



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J.]

CONSTITUTIONAL PETITION NO. 4 OF 2018

BETWEEN

1. SAMSON GETOBAI MAROA
2. THOMAS MANENO MWIKWABE
3. MASWAGE CHRYS CHACHA.....PETITIONERS

VERSUS

1. THE COUNTY GOVERNMENT OF MIGORI
2. THE GOVERNOR COUNTY GOVERNMENT OF MIGORI
3. THE COUNTY ASSEMBLY OF MIGORI
4. PUBLIC SERVICE BOARD
- THE CHIEF OFFICER - LANDS,
HOUSING & PHYSICAL PLANNING
5. COUNTY GOVERNMENT OF MIGORI
6. THE CABINET SECRETARY NATIONAL MINISTRY OF TRANSPORT, INFRASTRUCTURE
HOUSING & URBAN DEVELOPMENT
7. NATIONAL TREASURY
8. THE HON. ATTORNEY GENERAL.....RESPONDENTS

AND

- THE WORLD BANK GROUP, KENYA.....INTERESTED PARTY**

JUDGMENT

1. This judgment is in respect of the Petition dated 19/12/2018. The Petition raised a very hearty and emotive issue. It was on alleged discrimination of one community in Migori County in respect to development matters.
2. The Petition was instituted by three male adults from the Kuria community in Migori County through the firm of **Messrs. Rapando and Odunga Advocates**.
3. The Petition captures the background of the dispute in paragraphs 37 to 50 inclusive as follows: -

37. On 8th October 2014, His Excellency, the Governor of Migori, Zachary Okoth Obado constituted an Ad Hoc Committee to provide the strategic lead on the development, implementation and conferment of urban areas to municipality or town status.
38. The Ad Hoc Committee's Report was tabled for adoption and actually adopted by the County Assembly of Migori on Friday 29th June 2018.
39. On 23rd June 2018 the County Public Service Board advertised various vacancies to establish Board Members for Migori, Rongo and Awendo municipalities.
40. The World Bank Group, Kenya issued conditions that must be met by all County Governments so as to release the 28 Billion Grant to the County Governments to develop urban areas under the Kenya Urban Support Program.
41. The various Boards ought to have been legitimately established under the Urban Areas and Cities Act, 2011 (hereinafter referred to as 'the Act') before the Ad Hoc Committee(s) are constituted.
42. The procedure and conditions precedent for an area to be considered to be a Town, Municipality or a City is provided for under the Act and that the 1st, 2nd, 3rd, 4th and 5th Respondents did not follow the procedure at all and that Migori, Awendo and Rongo are not and cannot be municipalities as they do not meet the threshold under Section 9 of Act.
43. In any case, under the Local Governments Act (now repealed) there was established Migori Municipality and Kehancha Municipality which may continue to be considered as such by dint of Section 18 of the Sixth Schedule of the Constitution and that Awendo and Rongo were not municipalities even under the Repealed Local Governments Act.
44. Going by the statistical data provided for on page 9 - 11 of the Ad Hoc Report, Kehancha and Isebania come 2nd and 3rd respectively in terms of population density before Awendo and Rongo areas.
45. Owing to the foregoing facts the 1st, 2nd, 3rd, 4th and 5th respondents grossly violated the Constitution and the provisions of the Urban Areas and Cities Act, 2011 in their bid to comply with the strict conditions set out by the World Bank Group, Kenya so as to release the 28 Billion Grant to the County Governments to develop urban areas.
46. It is unfair and therefore unjust to members from Kuria region to be left out by the 1st, 2nd, 3rd, 4th and 5th respondents from Kenya Urban Support Program (KUSP) being sponsored by the World Bank through the National Ministry of Transport, Infrastructure, Housing and Urban Development.
47. The 1st, 2nd, 3rd, 4th and 5th Respondents' actions and/or omission are discriminatory and continue to marginalize the members of Kuria Community contrary to the provisions of the Constitution.
48. The 5th Respondent has now advertised Invitation to Tender for:
- a) Construction of Rongo Township Roads to Bitumen Standard Phase 1;
 - b) Construction of Awendo Township Roads to Bitumen Standard Phase 1;
 - c) Construction of Migori Township Roads to Bitumen Standard Phase 1;
 - d) Construction of Ombo Modern Market
 - e) Construction of Awendo Re-creation Park and pre-site visit date scheduled for 14th December 2018 and closing on the 24th December, 2018.
49. If the 1st, 2nd, 3rd, 4th and 5th Respondents are not stopped from continuing with the discriminatory process of developing one region and unjustifiably leaving out Kuria region, the members from Kuria region will remain marginalized and prejudiced contrary to the provisions of the Constitution.
50. The Petitioners have raised the issues herein with the Respondents directly before to no avail leaving this Court as the only remaining chance for justice.

