REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 99 OF 2015

INTERNATIONAL LEGAL

CONSULTANCY GROUP……...……....……..…..1ST PETITIONER

THE COUNCIL OF GOVERNORS…….....…..……..2ND PETITIONER

VERSUS

THE MINISTRY OF HEALTH……..……1ST RESPONDENT

THE CABINET SECRETARY FOR HEALTH ..…..…….2ND RESPONDENT

THE DIRECTOR OF MEDICAL SERVICES…..…...…..3RD RESPONDENT

PRINCIPAL SECRETARY,

MINISTRY OF HEALTH…….…….... 4TH RESPONDENT

PRINCIPAL SECRETARY,

NATIONAL TREASURY……5TH RESPONDENT

THE ATTORNEY GENERAL…… 6TH RESPONDENT

AND

THE COMMISSION FOR THE IMPLEMENTATION

OF THE CONSTITUTION……..….1ST INTERESTED PARTY

COMMISSION FOR REVENUE

ALLOCATION……....2ND INTERESTED PARTY

THE 47 COUNTY GOVERNNORS……..3RD- 49TH INTERESTED PARTY

THE TRANSITION AUTHORITY…..…….. 50TH INTERESTED PARTY

JUDGMENT

Introduction

1. This petition concerns the division of functions between the national and county governments in relation to health. It arises out of a decision by the national government, through the Ministry of Health, to procure certain medical equipment to be used in health facilities throughout the country. The petitioners argue that the actions of the national government are unconstitutional as they violate the division of functions between national and county governments.

2. The 1st petitioner, International Legal Consultancy Group, describes itself as a public interest organization that champions the observance of the rule of law.

3. Pursuant to an application made on its behalf, the Council of Governors, a statutory body established under section 19 of the Intergovernmental Relations Act, No. 2 of 2012, and comprising the Governors of the 47 counties, was joined to the proceedings as the 2nd petitioner on the 21st of July 2015. For the purposes of this judgment, the 1st and 2nd petitioners, whose alleged claim against the respondents is the same in all material respects, shall together be referred to as the petitioners.

4. The petitioners filed the petition against the 1st respondent, the Ministry responsible for health at the national government level (hereafter **"the Ministry"**) as well as the Cabinet Secretary responsible for the Ministry of health as the 2nd respondent. The 3rd respondent is an office in the Ministry of Health that is responsible for medical services, while the 4th respondent is the accounting officer at the said Ministry. The 5th respondent is the accounting officer at the National Treasury, while the office of the Attorney General (hereafter **"AG**"), established under Article 156 of the Constitution as the principal legal advisor of the national government, has been joined as the 6th respondent.
5. The 1st petitioner also joined the Commission on the Implementation of the Constitution and the Commission on Revenue Allocation as the 1st and 2nd interested party respectively. These Commissions did not file any pleadings or participate in the proceedings in any way.

6. Similarly, though the governors of the 47 counties were joined as the 3rd to the 49th interested parties, and the Transition Authority as the 50th interested party, they too, did not file pleadings or participate in the proceedings in any way.

Background

7. The petitioners are aggrieved by the facts, gleaned from the media, that the national government had signed a deal worth Kshs38 billion with some service providers for the provision of certain medical equipment to selected medical facilities at the county government level. The petitioners therefore filed their petition dated 16th March, 2015 challenging the constitutionality of the said acts of the national government. They allege that the national government has since drafted a Memorandum of Understanding (MOU) in which it seeks to incorporate county governments in the transaction. The petitioners allege that in the MOU, the Ministry of Health has disclosed that it invited tenders for the medical services equipment on 11th July, 2014.

8. The petitioners contend that as at this date, the Ministry had not executed the requisite inter-governmental agreement as required by Article 187 of the Constitution with respect to devolved health functions. They therefore contend that the respondents are in violation of the requirements of Article 187, hence the present petition in which they seek various orders, inter alia, that the national government cannot enter into agreements to procure equipment for county governments

without having entered the requisite agreements in accordance with Article 187.

