REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 280 OF 2017

IN THE MATTER OF ALLEGED INFRINGEMENT OF THE PROVISIONS OF ARTICLES 6(2), 10, 35, 47(2), 73, 129, 187, 189, 201, 202, 215, 217, 218 and 220 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF INTERGOVERNMENTAL RELATIONS ACT, 2012

BETWEEN

COUNCIL OF COUNTY GOVERNORS.....PETITIONER

VERSUS

LAKE BASIN DEVELOPMENT AUTHORITY.....1ST RESPONDENT

KERIO VALLEY DEVELOPMENT AUTHORITY.....2ND RESPONDENT

TANA AND ATHI RIVER

DEVELOPMENT AUTHORITY.....3RD RESPONDENT

EWASO NG'IRO SOUTH RIVER BASIN

DEVELOPMENT AUTHORITY.....4TH RESPONDENT

COAST DEVELOPMENT AUTHORITY.....5TH RESPONDENT

EWASO NG'IRO NORTH RIVER BASIN

DEVELOPMENT AUTHORITY.....6TH RESPONDENT

THE HON. ATTORNEY GENERAL.....7TH RESPONDENT

JUDGEMENT

PETITION

1. The Petitioner vide its Petition dated 5th June 2017 seeks for the Court to grant the following orders:-

> **a. A Declaration that within the intent of Article 6 (2), 189 (1) (a) (b) and 189 (2) and 259 (11) of the Constitution, integrated planning, coordination and implementation of projects and programmes is a function of the county level of government under the Fourth Schedule to the Constitution.**

b. A Declaration that Section 3 and 8 of the Lake Basin Development Authority Act is inconsistent with the provisions of Article 6 (2), 189 (1) (a) (b) and 189 (2) and 259 (11) of the Constitution, and to the extent of the inconsistency, is null and void.

c. A Declaration that the entirety of the Lake Basin Development Authority Act is inconsistent with the provisions of Article 6 (2), 189 (1) (a) (b) and 189 (2) and 259 (11) of the Constitution, and is null and void.

d. A Declaration that Section 3 and 10 of the Kerio Valley Development Authority Act is inconsistent with the provisions of Article 6 (2), 189 (1) (a) (b) and 189 (2) and 259 (11) of the Constitution, and to the extent of the inconsistency is null and void.

e. A Declaration that the entirety of the Kerio Valley Development Authority Act is inconsistent with the provisions of Article 6 (2), 189 (1) (a) (b) and 189 (2) and 259 (11) of the Constitution.

f. A Declaration that Section 3 and 8 of the Tana and Athi River Development Authority Act are inconsistent with the provisions of Article 6 (2), 189 (1) (a) (b) and 189 (2) and 259 (11) of the Constitution, and to the extent of the inconsistency is null and void.

g. A Declaration that the entirety of the Tana and Athi River Development Authority Act is inconsistent with the provisions of Article 6 (2), 189 (1) (a) (b) and 189 (2) and 259 (11) of the Constitution, and is null and void.

h. A Declaration that Section 3 and 8 of the Ewaso Ng'iro South River Basin Development Authority Act is inconsistent with the provisions of Article 6 (2), 189 (1) (a) (b) and 189 (2) and 259 (11) of the Constitution and is null and void.

i. A Declaration that Section 3 and 8 of the Coast Development Authority Act inconsistent with the provisions of Article 6 (2), 189 (1) (a) (b) and 189 (2) and 259 (11) of the Constitution.

j. A Declaration that the entirety of the Coast Development Authority Act is inconsistent with the provisions of Article 6 (2), 189 (1) (a) (b) and 189 (2) and 259 (11) of the Constitution, and is null and void.

k. A Declaration that Section 3 and 8 of the Ewaso Ng'iro North River Basin Development Authority Act is inconsistent with the provisions of Article 6 (2), 189 (1) (a) (b) and 189 (2) and 259 (11) of the Constitution.

l. A Declaration that the entirety of the Ewaso Ng'iro North River Basin Development Authority Act is inconsistent with the provisions of Article 6 (2), 189 (1) (a) (b) and 189 (2) and 259 (11) of the Constitution, and is null and void.

PETITIONER'S CASE

2. The Petitioner's case is that: to the extent that the Lake Basin Development Authority Act; the Kerio Valley Development Authority Act; the Tana and Athi River Development Authority Act; the Ewaso Ng'iro South River Basin Development Authority Act; the Coast Development Authority Act; and the Ewaso Ng'iro North River Basin Development Authority Act vest the respective Authorities with power to undertake integrated planning, coordination and implementation of projects and programmes in their areas of jurisdiction violate the provisions of ***Article 6 (2), Article 186, Article 189 and Section 8 of Part 2 of the Fourth Schedule of the Constitution***.