4. Resulting from the foregone, the Petitioners contended that the Respondents variously violated the **Constitution of Kenya** and failed to comply with the **Urban Areas and Cities Act, 2011**.

5. The Petitioners prayed for the following orders: -

1. A declaration that within the intendment of Article 10 of the Constitution the Respondents are bound by the key national values and principles, to have regard to human dignity, equity, social justice, inclusiveness, equality and human rights.

2. A declaration that within the intendment of Article 28 of the Constitution the Respondents are bound to respect and protect the inherent dignity of the Petitioners.
3. A declaration that within the intendment of Article 35 (1) of the Constitution the Respondents are bound to released all documents pertaining to the reasons and justification of the tender advertisements on:
 - a) Construction of Rongo Township Roads to Bitumen Standard Phase 1;
 - b) Construction of Awendo Township Roads to Bitumen Standard Phase 1;
 - c) Construction of Ombo Modern Market
 - d) Construction of Awendo Re-creational Park and preside visit dated scheduled for 14th December, 2018 and closing on the 24th December, 2018.
4. A declaration that within the intendment of Articles 47 (1) of the Constitution the Respondents are bound to provide administrative action that is lawful reasonable and procedurally fair.
5. A declaration that within the intendment of Articles 47(2) of the Constitution, the Respondents are bound to provided reasons for failure to include towns and urban centres within Kuria East and Kuria West in the Kenya Urban Support Program's projects.
6. A declaration that the failure to include towns and urban centres within the larger Kuria area of Migori County is inconsistent with the provisions of Articles 10, 27(4), 28, 35(1), 47, and of the Constitution, and is illegal, null and void.
7. An order of Judicial Review in the form of certiorari does issue from this court to quash the decision by the 5th Respondent to advertise for invitation to tender for projects under the Kenya Urban Support Programme in Migori County.
8. An order of permanent injunction to be issued to restrain the Respondents, their agents and persons acting under the authority of the respondents, their agents and persons acting under the authority of the respondents from implementing any of the projects now advertised by the 5th Respondent in its advert for:
 - a. Construction of Rongo Township Roads to Bitumen Standard Phase 1;
 - b. Construction of Awendo Township Roads to Bitumen Standard Phase 1;
 - c. Construction of Migori Township Roads to Bitumen Standard Phase 1;
 - d. Construction of Ombo Market;
 - e. Construction of Awendo Re-creational Park
9. An order of prohibition against the Respondents, their agents or persons acting under their authority and command, from implementing the projects advertised by the 5th Respondent on:
 - a. Construction of Rongo Township Roads to Bitumen Standard Phase 1;
 - b Construction of Awendo Township Roads to Bitumen Standard Phase 1;
 - c. Construction of Migori Township Roads to Bitumen Standard Phase 1;
 - d. Construction of Ombo Modern Market;
 - e. Construction of Awendo Re-creational Park

Until they make the projects inclusive and that the projects protect the rights of the Kuria Community in accessing development projects within the county.

10. There be an order as to costs.

6. The Petition was opposed. Messrs. Omonde Kisera & Company Advocates appeared for the 1st, 2nd, 4th and 5th Respondents. Messrs. Agure Odero & Company Advocates appeared for the 3rd Respondent. The rest of the parties did not participate in the hearing of the

Petition.