The Petitioners' Case

9. The petitioners' case is set out in the petition and the affidavit in support sworn by Mr. Miller Ateka, the 1st petitioner's Advocacy Manager, on 16th March 2015. The 2nd petitioner also filed an affidavit in support of its application to be enjoined as a party, sworn by its then Chairman, Mr. Isaac Ruto, on 6th May 2015.

10. In his affidavit, Mr. Ateka deposes that in accordance with the Fourth Schedule of the Constitution, health services, with the exception of national referral health facilities and health policy, have been devolved to the county governments. Consequently, the decision of the Ministry to invite tenders for devolved health functions on 11th July, 2014 was unilateral as no county government was consulted. He avers further that despite indications from the Governors of the various counties that the Ministry was overstepping its constitutional mandate, the Ministry has proceeded to pressurize county governments to sign a Memorandum of Understanding with respect to the medical equipment without disclosing to the county governments the contracts it has executed with the medical equipment providers. Further, that as the county governments are not parties to the contracts signed by the Ministry, the Ministry is, through the MOU, trying to impose on counties the unknown terms of these agreements, and Mr. Ateka avers that the national government should disclose the terms of these contracts.

11. It is his further deposition that the Commission on the Implementation of the Constitution (CIC) had, by a letter dated 9th February, 2015, informed the Ministry of Health of the fact that county health facilities had been fully devolved via a Transition Authority Gazette Notice of 9th August, 2013. CIC had also requested for the documents relating to the transaction to verify compliance with the Constitution.

12. In his affidavit, Mr. Ruto repeats the factual averments by Mr. Ateka. He also makes various averments with respect to the actions taken by county governments with respect to improvement of health services in the counties, as well as the challenges and the proposed resolutions of the financing challenges in respect of medical equipment for health facilities in county health institutions.

13. The petitioners asserted that the provision of health services has been devolved to counties under the Fourth Schedule of the Constitution. They contend that a function or power of government at one level may be transferred to a government at the other level by agreement between the governments, but that such function or power may only be transferred if it would be more effectively performed or exercised by the receiving government, and on the basis of an agreement between the two levels of government. They contend that there is no agreement between the counties and the national government for the transfer of the health function or a part thereof, and that the MOU with the county governments does not amount to such an agreement due to its unilateral nature and outright exclusion of the concerns of county governments. It was their case therefore that the entire transaction involving the medical equipment does not conform to the requirements of Article 187 of the Constitution.

14. In his submissions on behalf of the petitioners, Learned Counsel, Mr. Wanyama, argued that the Constitution has significantly devolved the health function except the management of two referral hospitals. Article 187 provided for one level of government to undertake the functions of another if the receiving government will effectively perform the transferred functions, and if the transfer is not prohibited by legislation. The transfer of function should, in accordance with Article 187(2), be done by way of an agreement between the two levels of government, and adequate resources should accompany the transfer.

15. Mr. Wanyama disputed the national government's claim that it had consulted with county

governments. It was his submission that Article 183 of the Constitution provides that the executive authority of the county is vested in the county executive headed by the Governor, and not in the persons known as a county executive committee member responsible for health which the respondents say was consulted.

16. With respect to the national government's argument that it was involved in capacity building and technical assistance for counties, Mr. Wanyama submitted that under the Constitution, capacity building and technical assistance is not a function that can be used to take over procurement of medical equipment for facilities devolved to counties. Further, that formulation of health policy, which was the mandate of the national government, could not be used to undertake health functions for counties. Accordingly, in the petitioners' view, the national government could not properly claim, as it had, that the monies in the Division of Revenue Act, which appeared as funds for leasing of medical equipment for facilities devolved to the counties, were for capacity building or policy.

