



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 280 OF 2017

IN THE MATTER OF ALLEGED INFRINGEMENT OF THE PROVISIONS OF ARTICLES 6(2), 10, 35, 47(2), 73, 129, 187, 189, 201, 202, 215, 217, 218 and 220 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF INTERGOVERNMENTAL RELATIONS ACT, 2012

BETWEEN

COUNCIL OF COUNTY GOVERNORS.....PETITIONER

-VERSUS-

LAKE BASIN DEVELOPMENT AUTHORITY.....1ST RESPONDENT

KERIO VALLEY DEVELOPMENT AUTHORITY.....2ND RESPONDENT

TANA AND ATHI RIVER DEVELOPMENT AUTHORITY.....3RD RESPONDENT

EWASO NG'IRO SOUTH RIVER BASIN DEVELOPMENT AUTHORITY.....4TH RESPONDENT

COAST DEVELOPMENT AUTHORITY5TH RESPONDENT

EWASO NG'IRO NORTH RIVER BASIN DEVELOPMENT AUTHORITY.....6TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....7TH RESPONDENT

RULING

1. The Council of Governors through a Petition dated 5th June 2017 seek declarations and orders inter alia:-

a. The integrated planning, coordination and implementation of projects and programmes is a function of the County level; under the fourth schedule of the Constitution;

b. A declaration that Section 3 and 8 of the Lake Basin Development Authority Act, Cap 442, Laws of Kenya, Sections 3 and 10 of the Kerio Valley Development Authority Act, Cap 441, Laws of Kenya, Sections 3 and 8 of the Tana and Athi Rivers Development Authority Act, Cap 443, Laws of Kenya, Section 3 and 8 of the Ewaso Ng'iro South Basin Development Authority Act, Cap 447, Laws of Kenya, Section 3 and 8 of the Coast Development Authority Act, Cap 449, Laws of Kenya and Section 3 and 8 of the Ewaso Ng'iro North Basin Development Authority Act, Cap 448 are unconstitutional to the extent that they are inconsistent with Article 6(2), Article 189 (1)(a) (b) and 189(2) and 259(11) of the Constitution, and

c. That the entire legislations cited above are inconsistent with the provisions of Article 6(2), Article 189(1) (a) (b) and 189(2) and 259 (11) of the Constitution.

2. That before the hearing of the main Petition the 3rd and 7th Respondents filed Notice of Preliminary Objection dated 22nd November 2019 setting out 7 grounds of objection begin as follows: -

a. THAT the Petitioner herein has no locus to institute this Petition before any Court of law.

b. THAT the Supreme Court of Kenya, in Supreme Court Advisory Reference 2 of 2017 Council of County Governors, The Attorney General & Others has declared that the Petitioner has no legal status known in law and as such is amorphous.

c. THAT the Supreme Court in the above matter has declared that the Petitioner cannot acquire locus before the Honourable Court as an agent of County Governments.

d. THAT the import of the aforementioned decision by the Supreme Court is that the Petitioner is not the proper party to institute legal proceedings against any party on behalf of County Governments.

e. THAT the Petitioner herein as established under the Intergovernmental Relations Act has no legal authority to institute a suit.

f. THAT the proceedings before this Honourable Court have been undertaken contrary to the letter and spirit of the Inter-Governmental Regulations Act, 2012 and the Constitution as provided for under Articles 159, 189(3) and 189(4).

g. THAT under Article 163(7) of the Constitution of Kenya (2010) this Honourable Court is bound by the decision of the Supreme Court in Supreme Court Advisory Reference 2 of 2017, Council of County Governors, The Attorney-General & Others.

3. The Petitioner and the other Respondents in this Petition did not file any response; however the Petitioner is opposed to the Preliminary Objection but all other Respondents support the preliminary Objections.

4. The 3rd and 7th Respondents rely on their written submissions dated 10th February 2020. The Petitioner and other Respondents did not file any submission but opted to submit orally before the Court.

5. The 3rd and 7th Respondents grounds of objection challenges the locus of the Petitioner to institute proceedings, before this court in light of the findings of the Supreme Court in Supreme Court Advisory Reference No.2 of 2017, Council of County Governors; the Attorney General and others.

6. The 3rd and 7th Respondents contend that the Petitioner herein lacks requisite Legal status or authority to file or prosecute the Petition herein on behalf of County Government as well as in public interest. This it is urged is by the operations of the findings in the Supreme Court in its Supreme Court Advisory Reference No. 2 of 2017, Council of County Governors; the Attorney General and others.