7. The 1st, 2nd, 4th and 5th Respondents jointly relied on the Replying Affidavit of **Christopher Odhiambo Rusana** sworn 21/01/2019 and filed on 23/01/2019. The deponent was the then County Secretary to the County Government of Migori, the First Respondent herein. I will hereinafter refer to the said deponent as '**Mr. Rusana**'.

8. In his response Mr. Rusana attempted to lay the background of the *status quo* in detail. He stated that sometimes in 2017 or thereabout the National Government of the Republic of Kenya negotiated a Grant from the World Bank in the sum of US Dollars 300 Million for **Kenya Urban Support Programme** (hereinafter referred to as '**the Programme**') to be disbursed to 45 counties in the country. The Grant specifically targeted one of the Big Four Agendas of the National Government on Housing and Infrastructural Development.

9. Mr. Rusana further stated that the World Bank codified the implementation of the Programme and the utilization of the Grant in a **Programme Appraisal Document** which was unilaterally designed and drawn by the World Bank. The document was annexed as the 1st, 2nd, 4th and 5th Respondents' Exhibit '**COR 1**'. I will hereinafter refer to the Programme Appraisal Document as '**the Document**'.

10. He contended that according to the Document the World Bank set the criteria for the eligibility of the urban areas which were to benefit from the Grant. The respective roles of all the partners were as well spelt out in the Document.

11. Mr. Rusana also stated that from the Document it was the World Bank which determined the eligibility of an urban centre to benefit from the Grant upon set parameters. He deponed that upon subjecting the various urban areas within Migori County the World Bank selected three urban areas to benefit from the grant. They were Migori, Rongo and Awendo towns. He re-affirmed the position that no other entity or body apart from the World Bank had a role to play in selecting the towns earmarked to benefit from the Grant.

12. Mr. Rusana further deponed that the implementation of the Grant must be seen in its right perspective as a product of the National Government and the World Bank and not of the County Government of Migori. The County Government of Migori participated in the programme by virtue of the benefitting towns and not otherwise. To that end, an Intergovernmental Participation Agreement was entered into between the National Government and the County Government of Migori. A copy of the Agreement was annexed as the 1st, 2nd, 4th and 5th Respondents' Exhibit '**COR 3**'.

13. Mr. Rusana posited that long before the advent of the Programme the County Government of Migori had in 2014 initiated the process of identifying and classifying the cities, municipalities, towns and urban areas within the County in conformity with the **Constitution** and the **Urban Areas and Cities Act No. 13 of 2011** (hereinafter referred to as '**the Cities Act**'). He further posited that the process has been quite extensive and is still in progress. He stated that the County Government of Migori prepared a Report and submitted it to the County Assembly of Migori County for consideration. He also pointed out that several towns within Kuria Sub counties had been proposed for conferment of various status. He annexed the Report as the 1st, 2nd, 4th and 5th Respondents' Exhibit '**COR 2**'.

14. Returning to the matter at hand, Mr. Rusana also stated that one of the conditions precedent to the implementation of the Programme was that the counties were to implement **the Cities Act** so as to come up with their respective cities, municipalities, towns and urban areas within the counties. However, according to the Document no County had fully complied with **the Cities Act** by July 2017. That was attributed to several factors.

15. Since the Programme was to be implemented within defined timeline of 5 years from 2017, the World Bank waived the requirements of complying with **the Cities Act** for the financial years 2017/2018 and 2018/2019. In its place the World Bank relied on **Condition 7** of the Document and urged the benefitting counties to adopt like administrative structures as was in Kitui County.

16. The Counties were then to run the Programme through their respective departments in-charge of Urban and Infrastructure Development. The Counties were to in particular establish town administrations with a Town Manager and a budget to effectively manage the urban areas and in a bid to implement the Programme. The town administrations were to include transitional Town/Municipal Boards.

17. Mr. Rusana deponed that the arrangement was however a stop gap measure. As a result, the County Government of Migori was committed in the implementation of the Programme and that is why it carried out the impugned advertisements on the constitution of the Municipal Boards as well as the various procurements. That was also the basis upon which the CEC Member and his Chief Officer were involved in *inter alia* the capacity building and further implementation of the Programme.

18. Mr. Rusana steered it clear that the aforesaid transitional arrangement which the World Bank came up with had nothing to do with the process the County Government of Migori had initiated under the **Constitution** and **the Cities Act**.

