Council of County Governors v Attorney General & 19 others (Petition 278 of 2017) [2023] KEHC 21855 (KLR) (Constitutional and Human Rights) (15 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21855 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 278 OF 2017

HI ONG'UDI, J

AUGUST 15, 2023

BETWEEN

COUNCIL OF COUNTY GOVERNORS ..... PETITIONER

AND

THE ATTORNEY GENERAL ..... 1ST RESPONDENT

SPORTS KENYA ..... 2ND RESPONDENT

NATIONAL MUSEUM OF KENYA ..... 3RD RESPONDENT

KENYA NATIONAL LIBRARY SERVICE BOARD ..... 4TH RESPONDENT

THE BETTING CONTROL AND LICENSING BOARD ..... 5TH RESPONDENT

MINISTRY OF SPORTS, CULTURE AND ARTS ..... 6TH RESPONDENT

MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT ..... 7TH RESPONDENT

TOURISM REGULATORY BOARD ..... 8TH RESPONDENT

KENYA TOURISM BOARD ..... 9TH RESPONDENT

BOARD OF TRUSTEES OF TOURISM FUND ..... 10TH RESPONDENT

COMMISSIONER, CO-OPERATIVE DEVELOPMENT ..... 11TH RESPONDENT

THE SACCO SOCIETIES REGULATORY AUTHORITY ..... 12TH RESPONDENT

MINISTRY OF INDUSTRY, TRADE AND COOPERATIVES .... 13TH RESPONDENT

MINISTRY OF TOURISM ..... 14TH RESPONDENT

KENYA NATIONAL BUREAU OF STATISTICS ..... 15TH RESPONDENT

THE LAND SURVEYORS BOARD ..... 16TH RESPONDENT

NATIONAL HOUSING CORPORATION ..... 17TH RESPONDENT

MINISTRY OF DEVOLUTION AND PLANNING ..... 18TH RESPONDENT

MINISTRY OF LAND,URBAN DEVELOPMENT AND HOUSING .... 19TH RESPONDENT

TECHNICAL AND VOCATIONAL TRAINING AUTHORITY .... 20TH RESPONDENT

RULING

1. The matter herein as captured in the petition dated 5th June 2017 revolves around the challenge to the constitutionality of statutes that establish and empower various state parastatals to perform functions which are now within the County Governments' mandate as provided under the Fourth Schedule of the *Constitution*.

2. This Ruling is in relation to the preliminary objections filed by the respondents in reaction to the connected petitions and the petitioner's application in response dated 21st July 2021.

The Preliminary Objections

The 1st, 3rd, 5th, 6th, 11th, 12th, 13th, 17th and 18th Respondents

3. These respondents filed a preliminary objection to the petition dated 3rd October 2017 on the grounds that:

    i. The case is a dispute between the County and National Government and so these proceedings are contrary to Articles 159,189(3) and (4) of the *Constitution*.

    ii. The petitioner did not follow the correct procedure as provided under law which is alternative dispute resolution as envisaged under Section 31 of the *Intergovernmental Relations Act*.

    iii. According to Article 201(d) of the *Constitution* public funds should be used in a prudent way not in unnecessary litigation.

    iv. The respondents are bound by the provisions of Section 79 as read with Section 102 of the *Public Finance Management Ac*t.

    v. The suit is premature and Court ought to decline jurisdiction.

The 10th Respondent

4. The 10th respondent similarly filed its preliminary objection dated 6th October 2017 on the premise that:

    i. The petition is an abuse of court process as the petitioners have not followed the alternative dispute resolution mechanism availed under Article 189(3) and (4) of the *Constitution* and Section 31 of the *Intergovernmental Relations Act*.

    ii. This Court lacks jurisdiction to hear and determine the suit.

