REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 552 OF 2015

THE COUNCIL OF COUNTY GOVERNORS............PETITIONER

VERSUS

THE ATTORNEY GENERAL..1ST RESPONDENT

TRANSITION AUTHORITY..2ND RESPONDENT

AGRICULTURE, FOOD AND FISHERIES AUTHORITY...3RD RESPONDENT

AGRICULTURAL DEVELOPMENT CORPORATION.......4TH RESPONDENT

KENYA DAIRY BOARD..5TH RESPONDENT

KENYA PLANT HEALTH INSPECTORATE SERVICES...6TH RESPONDENT

NATIONAL CEREALS AND PRODUCE BOARD...............7TH RESPONDENT

NATIONAL IRRIGATION BOARD.......................................8TH RESPONDENT

AGRICULTURAL FINANCE CORPORATION...................9TH RESPONDENT

NYAYO TEA ZONES DEVELOPMENT AUTHORITY.....10TH RESPONDENT

DIRECTORATE OF FISHERIES..11TH RESPONDENT

KENYA LEATHER DEVELOPMENT COUNCIL..............12TH RESPONDENT

MINISTRY OF AGRICULTURE, LIVESTOCK AND

FISHERIES...13TH RESPONDENT

JUDGMENT

1. The Petitioner is the Council of Governors established under Section 19 of Intergovernmental Relations Act No. 2 of 2012 with the mandate of sharing information regarding the performance of counties in the execution of their mandate learning and promoting best practice among others. The 1st respondent is the Attorney General, a constitutional office established under Article 156(1) of the Constitution to represent the national government in civil litigation and to promote, protect and uphold the rule of law and defend public interest.

2. The 2nd respondent is the transition Authority established under section 4 of the Transition authority Act. The 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th and 12th respondents are state corporations established under various national legislations while the 13th respondent is the Ministry of Agriculture Livestock and Fisheries. The 1st interested party is the Law Reform Commission established under the Law Perform Act whose mandate is to review laws and recommend reforms in the laws to ensure they are in conformity with the Constitution.

3. According to the petition, prior to the 2010 constitution, the Agricultural sector was managed by different Ministries, subsectors and corporations. The petitioner contends that according to section 1 of part 11 of the Fourth Schedule to the constitution, agriculture is a function of the county governments that is; crop and animal husbandly, livestock sale yards, county abettors, plant and animal decease control and fisheries.

4. The Petitioner further contends that the role of the national government in so far as agriculture and veterinary are concerned, is limited to policy formulation thus technical departments of the Ministries responsible for agriculture livestock and fisheries are devolved to the counties. It is the petitioner's case that since the sector covers a wide range of areas, not all substantive functions were transferred to the counties after 4th March 2013 under Legal Notices No 137 to 182 of 2013 and no legal reforms have taken place in the Ministries of agriculture, livestock and fisheries so that the agencies in charge of agriculture at the national level and county governments rationalization.

5. The petitioner avers that despite transfer of functions in Agriculture to county governments, budgetary alterations are still made to various state corporations and state departments thereby denying county governments funds to enable them provide their constitutional mandate in these sectors. The petitioner further avers that despite transfer of functions the 3rd respondent is still the successor of the former regulatory institutions under the crops Act and that section 4 of the AFFA Act requires the 3rd respondent to perform its function in consultation with county governments, despite the fact that under section 1 of part II of the Fourth Schedule, the 3rd respondent's functions are a preserve of county governments which violates the constitution.

6. The petitioner states that Agricultural Development Corporation, the 4th respondent, whose functions are set out in section 12 of the ADC Act, is a devolved function and funds and budgetary allocations to it ought to have been channeled to the county governments but this has not happened in contravention of Article 189 of the constitution on functional and institutional integrity. The petitioner states that the 5th respondent's functions fall within the counties and so is KEPHIS the 6th respondent, the National Cereals and Produce Board, NCPB, the 7th respondent, national Irrigation Board –NIB the 8th respondent and Agricultural Finance Corporation, the 9th respondent. The petitioner contends that Nyayo Tea Zone, the 10th respondent, falls within the mandate of the counties' functions as well as the 11th respondent, the Directorate of fisheries, Kenya Leather Development Council the 12th respondent as well as various programmes in the Ministry of Agriculture Livestock and fisheries.

7. Based on the above averments, the petitioner filed the petition dated 11th December 2013 and sought the following reliefs-

