Okoiti v Parliament of Kenya & 2 others; County Government of Taita Taveta & 3 others (Interested Parties) (Petition 33 of 2021) [2022] KEELC 33 (KLR) (23 March 2022) (Ruling)

Okiya Omtata Okoiti v Parliament of Kenya & 2 others; County Government of Taita Taveta & 3 others(Interested Parties) [2022] eKLR

Neutral citation: [2022] KEELC 33 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

PETITION 33 OF 2021

LL NAIKUNI, J

MARCH 23, 2022

IN THE MATTER OF ARTICLES 1 (3) (C), 22(1) & 22 (C) 23, 48, 50 (1) 159, 162(2) (B) 165 (5) (B) & 6, 258 (1) & 259 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED VIOLATION OF ARTICLES 1, 2, 3(1) 4 (20), 6 (1), 10, 19, 20, 21, 24, 93 (2), 94 (3), 129, 130, 131(1) (B) & 2 (A) & (B) 156, 188 AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLE 47 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF COMPELLING PARLIAMENT OF KENYA TO SET UP AN INDEPENDENT COMMISSION TO RESOLVE THE RULING ELC. PET. NO. 33 OF 2021 PAGE 1 OF 95 L. NAIKUNI (JUDGE) BOUNDARY DISPUTE BETWEEN TAITA TAVETA AND KWALE AND BETWEEN TAITA TAVETA AND MAKUENI

AND

COMPELLING THE NATIONAL GOVERNMENT TO SURVEY AND ERECT BEACONS TO CLEARLY DEMARCATE THE BOUNDARIES IN ISSUE

AND

IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATIONS

BETWEEN

OKIYA OMTATA OKOITI ..... PETITIONER

AND

PARLIAMENT OF KENYA ..... 1ST RESPONDENT

NATIONAL EXECUTIVE OF KENYA ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

COUNTY GOVERNMENT OF TAITA TAVETA ..... INTERESTED PARTY

COUNTY GOVERNMENT OF KWALE ..... INTERESTED PARTY

COUNTY GOVERNMENT OF MAKUENI ..... INTERESTED PARTY

MINISTRY OF LANDS AND PHYSICAL PLANNING ..... INTERESTED PARTY

The National Land Commission (NLC) has jurisdiction to determine inter-county boundary disputes.

The ruling decided on the question about the correct forum for the determination of an inter-county boundary dispute involving individual residents of a county and county governments. The residents had been victims of harassment as it was unclear which county government they were to pay their taxes to. The Environment and Land Court decided that the dispute was not one to which the Intergovernmental Relations Act could provide a solution as on one side the parties were individual residents. The court also found that the Independent Electoral and Boundaries Commission was not the appropriate forum but found that the dispute could be resolved by the National Land Commission.

Reported by John Ribia

Constitutional Law *– devolution – inter-county disputes – inter-county boundary disputes – what was the appropriate dispute resolution forum to address issues of inter-county boundary disputes – whether inter-county boundary disputes amounted to intergovernmental disputes and were to be subjected to the dispute resolution mechanisms under the Intergovernmental Relations Act – whether an inter-county boundary dispute fell under the delimitation of boundaries under which was a preserve of Independent Electoral and Boundaries Commission – Constitution of Kenya, 2010 articles 67, 88, 89, 162, 188, 189 and 261.*

Words and Phrases *– delimitation – definition of – the act of fixing, marking off, or describing the limits or boundary line of a territory or country – Blacks Law Dictionary*

Brief facts

The petition sought to compel the Parliament of Kenya to set up an independent commission to resolve the boundary dispute between the counties of Taita Taveta and Kwale; between the counties Taita-Taveta and Makueni, and the national government to survey and erect beacons to clearly demarcate the boundaries in issue. The petitioner averred that he received a letter from 178 residents of the County of Taita Taveta requesting him to intervene and help them find a solution to the protracted boundary disputes between the Counties of Taita-Tavetta and Kwale on the one hand over Mackinnon Town and the Counties of Taita-Tavetta and Makueni on the other over Mtito-Andei Town which had been simmering for a long time since pre-independence days. The residents were the victims of harassment by the county officials of the three counties and were often subjected to double taxation.

Issues

i. Whether the Environment and Land Court had jurisdiction to address issues of inter-county boundary disputes.

ii. What was the appropriate dispute resolution forum to address issues of inter-county boundary disputes?

iii. Whether inter-county boundary disputes amounted to intergovernmental disputes and were to be subjected to the dispute resolution mechanisms under the Intergovernmental Relations Act.

iv. Whether an inter-county boundary dispute fell under the delimitation of boundaries under article 189 of the Constitution which was a preserve of the Independent Electoral and Boundaries Commission.

Held

1. A preliminary objection could be brought at any time at least before the final conclusion of the case. It ought to be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. The issues raised in the preliminary objection were serious and pure issues of law which the court was duty bound to critically venture to be heard and determined prior to setting down the case for a full trial on its own merit. The issues were not fanciful nor remote. The objections raised by the respondents and the interested parties were properly filed.
2. The Constitution was to be interpreted in a manner that promoted its purposes, values and principles. The court had to give a liberal interpretation and consideration to any provision of the Constitution and have regard to the language and wording of the Constitution. Where there was no ambiguity, an attempt to depart from the straight texts of the Constitution had to be avoided. The Constitution must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.
3. The petitioners had dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting the petition against the respondents and the interested parties.
4. Subject to sections 3, 33, 34(1) and 35 of the Intergovernmental Relations Act, Act no. 2 of 2012, where a dispute involved the government and county government on one level and county to county governments; the elaborate legislation did not make any provision where there existed a dispute between an individual and the county government or the vice versa as it was in the instant case.
5. The primary basic ingredient in an intergovernmental dispute was that it had to be between the national government and a county government; or amongst county governments. Both the petitioner and the 178 residents of the County of Taita-Taveta claiming harassment by the county governments of Kwale and Makueni in Mackinnon Road and Mtito Andei Town, respectively, did not have standing to invoke the dispute resolution mechanism under articles 189 (3) and (4) of the Constitution as read together with sections 30, 31, 32, 33, 34 and 35 of the Intergovernmental Relations Act.
6. If the dispute was one between the three County Governments of Taita-Taveta, Makueni and Kwale, articles 189 (3) and (4) of the Constitution as read together with sections 30, 31, 32, 33, 34 and 35 of the Intergovernmental Relations Act would have been applicable. The petitioner and the 178 residents as individuals had no place to turn to for assistance. The more reason the legislature should have invoked and operationalized the provisions of article 261 (1) to (8) of the Constitution of Kenya in the enactment of such specific legislation to cater for such eventualities.
7. The moment a party to a suit challenged the jurisdiction of a court, anything else the court did from then onwards became a nullity. Once that happened, it was significant that the huddle was finally tackled first and foremost. That was because without jurisdiction the court had no mandate to make one more step. It had to down its tools.
8. The doctrine of exhaustion provided that a litigant ought to explore all other available mechanisms in dispute resolution before proceeding to the courts. Where there were clear procedures for redress of any particular grievance prescribed by the Constitution or statute, then the procedure should be strictly followed and adhered to. There were certain exceptions. The court needed to determine if that was a purely governmental or inter-governmental dispute meted out between governments. That was not the case in the instant case. The dispute was by an individual - the petitioner and the 178 residents of the County of Taita Tavetta residing and carrying out their trades within the two towns and who

were adversely and directly affected by the double taxation by the three county governments and not inter-governmental as envisaged by law.

9. Based on the provisions of article 162(2)(b) of the Constitution, sections 3 and 13 of the Environment and Land Court Act, sections 150 of the Land Registration Act, and section 101 of the Land Act conferred the instant court with unlimited and original jurisdiction to hear and determine on all matter pertaining to land and environment matters. There existed a boundary dispute between an individual and three county governments as a result of gross infringements, denial and violations of certain fundamental rights and freedoms under the Bill of Rights of individuals and hence the only redress attainable was before that court. The ELC was clothed with original and unlimited jurisdiction to hear and determine such a dispute. The suit was properly before the instant court and the objection that the court had no jurisdiction was dismissed.

10. Land and land-related disputes remained very emotive issues. Land had for years been the primary basis of disputes leading to mass displacement and killings in the country. The Constitution of Kenya, 2010 dedicated a whole chapter to address the issues of land.

11. The petitioner and the respondents had misunderstood the dispute in question, whereas the petitioner had placed the instant dispute under articles 129, 130 and 188 of the Constitution; the respondents on the other hand were placing it under articles 88, 89 and 188 of the Constitution. Article 188 of the Constitution dealt exclusively with the process of altering county boundaries and the issue at hand in the instant matter was demarcation and confirmation of boundaries which the matter did not fall under the purview of article 188 of the Constitution.

12. Purposive interpretation of the Constitution was to the effect that territorial county boundaries were fixed and could only be altered through the clear step provided by the Constitution in strict adherence to the provisions of article 188 of the Constitution. The National Executive had no role in altering or demarcating county boundaries while the Independent Electoral and Boundaries Commission could only delimit constituencies and wards and had no role or authority to alter or demarcate county boundaries. With the promulgation of the Constitution, 2010 all the actions in this country were done as per the Constitution.

13. The boundary disputes afflicting the three Counties of Taita-Tavetta, Kwale and Makueni and other spiral effects it had on the violation of the fundamental rights of the ordinary residents of the area were essentially caused by the insurgencies of historical injustices within the area by the colonial leadership. Where there existed a proper and suitable alternative forum for resolving disputes then there was a need to strictly adhere to and present a dispute before such a forum. However, in the instant petition, the respondents were clearly mistaken in their argument that the current dispute should be resolved as provided under the ambit of article 189(3) of the Constitution and the provisions of the Intergovernmental Relations Act.

14. Section 15 of the National Land Commission Act provided for historical land injustices that pursuant to article 67(3) of the Constitution, the Commission was to receive, admit and investigate all historical land injustice complaints and recommend appropriate redress. A historical land injustice meant a grievance which:

    1. was occasioned by a violation of right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement;
    2. resulted in displacement from their habitual place of residence;
    3. occurred between June 15, 1895 when Kenya became a protectorate under the British East African Protectorate and August 27, 2010 when the Constitution of Kenya was promulgated; and
    4. had not been sufficiently resolved and subsisted up to the period specified above.

15. To resolve the boundary dispute pitting the three counties and having the disputed areas investigated, surveyed and beacons erected to clearly demarcate the boundaries in issue were best handled by the

National Land Commission and appropriate recommendations would be made. Ultimately resolving the boundary dispute would in turn provide clearly which county/ counties the residents of the towns Mackinnon Road Town and Mtito Andei should pay their taxes to.