19. It was further deponed that the Programme had been substantially implemented up to around 50% thereof. The World Bank has so far released Kshs. 518,367,800/= for the three benefitting towns within Migori County.

20. According to Mr. Rusana the foregone was the background upon which the Programme was implemented. It is on that basis that the 1st, 2nd, 4th and 5th Respondents contended that the Petitioners were cleverly misrepresenting facts to mislead this Court.

21. Mr. Rusana wondered the manner in which the Petitioners had crafted the allegation of discrimination of the Kuria community. He wondered why the Petitioners were not alive to the fact that even the Kuria Community had exclusively benefitted from some projects within the County. He for instance pointed out the Kshs. 100 Million grant by the EU for the development of sweet potatoes in the Kuria sub-counties.

22. To Mr. Rusana the Petition was aimed at unreasonably invoking ethnic hatred and feelings within the County. Mr. Rusana further pointed out that the development of the entire County was the mandate of the County Government and County Assembly of Migori County. He stated that so far an Integrated Development Plan was prepared and is implemented towards that goal.
23. It was deponed that the Petition was not based on empirical data to support the insinuation that Isebania and Kehancha towns are exclusively occupied by the Kuria community or that no member of the Kuria community resides or deals with any of the three benefiting towns.
24. The 1st, 2nd, 4th and 5th Respondents read malice in the Petition. To them the Petition was initiated by the second Petitioner who was sacked as a CEC Member at the County Government of Migori. It is alleged that the Petition is a revenge mission aimed at portraying the Respondents as insensitive, tribal and in bad light.
25. The 1st, 2nd, 4th and 5th Respondents drew the Court's attention to **Migori High Court Judicial Review No. 4 of 2018**. They stated that the suit raised similar issues as the Petition herein and that it was also instituted by proxies of the Petitioners herein.
26. The 1st, 2nd, 4th and 5th Respondents prayed that the Petition be dismissed with costs.
27. The 3rd Respondent also opposed the Petition. It relied on the Replying Affidavit sworn by **Boaz Awiti Okoth Onyango** on 19/06/2019. Boaz Awiti Okoth Onyango was the Honourable Speaker of the County Assembly of Migori County. The 3rd Respondent prayed that the Petition be dismissed with costs as it was not based on any solid grounds.
28. Directions on the Petition were taken. The parties proposed and the Court sanctioned that the interlocutory application be abandoned in favour of the main Petition. The main Petition was to be heard by way of written submissions. All participating parties duly filed their respective submissions. They also referred to several decisions on their rival positions.
29. The Petitioners submitted on two main issues. The first one was that the Respondents failed to undertake any public participation in conferring the Municipal status to Migori, Rongo and Awendo towns. They submitted that the Respondents were all bound by the **Constitution** and were to observe the National values and principles of governance under **Article 10 of the Constitution**. It was further submitted that the Programme was an implementation of a policy process and for that reason the Respondents were bound by the national values and principles of governance. They referred to **Article 118** of the **Constitution** which called for the business of the Parliament to be conducted in an open manner and to facilitate public participation.
30. The Petitioners therefore submitted that since the process towards conferring the municipal status on Migori, Rongo and Awendo towns was flawed then the resultant municipal towns were so conferred in contravention of the **Constitution**. The Petitioners relied on the decisions in **Robert N Gakuru & Others v Kiambu County Government & 3 Others (2014) eKLR** and **The Doctors for Life International v. Speaker of the National Assembly & Others (CCT 12/05) (2006) ZACC 11, 2006 (12) BCLR 1399 (CC), 2006 (6) SA 416 (CC)** in support of this submission.
31. The second limb of the Petitioners' submissions was that the conferment of Municipal status to Migori, Rongo and Awendo towns which are predominantly occupied by the Luo community leaving Kehancha and Isebania which are predominantly occupied by Kuria community amounted to ethnic discrimination.
32. The Petitioners drew the Court's attention to **Article 27** of the **Constitution** and **Section 97** of the **County Governments Act** which all frown against discrimination. The decisions in **Benson Okera Magana & 12 Others vs. County Public Service Board & 2 Others (2014) eKLR**, **John Mining Temoi & Another v. Governor of Bungoma County & 17 Others (2014) eKLR** and **Al Yusra Restaurant Ltd vs. Kenya Conference of Catholic Bishops & Another (2017) eKLR** were referred to.
33. Resulting from the foregone the Petitioners urged this Court to allow the Petition with costs.
34. The 1st, 2nd, 4th and 5th Respondents relied on their pleadings in attempting to demonstrate that the Petition was misconceived and a pure abuse of the process of the Court.
35. The 1st, 2nd, 4th and 5th Respondents raised 4 issues for determination. The first one was that since the Programme was funded by a donor then this Court has no powers to interfere with the process. The second issue was that **the Cities Act** was not applicable in the Programme implementation given that that law was then inoperational. Thirdly, it was submitted that the Petition was overtaken by events since the Programme had long been rolled out and was in its second financial year. Lastly, it was submitted that the Petition did not meet the constitutional threshold since it was based on dangerous persuasions on stereotype notions and that it did not raise substantive constitutional issues for determination.
36. The 3rd Respondent submitted as well. It principally submitted that the Petition failed to demonstrate that the 3rd Respondent was in breach of the **Constitution** and the law. **Articles 184, 185 and 196** of the **Constitution** and **the Cities Act** were cited in support of the submission.
37. The 3rd Respondent further submitted that there was no slightest demonstration that it discriminated against the Kuria community. Reference was made to **Articles 19, 20, 21, 22 and 24** of the **Constitution**. It instead submitted that Isebania and Kehancha towns are cosmopolitan areas.
38. The submission that the Petition fell short of the required threshold was also raised by the 3rd Respondent. It was further submitted that