> ***a. A <u>declaration</u> that the role of regulating the production, processing marketing grading, storage, collection, transportation and warehousing of agricultural and aquatic products, determining the research priorities in agriculture and aquaculture and to advise generally on research thereof is an exclusive function of county governments under the fourth schedule of the constitution.***
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> ***b. A <u>declaration</u> the role of implementing the agricultural policy set out in the crops act and AFFA Act and licensing entities in the agricultural sector is an exclusive function of County governments under the Fourth Schedule of the Constitution.***
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> ***c. A <u>declaration</u> that the authority to collect, collate date and maintain a database on agricultural and aquatic products excluding livestock products, documents and monitor agriculture through registration of players as provided for in the Crops Act and the Fisheries Act is an exclusive function of County government s under the Fourth Schedule of the Constitution.***
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> ***d. <u>A declaration</u> that section 4 of the AFFA Act in particular and the entire 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. <u>A declaration</u> that Sections 12 and 13 of the Agriculture Development Corporation Act in particular, and the entire 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.***
>
> ***f. A declaration that organizing, regulating and developing efficient production, marketing, distribution and supply of daily produce in Kenya is an exclusive function of County Governments under the Fourth Schedule of the Constitution.***
>
> ***g. <u>A declaration</u> that section 17 of the Dairy Industry Act in particular, and the entire 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.***
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> ***h. A declaration that the regulation, control of the collection, movement, storage, sale, purchase, transportation, marketing, processing, distribution, importation, exportation, and supply of maize, wheat and other scheduled agricultural produce is an exclusive function of County governments under the fourth schedule of the constitution.***
>
> ***i. A declaration that sections 4, 12, 14, 18, 19, 20, 21, 22, 23, and 24 of the National Cereals and Produce Board Act in particular and the entire 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, are null and void.***
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> ***j. A declaration that sections 15, 16, and 17 of the Irrigation Act Cap 347 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, are null and void.***
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> ***k. A declaration that the irrigation Act cap 347 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 in its entirety.***

l. A declaration that the mandate to establish, manage and develop tea and fuel wood plantations and indigenous trees and establish, manage and maintain tea processing factories and process tea is a function of County governments under the Fourth Schedule of the constitution.

m. A declaration that the mandate to construct and maintain rural access roads, offices and green leaf collection centres and transport, lease, sell or market in Kenya or outside Kenya any tea, wood or other products produced is a function of county governments under the Fourth Schedule of the Constitution.

n. A declaration that Legal Gazette Notice No 265 of 1986 creating Nyayo Tea Zones 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 in its entirety.

o. A declaration that the mandate to manage fisheries, prescribe and enforce fisheries development measures, limit fishing and license fishing vessels is an exclusive function of county governments under the Fourth Schedule of the Constitution.

p. A declaration that sections 3, 4, 5, 6 and 7 of the fisheries Act in articular and the entire Act inconsistent with the provisions of Article 6(2), 189 (1)(a)(b) and 189(2) and 259(11) of the Constitution and o the extent of the inconsistency, is null and void.

q. A declaration that the Fisheries Act is inconsistent with the provisions of Article 6(2), 189(1) (a) (b) and 189(2) and 259(110 of the constitution and is null and void in its entirety.

r. A declaration that the promotion, direction, coordination, harmonization and licensing of all activities in the leather sub-sector is an exclusive function of county governments under the fourth schedule of the constitution.

s. A declaration that legal Notice No 114 of 9th September 2011 establishing the Kenya Leather Development Council 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 in its entirety.

t. A declaration that the Ministry of Agriculture, Livestock and Fisheries, in continuing to receive funding for and run programmes geared towards development of Agriculture is in violation of the provisions of Article 6(2), 189(1)(a)(b) and 189(2) and 259(11) of the Constitution.

u. A declaration that the allocation of funds to the 3rd – 12th respondents for functions reserved for the county governments under part 11 of the Fourth Schedule of the constitution is unconstitutional.

v. This Honourable Court be pleased to order that the 4th respondent be wound up and all its farms, assets and projects be transferred to the respective counties in which they lie within sixth (60) Days.

w. This Honourable Court be pleased to order that section 5(a), (c), (1) and (m) of the Kenya Plant Health Inspectorate service Act 2012 be amended to recognize the role of county governments and to provide that the functions of the 6th Respondent therein should be carried out in consultation with and with the consent of the county governments.

x. This Honourable court be pleased to order that in carrying out its functions, the 8th Respondent ought to undertake the same in consultation and with the consent of the county governments.

y. This Honourable Court be pleased to order that any appointment of directors in the 10th Respondent ought to be done in consultation with and with the consent of the county governments.

z. This Honourable Court do grant a permanent injunction prohibiting the Ministry of Agriculture, Livestock and Fisheries from undertaking or receiving any funds for any programmes geared towards development of agriculture without consultation with and involvement of the county governments.

aa. This Honourable court be pleased to order that Section 4 the Agricultural Finance Corporation Act Cap 323 of the Laws of Kenya be amended to provide that the members of the Board be appointed by the Cabinet Secretary in consultation with and with the consent of the Petitioner on behalf of the county governments.

bb. An order compelling the 1st and 2nd respondents to undertake within Sixty (60) Days all the steps required under Section 7(2) of the Transfer to Devolved Government Act, 2012 and transfer to the County Governments all the functions undertaken by the 3rd, 12th and 13th and 14th respondents.

cc. This Honourable Court be pleased to issue any other appropriate order or relief as it may deem fit and just.

dd. Costs of the petition.

1st, 4th, 6th, 7th, 11th, 12th and 13th Respondent's response

8. The 1st, 4th, 6th, 7th, 11th, 12th and 13th Respondents filed a preliminary objection dated 9th February 2017 and filed in court on 13th

February 2017, contending that the petition violates Article 189(3) and (4) of the Constitution; that it is premature and is a gross abuse of court process for violating sections 30, 31, 21 and 33 of the Inter-Governmental Relations Act. They also contend that in instituting the petition, the petitioner has violated Section 35 of the same Act; that it violates Article 6(2) of the Constitution and that under section 20 of the Intergovernmental Relations Act, the petitioner lacks mandate to institute the proceedings. These respondents therefore contend that the petition is incompetent and frivolous.

