



**Base Titanium Limited v County Government of Mombasa & another
(Petition 22 of 2018) [2021] KESC 33 (KLR) (16 July 2021) (Judgment)**

Base Titanium Limited v County Government of Mombasa & another [2021] eKLR

Neutral citation: [2021] KESC 33 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

PETITION 22 OF 2018

PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

JULY 16, 2021

BETWEEN

BASE TITANIUM LIMITED APPELLANT

AND

COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal at Mombasa (A. Visram, W. Karanja & M.K Koome, JJA) in Civil Appeal No. 69 of 2017 delivered on 5th July 2018)

County government levy of a charge for a road that is vested in the National Government improper

Reported by Kakai Toili

Devolution – county governments – power of county governments – power to charge cess, levy or tax - circumstances in which a county government could charge a cess, levy or tax – claim that a county government charged cess for road transport services for a road vested in the National Government - whether a county government could levy a charge for road transport services for a road that was vested in the National Government – Constitution of Kenya, 2010, article 209 and the Fourth Schedule Part 2 section 5.

Constitutional Law – public finance – accounting for payment – claim that a receipt for payment of cess to a county government was indicated as miscellaneous - whether the use of the term miscellaneous to account for payment was ambiguous and was against the spirit of article 201 of the Constitution on the principles of public finance – Constitution of Kenya, 2010, article 201(a).

Statutes – interpretation of statutes – interpretation of the Kenya Roads Act - distinction of the roles of Kenya National Highways Authority (KeNHA), the Kenya Urban Roads Authority (KURA) and the Kenya Rural Roads Authority (KERRA) - what was the distinction of the roles of Kenya National Highways Authority (KeNHA), the Kenya Urban Roads Authority (KURA) and the Kenya Rural Roads Authority (KERRA) in building, maintaining and regulating Kenya's road networks.



Words and Phrases – service – definition of service – a system that provides something that the public needs, organized by the government or a private company - Oxford Dictionary of English 3rd Edition 2015.

Words and Phrases – miscellaneous - definition of miscellaneous - consisting of many different kinds of things that are not connected and do not easily form a group - Oxford Dictionary of English 3rd Edition, 2015.

Brief facts

The appeal concerned a cess of Kshs 3000 imposed upon each of the appellant's trucks from June 17, 2014, whenever transporting its minerals from Kwale County to Mombasa Port (the port) which was within the 1st respondent's jurisdiction. That cess was levied under item 90 of the Schedule to the Mombasa County Finance Act, 2014. The 1st respondent continued to impose the cess despite a protest from the appellant that the same contravened the Constitution of Kenya, 2010, (the Constitution) and further confirmation from the Attorney General that the cess imposed was unconstitutional.

Aggrieved by the 1st respondent's action, the appellant filed a suit at the High Court and sought among other orders; a declaration that the actions of the 1st respondent to charge the cess was unconstitutional; and a declaration that the 1st respondent had no mandate under the Constitution to pass any legislation that restricted the appellant's right of movement by imposing a tax or revenue to be paid by the appellant as a condition for moving its goods across the 1st respondent's boundaries.

The High Court dismissed the appellant's petition with costs and stated that county governments had, under article 209(3) and (4) of the Constitution, the power to levy taxes and charges for services that they provided including road transport services. Dissatisfied by the High Court's finding, the appellant lodged an appeal at the Court of Appeal. The Court of Appeal dismissed the appeal with costs hence the appellant filed the instant petition of appeal at the Supreme Court.

Issues

- i. What were the circumstances in which a county government could charge a cess, levy or tax?
- ii. Whether a county government could levy a charge for road transport services for a road that was vested in the National Government.
- iii. Whether the use of the term miscellaneous to account for payment was ambiguous and was against the spirit of article 201 of the Constitution on the principles of public finance.
- iv. What was the distinction of the roles of Kenya National Highways Authority (KeNHA), the Kenya Urban Roads Authority (KURA) and the Kenya Rural Roads Authority (KERRA) in building, maintaining and regulating Kenya's road networks?

