a) *a certified copy of the minutes of the meeting of the local authority at which the by-law was adopted;***

**(b) *a certificate by the clerk that section 203 of this Act has been complied with; and***

**(c) *copy of any objection to the adoption of the by-law which has been lodged in writing with the local authority, or, if no such objection has been lodge, a statement to that effect.***

**(3) *The Minister may approve, with or without alteration or reject any such by-law.***

**(4) *No by-law made under this Act shall have the force of law until it has been approved, whether with or without alteration, by the Minister, and published, or notice thereof published, in the manner provided by section 205 (1) or, in the case of any by law exempted under the provision to section 205 (1), until it has been communicated to the inhabitants pursuant to section 205 (3)*”.**

15. **Section 206** of the *Local Government Act* provides as follows:

***“206 Admissibility in evidence of signed copy of by-laws and certificates of clerks.***

***(1) A copy of every by-law which has been approved by the Minister, signed or purporting to be signed by the clerk of the local authority which made it and approved by the Minister, shall be kept by the clerk and shall be admissible in evidence without further proof and shall be evidence of the due making of such by-law and of the contents thereof,***

***(2) The production of a printed copy of any by-laws purporting to be made by a local authority upon which is endorsed a certificate purporting to be signed by the clerk of the local authority stating:***

***(a) that the by-laws were made by that local authority;***

***(b) that the copy is a true copy of the by-laws;***

***(c) that on a specified date the by-laws were approved by the Minister; and***

***(d) the date from which the by-laws have effect, shall be prima facie evidence of the facts stated in the certificate without proof of the writing or official position of the person purporting to sign the certificate”.***

16. **Section 192A** of the *Agriculture Act (Cap 318 of the Laws of Kenya)*

provides as follows:

***“192A. (1) Subject to subsection (1A) a local authority may, with the consent of the Minister given after consultation with the Minister for the time being responsible for local government, by by-laws, impose a cess on any kind of agricultural produce, and may in the by-laws make such incidental provision as is necessary or expedient; and the cess shall form part of the local authority's revenues.***

***(1A) Notwithstanding the provisions of subsection (1), eighty percent of all monies collected as cess under that subsection shall be used in maintaining roads and other services, in the local authority, related to the sectors in respect of which such monies are levied, and the remaining twenty percent shall be credited to the general account of the local authority:***

***Provided that the eighty percent of the cess collected in respect of tea and coffee shall be transmitted to the respective District Roads Committee.***

***(1B) For the purposes of this section, "District Roads Committee" has the meaning assigned to it in section 2 of the Kenya Roads Board Act, 1999”.***

17. The relevant provisions of the *Local Government Act* as well as the *Agriculture Act* have been reproduced above. The appellants submitted that **Section 192A (1)** of the *Agriculture Act* is worded in a discretionary manner by virtue of the word “may” in the provision. It is the appellants’ submission that the wording in the section reads that “a local authority **may**, with the consent of the Minister..., impose a cess on any kind of agricultural produce”. The appellants submitted that the discretion to apply for consent lies with the local authority. The learned Judge interpreted this provision and held that it is mandatory to obtain consent of the Minister. On our part, we find that the discretion of whether or not to impose a cess lies with the local authority. The true construction of the provision reads as follows: *a local authority may .... by by-laws, impose a cess on any kind of agricultural produce.* It is our considered view that once the local

authority exercises the discretion and chooses to impose cess on an agricultural produce, the Minister for Agriculture must consent and then consult with the Minister for Local Government and if approval is granted, the cess can be imposed. We hold that a local authority cannot impose cess on an agricultural produce without consent of the Minister for Agriculture who must consult and obtain approval from the Minister for Local Government. Such consent, consultation and approval are mandatory before cess can be levied on an agricultural produce.

18. Another ground of appeal is that the learned Judge erred in law and fact by failing to find that there was no evidence to prove derogation from the provisions of the **Local Government Act, Section 202 (3)** of the **Local Government Act** provides that nothing in the **Act** shall be deemed to empower a local authority to make by-laws overriding or derogating from the provisions of any other written law for the time being in force in Kenya. The import of this provision is that **Section 202 (1)** of the **Local Government Act** cannot override or derogate from the provisions of **Section 192A (1)** of the **Agriculture Act**. **Section 192A (1)** of the **Agriculture Act** makes it mandatory that before cess is imposed on an agricultural produce, the Minister for Agriculture must consent and then consult and obtain approval from the Minister for Local Government. It is our considered view that **Section 202 (1)** of the **Local Government Act** which empowers a local authority to impose cess is subject to **Section 202 (3)** of the **Local Government Act** and **Section 192A (1)** of the **Agriculture Act**. From the foregoing, it is our considered view that the learned Judge did not err in law by finding that approval of the Minister for Local Government obtained upon consultation with the Minister for Agriculture is a mandatory requirement before cess can be imposed on an agricultural produce.