5th Respondents response

9. The 5th respondent filed a replying affidavit by ***Humphrey Maina,*** its Acting Managing Director, sworn on 20th April 2016 and filed in court on 21st April 2016. It is deposed that contrary to the petitioner's allegations, the 5th respondent is guided by part 1 Sub Articles 9, 11, 13, 14, 22, 29 and 32 of in so far as they apply to the Dairy Industry; that funds and budgetary allocations are rightly channeled to the 5th respondent; that the 5th respondent has not usurped the county governments' functions; that the county government can only undertake practical issues including animal husbandry and applying and enforcing policy frameworks and that structurally the county government are ill equipped to carry out functions as part of realizing international trade, carrying our national statistics, protecting consumers and formulating agricultural policy. It is deposed that county governments are designed to operate in a particular way and cannot try to extend their mandate beyond the scope within which they should operate.

10. ***Mr. Maina*** states that the 5th respondent is not opposed to devolution of some practical aspects it handles provided that county governments are able to comply with standards set out and regulated by the 5th respondent. He contends that section 17 of the Dairy Industry Act is consistent with the constitution and in particular the Fourth Schedule to the constitution and that if there is no any conflict, it should be resolved within the confines of Article 191 of the Constitution.

9th Respondent's response

11. The 9th respondent filed a response dated 27th March 2017 and file in court on 30th March 2017 contending that it is a fully fledged national government owned corporation established vide the AFC Act as a Development finance institution operating under the national treasury and that it is a national state organ in terms of Article 6(3) of the constitution and is to ensure reasonable access to services in all parts of the country. According to the 9th respondent, its functions fall within the national government functions and it has established offices in 33 among the 47 counties and the process of covering the rest of the counties is ongoing.

10th Respondent's response

12. The 10th respondent filed a replying affidavit by ***Peter K Korir,*** its Managing Director, sworn on 15th March 2017 and filed in court on 16th march 2017 deposing that the petition does not make a case to warrant grant of the reliefs sought; that the petitioner has merely recited constitutional provisions without demonstrating how they have been violated by the 10th respondent; that the petition is misguided and a misconception of the law for seeking declarations including nullification of Legal Notice No 265 of 1986 when the same is no longer available for nullification having been revoked under section 4 of the State Corporations Act and that the petition is misconceived for assuming that the functions performed by the 10th respondent are county government functions yet they fall under the national government by virtue of section 22 of the Fourth Schedule to the Constitution.

13. According to ***Mr. Korir***, the 10th respondent was established to protect gazetted forests from human encroachment thus the 10th respondent falls under the Ministry of Agriculture, Livestock and fisheries of the national government. It is also contended that the 10th respondent's functions fall within the scope of protection of the environment, a function of the national government under section 22 of the Fourth Schedule to the Constitution hence this function cannot be transferred to the county governments.

14. ***Mr. Korir*** contends, therefore, that there is no violation of the constitution in the establishment of the 10th respondent and that the 10th respondent's mandate is to construct and maintain rural access roads among others functions and argues that under Article 186(2) of the constitution a function or power conferred on one or more levels of government is a shared function or power.

13th Respondent's response

15. The 13th respondent filed a replying affidavit by ***Frankie Wehekhe,*** interim head of legal services of the 13th respondent sworn on 9th June 2017 and filed in court on 15th June 2017. ***Mr. Walekhe*** deposes that the 13th respondent's mandate is to regulate and promote development of agricultural crops and administer the Crops Act following introduction of reforms in the agricultural sector. According to ***Mr. Welekhe,*** the objectives of the AFA Act, is to administer the functions and roles of both national and county governments in agriculture excluding livestock and fisheries and therefore the 13th respondent is established as a directorate under it.

16. The deponent states that agriculture is devolved with certain functions transferred to the county governments namely; crops and animal husbandry; livestock sale yards, county abattoirs, plant and animal decease control and fisheries. He however states that under part 1 clause 29 of the Fourth Schedule to the constitution, the national government undertakes the function of agriculture policy formulation of general principles through legislation and management as a guide to the agricultural sector. It is deposed that the 13th respondent plays an important role and contribution towards the realization of food security in a number of ways which are not devolved functions. It is therefore contended that the crops Act and the Agriculture and Food Authority Act fall within the contemplation of Article 191 of the constitution in that matters provided for in the two Acts cannot be effectively regulated if the counties were to make laws to govern them.

Petitioner's submissions

17. ***Mr. Wanyama,*** learned counsel for the petitioner, abandoned their complaint against the 2nd respondent as well as the constitutionality of the Fisheries Act, the 11th respondent. Learned counsel then submitted highlighting their written submissions dated 5th June 2017 and filed in court on 8th June 2017 that the legal landscape within which the 3rd to 10th respondents and 12th and 13th respondents exist is unconstitutional as it violates Article 1(4) of the constitution as they exercise powers and functions of county governments. Learned counsel submitted that Article 6(2) of the Constitution is clear that the two levels of government are distinct and inter dependent.