3. The Petition is supported by the affidavit of Jacqueline Mogeni dated 8th June 2017. It is deposed therein that the County Governments are concerned that the National Government has failed to devolve the remaining functions even after the lapse of the transition period. Furthermore, the transfer of functions to counties cannot be left to the Intergovernmental Relations Technical Committee as it lacks the legal mandate and capacity to handle the same.

RESPONDENTS' CASE

4. The 2nd Respondent filed a Replying Affidavit dated 1st March 2018 and sworn by David Kipchumba Kimosop in opposition of the Petition dated 5th June 2017. The 2nd Respondent claims that pursuant to the provisions of ***Articles 6 (2) and 189 (3) & (4) of the Constitution*** and ***Sections 30, 31, 32, 33, 34 and 35 of the Intergovernmental Relations Act No. 2 of 2012*** the dispute before the Court is premature.

5. The 2nd Respondent contends that the 'National Basins Integrated Development Authority Bill, 2016 has been developed to consolidate laws on planning, implementation and management of basin-wide integrated development programmes, projects and public investments. The Respondent asserts that the Bill seeks to repeal the six pieces of legislation establishing the six Regional Development Authorities (RDAs) thereby restructuring the functioning of the RDAs to fit into the new constitutional dispensation.

6. The 2nd Respondent avers that the orders sought herein are extremely coercive with far-reaching constitutional, legal, commercial, socio-economic and political ramifications.

7. The 3rd Respondent opposed the Petition vide its Replying Affidavit sworn by Parmenas Mukeku dated 28th February 2018. The 3rd Respondent contends that the Petitioner's actions have brought to a halt the process of finalising and implementing the ***Draft National Basins Development Policy*** and ***draft National Basins Development Bill 2017*** which demonstrates the Petitioner's unwillingness to realize the completion of the process of fully devolving the functions of the 3rd Respondent in accordance with the ***Fourth Schedule of the***

Constitution.

8. The 3rd Respondent claims that the Petitioner wants this Honourable Court to usurp the functions of the Inter-Governmental Relations Technical Committee when there is no reason for the Court's intermeddling.

9. The 5th Respondent filed a Replying Affidavit sworn by Mohammed Keinan Hassan who deposes that the 5th Respondent is a parastatal and works under the National Government and in no way does it interfere with the work of any County Government or devolution in general. The County Governments and National Government work in Coordination and interdependence in an effort to serve the people and enhance sustainable development. The Petitioner fails to comprehend that Devolved Government is not Federal Government. Furthermore, the Petitioner by quoting the ***Fourth Schedule of the Constitution*** fails to prove how the 5th Respondent is interfering with the functions of the County Governments as based on the general functions as outlined in ***Section 8 of the Coast Development Authority Act***.

10. The 5th Respondent further argues that embracing the ***Inter-Governmental Relations Act and Articles 6(2) and Article 50 (1)***, it can be concluded that the Petition is premature, contradicts the Constitution and the good faith bestowed upon these institutions by the Kenyan people. Moreover, it is asserted that the 5th Respondent does not in any way undertake functions of the devolved governments contrary to ***Section 186 (1) and 187 (1)***; and 5th Respondent does not in any way contradict ***Section 8, Part 2 of the Fourth Schedule of the Constitution, Article 6(2) and Articles 186 and 189*** and the Petitioner has failed to prove the same. The Respondent prays that the Petition be dismissed with costs to the Respondents.

11. The 6th Respondent filed a Replying Affidavit sworn by Mohammed Keinan Hassan dated 27th February 2018 in opposition to the Petitioner's Petition. The 6th Respondent asserts that the Petition is premature and confused in its aim and objective as in its substance requests the Court to interpret and ascertain the functions of the 5th Respondent and in its prayer, asks the Court to declare that integrated planning and coordination of projects and programmes is a function of county governments as per the fourth schedule. The Respondent contends that this is a premature prayer as ***Article 6 (2), Articles 189 and 259*** embrace the need for interdependency and mutual relations via coordination and cooperation.

12. Furthermore, the 6th Respondent argues that the Petition failed to abide by ***Articles 6 (2), 189 (3) of the Constitution*** and ***Sections 30-35 of the Inter-governmental Relations Act*** and therefore fails in its substance and objective.

PETITIONER'S SUBMISSIONS

13. The Petitioner filed Submissions dated 16th March 2018 submitting that the issues for determination are:-

i. Whether the Court has jurisdiction to hear this matter

ii. Whether the Petitioner has the capacity to sue

iii. Whether the Regional Development Authorities violate the functional and institutional integrity of the county level Government

iv. Whether the continued existence of the regional development authorities impeaches on the concept of the rule of law as set out under Article 2 and 10 of the Constitution

v. Whether the Regional Development Authorities violate the principle of Subsidiarity as establishes under Article 174 (c) and (d)

14. On the first issue, the Petitioner submits that in reliance on the Ruling delivered on 27th November 2017, as well as ***Articles 165 and 259 of the Constitution of Kenya*** the Court has jurisdiction to hear this matter.

