



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 190 OF 2013**  
**BETWEEN**  
**THE LAW SOCIETY OF KENYA.....PETITIONER**  
**AND**  
**THE TRANSITION AUTHORITY.....1<sup>ST</sup> RESPONDENT**  
**THE PUBLIC SERVICE COMMISSION.....2<sup>ND</sup> RESPONDENT**  
**THE HON ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Law Society of Kenya (“Law Society”) exercising its mandate under the *Law Society of Kenya Act* has brought this matter in public interest and in the interests of the proper and effective operation of County Governments and on the ground that it is necessary and important for the High Court to interpret various provisions and articles of the Constitution and sections of national legislation. The petitioner states that the petition is filed with a view to resolving competing interests and conflicts between the County Government and office of the Governor vis-à-vis the Provincial Administration and County Commissioners.

**Petitioner’s Case**

2. The Law Society moved the Court by a petition dated 11<sup>th</sup> April 2013 seeking the following orders;

*a. A declaration that the creation of the public office of County Commissioner, Assistant County Commissioner, Chief, Assistant Chief as offices under the national government is inconsistent with the provisions under the Constitution requiring that the national government shall structure the system of administration commonly known as the provincial administration to accord with and respect the system of devolved government established under the Constitution.*

b. Orders consequential upon the above declaration that;

i. Section 15 and 20 of the National Government Co-ordination Act 2013 are inconsistent with the principles of devolution as set out in Article 1 and Article 174 of the Constitution and are accordingly null and void to the extent of the inconsistencies and all appointments by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to offices created under the sections are invalid, null and void.

ii. An order that provincial administration purported to be structured under the National Government Co-ordination Act 2013 be deemed to be appointments under the County Government Act 2012 and accountable to the Governor and County Assembly.

c. Such further declarations and or orders be granted by this Honorable Court as deemed appropriate for the lawful operationalisation of the system of devolved government under the Constitution.

d. Costs.

3. The petition is supported by the affidavit of its Secretary and Chief Executive Officer, Mr Apollo Mboya, sworn on 11<sup>th</sup> April 2013. The affidavit largely recites provisions of statutes and matters of law which is contrary to accepted practice that an affidavit must really be confined to stating facts. The deponent sets out, in paragraphs 9 and 10, the following factual statements;

[9] *The LSK is aware that an induction workshop bringing together the 47 County Governors and the top leadership of the national government and leaders of the constitutional commissions responsible for implementing the system of devolved governance turned stormy and forced governors to walk out in protest. A copy of a sample of media coverage of the induction workshop is annexed hereto and marked as LSK1.*

[10] *At the centre of the controversy are constitutional provisions relating to the system of government existing before the Constitution known as "Provincial Administration."*

4. The petitioner avers that in purporting to exercise the role of National Government, the 1<sup>st</sup> and 2<sup>nd</sup> respondents have been and continue to usurp functions of the County Government in utter disregard of the principle of devolution set out in the Constitution under guise that they draw their power and jurisdiction from the **Transition to Devolved Government Act, 2012** the **Intergovernmental Relations Act, 2012**, **National Government Co-ordination Act, 2013** and the **County Government Act, 2013**.

5. The petitioner avers that this state of affairs is likely to interfere and restrict the principles of devolution as enshrined in the Constitution as was amply demonstrated in the incident reported in the media where the Governors walked out of their induction meeting with the leadership of the National Government protesting delayed funding and alleged meddling by senior civil servants.

6. The interested party has filed written submissions and supports the petitioner's case.

### **Respondents' Case**

7. The petition has been opposed by the respondents on various grounds but primarily on the ground that if there are disputes between the County and National Governments, there is in place a constitutional and legislative scheme to resolve these disputes. The respondents further aver that the issues between the National Government and the County Government fall within the realm of implementation and if indeed there are disputes then the mechanisms provided by the law must be utilized as court proceedings are the last resort.