5. By way of a Notice of Motion dated 21st July 2021 filed under Rules 3(2)(3)(4)(5) and 19 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms)Practice and Procedure Rules*, 2013, "Mutunga Rules") the petitioner seeks the following orders that:

   i. This Honourable Court be pleased to vary the order granted on 7th March 2018 staying Nairobi Constitutional Petition No 278 of 2017; *Council of County Governors v Attorney General and 19 others* pending the outcome of the interlocutory Appeal in the Court of Appeal against the ruling in a related matter, Constitutional Petition No 280 of 2017 to read as follows:

      > "This Honourable Court be pleased to stay the hearing of the petition pending mediation of the dispute by the Intergovernmental Technical Relations Committee in accordance with the provisions of Section 31 of the *Intergovernmental Relations Act*, 2012 and Article 189(3) and (4) of the *Constitution*.
      >
      > The Intergovernmental Technical Relations Committee shall file the mediation report in this matter with the Deputy Registrar of the Court within four (4) months from the date of the submissions of the dispute for mediation."

   ii. The Costs of this application be provided for.

6. The application was supported by the grounds on its face and the sworn affidavit of the petitioner's Acting Chief Executive Officer, Mary Mwiti of even date. She made known that the petitioner is a statutory body established under the *Inter-governmental Relations Act*, No 2 of 2012. That the petitioner in the year 2017 filed 5 associated petitions (Petition 277 of 2017; Petition 278 of 2017; Petition 279 of 2017; Petition 280 of 2017 and Petition 281 of 2017) challenging the constitutionality of statutes that establish and empower various state parastatals to perform functions which are now within the County Governments.

7. She deponed that under Petition 280 of 2017 a preliminary objection challenging this Court's jurisdiction by virtue of the doctrine of exhaustion was raised. The Court in its Ruling dated 27th November 2017 dismissed the preliminary objection. This saw the respondents file an appeal at the Court of Appeal under Nairobi Civil Appeal No 23 of 2018; *Tana and Athi River Development Authority v Council of Governors and 6 others* against the Ruling. In view of this appeal, the respondents sought for an order to stay all the linked petitions pending the appeal. This order was accordingly granted on 7th March 2018.

8. It was further deposed that owing to the Supreme Court decision in *Council of Governors v Attorney General & 7 others* (2019) eKLR and the High Court decision in the cases of Petition No 280 of 2017: *Council of Governors v Lake Basin Development Authority & 7 others* and Petition No 552 of 2015: *Council of Governors v Attorney General & 14 others*, it was clear that disputes between the two levels of government ought to be subjected to alternative dispute resolution mechanisms. Considering this, it was deposed that the dispute ought to be subjected to mediation under the Intergovernmental Technical Relations Committee.

9. She however noted that the issue of the constitutionality of the Acts of Parliament could not be subjected to mediation. As a result she deposed that at the conclusion of the process, the mediation report ought to be filed in Court so as to form the basis of the argument of the petition. It is further to assist the Court appreciate the contours of the dispute in making its final decision in the instant petition. On this premise she prayed that the sought orders be granted.

10. The 2nd, 4th, 7th, 10th, 14th, 15th, 16th, 19th, & 20th respondents did not file any response to the application or preliminary objection.

The 1st, 3rd, 5th, 6th, 11th, 12th, 13th and 18th Respondents' Case

11. They filed their grounds of opposition dated 16th March 2023 to the application on the basis that:

    i. In the judgment in Petition 280 of 2017, the Court declined jurisdiction and found that the petitioner herein had not exhausted all Alternative Dispute Resolution Mechanisms available for resolving disputes between National and County Government before approaching the Court.

    ii. Under Section 31(b) of the *Intergovernmental Relations Act*, 2012, the national and county governments shall take all reasonable measures to apply and exhaust the mechanisms for alternative dispute resolution provided under this Act or any other legislation before resorting to judicial proceedings as contemplated by Article 189(3) and (4) of the *Constitution*.

    iii. The doctrine of exhaustion of remedies prevents a litigant from seeking a remedy in a new court or jurisdiction until all claims or remedies have been exhausted in the original one.

    iv. The petitioner is forum shopping and seeking a favourable avenue to have its grievances aired and the dispute resolved and the same amounts to an abuse of the Court process.

The 8th and 9th Respondent's Case

12. They filed the following grounds of opposition dated 13th March 2023:

    i. This Court lacks jurisdiction in view of Article 189 of the *Constitution* and Section 31 of the *Intergovernmental Relations Act*, 2012 to adjudicate on the disputes before Court.

    ii. The application is premature and speculative.

    iii. The application has been overtaken by events.