17. The petitioners argued further that the national government cannot, under Article 203 of the Constitution, be allocated funds for functions which are devolved. If the national government wished to operate in the counties, it could only do so in accordance with Article 202 of the Constitution. Mr. Wanyama submitted that in any event, the money for the equipment appears in the Division of Revenue Act as a conditional grant to counties, in which case such monies would be managed by the counties. The petitioners therefore asked the Court to allow the petition and grant the following orders and declarations:

a. ***A declaration that within the intendment of Article 10 of the Constitution and resonating the intention of Article 201 (a) of the Constitution, the respondents are bound to discharge their public duties in an open and transparent manner.***

b. ***A declaration that within the intention of Article 6 (2), 189 (1) (a) (b) and 189 (2) and 259 (11) of the Constitution, the national government cannot procure for health care services/equipment and undertake devolved health care functions without executing requisite intergovernmental agreements as required by Article 187 of the Constitution.***

c. ***A declaration that within the interment of Article 202 (2) of the Constitution, the only mechanisms for national government to fund devolved functions is through allocations of conditional/unconditional grants to the Counties from its own share of the national revenue.***

d. ***A permanent injunction be issued to restrain the respondents from implementing the impugned contracts with Shenzen Mindray Bio-Medical Electronics Co. Ltd, Esteem Industries Inc, Bellco S.r.l, Philips Medical Systems Nederland BV and GE East Africa Services Limited, with respect to devolved health services.***

e. ***An order directing the Principal Secretary, Health and the Principal Secretary National Treasury not to pay Shenzen Mindray Bio-Medical Electronics Co. Ltd, Esteem Industries Inc, Bellco S.r.l, Philips Medical Systems Nederland BV and GE East Africa Services Limited any sums from the consolidated fund or from any accounts held at Central Bank of Kenya or any Commercial Bank in Kenya or from public funds on account of the impugned contracts to the extent that these contracts cover devolved health services.***

f. ***An order be issued to the respondents to comply with the provisions of Article 187 of the Constitution with respect to contracts it has executed with Shenzen Mindray Bio-Medical Electronics Co. Ltd, Esteem Industries Inc, Bellco S.r.l, Philips Medical Systems Nederland BV and GE East Africa Services Limited that cover devolved health services.***

g. ***An order be issued directing the respondents to provide the County Governments the contracts it has with Shenzen Mindray Bio-Medical Electronics Co. Ltd, Esteem Industries Inc, Bellco S.r.l, Philips Medical Systems Nederland BV and GE East Africa Services Limited that cover devolved***

health services.

h. ***There be no order as to costs***.

The Case for the Respondents

18. The respondents oppose the petition and have filed a Notice of Preliminary Objection dated 25th March, 2015, Grounds of Opposition dated 25th March, 2015, and a Replying Affidavit sworn on their behalf by Dr. Nicholas Muraguri, the Director of Medical Services, on 9th June, 2015.

19. The respondents raise the preliminary objection that the matters raised in this petition are within the realm of procurement and ought to have been brought as proceedings in the appropriate forum as required by the **Public Procurement and Disposal Act**. It is also their argument that the MOU in question between the county governments and the Ministry is in accord with the constitutional requirement in Article 189 (2) of the Constitution with regard to co-operation between different levels of Government.

20. In the respondent's Grounds of Opposition (which pre-dated the joinder of the 2nd petitioner) and were directed primarily at the application for conservatory orders, the respondents argued that the (1st) petitioner had no legal capacity to commence these proceedings. They also argued that the application should be struck out as it was unsupported by any evidence but was based on mere hearsay.

21. The respondents have also, in their written submissions, questioned the jurisdiction of this Court to deal with the matters in dispute. They submit, on the authority of the decision in **Alphonse Mwangemi Munga vs African Safari Club [2008] eKLR** that the petitioners had an alternative forum provided under the **Intergovernmental Relations Act** for the resolution of the matters at issue, and they have not demonstrated that they used that process before approaching the Court.

22. With respect to the substance of the petition, the respondents relied on the affidavit of Dr. Muraguri sworn on 9th June 2015. In the said affidavit, Dr. Muraguri deposes that the roll out of the medical equipment, following the execution of the MOU by county governments, was already ongoing in some counties. For the Court, therefore, to grant any orders halting the roll-out on the basis of unfounded allegation made in the petition would be unjust to members of the public who had to travel from the counties to Kenyatta National Referral Hospital for treatment.

23. It was his deposition that due to lack of medical equipment in the counties, medical services have been affected, with the result that the counties send many of their patients to Kenyatta National Referral Hospital. As a result, the equipment and services at the Kenyatta National Referral Hospital have been stretched beyond its institutional capacity.

