REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 281 OF 2019

IN THE MATTER OF :

CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS AS ENSHRINED UNDER ARTICLES 10, 22, 23, 33(1)(a), 35(1)(b), 258 AND 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010;

AND

IN THE MATTER OF :

SECTION 4(1) (a) AND 4(3) OF THE ACCESS TO INFORMATION ACT NO. 31 OF 2016;

AND

IN THE MATTER OF: SECTION 7(e) AND 7(f) OF THE WILDLIFE (CONSERVATION AND MANAGEMENT) ACT, CAP 376;

AND

IN THE MATTER OF:

THE PETITION BY THE COUNTY GOVERNMENT OF TAITA TAVETA SEEKING TO ENFORCE THEIR FUNDAMENTAL RIGHT TO INFORMATION UNDER THE CONSTITUTION OF KENYA, 2010;

AND

IN THE MATTER OF:

THE PETITION BY THE COUNTY GOVERNMENT OF TAITA TAVETA SEEKING TO ENFORCE ADHERANCE OF THE PROVISIONS OF WILDLIFE (CONSERVATION AND MANAGEMENT) ACT, CAP 376;

-BETWEEN-

COUNTY GOVERNMENT OF TAITA TAVETA.....PETITIONER

AND

THE KENYA WILDLIFE SERVICES.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

COUNCIL OF GOVERNORS.....1ST INTERSTED PARTY

COMMISSION FOR REVENUE ALLOCATION....2ND INTERSTED PARTY

RULING

PETITION

1. The Petitioners through a Petition dated **12th July, 2019**, and filed on **16th July, 2019,** supported by supporting affidavit dated 11th July 2019 seeks the following orders :-

a) A declaration be and is hereby issued that the Petitioner's fundamental rights and freedoms as enshrined under Articles 33(1) (a) and 35 (1) (b) of the Constitution of Kenya 2010, have been contravened and infringed upon by the 1st Respondent by its refusal to give the petitioner the information they requested by supplying or sharing with the petitioner; all statements on revenue collected from Tsavo West and Tsavo East National Parks from 2013-2018;

b) A declaration be and is hereby issued that the 1st Respondent has failed to fulfill its statutory obligation to develop a mechanism for benefit sharing with communities living in wildlife areas as provided for by the Wildlife (Conservation and Management) Act, Cap 376 of the Laws of Kenya (Wildlife Act);

c) An Order be and is hereby issued compelling the 1st Respondent to release to the Petitioner all the documents including revenue collection statements, records of expenses and disbursements to the National Government from Tsavo East and Tsavo West National Parks for the period of 2013 to 2018;

d) An order be and is hereby issued compelling the 1st Respondent to develop a mechanism for benefit sharing with communities living in wildlife areas as provided for by the Wildlife (Conservation and Management) Act, Cap 376 of the Laws of Kenya (Wildlife Act) forthwith at the ratio 30:70;

e) Any other or further orders, writs, directions as this honourable court may consider appropriate;

f) Costs of the Petition;

g) Interests.

THE 1ST RESPONDENT'S RESPONSE AND THE PRELIMINARY OBJECTION

2. The 1st Respondent through its response dated 14th of August, 2019 and filed on the 15th of August, 2019, raised a preliminary objection seeking to have the petition struck out on the following grounds;-

a) That in the face of the express provisions of Article 189 of the Constitution and Part IV of the Inter-Governmental Relations Act No. 2 of 2012, this Honourable Court Lacks original jurisdiction to hear and determine this matter on its own merit;

b) That in the alternative in view of the express provisions of the Access to Information Act No. 31 of 2016, this Honourable Court's original jurisdiction has been prematurely invoked;

c) That in the alternative in view of the express provisions of Section 117 of the Wildlife Conservation and Management Act No. 47 of 2013 the original jurisdiction of this honourable court has been prematurely invoked;

d) That this suit contravenes the well settled doctrines of constitutional avoidance and exhaustion of statutory provided dispute resolution mechanisms

e) That this suit amounts to a total abuse of the court process and the law in that there is no constitutional issue involved.