The 17th Respondent's case

13. In response the 17th respondent filed a replying affidavit dated 24th January 2022 sworn by William Kimutai B. Keitany, the Corporations Secretary. He deposed that the instant petition and related ones were filed un-procedurally and unconstitutionally in view of Article 189(3) and (4) of the *Constitution* and Section 31 of the *Intergovernmental Relations Act*, 2012. As such he stated that the petition is premature as the petitioner failed to exhaust of the available mechanisms.

14. He further deposed that since the stay granted by the Order dated 7th March 2018 was to enable the appeal, the same was extinguished upon the determination of the Appeal hence the order sought is incompetent.

15. It was further averred that this Court has no supervisory role over the Intergovernmental Technical Relations Committee in the manner advanced by the petitioner in its application. He thus deposed that the petitioner could not ask this Court to refer the matter to mediation and still seek stay of the instant petition pending the outcome.

The Petitioner's Submissions

16. The petitioner through their advocates, Manyonge Wanyama and Associates LLP filed written submissions and a list of authorities dated 21st July 2021. Counsel identified the only issue for determination to be whether this honorable Court should stay the instant petition and refer the matter for mediation to the Intergovernmental Technical Relations Committee.

17. He submitted that where the *Constitution* or Statute provides a dispute resolution mechanism, the same should be sought as the first port of call before a party can approach the Court as observed in the case of *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* (2015) eKLR. Considering this he submitted that this dispute ought to be referred to the Intergovernmental Technical Relations Committee for mediation as provided under Section 31 of the *Intergovernmental Relations Act*, 2012 before the Court can hear and determine it.

18. Counsel observed that the Supreme Court in the case of *Council of Governors v the Attorney General* (2019)eKLR held that Section 31 of the *Intergovernmental Relations Act* recommends for the alternative dispute resolution mechanisms be exhausted before pursuing the matter in Court. As such, in case of a dispute between the two levels of government, every effort to settle the dispute under the national law should be pursued. That in light of this, this Court should not allow a requirement of the *Constitution* to be abdicated. Similar reliance was also placed on the Supreme Court case of *Geoffrey M Asanyo v Attorney General* (2018) eKLR on this subject and the case of *County Government of Nyeri v Cabinet Secretary Ministry of Education Science and Technology & Another* (2014) eKLR.

19. In conclusion he submitted that subjecting the instant petition to mediation would not oust the jurisdiction of this Court as the parties are at liberty to come back to Court if the mediation process fails.

The 1st, 3rd, 5th, 6th, 11th, 12th, 13th and 18th Respondent's Submissions

20. State Counsel, Ruth Wamuyu on their behalf filed written submissions dated 16th March 2023. She stated that the main issue was whether the instant petition should be stayed.

21. By the same token and while citing the pronouncement in Petition No 280 of 2017, counsel submitted that the Court had found it had no jurisdiction by virtue of the failure by the petitioner to exhaust the available mechanisms under Section 31(b) of the *Intergovernmental Relations Act*, 2012 before filing the instant suit. In support of this argument reliance was placed on the case of *Narok County Council v Trans Mara County Council and another* (Civil Appeal No 25 of 2000) and *Okiya Omtata and another v AG and 6 others* (2014) eKLR. She thus:

22. Counsel in view of this argued that the petitioner had not demonstrated sufficient reasons for this Court to grant stay orders as seen in the Court of Appeal case of *Esmaj v Mistry Shamji Lalji and Co.* (1984) KLR.

The 8th and 9th Respondents Submissions

23. Their submissions dated 13th March 2023 were filed by Prof. Tom Ojienda & Associates in response to the application dated 21st July 2021. Counsel while submitting on this Court's jurisdiction stated that according to the Court of Appeal in *Speaker of the National Assembly v James Njenga Karume* (1992) eKLR, where a procedure is established in law, the same ought to be strictly followed. He noted that the dispute herein related to the national and county government and so the dispute ought to be settled in the manner prescribed by the enabling Statute.