18. According to learned counsel each, level of government should exercise powers and perform functions assigned by the constitution because of the autonomy between the two levels and when exercising their mandate they should agree on the provision of services. In ***Mr. Wanyama's*** view, Article 189(1) of the constitution is clear that government at one level should perform its functions while respecting those of the government at the other level. Learned counsel submitted, therefore, that the respondents have been established by legal regimes that do not respect the functions of the county governments. Counsel relied on the Supreme Court opinion in ***Speaker of the Senate & Another v Attorney General & Others Advisory Opinion No 2 of 2013*** ***[2013]eKLR*** (opinion by ***Mutunga, CJ*** paragraph 187-212) on the centrality of Devolution. He contended that this view creates on obligation to amend the existing laws to bring them in conformity with the constitution.

19. According to ***Mr. Wanyama***, the advisory opinion created other obligations on the national government to ensure that legislation enacted after the effective date is in conformity with constitutional dictates. He argued that legal regimes constituting the 4th to 10th respondents have not been amended to bring them in conformity with the constitution. He referred to the statutes being challenged, including AFA and the Crops Act, ADC Act, and the Dairy Act, and submitted that although Article 191 of the constitution allows the national government to set up norms and standards by way of legislation, these norms and standards are to be implemented by the county governments. He contended that corporations such as National Cereals and Produce Board and the National Irrigation Board cover devolved functions.

20. In the same breath, ***Mr. Wanyama*** challenges Agricultural Finance Corporation contending that it violates the county government's financial support to farmers and that the corporation cannot provide credit to farmers as a public body from public coffers as it will undermine devolution. Learned counsel relied on Article 191(4) of the constitution on the superiority of county governments and contended that the national government cannot rely on Article 186(3) to take over functions assigned to county governments.

1st, 4th, 6th, 7th, 11th, 12th and 13th Respondent's Submissions

21. ***Mr. Githunji,*** learned counsel for the 7 respondents submitted relying on their preliminary objection dated 9th February 2017 and filed in court on 13th February 2017 as well as written submissions dated 23rd November 2017 and filed in court on 30th November 2017, that under Article 189(3) and (4) of the constitution as read with sections 30 through 35 of the Inter-Governmental Relations Act 2012, the court should invoke the constitutional avoidance doctrine and decline to hear this petition. According to learned counsel, this is because the dispute, if any, is capable of being resolved by other means than the present litigation. He relied on the Supreme Court decision in ***Communication Commission of Kenya & 5 others v Royal Media Services Ltd & 5 Others [2014]eKLR*** (para 256).

22. Learned counsel submitted that sections 33 and 34 of Intergovernmental Relations Act outline an elaborate process to be followed in resolving disputes between the two levels of government. He contended that the petitioner has not exhausted that process hence the petition is premature, and relied on the case of ***Government of Nyeri v Ministry of Education Science & Technology*** [2014] eKLR for that contention.

23. Regarding the main petition, ***Mr. Githinji*** submitted that agriculture is not a fully devolved function according to the Fourth Schedule to the constitution. Learned counsel relied on Part I paragraph 29 as read with Part II page 8.1 of the same Schedule contending that it is a shared function in accordance with Article 186(2) of the constitution.

24. On allocation of funds to the 13th respondent, ***Mr. Githinji*** contended that the legislation establishing the 13th respondent contains policy aspects. Relying on Article 132(5) of the constitution, learned counsel contended that the President is to ensure that international obligations of the Republic are fulfilled through relevant cabinet secretaries hence this is not a function of the county government. As to the constitutionality of the sections in AFA Act, Dairy Industry Act, counsel argued that the sections are constitutional and relies on paragraphs 20-26 of their submissions and contended that the petition is unmeritorious and should be dismissed.

3rd Respondent's submissions

25. ***Mr. Okuto*** learned counsel for the 2nd respondent relied on their submissions dated 2018 and filed on the same day and urged the court to dismiss the petition. It is to be noted that the reliefs sought against the 3rd respondent were abandoned.

5th Respondent's submissions

26. ***Mr. Odhiambo***, learned counsel for the 5th respondent submitted relying on their replying affidavit sworn on 20th February 2016 and filed in court on 21st February 2016, that section 17 of the Dairy Industry Act is constitutional as it creates policy framework through which the Dairy Industry is managed and that the 5th respondent does not perform any of the functions reserved for the county government in that it does not carry out production in the dairy industry.

27. Learned counsel contended that the 5th respondent's mandate is merely regulatory by setting parameters under which operations within the industry must function. He argued that section 17 should be read to be in conformity with the constitution in particular paragraph 24 Part 1 of the Fourth Schedule to the constitution which gives the national government mandate to regulate agricultural sector.

28. Regarding Article 191 (1), learned counsel submitted that in case of conflict on issues of policy the conflict should be resolved in favour of the 5th respondent. He also submitted that the petition is premature because Article 189(3) and (4) read together with the Inter-

Governmental Relations Act provide a comprehensive mechanism for resolving disputes between the two levels of governments which the petitioner did not attempt to follow.

