



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 370 OF 2015

BETWEEN

ISIOLO COUNTY ASSEMBLY SERVICE BOARD.....1ST PETITIONER

THE CLERK, ISIOLO COUNTY ASSEMBLY.....2ND PETITIONER

AND

THE PRINCIPAL SECRETARY (DEVOLUTION)

MINISTRY OF DEVOLUTION AND PLANNING.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Introduction

1. The Preliminary objection raised by the Respondents herein seeks the court to address the necessity by parties to exploit statutory alternative dispute resolution avenues prior to accessing the court.
2. The Respondents' contention is that the Petition is simply an abuse of the process as the Petitioners have not followed the alternative dispute resolution mechanisms availed by both the Constitution as well as statute prior to resorting to the more adversarial court process. In particular, the Respondents assert that pursuant to Article 189(3) and (4) of the Constitution and Section 31 of the Intergovernmental Relations Act (Cap 5G) ("**the Act**"), the court currently has no jurisdiction to entertain and determine the instant petition.

Background facts

3. The facts are relatively not in dispute and may be stated as follows.
4. The 1st Petitioner is an organ of a devolved government, the County Government of Isiolo. It is constituted as a corporate entity under Section 12 of the County Governments Act, No. 17 of 2012. It is responsible for providing services and facilities to ensure the efficient and effective functioning of the County Assembly and by extension the county government. It is also responsible for constituting offices

in the County Assembly service as well as supervising office holders. The 2nd Petitioner is in the public service of the county government of Isiolo.

5. The 1st Respondent is an officer in the public service of the national government. The 2nd Respondent is the Chief Legal Advisor of the government of Kenya. The 2nd Respondent has been sued on behalf of the government of Kenya pursuant to Article 156 of the Constitution.

6. The dispute herein was precipitated by an advertisement placed in one of the local dailies by the 1st Respondent on 30th June 2015. The advertisement, intitled “*Consultancy services for preparation of spatial plan for Isiolo County*”, invited consultants to be recruited for purposes preparing the spatial development plan for Isiolo County. The terms of reference would include carrying out a detailed study and analysis resulting in a plan to address the present and future land use and development land dynamics of Isiolo County. The consultant was also to prepare a spatial plan and a GIS mapping for Isiolo county.

7. The Petitioner deemed the 1st Respondent’s actions of unilaterally initiating the process of developing a spatial plan for the Isiolo County unconstitutional as statutory responsibility lay not with the national government but the county government. The process, it was stated, involved the County’s planning and development. The Petitioners therefore quickly moved to court seeking orders to declare the Respondents’ actions unconstitutional null and void. The Petitioner also sought a prohibitory order to restrain the 1st Respondent and any other organ of the national government from developing or preparing a spatial plan for Isiolo County.

8. Evidently in advertising for a consultant to prepare and develop a spatial plan for Isiolo County, the 1st Respondent believed that it is part of the national government’s mandate.

The Preliminary objection

9. Without filing any response to the petition however, the Respondents lodged an objection *in limine* that the court has no jurisdiction to entertain and determine the dispute. The Notice was prolific and contained some odd nine points but all were to the effect that the Petition had been prematurely filed and the court had no jurisdiction.

10. In the bountiful case of ***Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors [1969] EA 696***, well approved by the Supreme Court of Kenya in the case of ***Hassan Ali Joho & Another v. Suleiman Said Shabhal & 2 Others, Supreme Crt Petition No. 10 of 2013, [2014] eKLR***, the court was clear that

“..a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.”(emphasis mine)

11. Mr. P. Kisaka, perhaps on the basis of the above statement, argued that the instant objection did not meet the requirements of a preliminary objection as in any event the Respondents were not urging for the striking out of the Petition.

12. While I would agree with Mr. Kisaka’s submission that a preliminary objection should ordinarily lead to the ultimate disposal of the case, it would be appropriate to immediately state that the perceptive effect and consequently the precincts of preliminary objections have lately been expanded. In the case of ***Independent Electoral & Boundaries Commission vs. Jane Cheperenger & 2 Others [2015]eKLR***, the Supreme Court stated as follows:

“[21] The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public

cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits. [emphasis is mine]

13. It is clear that the parameter of a preliminary objection is no longer limited to such objections as may lead to the ultimate disposal of the case but even such objections as may lead to a stay of proceedings. Such objections if successful would assist in saving the objecting party, some time and resources. The objection would also save the much sought after judicial time.