24. Dr. Muraguri further averred that patients had to wait, sometimes for years, for treatment for life threatening conditions or diseases. Now that they had been accorded an opportunity to be attended quickly and with more modern equipment and services, the Court should not be used by the petitioners for their ulterior motives. It was his deposition that the roll-out of the medical equipment and services was justified by the saving of lives in the counties. To illustrate, he deposed that if the rolling out of the medical equipment is stalled, there were chances that the more than 10, 000 patients who need dialysis may suffer untold complications while waiting for treatment at the Kenyatta National Hospital.

25. Dr. Muraguri further argued that decent medical treatment is not a preserve of the urbanites hence the roll out of equipment and services to the counties. He observed that the respondents had rolled out, without any complaints from the petitioners, a programme to train thousands of doctors at the county level. In his view, without equipment, such training would not be of help in the counties, and the respondents are merely attempting to heal the hitherto ailing health sector by exposing the

medical sector and personnel to high technology equipment and sectorial capacity building which would have the effect of filling in the service delivery gaps in the sector.

26. Dr. Muraguri made further averments with respect to the benefits to the health sector and to patients within the country of the roll-out of the medical equipment, which I need not go into here.

27. It was the respondents' case that they had not placed any financial obligations on the counties, nor had they sought to obtain any share of the revenues earned by the county governments from equipment and services offered by the programme. Their position was that the provision of the equipment from the manufacturers through the national government offers the entire national economy a chance to enjoy great value in terms of economies of scale that come with bulk supply by the original equipment manufacturers. Further, by the provision of the equipment on a lease basis, the country will enjoy the services over a long time through periodic payments of funds which the country does not have in a lump sum at the moment, and the improvement in the health of the citizens in the long run is worth this arrangement.

28. The respondents argued, further, that there is great benefit through the leasing arrangement in that the equipment will only be paid for while it is working, thus ensuring minimum down time. In addition, leasing the equipment will enable the government avoid being tied down by obsolete equipment as technology constantly changes, that it will have no problems in disposal of such obsolete equipment, and the arrangement ensures constant availing of the newest technology each time.

29. The respondents further argued that the (3^{rd} -49^{th}) interested parties, the governors of the counties, were consulted all along during the planning and the feasibility studies which involved all the counties; that there was also vide consultations with the (3^{rd} -49^{th}) interested parties with respect to the equipment and services, and the hospitals in which the medical equipment and services would be established and provided were identified by a team in the Ministry of Health in conjunction with officers from county governments, and the county governments validated the establishments that were to receive the services.

30. The respondents therefore took the position that the benefits of the contracts for the supply of medical equipment will be colossal; that they had a duty under the Constitution to provide and support the highest attainable standards of health throughout the country; that they are under a duty to ensure that emergency medical treatment is available to any person who needs it all over the republic for the purpose of saving lives; and that the services to be provided at the county level will greatly reduce the movement of patients from the counties to national referral health facilities, thus saving patients the hassle and cost of travel while in ill health.
31. The respondents further argued that the contracts had already been signed and are in the execution or implementation stage, and third party interests have also accrued to the medical service equipment suppliers. In addition, it was their case that many county governments have already executed the MOU to benefit their constituents.

32. In his submissions on behalf of the respondents, Learned State Counsel, Mr. Njoroge, submitted that on 22^{nd} October, 2013, County Executive Members of health had met with the Cabinet Secretary of health; that what signifies whether the county government accepted or rejected the national government plan is the signature on the MOU between the national government and the county; and once the MOU was signed, the national government was not required to look behind to establish what happens at the county level.

33. Mr. Njoroge further submitted that the allegation by the petitioners that the counties were under pressure to sign the MOU were unfounded, and no evidence has been brought before the Court to show such pressure.

34. Counsel further submitted that the allocation of funds under the Allocation of Revenue Act was not a matter for this Court, and further, that the issues raised in this petition do not relate to the

Act. He submitted that the two levels of government are inter–dependent; that Article 187 of the Constitution deals with the transfer of powers while under the Fourth Schedule, the national government is tasked with capacity building within counties and the provision of managed medical equipment is one form of capacity building.

