



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILINMANI LAW COURTS**  
**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 THE 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 AUTHORITY..... 5TH RESPONDENT**

**EWASO NG'IRO NORTH RIVER BASIN DEVELOPMENT  
AUTHORITY.....6THRESPONDENT**

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

**RULING**

***Introduction***

1. The constitution of Kenya, 2010, ushered in a new set of national values, a new bill of rights and a new system of government. It reset the relationship between the citizen and the state and reconfigured

both the ethos and the architecture of governance.[1]

2. Gradually, the philosophy, the values and the structures of the previous constitution began to give way to those of the new constitutional order through the enactment of new legislation, the realignment of the bureaucracy and the rallying of the national consciousness to the new dawn.[2] Quite inevitably, novel questions of constitutional law began to emerge and the inadequacy of much of the existing constitutional law jurisprudence in answering those questions became apparent.[3]

3. Relevant to this Ruling is section 7 (1) (2) of Part two of the sixth schedule to the Constitution entitled "Existing Obligations, Laws and Rights." provides that:- (1) "All law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution." (2) If, with respect to any particular matter—(a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and (b) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict.

4. In a recent decision[4]I observed that "our Constitution is highly valued for its articulation. Such astute drafting is the fact that the Constitution gives prominence to national values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights and Rule of law."[5] In this list, we can add Devolution, Access to Services[6] and Relationships Between Governments.[7]

5. At the centre of this Ruling is Article 189 (3) which provides that in any dispute between governments, the government shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation. The legislation contemplated here is the Intergovernmental Relations Act.[8]

6. Since determining the issues raised in this Ruling will of course involve interpreting provisions of the Constitution and the relevant Statute, at the outset, it is necessary to consider the approach to statutory interpretation. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.[9]

7. Article 259 of the Constitution introduced a new approach to the interpretation of the Constitution. The Article obliges courts to promote '*the spirit, purport, values and principles of the Constitution, advance the rule of Law, Human Rights and fundamental freedoms in the Bill of Rights and contribute to good governance.* This approach has been described as 'a mandatory constitutional canon of statutory and Constitutional interpretation.' The duty to adopt an interpretation that conforms to Article 259 mandatory.

8. It is by now trite that the Intergovernmental Relations Act[10] having been enacted pursuant to Article 189 (4) of the Constitution must be understood purposively because it is umbilically linked to the Constitution. As we do so, we must seek to promote the spirit, purport and objects of the Constitution. We must prefer a generous construction over a merely textual or legalistic one in order to afford the fullest possible constitutional guarantees.

9. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the Constitution as a whole, including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous.

10. Therefore, in construing provisions ousting the jurisdiction of this Court, we are obliged not only to avoid an interpretation that clashes with the Constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes Devolution and Access to services and promotes good governance and amicable resolution of disputes between the levels of government.

11. It is thus clear that it is the duty of a court in construing statutes to seek an interpretation that promotes the objects of the principles and values of the Constitution and to avoid an interpretation that clashes therewith. If any statutory provision, read in its context, can reasonably be construed to have more than one meaning, the court must prefer the meaning that best promotes the spirit and purposes of the Constitution and the values stipulated in Article 259.

## **Background**

12. The Council of County Governors, *instituted this petition against the Respondents seeking declarations that:-*

*a. Integrated planning, coordination and implementation of projects and programmes is a function of the County level under the Fourth Schedule to the Constitution; and*

*b. A declaration that sections 3 & 8 of the Lake Basin Development Authority Act,[\[11\]](#) Section 3 & 10 of the Kerio Valley Development Authority Act,[\[12\]](#) Section 3 & 8 of the Tana & Athi Rivers Development Authority Act,[\[13\]](#) Section 3 & 8 of the Ewaso Ng'iro South Basin Development Authority Act,[\[14\]](#) Section 3 & 8 of the Coast Development Authority Act[\[15\]](#) and Section 3 & 8 of the Ewaso Ng'iro North Basin Development Authority Act[\[16\]](#) are all unconstitutional to the extent that they are inconsistent with Article 6 (2), 189 (1) (a) (b) and 189 (2) and 259 (11) of the Constitution.*

*c. The Petitioner also seeks declarations that the entire legislations cited above are inconsistent with the provisions of Article 6 (2), 189 (1) (a) (b) and (2) and 259 (11) of the Constitution.*

13. The six Development Authorities created by the statutes establishing the first to the sixth Respondents are legal entities with perpetual succession and a common seal. The common denominator is to be found in the challenged provisions in the respective statutes which stipulate their respective functions. It is these functions that the Petitioner avers that under the fourth schedule to the Constitution,[\[17\]](#) they are all devolved functions and ought to be exercised by the County Governments.