24. He noted that the matter had already been referred to mediation under the Intergovernmental Technical Relations Committee. Considering this, Counsel asserted that this Court lacks jurisdiction to take any further action including stay of the instant petition. This is since the Act does not confer upon this Court jurisdiction to issue stay orders pending the hearing and determination of the dispute before the Committee.

25. In support reliance was placed on the Supreme Court case of *In the Matter of Interim Independent Electoral Commission* (2011) eKLR where it was stated that jurisdiction is everything. On this basis Counsel submitted that the application ought to be dismissed with costs.

The 10th Respondent's Submissions

26. The 10th respondent through its Counsel, Lumumba and Lumumba Advocates filed written submissions and a list of authorities dated 7th December 2022. On whether the Court should stay the petition and refer the matter to mediation before the Intergovernmental Technical Relations Committee counsel submitted that the 10th respondent was not opposed to the matter being referred to mediation. He however noted that the bone of contention was that the petitioner had filed the dispute prematurely before exhausting the available mechanisms as dictated by Article 189(3) of the *Constitution* and Section 31 of the *Intergovernmental Relations Act*. Considering this he submitted that the jurisdiction of this Court had been invoked prematurely.

27. Counsel further argued that the jurisdiction of this Court was limited by virtue of these provisions until the mechanisms are exhausted as stated by the Court in the case of *Isiolo County Assembly Service Board and another v Principal Secretary (Devolution) Ministry of Devolution and Planning and another* (2016) eKLR.

28. In light of this he submitted that the law does not prescribe a situation where a dispute is referred to mediation when there is a petition on the same issue pending before the Court. He thus submitted that the petitioner had acted un-procedurally and as a consequence this Court lacks jurisdiction at this stage to entertain the application.

The 17th Respondent's Submissions

29. The firm of COOTOW and Associate Advocates filed written submissions and a list of authorities dated 14th December 2022 on behalf of the 17th respondent. Counsel begun by stating that, the respondent was opposed to the prayer for stay not mediation. Counsel submitted that the petitioner had admitted that the dispute had not complied with Section 31 of the *Intergovernmental Relations Act* as provided by Article 189 (3)(4) of the *Constitution*. He noted that this was the position also upheld by the Court in Petition 280 of 2017 (*Council of County Governors v Lake Basin Development Authority & 6 others* (2021) eKLR) in rendering its judgement. Counsel argued that the Petitioner was not deserving of the orders sought since the petition had been filed.

Analysis and Determination

30. I hereby note that this file is interconnected with Petition No 277 of 2017 and Petition 279 of 2017. As such the issues highlighted in the respondents' preliminary objections herein and the petitioner's application are identical in the other two files as well. Having analyzed the actualities of the parties' pleadings and their submissions, the main issues as reiterated by all the parties are as follows:

    i. Whether the instant application should be stayed pending the mediation of the dispute by the Intergovernmental Technical Relations Committee in line with Section 31 of the Intergovernmental Relations Act, No 2 of 2012.

    ii. Whether the respondents' preliminary objections are merited.

Issue No (i). Whether the instant application should be stayed pending the mediation of the dispute by the Intergovernmental Technical Relations Committee in line with Section 31 of the Intergovernmental Relations Act, No 2 of 2012

31. The petitioner in its application dated 21st July 2021 sought orders to have this Court vary the order granted on 7th March 2018 staying Nairobi Constitutional Petition No 277 of 2017; Council of County Governors v the National Environmental Management Authority and 14 others pending the outcome of the interlocutory Appeal in the Court of Appeal against the ruling in a related matter, Constitutional Petition No 280 of 2017. The petitioner averred that this Court should stay the instant petition pending the determination of the dispute by the Intergovernmental Technical Relations Committee.

32. The respondents strongly opposed the application arguing that was bad in law, as there is no law that provides that this Court can stay a matter which was filed before the exhaustion of the available mechanisms in law. For this reason, the respondents challenged this Court's jurisdiction to grant the said orders. It was also noted that the Orders referred to by the petitioner in the application had already been overtaken by events as the subject suit had been determined and the appeal at the Court of Appeal withdrawn for the matter to be determined by the Committee as prescribed by law.