35. With regard to the requirements of Article 187 of the Constitution and whether there was violation thereof, the respondents submitted that there was no transfer of functions but an urgent intervention, brought about by the need for a broad policy approach to the health situation in the country. In their view, if a decision is made that health equipment should be purchased wholesale, this is a policy of the national government which the petitioners should not question as the Constitution gives the national government the role of capacity building and technical assistance.

36. It was Counsel's further submission that the national government took action on the matter given its urgency and in light of the Court's decision in **Luco Njagi and Others vs Attorney General, Petition No 218 of 2014**. His submission was that the Court should be slow to interfere with rational decisions of political and medical authorities.

37. With respect to the averment that the CIC had sought but had not received information on the contracts entered into by the national government for provision of equipment, Mr. Njoroge submitted that CIC is not a party to the petition, and the petitioners had not requested for any information. Accordingly, that if a third party had sought information, the petitioners did not know whether they had gotten it, and further, before a party comes to court with respect to information, it must show that it sought the information in question. Mr. Njoroge submitted therefore that the present petition was unmerited.

38. The respondents further submitted, on the authority of the case of **Randu Nzai Rua vs Attorney General, Petition No 6 of 2012**, that the 1st petitioner does not have the locus to institute the present proceedings and that the persons who ought to litigate the issues in this matter are not involved. He argued that there is nothing preventing the governors from swearing affidavits or acting in their own names to denounce the services brought to their county, as was held in **Okiya Omtatah Okoiti vs Attorney General, Petition No 354 of 2013**.

39. Counsel expressed the view that there has been no violation of the Constitution or the constitutional rights of the petitioners. He submitted that there had been sufficient consultation with the governors, and prayed that the petition should be dismissed with costs.

Determination

40. I have read and considered the pleadings of the parties as well as their submissions and authorities. I have also heard the highlights of their respective cases presented by their Counsel. In my view, the sole substantive issue that arises for determination in this matter is whether, in procuring the medical equipment for health facilities in the counties, the national government violated the petitioners' rights or any provision of the Constitution.

41. However, determination of this issue is dependent on my finding with respect to the preliminary issue raised by the respondents with regard to the jurisdiction of the Court to address its mind to the matters at issue in this petition.

Jurisdiction

42. The respondents have argued that the Court has no jurisdiction to determine this matter as there is an alternative forum provided under the Inter-Governmental Relations Act. They have relied in this regard on the decision in **Alphonse Mwangemi Munga vs African Safari Club (supra)** to submit that the petitioners have not demonstrated that they had pursued the conciliation or alternative dispute procedures envisaged under the Act.

43. The respondents have also argued that the issues in this petition relate to procurement and therefore fall within the jurisdiction of the **Public Procurement Complaints, Review and Appeals Board**.

44. The petitioners' response is that this Court has the jurisdiction to entertain the present matter as the matter is not concerned with breach of procurement procedures under the Public Procurement and Disposal Act.

45. I agree with the respondents with respect to the importance of jurisdiction. I need not repeat the well-worn words of Nyarangi JA in the case of **The Owners of Motor Vessel "Lillian S" vs Caltex Oil Kenya Ltd [1989] KLR 1** that ***"Jurisdiction is everything. Without it, a court has no power to make one step."*** The Supreme Court of Kenya expressed similar sentiments in **Advisory Opinion Reference No. 2 of 2013, Speaker of Senate and Another vs The Attorney General and Others** where it was noted that:

> "***Jurisdiction, in any matter coming up before a Court, is a fundamental issue that must be resolved at the beginning. It is the fountain from which the flow of the judicial process originates.***"

46. See also **Macharia and Another vs Kenya Commercial Bank Ltd and 2 Others Civil Application No. 2 of 2011.**

47. The jurisdiction of this Court stems from Article 165(3) of the Constitution, which provides that the High Court shall have:

a. ***Unlimited original jurisdiction in criminal and civil matters;***

b. ***Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***

c. ***Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;***

d. ***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 with the 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 levels of government;***

   iv. **….**

48. It is, I believe, undisputed that the High Court is vested with unlimited original jurisdiction in civil and criminal matters as set out in Article 165(3) above. However, it is also recognized that such jurisdiction should not be exercised to exclude other dispute resolution mechanisms provided by law. This position has been reiterated by the Court in various decisions pertaining to a variety of matters before the Court.

