



**Kakuzi Plc v General & another (Petition 57 of 2018)
[2024] KEHC 5288 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 5288 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
PETITION 57 OF 2018**

**J WAKIAGA, J
APRIL 30, 2024**

BETWEEN

KAKUZI PLC PETITIONER

AND

THE HON ATTORNEY GENERAL 1ST RESPONDENT

COUNTY GOVERNMENT OF MURANGA 2ND RESPONDENT

County governments lack authority to levy agricultural cess

The petition challenged the constitutionality of the Muranga County Finance Act 2013, which imposed agricultural cess on tea and fruits at 1% of turnover. The petitioner, Kakuzi PLC, argued that the cess was unconstitutional as county governments lack the authority under article 209(3) of the Constitution to levy such taxes without authorization by national legislation. The petitioner further claimed the Act was invalid, having not been published in the Kenya Gazette as required under Article 199(1) of the Constitution. The court found the cess to be an unauthorized tax, the Act unconstitutional, and the retroactive cess demands unlawful. The petition was allowed.

Reported by John Ribia

Devolution – county governments – taxation and revenue collection – scope – agricultural cess - whether county governments had the mandate to levy cess on agricultural produce – whether county governments had the power/mandate to levy agricultural cess - whether the cess was a tax or charges for the services rendered by the county government - whether the Crops Act authorized county governments to levy cess as a tax on agricultural produce or limited their powers to specific fees for agricultural development – Constitution of Kenya articles 209 and 210; Crops Act (cap 265) sections 7 and 17; Public Finance Management Act (cap 412A) section 161.

Statutes – legislative process – requirement of publication of statutes in the Kenya Gazette – county legislation - whether county legislation could be deemed to have come into effect if it had not been published in the Kenya Gazette - whether the Muranga County Finance Act 2013 was unconstitutional for failure to comply with the constitutional and statutory requirements of publication in the Kenya Gazette - Constitution of Kenya article



199(1); County Governments Act (cap 265) section 25; Public Finance Management Act (cap 412A) section 161; Constitution of Kenya articles 209 and 210

Brief facts

The petitioner, Kakuzi PLC, challenged the imposition of agricultural cess under the Muranga County Finance Act 2013, arguing that it was unconstitutional and violated statutory provisions. The cess, levied on tea and fruits at 1% of turnover, was retroactively demanded from 2013 to 2017. Kakuzi contended that the County Government of Muranga lacked authority under article 209(3) of the Constitution and the Crops Act to levy the cess and that the Finance Act was invalid as it had not been published in the Kenya Gazette as required under article 199(1). The respondents defended the cess, asserting it was within their mandate.

Issues

- i. Whether county governments had the power/mandate to levy agricultural cess.
- ii. Whether the cess was a tax or charges for the services rendered by the county government.
- iii. Whether the Crops Act authorized county governments to levy cess as a tax on agricultural produce or limited their powers to specific fees for agricultural development.
- iv. Whether county legislation could be deemed to have come into effect if it had not been published in the Kenya Gazette.
- v. Whether the Muranga County Finance Act 2013 was unconstitutional for failure to comply with the constitutional and statutory requirements of publication in the Kenya Gazette.

Held

1. It was not a contested fact that the County Finance Act had not been gazetted (published) in the Kenya Gazette as required under article 199 of the Constitution and that to cure the defect the respondent published the same in the Muranga County Gazette Supplement.
2. The Constitution was to be interpreted in a manner that promoted its purposes, values and principles. In determining whether a statute was unconstitutional, the court must determine the object and purposes of the impugned statute.
3. Article 210 of the Constitution provided 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 provided 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. The Constitution only allowed the counties to levy two kinds of taxes; property and entertainment; any other charges must be guided by the fourth schedule to the Constitution, which included the requirement that they must be providing services.
4. Cess was a tax on the movement of agricultural produce and applied to farm produce, livestock and products marketed in outlets managed by Counties or on transit within the County. Cess as was defined under the Finance Act as a tax. The cess was a tax and having not been authorised by national legislation was levied in violation and was to that extent unconstitutional.
5. Section 17 of the Crops Act authorised 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 did not authorise the respondent to charge cess as a tax on the agricultural produce.
6. The Finance Act was not published as required in law for it to become operative and therefore even if the respondent was authorised to levy cess, then the same was in violation of article 199(1) as read with article 260 of the Constitution and section 25 of the County Government Act which specifically provided that county legislation will only come into force on the fourteenth day after its publication in the Kenya gazette unless the legislation stipulated a different date.
7. It was unlawful for the respondent to demand payment of agricultural cess from the petitioner under a County Act which had not been published as required and to that extent the said demand was null and void.