PETITIONER'S RESPONSE TO THE PRELIMINARY OBJECTION

3. In response to the preliminary objection raised, by the 1st Respondent, the Petitioner through its submissions dated **14th May, 2020**

averred that they were alive to the dispute resolution mechanism stipulated under ***Article 189(2) of the Constitution,*** cooperating with the national government and resolving intergovernmental disputes and states that it made attempts to resolve the dispute by writing to the Chair of the Intergovernmental Relations Technical Committee vide a letter dated **20th June, 2019** and which was not responded to.

4. The Petitioner further aver that the lack of response from the aforementioned committee amounted to a failed attempt towards alternative dispute resolution in line with **Article 189** ***of the Constitution***, thereby leaving the petitioner with no option but to move to the Constitutional Court.

5. The Petitioner further states that the provisions of ***Part IV of the Inter-Government Relations Act No. 2 of 2012*** do not oust the jurisdiction of this court to determine the issues at hand relying on the case of ***Nderitu Gachagua V. Dr. Thuo Mathenge Civil Appeal No. 14 of 2013*** as well as ***Article 165 of the Constitution***.

6. Further it is contended that even though ***Section 6 of the Access to Information Act No. 31 of 2016*** provides for the limitations of the Right to Access information, the said Section do not apply to the instant Petition, in that there was no contraventions of any limitation with respect to the petitioner's right to access information as stipulated under ***Article 24 of the Constitution.*** The Petitioner in support sought to rely in the case of ***President of the Republic of South Africa & Others vs M & G Media Limited*** where the court held that the evidentiary burden rests with the holder of information and not the requester.

7. It is Petitioner's position that the Petition is instituted on grounds of violations under ***Articles 10, 22, 23 and 33(1) and 35(1) (b) of the Constitution.*** On the violation of the Petitioner's constitutional rights the Petitioner placed reliance on ***Article 258(1) of the Constitution*** which states that every person has a right to claim that the constitution has been violated. The County Government, herein it is stated has moved this Corut on behalf of the residents of the county who have a right to access information and the dispute herein ought not to be termed as a dispute between the County Government and National Government.

THE 1ST INTERESTED PARTY'S RESPONSE

8. The 1st interested party filed a response dated 26th January, 2021 stating that the dispute between parties herein do not amount to an intergovernmental dispute falling within the meaning of ***Part IV of the Intergovernmental Relations Act*** but rather a Constitutional Petition seeking the enforcement of rights under ***Article 35 of the Constitution***.

9. It is argued that ***Article 35 of the Constitution*** guarantees the right of access to information and that the petition is faulting the 1st respondent for wilful failure to disclose the amount of revenue generated from the two national parks (Tsavo East and Tsavo West).

10. The 1st interested party further contend that ***Section 7 of the Wildlife (Conservation and Management) Act, (Cap 376)*** confers the 1st respondent with the responsibility of conservation and management of national parks, wildlife conservation areas and sanctuaries under its jurisdiction and also mandates the 1st respondent to collect revenue, levies and charges due to the National Government from wildlife as appropriate, and develop mechanisms for benefit sharing with communities living in wildlife areas and that notwithstanding the above provisions, the 1st Respondent continues to collect revenues from the two parks and still failed to develop a benefit sharing mechanism as mandated by the ***Wildlife (Conservation and Management) Act***.

11. It is contended that this honourable court has jurisdiction to hear and determine the matter pursuant to ***Article 165 3(b) of the Constitution.*** In support thereof the Interested Party referred to the case of ***Samuel Kamau Macharia vs Kenya Commercial Bank Ltd & 2 others; Application No. 2 of 2011 in the Supreme Court,*** where the Supreme Court affirmed that a court's jurisdiction is conferred by the Constitution.

12. It is urged that matters relating to the interpretation of the Constitution are not subject to Alternative Dispute Resolution Mechanisms as the jurisdiction rests solely with this Honourable Court.

13. It is therefore stated that the Preliminary Objection is not merited and should be dismissed and the Court do proceed to hear and determine the matter.

BACKGROUND OF THE PETITION

14. The background of the Petition is that the petitioner is a county government of Taita Taveta who brought this petition on behalf of the people of Taita Taveta County for the enforcement of their fundamental rights as enshrined in ***Articles 10, 33 and 35 of the Constitution*** and ***Section 4, 9 and 21 of the Access to information Act***.

