



Council of County Governors v Energy Regulatory Commission & 7 others (Petition 279 of 2017) [2023] KEHC 21365 (KLR) (Constitutional and Human Rights) (15 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21365 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 279 OF 2017

HI ONG'UDI, J

AUGUST 15, 2023

BETWEEN

COUNCIL OF COUNTY GOVERNORS PETITIONER

AND

THE ENERGY REGULATORY COMMISSION 1ST RESPONDENT

RURAL ELECTRIFICATION AUTHORITY 2ND RESPONDENT

NATIONAL TRANSPORT AND SAFETY AUTHORITY 3RD RESPONDENT

KENYA URBAN ROADS AUTHORITY 4TH RESPONDENT

THE KENYA RURAL ROADS AUTHORITY 5TH RESPONDENT

KENYA FERRY SERVICES LIMITED 6TH RESPONDENT

KENYA ROADS BOARD 7TH RESPONDENT

THE ATTORNEY GENERAL 8TH 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 as such 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 Respondent

3. The 1st respondent filed a preliminary objection to the petition dated 13th November 2017 on the grounds that:
 - i. The petition is incompetent and bad in law as the Court lacks jurisdiction to hear and determine the suit as pleaded.
 - ii. The petitioner is not sui juris and as such lacks legal capacity to either institute suits or sue in its own name.
 - iii. The petitioner is neither a natural person nor an incorporated entity; therefore cannot institute a suit as purported.
 - iv. Under Section 20 of the *Intergovernmental Relations Act*, the petitioner is incapable of legal capacity to institute a suit.
 - v. The petitioner in instituting this suit acted ultra vires and is in blatant contravention of the provisions of Section 20 of the *Intergovernmental Relations Act*.
 - vi. The petition in its entirety is in contravention of Sections 31, 32, 33 and 34 of the *Intergovernmental Relations Act*.
 - vii. The petition is in flagrant violation of the provisions of Section 3, 4, 5 and 6 of the *Intergovernmental Relations Act*.

The 7th Respondent

4. Through a preliminary objection dated 26th September 2017 the 7th respondent opposed the petition on the grounds that:
 - i. This Court lacks jurisdiction to entertain the petition as filed.
 - ii. The petitioner lacks the requisite legal capacity and mandate under Section 20 of the *Intergovernmental Relations Act* to institute and maintain the petition.
 - iii. The petitioner is constituted as a forum and not a legal person capable of instituting and maintaining the suits before any Court of law.
 - iv. The petition is premature and a gross abuse of the Court process for want of compliance with Sections 30,31,32,33 and 34 of the *Intergovernmental Relations Act*.
5. By way of a Notice of Motion dated 21st July 2021 filed under Rule 3(2)(3)(4)(5) and 19 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms)Practice and Procedure Rules, 2013, 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.279 of 2017; Council of County Governors v the Energy Regulatory Commission and 7 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 deposed 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 averred 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 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 petitioner and further, 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.

The 1st Respondent’s case

10. The 1st respondent filed its grounds of opposition to the application dated 4th March 2022 on the basis that:
 - i. The Notice of Motion is incompetent and bad at law as this Court lacks jurisdiction to hear and determine the matter herein; especially upon the



determination of the Supreme Court in Reference Number 3 of 2019, and compliance with Article 189(4) of *the Constitution*.

- ii. The Supreme Court, in its determination, pronounced the imperative and mandatory requirement for parties to follow the laid down procedures of dispute resolution under both *the Constitution* and statutes. The decision is therefore binding on this Court.
- iii. The Notice of Motion in its entirety is in contravention of the provisions of Sections 3, 4, 5, 6, 31, 32, 33 & 34 of the Inter-Governmental Relations Act.
- iv. Therefore, this Honourable Court does not have the requisite jurisdiction, as the court of first instance, to either seize this matter nor issue stay orders pending mediation.

