



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION. 4 OF 2020

COUNTY GOVERNMENT OF MOMBASA.....PETITIONER

-VERSUS-

THE NATIONAL TREASURY.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

THE INTER-GOVERNMENTAL RELATIONS &

TECHNICAL COMMITTEE.....INTERESTED PARTY

RULING

1. This is a ruling in respect of an application by way of Notice of Motion dated 4.2.2020 by the Petitioner, COUNTY GOVERNMENT OF MOMBASA in which it seeks for orders;

(a) Spent;

(b) a conservatory order to stay all the arrest warrants and execution proceedings as against the Executive Member Finance, Chief Officer Finance, County Secretary and the County Attorney of the County Government of Mombasa;

(c) A Conservatory order does issue staying all such decisions and/or proceedings in regard to enforcement of any liabilities accruing from the defunct Municipal Council of Mombasa entered against the County Government of Mombasa pending the official release of the report on assets and liability of the defunct local authorities by the Inter-governmental Relations Technical Committee and proving for options of settle the debts accord by the defunct Municipal Council of Mombasa pending the hearing an determination of the instant petition.

(d) The costs of this application;

(e) Any other remedy that the court deems fit and just.

2. The application is premised on the grounds on the face of it and the supporting affidavit of JIMMY WALIAULA, the Director, Legal Services at the office of the County Attorney of the County Government of Mombasa, the applicant /petitioner herein. In summary, the said grounds are as follows;

(a) That there are on-going court proceedings seeking to enforce various debt and/or liabilities accruing to the defunct Municipal Council of Mombasa, which debts and/or liabilities are being enforced against the County Government of Mombasa and its officers;

(b) That the petitioner's operations are greatly compromised and prejudiced and its financial obligations have been overwhelmed owing to the financial burden imposed and arising due to the demands for it to settle liabilities of the defunct Municipal Council of Mombasa especially considering such debts have accrued a huge interest rate.

(c) That the effect of the ongoing demands, proceedings seeking to enforce debts accruing to the defunct Municipal Council of Mombasa against the applicant herein is that its operations and affairs have been and continue to be greatly compromised and it is greatly prejudiced as its effects to promote social and economic development are being jeopardized

by the huge financial burden it is being forced to carry on behalf of the defunct municipal council of Mombasa which ordinarily defeats the purpose and the whole idea of devolution.

(d) That the petitioner through counsel herein, wrote the Intergovernmental Relations Technical Committee requesting for the report of the assets and liabilities with the proposed liquidation options for the settlement of liabilities by the defunct local authority and the said intergovernmental relations technical committee responded stating that the said report was not yet ready.

(e) That the petitioner is therefore aggrieved and apprehensive that its constitutional right to property as enshrined under Article 40 of the constitution shall be and continue to be infringed as its assets and monies are being used and threatened with attachment in the settlement of debts and liabilities that accrued to the defunct Municipal Council of Mombasa.

(f) That the continued enforcement and demand against the petitioner for the settlement of liabilities of the defunct Municipal Council of Mombasa without the recommendations and directs of the Inter Governmental relations Technical Committee is and illegality and contrary to Article 27 (1) of the Constitution as read with Sections 3,4, and 5 of the Intergovernmental relations Act.

3. The application was certified urgent and fixed for hearing and or directions on 6.2.2020.

4. The application was opposed by the Respondents and 1st Interested party who filed a Notice of Preliminary Objection dated 5th February, 2020 and raised the following points of law as follows;

(a) That the petition as drawn and filed offends Articles 6,159 (c), and 189 & (4) of the constitution (all read together) and therefore a non-starter and should be dismissed and/or referred to an alternative dispute resolution forum.

(b) That this petition is an Inter-Governmental dispute whose resolution is envisaged and provided for differently under the Constitution and statute.

(c) The petition is filed contrary to the Constitution and sections 30-35 of the Intergovernmental Relations Act No 2 of 2012 which provides that National and County Governments to have mutual relations on the basis of consultation and cooperation and settle disputes amicably.

(d) That this suit is premature and the court ought to decline to hear it (together with the Notice of Motion dated 30th January,2020)as provided for under the constitution of Kenya (Protection of Rights and Fundamental Freedoms) (e) Practice and Procedure rules 2013, rule 31 and Section 35 of the Intergovernmental Relations Act, No 2 of 2012 and the inherent powers of the court refer this matter for hearing and determination by alternative dispute resolution mechanisms.

5. When the application came up for hearing and or directions on 6th February, 2020, Mr Robinson Onyango Malombo t/a O.M Robinson & Co. Advocates filed a notice of motion application dated 4.2.2020 seeking for leave to be enjoined in the petition as an interested party on the following grounds;

(i) That his firm has Certificates of Taxation,decree, orders of mandamus in various matters against the Petitioner/Respondent.

(ii)That his firm has taken out warrants of arrest against some of the petitioners officials. Therefore, the conservatory orders sought will have an adverse effect on him firm, as he will be denied his hard-earned fees.