Held

1. Article 209 of the Constitution empowered counties to raise revenue and levy taxes, rates, or other charges. Under article 209(4), the 1st respondent was authorized to impose charges for services provided. Service included county transport which entailed county roads; street lighting; traffic and parking; public roads transport; and ferries and harbors, excluding the regulation of international and national shipping and matters related thereto comprised some of the functions and powers of county governments under section 5 part 2 of schedule four to the Constitution. The intention of article 209(4) of the Constitution was to confer county governments the discretionary powers to impose charges for services, more specifically, that they could charge or impose payment in exchange for a public need or amenity.
2. The insertion of the words 'for services' in article 209(4) of the Constitution were a qualification to the charge of the services. Whereas a county could levy charges, it had to do so in exchange for an amenity. A county did not have the authority to charge a cess, levy or tax where they did not offer anything in return.
3. The Constitution permitted county governments to impose charges for the realization of their powers under the Fourth Schedule. But that power did not go unchecked. In the spirit of harmonious interpretation of the Constitution, in enacting the law, county governments had to heed the provisions



- of article 209(5) of the Constitution and ensure that the charges imposed would not be detrimental to national economic policies, economic activities across boundaries or the national mobility of goods, services, capital or labor. Hence Counties could charge for services.
4. Mobility of goods in Kenya was governed by the Kenya Roads Act (the Act). Under that Act, the Kenya National Highways Authority (KeNHA), the Kenya Urban Roads Authority (KURA) and the Kenya Rural Roads Authority (KERRA), were established for among other functions constructing, upgrading, rehabilitating and maintaining roads, controlling and implementing policies relating to national roads, rural roads and urban roads.
 5. The Kenya Roads Board was established with its mandate under the Kenya Roads Board Act being to oversee the road network in Kenya and coordinate maintenance, rehabilitation and development, all funded by the Kenya Road Board Fund established under section 31 of the Kenya Roads Board Act.
 6. KeNHA was responsible for the development, rehabilitation, management, and maintenance of all national trunk roads comprising classes S, A, and B roads. KURA was responsible for the management, development, rehabilitation and maintenance of all public roads in cities and municipalities except where the roads were categorized as national roads. After the January 2016 gazette, KURA's mandate was expanded to all counties in line with article 6(3) of the Constitution. On their part, KERRA was in charge of constructing, upgrading, rehabilitating and maintaining rural roads, controlling reserves for rural roads and access to roadside developments and implementing road policies in relation to rural roads. Under the classification of roads, KERRA was in charge of categories D, E, F, G, K, L, P, R, S, T, U, and W.
 7. There was a distinction between national roads and county roads. National roads were maintained solely by the National Government through KeNHA while counties maintained their roads in collaboration with the other authorities.
 8. To access the port, the appellant had to use the Likoni-Ukunda Road which the Kenyan road system identified as an A14 road. That road, A14 fell directly into the category of a national road. That category fell directly under the mandate of KeNHA and the National Government which was in charge of its development, rehabilitation, management and maintenance. The 1st respondent had not clarified how the charge met the categories it set out in item 90 of the Mombasa County Finance, 2014.
 9. The 1st respondent had not stated if they provided street lighting, parking or maintenance of the road accessed by the petitioners. While the superior courts were in agreement with them that the charge was a road service charge, the Supreme Court was of a contrary opinion, as the 1st respondent did not illustrate how such road services were provided. It was improper for the 1st respondent to levy a charge for road transport services when the same road was vested in the National Government.
 10. Article 201(a) of the Constitution called for openness and accountability including public participation in financial matters. The intention of that provision was to ensure efficiency within the public financial management sector which had faced tremendous challenges occasioned by gaps that had resulted in the past embezzlement of public funds. Article 201(a) of the Constitution sought to curb the problem of abuse of public resources and corruption, by calling for transparency in the handling of those resources. Public finances were to be managed efficiently with firm checks and balances.
 11. In issuing receipts marked 'miscellaneous income' the 1st respondent had created avenues for possible abuse. The word miscellaneous was vague and it was not easily discernible what the payments were directed at. Using the term miscellaneous to account for payment led to ambiguity which went against the spirit of article 201 of the Constitution. Miscellaneous could refer to any number of things and it was essential that that form of opaqueness in accountability was discouraged. It was imperative that any payments to counties should clearly state in precise, unambiguous words what the payments were for.
 12. The National Government was the provider of the road service in the instant case. Should an access fee be owing, then the proper entity to which that amount was owed should be the National Government



not the 1st respondent. The cess imposed by the 1st respondent under item 90 of the Schedule to the Mombasa County Act, 2014 was improperly imposed as a charge for services provided by the County Government and was not a charge for service as contemplated by article 209(4) of the Constitution.