15. The petitioner's case is that there are two ***National Parks (Tsavo East National Park and Tsavo West National Park)*** which occupy 62% of the county's land mass and that the 1st respondent is mandated by the ***Wildlife (Conservation and Management) Act, Cap 376***, to collect revenue and charges due to the National Government and to develop mechanisms for benefit sharing with communities living in wildlife areas.

16. The petitioner avers that despite the 1st Respondent collecting revenue from the two national parks as mandated by the aforementioned Act, the amounts collected have not been ascertainable and the Petitioner's efforts to get the recurrent information has been futile since the 1st respondent vide their website failed to update their annual and financial reports since 2015 and the same excluded the Petitioner's County.

17. Furthermore, as a result of the 1st Respondent's actions and commissions, the people of Taita Taveta have not benefitted in any way from the revenue collected, from the land and natural resources found in National Parks. In addition it is stated that there is also no

mechanism that exists for sharing the revenue collected by the 1st Respondent.

18. The Petitioner contend that the fundamental right of the people of Taita Taveta to access information has been systematically contravened and grossly violated by the Kenya Wildlife service. It is the Petitioner's position that the people of Taita Taveta through the County Government ought to know how much revenue is generated from the two national parks and as such it is contended the right to access information becomes a fundamental human right upon which other rights flow.

19. It is therefore stated that the 1st Respondent is in breach of Petitioner's constitutional rights through denial of the right of access to information, on the revenue collected over the years from Tsavo East and Tsavo West National Park, and also through the blatant disobedience to the law, and specifically to the provision by the Wildlife Act, on developing a mechanism for benefit sharing with communities living in wildlife areas.

20. Accordingly and by the aforesaid reasons, the Petitioner contend that its ambition to achieve the objectives, as provided by the Fourth schedule of the Constitution on generating own revenue has been curtailed by the 1st Respondent's actions and omissions.

21. The Petitioner therefore seek among other orders, a declaration be issued that the Petitioner's fundamental rights and freedoms as enshrined under ***Articles 33(1) (a) and 35 (1) (b) of the Constitution of Kenya 2010,*** has been contravened and infringed upon by the 1st Respondent by its refusal to give the Petitioner the information requested, and by refusing to supply or share with the Petitioner; all statements on revenue collected from Tsavo West and Tsavo East National Parks from 2013-2018. The Petitioner further prays that an order be issued compelling the 1st Respondent to develop a mechanism for benefit sharing with communities living in wildlife areas as provided for by the ***Wildlife (Conservation and Management) Act*** among other prayers.

ANALYSIS AND DETERMINATION

22. Having carefully considered the Petition dated ***12th July, 2019***, the 1st Respondent's Preliminary Objection dated ***14th August, 2019,*** the 1st Interested Party's response and submissions by all the parties, on the Preliminary Objection the following issues arise for determination:-

a) Whether the dispute before this honourable court amounts to an intergovernmental dispute;

b) Whether this honourable court has jurisdiction to hear and determine the Petition herein;

c) Whether the Preliminary Objection raised by 1st Respondent should be upheld.

A. WHETHER THE DISPUTE BEFORE THIS HONOURABLE COURT AMOUNTS TO AN INTERGOVERNMENTAL DISPUTE

23. The Petitioner and the Interested Party, positon is that this matter is not an Intergovernmental dispute falling within the meaning of ***Part IV of the Intergovernmental Relations Act*** but rather a Constitutional Petition in which the Petitioner is seeking the enforcement of the Petitioner's Constitutional Rights as enumerated in the Petition. The 1st Respondent argues otherwise.

24. ***Article 186 of the Constitution*** deals with the respective functions and powers of the National and County Governments. The functions and powers of the National Government and the County Governments, respectively are as set out in the ***Fourth Schedule of the Constitution***, which outlines the specific functions of the two levels of Government. ***Article 186(3) of the Constitution*** mandates the Parliament to enact legislation that provides for the functions and execution thereof of both levels of government.

