



**Kakuzi Plc v County Government of Muranga & another (Constitutional
Petition 23 of 2019) [2024] KEHC 5289 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 5289 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CONSTITUTIONAL PETITION 23 OF 2019**

J WAKIAGA, J

APRIL 30, 2024

BETWEEN

KAKUZI PLC PETITIONER

AND

HON ATTORNEY GENERAL 1ST RESPONDENT

THE COUNTY GOVERNMENT OF MURANGA 2ND RESPONDENT

JUDGMENT

1. This petition arises out of the enactment and publication of the Muranga County finance Act in the Kenya Gazette supplement No 12 of 14th February 2019, upon which the first Respondent demanded for the Petitioner *vide* a letter dated 29th July 2019 a cumulative amount of Kshs. 59, 777,570 as cess for the years 2018 and 2019.
2. It is the Petitioner's contention that the said Finance Act did not legislate the imposition of agricultural produce cess and therefore the said demand is unconstitutional as it contravenes Article 210(1) of the Constitution as read with the Provisions of Article 209(3) which authorizes the Respondent to only levy property rates entertainment taxes and such other taxes imposed by an Act of parliament.
3. There being an Act of Parliament authorizing the said cess, the Respondents Finance Act was unconstitutional.
4. It was the Petitioner's case that tea and fruit tree are covered under Section 7 and first schedule of the Crops Act as read with Section 17 (1) thereof which only allows the National Government to impose taxes on the scheduled crops and by purporting to levy such cess the same was in conflict with a national legislation which should prevail per the Provisions of Article 191 of the Constitution and amounted to double taxation.



5. It was contended that the Petitioner was already paying cess to the Horticultural Crop Directorate and the said demand amounted to double taxation and contrary to Article 209(5) which provides that the taxation and other revenue raising powers of a County shall not be exercised in a way that prejudice national economic policies and Article 201 which provides that the burden of taxation should be shared equally.
6. The Petitioner sought the following prayers:
 - a. Declaration that the said demand is unconstitutional and therefore null and void.
 - b. Order quashing the said demand.
 - c. An order of prohibition.
 - d. A permanent injunction.
7. The petition was supported by the affidavit of Denis Gitaka.
8. The Respondent filed a replying affidavit in opposing the petition sworn by Patrick Mukuria the County secretary in which it was deposed that the petition was without merit as it purported to challenge the powers of the County Government to legislate and impose cees, fees and other charges on agricultural produce contrary to Article 186 as read with the Fourth Schedule.
9. That Section 17 of the Crop Act empowers County Government to impose fee for development of agricultural crops within the County under which the said finance act was enacted and ass such there was no conflict with the said Act.
10. He deposed that the power of the County Government to levy cess on agricultural produce was expressly provided far both in the Constitution a statute to enable the County Government deliver on its services and functions devolved to it under the Constitution and as such there was no conflict between national and County law.
11. It was contended that the Petitioners claim that the demand for cess on its global turnover which included produces from activities in other counties and or other cost was a matter for taking and reconciling accounts and not a substance for Constitutional litigation.
12. On the issue of double taxation, it was deposed that cess payable to Horticultural Crops Directorate was for purposes of promotion and development of production and marketing while cess by the County Government was to finance delivery of services within the County and could not prejudiced national economic policies.
13. It was contended that the orders sought could not be issued as they amounted to Court interference with the Constitutional functions of the County and was not in the best public interest.

Submissions

14. Directions were issued on the deposition of the petition by way of written submissions and on behalf of the Petitioner it was submitted that the only issue for determination was whether the first Respondent could Constitutionally levy cess, outside the Provision of Article 209(1) of the Constitution? It was the Petitioner's contention that it could not do so unless authorized by an act of Parliament was stated and confirmed by the Supreme Court, in Base Titanium Limited v The County Government of Mombasa & another [2017] eKLR.
15. It was contended that the demand for cess for tea and fruits violated the Provision of Crop Act national legislation and was in contravention of Article 191 of the Constitution as confirmed in the case of



Eastern Produce Kenya limited & 3 others v County Government of Nandi & Another [2019] eKLR in which the Court held that the cess was invalid and unenforceable for being in conflict with national legislation. This position was confirmed in the case of *Lake Naivasha Growers Group & another v County Government of Nakuru* [2019] eKLR where the Court held that action in charging cess was ultra vires.