Petition of appeal allowed.

Orders

- i. *Judgment of the Court of Appeal dated July 5, 2018 set aside.*
- ii. *Judgment of the High Court dated February 21, 2018 set aside.*
- iii. *The actions of the 1st respondent to charge the appellant a cess in the sum of Kshs. 3,000 per truck, or any sum at all, a condition for the appellant to move its goods across the boundaries of the 1st respondent's county were declared unconstitutional, null and void.*
- iv. *The 1st respondent was directed to refund to the appellant the sum of Kshs. 1,542,000 paid by the appellant to the 1st respondent as of December 31, 2014.*
- v. *Any other additional sums that the appellant had paid to the 1st respondent from January 1, 2015, to the date of the judgment as cess on trucks transporting goods across the 1st respondent's boundaries were to be pursued at the High Court.*
- vi. *The 1st respondent was to bear the costs of the appeal.*

Citations

Cases

Kenya

1. *Base Titanium Limited v County Government of Mombasa & another* Civil Appeal 69 of 2017; [2018] KECA 375 (KLR) - (Explained)
2. *Base Titanium Limited v County Government of Mombasa & Attorney General* Petition 9 of 2015; [2016] KEHC 3776 (KLR) - (Explained)
3. *Council of County Governors v Attorney General & 3 others; Transition Authority (Interested Party)* Petition 472 of 2014; [2015] KEHC 8014 (KLR) - (Explained)
4. *Kariuki, James Gacheru t/a Constituyen Traders & 536 others v County Government of Kiambu & others* Constitutional Petition 8 of 2016; [2017] KEHC 4933 (KLR) - (Mentioned)
5. *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* Petition 15 & 16 of 2015 (Consolidated); [2017] KESC 2 (KLR) - (Mentioned)
6. *Pwani Super Capacity Transporters Savings & another v County Government of Mombasa* Constitutional Petition 27 of 2019; [2020] eKLR - (Mentioned)
7. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR); [2014] 2 KLR 253 - (Mentioned)

Texts

Hornby, AS., *et al* (Eds) (2015), *Oxford English Dictionary* Oxford : Oxford University Press 3rd Edn

Statutes

Kenya

1. Constitution of Kenya articles 2(2); 6(3); 10; 62; 163(4)(a); 185(2); 186(1); 187(2)(b); 201; 209(3)(4) (5); 259; 261; Schedule 4 part 2 section 5 - (Interpreted)
2. County Governments Act (cap 265) section 5 - (Interpreted)
3. Kenya Roads Board Act, 2007 (cap 408A) sections 22, 31 - (Interpreted)
4. Public Finance Management Act (cap 412A) section 161 - (Interpreted)
5. Supreme Court Rules, 2010 (cap 9B Sub Leg) rules 8, 32 - (Interpreted)
6. Traffic Act (cap 403) In general - (Cited)

Advocates

None mentioned



JUDGMENT

A. Background

1. The present appeal arises from the Judgement of the Court of Appeal (Visram, Karanja & Koome, JJA) which upheld the decision of the High Court which had dismissed the appellant's petition.
2. This appeal concerns a cess of KES. 3000 imposed upon each of the appellant's trucks from June 17, 2014, whenever transporting its minerals from Kwale County to Mombasa Port which is within the 1st respondent's jurisdiction. The 1st respondent continued to impose the cess despite a protest from the appellant that the same contravened the *Constitution*, and a further confirmation from the Attorney General that the cess imposed was unconstitutional.
3. Aggrieved by the 1st respondent's action, the appellant filed HC Petition No 9 of 2015, *Base Titanium Limited v the County Government of Mombasa & another* where it sought the following orders: (a) a declaration that the actions of the 1st respondent to charge the appellant a cess in the sum of Kshs 3,000 per truck, or any sum at all, a condition for the appellant 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 to pass any legislation that restricts the appellant's right of movement by imposing a tax or revenue to be paid by the appellant as a condition for moving its goods across the 1st respondent's boundaries; and (c) a mandatory injunction compelling the 1st respondent to refund to the appellant the sum of Kshs.1,542,000 paid by the appellant to the 1st respondent under duress as at December 31, 2014, and/or any other additional sums that the appellant 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.
4. On February 21, 2017, the High Court (Ogola J) delineated one issue for determination that is, whether levy by the County Government of Mombasa of a cess charge for transportation of the appellant's goods through the County is constitutional within the power of the County Government under article 209 of the *Constitution*. While dismissing the appellant's petition with costs, the learned judge found that County Governments have, under article 209 (3) and (4) of the *Constitution*, the power to levy taxes and charges for services that they provide including road transport services. In that context, he concluded that 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 on the mineral product of Titanium mined and transported by the appellant, 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. Further, that the appellant failed to demonstrate how the imposition of the cess on the vehicles carrying its product into Mombasa prejudices the national interests as per article 209 (5) of the *Constitution*.
5. Dissatisfied by the above finding, the appellant lodged an appeal at the Court of Appeal, Civil Appeal No 69 of 2017 *Base Titanium Limited v County Government of Mombasa & another*. In its appeal, the appellant faulted the trial Judge mainly for: finding that the cess was a charge for services referred to 'road transport service' provided by the 1st respondent; making a determination on issue(s) not pleaded thus infringing on the appellant's right to a fair hearing; misapprehending the law with respect to implementation of article 209(5) of the *Constitution*; and failing to hold that the imposition of the cess was unconstitutional. It sought for the appeal to be allowed, grant of the prayers in the petition dated February 20, 2015, and for the costs of the appeal and at the High Court.