### **Determination**

8. I have considered pleadings and written submissions by the parties and I take the following view of the matter. Resolution of disputes between the National and County Government is provided for under **Article 189** of the Constitution. It provides as follows;

*189. (1) Government at either level shall—*

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

*(b) assist, support and consult and, as appropriate, implement the legislation of the other level of government; and*

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

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

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

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

9. Pursuant to these provisions, the **Intergovernmental Relation Act, 2012** (“*the Act*”) was enacted to give effect to the dispute settlement provisions of **Article 189**. As the petitioner has raised the spectre of conflict between County Commissioners and Governors and I would refer to **section 19** of **National Government Co-ordination Act, 2012** which provides that where a dispute arises as to the mandate or powers of any of the officers, or roles of respective officers of the county governments and those of the national Government, a mediation team shall be constituted to deal with the dispute. Should the mediation team fail to resolve the dispute within the stipulated time, the matter may be referred to the Summit under the **Intergovernmental Relations Act, 2012** for resolution.

10. Accordingly, I agree with Ms Kambuni, S.C., for the 1<sup>st</sup> and 2<sup>nd</sup> respondent, that this case is not ripe for determination in view of the dispute resolution mechanism provided. Furthermore, judicial proceedings are a last resort as **section 35** of *the Act* provides that, “*Where all efforts of resolving a dispute under this Act fail, a party may submit the matter for arbitration or institute judicial proceedings.*” I also agree that if there is indeed a dispute then it is either the National Government or the County Government to declare the dispute and invoke the statutory provisions and not the Law Society.

11. The declarations sought by the petition cannot be granted as no factual basis has been laid for any determination and no dispute exists capable for being resolved between the parties to this litigation. The authority and jurisdiction of the High Court to interpret provisions of the Constitution and statutes including the authority to declare a statute unconstitutional does not exist in a vacuum and cannot be so exercised in the absence of a real dispute (See **Peter Kaluma v Attorney General Nairobi Petition No. 79 of 2011 (Unreported)**, **Harun Mwau and Others v Attorney General and Others Nairobi Petition No. 65 of 2011 (Unreported)** and **Jesse Kamau and 25 Others v The Attorney General, Nairobi Misc. App. No. 890 of 2004 (Unreported)**). What passes for a factual dispute in this case is some newspaper article where Governors are stated to have walked out of their induction meeting. This is hardly the basis to institute such serious proceedings.

12. The obligation imposed on the National Government by **section 17** of the **Sixth Schedule** to the Constitution is as follows:

*17. Within five years after the effective date, the national government shall restructure the system of administration commonly known as the provincial administration to accord with and respect the system of devolved government established under this Constitution.*

13. The National Government has five years from 22<sup>nd</sup> August 2010 to restructure the provincial administration. This is not a one off event; it is a process that involves public and stakeholder participation. Parliament has had a say in the process by enacting various statutes to govern devolution. The provisions of these statutes will always be subject to amendment as and when circumstances require within the process of “*restructuring*”. The National and County Governments are both recognized by the Constitution and must be given effect in the manner contemplated by the Constitution.

14. The County Governments have only just come into existence after the 4<sup>th</sup> March 2013 election. They must be incubated and supported and this Court is an integral part of that process. **Article 189** requires that the National and County Governments respect each other, assist and support each other and co-ordinate their functions. Granting the declarations sought in the petition will undermine this objective and process of implementation of the Constitution, devolution and the restructuring of the provincial administration.

15. In the circumstances and for the reasons I have set out above the petition is now dismissed. I make no orders as to costs.

**DATED and DELIVERED at NAIROBI** this 14<sup>th</sup> June 2013.

**D.S. MAJANJA**

**JUDGE**

Mr Kouna instructed by Gitobu Imanyara and Company Advocates for the petitioner.

Ms Kambuni, S.C., instructed by L. M. Kambuni and Associates Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> respondent.

Mr Moimbo, Litigation Counsel, instructed by the State Law Officer for the 3<sup>rd</sup> respondent.

Ms Achitsa, instructed by Prof. Albert Mumma and Company Advocates for the interested party.