



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**PETITION NO. 3 OF 2014**

**COUNTY GOVERNMENT OF NYERI .....PETITIONER**

**VERSUS**

**THE CABINET SECRETARY,**

**MINISTRY OF EDUCATION**

**SCIENCE & TECHNOLOGY**

**THE PRINCIPAL SECRETARY,**

**MINISTRY OF EDUCATION**

**SCIENCE AND TECHNOLOGY.... .....RESPONDENTS**

**RULING**

1. The Petitioner is the County Government of Nyeri established under Article 176(1) of the Constitution of Kenya and the county Government Act No. 17 of 2012 while the 1st Respondent is the Cabinet Secretary Ministry of Education Science and Technology and the 2nd Respondent is the Principal Secretary thereof.
2. The petition is founded under Articles 22 and 23 of the Constitution and alleges contravention of fundamental right and freedoms under Article 27 of the Constitution in respect of Form one selection in 2014 in Nyeri County.
3. The petitioner states that by a letter dated 15th November 2013 to all County Directors of Education, District Education Officers and all Principals of Secondary Schools in Kenya the 2nd Respondent issued guidelines for form one selection 2014 aimed at ensuring:

***i. Placement of candidates in schools of their choice and through merit.***

***ii. Equity in school placement through quotas and affirmative action where applicable.***

***iii. Proportionate sharing of national schools places between public and private schools candidates in every district based on the number of candidates taking KCPE from either category of primary schools.***

***iv. Harmonization of the selection policies throughout the county at all levels national county and district.***

4. That the extra-county schools (high performing schools with a mean score of 6.5 in KCSE) and

county schools were supposed to admit students as follows

***i. Extra County: 40% National 40% from within county and 20% from the District hosting the school.***

***ii. County: 20% from the District hosting the school and 80% from the rest of the county.***

1. The Petitioner stated that this circular was not followed in schools within Nyeri county thereby violating the Constitutional provision under Article 27 by discriminating against the students from Nyeri County and its various districts by having negligible students admitted from its host district schools and a staggering of students from other counties admitted in its schools over and above the 40% prescribed in the guidelines

2. The Petitioner prayed for:

***1) A declaration that the selection to form one places in the extra county secondary schools in Nyeri County is discriminating against the residents of Nyeri County against their legitimate expectation and unconstitutional.***

***2) An order annulling the selection of form one places in the extra county secondary schools in Nyeri county.***

***3. An order directing the Respondents to carry out a new selection for the extra county secondary schools in total and strict compliance with the guidelines dated 11st March 2013 the principles of equity and Constitution of Kenya.***

***4. An order stopping any admission of form one students in the extra count secondary schools in Nyeri county pending hearing and determination of this petition.***

***5. Cost of the suit and interest at court rate.***

***6. Any further or better relief.***

1. Together with the petition the Petitioner took out a notice of motion under certificate of urgency under order 40 rules 1, 2, 3 and 4 order 51 Rules 1 and 2 of Civil Procedure Rules and the Constitution of Kenya for order that the Honourable court grant conservatory orders restraining any form one admission on the following extra county schools in Nyeri County Namely: **Nyeri High , Tumutumu Girls, South Tetu Girls, Kangubiri Girls, Othaya Girls, Chinga Boys, Karima Boys, Naromoro Girls and Othaya Boys** until the full hearing and determination of the application or until further orders of court.

2. The application was certified urgent and fixed for interpartes hearing on 5th February 2014 when Mr. Wahome appeared for the Petitioner and Mr. Muthuri for the Respondent and upon application for adjournment by Mr. Muthuri to enable them file reply the court issued temporary conservatory orders pending interpartes hearing on 7th February 2014.