16. On behalf of the first Respondent, it was submitted that Article 186 as read with the fourth schedule vest County Government with the exclusive mandate over agriculture and therefore the cess imposed was in pursuant to Article 209(3) (c) of the *Constitution* and Section 17 of the *crops Act*. It was contended that the case of Base Titanium Limited (supra) was distinguishable since it was in respect of cess on appellants tracks whereas cess in contention was a tax under Article 209 and that where County levy charges it must do so in exchange for services which the Petitioner receives.
17. It was contended that there was no conflict between the crop act and the Muranga County Finance Act 2018 with regard to cess and that the County Government has legislative discretion to impose charges for services rendered under Article 209(4) which can only be through County Finance Act as was stated in the case of *Pwani Super Capacity Transporters Saving & Another v County Government of Mombasa* [2020] e KLR.
18. It was submitted that cess levied by Horticultural Crop Directorate was for promotion and development of production and marketing of horticultural produced while that levied by the Respondent was a tax for service delivery and did not amount to double taxation and that the Petitioner had not demonstrated how the levying of the cess prejudiced the national economic policies

Analysis and Determination

19. From the pleadings and submissions herein the only issue for Courts determination is whether the Muranga County Finance Act 2018 met the Constitutional threshold put differently whether the imposition of cess by the said act was constitutional?
20. The starting point in the determination herein, is the Constitutional interpretation. In *Social Accountability and Another v National Assembly & 4 others* [2015] eKLR, it was stated that the Court is enjoined by Article 259 of the *Constitution* to interpret the *Constitution* in a manner that promotes its purposes values and principles, advance the rule of law human rights and fundamental rights in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, the Court is obliged under Article 159(2) (e) to protect and promote the purpose and principles of the *Constitution*.
21. The Court stated further that in determining whether a statute is unconstitutional, the Court must determine the object and purposes of the impugned statute for it is important to discern the intention expressed in the act itself as was stated in *Muranga Bar operators & Another v Minister for State of Provincial administration* [2011] eKLR.
22. Article 186(1) of the *Constitution* set out the powers and the functions of the County and National Governments under the fourth schedule and Article 189(1) provides that at either level is to perform its functions and exercise its powers in a manner that respects the functional and institutional integrity.
23. As regards the petition before the Court, Article 209(3) provides that the County Government may impose
 - (a) property rates
 - (b) entertainment taxes and



- (c) any other tax that it is authorized to impose by an act of parliament and sub Article (4) provides that the National and County Governments may impose charges for services they provide.
24. The question which the Court is called upon to answer is whether the cess imposed by the Respondent was a tax within the meaning Article 209 or charges for the services rendered by the County Government for which they are allowed under the Constitution and whether the said by the Petitioner.
25. Article 210 of the Constitution provides that no tax or licencing fee may be imposed waived or varied except as provided by legislation and Section 161 of the Public finance Management Act provides that a County Government shall ensure that tax imposition or any other revenue raising measures shall conform to Article 209 (5) of the Constitution or any other legislation.
26. It is clear that the Constitution only allows the Counties to levy two kinds of taxes that is to say property and entertainment, any other charges must be guided by the fourth schedule to the Constitution, which is they must be providing services.
27. Cess is a tax on the movement of agricultural produce and applies to farm produce, livestock and products marketed in outlets managed by counties or on transit within the County.
28. The answer to the above can only be determined when one looks at the definition of the cess as provided for under the said Finance Act which defines the cess as a tax as defined under Section 2 thereof to mean all taxes and or levies imposed and payable.
29. It therefore follows that the cess herein was a tax and having not been authorised by national legislation is in violation and to that extent unconstitutional.
30. I have looked at Section 17 of the Crops Act which authorises the Counties to charge fees for the development of agricultural crops within the County, development and regulations of scheduled crop market within the County, issuance of licenses to any person trading in scheduled crops, a clear reading of the act does not authorise the Respondent to charge cess as a tax on the agricultural produce.
31. The same is further not a fee charged on services rendered, it therefore follows that the petition herein has merit and is therefore allowed in the following terms
- a. A declaration is hereby issued that the demand for agricultural produces cess against the petition is unconstitutional, unlawful and illegal.
 - b. A declaration that the cess under the County finance Act as against the Petitioner contravenes the Provisions of Articles 201, 209 (3) and 210 (1) of the Constitution and to that extent null and void.
 - c. An order is hereby issued quashing the demand contained in the letter dated 29th of July 2019 as against the Petitioner.
32. On the issue of cost, I have noted that the Respondent action was based on an honest innocent interpretation of the law and for the public good of the people of Muranga County and therefore each party shall bear their own cost
33. And it is ordered.

SIGNED, DATED AND DELIVERED AT MURANGA THIS 30TH DAY OF APRIL 2024

J. WAKIAGA

JUDGE



In the presence of:

Mr. Kihara for the Petitioner

Mr. Shamer for Mr. Nganga for the Respondents

Jackline - Court Assistant

