



Adega & 2 others v Kibos Sugar and Allied Industries Ltd & 4 others; Kenya Union of Sugar Plantation and Allied Workers (Interested Party) (Environment & Land Petition 8 of 2018) [2023] KEELC 18772 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18772 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND PETITION 8 OF 2018
SO OKONG'O, J
JULY 13, 2023**

BETWEEN

**BENSON AMBUTI ADEGA 1ST PETITIONER
ERICK OCHIENG 2ND PETITIONER
BETHER ATIENO OPIYO 3RD PETITIONER**

AND

**KIBOS SUGAR AND ALLIED INDUSTRIES LTD 1ST RESPONDENT
KIBOS POWER LIMITED 2ND RESPONDENT
KIBOS DISTILLERS LIMITED 3RD RESPONDENT
MANAGEMENT AUTHORITY 4TH RESPONDENT
COUNTY GOVERNMENT OF KISUMU 5TH RESPONDENT**

AND

KENYA UNION OF SUGAR PLANTATION AND ALLIED WORKERS INTERESTED PARTY

RULING

1. The petitioners brought this petition against the respondents by way of a petition dated October 25, 2018 seeking several reliefs. The interested party joined the petition on December 20, 2018. In a judgment delivered on July 31, 2019, this court allowed the petitioners' petition and condemned the respondents to pay the costs of the petition. The respondents and the interested party were dissatisfied with the decision of this court and appealed against the same to the Court of Appeal in, Kisumu Court of Appeal Civil Appeal No. 153 of 2019. In a judgment delivered on January 31, 2020, the Court of



Appeal set aside the judgment of this court and ordered the petitioners herein together with the 4th respondent to pay the costs of the appeal and of the petition. The Court of Appeal order on costs was as follows:

“Costs

On costs, I have agonized whether this was a public interest litigation or a personal litigation by the 1st, 2nd and 3rd respondents. In the petition, these respondents prayed for compensatory damages for alleged violation of their constitutional rights. These respondents did not lead an iota of evidence that individually they had suffered any injury. There is nothing like a presumption of damage or injury because there is no EIA study report. In addition, the learned judge at paragraph 28 of the judgment observes that these respondents were claiming compensatory damages for Ksh. 100,000,000/- (One Hundred Million). This perse means that these respondents were pursuing personal compensation and were neither pursuing nor advancing public interest litigation. For this reason, I am obliged to follow the long established dicta that costs follow the event. Accordingly, the 1st, 2nd and 3rd respondents shall jointly and severally bear the costs of this appeal and the costs before the ELC.”

2. As regards the 4th respondent, I note that the 4th respondent is a statutory body charged with the responsibility of issuing EIA Licences. In the instant matter, the 4th respondent issued EIA Licences to the three appellants. However, in this appeal, the 4th respondent has prevaricated and disowned the Licences. A public body cannot issue a licence and then turn around and disown the same. Such a conduct must be condemned by way of costs. Accordingly, the 4th respondent shall also jointly with the 1st, 2nd and 3rd respondents bear the costs of the suit before the ELC and in this appeal.”
3. The petitioners were dissatisfied with the decision of the Court of Appeal and appealed against the same to the Supreme Court in, Supreme Court Petition No. 3 of 2020. In a judgment delivered on August 4, 2020, the Supreme Court struck out the petitioners’ appeal against the Court of Appeal decision.
4. Following the striking out of the petitioners’ appeal by the Supreme Court that left the decision of the Court of Appeal undisturbed, the 5th respondent among others who were awarded costs by the Court of Appeal filed their bills of cost for taxation against among others the 4th respondent. The 5th respondent filed its bill of costs on June 3, 2021. In a ruling delivered on November 4, 2021, the taxing officer taxed the 5th respondent’s costs at a total sum of Kshs. 4,291,342/-. The taxing officer taxed the instruction fees at Kshs. 3,000,000/- and the getting up fees at Kshs. 1,000,000/-. On February 8, 2022, the 5th respondent filed an application by way of a Notice of Motion of the same date seeking an extension of time within which to file a reference against the said ruling of the taxing officer delivered on November 4, 2021. The 5th respondent’s application is pending determination.