Petition allowed.

Orders

i. *The preliminary objection raised by the respondents and the interested parties was disallowed for being unmeritorious.*

ii. *That for the sake of attempting to resolve to resolve the existing boundaries dispute facing the three Counties of Taita Tavetta, Makueni and Kwale, under the circumstances where there existed no clear legal mechanisms to do so, the instant proceedings were stayed for a period of six (6) months from the date of the instant ruling;*

iii. *The petitioner was directed to immediately serve the instant orders upon the National Land Commission, lodge a formal complaint with the National Land Commission to enable them initiate investigations into the historical injustices and the instant county boundary dispute involving those three counties, prepare a detailed report with practical and pragmatic recommendations on the appropriate redress to resolve the said county boundary dispute once and for all.*

iv. *The petitioner was directed to, within seven days from the date of the instant ruling, extract and serve the instant orders upon the National Land Commission for their action thereof.*

v. *Upon service, the Chairman and the Secretary to the National Land Commission were directed to file a comprehensive report on the three county boundaries before the instant court on its recommendations and appropriate redress within the next seven days after its preparation for its adoption by court and further direction;*

vi. *There were interim orders appointing and/or authorizing the County Government of Taita Taveta to be the sole authority issuing business permits and levying county taxes in Mackinnon Road Town just as its predecessor did before the establishment of county governments in 2013, and to deposit all the revenues it so collects into an interest earning bank account opened jointly with the County government of Kwale for a period of six months from the date of the instant ruling.*

vii. *Interim order was issued appointing the county government of Taita Taveta to be the sole authority issuing business permits and levying county taxes in Mtito Andei town just as its predecessor did before the establishment of county governments in 2013 and to deposit all the revenues it so collects into an interests earning bank account opened jointly with the county government of Makueni.*

viii. *The instant matter was to be mentioned on October 10, 2021 for purposes of compliance by the National Land Commission, ascertainment of the progress and taking further directions with regard to the disposal of the main petition hereof.*

ix. *There was no orders as to costs.*

Citations

Cases

Kenya

1. *Anam, Peter Ochara & 3 others (Petitioning on their own behalf as Kenya citizens, Nyatuje Constituents and as representatives of Nyatike Constituency inhabitants and for and on behalf of Nyatike Constituency) v Constituencies Development Fund Board & 4 others* Constitutional Petition 3 of 2010; [2011] KEHC 3034 (KLR) - (Explained)
2. *Anarita Karimi Njeru v Republic (No 1)* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); [1979] KLR 154; (1976- 1980) 1 KLR 1272 - (Explained)
3. *Attorney General & another v Andrew Mwaura Githinji & another* Civil Appeal 21 of 2015; [2016] KECA 817 (KLR) - (Explained)

4. *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* Application 50 of 2014; [2015] KESC 23 (KLR) - (Explained)
5. *Charo, Hassan Nyanje v Khatib Mwashetani & 3 others* Civil Application 23 of 2014; [2014] KESC 5 (KLR) - (Explained)
6. *County Government of Isiolo & 10 others v Cabinet Secretary, Ministry of Interior and Coordination of National Government & 3 others* Constitutional Petition 511 of 2015; [2017] eKLR - (Explained)
7. *County Government of Nyeri v Cabinet Secretary Ministry of Education Science and Technology & another* Petition 3 of 2014; [2014] eKLR - (Explained)
8. *County Government of Taita Taveta v Kenya Wildlife Services & another; Council of Governors & another (Interested Parties)* Petition 281 of 2019; [2021] KEHC 12920 (KLR) - (Explained)
9. *County Government of Turkana v National Land Commission & another* Environment & Land Case 2 & 3 of 2019; [2019] KEELC 3436 (KLR) - (Explained)
10. *Daudi, Stanley Mungathia & 4 others v Cyprian Kubai & 3 others* Petition 5 of 2013; [2013] KEHC 2353 (KLR) - (Explained)
11. *In the Matter of the National Land Commission* Advisory Opinion No 2 of 2014; [2015] eKLR - (Explained)
12. *In the Matter of the Speaker of the Senate & another* Advisory Opinion Reference 2 of 2013; [2013] eKLR - (Applied)
13. *Independent Electoral & Boundaries Commission v Cheperenger & 2 others* Civil Application 36 of 2014; [2015] KESC 2 (KLR) - (Explained)
14. *International Legal Consultancy Group & another v Ministry of Health & 9 others* Petition 99 of 2015; [2016] KEHC 7536 (KLR) - (Explained)
15. *Isiolo County Assembly Service Board & another v Principal Secretary (Devolution) Ministry of Devolution and Planning & another* Petition 370 of 2015; [2016] KEHC 7728 (KLR) - (Explained)
16. *Joho & another v Shahbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR) - (Explained)
17. *Kabiru, Geoffrey Muthinja & 2 othes v Samuel Munga Henry & 1756 others* Civil Appeal 10 of 2015; [2015] KECA 304 (KLR) - (Explained)
18. *Ledidi Ole Tauta & others v Attorney General & 2 others* Constitutional Petition 47 of 2010; [2015] KEHC 7241 (KLR) - (Explained)
19. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)
20. *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd* [1969] EA 696 - (Explained)
21. *Narok County Government v Trans Mara County Council & another* Civil Appeal 25 of 2000; [2000] KECA 35 (KLR) - (Explained)
22. *Njoya, Timothy M & 6 others v Attorney General & 3 others* Miscellaneous Civil Application 82 of 2004; [2004] KEHC 2645 (KLR); [2004] 1 KLR 261; [2004] 1 EA 194 - (Explained)
23. *Owners of the Motor Vessel "Lillian S"' v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR); [1989] KLR 1 - (Explained)
24. *Republic v Chief Justice of Kenya & others; ex-parte Moijo Mataiya Ole Keiwua* Miscellaneous Civil Application 1298 of 2004; [2005] KEHC 16 (KLR) - (Explained)
25. *Speaker of the National Assembly v Karume* Civil Application 92 of 1992; [1992] KECA 42 (KLR); [1992] KLR 22; (2008) 1 KLR (EP) 425 - (Explained)

United Kingdom

Thorp v Holdsworth (1886) 3 Ch D 637 - (Explained)

Texts

Black, HC., (Ed) (1910), *Black's Law Dictionary* Clark, New Jersey: St Paul Minnesota: West Publishing Co

Statutes

Kenya

1. Constitution of Kenya articles 1(3)(c); 2; 3(1); 4(2); 6(1); 10; 19; 20; 21; 22(1)(c); 23; 24; 40(3); 47(1); 48; 50(1); 67(2)(e)(3); 93(2); 94(3); 119(2); 129; 130; 131(1)(b)(2)(a)(b); 156; 159(2); 162(2)(b)d(i)(ii)(iii)(5); 165(3)(b)(d)(i)(ii)(iii)(5)(b)(6); 176; 188(1); 189(3)(4); 258(1); 259(1)- (Interpreted)
2. Environment and Land Court Act (cap 8D) sections 3, 13- (Interpreted)
3. Intergovernmental Relations Act (cap 265F) sections 3, 30, 31(a)(b); 32 - 35- (Interpreted)
4. Land Act (cap 280) section 150- (Interpreted)
5. Land Registration Act (cap 300)section 101 - (Interpreted)
6. National Land Commission Act (cap 281) section 15- (Interpreted)

Advocates

Mr. Odera h/b for *Mr. Okiya Omtata Okoiti* for the petitioner
Mr. Thanji for the 1st respondent
M/s Langat for the 2nd respondent & interested party – the Hon. Attorney General
M/s. Mwashuruti for the 2nd interested party
M/s. Muthiani for the 3rd interested party

RULING

I. Historical background of the dispute.

1. The petition before this honorable court for its determination is the one dated July 19, 2021. It was filed on July 23, 2021 by the petitioner herein acting on behalf of 178 residents of the County of Taita Tavetta against the 1st, 2nd and 3rd respondents, the 1st, 2nd and 3rd interested parties hereof. Primarily, it was brought under the provisions of articles 1(3)(c), 22(1) & 22(c) 23, 48, 50(1) 159, 162(2)(b) 165(5)(b) & 6, 258(1) & 259(1) of the *Constitution of Kenya* (Hereinafter referred to as "The Constitution") the alleged violation of articles 1, 2, 3(1), 4(20), 6(1), 10, 19, 20, 21, 24, 93(2) , 94(3), 129, 130, 131(1)(b) & (a) & (b) 156, 188 and 258 of the Constitution, the alleged violation of rights and fundamental freedoms under articles 47(1) of the Constitution. The petition seeks to compel Parliament of Kenya to set up an independent commission to resolve the boundary dispute between Taita Taveta and Kwale and between Taita Taveta and Makueni and the national government to survey and erect beacons to clearly demarcate the boundaries in issue.

2. By and large, this matter is marred and wholesomely perpetrated by deep insurgencies of historical injustices meted upto the community ordinarily residents of the suit land. Primarily, the said conundrum emanates from certain decisions made pertaining to geographical locations which had adverse negative – political and economic effect touching on boundaries made during the colonial era. The events leading to the filing of this petition are set out in the facts, testimony and a 31 grounds of the Notice of Motion application and the 8 Paragraphed supporting affidavit sworn by Mr Okiya Omtatah Okoiti and a bundle of annextures marked as "Exhibit 000 – 1" annexed hereto.

3. The petitioner averred that he received a letter dated July 12, 2021 from some 178 ordinarily residents of the County of Taita Taveta requesting him to intervene and help them find a solution to the protracted boundary disputes between the Counties of Taita Tavetta and Kwale on the one hand over Mackinnon Town and the Counties of Taita Tavetta and Makueni on the other over Mtito Andei Town which had been simmering for a long time since pre-independence days (hereinafter referred as "The Counties").

4. The petitioner enclosed in the letter were copies of five (5) affidavits sworn by the affected parties and a copy of a document titled "Boundary Committee Report", prepared in the year 2015 by a committee appointed by the County Government of Taita Taveta. The petitioner averred that according to the

Boundary Committee Report, the County of Taita Tavetta (formerly Taita District under the repealed Constitution of Kenya) has had long standing boundary disputes with the Counties of Kwale and Makueni (formerly Kwale and Makueni Districts), and all previous efforts to resolve them failed. In particular, the boundary dispute was between the Counties of Taita Tavetta and Makueni over the location of Mtito Andei town, which lies on what used to be the boundary between the former Coast and eastern Provinces of the repealed Constitution of Kenya. The petitioner deposed that whereas, on the one hand, the County of Makueni claims that the entire town belongs to it, the County of Taita Tavetta, on the other hand, claims that part of the town belongs to it pursuant to existing documentation and recent history.