14. The Petitioner avers that the overall objective behind the devolved system of government is to dismantle the hitherto centralized system by dispersing powers and resources[\[18\]](#) and that a cardinal principle underpinning devolution is the need to decentralize administrative, financial and political power to the local level in order to enhance efficiency and effectiveness in government.

15. The Petitioner also avers inter alia that the Intergovernmental Relations Act[\[19\]](#) establishes a framework for consultation and cooperation between the national and County Governments and amongst County Governments and that the Fourth Schedule to the constitution stipulates modalities in the distribution of functions between the National Government and County Government. The Petitioner further avers that despite the transfer of the function of health by the Transition Authority through Leg Notice Number 137 to 182 of 2013, various state bodies continue to carry out functions that are reserved for the County Governments in gross violation of the Constitution as particularized in paragraphs 44 to 62 of the Petition.

## **Notice of preliminary objection**

16. All the Respondents filed notices of Preliminary objections, objecting to this court's jurisdiction to entertain this matter. The common thread in the objections is:-

*i. That by virtue of Articles 6 (2) and 189 (3) & (4) of the Constitution, Sections 30, 31, 32, 33,*

34, and 35 of the Inter-Governmental Relations Act[20] this honorable court has no jurisdiction to entertain this case.

ii. ***That*** this petition is premature because the Petitioner has not exhausted the dispute resolution mechanisms under the Constitution and the Intergovernmental Relations Act.[21]

iii. ***That*** there is no dispute for adjudication before this Honourable court as no dispute has been formally declared under Section 33 of the Intergovernmental Relations Act.[22]

iv. ***That*** where a statute creates an obligation and enforces the performance of it in a specified manner, the general rule is that performance cannot be enforced in any other manner[23]and that the Intergovernmental Relations Act[24] and Article 189 (4) of the Constitution outlines procedures to be followed in addressing disputes.

v. ***That*** Section 3 of the Act provides that the national and county governments shall take all reasonable measures to resolve disputes amicably and apply and exhaust the mechanisms for alternative dispute resolution provided under the act or any other legislation before resorting to judicial proceedings as contemplated under Article 189 (3) and (4) of the Constitution.[25]

vi. ***That*** the Petition is incompetent for want of capacity.

### ***Petitioners' Counsels Response to the objection***

17. Mr. Wanyama for the Petitioner argued that the Petition seeks declarations that the challenged provisions are unconstitutional; that such reliefs can only be obtained from the High court and not from the forums anticipated in the provisions cited by the Respondents; that all the authorities cited by the Respondents counsels dealt with general issues that fall under Article 189 and the relevant statutory provisions, and none dealt with the constitutional issues raised in this Petition; and that only the High Court has powers to interpret the constitution and to determine the constitutionality or otherwise of statutory provisions.

18. Counsel also pointed out that none of the Respondents had filed a Response to the Petition which could have helped the court to appreciate the nature of the dispute and that devolution is a fundamental issue and that the court has an obligation to protect devolution.

### ***Definition of a dispute under the Act***

19. One of the purposes of law is to regulate and guide relations in a society. One of the ways it does so is by providing remedies and facilitating access to courts and other *fora* for the settlement of disputes. As supreme law, the Constitution protects basic rights including the right to access courts.[26] Legislation based on the Constitution is supposed to concretize and enhance the protection of these rights, amongst others, by providing for the speedy resolution of disputes.

20. I am fully aware that **where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, parties should to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.**[27]

21. Article 189 (3) & (4) of the Constitution provides as follows:-

(3) *In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.*

(4) *National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.*

22. The legislation contemplated above is the Intergovernmental Relations Act[28] an "Act of Parliament

to establish a framework for consultation and co-operation 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."

23. Section 3 of the act provides the objects and purposes of the act which include to provide mechanisms for the resolution of intergovernmental disputes where they arise.[29] Part IV of the Act provides for Dispute Resolution Mechanisms. Section 30 (1) defines a Dispute under the Act unless the context otherwise requires as an "intergovernmental dispute." Section 30 (2) provides that Part IV shall apply to resolution of disputes (a) between the national government and a County Government or (b) amongst County governments.