The application before the court

5. In response to the 5th respondent’s application dated February 8, 2022 aforesaid, the 4th respondent filed an application on February 9, 2023 by way of Notice of Motion dated February 6, 2023 seeking the following orders;
 1. That pending the adjudication and final determination of the dispute lodged with the Intergovernmental Relations Technical Committee (IGRTC) as between the 4th respondent and the 5th respondent and the Court of Appeal Civil Appeal No. E239 of 2022, there be a stay



of proceedings of the application dated February 8, 2022 and any other proceedings lodged herein by the 5th respondent.

2. That the costs be in the cause.
6. The 4th respondent's application which was supported by the affidavit of the 4th respondent's Director General, Mamo B. Mamo sworn on February 6, 2023 was brought on several grounds. The 4th respondent averred that the 5th respondent had filed bills of cost for taxation before this court and the Court of Appeal for taxation which were onerous and inimical to the spirit of co-operation of governments as espoused in the Constitution. The 4th respondent averred that the 5th respondent violated the government policy on litigation between government institutions. The 4th respondent averred that the 5th respondent's application dated February 8, 2022 was brought following the success of a similar reference by the 1st respondent in which a ruling was made by this court on July 15, 2022 enhancing the costs that were awarded to the 1st respondent by the taxing officer to over Kshs. 16,000,000/-. The 4th respondent averred that it had lodged an appeal to the Court of Appeal against the said ruling of July 15, 2022 in favour of the 1st respondent, namely, Kisumu Court of Appeal Civil Appeal No. E239 of 2022.
7. The 4th respondent averred that the 5th respondent's costs were taxed at around Kshs. 4,000,000/- by the taxing officer and the 4th respondent had settled the said amount in full. The 4th respondent averred that the 5th respondent's application dated February 8, 2022 was seeking to enhance the said amount that was awarded by the taxing officer. The 4th respondent averred that it had invoked the mandate of the Intergovernmental Relations Technical Committee (IGRTC) established under the Intergovernmental Relations Act, No.2 of 2012, and declared a dispute within the provisions of the Act. The 4th respondent averred that IGRTC advised it to seek a stay of these proceedings so as to allow mediation of the dispute by IGRTC.
8. The 4th respondent averred that Article 159(2) of the Constitution behooves this court to encourage and allow for alternative dispute resolution. The 4th respondent averred further that Article 189 provides that disputes between governments shall as a priority be decided by alternative dispute resolution mechanisms established by national legislation. The 4th respondent averred that it is an agency of the national government while the 5th respondent is a county government. The 4th respondent averred that the application was brought in good faith and in the interest of upholding the principles of cooperation between the two levels of government.
9. The 4th respondent's application was opposed by the 5th respondent through a Notice of Preliminary Objection dated March 13, 2023 and a replying affidavit of Jared Sala sworn on March 13, 2023. In its Notice of Preliminary Objection and replying affidavit, the 5th respondent contended that IGRTC had no jurisdiction to determine the dispute between the 4th respondent and the 5th respondent because the same had been litigated and determined with finality. The 5th respondent averred that referring the dispute to IGRTC would render it res judicata. The 5th respondent averred that what was pending between the 4th respondent and the 5th respondent was the payment of the taxed costs that had been partially done by the 4th respondent and the hearing of the 5th respondent's reference. The 5th respondent averred that the 4th respondent's application was an attempt to delay the 5th respondent from enjoying the fruits of justice. The 5th respondent urged the court to dismiss the 4th respondent's application with costs.



10. The 4th respondent's application and the 5th respondent's preliminary objection were heard together by way of written submissions. The 5th respondent filed its submissions on March 14, 2023 while the 4th respondent filed its submissions on April 25, 2023.

Analysis and determination

11. I have considered the 4th respondent's application together with the supporting affidavit. I have also considered the 5th respondent's preliminary objection and replying affidavit filed in opposition to the application. Finally, I have considered the submissions by the parties and the various authorities cited in support thereof. The 4th respondent's application was brought under Article 189(3) and (4) and Article 159(2)(c) of the Constitution.