The 4th and 8th Respondent's Case

11. They filed the following grounds of opposition dated 16th March 2023:

- i. In the judgment in Petition 280 of 2017, the Court declined jurisdiction and found that the petitioner herein has 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 2nd, 3rd, 5th, 6th and 7th Respondent's cases

12. Their responses to the application were not found in the Court file and CTS.

The Parties' submissions

The Petitioner's submissions

13. 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.
14. Counsel, 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 Versus Samuel Muguna Henry & 1756 others (2015) eKLR.



Considering this he submitted that the 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.

15. Counsel observed that the Supreme Court in the case of Council of Governors versus 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 Versus Attorney General (2018) eKLR on this subject and the case of County Government of Nyeri Versus Cabinet Secretary Ministry of Education Science and Technology & another (2014) eKLR.
16. In conclusion counsel 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 Respondent's submissions

17. The 1st respondent through the firm of Ogetto, Otachi and Company Advocates filed written submissions and a list of authorities dated 11th March 2022 in response to the application and in support of its preliminary objection. On whether the petitioner is capable of instituting the instant petition in its name, Counsel submitted that the petitioner is an unincorporated body not clothed with the legal capacity to institute and maintain a suit in its own name as appreciated in the case of Kipisiwo Community Self Help Group v Attorney General and 6 others (2013) eKLR which was cited in support.
18. On the second issue, as to whether this Court has the requisite jurisdiction to entertain the petition, Counsel answered in the negative. He argued that owing to Section 31 of the *Intergovernmental Relations Act* disputes between the national and county government are to be resolved as prescribed before resorting to judicial proceedings.
19. Counsel stated that the petitioner had failed to exhaust these mechanisms and further not adduced evidence to that effect as emphasized by the Court of Appeal in the case of Speaker of the National Assembly v James Njenga Karume (1992) eKLR. Comparable reliance was placed on the cases of County Assembly Service Board and another v Principal Secretary (Devolution) Ministry of Devolution and Planning and another (2016) eKLR; The National Gambling Board v the Premier of KwaZulu Natal and 4 others, (CCT32/01) [2001] ZACC 8 and Supreme Court case of Counsel of Governors and 47 others v Attorney General and 3 others (Interested parties); Katiba Institute and 2 others (Amicus Curiae) (2020) eKLR.
20. Counsel while relying on the case of Owners of Motor Vessel Lillian S v Caltex Oil Kenya Ltd(1989)KLR 1 argued that this Court is not vested with the requisite jurisdiction as dictated by Article 189(3) and (4) of *the Constitution* and Section 31 of the *Intergovernmental Relations Act* to determine the dispute at first instance. Counsel therefore urged the Court to find merit in the preliminary objection and dismiss the petition.

The 2nd, 3rd and 7th Respondent's Submissions

21. The 7th respondent in support of its preliminary objection filed written submissions dated 16th February 2018 highlighting the major issues being the petitioner's capacity to sue and this Court's