49. In **Peter Ochara Anam and 3 Others vs Constituencies Development Fund Board and 4 Others, Kisii High Court Petition No 3 of 2010**, the Court (Makhandia J, as he then was) underscored the importance and rationale behind allowing such other dispute resolution mechanisms and bodies in which jurisdiction was vested to undertake their functions. He stated as

follows:

> "***Jurisdiction we all know is everything and once raised it must be confronted from the onset and if successful the court must down its tools. I have no doubt at all that under article 165(3) of the Constitution, I have unlimited and inherent jurisdiction. I am also aware that under article 23(1) of the same constitution this court has jurisdiction, in accordance with article 165 to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights. I also agree as pointed out by counsel for the petitioner that any interpretation of the Constitution that seeks to curtail such wide and unfettered jurisdiction would be contrary to the spirit and letter of the constitution and would thus render itself invalid."***

50.The court went on to state that:

> ***"I do not however agree that the bodies created under the provisions of the CDF such as the 1st respondent are invalid, null and void as per the constitution. As I have already stated elsewhere in this ruling, it is not uncommon in this country for a statute to provide the procedure through which proceedings founded under the statute are to be handled. Such is section 52 of the CDF. There is nothing unconstitutional about it. The section does not deny the petitioners the right to come to court. It only provides a procedure to be followed when dealing with the disputes under the Act, like the instant dispute. The petitioners have a right to come to this court on whatever matter and howsoever but that must be done in the correct way. It cannot therefore be the case of the petitioners that section 52 of the CDF is in conflict with articles 22, 23, 48 and 50 of the Constitution. Similarly, it cannot be their case that section 52 qualifies the right to access justice in this court…"***

51.The Learned Judge concluded as follows:

> ***"I do not think that it is right for a litigant to ignore with abandon a dispute resolution mechanism provided for in a statute and which would easily address his concerns and rush to this court under the guise of a constitutional petition for alleged breach of constitutional rights under the bill of rights.***
>
> ***… Coming to court by way of a constitution petition is not excepted either much as the Constitution is superior law to the statute aforesaid. In view of this provision and there being no allegations or evidence that the petitioner exhausted these remedies, in bringing this petition, the petitioners have deliberately avoided the procedure and remedy provided for under the Act. They have not proffered any explanation as to why they did not refer any of the complaints they have raised to the 1st respondent as required by law. It has been stated constantly that where there exists sufficient and adequate legal avenue, a party ought not trivialize the jurisdiction of the court pursuant to the Constitution. Indeed, such a party ought to seek redress under the relevant statutory provision, otherwise such available statutory provisions would be rendered otiose."*** (Emphasis added)

52.**Similar sentiments had earlier been expressed in the case of The Speaker of the National Assembly vs The Hon. James Njenga Karume, *Civil Application No. NAI 92 of 1992 [NAI 40/92 UR] (unreported)*** *in which the Court stated as follows:*

> ***"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."***

53. **In Stanley Mungathia Daudi and 4 Others vs Hon. Cyprian Kubai and Others, Meru Petition No.5 of 2013, Makau J, while addressing the question of dispute resolution under the** Constituency Development Fund Act, 2013 **expressed the view that:**