12. Article 159 of the Constitution provides as follows:

“ 159.

- (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
- (2) In exercising judicial authority, the courts and tribunals shall 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.
- (3) Traditional dispute resolution mechanisms shall not be used in a way that—
 - (a) contravenes the Bill of Rights;
 - (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
 - (c) is inconsistent with this Constitution or any written law.”

13. Article 189 of the Constitution provides as follows:

“ 189.

- (1) Government at either level shall—



- (a) perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level;
 - (b) assist, support and consult and, as appropriate, implement the legislation of the other level of government; and
 - (c) liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.
- (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 intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.

14. The national legislation that has been enacted pursuant to Article 189(3) and (4) is the *Intergovernmental Relations Act*, No. 2 of 2012 (hereinafter referred to only as “the Act”). Sections 31, 32, 33, 34 and 35 of the *Act* provide 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.”

15. 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 spelt out in Article 189(3) and (4) of the *Constitution* and sections 31 to 35 of the Act reproduced above. The issue has been the subject of several judicial pronouncements. I will only refer to a few. In *Murang'a County Public Service Board v. Grace N Makori & 178 others* [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.”

16. In *International Legal Consultancy Group & another v. Ministry of Health & 9 others*, [2016] eKLR, the court stated that:

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 that 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.



17. 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.”

18. In *Okiya Omtatah Okioti & another v. Attorney General & 6 others* [2014] eKLR the court stated that:

I now turn to examine the import of the alleged ouster of the Court’s jurisdiction under Article 189 of the Constitution. It was submitted by the Respondents and the Amicus Curiae in that regard that the Courts are not the only means through which disputes relating to devolution must be resolved. That the Constitution has placed great emphasis in resolving disputes relating to devolution through an intergovernmental dispute resolution mechanism and that is the proper mechanism to resolve the present dispute.

The starting point in addressing the issue is Article 6 of the Constitution which must be read with Article 189 of the Constitution... The legislation contemplated in Article 189(4) has already been enacted i.e. the *Intergovernmental Relations Act* of 2012, which has established institutions and sets out mechanisms of resolution of intergovernmental disputes. The Preamble to this Act state that it is;

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.”

As can be seen from the above, the Act was intended *inter-alia* to establish mechanisms for the resolution of intergovernmental disputes pursuant to the provisions of Articles 6 and 189 of the Constitution. The dispute resolution mechanisms are then specifically established under Sections 30 to 35 of that Act. Section 30 stipulates as to when a dispute can be said to have arisen between the two levels of government as it provides thus...

The reasoning behind the above enactment is not hard to find; that alternative dispute resolution mechanisms should be sought in the first instance so as not to strain the relationship between the national government and the county governments and in the case of counties, among themselves. Article 6 of the Constitution has therefore mandated the two levels of government to conduct their mutual relations on the basis of consultation and co-operation. Section 31 has indeed provided for the measures to be undertaken in dispute resolution as follows...

The place of judicial proceedings in the dispute resolution mechanism provided for under the Act is clear; that judicial proceedings are a last resort and Section 35 specifically states that...

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.”