8th Respondent's submissions

29. ***Mr. Baraka,*** learned counsel for the 8th respondent submitted highlighting their written submissions dated 21st June 2017 and filed on 26th June 2017 that there is presumption of constitutionality of a statute and that the burden is on the petitioner to prove otherwise; that the 8th respondent conducts functions under the irrigation Act and that irrigation is not among the devolved functions.

30. Learned counsel also contended that under Article 186(4) it is the duty of the National Assembly to legislate for purposes of certainty; that functions of the 8th respondent are contained in Article 186(3) of the constitution and that if there is doubt as to the functions of the 8th respondent, Article 186(4) would kick in. He supported ***Mr. Githinji's s***ubmission that the alternative remedy was not utilized and referred to Article 189(3) on amicable resolution of disputes between the two levels of government. He relied on the case ***International Legal Consultancy Group & Another v Ministry of Health of Health*** [2016] eKLR for the submission that the petitioner should have exhausted the available mechanism for resolving the issue.

9th Respondent's submissions

31. ***Mr. Mabonga,*** learned counsel for the 9th respondent submitted also highlighting their written submissions dated 12th February 2018 and filed in court on 13th February 2018, that Agricultural Finance Corporation (AFC) is established under section 3 of the impugned Act with the aim of assisting in the development of agriculture by advances loans to farmers, thus its functions are in tandem with the constitution. Learned counsel urged the court to avoid an interpretation that would lead to an absurdity. He relies on the case of in *The Matter of* ***Republic v Cabinet Secretary Ministry of Agriculture Livestock and Fisheries & 4 Others Ex parte Council of Governors*** [2017] eKLR (paragraph 11) for the submission that agriculture is a shared function between the two levels of government hence Article 189(1) (a) applies in terms of functions and exercise of shared functions at the two levels.

10th Respondent's submissions

32. ***Mr. Kimondo,*** learned counsel for the 10th respondent submitted also highlighting their written submissions dated 31st August 2017 and filed in court on the same day, that the petition is premature and that the court has no jurisdiction to entertain it. According to learned counsel Article 189(3) of the constitution as read with Article 6(2) is clear that governments at both levels are inter dependent and have to conduct their functions in consultation as required by Article 189(3) and (4) of the constitution. In learned counsel's view, there is no evidence on record that the petitioner attempted to resolve the matter as required by the constitution and Inter governmental Act

33. On jurisdiction, learned counsel contended that the court has no jurisdiction to hear the petition and that the proceedings are in that regard a nullity. ***Mr. Kimondo*** relied on the authority of ***Okiya Omtatah & Another v Attorney General & 6 Others [2014] eKLR*** which cited the case of ***Narok County Council v Transmara County Council*** *(CA.NO 25 of 2001)* for the submission that where the court acts without jurisdiction the proceedings are a nullity.

34. Learned counsel contended that the court should decline to entertain the proceedings because there is a procedure that should have been followed. According to counsel, the 10th respondent is a state corporation under the State Corporations Act and is established under legal Notice No 30 of 8th March 2012 with her mandate set out under section 3(2) of its Act. He further contended that the reliefs sought against the 10th respondent are directed at a non-existent Legal Notice. Counsel relied on the case of ***Jacinta Wanjiru Raphael v William Wangule & 2 Others*** [2014] eKLR (para 4 – 8 para 23) for the submission that the court does not act in vain.

35. ***Mr. Kimondo*** also relied on the case ***Kenya Ferry Services v Mombasa County Government & 2 Others*** [2016] eKLR (para 51) for the submission that the 10th respondent is part of the national government. In learned counsel's view, the 10th respondent creates a buffer zone to protect gazetted forests and that this does not result into a breach of the constitution in so far as its functions are concerned being functions of the national government. He relied on the case of ***Counsel of Governors & 3 others v Senate & 53 Others*** [2015] eKLR (para 76-82) and ***Law society of Kenya*** (Authority No 6. Learned counsel further relied on the case of ***Council of Governor v Attorney general & 6 others*** [2016] eKLR for the submission that the court (***Muriithi J***) had stayed that petition to allow parties to follow the procedure for resolving the dispute.

36. ***Mr. Kimondo*** submitted that there may be a dispute regarding the Ministry of Agriculture's undertaking programmes in the sector that are funded by development partners which is a factual matter but is not a constitutional issue. According to learned counsel, the issues in the petition at paragraph 145 are of fact and should have been resolved amicably and resort to judicial intervention only if they could not agree. Learned counsel contended that there were on going meeting as shows in paragraphs 12-61 of the affidavit supporting the petition hence the process had not been concluded and as a result the court has no jurisdiction and the petition is unmeritorious

Petitioner's rejoinder

37. In a short reply, ***Mr. Wanyama*** contended that the mandate of the 10th respondent vests in county governments and according to counsel under the Fourth Schedule of the constitution, functions no 10 Part II is under county governments. He argued that the function was subsequently broken down by the Transitional Authority in ***Gazette Notice No 137 of 2013*** of 9th August 2013) and that forestry including farms, forest extension services forest and game reserves excluding forests managed by ***Kenya Forest Service, National Water Tower and Public Forests*** belong to the county governments. Learned counsel argued that the Forests Act 2016 recognizes counties when it comes to managing forests. Regarding the preliminary objection, learned counsel submitted that the court has jurisdiction hear the petition.