25. It is therefore evident that the substantive law applicable in solving dispute amongst the two levels of Governments is ***Part IV of the Inter-Governmental Relations Act No. 2 of 2012*** and ***Article 189(2)(3) and (4) of the Constitu***tion that provides:-

> ***"189. (2) Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.***
>
> ***(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."***

26. ***Part IV of the Inter-Governmental Relations Act No. 2 of 2012*** provides for the measures to be undertaken in case a dispute arises. ***Article 189(2) of the Constitution*** is clear that each level of government is obligated to co-operate in the performance of functions and exercise of powers. The two levels are required to embrace team work and support each other to ensure performance of their respective functions.

27. The 1st Respondent in its submission of 14th January 2020 contend the dispute as spelt out in the Petition amounts to an Intergovernmental dispute between the National Government and County Government of Taita Taveta as defined under ***Section 30 of the Intergovernmental Relations Act 201***2 which provides:-

"30. (1) In this Part, unless the context otherwise requires, "dispute" means an intergovernmental dispute.

(2) This Part shall apply to the resolution of disputes arising—

(a) between the national government and a county government; or

(b) amongst county governments."

28. The 1st Respondent herein the Kenya Wildlife Services is a National Government Organ established under the ***Wildlife Conservation and Management Act No. 47 of 2013.*** Looking at ***Article 189(3) and (4) of the Constitution*** it is clearly stated that Intergovernmental dispute are supposed to be settled through procedures of alternative dispute resolution such as negotiations, mediation and arbitration.

29. The Petitioner do not seek to deny that this matter as alluded to by the 1st Respondent is a dispute related to Intergovernmental dispute between the two levels of government but avers that being alive to the provisions of ***Article 189(2) of the Constitution,*** it made attempts to have the disputes resolved by writing to the Chair; Intergovernmental Relations Technical Committee through a letter dated 20th June 2019; in which letter the Petitioner was seeking amicable solution to dispute in accordance with the provisions of the Constitution and Statute. The letter, it is argued having not been responded to, the Petitioner deemed, that as a failed attempt towards alternative Dispute Resolution Mechanism accordance with the provisions of ***Article 189(2) of the Constitution*** and was left with no alternative but to file the instant Petition.

30. The 1st Respondent urges on what constitutes of a National Government relies in the case of ***Council of Governors & 5 others v The Senate & another [2019] eKLR,*** **in which** the Court of Appeal cited the case of ***Judicial Service Commission vs Speaker of the National Assembly & others (supra)*** which stated with regards to the definition of national government as;

"The Constitution does not define the national government, but it is implicit in its provisions that the national government is the national Executive, the Legislature and the Judiciary as opposed to the County or devolved government."

31. In view of the above I now turn to consider whether the 1st Respondent form any of the three arms of government. The 1st Respondent has been established under **section 6** of The **Wildlife Conservation and Management Act, 2013** which states;-

"6. (1) There is established a Service to be known as the Kenya Wildlife Service.

(2) The Service shall be a body corporate with perpetual succession and a common seal and capable, in its corporate name, of-

Kenya Wildlife Service.

(a) suing and being sued;

(b) purchasing, holding and disposing of movable and immovable property; and

(c) doing all such other things as may be done by a body corporate.

(d) doing all such other things as may be done by a body corporate."

32. Further ***Section 7 and 8 of the Act*** provides:-

"(a) conserve and manage national parks, wildlife conservation areas, and sanctuaries under its jurisdiction;

(b) provide security for wildlife and visitors in national parks, wildlife conservation areas and sanctuaries;

(c) set up a county wildlife conservation committee in respect of each county;

(d) promote or undertake commercial and other activities for the purpose of achieving sustainable wildlife conservation;

(e) collect revenue and charges due to the national government from wildlife and, as appropriate, develop mechanisms for benefit sharing with communities living in wildlife areas;

(f) develop mechanisms for benefit sharing with communities living in wildlife areas;"

33. ***Section 8 of the Act*** goes on to state its management as follows;-

"(I) The Service shall be managed by a Board of Trustees appointed under subsection (2).