6. On July 5, 2018, the learned judges of appeal dismissed the appeal with costs. In doing so, they identified two issues for determination as follows: whether the 1st respondent had power to levy the cess in question and that in the alternative, if it did have such power, whether the same was exercised contrary to the Constitution. The appellate court agreed with the trial Judge that the cess levied by the 1st respondent was in line with article 209(4) of the Constitution which empowers a County Government to impose charges on services rendered and in accordance with item 90 of the Schedule to the Mombasa County Finance Act, 2014. The learned judges of appeal concluded that the appellant failed to demonstrate the manner in which the 1st respondent had violated article 209(4) and (5) of the Constitution by hindering the movement of its goods or how it was prejudicial to national economic policies or unlawful in any way.
7. Aggrieved further by the finding of the Court of Appeal, the appellant filed the present appeal under rule No. 8 and 32 of the Supreme Court Rules 2010. The appeal is premised on the grounds *inter alia* that the Court of Appeal erred in its interpretation and application of article 209(4) of the Constitution when it found that a levy in the Mombasa County Finance Act, 2014 was properly imposed as a charge for services provided within the meaning of the said article without specifying whether the levy related to a service offered by the 1st respondent, and if so, the nature of the said service. The appellant also faults the court's finding that the said levy was properly imposed for services provided by the 1st respondent without considering whether the said levy complied with the Constitution.
8. In summary, the appellant seeks the following orders: the appeal be allowed; a declaration that the Court of Appeal in its decision made on July 5, 2017 erred in its interpretation and application of article 209(4) of the Constitution; a reversal of the Court Appeal's decision of July 5, 2017; and costs of this appeal as well as those of the Court of Appeal.

B. Parties Submissions

a. The appellant

9. In its submissions filed on March 3, 2020, and supplementary submissions filed on June 26, 2020, the appellant submits that its appeal is premised on article 163(4)(a) of the Constitution as it challenges the superior courts' interpretation and application of article 209(4) and (5) of the Constitution. The appellant urges that the High Court and the Court of Appeal erred when they failed to follow the guidelines on the interpretation and application of the Constitution as provided for under articles 259 and 10 of the Constitution.
10. Relying on article 209(4) of the Constitution, the appellant argues that even if the Constitution empowers the 1st respondent to impose charges for services it renders, it cannot raise charges under the said article where no services have been rendered.
11. Learned counsel for the appellant urges that taxes or levies charged by the 1st respondent were undisclosed in their receipts which indicated that the payments were for either "miscellaneous income" or "Likoni Revenue Barrier". In that context, the appellant maintains that the 1st respondent did not provide any evidence of the services, if any, rendered by it to the appellant so as to justify the charges in terms of article 209(4) of the Constitution. It urged that it was entitled to know the nature of services provided by the 1st respondent and the price of the charges. It relied on article 261 of the Constitution, section 161 of the Public Finance Management Act, and the Mombasa County Finance Act 2014 to support its argument that there was no such service(s) known as "miscellaneous."
12. In addition, the appellant urges that no evidence was placed before the trial court to support its finding that the alleged levy was a cess, payment for road service, garbage collection, parking facilities, street



lighting, drainage and roads maintenance or for services rendered by the 1st respondent. Furthermore, that the Cabinet Secretary (Treasury) was not consulted before the enactment or enforcement of Item 90 of Mombasa Finance Act 2014.