Petition allowed.

Orders

- i. *Declaration that the Muranga County Finance Act 2013 was unconstitutional and therefore null and void as against the petitioner.*
- ii. *The demand letters dated May 13, 2013 and June 3, 2015 directing the petitioner to remit cess to the respondent was quashed.*

Citations

Cases

Kenya

1. *Base Titanium Limited v the County Government of Mombasa & another* Petition 9 of 2015; [2017] KEHC 7040 (KLR) - (Explained)
2. *Eastern Produce Kenya Ltd & 3 others v County Government of Nandi and another* Petition 7 of 2018; [2019] KEHC 4872 (KLR) - (Applied)
3. *Institute of Social Accountability & another v National Assembly & 4 others* Petition 71 of 2013; [2015] KEHC 6975 (KLR) - (Explained)
4. *James Gacheru Kariuki & 22 others v Kiambu County Assembly, Kiambu County Executive, Commission on Revenue Allocation & Attorney General* Judicial Review Application 2 of 2017; [2017] KEHC 4789 (KLR) - (Explained)
5. *Lake Naivasha Growers Group & another v County Government of Nakuru* Petition 8 of 2017; [2019] KEHC 5817 (KLR) - (Applied)
6. *Muranga Bar Operators & another v Minister for State of Provincial Administration* Petition 3 of 2011; [2011] KEHC 4242 (KLR); [2011] 1 KLR 543 - (Applied)

Statutes

Kenya

1. Constitution of Kenya articles 176, 186(1); 199(1); 201; 209; 210; 259; 260; Schedule Fourth- (Interpreted)
2. County Governments Act (cap 265) sections 25, 115- (Interpreted)
3. Crops Act (cap 318) sections 7, 17- (Interpreted)
4. Public Finance Management Act (cap 412A) section 161 - (Interpreted)

Advocates

Mr. Kihara for the petitioner

Mr. Shamer h/b for *Mr. Nganga* for the 1st respondent

JUDGMENT

Introduction

1. The petitioner herein is a publicly listed limited liability company involved in various agricultural activities in the Republic of Kenya. The 1st respondent is the County Government of Muranga established under article 176 of the *Constitution*, which set out its functions and limitations thereof, while the 2nd respondent is the principal legal Adviser to the National Government.
2. The petitioner's contention is that the first respondent enacted its County finance Act 2013, which came into operation on the 12th day of May 2014 which was not published in the Kenya Gazette as required under article 199(1) of the *Constitution*.



3. The said Finance Act imposed various taxes levies fees and charges upon the residents and businesses residing and operating with the County, including agricultural cess on sales turnover of produces within the county and it was the petitioner's case that the said Finance Act imposed cess levy on any kind of agricultural products grown, produced on in transit within Muranga County to be paid on tea at the rate of 1% of Turnover and fruit access at 1% of the turnover.
4. Pursuant to the said Act the first respondent issued to the petitioner a demand notice for the payment of Agricultural produce cess of Kshs 13,843,750, for the year 2013, Kshs 16,899,170 for the year 2014 and a consolidated cess for the year 2013-2017 at the sum of Kshs 81,440,430, applying the demand retroactively breach of the law.
5. It was the petitioner's contention that under article 209(3) of the *Constitution*, the first respondent may only levy property rates, entertainment taxes and any other taxes that it is authorized by an Act of Parliament and therefor the imposition of the cess was un constitutional.
6. As regards tea and fruits, it was contended that the same are covered under section 7 and 17 of the *Crop Act* which is a function of the National Government and therefore the levy under the Finance Act was in conflict with the said Act and in view of the provisions of article 191 the National Legislation should prevail.
7. The petitioner sought the following orders:
 - a. Declaration that the Muranga County Finance Act 2013 was enacted contrary to the Provisions of articles 201, 209(3) and 209 (5) of the *Constitution* and is therefore null and void.
 - b. Declaration that the said Act was enacted contrary to the Provision of articles 196 and 201 of the *Constitution* and section 115 of the *County Government Act* and to thsat extent null and void.
 - c. Declaration that section 2 and part 111, section 5.0(4) and (12) of the Muranga County Finance Act 2013 in so far as they provide for the levying of cess on scheduled crops and in particular tea and fruits by Muranga County are null and void.
 - d. The honourable court be pleased to quash the decision of the first respondent contained in the letter dated 13th May and June 3, 2015 directing the petitioner to remit cess to the first respondent.
 - e. Prohibition against the first respondent from levying cess on scheduled crops under section 2 and part 111, section 5.0(4) and (12) of the Muranga County Finance Act 2013 and or its successor.
 - f. Grant of permanent injunction restraining the first respondent from demanding and collecting any cess on tea and fruits from the petitioner.
8. The petition was supported by an annexed affidavit sworn by Denis Gitaka the Legal Manager of the petitioner in which it was deposed that the petitioner purchases avocado from small scale farmers in Muranga and surrounding counties which it exports to Europe, far East and the United States and that the Finance Act complained against retroactively imposed cess upon the Petitioner who was already paying cess to the Horticultural Crop directorate for its produce.
 1. In response to the petition, the first respondent filed grounds of opposition as follows:
 - a. The petition seeks to injunct the first respondent from carrying its duties.