5. The petitioner averred that the root cause of all these three (3) County boundaries dispute arose from as early as in the Colonial times. According to him and the residents, there was a boundary dispute between the Counties of Taita Tavetta and Kwale over the location of Mackinnon Road Town, which was gazetted in 1947. This was part of Taita until the year 1961 when a colonial District Commissioner (DC) for Taita District called A F Holford Walker, who was based in Voi Town, wrote to the then Coast Provincial Commissioner requesting to transfer it to Kwale District, citing administrative challenges. The move was heavily criticized and resisted by the residents of the Mackinnon town and by other political leadership of Taita District. As a result, the decision was reversed within six months. However, taking that the transfer had already been gazetted, it required the following year's – 1962 Boundary Review Commission to correct the anomaly and de – gazette the transfer. Unfortunately, according to the petitioner, to date, the transfer has not been de – gazette resulting in the current boundary dispute between the two Counties of Taita Tavetta and Kwale. There are no beacons clearly demarcating the boundaries between the Counties of Taita Tavetta and Kwale; and Taita Tavetta and Makueni.

6. The petitioner asserted that there were no beacons clearly demarcating the boundaries between the Counties of Taita Taveta and Kwale, and Taita Taveta and Makueni thereof. The two boundary disputes did not just concern the actual boundaries of the County of Taita Taveta they were also based on the allegation that the current county boundaries were unfair as they were based on historical injustices. To the petitioner, at the Centre of the disputes was the question of who collected levies in the disputed towns which were key tax collection points. The question of which county collected taxes was a key source of conflict in Kenya's devolved governance system.

7. The petitioner further contended that the disputes had created tension on the ground. It had a very high potential of turning violent at the 2022 general elections leading to the loss of lives and livelihoods. Hence, he stressed, if left unresolved, these disputes had the potential of undermining the objects of devolution and national security. The petitioner further stated that the foregoing state of affairs called for urgent action by the Parliament of Kenya (The National Assembly and the Senate) which alone was mandated to alter the county boundaries under the *Constitution* pursuant to the provisions of articles 94(3) and 188.

8. He asserted that the two boundary disputes did not just concern the actual boundaries of the County of Taita Tavetta but they are based on the allegation that the current County boundaries are unfair because they are based on historical injustices. He stated that the said County boundary dispute has created tension on the ground and have the very high potential of turning violent during the next Presidential, National Assembly, Senate, Women Representatives, Gubernatorial and Members of the County Assembly general election of 2022 leading to loss of lives and livelihoods. It may also erode the gains achieved in the devolved governance systems.

9. The petitioner viewed that at the centre of the disputes is the question of who collects levies in the disputed two (2) towns which are key tax collections points. The question of which County collects taxes is a key source of conflict in Kenya's devolved governance system. The disputes have resulted

in innocent traders who used to pay taxes to the predecessor of the County Taita Tavetta before the establishment of the Counties being forced to pay taxes twice to two different Counties. In Mackinnon Road town the ordinarily residents and traders pay taxes to both the Counties of Taita Tavetta and Kwale; and Mtito Andei Town. They also pay taxes to both the Counties of Taita Tavetta and Makueni. Due to this high tend confusion, the traders do not know from which County they should demand services and accountability for the taxes they lawfully and regularly pay.

10. According to the petitioner, the residents of the two towns – Mtito Andei and Mackinon road towns and its environs were complaining of harassment by officials from the said Counties competing for the control of the towns. In particular, the residents complained that they were forced to pay taxes to two different Counties resulting to double taxation which was a gross violation of the affected traders property rights under the provisions of articles 40(3) and 47(1) of the *Constitution of Kenya*. And due to the confusion they did not know which County they should demand services and accountability for the taxes they paid.

11. The petitioner posited that according to the boundary committee report, the County of Taita Taveta, formerly known as the District of Taita under the repealed Constitution had had long standing boundary disputes with the Counties of Kwale and Makueni formerly the Districts of Kwale and Makueni respectively and all the efforts to resolve the said dispute had been futile. Further, at the same time and in particular there was an existing boundary dispute between the Counties of Taita Taveta and Makueni over the location of Mtito Andei Town, which is allegedly on what used to be the boundary between the former Coast and Eastern provinces of the repealed Constitution of Kenya. On the other hand, while the County of Makueni claimed that the entire town belonged to it, the County of Taita Taveta on the other hand claimed that part of the town belonged to it pursuant to existing documentation and recent history.

II. The Petitioner's Case.

12. Vide filed petition dated July 19, 2021, the petitioner acting on instruction and behalf of 178 residents of the County of Taita Taveta filed the instant petition together with a noticeof motion application brought under the certificate of urgency. The application sought the following Conservatory orders *inter alia*:

    a. Spent.

    b. That pending "the *inter- parties*" hearing and determination of the application and/ or the petition herein, this honorable court be pleased to issue and hereby issues an interim order of *status quo ante*:

        i. Appointing the County Government of Taita Taveta to be the sole authority issuing business permits and levying county taxes in Mackinnon Road Town just as its predecessor did before the establishment of county governments in the year 2013, and to deposit all the revenues it so collects into an interest earning bank account opened jointly with the Kwale County government.

        ii. Appointing the County government of Taita Taveta to be the sole authority issuing business permits and levying county taxes in Mtito Andei town just as its predecessor did before the establishment of county governments in the year 2013 and to deposit all the revenues it so collects into an interests earning bank account opened jointly with the Makueni county government.

c. That pending the *inter- parties* hearing and determination of the application and/ or the petition herein, this honorable court be pleased to issue and hereby issues an interim order of prohibition:-

i. Prohibiting the County Government of Kwale and its agents from collecting revenues in any way whatsoever or howsoever in Mackinnon Road Town where its predecessor did Not collect revenues before the establishment of county governments.

ii. Prohibiting the County Government of Makueni and its agents from collecting revenues in any way whatsoever or howsoever in Mtito Andei town where its predecessor did Not collect revenues before the establishment of county governments.

d. That consequent to the grant of the prayers above the Honorable court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/ or favour the cause of justice.

e. That the costs be in the cause

As indicated, the application is supported by the facts, grounds and averments on the supporting affidavit sworn by the petitioner Mr Okiya Omtatah Okoiti.

13. On the other hand the main petition prays the honorable court be pleased to make declarations and issue the following orders:

a. A declaration be and is hereby issued that forcing the residents of Mtito Andei and Mackinnon Road Towns to pay double taxes is a gross violation of the affected traders property rights under article 40(3) of the *Constitution*.

b. A declaration be and is hereby issued that the double taxation the residents of Mtito Andei and Mackinnon Road Towns violates article 47(1) of the *Constitution*.

c. A declaration be and is hereby issued that Parliament of Kenya should set up an independent commission to resolve the simmering boundary disputes pitting Taita Taveta County against Makueni and Kwale counties.

d. A declaration be and is hereby issued that the Parliament of Kenya should enact enabling legislation to implement articles 94(3) and 188 of the *Constitution*.

e. A declaration be and is hereby issued that the National Executive of Kenya has failed to lessen county boundary disputes by surveying and erecting visible beacons to clearly demarcate the boundaries of Kenya's 47 counties pursuant to articles 129, 130, 131(1)(b) & 2(a) & (b), as read together with article 6(1) of the First Schedule to the *Constitution*.

f. A declaration be and is hereby issued that the National Executive of Kenya should survey and erect visible beacons to clearly demarcate the boundaries of Kenya's 47 counties, pursuant to articles 129, 130, 131(1)(b) & 2(a) & (b), as read together with article 6(1) and the First schedule to the *Constitution*....this is repeated twice

g. A mandatory order compelling the Parliament of Kenya to set up, within three months from the date of this order, an independent commission to resolve the simmering boundary disputes pitting Taita Taveta County against Makueni and Kwale counties.

h. An mandatory order compelling Parliament, after the boundary disputes have been resolved to direct how the County Governments of Taita Taveta, Makueni and Kwale will utilize the

money held in the joint accounts they opened for revenue collections in Mackinnon Road and Mtito Andei tows as ordered by the court at the beginning of these proceedings.

i. A mandatory order compelling the Parliament of Kenya to enact, within 6 months from the date of this order, enabling legislation to implement articles 94(3) and 188 of the constitution .

j. A mandatory order compelling the National Executive to, within twelve months from the date of this order, survey and erect visible beacons clearly demarcating the boundaries of Kenya's 47 counties as per the Districts and Provinces Act, 1992, with preference being given to the Boundaries between Taita Taveta County and Makueni County on the one hand, and Taita Taveta County and Kwale County on the other.

k. A mandatory order compelling the National Executive and the Parliament of Kenya to file in this honorable court affidavits demonstrating compliance with the court orders at the expiry of the periods within which they have been ordered to act.

l. A mandatory order compelling the respondents to pay the petitioner's costs of this petition.

m. The Honorable court be pleased to issue any other or further remedy that the Honorable court shall deem fit to grant.

III. Notice of Preliminary Objections.

14. Upon service of the pleadings to all the parties, and before the application could be heard and determined, the 2nd, 3rd respondents, the Senate, the 3rd and 4th interested parties each filed notices of preliminary objections dated September 4, 2021, 19th October and October 21, 2021 respectively.

A. The Notice of the Preliminary Objection by the 2nd, 3rd Respondents and the 4th Interested Party.

15. Vide notice of preliminary objection dated October 19, 2021, the 2nd and , 3rd respondents and the 4th interested party raised a preliminary objection on the grounds:-

a. That the disputes alluded within the petition are intergovernmental disputes between county governments and that the orders sought in the petition affect relations between the National government as well as county government and should be solved within Constitutional and statutory framework of the *Intergovernmental Relations Act* .

b. That article 189 of the Constitution states that disputes are to be settled within the mechanisms outside court which sections 31(a) and (b) of the *Intergovernmental Relations Act, No 2 of 2012* .

c. That the petitioners have not exhausted all available forms of dispute resolutions and hence the petition is not is not properly this court citing the case of "Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR."

d. That orders in the petition should they be granted will be circumventing the Intergovernmental Relations Act. That such orders will be in vain for unenforceability. Reliance is placed in the case of " *Republic v Chief Justice of Kenya & others, ex-parte Moijo Mataiya Ole Keiwua* Nairobi HCMA No 1298 of 2004.

e. That the dispute alluded to in the petition concerns delimitation of boundaries in accordance with article 89 of the *Constitution* which is within the constitutional preserve of the Independent Electoral and Boundaries Commission.