> "***Section 49 of the Constituency Development Fund Act, 2013 sets out the procedure to be followed in respect of all complaints and dispute by persons arising due to the administration of the Act. It is clearly provided that such complaints and disputes shall be forwarded to the Board in the first instance. The Section hereinabove is not a formality but is mandatory. A petition cannot be heard to say he has come to court by way of Constitutional reference with a view to oust a specific provision of a statute. The petitioner is obliged to just exhaust all the remedy as laid down in the respective statute before bringing up a petition to the High Court. A petitioner has no choice but to comply with the specifically spelled out procedure and pursue his remedy accordingly. He cannot be heard to hide behind the Constitutional provisions. The petitioner in this petition did not refer any complaint or dispute to the Board as provided by the Constituency Development Fund Act, 2013. This court is aware of the important tenet of the concept of the rule of law that before exercising its jurisdiction under Article 165 of the Constitution in general, it must exercise restraint that it must give chance to relevant Constitutional bodies or state agencies an opportunity to deal with complaints and/or disputes under the relevant provisions of the parent statute. The court can only act where the petitioners demonstrate that the Constitutional bodies or State organs have maliciously or through negligence or otherwise failed to carry out their mandate as provided in the parent statute and not otherwise.***
>
> ***It has been stated constantly that where there exists sufficient and adequate mechanism to deal with a specific issue of dispute by other designated Constitutional organs, the jurisdiction of the court should not be invoked until such mechanism has been exhausted***." (Emphasis added)

54. **I close this analysis of the decisions relating to jurisdiction by considering the view expressed in Diana Kethi Kilonzo and Another vs IEBC and 10 Others, Petition No. 359 of 2013. In its decision, the three-judge bench (Mwongo, Mumbi. Ngugi and Korir JJ) expressed the following view**:

> **[73.]** ***"We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."***

55. The question is whether, with regard to the issues raised in the present petition, there is a mechanism provided in law which the petitioners should have utilized before coming to this Court by way of a constitutional petition.

56. The petition relates to a dispute between the national and county governments over the procurement of certain medical equipment for use in county health facilities. The petitioners allege that the national government is encroaching on the functions and mandate of county governments with respect to the right to health by procuring the said equipment. They accuse the respondents of violating Article 187, and of failing to consult with the (3^{rd} -49^{th}) interested parties, the governors of the counties.

57. The respondents have argued that the process that the petitioners should have followed is first, under the Public Procurement and Disposal Act, and therefore their claim should have been filed before the Public Procurement Complaints, Review and Appeals Board. I believe this is an argument that can be easily disposed of. The petitioners' complaint is not about a failure to follow the procurement rules under the Act. It is about a failure by the national government, in procuring medical equipment for health facilities in the country, to act in accordance with the Constitution in relation to the division of functions between itself and county governments. By no stretch of the imagination can that issue be taken as one that is subject to the procurement laws. The dispute, as I see it, is solely one that relates to the relations between national and county governments.

58. The relationship between the two levels of government is governed by the Constitution, and by legislation that is underpinned by the Constitution. Article 6(2) provides that the two levels of government at the national and county levels ***"… are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation."*** Article 189, which is titled **"Cooperation between National and County Governments**", provides as follows:

1. ***Government at either level shall-***

    a. ***Perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level;***

    b. ***Assist, support and consult and, as appropriate, implement the legislation of the other level of government; and***

    c. ***Liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.***

2. ***Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.***

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

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

59. The Constitution thus contemplates, indeed ordains, that whenever any dispute arises between the national and county governments, the two levels should make every reasonable effort to settle the dispute, ***"including by means of procedures provided under national legislation."***

60. Are there such procedures provided by legislation for the resolution of intergovernmental disputes? The **Inter-Governmental Relations Act 2012** was enacted as an Act of Parliament to "***establish a framework for consultation and co-operation between the national and county governments and amongst county governments; <u>to establish mechanisms for the resolution of intergovernmental disputes pursuant to Articles 6 and 189 of the Constitution</u>, and for connected purposes."***

61. Section 30 of the Act, which is contained in Part IV of the Act titled "**Dispute Resolution Mechanism**,**"** provides as follows:

1. ***In this part, unless the context otherwise requires, "dispute" means an intergovernmental dispute.***

2. ***This Part shall apply to the resolution of disputes arising—***

    a. ***between the national government and a county government; or***

        (b) amongst county governments.