15. On the second issue, it is argued that ***Articles 22, 258 and 260 of the Constitution*** are deemed to give an enlarged view of locus standi, to the effect that 'every person' including persons acting in the public interest can move a Court of law contesting infringements of any provisions of the Bill of Rights or the Constitution. Further reliance is placed on the Ruling delivered on 27th November 2017, and the decisions in ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others; Mining Temoi & another v Governor of County of Bungoma & 17 others [2014] eKLR,*** *and* ***Republic v Kenya Association of Music Producers (KAMP) & 3 others Ex-Parte Pubs, Entertainment and Restaurants Association of Kenya (PERAK) [2014] eKLR.***

16. On the third issue, the Petitioner asserts that the 1st to 6th Respondents herein have continued to perform functions that are reserved for County Governments in contravention of the Constitution. Reliance is placed on the decisions in ***Institute of Social Accountability & another v National Assembly & 4 others [2015] KLR_HCK***, ***Robert N. Gakuru & others v Governor Kiambu County and 3 others [2014] eKLR and Council of County Governors v Attorney General & 4 others [2015] eKLR*** where it is submitted that despite the transfer of the functions of county planning and development by the Transition Authority through ***Legal Notice No. 137 to 182 of 2013***, various state bodies continue to carry out functions that are reserved for the County Governments in violation of the Constitution. The continued existence of the Regional Development Authorities is therefore antithetical to ***Article 186 (1) of the Constitution*** and the Acts of Parliament establishing these authorities ought to be declared unconstitutional.

17. On the fourth issue, the Petitioner submits that under the respective legislation to the 1st to 6th Respondents the impugned sections may be well-meaning and intended to person noble functions. Nevertheless, the said Sections cannot purport to donate powers to the 1st to 6th

Respondents that they have no mandate to execute. To that extent, the respective sections are unconstitutional. Reliance is placed on the South African case of ***Speaker of the National Assembly & others v De Lille, M.P. & another [297/298] [199] ZASCA.***

18. On the last issue, the Petitioner submits that the Respondents by purporting to perform county planning and developing functions, therefore, abuse the sanctity of devolution and the Constitution. This is supported by the decision in ***Council of Governors & 3 others v Senate & 53 others [2015] eKLR.***

1ST RESPONDENT'S SUBMISSIONS

19. The 1st Respondent filed Submissions dated 22nd November 2019 submitting that the Petitioner has not exhausted all Alternative Dispute Resolution Mechanisms available for resolving disputes between the National and County Governments. The 1st Respondent is guided by ***Articles 189 (3) (4), 6 (2),159 (2) (c) of the Constitution of Kenya***, and ***Sections 30, 31, 32, 33, 34 and 35 of the Intergovernmental Relations Act, 2012***. The 1st Respondent rely on the decisions in ***County Government of Migori & 4 others v Privatization Commission of Kenya & another [2017] eKLR; Council of County Governors v Attorney General & 12 others [2018] eKLR; and Republic v Kenya*** where the Court postulated on the exhaustion of Alternative Dispute Resolution Mechanisms before approaching the Court.

20. On the question on whether ***Section 3 and 8 of the Lake Basin Development Authority Act*** is inconsistent with the provisions of ***Article 6 (2), 189 (1) (a) (b), 189 (2) and 259 (11) of the Constitution***; it is submitted that there are exclusive functions of regional development authorities that had been retained at National Government Level and therefore not all functions or powers of the 1st Respondent were to be transferred to the Counties. It is further submitted that the pending ***National Basins Integrated Development Authority Bill, 2016*** will consolidate the laws on planning, coordination, implementation and management of basin-wide integrated development programs, projects and public investment and also to provide for the establishment, composition and functions of the National Basins Integrated Development Authority among others. Once passed, it will expressly lay out the exclusive functions of the RDAs and those that fall under the concurrent jurisdiction.

21. The 1st Respondent's final submission is that the dispute before the Court is not a constitutional one but is a dispute which can be dealt with outside the Court through the alternative dispute resolution mechanisms as enshrined in the ***Constitution*** and ***Intergovernmental Relations Act, 2012***.