The 2nd, 3rd respondents and the 4th interested party prays that the petition and the applications dated July 18, 2021 be dismissed.

B. The Senate's Notice of Preliminary Objection.

16. Vide a notice of preliminary objection dated October 21, 2021, the Senate raised a preliminary objection on the grounds:

    a. That article 188 of the Constitution provides for the boundaries of counties.

    b. That the Senate is the body set up under article 96 of the Constitution to represent the counties, and serves to protect the interests of the Counties and their governments.

    c. That the petitioners have not invoked their rights under article 119 of the Constitution to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation and as provided for in the petition to Parliament (Procedure) Act which is enacted pursuant to article 119 (2) of the Constitution.

    d. That petition violates the principles under article 159(2) of the constitution which enjoins the courts to be guided and to promote the principles of alternative forms of dispute resolution including reconciliation, mediation and arbitration

    e. That disputes herein is a dispute contemplated by article 189(3) of the Constitution.

    f. That the petitioners have not complied with the requirements of section 31 of the *Intergovernmental Relations Act*, cap 5G, laws of Kenya to refer disputes such as the present dispute to an alternative dispute resolution mechanism before instituting court proceedings

    g. That it is trite law that where the law provides a mechanism for dispute resolution, that mechanism must first be invoke and exhausted before this honorable court's jurisdiction can be properly invoked

    h. That the present proceedings are therefore premature as Petitioner is seeking the intervention of this honorable court without first invoking and exhausting the mechanisms provided for under the Constitution, the petition to Parliament (Procedure) Act and the Intergovernmental Relations Act.

17. The Senate prayed that the petition herein be struck out with costs to the respondents

C. The Preliminary objection by the 3rd Interested Party.

18. Vide a notice of preliminary objection dated 4th September 2021 and filed on 4th October 2021, the 3rd interested party raised a preliminary objection dated 4th September 2021 on the grounds:-

    a. That this honourable court lacks jurisdiction to hear and determine the petition which was filed in violation of express provisions of article 189(3) and (4) of the Constitution and sections 31, 32, 33, 34 and 35 of the Intergovernmental Relations Act.

    b. That the petition is premature and abuse of the court process.

D. The Grounds of Opposition by the Petitioner.

19. Through statement of grounds of opposition dated October 26, 2022, the petitioner opposed the all the preliminary objections dated 4th September 2021, 19th and 21st October 2021 upon the grounds that:

The petitioner held that the filed preliminary objections were incompetent. That they were vexatious, scandalous, and were brought maladides. The preliminary objections were an abuse of the process of this honorable court.

a. He contended that pursuant to articles 162(2)(b) of the Constitution as read together with articles 23 and 165(3)(b) & (d)(i), (ii) & (iii) and (5)(b) this court has jurisdiction to hear and determine constitutional claims arising herein given that:

a. Both the petitioner and 178 residents of Taita Taveta County claiming harassment by governments of Kwale and Makueni counties in Mackinnon Road Town and Mtito Andei respectively, were not and did not represent the National or any County Government to be subjected to the dispute resolution mechanisms under article 189(3) and (4) of the Constitution as read with sections 30, 31, 32, 33, 34 and 35 of "the Intergovernmental Relations Act No 2 of 2012".

b. Both the petitioner and the 178 residents of Taita Taveta county claiming harassment by governments of Kwale and Makueni counties in Mackinon Road and Mtito Andei Town, respectively, did not have standing to invoke the dispute resolution mechanism under article 189(3) and (4) of the Constitution as read together with sections 30, 31, 32, 33, 34 and 35 of the Intergovernmental Relations Act.

b. The dispute herein fell under the ambit of articles 94 (3) and 118 of the Constitution hence could not raise the bar of the doctrine of exhaustion of the dispute resolution mechanism under article 189 (3) and (4) of the Constitution as read together with sections 30, 31, 32, 33, 34 and 35 of the Intergovernmental Relations Act, No. 2 of 2012.

c. Under the provision of article 189(3) and (4) of the Constitution as read together with sections 30, 31, 32, 33, 34 and 35 of The Intergovernmental Relations Act does not oust the powers and the provisions of articles 94(3) and 118 of the *Constitution*.

d. Parliament's failure to execute its mandate under articles 94(3) and 118 of the Constitution could not be remedied through the dispute resolution mechanism provided under article 189(3) and (4) of the Constitution as read together with sections 30, 31, 32, 33, 34 and 35 of the Intergovernmental Relations Act. The failure could only be remedied through the intervention of this court pursuant to articles 162(2)(b) & d(i), (ii) & (iii) and 5(b) of the Constitution.

e. The dispute in the petition did not concern the delimitation of boundaries of electoral units by the IEBC under article 89 of the *Constitution*

f. Under the provision of article 119 of the *Constitution* was irrelevant to these proceedings since Parliament had no capacity to grant all the reliefs sought herein, including the violation of the bill of rights under articles 40(3) and 47(1) of the *Constitution*, and failure by the National Executive of Kenya to lessen county boundary disputes by surveying and erecting visible beacons to clearly demarcate the boundaries of Kenya's 47 counties, pursuant to articles 129, 130, 131(1)(b) & (2)(a) & (b) of the Constitution.

g. The petition does not violate the principles of alternative dispute resolution mechanisms under article 159(2) of the constitution since only this court has the requisite jurisdiction to hear an determine all the issues herein

h. Hence the petition is ripe and this court, which has been properly been moved should determine the motion on the merits.

20. The preliminary objections by the respondents and the Interested parties were unmeritorious and hence should be dismissed with costs to the petitioner. That both the petition and the notice of motion application be set down for a full hearing on merit at the earliest date convenient to the court.

IV. The Submissions

21. On December 1, 2021 when all the parties appeared before court, they were directed to have the preliminary objections raised by them be canvassed and disposed off by way of written submissions. Pursuant to that all the parties obliged.

22. On January 25, 2022 each of parties were accorded some reasonable time to highlight their written Submissions and which was well utilized as the parties were extremely articulate. Thereafter, the honorable court reserved a date for ruling hereof.

A. The 1st Respondent's Oral and Written Submissions.

23. On January 12, 2022 the 1st respondent through the law firm of Messrs Wangechi Thanji Advocate filed their written submissions dated December 16, 2021. M/s Akama Advocate submitted that the petitioner had prematurely filed the present petition before exhausting the available mechanisms to settle the dispute before invoking the jurisdiction of the honourable court. Reliance was based on article 188 of the Constitution.

24. The 1st respondent submitted that the Senate is the body set up under article 96 of the Constitution to represent the Counties, and serves to protect the interests of their counties and their governments. It averred that the petitioner had not invoked their rights under article 119 of the Constitution to Petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation as provided in the petition to Parliament (Procedure) Act which is enacted pursuant to article 119(2) of the Constitution. The petition violates the principles under article 159(2) of the Constitution which enjoins courts to be guided and to promote the principles of alternative forms of dispute resolution including reconciliation, mediation and arbitration.

25. The 1st respondent submitted that the dispute herein was a dispute contemplated by article 189(3) of the Constitution. They further placed reliance on the provision of sections 31,32, 33, 34 and 35 of the *Intergovernmental Relations Act* to posit that the petitioner had not referred the present dispute to an alternative dispute resolution mechanism before instituting court proceedings and therefore the instant petition was premature.

26. It posited that under the provision of article 165(3) of the *Constitution*, the High Court has no jurisdiction to hear any question concerning the interpretation of the constitution and whether the action done under the Constitution complies with the constitution and in doing so, the person alleging a violation of the constitution must have complied with all other dictates of the constitution, to the 1st respondent the petitioner had not complied with the provision of article 159(2) of the *Constitution*. However, while the High Court has jurisdiction the petitioner had not exhausted the alternative methods of dispute resolution provided by the Constitution.

27. To buttress on this argument, the 1st respondent cited the cases of " *Isiolo County Assembly Service Board & another v Principal Secretary (Devolution) Ministry of Devolution and Planning & another*[2016] eKLR; *County Government of Taita Taveta – v Kenya Wildlife Services & another; Council of Governors & another (Interested parties)* [2021] eKLR, *International Legal Consultancy Group & another v Ministry of Health & 9 others*, Nairobi High Court Petition No 99 of 2015 [2016] eKLR".

B. The Honourable Attorney General's Oral and Written submissions.

28. The Honourable Attorney General on behalf of the 2nd respondent, 3rd respondent and 4th interested party filed written submissions dated November 3, 2021. The Honourable Attorney General framed three (3) issues for determination by this court:-

    a. Whether the disputes alluded within the petition are intergovernmental disputes between the county governments and should be solved within the Intergovernmental Relations Act?

    b. Whether the petitioner has exhausted all available dispute resolution mechanism?

    c. Whether the dispute affects Delimitation of boundaries under article 89 of the *Constitution* which is a preserve of IEBC.

29. Mr Penda Advocate for the Attorney General submitted that this was a clear indication that the disputes alluded to in the facts of the petition were connected to the boundary disputes, the first being the geographical demarcation of Mackinnon Road Town. Whether it lied within Kwale county jurisdiction or Taita Taveta county or Makueni County. The Attorney General contended that the petitioner stated that the residents of the two towns were under uncertainty on where to pay levies. The uncertainty was also leading to dispute between county governments in terms of revenue collection jurisdiction. To the Attorney General, from the facts of the petition it was clear that the disputes in boundaries of both Mackinnon Road Town as well as Mtito Andei town set county governments against each other and qualify to be intergovernmental relations dispute.

30. The Honourable Attorney General submitted that the dispute being intergovernmental relations dispute, the petitioner had not exhausted all the available dispute resolution mechanism. To buttress the case, the Attorney General cited the provisions of article 189 of the Constitution, sections 3, 30, 31, 32, 33, 34 and 35 of the Intergovernmental Relations Act, the case of Petition no 370 of 2015, "*Isiolo County Assembly Service Board & another v Principal Secretary (Devolution) Ministry of Devolution and Planning & another* 2016 eKLR".

31. On whether the dispute affected the Delimitation of boundaries under the provisions of article 89 of the Constitution, the Attorney General submitted that the nature of the prayers sought in the petition would adversely affect the boundaries of the electoral units, constituency as well as ward units because of the existence of a boundary dispute involving the towns of Mackinnon Road Town on which county they belong.

32. In addition, the Attorney General submitted that the County Assembly boundary positions as well as constituency boundaries may end up being altered. These formed the basic electoral units at the county and national level that provide representation as part of government. Their contention was that the preserve of reviewing and altering the boundaries of such crucial electoral units lied with the IEBC.