19. I am in agreement with the 4th respondent that in disputes involving county governments and the national government, court action should be invoked as a last resort. The first port of call should be the alternative dispute resolution mechanism provided for under the Act. What I need to determine is whether there is in existence a dispute which should be referred to alternative dispute resolution mechanisms under the Act. In *County Government of Nyeri v. Cabinet Secretary, Ministry of Education Science & Technology Another* [2014] eKLR, the court stated as follows:
20. Is this dispute therefore one between County and National Government to which dispute settlement mechanism under *Intergovernmental Relations Act* applies and for which this court ought to postpone or decline the exercise of its jurisdiction to enable the parties exhaust the procedures set therein? In answering this question I note that what amounts to Intergovernmental dispute is not defined in our Act which provides as follows:
- Section 30(1) in this part unless the context otherwise requires 'dispute' means an Intergovernmental dispute.
- To get the definition thereof I had to look at the South African Act:- Intergovernmental Relations Frame Works Act 2005 which defines Intergovernmental Disputes as follows:
- a dispute between different governments or between organs of state from different governments concerning a matter
- a. arising from
 - (i) Statutory powers or function assigned to any of the parties
 - (ii) an agreement between the parties regarding the implementation of a statutory power or function and
 - b. which is justiciable in a court of law and include any dispute between parties regarding a related matter”
21. For a dispute to fall within the ambit of IGR framework *Act* it must fulfill for basic requirements:
- a. The dispute must involve a specific disagreement concerning a matter of fact, law or denial of another.
 - b. Must be of a legal nature. That is a dispute capable of being the subject of a judicial proceeding.
 - c. Must be an intergovernmental one in that it involves various organs of state and arises from the exercise of powers of function assigned by the Constitution, a statute or an agreement or instrument entered into pursuant to the Constitution or a statute.
 - d. The dispute may not be subject to any of the previously enumerated exceptions.”
22. From the definition of what constitutes an intergovernmental dispute given in the foregoing case with which I am in agreement, I am not satisfied that there is in existence a dispute between the 4th and 5th respondents within the meaning of section 30(1) of the *Act* which should be referred to alternative dispute resolution under the Act. I am of the view that the dispute referred to by the 4th respondent is of its own creation. The dispute between the 4th and 5th respondents was over the legal costs arising from the proceedings herein. As I mentioned earlier in the ruling, the issue was considered by the Court of Appeal. The Court of Appeal awarded the costs of the petition herein to the 5th respondent against the 4th respondent. The issue as to who should pay the costs of the petition was therefore determined with finality. A dispute as to the quantum of costs awarded by the court to the 5th respondent against the 4th



respondent cannot by any imagination be termed a dispute under section 30(1) of the Act which should be referred to IGRTC. Even if it is assumed to be such a dispute, it is common ground that the 5th respondent filed its bill of cost which was taxed by the taxing officer. According to the 4th respondent, it has already settled the 5th respondent's taxed costs. What is pending is the 5th respondent's application dated February 8, 2022 for extension of time within which to file a reference against the taxation by the taxing officer. The application may or may not be allowed by the court. If it is allowed and a reference is filed, the reference also may or may not be allowed. The 5th respondent's application dated February 8, 2022 can only be determined by this court. The dispute has been narrowed down to whether or not the court should extend time for the 5th respondent to file a reference and if time is extended and a reference is filed, whether the reference should be allowed. These are issues arising in judicial proceedings which only this court is seized of jurisdiction to determine. The court cannot decline jurisdiction in a dispute which can only be determined by the court. I am in agreement with the 5th respondent that the IGRTC has no jurisdiction over the matters in dispute between the 4th and 5th respondents pending before this court.

23. The 4th respondent had also sought a stay of proceedings in relation to the 5th respondent's application dated February 8, 2022 pending the hearing and determination of Kisumu Court of Appeal, Civil Appeal No. E239 of 2022. It is common ground that the 5th respondent has nothing to do with the said appeal. It is neither an appellant nor a respondent. The appeal involves the 4th respondent and the 1st respondent. I am not persuaded that any reasonable justification has been put forward to warrant preventing the 5th respondent from prosecuting its application dated February 8, 2023 until the said appeal is heard and determined. The 4th respondent has not convinced this court that it stands to suffer any prejudice or substantial loss if the said application is heard while its said appeal is pending. The possible prejudice and loss cited by the 4th respondent are based on conjecture.

Conclusion

24. In conclusion, I find no merit in the 4th respondent's Notice of Motion application dated February 6, 2023. The application is dismissed with costs to the 5th respondent.

DELIVERED AND SIGNED AT KISUMU THIS 13TH DAY OF JULY 2023

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Gitonga for the 4th Respondent

Mr. Sala for the 5th Respondent

Mr. Gichaba for the 1st, 2nd and 3rd Respondents

Ms. J. Omondi-Court Assistant