the Petition was based on a personal vendetta by a vengeful Petitioner who had been relieved of his duties by the County Government of Migori.

39. The 3rd Respondent submitted further that this Court has no jurisdiction to interfere with the Programme which was wholly donor funded. In support of that submission the 3rd Respondent referred to the decisions in **Peter O. Ngoge vs. Francis Ole Kaparo (2007) eKLR**, **Trusted Society of Human Rights Alliance vs. Attorney General, Mumo Matemu vs. Trusted Society of Human Rights Alliance (2013) eKLR** and **Kenya Small Scale Farmers Forum & Others vs. Republic of Kenya & 2 Others (2013) eKLR**.

40. The 3rd Respondent called for the dismissal of the Petition with costs.

41. I have carefully read and understood the parties' pleadings, submissions and the decisions relied on.

42. It is true **Migori High Court Judicial Review No. 4 of 2018** was filed. It was determined vide a judgment rendered on 15/10/2019. It is also true that some issues in the Petition were raised in the judicial review suit. One of those issues was the implementation of the Programme. I addressed my mind to the issue.

43. Since I already settled the issue the best I can do herein is to reiterate what I stated in **Migori High Court Judicial Review No. 4 of 2018**. This what I said: -

12.Given the admissions by the Respondents it now seems that the dispute revolves on the legality of the Respondents' actions towards the implementation of the World Bank Programme.

13. I have carefully perused the Programme Appraisal Document. I have noted the Condition 7 of the document. I am persuaded that Condition 7 was an interim measure taken by the World Bank towards the project implementation. The resultants boards of those urban areas were hence transitional.

14. The County Governments were therefore required to comply with the Constitution and the Cities Act and legally establish the municipalities, towns and urban centres. Once established, the respective boards of the municipalities, towns and urban centres would then be put in place. Those boards would eventually take over the role of the transitional boards created under the World Bank programme.

15. The procedure towards establishment of the municipalities, towns and urban centres currently undertaken by the County Government of Migori under the Cities Act has not been impugned. The suit instead challenged the interventions taken by the World Bank during the time when the Cities Act was inoperational. In that case to expect the said interventions to be compliant with the then inoperative law would be unreasonable. In judicial review a Court is called to inter alia check on unreasonableness, arbitrariness or irrationality of administrative actions on the part of public entities. It is not expected that the Court would itself act arbitrarily, irrationally or unreasonable.