33. The petitioner submitted that the prayers in the petition could not be implemented without the input of IEBC that had not been enjoined in the petition and should the court grant the prayers the same would be in vain as they would not address the electoral discrepancies that would arise and prayed that the petition dated July 19, 2021 and all applications therein be dismissed.

C. The 3rd Interested Party's Oral and written Submissions

34. Whereas the 3rd interested party submitted on the preliminary objections dated, October 4, 2021, October 19, 2021 and October 21, 2021 filed by the law firm of Messrs. Mutheu Muthiani & Company

Advocates, I have perused the record and the 3rd interested party's notice of preliminary objection is dated September 4, 2021 and filed on October 4, 2021.

The 3rd interested party framed issues for determination as:

a. Whether the dispute before this honourable court amounts to an intergovernmental dispute.

b. Whether the petition before this honourable court offends the express provisions of article 189(3) and (4) of the constitution

c. Whether this honourable court has jurisdiction to hear and determine the petition herein.

35. M/s Muthiani Advocate for the 3rd interested party submitted that the current petition raised the issues of boundary dispute and double taxation which were of legal nature capable of being heard and determined by this honourable court as an appellate stage in the event that parties failed to resolve the dispute as contemplated under article 189(3) and (4) of the Constitution and sections 30 to 35 of the Intergovernmental Relations Act. It submitted that the dispute before this honourable court meets the basic requirements for a dispute to fall within the ambit of Intergovernmental Relations Act. On this point, the learned counsel cited the case of:- "*County Government of Nyeri v Cabinet Secretary Ministry of Education Science and Technology & Another* 2014 eKLR.

36. The learned counsel averred that a cursory look at the Petition indicated that the petitioner, who was a proxy of the 1st interested party – the County Government of Taita Taveta had approached this honourable court before exhausting the alternative dispute resolution mechanisms as enshrined under provisions of article 189 (3) and (4) of the Constitutions and sections 30 to 35 of the *Inter Governmental relations Act*. It further submitted that courts have time without number held that where there existed sufficient and adequate legal avenue, a party ought not to trivialize the jurisdiction of the court pursuant to the constitution and to seek redress under the relevant statutory provision, otherwise such statutory provisions would be rendered otiose. To buttress on this point, She placed reliance in the case of "*Peter Ochara Anam & 3 others v Constituencies Development Fund Board & 4 others*, Kisii High Court Petition No 3 of 2010 and *County Government of Turkana v National Land Commission & another* 2019 eKLR"

37. The learned counsel further place reliance in the *locus classicus* case of " the *Owners of the Motor Vessel " Lilian S" v Caltex Oil Kenya Limited*; the *Speaker of the Senate & another v Attorney General & others* Advisory Opinion Reference No 2 of 2013, *Isiolo County Assembly Service Board & another v Principal Secretary (Devolution) Ministry of Devolution and Planning & another* 2016 eKLR and *Narok County Government v Trans Mara County Council & another* Civil Appeal No 25 of 2004.

38. The 3rd interested party delve into the issue and submitted that although a keen reading of the cited authorities and provisions left no doubt that in as much as the jurisdiction of this honourable court is unlimited, in the instant petition the said jurisdiction had been clawed back by the constitution and the Intergovernmental Relations Act and could not be invoked in the first instance. It was the 3rd interested party's submissions that that the petitioner ought to have exhausted the alternative dispute resolution mechanisms before moving this honourable court. That the instant petition was premature and abuse of court process since it squarely fell within the purview of disputes between county governments, yet no attempt had been made to exhausted the alternative dispute mechanisms provided under the law. Therefore, this court lacked the original jurisdiction to entertain the instant petition.

39. In addition, the 3rd interested party submitted that it also supported the preliminary objections dated 19th October 2021 and October 21, 2021, to the effect that there was a boundary dispute between two counties and that the petitioner ought to have invoked the provisions of article 188(1) of the

constitution. That articles 94(3), 188 and 189 of the Constitution provides for the role of Parliament in regard to altering boundaries , that article 93(3) of the Constitution provides that parliament may consider and pass amendments to the Constitution and alter county boundaries as provided for in the constitution and lastly that article 119 of the Constitution provided for the right to Petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation

40. In conclusion, the learned counsel for the 3rd interested party submitted that the dispute before this court amounted to intergovernmental dispute. Her contention was that the petition offended the express provisions of article 189(3) and (4) and sections 30, 31, 32, 33, 34 and 35 of the Intergovernmental Relations Act and that this honourable court has no jurisdiction to hear and determine the petition. In relation to a preliminary objection reliance was placed in the case of "*Mukisa Biscuits Manufacturers company Limited – v West End Distributors Limited* 1996 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 Court Petition No 10 of 2013 (2014) eKLR". The 3rd interested party urged this honourable court to uphold the preliminary objection and dismiss the instant petition with costs.

IV. Analysis and Determination

41. The honourable court has critically perused all the filed pleadings, the annextures, both the oral and written submissions by all the parties together with the cited authorities and all the relevant provisions of the law. In order to arrive at a fair, just and an informed decision, it has framed the following six (6) salient issues for determination. These are:-

    a. Whether the preliminary objections raised by the 1st, 2nd and 3rd respondents and the 3rd and 4th interested parties dated September 4, 2021, October 19, 2021 and October 21, 2021 fulfil the fundamental threshold of an objection by law and precedents.

    b. Whether the filing of a constitution petition was the appropriate avenue to ascertain the claims by the petitioners.

    c. Whether the dispute before this Honourable court amounts to an intergovernmental dispute and if so, whether it offends the express provisions of article 189(3) and (4) of the Constitution by not subjecting it to alternative dispute resolution mechanism under the Intergovernmental Relations Act;

    e. Whether this honourable court has jurisdiction to hear and determine the petition dated July 19, 2021 and filed on July 23, 2021 by the petitioner herein.

    f. Whether the dispute affects delimitation of boundaries under article 89 of the Constitution which is a preserve of IEBC; and

    g. Who will bear the costs of this petition.

ISSUE a). Whether this Honourable Court has Jurisdiction to hear and determine the Petition dated 19th July, 2021 and filed on 23rd July, 2021 by the Petitioner herein.

42. As indicated above, the preliminary objection was filed by the 2nd & 3rd respondents, the Senate, the 3rd interested party, the 3rd and 4th interested parties dated 4th September, 19th October and 21st October

respectively. It is the subject of this ruling. According to the *Black Law Dictionary* a preliminary objection is defined as being:

> " In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary....."

The above legal preposition has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co Limited v West End Distributors Limited*. [1969] EA 696. Where Lord Charles Newbold P held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

> " The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

43. I wish to cite the case of *Attorney General & another v Andrew Mwaura Githinji & another* [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a preliminary objection *inter alia*:-

(i) A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

(ii) A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

(iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

44. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. Certainly, the issues raised by the 2nd and 3rd respondents, the 3rd and 4th interested parties herein are serious and pure issues of law which this court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. The issues are not fanciful nor remote. For these reasons, therefore, I find that the objection raised by the respondents and the interested parties were properly filed hereof. It constitutes matters akin to be determined at the preliminary level before embarking on the hearing of the case on its own merit in conformity to the case of *Mukisa Biscuits Manufacturing Co Limited (supra)*. Therefore, I shall proceed to consider them and determine them accordingly.

ISSUE No. b). Whether the Petition is the appropriate avenue for the Petitioners to ascertain their claim.

45. Undoubtedly, and as founded herein above, preliminary objection ideally ought to be on matter of pure law. As a matter of course, the Constitution of Kenya under article 259(1) provides a guide on how it should be interpreted as such:-

This Constitution shall be interpreted in a manner that:-

a) Promotes its purposes, values and principles;

b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

c) Permits the development of the law; and

d) Contributes to good governance....."

This court must give a liberal interpretation and consideration to any provision of the Constitution and have regard to the language and wording of the Constitution and where there is no ambiguity attempt to depart from the straight texts of the Constitution must be avoided.

Further, it is important to fathom that the Constitution is "a living instrument having a soul and consciousness of its own". It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.

46. A petition ought to follow the principles laid down of drafting constitutional petitions. Based on the principles set out in the edit of the Court of Appeal case of the *Mumo Matemu – v – Trusted Society of Human Rights Alliance & another* (2013) eKLR provided the standards of proof in the Constitutional Petitions as founded in the case of *Anarita Karimi Njeru –v- Republic* [1980] KLR 154 [1979] eKLR. Trevalyan J (as he then was) and Hancox J (as he then was) stated as follows:

> " We would however again stress that if a person is seeking redress from High Court on a matter which involves a reference to the Constitution it is important (if only to ensure that justice is done to his/her case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed." where the court is satisfied that the petitioner's claim were well pleaded and articulated with absolute particularity. It held:-
>
> > "Constitutional violations must be pleaded with a reasonable degree of precision....."

Further, in the "*Thorp v Holdsworth* (1886) 3 Ch D 637 at 639, Jesse, MR said in the year 1876 and which hold true today:

> " The whole object of pleadings is to bring the parties to an issue and the meaning of the rule.....was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expense and delay especially as regards the amount of testimony required on either side at the hearing".

In other words, cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assists in that regard and are a tenet of substantive justice, as they give fair notice to the other party....."

47. In direct application of these set out principles for filing a constitutional petition to this case, the honorable court wishes to address itself on two broad issues. Firstly, has the Petition filed by the petitioners herein pleaded with reasonable precision as founded in the *Anarita Karimi* (*supra*). To respond to this query, the honorable court totally concurs all that the petitioners have dutifully

complied and fully met the threshold of reasonable precision in pleadings for instituting this petition against the respondents and the interested parties herein and pleading for the prayers sought.

48. The petitioners claims that the respondents violated and infringed the provisions of articles 1, 2, 3(1) 4(2), 6(1), 10, 19, 20, 21, 24, 93(2) , 94(3), 129, 130, 131(1) (b) & 2(a) & (b) 156, 188 and 258 of the Constitution of Kenya among others and has specifically provided all the particulars of the ostensible violation, infringement or denial of these fundamental rights in the Bill of Rights that have been allegedly violated; provide the particulars of the alleged violations; and provide particulars in which the respondents and the Interested parties had purportedly infringed the rights.

49. In Petition No 370 of 2015, *Isiolo County Assembly Service Board & another v Principal Secretary (devolution) Ministry of Devolution and Planning & another* (2016) eKLR at paragraph 13, JL Onguto J noted-.

> " 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".

50. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR" pronounced itself:-

> [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.

In *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*, Petition No 10 of 2013, [2014] eKLR decision which has been subsequently cited by the Supreme Court in *Hassan Nyanje Charo v Khatib Mwashetani & 3 others*, Civil Application No 23 of 2014, [2014] eKLR; and in *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 other*s, Application No 50 of 2014, [2015] eKLR, the Supreme Court further stated at paragraph 15:

> " Thus a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record."