The arguments on the preliminary objection

14. Ms. Jennifer Gitiri urged the preliminary objection on behalf of the Respondents while the Petitioner's case was presented by Mr. P Kisaka.

Respondents' submissions

15. Ms. Gitiri submitted that there was a dispute between the county and national governments, and that Section 31 of the Act dictated the forum where such disputes were to be resolved in the first instance rather than the court. According to Ms. Gitiri, in such cases resort to the court was only to be made after the provided avenue for dispute resolution had failed.

16. Referring to the cases of the **Speaker of the National Assembly vs. Karume [2008] 1 KLR 426, Narok County Council vs. Transmara County council and Another CACA No. 25 of 2000, Okiya Ombata & Another vs. Attorney General & Another HCCP No. 593 of 2014 [2014] eKLR and Dickson Mukwelukeni vs. Attorney General and 4 others HCCP No. 390 of 2012**, Ms. Gitiri submitted that where a specific mechanism has been provided for the resolution of a dispute then such mechanism has to be first exhausted by a party to the dispute before resorting to the court process.

17. In the instant case, counsel concluded, the Constitution was clear as was the Act that attempts at resolving intergovernmental disputes had first to be made through the mechanism availed under the Act . For completeness, Ms Gitiri asserted that the dispute between the Petitioner and the Respondents was of the nature contemplated under Article 189(3) of the Constitution.

Petitioners' submissions

18. In response, Mr. Kisaka submitted that the court had jurisdiction to entertain and determine the petition as under the Constitution the court's jurisdiction was unlimited and could not be ousted. For this proposition, Counsel relied on the case of **Nderitu Gachagua vs. Dr. Thuo Mathenge Civil Appeal No. 14 of 2013** wherein the case of **R. vs. Transition Authority & Anor Ex p Kenya Medical Practitioners, Pharmacists and Dentists Board and 2 Others [2013] eKLR** was cited with approval.

19. For the proposition that the court's jurisdiction was intact and the preliminary objection consequently had no merit, Counsel also relied more specifically on the case of **County Government of Nyeri vs. Cabinet Secretary, Ministry of Education Science & Technology and Another [2014]eKLR** where it was stated that:

“What these provisions of the Constitution and Statute (Intergovernmental Relations Act) in respect of the dispute resolution between the National and County Government does is not to oust the jurisdiction of the court but to postpone the same until the alternative dispute mechanism have been attempted.”

20. Additionally, it was Counsel's submission that in any event the dispute between the Petitioners and the Respondents was not a dispute as contemplated by Section 30(1) of the Act. It was not; put shortly, an “intergovernmental dispute”.

Discussion and Determination

21. There is no doubt and I agree with Ms. Gitiri that issues of jurisdiction are always of considerable import and ought to be resolved at the earliest opportunity. Where the court has no jurisdiction, then the court must immediately down its tools and proceed no further: see Nyarangi JA in **The Owners of Motor Vessel “Lillian S” vs. Caltex Oil Kenya Ltd (1989) KLR 1**. See also the Supreme Court of Kenya in the **Speaker of the Senate & Another Vs. Attorney General & Others Advisory Opinion Reference No. 2 of 2013** where the court stated as follows:-

“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.”

22. A court’s jurisdiction emanates from either the Constitution or statute. It is not in controversy that even where the jurisdiction is unlimited, the Constitution itself or statute may provide claw-backs by way of alternative dispute resolution forums. It is in this regard that both Mr. Kisaka and Ms. Gitiri made references to various provisions of both the Constitution and the Act.

Constitutional indexation

23. The High Court’s jurisdiction is expressly provided for under Article 165(3) of the Constitution. The Article provides that 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. ...*
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.*

24. Article 189 of the Constitution, upon which the Respondents’ preliminary objection is predicated, on the other hand provides as follows:-

189.(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 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.
(Emphasis)

25. Then Sections 30 and 31 of the Act stipulate as follows:-

30.(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.

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.

26. Additionally, Section 33 of the Act provides as follows:-

(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.

27. There is no doubt that the jurisdiction of this court is unlimited: see Article 165 of the Constitution. Such jurisdiction should not be limited in any way by statute, it can only be supplemented: See Article 165(3)(e) of the Constitution. However, where the Constitution has itself clawed- back the jurisdiction or held back the jurisdiction then such constitutional claw-back must be respected: see the Court of Appeal in **Jefferson Kalama Kengha & 2 Others vs. Republic [2015]eKLR**. Thus where the Constitution itself or vide statute seeks to and indeed provides an alternative mode of dispute resolution for specified disputes then, in the spirit of Article 159(2) of the Constitution, the court should oblige and cede

jurisdiction to such forums. The parties too, ought to embrace such dispute resolution mechanism.