- b. Article 209(3) and (4) empowers the first respondent to levy the charges.

Submissions

9. Directions were given on the hearing of the petition by way of written submissions and for the petitioner it was submitted there had not been enacted an Act of Parliament authorizing the 1st respondent to levy cess under article 209(3) of the *Constitution* in support of which reference was made to *Base Titanium limited v the County Government of Mombasa & another* [2017] eKLR where it was held and confirmed by the Supreme Court that a County does not have the authority to charge a cess a levy or tax where they do not offer anything in return.
10. It was contended that demand for cess on tea and fruits violates the *Crop Act* No 16 of 2013 which is a national legislation in support of which reference was made to the case of *Eastern Produce Kenya Ltd & 3 others v County Government of Nandi and another* [2019] eKLR and *Lake Naivasha Growers Group & another v County Government of Nakuru* [2019] eKLR.
11. It was contended that the said finance Act was not published in the Kenya gazette as required under article 199(1) of the *Constitution* as read with article 260 and as was held in *James Gacheru Kariuki & 3 others v Attorney General & 11 others* [2017] eKLR county legislation does not take effect unless it is published in the Kenya gazette.
12. On behalf of the respondent, it was submitted that the finance Act was gazetted in the County gazette supplement and that the petition was geared at avoiding taxation which falls under the tax Appeal tribunal.

Analysis and Determination

13. In this petition the following facts were not contested: that the County Finance Act had not been gazetted (published) in the Kenya Gazette as required under article 199 of the *Constitution* and that to cure the defect the respondent published the same in the Muranga County gazette supplement and that the cess demanded was for the period between 2013 to 2017.
14. From the pleadings and submissions herein, the following issues have been identified for determination is whether the levy of cess imposed by the respondent was constitutional.
15. 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*.
16. 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.
17. 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.
18. 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.
19. The question which the court is called upon to answer is whether the cess imposed by the respondent was a tax within the meaning of 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.
 20. 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.
 21. 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.
 22. 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.
 23. 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.
 24. 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.
 25. 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.
 26. It is clear that the finance Act was not published as required in law for it to become operative and therefore even if the respondent was authorised to levy cess, which I have find herein above that it was not, then the same was in violation of article 199(1) as read with article 260 of the Constitution and section 25 of the County Government Act, 2012 which specifically provides that county legislation will only come into force on the fourteenth day after its publication in the Kenya gazette unless the legislation stipulates a different date.
 27. It was therefore unlawful for the respondent to demand payment of agricultural cess from the petitioner under a County Act which had not been published as required and to that extent the said demand was null and void.
 28. It therefore follows that the petition herein has merit and is allowed in the following terms:
 - a. A declaration be and is hereby issued that the Muranga County Finance Act 2013 is unconstitutional and therefore null and void as against the Petitioner
 - b. The demand letters dated May 13, 2013 and June 3, 2015 directing the petitioner to remit cess to the respondent is hereby quashed.
 29. On the issue of cost whereas cost follows the event, I have taken note that the legislation was made under an honest and mistaken understanding of the respondent's mandate and for public good and should therefore not be condemned to pay cost. Each party shall therefore bear their own cost
 30. 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 1st Respondent

Jackline – Court Assistant