51. Both the petitioners and the respondents converge that there is an historical boundary disputes between the aforementioned counties, the point of divergence is whether the boundary dispute should first be subjected to the alternative dispute mechanisms established in law. The petitioner avers that he cannot be subjected to the provisions of the Intergovernmental Relations Act while the respondents contends the substratum of the instant petition is the boundary disputes which exists between the three counties and it should be dealt with in accordance with the provisions of the Intergovernmental Relations Act.

ISSUE c). Whether the dispute before this Honourable court amounts to an intergovernmental dispute and if so, whether it offends the express provisions of Article 189 (3) and (4) of the Constitution by not subjecting it to alternative dispute resolution mechanism under the Intergovernmental Relations Act;

52. The preliminary objection raised by the 2nd and 3rd respondents and 3rd and 4th interested parties herein seeks the court to address the necessity by parties to exploit alternative statutory dispute resolution mechanisms prior to approaching the court on the ground that the instant petition deals with intergovernmental disputes contemplated under article 189(3)(4) of the Constitution and sections 30, 3, 32, 33, 34 and 35 of the Intergovernmental Relations Act.

The Parties in the Petition

53. Undoubtedly, the petitioner is an individual person filing the instant petition on behalf of 178 residents of Taita Taveta County who live in Mackinnon Road Town and Mtito Andei and its environs who are complaining of harassment by officials from the said counties competing for control of the towns. In particular, the residents are complaining of being forced to pay taxes twice to two different counties and due to the confusion they do not know which county they should demand services and accountability for the taxes they pay.

54. The 1st respondent is the legislative arm of government established under article 93 of the Constitution; the 2nd respondent is the executive arm of the government under Chapter 9 of the Constitution; the 3rd respondent is the Attorney General who is the principal legal adviser to the government provided under article 156 of the Constitution. The 1st, 2nd and 3rd interested parties are devolved governments established pursuant to article 6, 176 of the *Constitution* and the County Governments Act while the 4th interested party is the ministry responsible for lands and physical planning in the country.

55. Article 6(2) provides that the governments at the national and county levels are distinct and interdependent and shall conduct their mutual relations on the basis of consultation and co - operation between national and county governments.

56. Pursuant to article 189(1) of the *Constitution* the 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.

57. To give effect to this provision, Parliament enacted the *Intergovernmental Relations Act* No 2 of 2012, The long title of the Act stipulates that it is 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.

58. Section 3 of the Act states that the objects and purposes of this Act are to—

(a) Provide a framework for consultation and co-operation between the national and county governments;

(b) Provide a framework for consultation and co-operation amongst county governments;

(c) Establish institutional structures and mechanisms for intergovernmental relations;

(d) Provide a framework for the inclusive consideration of any matter that affects relations between the two levels of government and amongst county governments;

(e) give effect to articles 187 and 200 of the Constitution, in respect of the transfer of functions and powers by one level of government to another, including the transfer of legislative powers from the national government to the county governments; and

(f) provide mechanisms for the resolution of intergovernmental disputes where they arise.

59. Part IV of the Act deals with dispute resolution mechanisms, section 30 provides that -

(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.

60. Section 31 provides for measures for dispute resolution and sates 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.

61. Section 32 deals with dispute resolution mechanisms to the effect 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.

62. According to section 33 of the Act-

(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.

63. As per the provisions of section 34(1) the procedure after formal declaration of a dispute is that-

> Within twenty-one days of the formal declaration of a dispute, the summit, the council or any other intergovernmental structure established under this Act shall convene a meeting inviting the parties or their designated representatives—
>
> (a) to determine the nature of the dispute, including—
>
> (i) the precise issues in dispute; and
>
> (ii) any material issues which are not in dispute; and
>
> (b) to—
>
> (i) identify the mechanisms or procedures, other than judicial proceedings, that are available to the parties to assist in settling the dispute, including a mechanism or procedure provided for in this Act, other legislation or in an agreement, if any, between the parties; or
>
> (ii) subject to article 189 of the Constitution, agree on an appropriate mechanism or procedure for resolving the dispute, including mediation or arbitration, as contemplated by articles 159 and 189 of the Constitution.
>
> (2) Where a mechanism or procedure is specifically provided for in legislation or in an agreement between the parties, the parties shall make every reasonable effort to resolve the dispute in terms of that mechanism or procedure.
>
> (3) Where a dispute referred to the council or any other intergovernmental structure established under this Act, fails to be resolved in accordance with section 33 (2), the Summit shall convene a meeting between the parties in an effort to resolve the dispute and may recommend an appropriate course of action for the resolution of the dispute.

64. The provisions of section 35 dictate 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.

65. What is envisaged from these legal provisions, is a situation where a dispute involves the government and County government from one level and County to County governments. The elaborate legislation does not make any provision where there exists a dispute between an Individual and the County government or the vice versa as it is in the instant case.

66. The Honourable Attorney General submitted that this is a clear indication that the disputes alluded to in the facts of the Petition are connected to the boundary disputes. The first being the geographical demarcation of Mackinnon Road Town. Whether it lies within the jurisdiction of the County of Taita Tavetta or Kwale or of Makueni. The Attorney General contended that the petitioner stated that the residents of the various towns are under uncertainty on where to pay levies. The uncertainty is also leading to dispute between county governments in terms of revenue collection jurisdiction. To the Attorney General, the facts of the petition are clear that the disputes in boundaries of both Mackinnon Road Town as well as Mtito Andei Town set county governments against each other and qualify to be Intergovernmental Relations Dispute.

67. The Honourable Attorney General submitted that the dispute being intergovernmental relations dispute, the petitioner has not exhausted all the available dispute resolution mechanism. To buttress the case the Attorney General cited article 189 of the Constitution, sections 3, 30, 31, 32, 33, 34 and 35 of the Intergovernmental Relations Act, Petition No 370 of 2015, the case of "*Isiolo County Assembly Service Board & Another – v Principal Secretary (Devolution) Ministry of Devolution and Planning & another* 2016 eKLR

68. In the case of *Isiolo County Assembly Service Board case* (*supra*) the nature of the dispute therein focused on the functions of the devolved county government. The petitioner had contended that the function or statutory power to develop a spatial plan is being usurped by the national government. The dispute had 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 was certainly a specific disagreement concerning matters of both fact and law which dispute involved the exercise of a function or power assigned by the Constitution and statute.

69. The basis of the instant petition is that the 178 Residents of the Mackinnon Road Town and Mtito Andei and its environs approached the petitioner complaining of harassment by officials from the said counties competing for control of the towns because of the existing county boundary dispute. In particular, the residents are forced to pay taxes twice to two different counties which amounted to double taxation and due to the confusion they do not know which county they should demand services and accountability for the taxes they pay. Clearly the Intergovernmental Relations Act deals with intergovernmental dispute which is horizontal or vertical disputes between the national government and a county government; or amongst county governments.

70. On this front, I fully agree with Wakiaga J in the case of *"County Government of Nyeri v Cabinet Secretary, Ministry of Education Science & Technology & another* [2014] eKLR" when he held:-

> " To get the definition thereof I had to look at the South African Act:- Intergovernmental Relations Frame Works Act 2005 which defines Intergovernmental Disputes as follows:
>
> > "a dispute between different governments or between organs of state from different governments concerning a matter
> >
> > a. arising from

(i) Statutory powers or function assigned to any of the parties

(ii) an agreement between the parties regarding the implementation of a statutory power or function and

b. which is justiciable in a court of law and include any dispute between parties regarding a related matter"

For a dispute to fall within the ambit of IGR framework Act it must fulfill for basic requirements:

a. The dispute must involve a specific disagreement concerning a matter of fact, law or denial of another.

b. Must be of a legal nature. That is a dispute capable of being the subject of a judicial proceedings.

c. must be an intergovernmental one in that it involves various organs of state and arises from the exercise of powers of function assigned by the Constitution, d. statute or an agreement or instrument entered into pursuant to the Constitution or a statute.

d. the dispute may not be subject to any of the previously enumerated exceptions.

71. Additionally, and coming to the case of *"County Government of Turkana v National Land Commission & another* [2019] eKLR the court (Mwangi Njoroge J) noted:-

"I am in full agreement with the criteria required for a dispute to fall within the ambit of the Act that Wakiaga J has laid down in that case, to wit, that it must fulfil some basic requirements as follows:

(a) The dispute must involve a specific disagreement concerning a matter of fact, law or denial of another.

(b) It must be of a legal nature, that is a dispute capable of being the subject of a judicial proceedings.

(c) It must be an intergovernmental one in that it involves various organs of state and arises from the exercise of powers of function assigned by the Constitution, a statute or an agreement or instrument entered into pursuant to the Constitution or a statute".

72. Both the petitioner and the 178 residents of the County of Taita Taveta in their individual capacities are claiming harassment by County Governments of Kwale and Makueni counties in Mackinnon Road Town and Mtito Andei town respectively and are before this court because as a result of boundary disputes between County governments of Taita Taveta, Kwale and Makueni respectively it has occasioned into the gross infringement, and violations on their fundamental rights onto right to property under articles 40 and 47 of the Constitution and are not representing the national or any county government to be subjected to the dispute resolution mechanisms under article 189 (3) and (4) of the Constitution and sections 30, 31, 32, 33, 34 and 35 of the *Intergovernmental Relations Act* No 2 of 2012 and therefore the instant dispute does not meet the threshold established In *County Government of Turkana case* (*Supra*).

73. As I understand, the primary basic ingredient in an intergovernmental dispute is that it must be between the national government and a county government; or amongst county governments. Having looked at totality of the dispute, I fully concur with the petitioner that both the petitioner and the 178 residents of the County of Taita Taveta claiming harassment by the County governments of Kwale and Makueni in Mackinon Road and Mtito Andei Town, respectively, do not have standing to invoke the dispute resolution mechanism under article 189 (3) and (4) of the Constitution as read together with sections 30, 31, 32, 33, 34 and 35 of the Intergovernmental Relations Act.