Determination

38. I have considered the petition, the responses, submissions by counsel for the parties and the authorities relied on. The petition challenges a number of provisions in various legislations that govern state corporations on grounds that the functions they govern or control fall within the mandate of the devolved governments in terms of Part II of the Fourth Schedule to the constitution. The petitioner wants the court to declare that functions performed by the respondent state corporations are county functions, order those functions transferred to the county governments and declare the statutes unconstitutional.

39. The respondents have on their part opposed the petition contending that the petition is misplaced and that the functions forming the basis of this petition fall within the Ministry of agriculture and that they are on policy hence are not devolved. It has also been contended as a preliminary point, that the petition is premature and that the court should apply the doctrine of avoidance and avoid hearing the petition until the procedure provided for dealing with disputes between the two levels of government has been exhausted.

40. ***Mr. Githinji,*** learned counsel for the 1st, 4th, 6th, 7th, 11th, 12th and 13th respondents has contended that the petition violates Article 189(3) and (4) of the constitution making the petition premature and an abuse of the court process. This is supported by the other respondents who contend that the primary mechanism for resolving inter government disputes has not been exhausted making the petition premature and, therefore, untenable. This therefore means the court must first determine this preliminary issue in order to decide whether it can proceed to determine the rest of the petition.

Whether the Petition is Premature

41. The respondents have contended that Article 189(3) and (4) of the constitution as read with sections 30-35 of the Intergovernmental Relations Act 2012, provide a mechanism for resolving disputes between the two levels of government and therefore the court should avoid hearing the petition. According to them, sections 33 and 34 of the Act contain an elaborate process to be followed in resolving disputes between the national and county governments. In urging the court to invoke the doctrine of avoidance, they have relied on the Supreme decision in ***Communication Commission*** of ***Kenya & 5 others v Royal Medea Services Ltd & 5 Others*** ***[2014] eKLR*** (paragraph 28).

42. The respondents have also contended that since the petitioner has not exhausted the available mechanism for resolving the intergovernmental disputes, this petition is premature and ought not to be heard and again relied on the decision in ***County government of Nyeri v Ministry of Education Science and Technology*** ***[2014] eKLR***.

43. Article 189(1) which is on cooperation between the national government and county governments requires government at either level to 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 institutional status and institutions of government at the other level including within the county level; assist, support and consult where appropriate, implement the legislation of the other level of government and liaise with government at the other level for purposes of exchanging information, coordinating policies and administration and enhancing capacity. Article 189(2) provides that the national and the county governments and within the county governments themselves should cooperate in the performance of functions and exercise of powers and for that purpose set up committees and joint authorities.

44. Article 189(3) which is material to this objection, provides that 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."*** To that extent, Article 189(4) states that the national legislation contemplated in Sub Article 3, should provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiations, mediation and arbitration.

45. It is therefore true that the constitution envisages there being mechanisms for addressing and resolving disputes between the two levels of government. In that regard, the constitution tasked the national assembly to enact a legislation that would provide for dispute settling mechanisms between the two levels of government. The constitution does not therefore; contemplate a direct court action pitting the two levels of government. It encourages a friendly dispute resolution mechanism that should enhance mutual respect in the resolution of disputes and encourage interdependence and cooperation of the two units of government.

46. The National Assembly in complying with the constitutional dictates enacted the Intergovernmental Relations Act 2012 which contains provisions laying down the mechanisms for addressing and resolving disputes that may arise between the two units, the national and county governments. Part 1V of the Act headed "***Dispute resolution mechanism***" covers sections 30 to 36.Section 30(1) defines ***"dispute"*** to mean ***an inter-governmental dispute;*** that is; a dispute between the two levels of government, the national and county levels. Section 30(2) states that Part IV applies to resolution of disputes arising between the national government and county government or amongst county governments themselves.

47. Section 31 provides for the measures for dispute resolution and states that national and county governments shall take all reasonable measures to resolve disputes amicably and "***apply***" and "***exhaust***" the mechanisms for alternative dispute resolution provided under the Act or any other legislation "***before resorting to judicial proceedings***" as contemplated by Article 189(3) and (4) of the constitution. Applying and exhausting alternative dispute resolution mechanisms, is thus a condition precedent to filing of court action by either of the units of government.

48. In that respect, section 32 provides for dispute resolution mechanisms stating that any agreement between the national and county governments or among county governments should include a dispute resolution mechanism that is appropriate to the nature of the agreement and provide an alternative dispute as resolution mechanism, judicial proceedings being the last resort. It states that where an agreement does not contain a dispute resolution mechanism or provides for one that does not accord with section 32(1), any arising dispute should be dealt with within the framework provided under Part 1V (sections 30-36) of the Act.

49. Section 33 on formal declaration of a dispute, states that before declaring a dispute, parties should 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 mediation and where negotiations fail a party to the dispute may formally declare a dispute by ***referring the matter to the summit, the council or any other inter-governmental structure established under the Act as may be appropriate.***

50. Section 34 provides for the procedure to be followed after formal declaration of a dispute stating;

> ***"1)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,***
>
> ***(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".***

51. Section 35 then provides that where all efforts made in resolving a dispute fail, a party to the dispute may submit the matter for arbitration or institute juridical proceedings.