(iii)That most of the issues raised the Petitioner herein are res-judicata. Hence, the need to be enjoined in this proceedings in order to address this Court on the same in order to assist in expeditious adjudication of the matter.

6. The court gave directions on how the parties would proceed with the application and fixed the case for hearing of the said application.

7. On the same day, the petitioner's counsel applied for interim orders to issue in terms of prayer No 2 of the application dated 30th January,2020 on the grounds that there is imminent danger touching on the freedom and liberty of public officers. He also prayed for time to get instruction on whether or not to oppose the said application for joinder by the 2nd interested parties. The court gave directions that the petitioner responds to the 2nd interested party's application and that each party files written submissions in respect of the said application of 4.2.2020.

8. The court fixed the hearing of the application dated 30th January,2020 for inter parties hearing on 17th February,2020. The court also reserved the ruling on the petitioner's counsel's application for the same day.

9. And on 17.2.2020, when the matter came up for hearing ,there was yet another application by the firm of M/s Chokaa and Co. Advocates, for joinder into the petition as an interested party.

10. Also, by then the petitioner had on 10.2.2020 filed a replying affidavit in response to the application dated 4.2.2020,the same having been sworn and filed by JIMMY WALIAULA who is described as a Director Legal Services at the office of the County Attorney of Mombasa County. He opposes the application by Mr Robinson Malombo on the ground that the same is frivolous, scandalous and vexatious as it seeks to derail the court from determining the matter.

11. The deponent in the replying affidavit avers:

(a) that the intended 2nd interested party has already been successful in derailing the petitioner from being heard, particularly on its prayers for conservatory orders and that what it seeks to produce is already in the custody of the 1st and 2nd Respondents;

(b) that most of the Decrees and/or arrest warrants the petitioner seeks to stay notably the one stated in “JW 2)b) and “JW 2 (d)” are in respect of the intended 2nd interested party/applicant.

(c) that the orders sought in the Notice of Motion and petition if granted will greatly prejudice the intended 2nd interested party/applicant.

(d) that the intended 2nd interested party/applicant has information in its possession which will assist the court to justly and expeditiously adjudicate this matter.

(e) that it is in the interest of justice that orders sought herein be granted.

DETERMINATION

12. I have considered the application, petition, notice of motion, grounds of opposition, supporting affidavits, the applications for joinder of interested parties together with the submissions, authorities and cited law.

13. Before I can move on to determine any of the applications before me, I have had the opportunity to read through the petition and notice of motion by the petitioner dated 30.1.2020, the notice of preliminary objection dated 30th January, 2020 by the Attorney General and the applications by the 2nd and 3rd interested parties.

14. In determining whether to grant the orders sought by the Applicant, I find the same bearing a final determination with far reaching implications as they could affect to all such proceedings in the County and Country. This Court needs to decipher what the dispute between the parties herein is. Therefore, looking at the substantive prayers sought in the forementioned pleadings, this Court has established that from the first prayer, the dispute before it is between a devolved unit of Government (County Government of Mombasa) and the Attorney General, who is the principal legal adviser to the Government, the National Treasury which is a State department in charge of management of public funds and the Intergovernmental Relation Technical committee created under the Intergovernmental Relations Act, which are creatures of the National Government and there is no dispute to this. This is therefore a dispute between government to government and the two cannot be seen to be engaged in a fight as this would disrupt services and create a bad image to its citizens.

15. The second and fourth prayers would involve service providers and yet each case ought to be determined on its own merit and this court cannot be seen to interfere with the independent jurisdiction of the other courts. This court has to be cautious so as not to put itself in a situation where it will be seen as injunctioning court proceedings by other courts, especially those of equal jurisdiction to it.

16. For prayer No.3 of the application, the questions that arise are that what is its basis and what effects would it have on the taxation process especially, the power of the Deputy Registrar of the High Court.

17. As for prayer No 5, the issues would be the legal basis upon which it is founded and the effect it will have on the operations of the Treasury as regards the internal debt management. Prayer No 6 would have an effect on the county Government's debt management. The question then becomes, what would the appropriate orders be?

18. Under **Article 189(3)** and (4) of the **Constitution**, it is provided 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 intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.”

19. The legislation contemplated under Article 189(4) of the Constitution is that the **Intergovernmental Relations Act**, has established institutions and mechanisms for resolving intergovernmental disputes. The Preamble of the said Act provides that it is an Act that establishes mechanisms for the resolution of intergovernmental disputes pursuant to the provisions of Articles 6 and 189 of the Constitution and it states that;

“An Act of Parliament to establish a framework for consultation and cooperation 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, and for connected purposes.”

20. **The Intergovernmental Relations Act, 2012** has a whole Part devoted to alternative dispute resolution mechanisms of disputes between National and County governments and between county governments, as follows:

“PART IV DISPUTE RESOLUTION MECHANISMS

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.

31. 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.(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. (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. (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. 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.