3. on 7th February 2014 the Respondent took out preliminary objections on point of law and the subject of this ruling to wit

***a. The case before the court is a dispute between a County and National Government and have been undertaken contrary to the letter and the spirit of the Constitution as provided for under Article 159, 189(3) and 4 of the Constitution.***

***b. The petition is filed contrary to section 31(a) (b) of the Intergovernmental Relations Act Chapter 5G which provides that National and County Governments shall take all reasonable measure to resolve dispute amicably and no attempts have been made by the parties to use any of the alternative disputes machinery as provided for under the law and the suit is premature and court ought to decline jurisdiction as provided for under the Constitution.***

- c. *The court did not have jurisdiction on the matter and the conservatory order issued by this honourable court cannot stand. The notice of motion and petition dated 4th February 2014 should both be dismissed.*

1. The Commissioner on Administrative Justice on 6th February 2014 filed an application to be granted leave to be joined in the petition as amicus curio or friend of court on the basis that the issues for consideration in the petition herein raised weighty matter of Constitution and Administrative Law in which the applicant may assist the court in arriving at a fair just and expeditious resolution of offering its expertise in an impartial and non partisan manner.
2. When the matter appeared before me on 7th February 2014 Miss Gathagu appeared with Miss Munyi and Gatiri for the Respondents. (Objector on the preliminary objection), Mr. Angima for the amicus curio and Mr. Wahome for the Petitioners and I allowed the application by Mr. Angima to be enjoined in the proceedings aforesaid and I directed that the preliminary objection be taken first as it raised issues on points of law.

### **SUBMISSIONS**

3. Miss Munyi submitted that the petitioner is the County Government of Nyeri established under Article 176(1) of the Constitution and County Government Act No. 17 of 2012. she submitted that at paragraph 3 three of the affidavit in support the Deponent County Secretary of Education stated that the County Government of Nyeri participates in the coordination, monitoring and education training in the county on behalf of the National Government in Nyeri County by virtue of being represented in the County Education Board under section 18 and 20 of the Basic Education Act number 14 of 2013 and is enjoined by the Constitution and other laws to protect the education interests of the Residents of Nyeri which is contrary to the 4th schedule of the Constitution and therefore as per Articles 6, 53(1)(b) and (2), 159, 189(3) and (4) and 259 of the Constitution this is a dispute between County Government and National Government and therefore the provision of article 189(3) and (4) applies.
4. It was submitted that the Legislation under subsection 4 above is the Intergovernmental Relations Act which provides for how disputes ought to be resolved at section 31 and in support thereof the case of REPUBLIC v TRANSITION AUTHORITY & ANOTHER EXPARTE KENYA MEDICAL PRACTITIONER, PHARMACIST & DENTIST BOARD (KMPDH) & 2 OTHERS [2013] EKLK was cited where it was held that section 30(1) should be followed and court should be last resort and therefore the action is an abuse of the court process.
5. It was submitted that Article 6(2) of the Constitution states that the Governments at the National and County levels are distinct and interdependent and shall conduct their mutual relationship on the basis of consultations and cooperation and that no attempt has been made by the petitioner to use any alternative dispute resolutions provided and therefore the suit is premature and the court ought to decline jurisdiction and in support of issue of jurisdiction the case of JOHN NJUE NYAGA v NICHOLAS NJIRU NYAGA & ANOTHER COURT OF APPEAL AT NYERI CIVIL APPEAL No. 175 OF 2010 was used.
6. Mr. Wahome for the Petitioner submitted that the dispute before the court was contravention of the rights of the child and that the County Government of Nyeri has come to court under Articles 22 and 23 and 27 on the violation of rights. He submitted that County Government of Nyeri falls under the “anyone” stipulated in Article 22 of the Constitution alleging that a right has been violated and that the people of Nyeri County have been discriminated on ground of their locality and in violation of Article 27 (b).
7. it was submitted that under Article 358(1) every person has a right to claim that the Constitution has been violated and that the County Government has come on behalf of the children in the county who should have joined form one and in public interest. He submitted that it was not a dispute between the County Government and National Government.
8. He submitted that Article 189 talks of relationship between the National Government and County Government and does not talk of the violation of rights. In support thereof he relied upon the case of TRANSITIONAL AUTHORITY supra.