33. As I commence this discussion it is worthy to note that neither of the parties were opposed to the matter being determined by the Committee as prescribed by law through mediation. The contentious issue is stay of the instant petition to await the Committee's determination. The petitioner made known that at the conclusion of the Committee's mediation process a report ought to be filed with this Court to assist it in determination of this petition.

34. It has been established that jurisdiction is everything, without it, a Court has no power to make one more step. (See: *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR). Unmistakably in each matter where the issue is raised the Court must examine its veracity before entertaining the matter. This is because a decision made without legal authority or jurisdiction is void ab initio.

35. A court's jurisdiction was described by the Supreme Court in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR as follows:

> "(68) A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.... Where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

36. This Court is guided by the above opine and correspondingly the principles set out under Article 259(1) of the *Constitution* which are:

> 1. This Constitution shall be interpreted in a manner that--
>
> a. promotes its purposes, values and principles;
>
> b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
>
> c. permits the development of the law; and
>
> d. contributes to good governance.

37. The instant matter as appreciated from the pleadings revolves around a dispute as between the county and national governments. This came about as a result of the devolution principle ascribed to by the citizens of Kenya in the 2010 Constitution under Article 6(2). With reference to this case the *Constitution* under Article 189 which deals with the cooperation between national and county governments provides as follows:

> (3) In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.
>
> (4) National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.

38. In this regard, Parliament enacted the *Intergovernmental Relations Act*, 2012 which is an Act of Parliament to establish a framework for consultation and co-operation between the national and county governments and amongst county governments; to establish mechanisms for the resolution of intergovernmental disputes pursuant to Articles 6 and 189 of the *Constitution*. Part IV of the Act deals with the dispute resolution mechanisms that should be adopted. In particular, Section 31 provides as follows:

> Measures for dispute resolution
>
> The national and county governments shall take all reasonable measures to—
>
> a. resolve disputes amicably; and
>
> b. apply and exhaust the mechanisms for alternative dispute resolution provided under this Act or any other legislation before resorting to judicial proceedings as contemplated by Article 189(3) and (4) of the *Constitution*.

39. It is plain from reading this Part that the *Constitution* and legislation were desirous as a first point of call to have a dispute between the two levels of government resolved by alternative dispute resolution mechanism before approaching the Court. This is seen under Section 35 of the Act which dictates at what point the Court can entertain the proceedings. This Section provides as follows:

> Where all efforts of resolving a dispute under this Act fail, a party to the dispute may submit the matter for arbitration or institute judicial proceedings.

40. While the Courts have determined that stay of proceedings is a matter of discretion, as seen in the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR, where it was stated:

> "...Therefore the test for stay of proceeding is high and stringent. See Ringera J in the case of *Global Tours &Travels Limited*; Nairobi HC Winding Up Cause No 43 of 2000 persuasively stated thus;
>
> "As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order...."

41. I take note that this discretion can only be exercised where a Court has jurisdiction in the first place. A perusal of the cited provisions does not indicate a procedure or scenario of stay pending mediation as advanced by the petitioner. The legal procedure provided in the Act is alternative dispute resolution which then means that commencement of judicial proceedings after completion of the mechanism. As has been discussed by the Supreme Court, a Court does not operate in a vacuum. Its authority must be embedded in law either in the *Constitution* or the law. In this case the Act makes known that this Court's jurisdiction is appellate in nature and not first instance jurisdiction.

42. This Court as is discernible from the *Constitution* and the Act is not the first point of call with reference to disputes between the two levels. As such this Court cannot grant itself such authority in the manner proposed by the petitioner to issue stay orders to await determination of the mediation. As emphasized this Court, was never supposed to entertain the matter in the first place. What becomes undeniable in effect is that assumption of jurisdiction by this Court contrary to the manner prescribed by the *Constitution* and the *Intergovernmental Relations Act* would be going against the law. Exercise of such jurisdiction undeniably would be void ab initio.

43. To this end I find that the petitioner's prayer in its application is not tenable in law as is not supported by the dictates of the *Constitution* or the *Intergovernmental Relations Act*.

Issue No (ii). Whether the respondents' preliminary objections are merited

44. The respondents in their preliminary objections challenged this Court's jurisdiction to entertain the instant matter by virtue of the dispute resolution mechanisms as provided in the *Intergovernmental Relations Act*. They also argued that the petitioner had not demonstrated that it had sought to exhaust these mechanisms before approaching this Court.