(2) The members of the Board of Trustees shall comprise-

(a)a chairperson appointed by the President:

(b)the Principal Secretary in the State Department for the time being responsible for matters relating to wildlife, or a designated representative;

(c)the Principal Secretary in the State Department for the time being responsible for finance, or a designated representative;

(d)the Principal Secretary in the State Department responsible for matters relating to county governments or a designated representative;

(e)the Inspector-General of Police;

(f)four other persons appointed by the Cabinet Secretary as follows -

(i)one representative from a national wildlife conservation non-governmental organization;

(ii)two representatives, who shall be of opposite gender and from community managed wildlife areas, nominated by an umbrella wildlife conservancy body;

(iii) one representative from privately-

managed wildlife areas;

(g) the Director-General of the Service, who shall be the secretary to the Board of Trustees."

34. Upon considering ***Section 7 and 8 of the Act*** on establishment of the functions and management of the 1st Respondent, it is clear that there is a heavy involvement of the executive in the management, functioning and running of the affairs of the 1st Respondent. It is clear under ***Section 6 of the Act*** the 1st Respondent does other things as may be done by body corporate and its services are managed by Board of Trustees and Chairman is appointed by the President in view whereof I find that it is safe to hold that the 1st Respondent is a state corporation, and therefore, the question that arises is whether 1st Respondent being a state corporation, does it qualify to be state organ and a part of the national government?

35. The question of whether a state corporation is a state organ was well elucidated by this court in the case of ***Elias Kibathi v Attorney General [2020] eKLR,*** where Korir J, observed;

"I draw support from the decision in Kimoi Ruto & another v Samwel Kipkosgei Keitany & another [2014] eKLR that:-

"40. It is a fine point whether a State Corporation is a State Organ. If one defines a State Corporation to be a State agency, then a State Corporation would fall under the definition of a State Organ as provided for in Article 260 of the Constitution which provides that a State Organ means "a commission, office, agency, or other body established under this Constitution." Without pretending to decide the point, I am a bit uncertain as to whether an agency of the State, not specifically established within the framework of the Constitution would be a State Organ. If I hold that a State Corporation is a State Organ, then the land held by it would be public land as defined by Article 62 of the Constitution and if not, then it would fall within the ambit of private land. If it is public land, then its holding will fall under either the County Government or the National Land Commission pursuant to the provisions of Article 62 of the Constitution, unless the land is held, used, or occupied by a national state organ. I do not think that the intention of the law would be to make land held by State Corporations to be managed by the Counties or National Land Commission, or that the purchase or sale of land by a State Corporation, would need to go through the stringent provisions provided for in the Land Act, Act No. 6 of 2012, for the sale of public land."

36. The 1st Respondent in managing and conserving national parks, which are situated on public lands in accordance with ***Article 62 of the Constitution*** on behalf of the national Government, qualifies to be a national government organ of the executive.

37. The next issue for consideration is whether the dispute herein qualify as an Inter-governmental dispute. According to ***Article 189 (3) and (4) of the Constitution*** it is provided as follows:-

"(3) In <u>any dispute</u> between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under <u>national legislation</u>.

(4) National legislation shall provide procedures <u>for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration</u>." *(Emphasis mine)*

38. Intergovernmental dispute was aptly defined by Hon. Justice Mativo in the case of ***Council of County Governors v. Lake Basin Development Authority & 6 others (2017) eKLR*** where the Honourable Judge stated:-

"What constitutes a dispute within the context of the Intergovernmental Relations Act [30] has received judicial construction by the High Court. In Isiolo County Assembly Service Board & another vs Principal Secretary (Devolution) Ministry of Devolution

and Planning & another [31] Onguto J stated:-

> ***"The dispute must be between the two levels of government. It must not be between one or the other on the other hand and an individual or person on the other hand. A dispute between a person or State officer in his individual capacity seeking to achieve his own interest or rights would not equate an intergovernmental dispute. A dispute between two or more county governments would however equate an intergovernmental dispute: see section 30(2)(b) of the Act. By the better reason, it would also follow that where a state officer seeks through any means to advance the interest of a government, whether county or national, against another government whether county or national, then such a dispute would rank as an intergovernmental dispute.***
>
> ***What precisely amounts to an intergovernmental dispute is not expressly detailed either under the Constitution or the Act. Guidance may however be retrieved from both Articles 6 and 189 of the Constitution as well as from Section 32 of the Act. Articles 6 and 189 provide for respect, cooperation and consultation in the conduct of the two governments' mutual relations and functions. The focus appears to be performance of functions and exercise of powers of each respective level of government. Section 32 of the Act however appears to precipitate even a commercial dispute as an intergovernmental dispute when the Section expressly refers to "any agreement" between the two levels of government or between county governments. The agreement, in other words, is not limited to that of performing functions or powers or that of guiding relations."*** *(Emphasis added)*