74. Therefore, for this very reason, and unlike if the dispute was one between the said three County Governments of Taita Taveta, Makueni and Kwale, the afore stated provisions of law would have been applicable the petitioner and the 178 residents as individuals have todate no place to turn to for assistance. Indeed, as the petitioner argued the more reason the Legislature should have invoked and operationalized the provisions of article 261(1) to (8) of the Constitution of Kenya in the enactment of such specific legislations to carter for such eventualities. During the highlighting of submissions, this court could notice the frustrations of the petitioner, he paused the question show me the right forum and I will head there. This court quickly sought soft landing solace from the Scripture in songs by David in the book of Psalms 121 verses 1 which holds:-

> " I lift my eyes to the mountains. From where does my help come? My help come from the Lord, who made heaven and earth. He will not let your foot be moved, he who keeps you will not slumber. He who keeps Israel will neither slumber nor sleep. The Lord is your Keeper; the Lord is your shade on your right hand. The sun shall not smite you by day nor the moon by night....." Thus, based on this glaring legal lacuna and vacuum the only place left for them was this honorable court.

ISSUE d). Whether this honourable court has jurisdiction to hear and determine the Petition dated July 19, 2021 and filed on 23rd July, 2021 by the Petitioner herein.

75. It is trite law that the moment a party in a suit challenges the jurisdiction of a court, anything else the court does from then onwards becomes a nullity whatsoever. Once that happens, it is significant that that huddle is finally tackled first and foremost. This is because without jurisdiction the court has no mandate to make one more step. It must down its tools. This legal preposition was well established in the now famous case in the now famous case of "*Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited* (1989) eKLR dealt with a court, jurisdiction thus:-

> " Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given".

76. In the instant case, this court's jurisdiction was challenged through the preliminary objections raised by the 1st, 2nd respondents, 3rd & 4th interested parties. They submitted, based on the Doctrine of Exhaustion,that the petitioner ought to have exhausted all the available and sufficient avenues to resolve the dispute before invoking this court process. They argued that the move was pre – mature this court being an appellate court. In doing so, they relied on the provision of article 189(3) of Constitution of Kenya and sections 33 to 35 of Inter Governmental Relations Act on aspects of where there existed governmental disputes, the same be resolved through an alternative dispute mechanisms

and certainly not instituting of a court case as the petitioner did in the instant case. The respondents and the interested parties emphasized that the petitioner ought to have exhausted this alternative dispute resolution mechanism provided for by dint of law before approaching the court. To them, the Doctrine of exhaustion provided that a litigant ought to explore all other available mechanisms in dispute resolution before proceedings to the courts. Where there were clear procedures of redress of any particular grievance prescribed by the constitution of statute, then the procedure should be strictly followed and adhered to.

77. In as much as this honorable court fully concurs with above legal preposition, but has a slight variation to it. The court holds that this case is not be a general principles applicable to all cases and facts. There are certain exceptions. The court needs to determine if this is a purely governmental or inter governmental dispute meted between governments. As stated above, this is not the case here. The dispute is by an individual - the petitioner and the 178 residents of the County of Taita Tavetta residing and carrying out their trades within the two towns and who are adversely and directly affected by the double taxation by the three County Governments as stated above. And not Inter governmental as envisaged by law.

78. From the above cited provision of the law, it brings out a very weighty issue on jurisdiction of this court on matters of an individual and the County governments. Based on the provisions of article 162(2)(b) of the Constitution of Kenya, sections 3 and 13 of the *ELC* Act, No. 19 of 2011, sections 150 of the *Land Registration Act*, No. 3 of 2012 and section 101 of the *Land Act*, No 6 of 2012 confers this court with unlimited and original jurisdiction to hear and determine on all matter pertaining to land and environment matters. From the facts hereof, there exists a boundary dispute between an Individual and three County Governments as result gross infringements, denial and violations of certain fundamental rights and freedoms under the Bill of Rights of individuals and hence the only redress attainable is before this court. The ELC is clothed with original and unlimited jurisdiction to hear and determine such a dispute. From the above, it will be discerned that this honorable court finds that the suit is properly before it and the objection that this court has no jurisdiction is dismissed.

ISSUE No. e) Whether the dispute affects Delimitation of boundaries under Article 89 of the Constitution which is a preserve of Independent Electoral and Boundaries Commission?

79. Under this sub heading, the Attorney General ably submitted that the nature of the prayers sought in the petition will affect the boundaries of the electoral units, constituency as well as ward units because of the existence of a boundary dispute involving the towns of Mackinnon Road Town on which county they belong. Further, the Attorney General submitted that the County Assembly boundary positions as well as constituency boundaries may end up being altered. To the Attorney General these form the basic electoral units at the county and national level that provide representation as part of government. The Attorney General submited that the preserve of reviewing and altering the boundaries of such crucial electoral units lies with the IEBC

80. First, article 6(1) of the *Constitution* on devolution and access to services provides that-

> The territory of Kenya is divided into the counties specified in the First Schedule.

81. Article 88 establishes the Independent Electoral and Boundaries Commission with the functions provided under article 88(4) which stipulates that the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

(a) the continuous registration of citizens as voters;

(b) the regular revision of the voters' roll;

(c) the delimitation of constituencies and wards;

(d) the regulation of the process by which parties nominate candidates for elections;

(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;

(f) the registration of candidates for election;

(g) voter education;

(h) the facilitation of the observation, monitoring and evaluation of elections;

(i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;

(j) the development of a code of conduct for candidates and parties contesting elections; and

(k) the monitoring of compliance with the legislation required by article 82(1)(b) relating to nomination of candidates by parties.

82. The provision of article 89 of the Constitution provides for Delimitation of electoral units, sub article 3 states that-

(3) The commission shall review the number, names and boundaries of wards periodically.
Sub article 8 provides that:-

(8) If necessary, the Commission shall alter the names and boundaries of constituencies, and the number, names and boundaries of wards.

Black's Law Dictionary defines delimitation as the act of fixing, marking off, or describing the limits or boundary line of a territory or country.

83. Under the provision of article 93(4) states thus:-

> Parliament may consider and pass amendments to this Constitution, and alter county boundaries as provided for in this Constitution.

The Constitution dedicates part 4 to the boundaries of counties, in particular under the provision of article 188 provides for Boundaries of counties-

(1) The boundaries of a county may be altered only by a resolution—

(a) recommended by an independent commission set up for that purpose by Parliament; and

(b) passed by—

(i) the National Assembly, with the support of at least two-thirds of all of the members of the Assembly; and

(ii) the Senate, with the support of at least two-thirds of all of the county delegations.

84. In this country land and land related disputes remain very emotive issues. Land has for years been the primary basis of disputes leading to mass displacement and killings in the country. The Constitution

of Kenya 2010 dedicates a whole chapter 5 to address the issues of land. in Advisory Opinion No 2 of 2014, *In the Matter of the National Land Commission* [2015] eKLR the Supreme Court noted:-:

> " Land, as a factor in social and economic activity in Kenya, has been a subject of constant interest, and of controversy, especially from a political standpoint. Thus, the special importance of chapter five of the Constitution....."

Further at Paragraph 213 of the advisory opinion, the Supreme Court rendered itself-

> " Chapter five of the Constitution is the reference-point, in seeking clarity on the issue of land ownership and land administration. Article 62 affirms that all land belongs to the people of Kenya collectively, as a nation, as communities, and as individuals. It specifies the manner in which public land vests, as well as the institution responsible for its administration."

In *County Government of Isiolo & 10 others v Cabinet Secretary, Ministry of Interior and Coordination of National Government & 3 others* [2017] eKLR the court (Isaack Lenaola J, as then he was) noted-

> " In that context, all parties agree that an 'independent commission' has the power to alter the boundaries of Counties as provided for in article 188 of the Constitution because they have argued (particularly the petitioners) that on the basis of article 188 of the Constitution, the parties are of the opinion that the 'independent commission' being referred to is the IEBC. I disagree. IEBC is an Independent 'Constitutional' Commission established by article 88 of the Constitution and among its responsibilities under article 88(4) are: (c) the delimitation of constituencies and wards. Article 89 then specifically provides on how the IEBC will carry out: "Delimitation of electoral units". Clearly, the boundaries alluded to, which IEBC has the power to review, are constituency and ward boundaries. The Constitution gives the IEBC no such power to 'alter' boundaries of Counties.
>
> It is my opinion therefore that while the parties are right that article 188 allows for an independent commission to alter a county's boundary, that is not the IEBC. The article provides for an 'independent commission' set up for that purpose by Parliament (Senate and National Assembly). In my understanding, this is a separate 'independent commission' set up the Parliament and it is not IEBC, a Constitutional Commission, the rationale being that County boundaries go to the core of the territory of the Republic of Kenya as provided for in articles 5, 6 and the first schedule, hence the high threshold for altering the boundaries as stated in article 188(1) of the Constitution".

85. On delimitation of boundaries under article 89 of the constitution, the Attorney General argued that the nature of the prayers sought in the Petition would affect the boundaries of the electoral units, constituency as well as ward units because of the existence of a boundary dispute involving the towns of Mackinnon Road Town on which county they belong. The Attorney General concluded his submissions that the County Assembly boundary positions as well as constituency boundaries may end up being altered that form the basic electoral units at the county and national level that provide representation as part of government which is the preserve of reviewing and altering the boundaries of such crucial electoral units lies with the IEBC

86. The petitioners are before this court as a result of a boundary dispute between the Counties of Taita Taveta and Kwale and between the Counties of Kwale and Makueni seeking orders to compel Parliament of Kenya to set up an independent commission to resolve the boundary dispute and to compel the national government to survey and erect beacons to clearly demarcate the boundary in issue.

87. Clearly the petitioner and the respondents have misunderstood the dispute in question, whereas the petitioner have placed the instant dispute under articles 129, 130 and 188 of the Constitution, the respondents on the other hand are placing it under articles 88, 89 and 188 of the Constitution. The genesis of the issue before this court is about boundary dispute between two Counties, succinctly put which county/ counties does Mackinnon Road Town and Mtito Andei belong to? Article 188 of the Constitution deals exclusively with the process of altering county boundaries and the issue at hand in this matter is demarcation and confirmation of boundaries which the matter does not fall under the purview of article 188 of the *Constitution*.

88. Under article 2 provides that the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government and No person may claim or exercise State authority except as authorised under this Constitution. The constitution is the living "grund norm" (a concept in the Pure theory of Law created by Hans Kelsen, a German jurist and legal philosopher to denote norm, order or rule that forms the underlying basis for a legal system), and in the words of Ringera J ring in my mind when the learned judge put it more succinctly in case of *"Njoya & others v Attorney General* when he observed that:-

> " the Constitution is the supreme law of the land; it is a living instrument with a soul and consciousness....."

89. Therefore, to my mind, purposive interpretation of the constitution is to the effect that territorial county boundaries are fixed and can only be altered through the clear step provided by the Constitution in strict adherence to the provisions of article 188 of the Constitution. My discernment from the Constitution is that the National Executive has no role in altering or demarcating county boundaries while Independent Electoral and Boundaries Commission can only delimit constituencies and wards and has no role or authority to alter or demarcate county boundaries. With promulgation of the Constitution, 2010 all the actions in this country are done as per the Constitution and the Constitution alone.