28. The general principle, in this regard, now laid down by the courts is that where it is possible to decide any case or dispute without reading a constitutional issue then that is the recourse to be followed. Likewise where through statute an alternative dispute resolution mechanism as well as remedy is provided then it is such alternate mechanisms which parties to a dispute ought to pursue first: see **The Speaker of The National Assembly vs. The Hon James Njenga Karume**, Civil Application No 92 of 1992 (Unreported); and **Kipkalya Kiprono Kones vs. Republic & Another ex-parte Kimani Wanyoike & 4 Others**, (2008) 3 KLR (EP) 291. In the *Karume* case, the Court of Appeal stated that:

“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.”

29. In my view, there is certainly nothing unconstitutional or untoward when statute provides for alternative dispute resolution forums. Indeed, such statutory provisions can only be deemed to be in promotion of Article 159(2) of the Constitution. Besides, it is also to be noted that such provisions do not deny any party to the specified dispute the access to court or justice. The provisions merely provide less adversarial avenues to be followed by the parties where there is a dispute and such avenues ought to be followed by the parties: see also **Diana Kethi Kilonzo & Another v Independent Electoral and Boundaries Commission & Others HCCP No. 359 of 2013 [2013] eKLR**.

30. In the instant case, the Respondents’ argument is that pursuant to the provisions of Section 31 of the Act, the Petitioners should not have filed a Constitutional Petition to resolve the dispute that appeared evidently to be between the national government and a county government. According to Ms. Gitiri, the Petition was an abuse of process as it had been prematurely filed without first going through the procedure laid down under Article 189(3) of the Constitution as read together with Sections 30 & 31 of the Act.

31. The Petitioners on the other hand whilst acknowledging the import of the provisions of the Act held the view and argued that the current dispute does not fall within the disputes contemplated by both Article 189(3) of the Constitution and Section 30 of the Act. The Petitioner also contends that the jurisdiction of the court cannot be ousted by statute.

32. The Constitution clearly requires organs of State to avoid litigation and appears to empower courts to refer disputes back to the parties. There is also no doubt that the Act provides an avenue as well as procedure for resolving disputes between the two levels of government. There is also no doubt that the Act does not oust the jurisdiction of the court. Indeed and with a view to promoting the provisions of Article 189(3) of the Constitution, the Act expressly exhorts the two levels of government to utilize and exhaust the avenues of dispute resolution provided under the Act before resorting to judicial proceedings. The court is deemed as the last resort.

33. It is clear that the Constitution pursuant to Article 189(3) intended to have all disputes between the two levels of government resolved in a less acrimonious or adversarial way. The Constitution has under the Article sought to promote the inter-dependence, consultation and cooperation between the two levels of government, rather than competition, as also propounded by Article 6(2) of the Constitution.

34. The Constitution preaches for “*every reasonable effort to be made to settle the dispute*”: Article 189(3). This is highlighted further by the provisions of the Act when it also provides alternative avenues and prescribes judicial proceedings as the avenue of last resort.

35. When, then, are the provisions of Sections 30 and 31 of the Act to be invoked? A closer reading of the statute which was enacted, to inter alia, establish mechanisms for the resolution of intergovernmental disputes pursuant to Articles 6 and 189 of the constitution would reveal that for the dispute resolution mechanism under the Act to be initiated there must first exist an intergovernmental dispute.

36. The dispute must be between the two levels of government. It must not be between one or the other on the one 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.

37. 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.

38. I would consequently agree with Wakiaga J, when, in the case of **County Government of Nyeri vs. Ministry of Education Science and Technology & Another Nyeri HCCP No. 3 of 2014 (2014) eKLR**, the learned judge stated that:

“[an intergovernmental dispute] is a dispute in relation to the functions and exercise of powers between the different levels of governments.”

I would also add that a contractual dispute, even of a commercial nature, between the two levels of government or between county governments would rank as an intergovernmental dispute by dint of the provisions of Section 32 of the Act. The dispute must of course be one capable of being determined by a court of law hence the cross-reference, under Sections 31 and 32 of the Act, to judicial proceedings as the last resort.