ANALYSIS AND DETERMINATION

7. I have considered the 3rd and 7th Respondents Preliminary Objection, the written submissions and the Petitioner's oral submissions as well as the 3rd and 7th Respondents oral submissions and from the above the following issues arises for consideration.

a. When can a preliminary objection be raised?

b. What is the legal status of the Petitioner?

c. What is the impact of the finding by the Supreme Court on the legal status of the Petitioner before the Honourable Court?

A. WHEN CAN A PRELIMINARY OBJECTION BE RAISED?

8. The question on when a preliminary objection can be raised was settled in the case of Mukisa Biscuits Manufacturer Ltd Vs. West End Distributors Ltd [1969] 1 E.A 695 where it was held that where an application to dismiss a suit for want of prosecution should be made by motion (and not dismissed as a preliminary objection when it was not). Discussing what constitutes a true preliminary objection, Law JA said at p. 700 DE that:-

“... so far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.”

9. Further to the above, in Oraro vs. Mbaja [2005] 1 KLR 141 Ojwang, J (as he then was) expressed himself as follows on preliminary objections:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit ... it raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.”

10. It is contended by the Respondents that the Supreme Court, The Superior Court of the land has pronounced itself on the status of the Petitioner herein. The Preliminary Objection raised by the 3rd and 7th Respondents upon its consideration, I find that it is purely based on the Articles of the Constitution and is a decision of Superior Court. The preliminary points herein raises a pure point of law which is argued on assumption that all facts by opposite side are correct.

11. From the aforesaid a preliminary objection can be raised at the earliest opportunity before the hearing of the matter pending before the Court.

B. WHAT IS THE LEGAL STATUS OF THE PETITIONER?

12. The Petitioner herein Council of County Governors was established under a two-tier government comprising National and County Government. Chapter Eleven (11) of the Constitution of Kenya provides for devolved government providing that each County Government Shall be headed by a county Governor and a Deputy Governor.

13. The various objects of devolution and principles of County Government is also provided for within Articles 174 of the Constitution of Kenya. Under Article 186 of the Constitution it is provided that the functions of the National and County Governments are set out in the Fourth Schedule and under Article 189 of the Constitution there is a requirement for co-operation and co-ordination in carrying out of the functions by both the National and County Governments.

14. Article 189 of the Constitution provides for the need for co-operation and co-ordination and provides for the legislation of a statute in furtherance of that mission, it states thus:-

“189. Cooperation between national and county governments

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.

15. Article 189(4) of the Constitution

- d) dispute resolution between counties within the framework provided under this Act;
- e) facilitating capacity building for governors:
- f) receiving reports and monitoring the implementation of inter-county agreements on inter-county projects.
- g) consideration of matters referred to the Council by a member of the public
- h) consideration of reports from other intergovernmental forums on matters affecting national and county interests or relating to the performance of counties: and
- i) performing any other function as may be conferred on it by this Act or any other legislation or that it may consider necessary or appropriate.

2) The council shall have powers to establish other intergovernmental forums including inter-city and municipality forums.

3) the Council may establish sectoral working groups or committees of the better carrying out of its functions.”

18. From the language of the establishing Act of the Petitioner it is clearly designed a caucus (forum) for the County Governors to consider matters of mutual concern to the county governments.

19. The Respondents contend that the Act fails to provide the council with any legal status beyond that of a forum for the functions provided for within section 20 of the IGRA. It is further urged by the Respondents that from an holistic reading of the Act it indicates that the role of considering intergovernmental matters is deferred to the National and County Government Co-ordination Summit which is established under Section 7 of the Act and its functions is provided under IGRA as follows:

“7. (1) There is established a National and County Government Co-ordinating Summit which shall be the apex body for intergovernmental relations.”

20. The Petitioner contend that a similar preliminary objection was filed and a ruling was delivered on 27/11/2017 by Hon. Justice J. M. Mativo in this matter. The Respondents preliminary objection is captioned at paragraph 16 of the Courts Ruling. This common thread in objective is:-

“1) performing any other function as may be conferred on it by this Act or any other legislation or that it may consider necessary or appropriate.

2) The council shall have powers to establish other intergovernmental forums including inter-city and municipality forums.

3) the Council may establish sectoral working groups or committees of the better carrying out of its functions.”