9. Mr. Angima submitted that to know the nature of the dispute the case must be looked at in its entirety and that the dispute is about form one selection which is a function of the National Government and that the other party is the County Government and therefore if it is coming to court then it is a dispute which is subject to Article 189 and Intergovernmental Relations Act.
10. On the issue of jurisdiction he submitted that Legislation does not take away the jurisdiction of the court under Article 165 but it would be premature before alternative dispute procedure is followed.
11. This court is therefore called upon to determine three issues

**1. Does the court have jurisdiction to determine the issue herein?**

**2. Is the dispute before the court a dispute between National Government and County Government?**

**3. What constitute a dispute between the County and National Government within the provisions of the Intergovernmental Relations Act and Articles of the Constitution?**

## **JURISDICTION**

12. Miss Munyi submitted that this court lacks jurisdiction since Article 159(c) provides that when exercising judicial authority the court shall be guided by principles of alternative forms of disputes resolutions including reconciliation, mediation, arbitration and traditional dispute resolution mechanism shall be promoted. She further submitted that Article 189(3) and (4) oust the jurisdiction of this court on the dispute of this nature.
13. To understand the nature of Miss Munyi's objection I hereby quote Article 189(3) and (4)

***“(3) in any dispute between governments the governments shall make every reasonable effort to settle the dispute, including by means of procedure provided under National Legislation.***

**4. National Legislation shall provide procedures for settling Intergovernmental disputes by alternative dispute resolution mechanism including negotiation, mediation and arbitration.**

1. The National Legislation referred to under subsection (4) above is the Intergovernmental Relations Acts Cap 5(a) which provides as follows:

Section 31 ***the National and County Governments shall take reasonable means to***

***a. resolve dispute amicably and***

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

2. The crucial issue therefore is whether those two provisions oust the jurisdiction of this court to determine the issues at hand and I have difficulty with this argument against the express provisions of Article 165 of the Constitution which give this court

***a. unlimited original jurisdiction in criminal or civil matter.***

***b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied violated infringed or limited.***

3. What these provisions of the Constitution and Statute in respect of the dispute resolution between the National and County Government does is not to oust the jurisdiction of the court but to postpone the same until the alternative dispute mechanism have been attempted.
4. The issue was dealt with by the Court of Appeal at Nyeri on appeal against a judgment of this

court in NDERITU GACHAGUA v DR. THUO MATHENGE CIVIL APPEAL No. 14 of 2013 Where in dealing with dispute settlement mechanism in election petition the court had this to say.

***“Indeed Article 88(4) (e) grants the 3rd Respondent jurisdiction to deal with election disputes before the declaration of the results. However, that does not take away the High Court original and unlimited jurisdiction to deal with any matter brought before it. It does not “exclude” or “limit” the High courts jurisdiction.”***

5. I also find support in the case of REPUBLIC v TRANSITION AUTHORITY supra where the court having confirmed that section 30(1) of the Intergovernmental Relations Act 2012 provided that dispute that could be resolved under the Act were disputes (a) between National Government and a County Government or (b) amongst County Governments. The court said that the existence of the alternative remedy and procedure could not necessarily oust the jurisdiction of the court.
6. I would therefore agree with the submissions by the friend of the court that the court has jurisdiction but the exercise of that jurisdiction is postponed or that the court can decline to exercise jurisdiction pending settlement of the same. I find support herein in the cases of (i) UTHEKELA DISTRICT MUNICIPALITY v PRESIDENT OF REPUBLIC OF SOUTH AFRICA 2003(1) SA 687 (CC) where the Constitutional court held that all extra judicial avenues for resolving disputes had to be exhausted before they become justiciable and (ii) NATIONAL GAMBLING BOARD v PREMIER OF KWAZULU NATAL & OTHERS 2002 (2) SA 715 (CC) where the court held that disputes should where possible be solved at political level rather than through adversarial litigation but the inclusion of the provision for dispute settlement did not oust the court jurisdiction to hear intergovernmental disputes or disprove any organ of Government powers vested in it under the Constitution.
7. I therefore find no merit on the Respondent objection to the courts jurisdiction.
8. Is this dispute therefore one between County and National Government to which dispute settlement mechanism under Intergovernmental Relations Act applies and for which this court ought to postpone or decline the exercise of its jurisdiction to enable the parties exhaust the procedures set therein? In answering this question I note that what amounts to Intergovernmental dispute is not defined in our Act which provides as follows:

section 30(1) ***in this part unless the context otherwise requires 'dispute' means an Intergovernmental dispute.***

9. To get the definition thereof I had to look at the South African Act:- INTERGOVERNMENTAL RELATIONS FRAMEWORKS 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”***

10. 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, a 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.*