13. Relying on article, 209(5) of the *Constitution*, the appellant also submits that the 1st respondent's powers to raise revenue should not be exercised in a way that prejudices national economic policies, activities across county boundaries or national mobility of goods, services, capital or labour. In that context, it maintains that the 1st respondent contravened the foregoing article of the Constitution and the Roads Act which governs mobility of goods on public roads.
14. The appellant concludes its submissions by stating that the 1st respondent's action contravened articles 2(2), 10 and 209(5) of the *Constitution*. Consequently, it faults the Court of Appeal for interpreting the "miscellaneous charge" levied upon the appellant to fall under Item 90 as a cess, yet the said item does not define a cess to mean a road service. Towards that end, it urges for the appeal to be allowed as prayed.

The 1st respondent

15. The 1st respondent's submissions were filed on June 12, 2020. It is the 1st respondent's case that the superior courts properly applied and interpreted article 209(4) of the *Constitution* and that the revenue it imposed on each of the trucks ferrying the appellant's goods is proper under Item 90 of the Schedule to the Mombasa County Finance Act, 2014.
16. Citing section 5 of the *County Government Act, 2012* and the Fourth Schedule of the Constitution, the 1st respondent urges that county governments are charged with the responsibility of managing and running transport including county roads, street lighting, traffic and parking, public transport, and ferries and harbors. It also submits that the sum of KES 3000/- levied as cess charges was specifically pleaded and that the same was pegged on item 90 of Mombasa County Finance Act 2014.
17. The 1st respondent refutes the appellants contention that the superior courts made a finding that the KES 3000/- imposed was cess on all motor vehicles carrying and offloading goods within its County. Instead, it submits that the issue as to whether Item 90 to the Mombasa County Finance Act 2014 as enacted contravened article 201 of the *Constitution*, was never pleaded, neither was it an issue for determination at the High Court and that the Appellant is estopped from pleading the same at this stage. It relies on this court's decision in *Francis Karioko Muruatetu & another v Republic & 5 others*, Petition 15 as consolidated with 16 of 2015[2017] eKLR to support its argument.
18. Furthermore, the 1st respondent agrees with the superior courts' interpretation and application of its powers under article 209(4) of the *Constitution of Kenya*. It urges that it has powers to impose charges for the services it provides and relies on the cases of *James Gacheru Kariuki t/a Constituyen Traders & 536 others v County Government of Kiambu & others*, Kiambu HC Petition No 8 of 2016 [2017]eKLR, and *Pwani Super Capacity Transporters Savings & another v County Government of Mombasa* [2020]eKLR to support its argument that it has powers to raise revenue through imposition of charges as long as they are founded in legislation pursuant to article 201 of the *Constitution*.
19. Finally, the appellant urges that the appeal be dismissed with costs and that the appellant should bear its costs at the Court of Appeal and in this court considering that it instituted the cause on its own behalf and not that of the public.

It relies on the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others Petition No 4 of 2012*; [2014] where this court stated that costs follow the event.



The 2nd respondent's

20. We note that the 2nd respondent did not attend the hearing and did not file written submissions.

C. Issues for Determination

21. Having carefully considered the grounds of appeal, the submissions of the parties, the authorities cited in support thereof, it is clear to us that there are two issues falling for determination, that is:
- i. Whether the cess charge imposed by the Mombasa County Government upon each of the appellant's truck was a charge on services as contemplated under article 209(4) & (5) of the Constitution of Kenya, and if so
 - ii. What remedies should the court offer?

D. Analysis

i. Whether the cess charge imposed by the Mombasa County Government upon each of the appellant's truck was a charge on services as contemplated under article 209(4) & (5) of the Constitution of Kenya?