4TH RESPONDENT'S SUBMISSIONS

22. The 4th Respondent filed Submissions dated 23rd September 2019 submitting that the Petitioner has filed its Petition before applying and exhausting all the mechanisms for alternative dispute resolution provided under the law as proved by the documents submitted by the Petitioner and marked as JM-3 prove. Reliance is placed on the decisions in ***Isiolo County Assembly Service Board & another v The Principal Secretary (Devolution) Ministry of Devolution and Planning & another (Nairobi Constitutional Petition No. 370 of 2015; International Legal Consultancy & another v Ministry of Health & 9 others (Nairobi Constitutional Petition No. 99 of 2015); Turkana County Government & 21 others v The Hon. Attorney General and 4 others Nairobi Constitutional Petition No. 113 of 2015.***

23. The 4th Respondent further alleges that the Petition is misconceived, frivolous and an abuse of the Court process. Moreover, the position of the Chief Executive Officer of the Council of County Governors does not exist under the Inter-government Relations Act and as such the said Jacqueline Mogeni who purportedly swore the Petitioner's Supporting Affidavit as the Chief Executive Officer of the Council of County Governor lacks the legal capacity or authority to swear the Supporting Affidavit on behalf of the Petitioner. Reliance is placed on the case of ***Peter Onyango Oyiego v Kenya Ports Authority (2004).***

5TH RESPONDENT'S SUBMISSIONS

24. The 5th Respondent through its written submissions dated 24th June 2019 submits that the Petition is premature by virtue of the ***Intergovernmental Relations Act No. 2 of 2012*** which provides for a framework for inter alia, establishing mechanisms for the resolution of intergovernmental disputes. The 5th Respondent contends that the Petitioner has neither consulted nor cooperated with the 5th Respondent as stipulated by the Constitution to have this issue amicably resolved.

25. The 5th Respondent further attests that there are functions and powers that cut across more than one level of government and these functions are undertaken by the 5th Respondent on behalf of the National Government. This is supported by the decision in ***Real Deals Limited & 3 others v Kenyan National Highway Authority & another [2015] eKLR.*** It is further argued that the functions of the Respondents herein are underpinned by ***Article 91 of the Constitution***.

26. The 5th Respondent submits that to effectively realize decentralization, there will be a need for cooperation and consultation between the two levels of government. The Petitioner has failed to adhere to the standard of consultation in the Intergovernmental Relations Act by lodging this Petition.

6TH RESPONDENT'S SUBMISSIONS

27. The 6th Respondent vide its Submissions dated 16th October 2019 submits that the Court ought to adopt an interpretation that advances the fundamental rights and freedoms and in this case to ensure the rights of the residents in the various counties are not prejudiced by disbanding the 6th Respondent which is likely to occur in the event this Petition is allowed. Reliance is placed on the decision in ***Jamlik Muchangi Miano v Attorney General [2017] eKLR.***

28. It is further stated that the Court ought to consider the intention of the legislature at the time when the Respondents were constituted, which was based on river basins and large water bodies to spur regional development through sustainable utilization and conservation of natural resources. The 6th Respondent relies on the decision in ***Council of County Governors v Attorney General & another [2017] eKLR,*** The Respondent submits that the Petition lacks merit and ought to be dismissed and costs awarded to the Respondents.

3RD AND 7TH RESPONDENTS' SUBMISSIONS

29. The 3rd and 7th Respondents jointly filed submissions dated 5th January 2021 and submit that in line with ***Article 189 of the Constitution*** it is a requirement for disputes between the National and County Government, particularly where functions are concurrent, to be subjected to various dispute resolution mechanisms with the final resort being the judicial interpretation. The Respondents argue that in accordance with ***Section 32 of the Intergovernmental Relations Act***, the proceedings have been brought before this Court in bad faith and total violation of the provisions of the Constitution and subsidiary legislation. Furthermore, the Petitioner has failed to initiate and facilitate co-operation and coordination as outlined within ***Article 189 of the Constitution***.

30. The Respondents submit that all the functions of the 3rd Respondent outlined within the Act fall squarely within the ambit of the National Government as they are primarily concerned with the collection of data, advising and facilitation of cooperation of agencies thereby enabling the National Government to carry out its function of policy creation and planning for the country as a whole. Thirdly the Petitioner has failed to demonstrate that the impugned provisions of the impugned Tana River Development Authority Act violate any provisions of the Constitution.

ANALYSIS AND DETERMINATION

31. I have carefully considered the pleadings of he parites, submissions and from the aforesaid the issues arising for determination can be summed up as follows:-

> **a. Whether the Court has jurisdiction to hear this matter / Whether the Petitioner has exhausted the alternative dispute resolution mechanisms available under the law before filing this suit.**
>
> **b. Whether the impugned Acts are inconsistent with Article 6 (2), 189 (1) (a) (b) and 189 (2) and 259 (11) of the Constitution, and whether to the extent of the inconsistency, are null and void.**
>
> **c. Whether the Petitioner is entitled to the reliefs sought.**
>
> **d. Who should bear the costs of the suit.**

A. WHETHER THE COURT HAS JURISDICTION TO HEAR THIS MATTER / WHETHER THE PETITIONER HAS EXHAUSTED THE ALTERNATIVE DISPUTE RESOLUTION MECHANISMS AVAILABLE UNDER THE LAW BEFORE FILING THIS SUIT.