24. What constitutes a dispute within the context of the Intergovernmental Relations Act[30]has received judicial construction by the High Court. In *Isiolo County Assembly Service Board & another vs Principal Secretary (Devolution) Ministry of Devolution and Planning & another*[31] Onguto J stated:-

*'The dispute must be between the two levels of government. It must not be between one or the other on the other hand and an individual or person on the other hand. A dispute between a person or State officer in his individual capacity seeking to achieve his own interest or rights would not equate an intergovernmental dispute. A dispute between two or more county governments would however equate an intergovernmental dispute: see section 30(2)(b) of the Act. By the better reason, it would also follow that where a state officer seeks through any means to advance the interest of a government, whether county or national, against another government whether county or national, then such a dispute would rank as an intergovernmental dispute.*

*What precisely amounts to an intergovernmental dispute is not expressly detailed either under the Constitution or the Act. Guidance may however be retrieved from both Articles 6 and 189 of the Constitution as well as from Section 32 of the Act. Articles 6 and 189 provide for respect, cooperation and consultation in the conduct of the two governments' mutual relations and functions. The focus appears to be performance of functions and exercise of powers of each respective level of government. Section 32 of the Act however appears to precipitate even a commercial dispute as an intergovernmental dispute when the Section expressly refers to "any agreement" between the two levels of government or between county governments. The agreement, in other words, is not limited to that of performing functions or powers or that of guiding relations.'*

25. I have no doubt in my mind that the Petitioner instituted this Petition seeking to enforce functions of the County Governments. On the other hand, the first to the sixth Respondents are state corporations undertaking various functions which the Petitioner states under the fourth Schedule to the Constitution are devolved functions and ought to be exercised by the County Governments. I find no difficulty concluding that the dispute raised in this Petition involves the two levels of Government as contemplated under the act and Articles 6 & 186 of the Constitution.

### **Whether this court has jurisdiction**

26. On principle it seems to me that in general a Court is bound to entertain proceedings that fall within its jurisdiction. Put differently, a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case.

27. *The South African Constitutional Court held in the matter between Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others*[32]had this to say:-

*"Jurisdiction is determined on the basis of the pleadings,[33]... and not the substantive merits of the case... In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including*

*in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant’s claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by.....{another court}, the High Court would lack jurisdiction..."*

28. The Petitioner invites this court to declare several provisions of the statutes establishing the first to sixth Respondents unconstitutional on grounds that the provisions vest in the first to sixth Respondents functions which are devolved functions under the constitution.

29. The first issue to address is whether this Petition raises constitutional issues and whether such issues can be resolved using the mechanism provided under the provisions cited in support of this objection. When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces us to consider constitutional rights or values.[\[34\]](#)

30. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others*[\[35\]](#) in which Justice O’Regan recalling the Constitutional Court’s observations in *S vs. Boesak*[\[36\]](#) notes that:-

*“The Constitution provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of .....the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”[\[37\]](#)*

31. Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation. [\[38\]](#) At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights, values, principles and purposes. Therefore the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organise an analysis of the nature of constitutional matters arising from the cases before the Court.

32. This Petition challenges constitutionality of provisions of several statutes on grounds that they offend the constitution. The provisions vest powers and functions to statutory bodies established under the various statutes which functions are said to be devolved functions under the Constitution. Determining this question will no doubt require the interpretation of the Constitution, its principles, purposes and values. I have no doubt in my mind that is a constitutional issue so far as it touches on the constitutionality of the challenged provisions.

33. The question that begs for an answer is whether the dispute resolution mechanism established under the Intergovernmental Relations Act[\[39\]](#) is competent to resolve a question relating to the interpretation of the Constitution or determination of constitutionality of Provisions of a statute?

34. Closely tied to this question is whether the provisions cited by the counsels for Respondents oust the jurisdiction of this court to determine this Petition. Can the dispute resolution mechanism cited as the basis of this objection resolve constitutional questions discussed above?

35. Article **165 (3) (d)** of the Constitution provides that the High Court shall have jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of-

- i. The question whether any law is inconsistent with or in contravention of this Constitution;
- ii. The question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution;
- iii. Any matter relating to constitutional powers of state organs in respect of county governments and any matter relating to the constitutional relationship between the two levels of governments;

36. From the above constitutional provisions and the Petition before me, the following fundamental issues emerge, namely; **(i)** the impugned provisions relate to functions, principles and values enshrined in the constitution, such as Devolution; **(ii)** the Respondents are performing functions which the constitution vests in the devolved units, **(iii)** the constitutionality of the said provisions is in question and **(iv)** Article 260 of the Constitution defines a state organ to include any body established by the Constitution. The Petitioner and the Respondents are state organs and are subject to the jurisdiction of the High Court as provided for in Article **165 (3) (d) (ii) and (iii)**.