52. The above discourse shows clearly that there is an elaborate mechanism for identifying, declaring and resolving intergovernmental disputes and, that, judicial proceedings only come in as a last resort and subject only to applying and exhausting the alternative dispute resolution mechanisms.

53. The inter-governmental relations Act is a constitutional derivative and encourages the two levels of government to identify, declare and resolve disputes amicably applying the procedure laid down in Part 1V thereof. It must be noted that emphasis is on ***mutual and amicable resolution of disputes through negotiation, mediation and even arbitration***. This is in line with the principle in Article 159(2) that alternative dispute resolution mechanisms including reconciliation mediation arbitration and traditional dispute resolution mechanisms should be encouraged and applied.

Whether this is an intergovernmental dispute

54. The facts in this petition show that the dispute pits the national government and the county governments. The petitioner is the Council of Governors while the respondents are the Attorney General, a national government Ministry and state corporations in the national government. It therefore involves the two levels of government. The petition seeks to have some functions that are housed mainly in the former Ministry of Agriculture Livestock and Fisheries within the national government, transferred to the County governments, a fact that is clear from the reading of the petition as well as the affidavit of ***Peter Munya,*** the then Chairman of Council of Governors sworn in support of the petition.

55. The functions at the heart of the petition are being performed by the state corporations namely; Agricultural Development Corporation, Kenya Dairy Board, KPHIS, National Cereal and Produce Board, National Irrigation Board, Agricultural Finance Corporation, Nyayo Tea Zones Development Authority and Kenya Leather Development Council which have also been named as respondents in this petition.

56. The issues raised in the petition, viewed from the averments depositions in the supporting affidavit and nature of the reliefs sought and as well as the responses to the petition are over whom between the national and county governments should have control over the said functions. That is why the petitioner wants the court to order transfer of the functions of these state corporations to the county government. The respondents have on their part contended that these functions belong to the national government. Looked at from that perspective, it is my finding that this is an intergovernmental dispute which falls for resolution within Article 189(3) and (4) of the constitution as read with Part 1V of the inter-governmental Relations Act for it is ***in relation to the functions and exercise of powers between the different levels of governments.*** (***County Government of Nyeri v. Ministry of Education Science and Technology & Another- supra)***.

57. That being the case, the two levels of government as parties to the dispute were under a constitutional and legal obligation to amicably

resolve the issues first and where they failed, identify and declare a dispute then go on to resolve it as required by application of the relevant constitutional and statutory dispute resolution mechanisms. Only after applying and exhausting the available dispute resolution mechanisms should they resort to judicial intervention.

Whether the mechanisms for resolving intergovernmental disputes was exhausted

58. The respondents have argued that the elaborate procedure provided for resolution of the dispute was not followed and have therefore urged the court to find the petition premature, apply the doctrine of avoidance and decline to hear it. They have relied on the Supreme Court decision in ***Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others*** ***(supra)*** for that submission. They have also argued that on the basis of the petitioner's failure to exhaust the available mechanisms for resolving the dispute, the court has no jurisdiction to hear the petition. The petitioner has countered that the attempt to amicably resolve the dispute failed leading to filing this petition and that the court has jurisdiction to resolve the dispute.

59. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in ***Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others*** ***(supra)*** (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided *on another basis.*

60. In the South African case of ***S v Mhlungu***, [1995] (3) SA 867 (CC), ***Kentridge AJ***, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that *he would lay down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. And in* ***Ashwander v Tennessee Valley Authority***, 297 U.S. 288, 347 (1936)), the U.S. Supreme Court held that it would not decide a constitutional question which was properly before it if there was also some other basis upon which the case could have been disposed of.

61. Whether or not the court should hear a case involving the two levels of government in the face of Article 189(3) and (4) as read with Part IV of the Intergovernmental Relations Act, is a matter that the court would have to decide depending on the facts of each case but does not mean the court does not have jurisdiction to decide such a dispute.

62. In the present petition, the respondents have argued that this court has no jurisdiction to hear the petition given the provisions in Article 189(3) and (4) of the constitution read with Part IV of the Act. I do not subscribe to this view. This is because jurisdiction of this court is granted by Article 165 of the constitution and a clear reading of the language of section 35 of the Intergovernmental Relations Act, it is plain that parties can file judicial proceedings but after exhausting alternative dispute resolution mechanisms.

63. The same view was taken in ***County Government of Nyeri v Ministry of Education Science and Technology*** *(supra*) where the court observed that the provisions of the Constitution (Article 189(3) and (4) and Part IV of the statute with respect to dispute resolution between the National and County Government do not oust the jurisdiction of the court but postpone the same until the alternative dispute mechanisms have been attempted. That is the court has jurisdiction but the exercise of that jurisdiction is postponed or the court may decline to exercise its jurisdiction pending settlement of the dispute. The question that this court must therefore decide is whether it should determine the petition given the competing submissions by both sides.