32. The Peittioner contended that the isuse of this Court's jurisdiction was heard and determined in the matter. It is further urged by the Petitioner, to a larger extent the issue herein, raises the question on whether the High Court has jurisdiction to hear this matter and to a great extent, whether the Dispute Resolution Mechanisms established under ***Intergovernmental Relations Act*** is competent to resolve a question relating to the interpretation of the Constitution.

33. It is averred by the Petitioner, that the Ruling delivered on 27th November 2017 by this Court on the Preliminary Objections of the Respondents the Honourable Court stated, that jurisdiction is determined on the basis of the pleadings. The Court proceeded to cite with approval the holding of the ***South African Constitutional Court in Vuyile Jackson Gcaba vs. Minister for Safety and Security*** . ***First & Others***

> **"[…] Jurisdiction is determined on the basis of pleadings… and not the merits of the case. In the event of the Court's jurisdiction being challenged at the onset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the Court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but aloes the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another Court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim … one that is to be determined exclusively by…. {another country}, the High Court would lack jurisdiction […].**

34. Further it is stated, that the issues, that are before this Court as was determined in the ruling delivered on 27th November, 2017 where the Honorable Court stated as follows:

> **"From the above constitutional provisions and the Petition before me, the following fundamental issues emerge, namely; (i) the impugned provisions relate to functions, principles and values enshrined in the constitution, such as Devolution; (ii) the Respondents are performing functions which the constitution vests in the devolved units, (iii) the constitutionality of the said provisions is in question and (iv) Article 260 of the Constitution defines a state organ to include anybody established by the Constitution. The Petitioner and the Respondents are state organs and are subject to the jurisdiction of the High Court as provided for in Article 165(3)(d)(ii) and (iii)."**

35. The Petitioner further stated that the learned Judge further noted that under ***Article 165,*** the High Court is under duty to exercise its jurisdiction and cannot delegate this sacrosanct constitutional mandate to another person or body.

36. The Petitioner therefore urged that this Honourable Court has held that the Court ought to remain faithful to its constitutional mandate and uphold the Constitution always and not stifle it. It is further contended that from this reading, that the Court decided that it was not in doubt that the court had powers to entertain this case and to determine the constitutionality or otherwise of the challenged provisions.

37. In addition thereto it is contended by the Petitioner, that the Honourable Court further noted that an effective remedy for the issues in the Petition if proved was not available through the mechanisms set out under the relevant provisions of the ***Intergovernmental Relations Act***. The laid down mechanism could not therefore address constitutional issues such as those alleged in the Petition.

38. The Petitioner drawing from the Ruling arising from the preliminary objection submitted that contrary to the Respondents assertion, this Court has jurisdiction to hear and determine this matter.

39. Under ***Article 165(d) (1) of the Constitution*** it is urged by the Petitioner that, the Constitution empowers High Court with jurisdiction to hear any question with respect to interpretation of the Constitution including the question whether any law is inconsideration with or in contravention of the Constitution. Further the Petitioner averred ***Article 165(d)(iii)*** provides that any matter relating to constitutional powers of state organs in respect of County Governments and any matter relating to the constitutional relationship between the two levels of government and ***Article 165 (d)(iv)*** regarding conflict of laws as per ***Article 191***, these constitutional provisions are crystal clear on the position of the High Court with regard to jurisdiction of the High Court, to the effect that the High Court by virtue of the matter involving Constitutional interpretation and by the virtue of the matter involving government parastatals and dispute between National and County Governments thus conflict of laws is under the jurisdiction of the High Court.

40. The Petitioner further urged that the right to access to Court is fundamental to the stability of the society, ensuring peaceful regulated and institutionalized mechanisms to resolving disputes and hence very powerful considerations that would be required for its limitation to be reasonable and justifiable. Thus the test is that of reasonability and justifiability.

41. Further it is submitted that in determining the issue herein, the Court is required to be mindful of ***Article 259,*** which requires that this Court, in considering the constitutionality of the issues as framed by the Petitioner, does interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, and contributes to good governance. In addition, this Honorable Court should interpret the Constitution in a manner that protects and promotes the purpose and principles of the Constitution of Kenya.

42. On the issue of capacity to sue the Petitioner refers to Courts ruling dated 27th November 2017, and urged that the Court noted that the Council of County Governors was established under ***Section 19 of the Act***. It further noted that ***Section 20 of the Act*** lists its functions as including, and providing a forum for consultation amongst County Governments, sharing of information on the performance of counties in the execution of their functions with the objective of learning and promotion of best practice and where necessary, initiating preventive or corrective action; considering matters of common interest to county governments; dispute resolution between counties within the framework provided under the Act; facilitating capacity building for governors; receiving reports and monitoring the implementation of inter-county agreements on inter-county projects; consideration of matters referred to the Council by a member of the public; consideration of reports from other intergovernmental forums on matters affecting national and county interests or relating to the performance of counties; and performing any other functions as may be conferred on it by the Act or any other legislation or that it may consider necessary or appropriate.