37. Article **165 (6)** provides that "The High Court has **supervisory jurisdiction** over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function."

38. The Court is reminded of the words of **Mahomed, Ag. JA** in Namibian case of *S v Acheson*<sup>[40]</sup> that:-

*“the constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.”*

39. Counsels for the Respondents submitted that the Constitution has placed great emphasis in resolving disputes between the two levels of government through an intergovernmental dispute resolution mechanism and that is the proper mechanism to resolve the present dispute and that this Court should be a last resort.

**40. Article 6** of the Constitution which must be read with **Article 189** of the provides that;

*“The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation”.*

41. The reasoning behind the ouster clauses can easily be construed to be the need to promote good relations between the levels of government; that alternative dispute resolution mechanisms should be sought between the national government and the county governments and in the case of counties, among themselves. Article **6** of the Constitution requires the two levels of government to conduct their mutual relations on the basis of consultation and co-operation.

42. Section **31** of the act provides for the measures to be undertaken in dispute resolution as follows:-

*“31. The national and county governments shall take all reasonable measures to—(a) resolve disputes amicably; and*

*(b) apply and exhaust the mechanisms for alternative dispute resolution provided under this Act or any other legislation before resorting to judicial proceedings as contemplated by Article 189(3) and (4) of the Constitution.”*

43. 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.” Judicial proceedings are therefore considered as a last resort. In fact our courts have on numerous occasions held that whenever an Act of Parliament provides for a clear procedure or mechanism of redress, the same ought to be strictly followed.[\[41\]](#)

44. I have no doubt that alternative dispute resolution processes are complementary to the judicial process and by virtue of Article 159(2)(c) of the Constitution, the Court is obligated to promote these modes of alternative dispute resolution. A Court is entitled to either stay the proceedings until such a time as the alternative remedy has been pursued or bring an end to the proceedings before the Court and leave the parties to pursue the alternative remedy.[\[42\]](#) I have no doubt that the place of alternative dispute resolution is respected by the courts and this court is no exception.

45. In view of the important requirements of co-operative government, a court, including this Court, will rarely decide an intergovernmental dispute unless the organs of state involved in the dispute have made every reasonable effort to resolve it. When exercising a discretion, this Court must thus bear in mind that the Constitution contemplates that organs of state must make every reasonable effort to resolve intergovernmental disputes before having recourse to the courts.

46. However, can the dispute disclosed in this Petition involving determining the constitutionality or otherwise of the impugned provisions fall within the disputes contemplated by the Act? Can such a dispute can be resolved within the confines of the Act? Can the mechanism contemplated determine constitutionality of provisions of a statute?

47. Should this court decline jurisdiction owing to the above clear provisions of the law establishing a dispute resolution mechanism. I am conscious of the fact that the right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes. Construed in this context of the rule of law, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable. This is the test the court should bear in mind when invited to decline jurisdiction.

48. Are there powerful considerations for this court to hold that the Petition is not properly before this court? Granted, the mandate of determining the constitutionality of provisions of a statute is vested in the High Court. If the dispute was to be subjected to the dispute resolution mechanism contemplated under the act, will it be possible for the mechanism to determine the constitutionality or otherwise of the provisions in question and grant an effective remedy?

49. The need for an effective remedy in a case may justify this court to take the exceptional course of entertaining a dispute where the court is satisfied that the laid down statutory mechanism may not provide an effective remedy to the aggrieved party or if it is clear the dispute disclosed by the facts substantially or wholly lies outside the scope of the laid down statutory mechanism.

50. What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred or will occur or there is a clear violation of the Constitution and that there is no alternative effective remedy within the statutory established mechanism.

51. Given the nature of the complaint in this Petition, I am clear in my mind that the mechanism used as a shield to challenge this court's jurisdiction cannot grant an effective remedy if this dispute were to be subjected to the said mechanism. Put bluntly, the constitution is very clear on where the jurisdiction to determine constitutionality of statutes lies, it is vested in the High court. No other body or person in this country has the jurisdiction to determine constitutionality of provisions of a statute.