39. Borrowing from the above definition by Onguto J (deceased), it is clear that the Petitioner herein seeks to advance the interests of the people of Taita Taveta with respect to the sharing of revenue collected by the 1st Respondent herein, which is remitted directly to the National Government. I find further even though the Petitioner contends it is seeking on enforcement of a constitutional right to access information under ***Article 31 of the Constitution***, the gist of the Petition is to enable the Petitioner apply the information in advancing the County's interest in ensuring that the 1st Respondent develops a mechanism for benefit, in sharing with communities living in Wildlife areas as clearly provided under the ***Wildlife (Conservation and Management) Act***. From the aforesaid it may be correct to infer that the major dispute in this Petition is really on the issue of revenue sharing between the National Government and the County Government, with regard to the collections of revenue made by the 1st Respondent in the Petitioner's County. In view whereof I find that the dispute is between the National Government and the County Government of Taita Taveta on Revenue sharing, which in my view would amount to an Intergovernmental dispute.

B. WHETHER THIS HONORABLE COURT HAS JURISDICTION TO HEAR AND DETERMINE THE PETITION HEREIN

40. In the Preliminary Objection dated 14th August 2019, it is contended by the 1st Respondent, that in view of the express provisions of ***Article 189 of the Constitution*** and ***Part IV of the Inter-governmental Relations Act No. 2 of 2012***, this Honourable Court lacks original jurisdiction to hear and determine this matter on its own merit. The question of jurisdiction is specifically well settled under ***Article 165 of the Constitution of Kenya*** in which it is provided thus:-

> ***"(3) Subject to clause (5), the High Court shall have—***
>
> ***a) unlimited original jurisdiction in criminal and civil matters;***
>
> ***b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***
>
> ***c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;***
>
> ***d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—***
>
> ***(i) the question whether any law is inconsistent with or in contravention of this Constitution;***
>
> ***(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;***
>
> ***(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government;"***

41. In addition to the above ***Article 23(1) of the Constitution*** provides that:-

> ***"The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."***

42. In view of the provisions of ***Article 165 and 23 of the Constitution***, it is clear that the jurisdiction of this Honourable Court is well established under the Constitution to hear and determine matters pertaining to the violations, breaches, infringement of fundamental rights and freedoms.

43. The Petitioner in the instant Petition has approached the Honourable Court on the ground that the 1st Respondent has infringed on its rights of access to information contrary to ***Article 33(1)(a) and 35 (1)(b) of the Constitution***. It is further contended that ***Article 25(1) of the***

Constitution, has been violated. The 1st Interested Party equally avers that the matter herein involves the violation of constitutional rights and cannot therefore be resolved through an Alternative Dispute Resolution Mechanisms, adding that the matter relates to the Interpretation of the Constitution, and is therefore not subject to ***Alternative Disputes Resolution Mechanisms*** as the jurisdiction rests solely with this Court.

44. ***Article 159(2) of the Constitution*** obligates this Court in exercising judicial authority to be guided by the following principles:-

> ***"a) justice shall be done to all, irrespective of status;***
>
> ***b) justice shall not be delayed;***
>
> ***c)alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);***
>
> ***d) justice shall be administered without undue regard to procedural technicalities; and***
>
> ***e) the purpose and principles of this Constitution shall be protected and promoted."***

45. The Constitution is always clearly speaking on matters relating to resolving disputes relating to ***resolving*** matters involving Intergovernmental issues. ***Article 189(3) and (4) of the Constitution*** provides:-

> ***"189. (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."***

46. In addition to the above, ***Sections 31, 32, 33, 34 and 35 of the Intergovernmental Relations Act*** which has provisions related to mechanisms for dispute resolution provides as follows:-