62. Section 31 stipulates that 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.***

63. Section 32 provides that:

1. ***Any agreement between the national government and a county government or amongst county governments shall—***

    a. ***include a dispute resolution mechanism that is appropriate to the nature of the agreement; and***
    b. ***provide for an alternative dispute resolution mechanism with judicial proceedings as the last resort.***

2. ***Where an agreement does not provide for a dispute resolution mechanism or provides for one that does not accord with subsection (1), any dispute arising shall be dealt with within the framework provided under this Part.***

64. At section 33, the Act provides that:

1. ***Before formally declaring the existence of a dispute, parties to a dispute shall, in good faith, make every reasonable effort and take all necessary steps to amicably resolve the matter by initiating direct negotiations with each other or through an intermediary.***
2. ***Where the negotiations under subsection (1) fail, a party to the dispute may formally declare a dispute by referring the matter to the Summit, the Council or any other intergovernmental structure established under this Act, as may be appropriate***.

65. It is, in my view, apparent that the constitutional and legislative intent was to have all disputes between the two levels of government resolved through a clear process established specifically for the purpose by legislation, a process that emphasizes consultation and amicable resolution through processes such as arbitration rather than an adversarial court system. As a result, a separate dispute resolution mechanism for dealing with any disputes arising between the national and county governments, or between county governments, has been established.
66. Before a dispute arising between these parties can be placed before the courts, the Constitution and legislation require that a reasonable attempt at amicably resolving the matter be made. Indeed, if there was any doubt about this, section 35 of the Act clears it away with specific words. It provides as follows:

    "Where all efforts of resolving a dispute under this Act fail, a party to the dispute may submit the matter for arbitration or institute judicial proceedings."

67. The legislative intention was therefore that judicial proceedings would only be resorted to once efforts at resolving the dispute between the two levels of government failed. The question is whether any attempt was made in this instance to resolve the matter in accordance with the Intergovernmental Relations Act before this petition was filed.

68. Two observations are necessary at this point. First, it was the 1st petitioner, a non-governmental organization, that first lodged this petition. The governors of the counties were joined in the petition as interested parties. It was only several months later that the 2nd petitioner, the Council of Governors, was joined to the proceedings.

69. As the body whose members are directly affected by the decision and actions of the national government with respect to the provision of the medical equipment, did the 2nd petitioner, and by extension, the 3rd -49th interested parties, utilize the dispute resolution mechanism under the Inter-Governmental Relations Act? I have not seen anything in the pleadings of the parties, particularly the 2nd petitioner and the 3rd -49th interested parties, which demonstrates that an attempt was made to resolve the dispute, if there was a dispute, in accordance with the provisions of the Inter-Governmental Relations Act. While the petitioners allege violation of the provisions of Article 187 and a lack of consultation in the process of procuring the medical equipment, they have not shown that they, at any point, made any efforts to resolve the matter as stipulated in the law.

70. I observe, also, from the depositions on behalf of the respondents by Dr. Muraguri, which were not disputed by the petitioners, that many of the county governments had signed the MOU with the national government for the supply of medical equipment for health facilities within their jurisdiction. Further, that the roll out of the equipment to the county health facilities had started and was in progress. Which brings me to what I alluded to earlier: was there a dispute between the national government and the county government, or, as suggested by the respondents in their Grounds of Opposition, the 1st petitioner was a busy body with no *locus standi* to lodge this petition, and only brought in the 2nd petitioner in order to deal with the question of *locus*?

71. On the material before me, and given, in particular, that county governments had accepted the medical equipment and entered into MOUs with the national government with respect thereto, and that the 2nd petitioner and interested parties had not attempted, at least from the material before me, to resolve such dispute as they deemed to be subsisting between themselves and the national government, I can only conclude that this petition had no merit from the beginning.

72. In the circumstances, it is hereby dismissed. Each party shall bear its own costs.

Dated and Signed at Nairobi this 16th day of March 2016

MUMBI NGUGI

JUDGE

Dated, Delivered and Signed at Nairobi this 17th day of March 2016

J. L. ONGUTO

JUDGE

Mr. Peter Wanyama instructed by the firm of Manyinge Wanyama & Associates Advocates for the petitioner.

Mr. Njoroge instructed by the State Law Office for the respondents.

Mr. Mengich instructed by the firm of Mengich & Co. Advocates for 31st interested party.