52. It is also important to bear in mind the Constitutional command in Article 259 of the Constitution which obligates this court to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human Rights and Fundamental Freedoms in the Bill of Rights and

permits the development of the law and contributes to good governance. It is my view that declining jurisdiction in this case will be a restrictive interpretation of the constitution which would go against the great command in Article 259.

53. Consistently with this, when the constitutionality of legislation is in issue, the court is under a duty to exercise its jurisdiction under Article 165 and examine the objects and purport of the Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.<sup>[43]</sup> The court cannot delegate this sacrosanct constitutional mandate to another person or body. Declining jurisdiction in such a case would in my view amount to declining to exercise its constitutional mandate. It would be treason to the Constitution. The court must remain faithful to its constitutional mandate and uphold the Constitution always and not to stifle it.

54. My reading of Articles 165 of the Constitution and the provisions cited by the Respondents leave me with no doubt that this court has powers to entertain this case and determine the constitutionality or otherwise of the challenged provisions. I am persuaded that an effective remedy for the issues raised in this Petition if proved is not available through the mechanism under the relevant provision of the Intergovernmental Relation Act<sup>[44]</sup> cited in this objection. Put bluntly, the laid down mechanism cannot address constitutional issues such as those alleged in this Petition.

55. The Constitution is also concerned that the entire legal system, including dispute resolution mechanisms cited must accord with the broader values of the Constitution by determining only disputes which fall within the scope of their mandate. Determining constitutional questions such as constitutionality or otherwise of provisions of a statute in my view falls outside the scope of their mandate and would amount to usurping the powers of the High Court under Article 165.

56. In a constitutional democracy like ours, where the substantive enjoyment of rights and dispute resolution has a high premium, it is important that any existing statutory remedy be an effective one. A remedy will be effective if it is objectively implemented, taking into account the relevant principles and values of administrative justice present in the Constitution and our law.

57. The “deepest norms” of the Constitution should determine whether the dispute involves explicit constitutional adjudication, or whether it could safely be left to the statutory provisions. In my view, determining constitutionality of a provision in a statute is a constitutional mandate of the High Court which is empowered under the Constitution to scrutinize the provisions and decide whether they accord with the demands of the Constitution. Thus, this dispute is properly before this court.

58. Mindful of the imperative to read legislation in conformity with the Constitution, but only to do so when that reading would not unduly strain the legislation, I find that the said provisions do not oust the jurisdiction of this court to determine the issues raised in this Petition. Put differently, the provisions of Article 165 must prevail over the statutory provisions in question.

59. Article 2 (4) on the supremacy of the constitution provides that "any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid." Article 165 (3) (d) (i) provides that the High court has jurisdiction to determine the question whether any law is inconsistent with or in contravention of the Constitution.

### **Whether the Petition is incurably defective**

60. *Counsel for the second Respondent argued that the Petition is incurably defective and incompetent in that the Council of Governors has no capacity to sue or be sued<sup>[45]</sup> and that the deponent of the supporting affidavit has no authority to swear the affidavit. However, I note that the authorities cited dealt with, self help groups, registered as Community Based Organizations and can be distinguished from the present case. Such Self Help Groups are not legal entities.*

61. My view on the said authorities is that it is settled law that a case is only an authority for what it

decides. This was correctly observed in *State of Orissa v. Sudhansu Sekhar Misra* where it was held:-[46]

*"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury, LC said in *Quinn vs. Leatham*, [47] that "Now before discussing the case of *Allen vs. Flood* [48] and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides...." (Emphasis added)*

62. The ratio of any decision must be understood in the background of the facts of that case.[49] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.[50] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[51]

63. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[52] In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[53] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[54] My plea is to keep the path of justice clear of obstructions which could impede it.

64. Council of County Governors is established under Section 19 of the Act. Section 20 stipulates its functions which include providing a forum for consultation amongst county governments; sharing of information on the performance of the counties in the execution of their functions with the objective of learning and promotion of best practice and where necessary, initiating preventive or corrective action; **considering matters of common interest to county governments;** dispute resolution between counties within the framework provided under the Act; facilitating capacity building for governors; receiving reports and monitoring the implementation of inter-county agreements on inter-county projects; consideration of matters referred to the Council by a member of the public; consideration of reports from other intergovernmental forums on matters affecting national and county interests or relating to the performance of counties; and performing any other function as may be conferred on it by the Act or any other legislation **or that it may consider necessary or appropriate.**