21. Article 189(3) and 189 (4) of the Constitution is on replicated in the Ruling of Hon. Justice John Mativo.

22. The Hon. Justice Mativo also dealt with an issue as to whether the Court has jurisdiction and rendered himself after considering the parties rival submission. I find that this is not the proper court to review or sit on appeal on the issue already determined by the Court of concurrent jurisdiction. Secondly the Respondents having been aggrieved by the Court’s decision preferred an Appeal to the Court of Appeal.

23. It should be noted that the establishing Act provide not only for mechanisms for inter-county co-ordination and co-operation but it also establishes an apex mechanism for inter-governmental relations in which the members of the council of County Governments sit together with the President and Deputy-President going as far as providing for the Intergovernmental Relations Technical Committee which is mandated under the Act to facilities the settlement of disputes under the act.

C. What is the impact of the finding by the Supreme Court on the legal status of the Petitioner before the Honourable Court?

24. The Respondent argue that under Article 22 of the Constitution of Kenya it is provided that in addition to a person acting in his own interest court proceedings may be instituted by

“a) A person acting on behalf of another person who cannot act in their own interest

b) A person acting as a member of, or in the interest of a group or class of persons;

c) A person acting in public interest; or

An association acting in the interest of one or more of its members.”

25. The Respondent avers that in the interpretation of the constitution the provisions of Article 259 of the Constitution on interpretation of the Constitution are of paramount importance. That the manner of interpretation of the Constitution ought to be one that promotes its purpose, values and principles as well as advancing the rule of law, human rights and fundamental freedoms in the Bill of Rights.

26. Article 258 of the Constitution provides:

“Enforcement of this Constitution

1. Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

a. a person acting on behalf of another person who cannot act in their own name;

b. a person acting as a member of, or in the interest of, a group or class of persons;

c. a person acting in the public interest; or

d. an association acting in the interest of one or more of its members.

27. Article 260 of the Constitution defines a “person” as follows - “person” includes a company, association or other body of persons whether incorporated or unincorporated (emphasis mine).

28. The Respondent avers that the Petitioner hence is not a person within the meaning of the Constitution having had its legal status declared ambiguous by the Supreme Court. It is further urged the Council of County Governors is a statutory body created by IGRA whose powers and functions are set out specifically within its establishing statute that is the IGRA however in stabilising the Petitioner it did not grant it powers to sue and be sued much unlike other statutory bodies in Kenya.

29. It is further contended the Petitioner has been declared not to have legal capacity before the Supreme Court and in effect all other Courts through the application of the Principle of stare decisis.

30. The Supreme Court in Supreme Court Advisory Reference No. 2 of 2017 stated at paragraph 56 stated:-

“The constitutive statute, IRA, does not in fact help the Applicant’s (Petitioner herein) case in this matter. A perusal of the Act reveals that the Applicant’s legal status is ambiguous...Beyond the above the legal status of the Applicant was not legislated upon. This position leaves many questions unanswered such as whether it has the capacity to sustain such proceedings.”

31. The Court in addressing whether the Petitioner in this case could be deemed an agent of County Government further stated in para 62.

“...something is either legal or not, either legitimate or not. It cannot be deemed to be what it is not.”

32. The Court also addressed itself to the role of Petitioner as regards being an agent of County Governments, in paragraph 59 and 60:

“It clearly emerges that agency as used in the constitution, in Article 260 or in statute, correctly construed, refers to government institutions charged with the performance of a particular mandate such as investigation and/or prosecution. It refers to the agent-principal relationship in the law of agency as the Applicant may want this Court to interpret. Hence the Applicant cannot acquire locus before this Court as an agent of County Governments.”

33. In its conclusion the Honourable Supreme Court held in para. 73 that “in any event, as we have held that the Applicant (the Petitioner herein) has no legal status known in law and that ...”

34. The Petitioner in response contend that it is the High Court which has the original jurisdiction on Constitutional matters under Article 165 of the Constitution which the court of Appeal and Supreme Court cannot limit. It is Petitioner’s further assertion that the Supreme Court’s decision emanated out of an issue on an application by the Council of Governors for Advisory opinion under Article 163 (6) of the Constitution of Kenya. In the Supreme Court’s decision the issue is urged was whether Petitioner is a state organ as per paragraph 39 where the Supreme Court stated:

“In our view, there is only one fundamental question to answer: whether the Applicant, COG, is a State Organ within the provisions of Article 260 of the Constitution so as to be clothed with the locus standi to seek an advisory opinion before this Court.”

