



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 252 OF 2016

THE COUNCIL OF GOVERNORS.....PETITIONER/APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE NATIONAL ASSEMBLY.....2ND RESPONDENT

THE SENATE.....3RD RESPONDENT

CABINET SECRETARY,

THE NATIONAL TREASURY.....4TH RESPONDENT

COMMISSION ON REVENUE ALLOCATION.....5TH RESPONDENT

CONTROLLER OF BUDGET.....INTERESTED PARTY

RULING

1. Through a petition filed on 15th June 2016, the petitioner herein, the Council of County Governors (COG), filed this suit against the respondents seeking following orders:

a) A declaration that national government cannot allocate itself funds for and undertake devolved functions, without first executing inter-government agreements required by Article 187 of the Constitution.

b) A declaration that in accordance with Article 202 (2) of the Constitution all funds christened in the Division of Revenue Act as conditional or unconditional grants should be netted from the national government's share of revenue and not from the overall revenues raised nationally.

c) A declaration that in accordance with Article 202 (2) of the Constitution all funds christened in the Division of Revenue Act as conditional or unconditional grants should be disbursed to the Counties through the County Revenue Fund.

d) A declaration that 'national interest' as stated in Article 203(1) (a) of the Constitution does not necessarily connote functions of the national government as provided in the 4th Schedule of the Constitution.

e) A declaration that funds christened as 'national interest' in the Division of Revenue Act 2016 or any other Division of Revenue Act enacted to implement the provisions of Article 202 and 203 of the Constitution cannot be apportioned on devolved functions without the same being channeled to the Counties as conditional or unconditional grants.

f) A declaration that, in its entirety, the Division of Revenue Act, 2016 is inconsistent with the provisions of Article 6(2), 10(2) (a), 174(c), (d) and (h), 2012(2), 174(g), 175(b), 186, 186(2), 187(1), 189, 189(1) (c), 2013(1) (d), 217 of the Constitution

g) An order directing the respondents to make necessary steps to amend the Division of Revenue Act, 2016 to conform to the provisions of Articles 202(2) and 203(1) of the Constitution.

2. In response to the said petition, the 2nd respondent on 28th July 2016 filed a notice of preliminary objection in which it listed the following grounds:

1. The petition violates the principles under Article 159(2) of the Constitution which enjoins the courts to be guided and to promote the principles of alternative forms of dispute resolution including reconciliation, mediation and arbitration.

2. The dispute herein is a dispute contemplated by Article 189(3) of the Constitution which provides:

“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.”

3. The petitioners have not complied with the requirements of Section 31 of the Intergovernmental Relations Act Cap 5G, Laws of Kenya to refer disputes such as the present dispute to an alternative resolution mechanism before instituting court proceedings.

4. Further the petitioners have also failed to comply with Section 6 (1) of the Division of Revenue Act, 2016 which requires that any state organ involved in an intergovernmental dispute regarding, the division of revenue shall, pursuant to Article 189 of the Constitution, exhaust all alternative dispute resolution mechanisms to resolve the dispute before approaching the court.

3. Through a ruling delivered on 3rd October 2016, this court, differently constituted, allowed the preliminary objection with costs to the 1st and 2nd respondents and ordered that the petition herein be stayed pending reference of the dispute to the Alternative Dispute Resolution Mechanism in accordance with Article 189(3) of the Constitution and the Intergovernmental Relations Act.

4. The matter was then referred to mediation and on 14th September 2018, the report on the mediation prepared by the Intergovernmental Relations Technical Committee (IGRTC) was filed in court. On 3rd October 2018, the parties herein urged the court to peruse the report with a view to issuing directions on the way forward regarding the petition.

5. On 14th October 2018, the matter came up before me for mention when Mr. Wanyama, learned counsel for the petitioner, submitted that the mediation report filed by the Intergovernmental Relations Technical Committee did not solve the questions in contest in the petition. Counsel urged the court to give directions that the petition be heard by this court as, according to the petitioner, the mediation process did not bear any fruits and that the issues were therefore not resolved by the mediator. Counsel contended that all the 18 meetings convened by the mediator were not attended by the representatives National Assembly and the Senate.

6. On her part, Miss Omuom, learned counsel for the 1st and 4th respondent submitted that the petitioners actions frustrated the mediation process as the petitioner did not participate in the mediation. She urged the court to deny the petitioner audience so that the matter can be sent back to the mediation table.