65. Guidance can be obtained from the High Court decision in the case of *Governor of Kericho County vs Kenya Tea Development Agency & 30 others Ex-Parte Ktda Management Services Limited* [55] where the Court addressed an objection raised regarding the capacity of the Governor of Kericho County to sue in the incident case, as follows; (paragraph 22-27)

22. *"The Constitution vests the executive authority of a county in its county executive committee consisting of the county governor, his deputy and members of his cabinet (CEC members). The Governor is directly elected representative elected by registered voters of a county. Under Article 179(4), a Governor is the chief executive of a county. The Governor performs various duties and functions as set out under the Constitution and the law. This includes representing the county in national and international fora and events. In performing these duties, a county governor is tasked to among other things, 'provide leadership in the county's governance and development', to 'promote democracy, good governance, unity and cohesion within the county; and to 'promote the competitiveness of the county' (See section 30(3) of the County Governments Act).*

23. *The respondents have urged this court that the Governor of Kericho, being non-juristic person is stripped of the capacity to sue on behalf of his residents, the tea farmers. That the title 'Governor' confers upon the petitioner executive authority thus, he ought to have sued in his own*

name.

24. *The State and every State organ bear a fundamental duty to observe, respect, fulfil, protect and promote the rights and fundamental freedoms in the Bill of Rights under Article 21(1). Indeed, defence of the Constitution is an obligation for each and every one of us as stipulated under Article 3(1) of the Constitution. As the chief executive officer of a county, a governor must surely be able to do just that. It is then for the Court to determine the merits of the case brought before it.*

25. *Moreover, Article 22 lifted the veil on the hitherto locus standi doctrine that for a long time blocked many a people from accessing justice. Under this provision, "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 is threatened". Further under Article 258(1), "Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention". In both cases, a person can institute proceedings in their own interest, they may institute in the interest of a group or class of persons.*

26. *Access to justice is a fundamental right guaranteed to 'all persons' and if public interest litigation, as in this case would ensure access to justice for the majority of tea farmers, then this Court should not shut its door to those who seek its reprieve. We do not find any provision in the Constitution or legislation limiting a county governor or other person exercising executive or other authority from instituting such suit. The definition of the term 'person' under Article 260 only further expounds on this definition. If only for argument sake, what would change in the substance of the suit before us to substitute the word 'Governor' with Paul Chepkwony the current governor of Kericho or to even add a hyphen and the Governor's name"*

27. *In adopting an interpretation that supports national values enshrined under Article 10, that supports the principles of exercise of judicial authority espoused under Article 159 and in conformity with Article 259 on how we must construe the Constitution of the land, we have reached a finding that the Governor is a proper party to sue. Access to justice is a fundamental right guaranteed to all persons and if public interest litigation, as in this case would ensure access to justice for the tea farmers, then this Court should not shut its door to those who knock it. We do not find the suit to be frivolous."*

66. The Supreme Court of Kenya has also given its voice to the issue of *locus standi* in the case of *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others* [56] The main argument raised in the application was that the 1<sup>st</sup> respondent, an NGO, did not have the *locus standi* to file an appeal as it had been deregistered and, thus, legally non-existent. Counsel for the applicant argued that the 1<sup>st</sup> respondent could not sue or be sued, and consequently, the appeal before Court was incompetent. Quite to the contrary, counsel for the 1<sup>st</sup> respondent urged the Court to take into account the right of access to justice, under Article 48 of the Constitution, as well as the principle of administering justice without undue regard to procedural technicalities, under Article 159(2)(d). The 1<sup>st</sup> respondent, in the instant matter, submitted that if the Court were to determine that it did not have *locus standi*, the Court should consider on whose behalf the matter was filed.

67. The Learned Justices held at paragraph 70:-

*"It is clear to us that the application herein and the Petition of Appeal which the 1st respondent had filed earlier, involve constitutional questions which are public in nature. "Public interest" is defined in Black's Law Dictionary, 9th Edition (page 1350) as: "the general welfare of the public that warrants recognition and protection" or "something in which the public as a whole has a stake, especially an interest that justifies governmental regulation". In the appeal, the 1st respondent alleges that the appointment of the applicant was not in accordance with the Constitution. Even though the 1<sup>st</sup> respondent was not directly aggrieved, it filed an appeal in this Court on behalf of the public at large."*

68. The learned Justices added that the NGO Act (and any other statute) must be interpreted in conformity with the Constitution. They stated that although Section 12(2) and (3) of the Act provides for the legal status of the 1<sup>st</sup> respondent, when read together with Articles 22, 258 and 260 of the Constitution, and in the public interest, *it is to be inferred that the 1st respondent did not lose its locus standi, even if it were to be assumed to have lacked registered status.* The three Articles give an enlarged view of *locus standi*, to the effect that every “person”, including persons acting in the public interest, can move a Court of law contesting infringements of any provisions in the Bill of Rights, or the Constitution.