1. Intergovernmental relations is defined to mean relationships that arise between different governments or between organs of statute from different governments in the conduct of their affairs.
2. As submitted by Mr. Angima that the nature of the dispute must be looked at in totality and as submitted by Wahome the dispute before the court relates to selection of form one in county schools within Nyeri county and is brought to enforce fundamental rights and freedoms under Article 22 and 23 and 27 of the Constitution, I am therefore not persuaded that this is a dispute in respect of the functions of the petitioner as stated in schedule 4 of the Constitution as submitted by Miss Munyi.
3. To understand the nature of Intergovernmental dispute covered by the Act one needs to look at the litigation on the same in South Africa where our Act is borrowed from and in the case of NATIONAL GAMING BOARD supra the dispute therein concerned the Constitutional status provisions or functions of any of those organs of the state and that distinction ought to be made between an institution or functionary exercising power or performing a function in terms of the Constitution. The dispute herein was in respect to interpretation of statute.
4. I am therefore of the considered view that the dispute referred to by both the Constitution and the statute are those in respect of traditional government functions at the two levels of Governments established by the constitution as stated by at Articles 6(2) and 189 which provides for cooperation between National and County Governments where Article 189 which provides as follows:

**1. Government at either level shall**

**a. Perform its functions and exercise its powers in a manner that respects the functional and institutional integrity of Government as the other level and respect the Constitutional status and institution of Government at the other level and in 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) Liase with government at the other level for purposes of exchanging information, coordinating polices and administration and enhancing capacity**

**2. Government at each level and different Governments at the County level shall cooperate in the performance of functions and exercise of powers and for that purpose may set up joint committees and joint authorities.**

1. It therefore follows that the dispute between governments is a dispute in relation to the functions and exercise of powers between the different level of Government.
2. Does the dispute therefore before court fall with the above scope so as to be within the intergovernmental Relations Act? The dispute as I see it is an allegation of violation of fundamental rights and freedoms as provided for under Article 22, 23 and 27 of the Constitution and can therefore see no reason to hold that it is intergovernmental dispute simply because the County Government of Nyeri is the the Petitioner and an entity of the National Government is the Respondent as submitted by Mr. Angima as to do so would lead to absurdity.
3. Is an allegation of violation of fundamental rights a dispute which can be subjected to alternative dispute settlement even if the court were to find that it is a dispute within the meaning of the Act and the Constitution which I find it is not? Article 165 3(b) gives the High court the exclusive

jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied violated infringed or threatened. This is a jurisdiction which is not shared with any other organs of the state and is further restate in Article 23(1) as follows;

***The High court has jurisdiction in accordance with Article 165 to hear and determine applications for redress of a denial violation or infringement of or threat to, a right or fundamental freedom in the Bill of Rights.***

4. Article 22(1) provides that

***Every person has a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Right has been denied violated infringed or is threatened (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by a) a person acting on behalf of another person who can not act on their own name.***

***(c) person acting in the public interest emphasis added***

5. I can see no reason to want to reduce an allegation of violation of fundamental rights to a dispute between County Government and National Government as to do so would amount to judicially created limitation on the express provision of the Constitution and since the Constitution as quoted herein above is very clear that any person can bring court action in respect of allegation of breach of fundamental rights and freedom I am not persuaded that the petitioner is not a person with the meaning of Article 22 having taken into account the history of infringement of fundamental rights in this court where courts could not allow enforcement of fundamental right on the basis of lack of locus standi.
6. It would therefore be a sorry day for our Constitution if this court would limit the enforcement of fundamental rights and freedom by upholding the preliminary objection herein since whether or not a right has been violated and which is the subject matter of the petition before the court is a question which only the High Court can determine and can not be mediated or settled through other alternative measures.
7. I have given some thought to the preliminary objection herein as stated above and find that the same lacks merit and is hereby dismissed with cost being in the cause. The Petition herein shall proceed for hearing and determination on its merits unless the parties herein are on their own willing to engage in alternative settlement of the matters herein for which the court shall have no objection in light of the provisions of Article 159(a).

Dated, signed and delivered at Nyeri this 17th day of February 2014.

J. WAKIAGA

JUDGE

Ruling is delivered in open court in the presence of all the parties.

J. WAKIAGA

JUDGE