43. The Court herein stand guided by the dictum in ***Governor of Kericho County v Kenya Tea Development Agency & 30 others Ex-Parte KTDA Management Services Limited [2016] eKLR*** where the Court noted that the state and every organ bears an obligation to observe, respect, fulfil, protect and promote the rights and fundamental freedoms in the Bill of Rights under ***Article 21(1) of the Constitution*** and this falls squarely on the doors of the Governor as the Chief Executive Officer of a County.

44. Similar finding were arrived at in the landmark case of ***Mumo Matemu v*** *Trustees* ***Society of human Rights Alliance & 5 others***. In adopting an expansive approach to jurisdiction as per the Constitution, the learned bench noted that the ***Non-Governmental Organization Act*** and any other statute for that matter, must be interpreted in conformity with the Constitution. They further observed that although ***Section 12(2) and (3) of the Act*** provides for the legal status of the 1st Respondent, when read together with ***Articles 22, 258 and 260 of the Constitution***, and in the public interest, it is to be inferred that the 1st Respondent did not lose ***locus standi*** even if it were to be assumed to have lacked registered status.

45. Further this Court in ***Republic v Kenya association of Music Producers (KAMP) & 3 others Ex-Parte Pubs, Entertainment and Restaurants Association of Kenya (PERAK) [2014] eKLR*** had the opportunity to determine the locus standi of an association established under the ***Societies Act***. In that case, it was contended that ex-parte Applicant in the case was an organization registered under the ***Societies Act, Cap 108, Laws of Kenya*** as a welfare organization and hence not a juristic person capable of suing or being sued in its own name and therefore lacked the requisite locus standi to sustain the proceedings. The Court stated:

> **"Article 47(1) and (2) of the constitution, on the other hand provides that:**
>
> **1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**
>
> **2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action (Para 51**
>
> **3. […] article 260, however defines a person as including "a company, association or other body of persons whether**

incorporated or unincorporated.(para 52).

4. […] The applicant herein describes itself as welfare society registered under Section10 of the Societies Act Cap 108 Laws of Kenya with membership throughout the Republic of Kenya. In my view, under the aforesaid provisions of the Constitution, the applicant has locus to institute these judicial review proceedings if as it is claimed, the Respondents' actions or inactions have adversely affected them or are likely to adversely affect them. (para 55).

46. I therefore find that ***Article 22, 258 and 260*** are deemed to give an enlarged view of locus standi, to the effect that ***'every person'***, including persons acting in the public interest, can move a Court of law contesting infringements of any provisions in the bill of Rights, or in the Constitution. In view whereof I find that Jacqueline Mogeni, whether in her official capacity as Chief Executive Officer of the Council of Governors or personal capacity as a citizen of Kenya and guardian to the Constitution, has a right to institute this suit and hence is competent to swear the contested affidavit in support of the instant Petition.

47. Further the Court in reliance that ***Article 10 of the Constitution*** underlies the rule of law as one of the cardinal values and principles under the Constitution, the rule of law hinges heavily on the principle of access to justice. Access to justice is a fundamental right guaranteed to all persons and if public interest litigation would ensure access to justice for the prosperity of devolution and decentralization of functions, this Honourable Court should not shut its doors to those who seek reprieve in the corridors of justice. I find that there is no provision in the Constitution or legislation that limits the Council of County Governors nor the Chief Executive Officer of the Council of County Governors from instituting such suit and as such the claims by the Respondents are unwarranted and unsupported by the Constitutional provisions.

48. The Respondents contention in response is that the Petition is premature by virtue of the ***Intergovernmental Relations Act No. 2 of 2012*** which provides for a framework for inter alia, establishing mechanisms for resolution of intergovernmental disputes. It is contended that the Petition is brought mala fides since the Petitioner has ignored the clear provisions of the Act, in particular ***Section 33*** which provides that intergovernmental relations should follow the procedure of showing good faith to amicably resolve disputes and have direct negotiations via intermediaries whereas ***Section 32*** on the other hand provides for Alternative Dispute Resolutions. ***Section 34*** similarly provides for the procedure after formal declaration of a dispute.

49. Upon perusal of the Petition and prayers sought thereto, it is clear that there is a dispute between the County Government and National Government to which the Constitution is elaborated on the correct procedure to be followed under ***Articles 189(3) and 189(4) of the Constitution*** and ***Section 31 of the Intergovernmental Relations Act***.