22. The bone of contention in this appeal is whether the cess charge imposed by the 1st respondent upon each of the appellant's truck is a charge on a service as contemplated under article 209(4) and (5) of the *Constitution*. It is the appellant's case that the 1st respondent's levy of KES. 3000 against each of its truck contravenes article 209(4) and (5) of the *Constitution* as they do not provide any services to them to justify the charge. Furthermore, that under article 209(5) of the Constitution, such charges prejudice national economic policies and economic activities across county boundaries. Conversely, the 1st Respondent is adamant that the said article bestows on them the power to impose any such charges for the services they provide and have not acted in excess of the powers stipulated in the said provisions. It is also the 1st respondent's case that the constitutionality of Item 90 of the Mombasa County Finance Act, 2014 was never raised at the trial court and that the appellant is barred from raising the same in this Court.
23. Article 185(2) of the *Constitution of Kenya* confers a County Government with the Legislative Authority to 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.
24. Further, article 186(1) states that the powers and functions of the National government and the County governments, respectively, are as set out in the Fourth Schedule, and finally, under article 187 (2)(b) of the *Constitution*, the constitutional responsibility for the performance of the functions or exercise of the power remain with the government to which it is assigned by the Fourth Schedule.
25. Under the provisions of article 209, a county is empowered to raise revenue and levy taxes, rates, or other charges. Additionally, under sub article (4), the 1st respondent is authorized to impose charges for services provided. So then, what is the meaning of the word 'services' for purposes of application within the meaning of article 209(4) of the *Constitution*? The word 'service' as provided in the *Oxford Dictionary of English* 3rd Edition 2015 is "a system that provides something that the public needs, organized by the government or a private company". This may include for County transport which entails County roads; street lighting; traffic and parking; public roads transport; and ferries and harbors, excluding the regulation of international and national shipping and matters related thereto comprise some of the functions and powers of County Governments under Schedule four part 2, section 5.



26. Taking that definition into account, a plain reading of that article reveals that the intention of article 209(4) of the Constitution, is to confer County Governments the discretionary powers to impose charges for services, more specifically, that they can charge or impose a payment in exchange of a public need or amenity.
27. To our minds, the insertion of the words ‘for services’ in article 209(4), are a qualification to the charge of the services. Whereas a County can levy charges, it must do so in exchange for an amenity. Put differently, a County does not have the authority to charge a cess, levy or tax where they do not offer anything in return.
28. Undoubtedly, Constitution permits County Governments to impose charges for the realization of its powers under the Fourth schedule. But that power does not go unchecked, in the spirit of harmonious interpretation of the Constitution, in enacting the law, County Governments must heed the provisions of article 209 (5) and ensure that the charges invoked will not be detrimental to national economic policies, economic activities across boundaries or the national mobility of goods, services, capital or labor.
29. Consequently, we agree with the High Court and the Court of Appeal, only to the extent that County Governments have the mandate to charge levies for services rendered.
30. Having found that Counties can charge for services, it then falls to us to determine if the roads accessed by the Petitioners are those within the purview of the Counties. Mobility of goods in Kenya is governed by the Kenya Roads Act.

Under that Act, the Kenya National Highways Authority (KeNHA), the Kenya Urban Roads Authority (KURA) and the Kenya Rural Roads Authority (KERRA), are established for among others “constructing, upgrading, rehabilitating and maintaining roads, controlling and implementing policies relating to national roads, rural roads and urban roads.”
31. More specifically, section 22 of that Acts vests in these authorities’ power to: maintain, operate, improve and manage the roads under its jurisdiction; construct new roads; measure and assess the weights, dimensions and capacities of vehicles using any road and provide measures to ensure compliance with rules relating to axle load control, other provisions of the Traffic Act (cap. 403) and any regulations under this Act; and provide such amenities or facilities for persons making use of the services or facilities provided by the Authority as may appear to the Authority necessary or desirable.
32. There is also established a Kenya Roads Board whose mandate under the Kenya Roads Board Act, is to oversee the road network in Kenya and coordinate maintenance, rehabilitation, and development, all funded by the Kenya Road Board Fund established under section 31 of the Kenya Roads Board Act.
33. In High Court in Petition no 472 of 2014, Council of County Governors v Attorney General & 4 others [2015] eKLR the court clarified that the County governments will be in charge of Class D, E, F and G (County Roads), whilst the National government is in charge of Class A, B and C (National Trunk Roads). That court decision resulted in a subsequent Legal Notice No 2 of 2016, which clearly elucidated the road network management system in the Country. Following that notice, the Kenya Roads Board, further categorized the roads network into various classes.
34. KeNHA is responsible for the development, rehabilitation, management, and maintenance of all National Trunk Roads comprising Classes S, A, and B roads. Class-S Road is defined as a highway that connects two or more cities and carries safely a large volume of traffic at the highest speed of operation; Class-A Road is defined as a highway that forms a strategic route and corridor connecting international boundaries at an identified immigration entry and exit points and international terminals