- jurisdiction. On the first issue, Counsel submitted that under Section 19 of the Act, the petitioner being a forum, lacked capacity to institute and sustain a suit in its name. He cited the case of Kipisiwo Community Self Help Group (supra) and Football Kenya Federation v Kenyan Premier League Limited and 4 others (2015) eKLR, in support.
22. On this Court's jurisdiction, Counsel submitted that Article 189(3) and (4) of *the Constitution* is instructive on how a relationship between the national and county governments is to be maintained including resolution of disputes. In line with this, Section 31 of the *Intergovernmental Relations Act* provides the manner in which such disputes are to be resolved. He submitted that the petitioner having not exhausted this mechanism had wrongly approached this Court in filing this petition. Prof. Albert Mumma and Company Advocates on their behalf filed written submissions dated 28th March 2023 in response to the application. Counsel identified the issue for determination to be whether this Court should stay or strike out the petition for being prematurely instituted.
 23. Counsel while relying on the pronouncements in Petition No.280 of 2017 and Petition No.552 of 2015 which are similar to this matter, submitted that the Courts had dismissed the petitions because the petitioner had failed to exhaust the explicit provision under Section 31 of the *Intergovernmental Relations Act* in resolving the disputes. Counsel contended that this petition involved an intergovernmental dispute which ought to be first resolved by the Intergovernmental Technical Dispute Relations Committee. In support counsel cited the cases of Geoffrey Muthinja (supra) and the Supreme Court case of NGOs Co-ordination Board v EG and 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019) (2023) KESC 17(KLR).
 24. On whether this Court should stay and refer the matter to mediation, counsel submitted that the argument had no basis in law, as the petitioner is seeking to confer on this Court a jurisdiction akin to court annexed mediation such action is offensive to Article 159 and 189 of *the Constitution* and infringes on the Intergovernmental Technical Dispute Relations Committee mandate. In support he cited the case of Geoffrey M. Asanyo (supra) where it was observed that some parties may use the Court, through filing of proceedings, as coercion for other parties to submit to negotiation. Further that such action amounts to abuse of Court process and Article 159(2)(e) of *the Constitution* cannot be a panacea to such a malpractice.
 25. Counsel finally submitted that the petitioner had failed to demonstrate a justifiable cause at first instance in this Court or other reason to merit a stay of the proceedings. It was further submitted that the order the petitioner sought to vary had already been overtaken by events as the related matter referred to in Petition No.280 of 2017 was dismissed in the Court's judgment dated 1st July 2021 for being premature. Further that the matter was already before the Committee and the petitioner would not suffer any prejudice.

The 4th and 8th Respondent's submissions

26. State Counsel, Ruth Wamuyu filed written submissions dated 16th March 2023, on their behalf. She identified the main issue to be whether the instant petition should be stayed. While referring to the pronouncement in Petition No. 280 of 2017, she 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 petition. He relied on the cases 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.
27. Counsel submitted 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.



Analysis and Determination

28. I find it worthy to mention that this file is interconnected with Petition No. 277 of 2017 and Petition 278 of 2017. As such the issues highlighted in the respondents' preliminary objections herein and the petitioner's application are similar to those in the other two files. Having analyzed of the parties' pleadings and submissions, I find the main issues for identification to be 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 Inter-governmental 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 Inter-governmental Relations Act, No.2 of 2012

29. 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.
30. The respondents opposed the application arguing that it was bad in law, as there is no law that provides that this Court can stay a matter which was filed without having exhausted 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 already been determined and the appeal at the Court of Appeal withdrawn for the matter to be determined by the Committee as prescribed by law.
31. As I commence this discussion it is worthy to note that neither of the parties is 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.
32. 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.
33. 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.”

34. 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.

35. The instant matter as appreciated from the pleadings revolves around a dispute as between the county and national government. 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.

36. 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*.

37. 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.

38. The Courts have held 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...”

39. 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 the alternative dispute resolution which means that commencement of judicial proceedings should be 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 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.

40. In view of this, this Court cannot grant itself such authority in the manner proposed by the petitioner that 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.

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

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

42. 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.



43. 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.”

44. 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) was 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.”

45. 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...”



46. 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 36 of this Ruling.
47. Needless to say 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.”
48. 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 was denied before approaching this Court. Moreover the petitioner did not file any application before this Court seeking exemption to the provisions of section 31 of the Act, based on an outstanding ground.
49. It has been confirmed that this matter has already been placed before the lawful committee under the Law. That is where it ought to have started.
50. The inevitable conclusion that this Court comes to as a result is that the respondents’ challenge of the Court’s jurisdiction through their various preliminary objections is merited, as the suit was filed prematurely. The Court cannot therefore issue the Orders sought by the petitioner.
51. The upshot is that the petitioner’s Notice of Motion dated 21st July 2021 lacks merit and is dismissed. On the flipside, the respondents’ preliminary objections have merit and are allowed. The Petition dated 5th June 2017 is hereby struck out with costs.
52. 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