39. There must however be the rider that the alternative dispute resolution mechanism is not intended to lock parties including both levels of governments from accessing the courts. Where it is clear that one party is definitely not ready and willing to adopt the mechanism availed for settling a dispute then the **“last resort”** which is court process must then be followed by the aggrieved party. What must be demonstrated by the aggrieved party is that every reasonable effort to secure a less acrimonious way of resolving the dispute has failed.

40. In the instant case, the 1st and 2nd Petitioners are a state organ and state officer respectively. They have not filed the petition to advance personal interests or rights guaranteed under the Constitution or by any statute. The Petitioners contest the fact that the Respondents did not consult with the County Government of Isiolo or the Petitioners prior to the Respondents sending out an invitation to engage a consultant. The consultant in question is to prepare a detailed spatial plan on the present and future land use and development in Isiolo County. The Petitioners contend that this is the function of the County Government and the Respondents ought not to usurp the same. Evidently, the petitioners are advancing the County Government of Isiolo's case. The Petitioners are litigating on behalf of a county government. Evidently as well and by the Petitioners' own admission, the Respondents have been sued on behalf of the national government.

41. In my view, there is a dispute between the two levels of government.

42. The nature of the dispute also makes it an intergovernmental dispute. The dispute herein focuses on the functions of the devolved county government. The Petitioners contended that the function or statutory power to develop a spatial plan is being usurped by the national government. The dispute has all to do with a determination as to whether the national government should be doing the same thing at all or only

in consultation with the county government. There is certainly a specific disagreement concerning matters of both fact and law. The dispute involves the exercise of a function or power assigned by the Constitution and statute.

43. The Respondents have argued that the Petitioners and by extension the county government of Isiolo have not followed the procedure laid down under the Constitution as well as the Act for resolving such disputes. The latter Act as clearly enumerated earlier provides that where there exists an intergovernmental dispute the parties must not only seek to resolve the dispute amicably but also exhaust all the dispute resolution mechanisms provided under the Act or any other legislation before resorting to court action. The Petitioners have been accused of resorting to court action as the first port of call. The Petitioners do not object to this accusations but insist that the court's jurisdiction is not ousted.

44. My view is that there is a clear process established under the Act for resolving dispute between county governments or between the national governments on the one hand and a county government on the other. The process must be followed before parties resort to court. There has to be an attempt firstly to resolve the dispute amicably and when this fails the parties must seek to convene before the Summit or the Council of Governors, which are both bodies established under sections 7 and 19 of the Act to assist in resolving the dispute. An elaborate process is provided for this under part IV of the Act. Judicial proceedings are only to be resorted to when all efforts at resolving the dispute under the Act the fail. So states Section 35 of the Act:

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

45. The Petitioners have not contested that they did not attempt to follow the process, under the Act prior to moving to court. The Petitioners have not accused the Respondents of adamantly failing to concede any ground on the dispute. Neither have the petitioners indicated that the Respondents are unwilling to engage in the process availed by statute.

Conclusion

46. The Act seeks not only to provide a dispute resolution mechanism but also to promote and foster a better relationship between the two levels of government pursuant to Article 6(2) of the Constitution. A less acrimonious process is prescribed. It ought to be followed and in these respects the Petitioners must be faulted for not having made an attempt to resolve the dispute in a more amicable manner.

Disposal and orders

47. I would consequently, agree with the Respondents and hold that the preliminary objection has merit given that the Petitioners did not make any efforts to resolve the dispute as stipulated in law.

48. Where there is abuse of its process, the court ought to act and avert such abuse. I am conscious of the fact that the Act provides that where the dispute is not resolved as provided for in the statute then parties have to revert to court. Ms. Gitiri also sought to have these proceedings stayed until the parties exhaust the alternative dispute resolution forum.

49. I would agree.

50. It would be more proportionate to stay the proceedings and give the parties the chance to explore the alternative avenue. That would also be in line with Article 159(2) of the Constitution.

51. In the result, I would make the following orders on the preliminary objection.

- a. The preliminary objection is upheld as the Petition herein was prematurely filed.
- b. The pleadings and proceedings herein shall however not be struck out but rather shall be stayed

to enable the parties to pursue a resolution of the dispute under the Intergovernmental Relations Act (Cap 5G) Laws of Kenya.

c. There will be liberty to either party to apply.

52. Orders accordingly.

Dated, Signed & Delivered at Nairobi this 31st day of May 2016

J.L. ONGUTO

JUDGE

In the presence of

Mr. P. Kisaka for the Petitioners

Ms. J. Gitiri for the Respondents