35. The Supreme Court in paragraph 40 of its decision stated:

“The provisions of Article 163(6) of the Constitution as regards this Court’s jurisdiction have been settled in a number of Cases. In the Matter of the Interim Independent Electoral Commission the Court, for the first time, expounded on this provision as follows [paragra.83]:

“(i) for a reference to qualify for the Supreme Court’s Advisory- Opinion discretion, it must fall within the four corners of Article 163(6): it must be ‘a matter concerning county government.’ The question as to whether a matter is one ‘concerning county government’ will be determined by the Court on a case-by case basis.”

36. I find indeed the single issue for determination by the Supreme Court was clearly set out under paragraph 40 of its decision and the Supreme Court did in its decision make findings on the status of the Petitioner as stated in the Respondents submissions. The Supreme Court under paragraph 56 stated the Petitioners legal status is ambiguous, and under paragraph 58 the Petitioner was found not to be a state agent, and paragraph 73 the Supreme Court held suit was ab initio unsuited 38.

37. I have very carefully perused the parties submissions and the Supreme Court’s decision, in the Supreme Court Advisory Reference No. 2 of 2017, Council of County Governors, Hon. Attorney General & others and I find that the Supreme Court made conclusive finding on the legal status of the Petitioner as regards the single issue before it, thus whether the Applicant (the Petitioner herein) COG, is a state organ within the provisions of Article 260 of the Constitution so as to be clothed with the locus standi to seek an advisory opinion before the supreme Court.

38. I have no doubt in my mind that the Supreme Court was only dealing with that one single issue as regards whether the Petitioner could seek an advisory opinion of the Supreme Court as provide for under Article 163 (6) of the Constitution which provides:

“163. Supreme Court -

(6) The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government.”

39. From the clear decision of the Supreme Court in Supreme Court Advisory Reference No.2 of 2017 relied upon by the Respondents and from my understanding of the same there was no issue before the Supreme Court as to whether the COG could sue or not as clearly demonstrated under paragraph 39 and 40 in the aforesaid decision. The issue as to whether the Petitioner could institute court proceedings seeking to enforce Bill of rights and /or enforcement of the constitution is well settled.

40. Under Article 22(1) of the Constitution it is clearly provided that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of rights has been denied, violated or infringed or threatened. Further Article 258 of the Constitution provides that every person has the right to institute court proceedings, claiming that this constitution has been contravened or is threatened with contravention. Article 260 of the Constitution provides in this constitution unless the context requires otherwise “person” includes a company, association or other body of persons whether incorporated or unincorporated.”

41. Article 259 of the Constitution clearly provides that the Constitution shall be interpreted in a manner that promotes its purpose, values and principles, advances the rule of law, the human rights and fundamental freedoms in the Bill of Rights, and that which permits development of the law and contributes to good governance. Taking holistic interpretation of the law and the guidelines under Article 259 of the Constitution and considering the provisions of Article 22(1) and Article 258 of the Constitution, I find that everyone has a right to institute a Constitutional reference whether as an association or other body of persons whether incorporated or unincorporated. I find the Petitioner has a constitutional right to sue and to defend any constitutional suit.

42. I have very carefully considered the Counsel rival submissions and the Supreme Court decision, in Supreme Court Advisory Reference No.2 of 2017 County Council of Governors, Attorney General & Others and find the Supreme Court decision can be distinguished in that it dealt with a specific issue of whether the Applicant COG, is a state organ within the provisions of Article 260 of the Constitution so as to be clothed with the locus standi to seek an advisory opinion before the Supreme Court but not whether it could institute a Constitutional Petition before a High Court for hearing and determination. The Supreme Court dealt with the single issue before it but not on whether the Petitioner could institute a Petition under Article 22 and 258 of the Constitution.

43. The Preliminary objection urged before me had nothing to do with the issue of jurisdiction which had previously been determined in a Preliminary Objection dealt with by Hon. Justice John Mativo in this Petition. The issue before me is totally different from the one raised before Hon. Justice John Mativo as it deals with whether the Petitioner has legal capacity to institute the present Petition or act as an agent of the County Government.

44. To the extent of my findings, I am satisfied that the 3rd and 7th Respondents’ Notice of Preliminary Objection is without merits.

45. The 3rd and 7th Respondents’ Preliminary Objection dated 22nd November, 2019 is accordingly dismissed with costs to the Petitioner.

Dated, Signed and Delivered at Nairobi on this 28th day of May, 2020.

.....

J. A. MAKAU

JUDGE