64. The petition seeks declarations that certain functions undertaken by the respondent state corporations fall within the mandate of the county governments. This is clear from the reliefs sought in the petition. the petitioner first wants the court to declare that certain functions undertaken by the corporations fall within the mandate of the county governments then asks the court to nullify either the legislation or some provisions of the Acts. For that reason the petition seeks to have certain statutory provisions relating to those state corporations declared unconstitutional only after finding that the their functions are county functions. The bottom line as far as the petition is concerned, seeks to vest the functions held and being performed by the concerned state corporations under the watch of the national government to the county governments. This comes out clearly when the reliefs sought are examined carefully.

65. This required the parties to amicably resolve the dispute as contemplated by both the constitution and the law which the respondents contend did not happen thus making the petition premature. To that extent, the respondents are in agreement that the petitioner did not exhaust the available mechanism for resolving the dispute hence the dispute was not ripe for intervention by the court.

66. I have carefully gone through the averments in the petition as well as the depositions in the affidavits in support of the petition. From paragraph 12 to 62 of the supporting affidavit, the deponent has deposed on what had been going on including consultative meetings that were held with the various stakeholders; proposals for policy formulations and legislations. The deponent did not depose that there was a formal declaration of a dispute as required by law and that the dispute was subjected to the dispute resolution mechanisms under Part IV of the Act.

67. What one gathers from the petition is that all that took place were consultative meetings but there was no declaration of a dispute or attempt to resolve it. Section 33 of the Act is clear that before formally declaring a dispute, parties should make every reasonable effort in good faith and take all necessary steps to resolve the matter by initiating direct negotiations with each other or through an intermediary and where the negotiations fail, a party may formally declare a dispute by referring the matter to the ***Summit***, ***the Council or any other intergovernmental structure established under the Act, as may be appropriate.***

68. It is after declaration of a dispute and having referred it to the summit, Council of Governors or any other intergovernmental structure for resolution that the process in section 34 of the Act kicks in. The organ to deal with the dispute has to convene a meeting within twenty one days to identify issues, available mechanisms other than judicial proceedings and generally how to resolve the dispute amicably. Only when the process in section 34 fails should a party invoke section 35 to go for arbitration or to court.

69. The petitioner has not demonstrated that indeed the process of identifying, declaring and resolving the dispute had been exhausted before turning to this court for intervention. I therefore find and hold that the statutory mechanism for resolving intergovernmental disputes was not

complied with or exhausted before filing this petition. The constitution in Article 189(3) and (4) as read with Article 6(2) is clear that the governments at both levels are distinct and inter depended and have to conduct their affairs in consultation and cooperation and as such, they must resolve their disputes amicably applying the laid down dispute resolution mechanisms and in this respect, the statutory dispute resolution mechanism must be complied with before court action.

70. In the case of ***Isiolo County Assembly Service Board & another v Principal Secretary Ministry of Devolution and Planning*** [2016] eKLR, the court observed while referring to the procedure established under the Intergovernmental Relations Act that; ***"[27]… where the Constitution itself or vide statute seeks to and indeed provides an alternative mode of dispute resolution for specified disputes then, in the spirit of Article 159(2) of the Constitution, the court should oblige and cede jurisdiction to such forums. The parties too, ought to embrace such dispute resolution mechanism."***

71. The court then went on to state that;

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

72. In ***Kenya Ferry Services Limited v Mombasa County Government & 2 others***, [2016] eKLR the court observed that Article 189(2) requires governments at the national and county government to cooperate and that under Article 189(3), any dispute between the two levels of governments and intra county governments are required to be settled by negotiations through alternative dispute resolution mechanisms.

73. It has also been established as a general principle of law that where there is a procedure established under the constitution or statute for resolving disputes, that procedure should be followed to conclusion and parties should only resort to court in exceptional circumstances. In this regard, the Court of Appeal stated in ***Speaker of the National Assembly v James Njenga Karume*** [992] eKLR) 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."*** This position has been followed in many other and is now embedded in statutory provisions.

74. Away from this jurisdiction, the Supreme Court of India observed in ***Commissioner of Income Tax and Others vs. Chhabil Dass Agarwal,*** [2014] 1 SCC 603 that;

> ***"… while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case, Titaghur Paper Mills case and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."***

75. And the same Court stated in the case of ***Authorized Officer, State Bank of Travancore and another v Mathew K.C.*** (Civil Appeal No. 1281 of 2018), that *"**the normal rule is that a writ petition under Article 226 of the Constitution ought not to be entertained if alternate statutory remedies are available, except in cases falling within the well- defined exceptions**."*

76. Flowing from the above authorities, the law is plain that only after exhausting alternative statutory mechanism provided for, should a party move to court. In the present case the petitioner had to first to exhaust the mechanisms provided for in Part IV of the Intergovernmental Relations Act, before instituting court proceedings.

77. Having carefully considered this petition, responses submissions and the relevant authorities and applied my mind to the constitution and applicable law, the conclusion I come to is that the petitioner skipped a vital constitutional and legal step and filed this petition prematurely hence it is unsustainable. Consequently, the petition dated 11th December 2015 is hereby struck out. This being an intergovernmental dispute, I make no order with regard to costs.

Dated, Signed and Delivered at Nairobi this 9th day of November 2018

E C MWITA

JUDGE