69. The learned Justices considered the element of public interest, in terms of Article 159 of the Constitution. Without minimizing the importance of every aspect of Article 159(2) of the Constitution, it was held, from the special facts of the case, that the act of deregistering the 1st respondent under the NGO Act, had not deprived that respondent of the standing in law to lodge an appeal before the Court, in a matter of public interest.

70. The Council of Governors is without doubt established by statute. Its functions are outlined under Section 20 of the Intergovernmental Relations Act.<sup>[57]</sup> By its very name the Council is composed of governors who derive their mandate from the public. Apart from representing the interests of the individual county governments and counties they govern, they hold an even higher responsibility as a Council, that of representing their counties’/county governments’ interests. Matters devolution cannot be divorced from public interest. The counties are composed of the public. On the argument that the Council is not a body corporate/ juristic person, I stand guided by the above cited cases above. To hold otherwise would in my view amount to a restrictive interpretation of the Constitution and an affront to Article 259.

71. The Intergovernmental Relations Act<sup>[58]</sup> must be read in conformity with the Constitution. The provisions of **Article 22** have lifted the veil on the hitherto *locus standi* doctrine that for a long time blocked many a people from accessing justice. Under this provision, “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 is threatened”. Further under **Article 258(1)**, “**Every person** has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.” In both cases, a person can institute proceedings in their own interest, they may institute in the interest of a group or class of persons. **Article 260** seals it all by defining the term ‘**Person**’ to **include a company, association or other body of persons whether incorporated or unincorporated.**

72. In this instance I find that the Council of governors fits well under Article **258(1)** and all enabling Articles of the Constitution in that; they have instituted proceedings claiming contravention or threatened violation of the Constitution; they represent individual, county and national interest; the petition lodged and the issues raised therein raise constitutional matters of public interest. Consequently, I find and hold that the Petitioner has capacity and indeed the right to file this petition before this Court.

73. On the question of "incompetence for want of compliance," the 2<sup>nd</sup> Respondent's counsel submitted that the affidavit sworn in support of the petition is undated. Further, that the deponent, Jacqueline Mogeni, describes herself as the Chief Executive Officer (CEO) of the Council. The main contention is that there is no office called CEO of Council, hence the deponent is a stranger under the Act and lacks authority to swear affidavit on behalf of the petitioner.

74. Article **159(2) (d)** enjoins the Courts to exercise judicial authority, and to administer justice without undue regard to procedural technicalities. Any party is allowed to amend its pleadings at any stage of the proceedings with the leave of Court, as provided under **Rule 18** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedural rules, 2013. This ground does not lock the doors of this Court for the Petitioner nor does it qualify to be a ground for a preliminary objection on a point of law.

75. Also relevant is the dicta of Fletcher Moulton L. J. in *Dyson Vs. Attorney General*<sup>[59]</sup>

*“...To my mind, it is evident that our judicial system would never permit a plaintiff to be “driven from the judgment seat” in this way without any court having considered his right to be heard,*

excepting in cases where the cause of action was obviously and almost incontestably bad".  
(Emphasis added)

76. Our Constitution requires a purposive approach to statutory interpretation. Rule 3 of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides for the scope of the Rules and their overriding objective which is to facilitate access to courts under Article 48 of the Constitution. Rule 3 commands this court to interpret the Rules in accordance with Article 259 (1) of the constitution with a view to advancing and realizing the rights and freedoms enshrined in the Bill of Rights and values and principles of the constitution.

### **Determination**

77. Applying the constitutional provisions cited above and the principles laid down in the law and the above authorities, the conclusion becomes irresistible that the preliminary objection raised in this case has no substance in law and has no merits at all and therefore it is unsustainable. *I find myself unable to uphold the preliminary objection.* I dismiss it with no orders as to costs.

Orders accordingly.