- such as international air or sea ports; and finally a Class-B Road, which is a highway that forms an important national route linking national trading or economic hubs, County Headquarters and other nationally important centres to each other and to the National Capital or to Class A roads.
35. KURA is responsible for the management, development, rehabilitation and maintenance of all public roads in cities and municipalities except where the roads are categorized as national roads. After the January 2016 gazettelement, KURA's mandate was expanded to all counties in line with article 6(3) of the [Constitution](#).
 36. On their part, KERRA is in charge of constructing, upgrading, rehabilitating and maintaining rural roads, controlling reserves for rural roads and access to roadside developments and implementing road policies in relation to rural roads. Under the classification of roads, KERRA is in charge of categories D, E, F, G, K, L, P, R, S, T, U, W.
 37. It is therefore clear to us that there is a distinction between national roads and county roads. National roads are maintained solely by the national government through KeNHA while Counties, maintain their roads in collaboration with the other authorities.
 38. So, what is the classification of the road used by the trucks transporting the appellants goods? In other words, does the 1st respondent operate, or maintain the road used by the appellant in accessing the Port? What service does the 1st respondent offer in regard to this particular road to entitle it to levy a sum of Kes 3000 on each of the appellant's trucks? Does entry into the 1st respondent's jurisdiction via such road justify the levy of the charge which would then be for entry? Is that a service and are they entitled to that fee?
 39. It is not in dispute that to access the Port, the appellant must use the Likoni-Ukunda Road which the Kenyan road system identifies as an A14 road. Going by the background and network system explained in detail above, that road, A14 falls directly into the category of a national road. That category falls directly under the mandate of KeNHA and the National government which is in charge of its development, rehabilitation, management and maintenance. In this matter, we note that the County Government has not clarified how the charge meets the categories it sets out in Item 90 of the Mombasa County Finance, 2014. They have not stated if they provide street lighting, parking or maintenance of the road accessed by the petitioners. While the superior courts were in agreement with them that the charge was a 'road service' charge, we are of a contrary opinion, as the 1st respondent did not illustrate how such road services are provided.
 40. Further, having established that it is not a county road, it is then improper for County Government of Mombasa to levy a charge for road service for the same road that vests in the National Government.
 41. We also note that it is the appellant's further case that the 1st respondent in issuing receipts marked 'miscellaneous income' or 'Likoni Revenue Barrier', did not disclose the nature nor details of the payment.
 42. In plain language, article 201 (a) of the [Constitution of Kenya](#) calls for openness and accountability including public participation in financial matters. It is not lost to us the intention of this provision is to ensure efficiency within the public financial management sector which has faced tremendous challenges occasioned by gaps that has resulted in the past embezzlement of public funds. This article seeks to curb the problem of abuse of public resources and corruption, by calling for transparency in the handling of these resources. We emphasize that public finances should be managed efficiently with firm checks and balances.
 43. It is clear to us that in issuing receipts marked 'miscellaneous income' the County government of Mombasa has created avenues for possible abuse. The [Oxford Dictionary of English](#) 3rd Edition 2015



defines miscellaneous as a word “consisting of many different kinds of things that are not connected and do not easily form a group”. By that very definition, the word ‘miscellaneous’ is vague, and it is not easily discernable what the payments are directed at. Using the term “miscellaneous” to account for payment leads to ambiguity which goes against the spirit of article 201 of the *Constitution*. That word could refer to any number of things and it is essential that this form of opaqueness in accountability be discouraged. It is imperative that any payments to Counties must clearly state in precise, unambiguous words what the payments are for.

44. Flowing from the above, we underline that it is the National government that is the provider of the road service in this instance. It is clear therefore that should an access fee be owing, then the proper entity to which that amount is owed should be the National government not the County government. In that regard, we find that the cess imposed by the County Government of Mombasa under Item 90 of the schedule to the Mombasa County Act 2014 was improperly imposed as a charge for services rendered for services provided by the County Government and is not a charge for service as contemplated by article 209 (4) of the *Constitution of Kenya*.
45. We, therefore, fault the superior courts’ interpretation and application of article 209(4) of the *Constitution* in their finding that the cess levied by the 1st respondent was in line Constitution.

ii. What reliefs should the Court offer?