> ***"31. 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.***
>
> ***32. Dispute resolution mechanisms***
>
> ***(1) Any agreement between the national government and a county government or amongst county governments shall—***
>
> ***(a) include a dispute resolution mechanism that is appropriate to the nature of the agreement; and***
>
> ***(b) provide for an alternative dispute resolution mechanism with judicial proceedings as the last resort.***
>
> ***(2) Where an agreement does not provide for a dispute resolution mechanism or provides for one that does not accord with subsection (1), any dispute arising shall be dealt with within the framework provided under this Part.***
>
> ***33. Formal declaration of a dispute***
>
> ***(1) Before formally declaring the existence of a dispute, parties to a dispute shall, in good faith, make every reasonable effort and take all necessary steps to amicably resolve the matter by initiating direct negotiations with each other or through an intermediary.***
>
> ***(2) Where the negotiations under subsection (1) fail, a party to the dispute may formally declare a dispute by referring the matter to the Summit, the Council or any other intergovernmental structure established under this Act, as may be appropriate.***
>
> ***34. Procedure after formal declaration of a dispute***
>
> ***(1) Within twenty-one days of the formal declaration of a dispute, the Summit, the Council or any other intergovernmental structure established under this Act shall convene a meeting inviting the parties or their designated representatives—***
>
> ***(a) to determine the nature of the dispute, including—***

(i) the precise issues in dispute; and

(ii) any material issues which are not in dispute; and

(b) to—

(i) identify the mechanisms or procedures, other than judicial proceedings, that are available to the parties to assist in settling the dispute, including a mechanism or procedure provided for in this Act, other legislation or in an agreement, if any, between the parties; or

(ii) subject to Article 189 of the Constitution, agree on an appropriate mechanism or procedure for resolving the dispute, including mediation or arbitration, as contemplated by Articles 159 and 189 of the Constitution.

(2) Where a mechanism or procedure is specifically provided for in legislation or in an agreement between the parties, the parties shall make every reasonable effort to resolve the dispute in terms of that mechanism or procedure.

(3) Where a dispute referred to the Council or any other intergovernmental structure established under this Act, fails to be resolved in accordance with section 33(2), the Summit shall convene a meeting between the parties in an effort to resolve the dispute and may recommend an appropriate course of action for the resolution of the dispute.

35. Judicial proceedings

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."

47. Further it is noteworthy that ***Section 3(f) of the Intergovernmental Relations Act***, provides that one of the objectives and purposes of the Act is to provide mechanisms for the resolutions of Intergovernmental disputes whenever they arise. In an Intergovernmental disputes the Environment and Land Court faced with similar issue in case by ***Council of County Governors v Cabinet Secretary Land, Housing & Urban Development & another [2017] eKLR,*** Honourable Justice Okong'o stated thus;-

"The intention of parliament to have all disputes between County Governments inter se and County Governments and National Government resolved through alternative dispute resolution mechanism is clearly echoed in the provisions of Article 189(3) and (4) and sections 31 to 35 of the Act which I have reproduced above. In the case of Murang'a County Public Service Board vs. Grace N Makori & 178 others Nyeri CA No. 37 of 2015 (2015) eKLR, the Court of Appeal stated that:

"Article 189(2) provides;

"Government at each level, and different governments at county levels, shall co-operate in the performance of functions and exercise of power and, for that purpose, may set up joint committees and joint authorities".

In the same spirit they are required under clauses (3) and (4) to make every effort to settle any inter-governmental disputes through alternative dispute resolution mechanisms including negotiation, mediation and arbitration. The Inter-Governmental Relations Act, 2012, was enacted to establish the legal framework for consultation and co-operation between the national and county governments and amongst county governments.

It is clear, then, that our constitutional architecture did not create, in the name of devolution, a wall of separation - high and impregnable - between national and county governments, with the latter being enclaves of insularity. Rather, it created a bridge - strong and vibrant - to ensure and encourage constant communication, consultation and co-operation within a diverse, devolved but united nation, between, amongst and within the levels of government."

48. Similarly in the case of ***International Legal Consultancy Group & another vs. Ministry of Health & 9 others, NRB HC Petition 99 of 2015 (2016) eKLR***, Honourable Justice Mumbi Ngugi, stated thus:-

"It is, in my view, apparent that the constitutional and legislative intent was to have all disputes between the two levels of government resolved through a clear process established specifically for the purpose by legislation, a process that emphasizes consultation and amicable resolution through processes such as arbitration rather than an adversarial court system. As a result, a separate dispute resolution mechanism for dealing with any disputes arising between the national and county governments, or between county governments, has been established.