36. (1) A person commits an offence under this Act if, in relation to section 34, the person–

(a) fails, without justifiable cause, to attend a meeting for settling a dispute when required to;

(b) refuses to produce any article or document when lawfully required to do so;

(c) knowingly gives false evidence or information; or

(d) interrupts any proceedings of the meeting.

(2) A person who commits an offence under subsection (1) is liable, upon conviction, to a fine not exceeding two hundred thousand shillings or to imprisonment not exceeding six months, or to both.”

21. It is noteworthy that Section 35 of the Intergovernmental Relations Act provides for judicial procedure as a last resort; that is:

“35. 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.”

22. I have looked at the documents annexed in support of the Petition and the Notice of Motion seeking for interim Conservatory orders. From the documents provided by the Petitioner, I find and hold that there has been no attempt to comply with the provisions of Section 33 of the Intergovernmental Relations Act as there is no evidence that the Petitioner before formally declaring the existence of a dispute, has made every reasonable effort and taken all necessary steps to amicably resolve the matter by initiating direct negotiations with the departments of the National Government or through an intermediary. What this petition presents is purely an administrative issue and not a legal issue amongst the parties. It has nothing to do with refusal to pay but when to pay and how. Hence the judicial process should be the last resort.

23. The Court process being the forum of last resort after all effort to amicably resolve the dispute have failed, I am in consonance with Mumbi Ngugi, J. in the case of *International Legal Consultancy Group & another v Ministry Of Health & 9 others* [2016] eKLR, where she held that the provision for dispute resolution between governments under the Act and the Constitution is intentionally established a consultative and amicable process in preference to court procedures, resort to which is only as last measure, if the alternative dispute resolution mechanism fail. The learned judge had this to say;

65. “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.

66. 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.

67. 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....”

24. There is no suggestion that the structures of alternative dispute resolution under the Intergovernmental Relations Act, 2012 cannot remedy the situation manifested in the dispute. This is what the constitution and statute contemplated. Having established that the subject matter of this Petition is not ripe for determination, by this court, as the dispute resolution mechanisms established under the **Constitution** have not been attempted and/ or exhausted, in that regard, Jurisdiction is everything and without it, the Court has no power to pronounce itself on an issue. See **Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367 .**

25. This Court on its own motion takes up the issue of jurisdiction since in the locus Classicus decision of *The Motor Vessel Lilian SS [1989] KLR 1* cited above; the Court of Appeal held that once a court finds that it has no jurisdiction on a matter it should decline to deal with the dispute on its merits. Hence, this court will not even at this stage attempt to deal with the applications by the intended interested parties who are seeking leave to be enjoined as parties herein.

26. Even, where a dispute is properly before the Court, the principle of constitutional avoidance bears upon the petition. In the case of **Jackson Maina Ngamau v Ethics and Anti-Corruption Commission & 3 others [2015] eKLR.**, this Court discussed constitutional avoidance as follows:

“18. The principle of ‘constitutional avoidance’ as discussed by the Supreme Court of Kenya in *Communications Commission of Kenya & 5 Ors. v. Royal Media Services Ltd & 5 Ors.* (2014) eKLR that the Court will not determine a constitutional issue or question even where it is properly before it, if there is another basis upon which the case can be disposed of, does not oust the jurisdiction of the Court but rather calls for judicial restraint in cases where there exists an statutory or other remedy. In addition, in accordance with the rule in *The Speaker of the National Assembly v. Karume* (2008) EG&F, it is now accepted as a principle of constitutional adjudication that where the constitution or statute makes provision for the process for determination of a particular matter that procedure should be strictly followed.”

27. Although, there appears to be substantive questions presented to the High Court for interpretation of the Constitution, the Constitution itself prescribes for harmonious resolution of any disputes that may arise between the governments. These may, among others, end up being administrative issues of failure to hold meetings, adherence with timelines and or lack of coram or funds and other internal issues which have nothing to do with judicial process and can thus not pass as real disputes. Also there is a likely to be possibility of opening flood gates where there would be so many interested parties seeking to be enjoined in the petition hence make the petition unbearable. For this

reasons, a course of avoidance by the Court is a constitutional imperative, at least, until the alternative dispute resolution methods have reasonably been employed and exhausted, without success meaning no court process should commence before this.

28. The Court cannot, therefore, be asked to resolve the dispute anyhow now that the matter is before it. Accordingly, for reasons set out above and as raised in the preliminary objection by the Respondent, this court finds the petition premature and for expediency, suo moto, refer the dispute before it to the relevant body charged with the responsibility of mediating and arbitrating disputes between National and County governments as contemplated by Articles 189 (3) and 4 of the Constitution and Section 31 of the Intergovernmental Relations Authority Act so as to confirm who has failed. In view of the public nature of the proceedings, the Court declines to make any order as to costs.

29. Mention in 60 days time to confirm position and give further directions.

Dated, Delivered & Signed at Mombasa this 20th day of February, 2020

D.O. CHEPKWONY

JUDGE