Signed, Delivered, Dated at Nairobi this 27<sup>th</sup> day of November 2017

**John M. Mativo**

**Judge**

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[1] Njeri Githang'a, Law Reporter, June 2013, <http://kenyalaw.org/kenyalawblog/a-compilation-of-summaries-of-selected-cases-on-the-interpretation-of-the-constitution-of-kenya-2010/>. Accessed on 24<sup>th</sup> November 2017

[2] Ibid

[3] Ibid

[4] The Law Society of Kenya vs The Kenya Revenue Authority & Another , Pet No. 39 of 2017

[5] Article 10 (1) (a)-(e)

[6] Article 6

[7] Part 5 of the Constitution

[8] Act No. 2 of 2012

[9] See Wallis JA dealt with the matter as follows in **Natal Joint Municipal Pension Fund vs Endumeni Municipality** 2012 (4) SA 593 (SCA) at para [18]

[10] Supra

[11] Cap 442, Laws of Kenya

[12] Cap 441, Laws of Kenya

[13] Cap 443, Laws of Kenya

[14] Cap 447, Laws of Kenya

[15] Cap 449, Laws of Kenya

[16] Cap 448, Laws of Kenya

[17] Pursuant to Articles 185 (2), 186 (1) and 187 (2)

[18] See Article 174 of the Constitution

[19] Act No 2 of 2012

[20] Act No. 2 of 2012

[21] Ibid

[22] Ibid

[23] Counsel cited The Hasbury's Laws of England, Vol. 10, para 319, 723, Narok County Council vs Transmara County Council {2000}1 EA, Eliud Wafula Maelo vs Ministry of Agriculture & 3 Others {2016} eKLR & Isiolo County Assembly Service Board & Another vs The Principal Secretary (Devolution) Ministry of Devolution and Planning & Another, NBI Constitutional Petition No. 370 of 2015

[24] Supra

[25] The Speaker of the National Assembly vs Karume {2008} 1KLR, Narok County Council vs Trans Mara County Council & Another, Civil Appeal No. 25 of 2000 cited.

[26] Article 48 of the Constitution

[27] See Kones vs. Republic & Another Ex parte Kimani Wa Nyoike & 4 Others {2008} 3 KLR (ER) 296) & **Speaker of the National Assembly vs Karume, Civil Application No. NAI 92 of 1992**

[28] Act No. 2 of 2012

[29] Ibid, section 3 (f)

[30] Ibid

[31] {2016} eKLR

[32] Case CCT 64/08 [2009] ZACC 26

[33] Fraser v ABSA Bank Ltd [2006] ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC) at para 40.

[34] Justice Langa in Minister of Safety & Security v Luiters, {2007} 28 ILJ 133 (CC)

[35] {2002} 23 ILJ 81 (CC)

[36] {2001} (1) SA 912 (CC)

[37] 2001 (1) SA 912 (CC)

[38] Supra note 5 at paragraph 23

[39] Supra

[40] [1991 \(2\) SA 805](#) (Nm HC) at 813

[41] [Speaker of the National Assembly vs Karume {2008} 1KLR 425](#) and [Kones vs. Republic & Another Ex parte Kimani Wa Nyoike & 4 Others{2008} 3 KLR \(ER\) 296](#)).

[42] [Majanja J in Dickson Mukweluine v Attorney General & 4 Others Nrb HCC Petition No.390 of 2012](#)

[43] [Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors: In Re Hyundai Motor Distributors \(Pty\) Ltd and Others v Smit NO and Others \[2000\] ZACC 12; 2001\(1\) SA 545; 2000 \(10\) BCLR 1079 \(CC\) at para 22.](#)

[44] Supra

[45] Counsel cited [Kipsiwo Community Self Help Group vs A.G & 6 Others {2013}eKLR](#), [Joseph M. Kirui & Others vs Ministry of Forestry & Wildlife & Others {2014}eKLR](#) & [Saaka Saaka Community Internally Displaced Persons Group vs Ministry of State for Social Programmes & Another {2014}eKLR](#)

[46] [MANU/SC/0047/1967](#)

[47] {1901} AC 495

[48] {1898} AC 1

[49] [Ambica Quarry Works vs. State of Gujarat and Ors. MANU/SC/0049/1986](#)

[50] Ibid

[51] [Bhavnagar University v. Palitana Sugar Mills Pvt Ltd \(2003\) 2 SC 111 \(vide para 59\)](#)

[52] [In the High Court of Delhi at New Delhi February 26, 2007 W.P.\(C\).No.6254/2006, Prashant Vats Versus University of Delhi & Anr. \(Citing Lord Denning\).](#)

[53] Ibid

[54] Ibid

[55] {2016 eKLR

[56] {2014} eKLR (Civil Application No. 29 of 2014

[57] Supra

[58] Supra

[59] {1911} KB 418