44. The above position still remains in this Petition. The way I see it is that the Petitioners did not real understand what was going on in respect of the Programme implementation. The process of establishing and classifying cities, municipalities, townships and urban centres within Migori County is still ongoing. According to the Respondents, that process is being undertaken in total compliance to the **Constitution** and the **Cities Act**. The Respondents alleged that the Report proposed Kehancha and Isebania towns be conferred the status of municipalities. That position was not controverted by the Petitioners.

45. The Respondents further alleged, and again without any objection, that as at the filing of these proceedings the County Government of Migori had forwarded the Report on establishing and classifying cities, municipalities, townships and urban centres within Migori County to the County Assembly of Migori County for consideration.

46. I must say it again that the present Petition did not challenge the ongoing process.

47. Be that as it may, this Court still must address itself on its jurisdiction over the Programme implementation. The Petitioners contended that the process variously infringed the **Constitution** and the law especially to the extent of identifying Migori, Rongo and Awendo as the only benefitting towns.

48. The Respondents were of the contrary position. They posited that this Court has no jurisdiction over this matter as the Programme was exempted from compliance with the municipal laws since it was a fully donor funded project. They further argued that even all the procurements thereto are not subject to the local laws.

49. The issue is very prime for it is on jurisdiction. The issue sought to illuminate the jurisdiction, if any, of the High Court over the implementation of donor funded projects in Kenya.

50. Nyarangi, JA held in **The Owners of Motor Vessel 'Lilian S' vs. Caltex Oil Kenya Limited (1989) 1 KLR 1** that: -

Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there should be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

51. My Lordship Ibrahim, JSC in **Supreme Court of Kenya Civil Application No. 11 of 2016 Hon. (Lady) Justice Kalpana H. Rawal**

vs. Judicial Service Commission & Others in demystifying jurisdiction quoted from the decision in **Supreme Court of Nigeria Supreme Case No. 11 of 2012 Ocheja Emmanuel Dangana vs. Hon. Atai Aidoko Aliusman & 4 Others** where **Walter Samuel Nkanu Onnoghen**, JSC and expressed himself as follows: -

...It is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity - dead - and of no legal effect whatsoever. That is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost...

52. On the source of a Court's jurisdiction, the **Supreme Court of Kenya** in the case of **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR** stated as follows:

A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

53. The issue of donor funded projects is not new to our Courts. I have gone through several decisions on the same. However, majority of the decisions dealt with the procurement processes. Nevertheless, the Courts in essence dealt with the issue of jurisdiction.

54. I will refer to only two decisions of the High Court. In **Republic v. Public Procurement Administrative Review Board & Another exparte Athi Water Services Board & Another (2017) eKLR** **Odunga, J.** dealt with the issue as to whether the Public Procurement Administrative Review Board had jurisdiction over a procurement under a bilateral agreement entered into by the Government of Kenya and a foreign government or agency. The Learned Judge had the following to say: -

173. I therefore agree with the Respondent and the interested party herein that a purposeful reading of Section 4(2)(f) of the PPAAD Act must necessarily lead to the conclusion that for a procurement to be exempted thereunder, one of the parties must be the Government of Kenya while the other party must be either a foreign Government, foreign government agency, foreign government entity or multi-lateral agency. I also agree at the rationale for such provision is clear must be to avoid the imposition of Kenyan law on another Government and that such procurement can only be governed by the terms of their bilateral or multilateral agreement, which agreements are of course subject to Parliamentary scrutiny. This exception would be justified under Article 2(5) of the Constitution which provides that the general rules of international law shall form part of the law of Kenya.

55. **Nyamweya, J.** in agreeing with the foregone position expounded the rationale for the exemption further. In **Republic v. Public Procurement Administrative Review Board & 2 Others exparte Kenya Power & Lighting Company Limited (2019) eKLR** the Learned Judge stated as follows: -

56. This exemption is in line with the legal position that the enforcement of internal agreements is governed by international law, and in particular the law relating to treaties, and even though many of the functions of such agreements may be analogous to those of domestic law, their efficacy is not judged in the same manner as domestic law because they operate between parties on an international level and re more likely to result in difficulties of interpretation and enforcement. The main purpose of the section is to avoid subjecting foreign countries and agencies to domestic law, and to facilitate international commit and co-operation with such foreign countries and agencies.