Before a dispute arising between these parties can be placed before the courts, the Constitution and legislation require that a reasonable attempt at amicably resolving the matter be made. Indeed, if there was any doubt about this, section 35 of the Act clears it away with specific words. It 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."

The legislative intention was therefore that judicial proceedings would only be resorted to once efforts at resolving the dispute

between the two levels of government failed. The question is whether any attempt was made in this instance to resolve the matter in accordance with the Intergovernmental Relations Act before this petition was filed."

49. In additional to the above it is clearly provided under ***Section 117 of the Wildlife Conservation and Management Act*** in respect of any dispute that may arise in respect of Wildlife Management, Protection or Conservation for such instance for referral to the lowest possible structure under the developed system of governments as set out in the Devolution of Government Act including traditional resolution mechanisms.

50. I find that the constitution provides for a very cautious approach with regard to intergovernmental disputes. The National and County Government are obligated to take any reasonable steps and / or efforts to settle any dispute arising between the two levels of government including adoption of an alternative dispute resolution mechanisms first, such as mediation, and arbitration. In the instant Petition I have observed that all avenues of alternative dispute resolution have not been fully utilized by the Petitioner herein. The Petitioner has only averred that through a letter dated 23rd April 2019, the Governor Taita Taveta wrote to the 1st Respondent's Director General requesting to be furnished with summary statements on collections from the two national parks falling within Taita Taveta county which went unanswered. It has also been stated that it made an effort to resolve the dispute amicably by writing to the Chair, Intergovernmental Relations Technical Committee vide a letter dated 20th June, 2019 and the same elicited no response necessitating the filing of this Petition. I find the two letters mentioned herein above do not amount to an alternative dispute resolution effort nor were they sufficient to warrant the institution of these proceedings by the Petitioner. According to ***Section 33 of the Intergovernmental Relations Act***, there is a requirement of a formal declaration of a dispute by the Petitioner against the Respondent. The letters in my view written by the Petitioner to the 1st Respondent and Chair of the Intergovernmental Relations Technical Committee do not amount to a formal declaration of a dispute. I find that the Petitioner has not maximised all efforts to resolve the dispute, it has with the Respondent as required under ***Section 35*** of the aforesaid ***Act***.

51. This Court is alive to the fact that where there exists a specific dispute resolution mechanisms as provided by the Constitution or statute, parties are bound to respect that mechanisms first, before purporting to invoke the inherent jurisdiction of the Court. In view of the aforesaid, it is my view, that even through this Court is divested with jurisdiction to hear and determine disputes on contravention, infringement; breaches and threat of constitutional rights and fundamental freedoms, the dispute in the instant Petition, is more of an intergovernmental dispute rather than a violation of constitutional rights and which should be subjected to alternative dispute resolution mechanisms first and before filing a suit in Court. The Petitioner as has already been observed has not fully exhausted all available Alternative Dispute Resolution Mechanisms to resort to invoking the inherent jurisdiction of this Honourable Court. I find therefore that the jurisdiction of this Honourable Court has been prematurely invoked and / or at this stage this Court has no jurisdiction to hear and determine this Petition.

52. ***The upshot is that the Preliminary Objection is meritorious and so as to give the parties time to initiate the Intergovernmental Dispute Resolution Mechanisms and complete the same, I will allow the Preliminary Objection by the 1st Respondent, stay the Petition for a period of 1 year within which period the Petitioner should resort to an alternative dispute resolution mechanism with the Respondent and also have an opportunity to pursue its Petition in case the dispute resolution mechanism fails. Equally if the Petitioner fails to take action towards resolving its dispute with the Respondents within the one (1) year period, the Petition should stand dismissed.***

53. ***In view of the aforesaid, the Preliminary Objection by the 1st Respondent dated 14th August 2019 is merited and is upheld as stated herein above. Each Party to bear its costs.***

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF MAY, 2021.

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J. A. MAKAU

JUDGE