ISSUE e). Whether there exists an alternative forum for resolving the issues raised in the instant Petition.

90. As stated above, this court reiterates that the boundary disputes afflicting the three Counties of Taita Tavetta, Kwale and Makueni and thus other spiral effects it has had onto the violation of the fundamental rights of the ordinarily residents of the area are essentially caused by the insurgencies of historical injustices within the area by the colonial leadership.

91. The respondents have relied in the cases of "*Geoffrey Muthinja Kabiru & 2 othes v Samuel Munga Henry & 1756 others* (2015) eKLR; *Republic v Honorable Chief Justice of Kenya & others; ex-parte Moijo Mataiya Ole Keiwua* Nairobi HCMA No 1298 of 2004; *Peter Ochara Onam & 3 others v Constituency Development Fund Board; County Government of Taita Taveta v Kenya Wildlife Services & another*; *Council of Governors & another (interested parties)* 2021 eKLR; *International Legal Consultancy Group & another v Ministry of Health & 9 Others*, Nairobi High Court Petition No 99 of 2015 (2016) eKLR; *Narok County Government v Trans Mara County Council & another* Civil Appeal No 25 of 2004" contending that this honourable court has no jurisdiction because there exists other alternatives.

92. I associate myself with the reasoning in the case of "Geoffrey Muthinja Kabiru (supra) where the Court of Appeal (PN WakiI, RN Nambuye & PO Kiage JJA) held as follows:

> " It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution."

93. Further in "*Peter Ochara Anam & 3 others* (supra) where the court noted:-

> " 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".

94. The court in the "*International Legal Consultancy Group* case also quoted with approval the cases of "*The Speaker of the National Assembly v James Njenga Karume*, Civil Application No NAI 92 of 1992 [NAI 40/92 UR] (unreported) and *Stanley Mungathia Daudi & 4 others v Cyprian Kubai and others*, Meru Petition No 5 of 2013, where similar sentiments were voiced with regard to the need to follow dispute resolution mechanisms provided for under different statutes where the court noted-

> " 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"

95. I have taken time to read the aforementioned decisions, I agree that where there exists a proper and suitable alternative forum for resolving disputes then there is need to strictly adhere and present a dispute before such forum. However, in the instant petition the respondents are clearly mistaken on argument that the current dispute should be resolved as provided under the ambit of article 189(3) of the Constitution and the provisions of the Intergovernmental Relations Act. Be that as it may, apart from this particular forum under article 189(3) of the Constitution which by now we all agree is not applicable to the instant case, and based on the Doctrine of Exhaustion, this court has asked itself if there is any other existing alternative forum upon which the petitioner should approach before coming to this court.

96. Critically speaking, and based on the surrounding facts and inferences of this case, the Constitution comes to our rescue as it makes a provision for that forum. This is under the provision under article 67 of the constitution establishes an institution called "the National Land Commission" and its functions are:-

(a) to manage public land on behalf of the national and county governments;

(b) to recommend a national land policy to the national government;

(c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;

(d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;

(e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;

(f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;

(g) to assess tax on land and premiums on immovable property in any area designated by law; and

(h) to monitor and have oversight responsibilities over land use planning throughout the country.

97. The provision of section 15 of the *National Land Commission Act, No 5 of 2012* act provides for historical land injustices that pursuant to article 67(3) of the Constitution, the Commission shall receive, admit and investigate all historical land injustice complaints and recommend appropriate redress.

For the purposes of that section, a historical land injustice means a grievance which:—

(a) was occasioned by a violation of right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement;

(b) resulted in displacement from their habitual place of residence;

(c) occurred between 15th June 1895 when Kenya became a protectorate under the British East African Protectorate and 27th August, 2010 when the Constitution of Kenya was promulgated; (d) has not been sufficiently resolved and subsists up to the period specified under paragraph (c);

98. Thus, in Nairobi High Court Constitutional Petition No 511 of 2015, *County Government of Isiolo & 10 others v Cabinet Secretary, Ministry of Interior and Co - ordination of National Government & 3 others* [2017] eKLR" the court asked itself:-

> 96. Who then is to demarcate county boundaries? It is worth noting that while the petitioners, were emphatic that the 1st respondent does not have the legal mandate to demarcate county boundaries, they alluded to that power being vested in the IEBC. I have however explained above that IEBC as a constitutional commission with a specific constitutional mandate has no power to demarcate or delimit county boundaries. The respondents and the 1st interested party on their part submitted that such a 'small issue' like demarcation of boundaries is well within the power of the 1st respondent but I have already alluded to how emotive the land question is in our country and how it led to the drafting of chapter 5 of the Constitution and so the matter is not small. It was submitted that the issue of the boundary between the two counties also has not reached the level of an 'historical injustice' against the petitioners. While, as I have stated above under article 188, it is the prerogative of parliament to set up an independent commission whenever there is need to alter county boundaries, it is my understanding of the law that in the meantime, issues to do with demarcation of boundaries and claims of historical injustices should be well channeled and resolved through the National Land Commission (NLC).

99. In the case of *Ledidi Ole Tauta & others v Attorney General & 2 others* [2015] eKLR, this court, (Nyamweya, Ougo & Mutungi, J) was categorical that issues to do with allegations of historical injustices are best resolved by the National Land Commission's involvement. The court in its wisdom stated that:

> " We also note that the petitioners claim to the land is predicated on what the Petitioners claim were historical injustices visited on the community by the colonial masters who required that they move out of what they claim were ancestral lands to pave way for white settlement. We do not think the court would be the right forum for the petitioners to ventilate their claim which is founded on historical injustices".
>
> The Constitution acknowledges that there could have been historical injustices in the manner land issues were handled by past regimes and hence among the functions and mandate of the National Land Commission established under article 67(1) of the Constitution is to investigate historical injustices and to make recommendations for redress.
>
> Article 67(2)(e) provides that among the functions of the National Land Commission is to:-
>
> > "(e) initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and historical land injustices, and recommend appropriate redress".

In our view it is (*sic*) the National Land Commission that has the mandate to investigate into historical land injustices and make appropriate recommendations for redress. The court is not the appropriate organ to carry out the investigation and/or inquiry and where the law has made provision for a state organ or institution to carry out a specific function that institution should be allowed to carry out its mandate. The court should not usurp the roles of other state institutions. We therefore are of the view, it was premature on the part of the petitioners to come to court without either exhausting the process of obtaining a degazettment of Ngong Hills Forest as a state forest under the provisions of the Forest Act and/or having the National Land Commission exercise its mandate under article 67(2)(e) of the Constitution."

100. This court having perused all the relevant provisions is telling the petitioner to lift his eyes; help is coming from the Constitution of Kenya which is the solid foundation of all doings governing this Republic. It is my finding that to resolve the present boundary dispute pitting the three counties and having the disputed areas investigated, surveyed and beacons erected to clearly demarcate the boundaries in issue are best handled by the National Land Commission and make appropriate recommendations and ultimately resolving the boundary dispute will in turn provide clearly which county/ counties the residents of the towns Mackinnon Road Town and Mtito Andei should pay their taxes to.

VIII. Conclusion & Disposition

101. Before I conclude this ruling I must commend the petitioner for his enthusiasm to end the county boundary disputes pitting the aforementioned counties. At the same time, I am duty bound to express my deepfelt and sincere gratitude to all the parties who appeared in this petition for their articulate and robust well researched submissions and persuasive authorities.

102. In view of my analysis and findings as enumerated above, this court declines to assume jurisdiction of the instant petition in the first instance. The upshot of all these and for avoidance of any doubts, I do hereby order as follows:-

a. That this honorable court has original and unlimited Jurisdiction under the provisions of article 162(2)(b) of the Constitution, sections 3 & 13 of the *Environment & Land Court Act No 19 of 2011*, sections 101 of the *Land Registration Act, No 3 of the 2012* and section 150 of the Land Act, No 6 of the 2012 to hear and determine the issues raised herein this petition and hence to that extent the preliminary objection raised by the respondents and the interested parties is disallowed for being unmeritorious.

b. That for the sake of attempting to resolve the existing boundaries dispute facing the three Counties of Taita Tavetta, Makueni and Kwale, under the circumstances where there exists no clear legal mechanisms to do so, the instant proceedings are stayed for a period of Six (6) months from the date of this ruling;

c. That in the meantime, the petitioner be and is hereby directed to immediately serve this orders upon the National Land Commission lodge a formal complaint with the National Land Commission to enable them initiate investigations into the historical injustices and the instant county boundary dispute involving these three Counties prepare a detailed report with practical and pragmatic recommendations on the appropriate redress to resolve the said County boundary dispute once and for all.

d. That in the petitioner be and is hereby directed to immediately within the next seven (7) days from the date of this ruling extract and serve this orders upon the National Land Commission for their action thereof.

e. That upon service the Chairman and the Secretary to the National Land Commission be and are hereby directed to file a comprehensive report on the said three County Boundaries before this honorable court on its recommendations and appropriate redress within the next seven (7) days after its preparation for its adoption by court and further direction;

f. That in the meanwhile, there be interim orders appointing and/or authorizing the County Government of Taita Taveta to be the sole authority issuing business permits and levying county taxes in Mackinnon Road Town just as its predecessor did before the establishment of county governments in 2013, and to deposit all the revenues it so collects into an interest earning bank account opened jointly with the County Government of Kwale for a period of six (6) months from the date of this ruling.

g. That interim order appointing the County Government of Taita Taveta to be the sole authority issuing business permits and levying county taxes in Mtito Andei town just as its predecessor did before the establishment of county governments in 2013 and to deposit all the revenues it so collects into an interests earning bank account opened jointly with the County Government of Makueni.

h. That this matter to be mentioned on October 10, 2021 for purposes of compliance by the National Land Commission, ascertainment of the progress and taking further directions with regard to the disposal of the Main Petition hereof.

i. That this being a matter of great public interest and still at the very initial stages there is no orders as to costs

It is ordered accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MARCH, 2022

HON. JUSTICE L.L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:

M/s. Yumna Hassan, Court Assistant.

Mr. Odera Advocate holding brief for Mr. Okiya Omtata Okoiti for the Petitioner.

Mr. Thanji Advocate for the 1st Respondent.

M/s Langat Advocate for the 2nd Respondent & Interested Party – the Hon. Attorney General.

M/s. Mwashuruti Advocate for the 2nd Interested Party

M/s. Muthiani Advocate for the 3rd Interested Party.