57. It is also expressly provided for by Article 2(5) and (6) of the Constitution that the general rules of international law shall form part of the law of Kenya, and that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution. In addition, it was laid down in Re Queensland Mercantile and Agency Ltd (1892) 1 Ch 219 that judicial notice is taken of rules and principles of public internationally law, even when not embodied in municipal or domestic law. Black's Law Dictionary, Ninth Edition in this regard defines international law at pages 892 as follows:

The legal system governing the relationships between nations, more modernly, the law of international relations, embracing not only nations but also such participants as international organizations and individuals (such as those who invoke their human rights or commit war crimes).

56. I wholly agree with the above interpretation of the law.

57. I have carefully considered the Document. The Document dealt with the implementation of the Programme based on the Grant by the World Bank to the Government of the Republic of Kenya. The Document defined the roles of the respective parties; that is the roles of the World Bank and those of the Government of the Republic of Kenya. Therefore, the Document is governed by **Article 2(5)** of the **Constitution** since it was entered into by the Government of the Republic of Kenya and a foreign entity.

58. That being the position, the implementation of the Programme including all procurements thereunder must be in accordance with the terms and conditions as contained in the Document and/or the general rules of international law.

59. The Document does not provide that the jurisdiction of the High Court shall be invoked in disputes resolution. The Document has a defined mode of settling disputes by anyone affected by the implementation of the Programme.

60. Further, the Petition does not allude any breach of the general rules of international law.

61. That hence settles the question of jurisdiction. For clarity, any dispute arising from the implementation of the Programme must be dealt with under the provisions of the Document and/or the general rules of international law. To that extent and the manner in which the Petition is tailored ousts the jurisdiction of the High Court.

62. In this case however the Petitioners had two avenues to seek redress of their grievances. The first one was to comply with the provisions of **Condition 77** of the Document. The said condition provided as follows: -

D. World Bank Grievance Redress

77. Communities and individuals who believe that they are adversely affected as a result of a Bank supported P for R operation, as defined by the applicable policy and procedures, may submit complaints to the existing program grievance redress mechanism or the World Bank's Grievance Redress Service (GRS). The GRS ensures that complaints received are promptly reviewed in order to address pertinent concerns. Affected communities and individuals may submit their complaint to the World Bank's independent Inspection Panel which determination whether harm occurred, or could occur, as a result of World Bank's non-compliance with its policies and procedures. Complaints may be submitted at any time after concerns have been brought directly to the World Bank's attention, and Bank Management has been given an opportunity to respond. For information on how to submit complaints to the World Bank's corporate Grievance Redress Service (GRS), please visit <http://www.worldbank.org/GRS>. For information on how to submit complaints to the World Bank Inspection Panel, please visit www.inspectionpanel.org.

63. The other avenue was for the Petitioners to petition Parliament under **Article 119(1)** of the **Constitution**. The said **Article** provides as follows: -

Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation.

64. The second avenue of redress is premised on **Articles 94(4)** and **95(5)(a)** of the **Constitution**. **Article 94(4)** commands Parliament to protect the **Constitution** and to promote the democratic governance of the Republic. **Article 95(5)(a)** *inter alia* empowers the National Assembly to review the conduct of the Executive.

65. The upshot therefore is that the Petition dated 19/12/2018 is unsustainable. It is hereby struck out for want of jurisdiction.

66. The Petition was brought on behalf of the Kuria Community. It was in the nature of public interest litigation. Each party to bear its own costs.

67. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of November, 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. Brian Mboya Counsel instructed by the firm of Messrs. Tom Mboya & Co. Advocates for the Petitioners.

Mr. Kisera Counsel instructed by the firm of Messrs. Omonde Kisera & Company Advocates for the 1st, 2nd, 4th and 5th Respondents.

Mr. Agure Odera Counsel instructed by the firm of Messrs. Agure Odera & Company Advocates for the 3rd Respondent.

Evelyne Nyauke – Court Assistant