45. The threshold of a preliminary objection was set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 as follows:

> "...a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit."

46. The parties highlighted a plethora of cases that have pronounced themselves on the need of exhaustion of available mechanisms before seeking judicial recourse which this Court is guided by and in

agreement with. In particular the Supreme Court decision in the case of *NGOs Co-ordination Board v EG & 4 others; Katiba Institute* (*supra*) held that:

> " 86. ...In this country, it is now firmly established law that in cases where there is an alternative dispute resolution mechanism established by legislation, the courts must exercise restraint in exercising their jurisdiction and accord deference to such dispute resolution bodies under the doctrine of exhaustion....In the case of *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others* SC Petition No 3 of 2016; [2019] eKLR we underscored the need for the relevant person, bodies, tribunals and any other quasi-judicial authorities and organs to be given the first opportunity to deal with disputes as provided for in the relevant parent statute. In the case of *United Millers Limited v Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 others*, SC petition (application) No 4 of 2021; [2021] eKLR we were emphatic that the courts must exercise restraint in exercising their jurisdiction conferred by the *Constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance.
>
> 87. This is further firmly rooted in Article 159 of the *Constitution* which requires the courts to promote alternative dispute resolution mechanisms. The moment a storm begins to brew; courts should not be the first port of call but rather the final resort. Before using the court's jurisdiction, it is essential to exhaust any available alternative dispute resolution options. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his interests within the mechanisms in place for resolution outside the courts. The exhaustion doctrine acts as a safeguard to delay judicial consideration of cases to ensure that a party is vigilant in protecting his interests within the channels available for dispute settlement methods. In this way, the doctrine serves to promote an efficient justice system and an autonomous administrative state."

47. Equally the Court in the case of *Commission for Human Rights & Justice (CHRJ) & another v Chief Officer, Medical Services County Government Of Mombasa & 3 others* (Constitutional Petition E003 of 2022) [2022] KEHC 12994 (KLR) (21 September 2022) (Judgment) noted as follows:

> " 5. When a statute expressly stated that the exhaustion of internal remedies was an indispensable condition precedent before launching an application to a court then that condition had to first be fulfilled..."

48. From the above analysis, the question that should be answered is whether there was a dispute resolution mechanism provided in the *Intergovernmental Relations Act* which the petitioner ought to have pursued before filing the instant petitions against the respondents. As deliberated in the previous issue, the *Act* does provide a dispute resolution procedure before judicial recourse as seen under Part IV of the *Act*. Specifically, Section 31 which is couched in mandatory terms and already cited at paragraph 38 of this Ruling.

49. There is no doubt that parties are obligated to exhaust the mechanisms provided by the Act before approaching the Court under Section 35. This is only exempted where there are exceptional cases as

observed by the Court in the case of *Republic v Kenya Revenue Authority Ex Parte Style Industries Limited* [2019] eKLR where it was held that:

> " 42. ...on application by the applicant, the court may grant an exemption. My reading of the law is that it is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under section 9(4) of the *FAA Act*. The person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given. Section 9(4) of the *FAA Act* [43] postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy. My reading of the said provision is that the applicant must first apply to the court and demonstrate the existence of exceptional circumstances."

50. A perusal of the facts of this case makes it plain that the petitioner did not seek to exhaust the mandatory requirement of exhaustion of the available mechanisms in the *Intergovernmental Relations Act* and before was denied before approaching this Court. Moreover the petitioner did not file any application before this Court seeking for an exemption to the provisions of Section 31 of the *Act*, based on an outstanding ground.

51. It has also been confirmed that the matter is already before the relevant committee as provided by statute. This ought to have been the position from the start.

52. The inevitable conclusion that this Court comes to as a result is that it lacks jurisdiction to hear and determine this petition which was filed prematurely.

53. The upshot is that the petitioner's Notice of Motion dated 21st July 2021 lacks merit and is dismissed. On the flipside, the respondents various preliminary objections have merit and are allowed. The petition dated 5th June 2017 is hereby struck out with costs.

54. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 15TH DAY OF AUGUST 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT