



**Tulaga Farmers Cooperative Society Limited & another v Nyandarua  
County Government & 2 others (Constitutional Petition 5 of 2023)  
[2025] KEHC 5142 (KLR) (Civ) (29 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5142 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA  
CIVIL  
CONSTITUTIONAL PETITION 5 OF 2023**

**KW KIARIE, J  
APRIL 29, 2025**

**BETWEEN**

**TULAGA FARMERS COOPERATIVE SOCIETY LIMITED ..... 1<sup>ST</sup> PETITIONER**

**MUKI FARMERS COOPERATIVE SOCIETY LIMITED ..... 2<sup>ND</sup> PETITIONER**

**AND**

**NYANDARUA COUNTY GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**NYANDARUA COUNTY ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. By a notice dated May 17, 20213, the County Government of Nyandarua required the petitioners and other dairy cooperatives in the county to remit milk cess for May 2023 by June 5, 2023, and thereafter on the 5th of every month. This requirement was made in accordance with the Nyandarua County Finance Act of 2023. This aggrieved the petitioners, who filed a petition dated August 7, 2023. They seek the following orders:
  - a) A declaration that the respondents' actions are brazen, illegal, egregious, discriminatory, and violate the petitioners' constitutional rights.
  - b) A declaration that the actions of the respondents above have violated the rights of the petitioners under Articles 1, 10, 27, 28, 40, 46, 47, 48, 196, 199 and 209 of the Constitution as read together with Section 132 of the Public Finance Management Act, 2012 and Sections 116-121 of the County Governments Act, 2012.



- c) A declaration that the relevant section of the Nyandarua County Finance Act, 2023, violates the provisions of Article 185 (2) and 209 of the Constitution to the extent that it empowers the 1st respondent to levy Milk cess in respect of milk and/or dairy products traded by the petitioners.
- d) An order of permanent injunction be issued prohibiting the County Government of Nyandarua from enforcing its Finance Act, 2023, to levy Milk Cess against the petitioners within Nyandarua County.
- e) A declaration be issued to declare that the demand by the County Government of Nyandarua for payment of cess by the 1st petitioner, amounting to Kshs. 780,300/- and by the 2nd Petitioner amounting to Kshs. As of 3rd August 2023, 3,672,200/- is illegal due to its violation of Articles 185(2) and 209 of the Constitution, read in conjunction with Section 132 of the Public Finance Management Act, 2012, and Sections 116-121 of the County Governments Act, 2012.
- f) A declaration that the decisions by the respondents to enact and enforce a statute without involving the public or interested parties were contrary to the Constitution and the County Governments Act, 2012, hence ultra vires.
- g) An order of certiorari to move into this Honourable Court to quash the decision by the respondent's additional cess amounting to double taxation.
- h) An order of prohibition be issued restraining the respondents from enacting a County Finance Act required by Sections 132 and 133 of the Public Finance Management Act, 2012, providing for the levying of Milk Cess regarding dairy products within Nyandarua County.
- i) A declaration be issued to declare that within the meaning of Article 27 of the Constitution and the relevant section of the Nyandarua County Finance Act, 2023 is null and void for being discriminatory against the petitioners for imposing payment of milk cess without providing any service to the Petitioners in relation to the production and sale of dairy products in Nyandarua County.
- j) A declaration be issued to declare that the imposition of milk cess by the 1st and the 2nd respondents against the petitioners and the intended confiscation and/or detention of its assets in purported enforcement of the impugned statute amount to a violation of the petitioners' right to enjoy the benefit of ownership of property and freedom from arbitrary deprivation of ownership and use of property.
- k) A declaration be issued to declare that the seizure/detention of the petitioners' assets in purported enforcement of the impugned statute violates the petitioners' right to fair administrative action enshrined in Article 47 of the Constitution.
- l) A declaration be issued to declare that the intended seizure and detention of the petitioners' assets by the 1st respondent without a court order amounts to a gross violation of the petitioners' right to a fair hearing protected by Article 50 (3) of the Constitution.
- m) The petitioners shall be paid the costs of this petition.

2. The petition was premised on the following grounds:

- a. That towards the end of April 2023 or thereabouts, the 1st respondent arbitrarily imposed a milk cess of 30 cents per litre against the petitioners through its Finance Act 2023.



- b. That on the 3<sup>rd</sup> day of August 2023, the 1<sup>st</sup> respondent tendered invoices demanding kshs. Kshs. 780,300 from the 1st petitioner and Kshs. 3,672,000/= from the 2<sup>nd</sup> petitioner being purported milk cess and in enforcement of the impugned statute (annexed hereto and marked “AB 1 “a” and “AB 1 “b” respectively are photostat copies of the said invoices)
  - c. That subsequent to the issuance of the said invoices, some agents and/or employees and/or servants of the 1st respondent have been harassing and intimidating employees and/or servants and /or agents of the petitioners to extort money from them and in purported enforcement of the impugned statute.
  - d. The 1<sup>st</sup> respondent has seized, alienated, and/or confiscated assets belonging to the petitioners herein in further purported enforcement of the impugned statute.
3. The petition was opposed by the first respondent, who raised the following grounds:
- a. The petition and the applicant is based on inaccurate facts and theories.
  - b. The Finance Act is the heart and soul of the Government at both the National and County levels. It represents the 1<sup>st</sup> respondent’s roadmap to service delivery for its constituents.
  - c. Under Article 260 of the Constitution, the definition of the term “legislation “includes law(s) made by an assembly of a County Government or under authority conferred by such a law. To that effect, the Act is a valid legislation within Article 260 of the Constitution.
  - d. Under the Constitution, as read together with the County Governments Act, 2012, the County Government is vested with the powers to make legislation necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the County Government under the Fourth Schedule.
  - e. In order to raise own-source revenue (OSR), County Government are empowered through legislation to levy, charge and collect fees, including rates rents, royalties, stamp duties, registration and licensing fees and taxes from within their jurisdiction, Accordingly, I have been advised by our advocates on record which advise I verily believe to be true that cess fees are necessary to enable the County Government to perform its obligations to its residents.
  - f. Article 185(2) of the Constitution is actualized through Section 5(2) (a) of the County Governments Act, 2012 to the effect that a County Government is responsible for County legislation in accordance with Article 185 of the Constitution. The imposition of cess fees by the 1<sup>st</sup> respondent is well within the powers of the 1<sup>st</sup> respondent.
  - g. Section 21 (4) of the County Government Act provides for the implementation of any money bill that deals with taxes, the imposition of charges on a public fund or the variation of any of those charges, the appropriation, receipt, custody, investment, or issue of public money, the raising or guaranteeing of any loan or its repayment, or matters incidental to any of those matters.
  - h. In their letter dated 15<sup>th</sup> May 2023, the Petitioner unequivocally admit and acknowledges that various consultative sessions were held even after under the 1st respondent’s initiative, including a meeting on Thursday, 27th April 2023, at the Nyandarua South D C O office to discuss the proposed milk cess fees. Therefore, due process was followed before the bill became law.



- i. The petitioners seek suspension of the collection of cess fees levied by the 1st respondent on primary milk producers in Nyandarua County without expressly stating how the said cess fees are illegal, punitive, oppressive or violate the petitioners' constitutional rights.
- j. As such, it is unfortunate that the petitioners are fighting to protect their selfish interests for the following reasons.
  - i. The act was assented into law on 17<sup>th</sup> February 2023 through a publication made on 23<sup>rd</sup> February 2023 *vide* Kenya Gazette No. Special Issue Kenya Gazette Supplement No. 2 (Nyandarua County Acts No. 1);
  - ii. Between 12<sup>th</sup> October 2023 and 17<sup>th</sup> February 2023, the petitioners have had sufficient timelines to convene any special general meetings as the case may be to appraise their members of the imposition of the milk cess fees that are to be paid to the 1<sup>st</sup> respondent; and
  - iii. The petitioners' failure to control and/or manage their internal affairs and seek the approval of their members cannot be sufficient reason to grant an injunction stopping the first respondent from undertaking its constitutional function of collecting revenue and service delivery, especially where no breach by the first respondent has been demonstrated, as in the present case.
4. The main thrust of this petition is that the Nyandarua County Finance Act, 2023, violates several provisions of Constitution and in Particular Article 185 (2) and 209 of the Constitution to the extent that it empowers the 1<sup>st</sup> respondent to levy a Milk cess in respect of milk and/or dairy products traded by the petitioners.
5. Article 185 (2) of the Constitution of Kenya provides as follows:

A county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule.
6. The parties herein agreed to canvass the petition through written submissions. In their submissions, the petitioners did not address the issue of breaching any Article of the Constitution. They only discussed the lack of public participation in enacting the Nyandarua County Finance Act, 2023. It is trite law that he who avers must prove. This was restated in the case of Hellen Wangari Wangechi v Carumera Muthini Gathua [2005] eKLR as follows:

It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed.
7. The prayers sought in paragraphs b, c, e, I, j, k, & l cannot be granted, for the complaints thereof were not proven.
8. The petitioners complained that there had been no public participation in the enactment of the Nyandarua County Finance Act of 2023. The 1<sup>st</sup> respondent argued that the opposite was true. There was a demonstration of publication in the daily newspapers and the Kenya Gazette calling for submissions on memoranda regarding the impugned Act, which was then a Bill.
9. The first respondent went further and demonstrated various stakeholders' public participation. The petitioners did not dispute this.



10. For any legislation to be declared unconstitutional, it must be shown that it conflicts with the Constitution of Kenya. The Court in *Simeon Kioko Kitheka & 18 Others v County Government of Machakos & 2 Others* (2018) eKLR quoted the case of *Ndyanabo v A.G.* (2001) EA 485, which stated:

...in interpreting the Constitution, the court would be guided by the general principles that there is a rebuttable presumption that legislation is constitutional hence the onus of rebutting the presumption rests on those who challenge that legislation's status save that, where those who support a restriction on a fundamental right rely on a claw back or exclusion clause, the onus is on them to justify the restriction. [Emphasis added]

11. The petitioners have failed to discharge the onus of proving that the Nyandarua County Finance Act of 2023 is unconstitutional. The petition is dismissed. Since the petitioners and the respondents are public entities, each party will bear its costs.

**DELIVERED AND SIGNED AT NYANDARUA THIS 29<sup>TH</sup> DAY OF APRIL 2025**

**KIARIE WAWERU KIARIE**

**JUDGE**