19. Applying the interpretation that we have given above to the facts of this case, we note that the learned Judge made a finding that the Mandera County Council by-laws were illegal as approval of the Minister for Local Government had not been obtained. **Section 204 (1)** of the **Local Government Act** makes it mandatory that after any by-law has been made by a local authority it shall be submitted to the Minister for his approval. **Section 202 (4)** of the **Local Government Act** provides that “No by-law made under this Act shall have the force of law until it has been approved, whether with or without alteration, by the Minister, and published, or notice thereof published, in the manner provided by **Section 205 (1)**.”

20. We are unable to find on record evidence that approval of the Minister for Local Government was obtained by Mandera County Council for the by-law imposing cess on “*miraa*”. On this issue, the learned judge stated:

***“Once the ex-parte applicants swore that the County Council of Mandera had no by-law in place to authorize the levying of cess on miraa within its jurisdiction, it fell upon the Council to exhibit any such by-law. If the Council did not exhibit then it must be found that it did not have such a by-law. Under Section 148 of the Local Government Act cess charged or imposed by the Council has to be authorized and regulated by a by-law which has to be approved by the Minister for Local Government”.***

21. We concur with the conclusion arrived at by the Judge taking into account the provisions of **Section 112** of the **Evidence Act** as read with **Sections 107** and **109** of the said **Evidence Act**. The respondents laid a factual basis by stating that the by-law for Mandera County Council had not been approved by the Minister. The evidential burden to prove the existence of approval by the Minister shifted to the County Council of Mandera to demonstrate that approval had been obtained. **Section 206** of the **Local Government Act** provides for the mode of admissibility of evidence in proof that approval of the Minister had been obtained. A copy of every by-law which has been approved by the Minister shall be kept by the clerk and shall be admissible in evidence without further proof and shall be evidence of the due making of such by-law and of the contents thereof. It is our considered view that the evidential burden to demonstrate that approval of the Minister was obtained is a fact which was within the knowledge of Mandera County Council and no evidence was placed before the High Court in accordance with **Section 206 (1)** of the **Local Government Act**; further, a Certificate in terms of **Section 206 (2)** of the **Local Government Act**

was never tendered in evidence. For the foregoing reasons, we find that the High Court did not err in its finding that there was no proof that Mandera County Council had obtained approval of the Minister to levy cess on “*miraa*”.

22. With regard to Wajir County Council, the appellants’ contend that the learned judge erred and failed to take cognizance of **Legal Notice No. 113** dated 5<sup>th</sup> September, 2008, (*Legislative Supplement No.40*) where approval by the Minister had been obtained and gazetted. **Section 192A (3)** of the **Agriculture Act** stipulates that the procedure for the making, approval and publication of by-laws made under **Subsection (1)** shall be that prescribed by the law under which the local authority is established, and, for the purposes of the enforcement thereof, such by-laws shall be deemed to be by-laws made under that law.

23. We have examined the **Legal Notice No. 113** dated 5<sup>th</sup> September, 2008. A Certificate in terms of **Section 206 (1)** of the **Local Government Act** was tendered in evidence before the High Court. In the said certificate, it is stated that the Minister for Local Government approved the imposition of cess on “*miraa*” for Wajir County Council on 19<sup>th</sup> December, 2008. In the approved by-law, it is stated that cess shall be paid at specified rates on any “*miraa*” brought into the area of jurisdiction of the Council. It is our considered view that the Gazette Notice dated 5<sup>th</sup> September, 2008, as read with County Council of Wajir (Miraa Import Cess) By-law, 2008, and as read with **Section 192A (3)** of the **Agriculture Act** is sufficient proof that relevant approval of the Minister for Local Government was obtained. We find that the learned Judge erred in law interpreting **Section 192A (1)** of the Agriculture Act without considering the provisions of **Section 192A (3)** of the same Act in holding that consent of the Minister for Agriculture was not obtained in relation to imposition of cess on “*miraa*” by the Wajir County Council. We find that cess imposed by Wajir County Council was legal because the procedure for the making, approval and publication of by-laws made under **Section 192A (1)** of the **Agriculture Act** is the procedure prescribed by the **Local Government Act**.

24. For the foregoing reasons, our re- evaluation of the evidence on record and interpretation of the relevant provisions of law lead us to set aside in entirety the ruling dated 19<sup>th</sup> September, 2011, and substitute in its place the following orders:

**(i) Cess imposed on “*miraa*” by the County Council of Wajir pursuant to Legal Notice No. 113 dated 5<sup>th</sup> September 2008 and the County Council of Wajir (Miraa Import Cess) By-law, 2008 is legal.**

**(ii) Cess imposed on “*miraa*” by the County Council of Mandera is illegal for want of a by-law that has been approved by the Minister for Local Government pursuant to the provisions of Sections 148 and 206 (1) of the Local Government Act as read with Section 192A (3) of the Agriculture Act.**

**(iii) This appeal being partially successful, each party shall bear its/his own costs.**

***Dated and delivered at Nyeri this 23<sup>rd</sup> day of June, 2014.***

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**MARTHA KOOME**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK** .....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**