46. In the petition before us, the appellant in summary seeks the following orders: the appeal be allowed; a declaration that the Court of Appeal in its decision, made on July 5, 2017, erred in its interpretation and application of article 209(4) of the *Constitution*; a reversal of the Court Appeal’s decision of 5th July 2017; and costs of this appeal, as well as those incurred before the Court of Appeal.
47. Having faulted the superior court’s interpretation and application of article 209(4) of the *Constitution* regarding the constitutionality of the cess KES 3000/-imposed on each of the Appellant’s truck upon entering the 1st Respondent’s jurisdiction, we hereby declare the superior courts’ interpretation of article 209(4) of the *Constitution* unconstitutional and therefore, null and void. Consequently, we set aside the Judgements of the High Court and of the Court of Appeal.
48. We note that the appellant sought us to grant the reliefs sought in Civil Appeal No 69 of 2017. We have noted that from page 4 of the record of appeal, the appellant sought the Court of Appeal to grant the prayers sought in the petition of appeal dated February 20, 2015. In that petition, the prayers sought were as follows: (a) a declaration that the actions of the 1st respondent to charge the appellant a cess in the sum of Kshs.3,000 per truck, or any sum at all, a condition for the appellant 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 to pass any legislation that restricts the appellant’s right of movement by imposing a tax or revenue to be paid by the appellant as a condition for moving its goods across the 1st respondent’s boundaries; and (c) a mandatory injunction compelling the 1st respondent to refund to the appellant the sum of Kshs.1,542,000 paid by the appellant to the 1st respondent under duress as at December 31, 2014, and/or any other additional sums that the appellant has so paid to the 1st respondent from January 1, 2015 as cess on trucks transporting goods across the 1st respondent’s boundaries to the date of compliance with the mandatory injunction.
49. Since we have already addressed the first two prayers, we now turn to the third prayer in that petition where the appellant sought: a mandatory injunction compelling the 1st respondent to refund to the appellant the sum of Kshs.1,542,000 paid by the appellant to the 1st respondent under duress as at December 31, 2014 and/or any other additional sums that the appellant has so paid to the 1st



respondent from January 1, 2015 as cess on trucks transporting goods across the 1st respondent's boundaries to the date of compliance with the mandatory injunction. We note with concern that neither the High Court nor the Court of Appeal considered the appellant's claim for a refund of the sum of KES 1, 542,000/- that had been remitted as of December 31, 2014 and any other payments remitted afterwards. Having confirmed from the record that the said amount was pleaded and proven and having nullified the 1st respondent's action to collect the same amount, if it is our finding that the appellant is entitled to a refund of the sum of KES 1, 542,000/ being the amount remitted as of December 31, 2014. As for any other additional sums paid by the appellant from January 1, 2015 onwards, the same may be pursued at the High Court.

50. Concerning costs, this court has previously settled the law on award of costs: that costs follow the event, and that a Judge has the discretion in awarding costs in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC. Petition No 4 of 2012: [2014] eKLR. The appellant sought for costs at the appellate court and before this court. We note that the learned Judges of appeal made no orders as to costs on the ground that this was a public interest matter. Since this was a pure exercise of discretion which discretion has not been challenged by the Appellant, we shall not interfere with the same. As for the costs before this court, it is our finding that the 1st respondent shall bear the same.

E. Orders

51. Consequent upon our findings above, the final orders are that:
1. The Petition of Appeal dated August 14, 2018 and filed on August 15, 2018 is hereby allowed.
 2. The Judgment of the Court of Appeal dated July 5, 2018 is hereby set aside.
 3. The Judgment of the High Court dated February 21, 2018 be and is hereby set aside.
 4. For the avoidance of doubt:
 - a. a declaration is hereby issued declaring that the actions of the 1st respondent to charge the appellant a cess in the sum of Kshs 3,000 per truck, or any sum at all, a condition for the appellant to move its goods across the boundaries of the 1st respondent's County is unconstitutional, null and void.
 - b. The 1st respondent is hereby directed to refund to the appellant the sum of Kshs 1,542,000 paid by the appellant to the 1st respondent as of December 31, 2014.
 - c. Any other additional sums that the appellant has so paid to the 1st respondent from January 1, 2015 to the date of this judgment as cess on trucks transporting goods across the 1st respondent's boundaries shall be pursued at the High Court.
 - d. The 1st respondent shall bear the costs of the appeal.

52. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JULY, 2021.

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM



JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

__ SUPREME COURT OF KENYA