7. Mr. Mwendwa for the 2nd and 3rd respondents submitted that the petitioner was in contempt of the court order issued on 3rd October 2016, referring the matter to mediation, by failing to participate in the mediation process and instead moving to this court to recall the said mediation. Counsel urged the court to find that no mediation took place as ordered.

8. Mr. Nyamodi, learned counsel for the 5th respondent did not make any submissions and only stated that his client will abide by the directions that the court will issue.

9. I have considered the parties rival submissions on the issue of whether or not the mediation process achieved its intended purpose which is to resolve the dispute between the parties or if the mediation actually happened.

10. According to the petitioner, the mediation did not solve the questions in contest while the respondents contended that the petitioner's actions frustrated the mediation process.

11. I have perused the mediation report filed by Intergovernmental Relations Technical Committee (IGRTC) in court on 14th September 2018. I note that the respondent's claim that the mediation was frustrated by the petitioner is not reflected in the said report. In fact, contrary to the respondent's assertions, I note that the petitioner was represented at the meetings convened by the mediation team and that a representative of the petitioner, one Zipporah Muthama appended her signature to the committee's final report on 15th August 2018. I further note that the mediation team distilled the issues for determination and at the end of the report gave the findings on each of the 9 issues for determination. The said issues were set out as follows:

i. Whether the allocation of conditional grants in the Division of Revenue Act 2016 is made in accordance with Article 202(2) COK 2010.

ii. Whether an accounting officer of the national government can spend money for conditional grants directly in the counties to undertake devolved functions.

iii. Whether an accounting officer of the national government can spend money for conditional grants directly in the counties to undertake devolved functions without the execution of an intergovernmental agreement under Article 187 of the COK 2010.

iv. What is the scope of an intergovernmental agreement under Article 187 of the COK 2010.

v. What is the meaning of the national interest as a criteria of revenue allocation as per Article 203 (1) (a) of the COK 2010

vi. Whether the national interest means the interest of the national government and not of the county governments.

vii. Whether an allocation for national interest ought to be allocated exclusively to the national government.

viii. Whether the national government can use the funds for national interest directly to undertake devolved functions.

ix. Whether national government has a constitutional obligation to disburse to counties, as conditional or unconditional grants, money allocated as national interest that are earmarked for devolved functions.

12. Turning to the claim that the mediation team did not resolve the questions raised before it, I note that in a meeting convened by the mediation team on 16th November 2017, the 9 issues for determination were isolated after which parties held a retreat from 30th June to 3rd July 2018 with the aim of conclusively distilling the issues for determination and preparing the mediation report to be submitted to court. As I have already stated in this ruling, the mediation report has already been filed before this court. I note that both the respondents and the petitioner are dissatisfied with the proceedings that took place before the mediation team and while the respondents argue that the matter should be referred back to mediation, the petitioner maintains that the petition should be heard and determined by this court.

13. My finding is that having been referred to the mediator and a report having been filed before this court, however unsatisfactory it may be, it will not be in the interest of justice to refer the case back to the same mediator all over again considering the age of the case. According to the mediation report it is noteworthy that parties had a consensus on some of the issues raised and further agreed that issues number 5-9 be referred to IBEC or the Summit for determination. For the above reasons and in line with the recommendations contained in the mediation report, I direct that issues 5-9 highlighted in the list of issues for determination hereinabove be submitted to Intergovernmental Budget and Economic Council (IBEC) or the Summit for determination in line with the provisions of Article 189(3) and section 35 of the Intergovernmental Relations Act that judicial proceedings be undertaken only after all efforts to resolve the dispute under the said Act have failed. I hasten to remind the parties to these proceedings that the provisions of Article 189(3) of the Constitution ought not to be taken lightly as the makers of the Constitution must have had a very valid reason for removing disputes involving the national and county governments from the purview of the court in the first instance. In the present case, I am not satisfied that all efforts to resolve the dispute have failed.

Dated, signed and delivered in open court at Nairobi this 28th day of November 2018.

W. A. OKWANY

JUDGE

In the presence of:

Mr Wanyama for the petitioner

Miss Nthangi for Mwendwa for the 2nd respondent

Miss Kiberenge for Miss Ndong for the 5th respondent

Mr Ngumbi for Miss Omuom for the 1st and 4th respondent

Court Assistant – Kombo