50. It is clear that pursuant to ***Article 6(2) of the Constitution***, the Government as at the National and County Level are distinct and inter-dependent and shall conduct their mutual relations on basis of consultation and corporation. Further ***Article 189 of the Constitution*** provides:-

"189. Cooperation between national and county governments

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."

51. The legislation of giving effect to ***Article 189(4) is the Intergovernmental Relations Act 2012***, whose preamble states thus:-

"An ACT of Parliament to establish a framework for consultation and co-operation between the national and country governments and amongst county governments; <u>to establish mechanisms for the resolution of intergovernmental disputes pursuant ot Article 6 and 189 of the Constitution, and for connected purposes"</u> *(Emphasis mine).*

52. The ***Inter-governmental Relations Act*** establishes institutions and states out mechanisms of resolution of intergovernmental disputes. In addition **Section 31 of the Intergovernmental Relations Act**, provides that:

"The National and County Governments shall take all reasonable measures to-

a. Resolve disputes amicably.

b. Apply and exhaust the mechanisms for alternative disputes 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."

53. From the aforesaid Constitutional Provisions and Statutory Provisions, it is evident that there are clear mechanisms for dispute resolution, that should first be adhered to. The Court of Appeal has extensively dealt with the importance of exhausting the mechanisms contemplated by the Constitution or Statutes in dispute resolution before resorting to judicial proceedings. In the case of ***The Speaker of the National Assembly v Karume (2008) 1 KLR 426.*** In **Narok County Council v Trans Mara County Council and Another, Civil Appeal No. 25 of**

2000, The Court of Appeal expressed itself as follows in that regard;

> **"Although Section 60 of the Constitution gives the High Court unlimited jurisdiction, it cannot be understood to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by a Minister as part of his statutory duty; it is where the Statute is silent on what is to be done in the event of a disagreement… Where the Statute provides that in case of a dispute the Minister is to give direction, the jurisdiction of the Court can be invoked only if the Minister refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter, his decision can be challenged by an application to the High Court for a writ of certiorari because under the relevant Section the decision is to be made on a fair basis. But if the Minister simply refuses to discharge his statutory duty, his refusal can also be challenged in the High Court by way of mandamus to compel the Minister to perform his statutory duty but not by way of a suit…If the Court acts without jurisdiction, the proceedings are a nullity…The extent of the jurisdiction of the High Court may not only, be that which is conferred or limited by the Constitution but also, that which the Constitution or any other law, may by express provisions or by necessary implication, so confer or limit… The jurisdiction of the High Court can be ousted by an Act of Parliament and in such cases all that the High Court can do is to enforce by judicial review proceedings, the implementation of the provisions of the Act; certainly not, to usurp the powers of the Minister … Even though resort to the judicial review process, may in appropriate cases not be a bar to other proceedings such as a plaint, this may not apply in peculiar circumstances such as this one, so as to entitle the Judge to do not only what he was not requested to do, but also, to do what he had no jurisdiction to embark upon… where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the dispute."** *(Emphasis added)*

54. Similarly the doctrine of exhaustion was enunciated in ***Petition 593 of 2013 Okiya Omtattah Okoiti & another v Attorney General & 6 others [2014] eKLR*** where it was further affirmed that;

> **73. "…As can be seen from the above, the Act was intended inter-alia to establish mechanisms for the resolution of intergovernmental disputes pursuant to the provisions of Article 6 and 189 of the Constitution. The dispute resolution mechanisms are then specifically established under Section 30 to 35 of that Act. Section 30 stipulates as to when a dispute can be said to have arisen between the two levels of Government as it provides thus;**
>
> **"30.(1) In this Part, unless the context otherwise requires, "dispute" means an Intergovernmental dispute.**
>
> **(2) This Part shall apply to the resolution of disputes arising –**
>
> **a) between the National Government and a County Government; or**
>
> **b) amongst County Governments."**
>
> **74. The reasoning behind the above enactment is not hard to find; that alternative dispute resolution mechanisms should be sought in the first instance so as not to strain the relationship between the national Government and the County Governments and in the case of counties, among themselves Article 6 of the Constitution has therefore mandated the two levels of Government to conduct their mutual relations on the basis of consultation and co-operation. Section 31 has indeed provided for the measures to be undertaken in dispute resolution as follows:**
>
> **"31. The National and County Governments shall take all reasonable measures to-**
>
> **a. Resolve disputes amicably; and**
>
> **b. Apply and exhaust the mechanisms for alternate dispute resolution provides under this Act or any other legislation before resorting to judicial proceedings as contemplated by Article 189(3) and (4) of the Constitution,"**
>
> **The place of judicial proceedings in the Dispute Resolution Mechanisms provided for under the Act is clear; that judicial proceedings are a last resort and Section 35 specifically states 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."**
>
> **75. In applying the above provisions to this Petition, I am aware that the Court of Appeal as well as the High Court have in the past extensively dealt with the importance of exhausting the mechanisms contemplated by the Constitution or statute in dispute resolution before resorting to judicial proceedings. Such has been the gist of the cases like The Speaker of the National Assembly v Karume (2008) 1 KLR 426. In Narok County Council v Trans Mara County Council and Another, Civil Appeal No. 25 of 2000…"** *(Emphasis mine)*

55. I find that the instant Petition squarely falls within the purview of the dispute between the National and Country Governments, yet no attempt has been made by the Petitioners to use any of the alternative Disputes Resolution Mechanisms as provided for under the law. I find it is clearly provided that whenever there is a dispute between National and County Government, the parties involved should first resort to Alternate Dispute Resolution Mechanisms of resolving dispute before going to the Court. The Court should be last resort and therefore the action by the Petitioners cannot, in my view, be justified by contending there is a Court ruling, stating otherwise. Further the decision relied upon by the Petitioner is of a Court of concurrent jurisdiction to this Court and the ruling thereto is only persuasive but not binding upon this

Court. I find a constitutional step clearly set in the Constitution and Statute cannot be ignored or skipped on the ground stated by the Petitioners, that step, has been overtaken by a ruling in this case, that the Alternative Dispute Resolution Mechanism cannot be stopped but matter has to be referred to Disputes Resolution Mechanism, first which is mandatory in my view.

56. Article 159(2)(c) of the Constitution provides that when exercising judicial authority, the court shall be guided by principles of alternative forms of disputes resolution including reconciliation, meditation, arbitration and traditional dispute resolution mechanisms. I find pursuant to the relevant provisions of the Constitution and the Intergovernmental Resolutions Act, that before any party at these two levels of government can proceed to Court or moves a Court, efforts and focus should first be placed on alternative Disputes Resolution Mechanisms to resolve the dispute. The jurisdiction of the High Court in such circumstances can be ousted by an Act of Parliament and parties are bound to follow the procedure provided by the law before parties can resort to Court of law as the Court would have no jurisdiction to entertain the dispute. In this case the two levels of Government has to faithfully comply with the Constitutional provisions and intergovernment Relations Act before resorting to the Court.

57. To buttress the above reliance has been placed in the case of ***County Government of Nyeri v Cabinet Secretary, Ministry of Education Science & Technology & another [2014 eKLR,*** where the Court at paragraph 10 while relying on ***Intergovernmental Relations Frame Works Act 2005 of South Africa*** gave basic requirements for a dispute to fall within the ambit of Intergovernmental Relations Act, it must fulfil the following 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 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."**

58. Upon consideration of the Petition herein, it is clear that the above stated requirements are present in the instant Petition. In addition it is clearly established, that this is a dispute between the National and County Governments. This I find is a dispute in the kind that is contemplated by the Intergovernmental Relations Act and the Constitution, under ***Article 189(3) and 189(4) of the Constitution***, and as such this Court has no alternative but to docline jurisdiction as the matter is premature and act as provided in the Constitution and Statutory provisions.

59. I agree with the Respondents submissions that the Petition herein is premature as the petitioner has not exhausted all Alternative Dispute Resolution Mechanisms available for resolving disputes between the National and County Governments before approaching this Court. The dispute between the parties is a dispute which can be resolved through Alternative Dispute Resolution Mechanisms as enshrined in ***Constitution*** and ***Intergovernmental Relations Act 2012***. I find therefore this Court's jurisdiction has been invoked prematurely as it has not been demonstrated the procedure provided by law before the parties can resort to Court of Law has been satisfied otherwise the Court have no jurisdiction to entertain the current dispute until conditions set in the ***Constitution*** and ***Intergovernmental Relations Act 2012*** are satisfied.

60. Having come to the conclusion that this Petition has been filed prematurely and that the dispute should have been referred to Alternative Disputes Resolution Mechanisms first, as provided in the ***Constitution*** and ***Intergovernmental Relations Act, 2012***, I find no basis for me to proceed on to consider the other issues already set out in this Petition.

61. The upshot is that the instant Petition is premature for failure to exhaust the procedure set out under the Constitution and inter-Governmental Relations Act 2012, as regards dispute between National and County Governments, I further find that the filing of the instant Petition before exhaustion of Alternative Disputes Resolution Mechanisms, is against the letter and spirit of Chapter 11 of the Constitution on Devolution, against the principles of good governance and Co-ordination between the National and County Governments, I have to add that the interests of public would have been better served by the reference of this matter and other concerns raised in the Petition to the various intergovernmental relations organs provided in the statute so as to foster the spirit of co-operation and co-ordination among the various levels of government in line with the provisions of Article 6(2) and 189(1)(a)(b)(2) of the Constitution.

62. The Petition is premature and is dismissed. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF JULY, 2021.

.....

J. A. MAKAU

JUDGE