REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO.511 OF 2015

COUNTY GOVERNMENT OF ISIOLO …….…….…….. 1ST PETITIONER

HASSAN GUYO SHANO ……..…….…….…… 2ND PETITIONER

YUSSUF HUKA JILLO ……..……..…… 3RD PETITIONER

ALBERT LTABURUA ……...…… 4TH PETITIONER

ABDULLAHI HAJI GONJOBE ……..…… 5TH PETITIONER

HUSSEIN MOHAMMED ……..…..…… 6TH PETITIONER

HASSAN BALLA GUYO …….....…… 7TH PETITIONER

RASHID ALI DEMO ……..……...…….. 8TH PETITIONER

GABRIEL ILIKWEL ……..…….....….. 9TH PETITIONER

BUKE GOLLO JATANI .....10TH PETITIONER

MOHAMMED SHEIKH ISSADIN ……..…….....…. 11TH PETITIONER

AND

THE CABINET SECRETARY, MINISTRY OF INTERIOR AND COORDINATION OF

NATIONAL GOVERNMENT ….…. 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL .....….....… 2ND RESPONDENT

AND

THE MERU COUNTY GOVERNMENT...….....1ST INTERESTED PARTY

THE NATIONAL COHESION AND INTERGRATION COMMISSION ….2ND INTERESTED PARTY

JUDGEMENT

Introduction

1. This Petition was filed on 18th November, 2015 together with a notice of motion application of even date seeking certain interim orders. The Petition seeks the following orders and declarations:

> ***i. That pending the hearing and determination of this Petition an order for injunction and orders of prohibition do issue restraining or prohibiting the Meru/Isiolo Boundary Dispute Committee from whatsoever assuming and/or carrying out adjudication, surveying the boundaries subject of this dispute with the intention of demarcation.***

ii. That the Court do issue prohibiting orders against the Cabinet Secretary in charge of the Ministry of Interior Co-ordination and National Government from interfering with the Meru/Isiolo boundary or purporting to adjudicate on the Meru/Isiolo Boundary Dispute. **(sic)**

iii. An order for declaration that the acts of the Cabinet Secretary in charge of the Ministry of Interior Co-ordination and National Government of constituting the Meru/Isiolo Boundary Dispute Committee is illegal, irregular and therefore null and void. **(sic)**

iv. An order of certiorari bringing to this Honourable Court and quashing the decision of the Cabinet Secretary in charge of the Ministry of Interior Co-ordination and National Government of constituting the Meru/Isiolo Boundary Dispute committee.

v. An order for declaration that the boundary dispute between Isiolo and Meru Counties should be resolved by the Independent Commission set up for that purpose by Parliament according to the law. **(sic)**

vi. A declaration that the fundamental rights and freedoms guaranteed to the petitioners especially under Articles 1(1)(b), 1(4)(b), 2, 3, 10, 19, 20, 21, 22,23, 27, 28, 40, 47 & 50 of the Constitution have been contravened and or are threatened by the Respondents.

vii. That this Honourable Court be pleased to invoke its power under Chapter 10 of the Constitution and Articles 22 and 23 of the Constitution thereof to revoke and/or set aside the Meru/Isiolo Boundary Dispute Committee constituted by the Cabinet Secretary in charge of the Ministry of Interior Co-ordination and National Government. **(sic)**

viii. That due to the nature and volatile situation currently prevailing at the Isiolo County and Meru County borders, the conflict resulting from the impugned acts and order that may issue, this Honourable Court be pleased to order the Police Isiolo and Meru County Commander and County Commissioners respectively to ensure compliance of the order as may issue from this Honourable court and also ensure peace prevails. **(sic)**

ix. That a temporary order do issue staying the effect of the decisions and the effect of the decisions and resolution of the Cabinet Secretary in charge of the Ministry of Interior Co-ordination and National Government of constituting a Meru/Isiolo Boundary Committee until the hearing and determination of this petition or such period as this Honourable Court may deem it.

x. That the costs of the Petition be provided for.

xi. That this Honourable Court be pleased to make any further orders as it may deem just and fit to grant

Parties

2. The Petitioners are residents of Isiolo County, and the Isiolo County Government itself, who instituted these proceedings on their own behalf and in the interest of the residents and members citizens of Isiolo County who are aggrieved and concerned by the 1st Respondent's decision of 'purporting' to constitute a team/committee to adjudicate on boundary disputes between the people of Isiolo and Meru Counties.

3. The 1st Petitioner is the County Government of Isiolo, established under **Article 176(1)** of the **Constitution,** and the **County Governments Act**. The 2nd Petitioner is a nominated member of the Isiolo County Assembly while the 3rd Petitioner is the County Co-ordinator in charge of civic education.

6. The 4th Petitioner is a member of the Council of Elders of the Samburu Community living in Isiolo County.

5. The 5th Petitioner is a former Senior Chief, Sericho Division and the current Chairman of the Borana Council of Elders of the Borana Community living in Isiolo County, while the 10th Petitioner is the Organizing Secretary of that Council of Elders and a former councilor, Kulamawe Ward. The 7th and 8th Petitioners are members of that Council of Elders of the Borana Community. The 7th Petitioner is also a former Councillor of Garfasa ward.

6. The 6th Petitioner is a member of the Council of Elders of the Somali Community living in Isiolo County in which Council the 11th Petitioner is the Treasurer and he is a former Councilor, Bulapesa ward.

7. The 9th Petitioner is the current Secretary of the Council of Elders of the Turkana community living in Isiolo County.

8. The 1st Respondent is the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government. The 2nd Respondent is the Attorney General, a State Officer of the office created pursuant to the provisions of **Article 156** of the **Constitution** with the mandate to, *inter alia*, represent the Government in court or in any proceedings to which the National Government is a party.

9. The 1st Interested Party is the County Government of Meru established under **Article 176(1)** of the **Constitution** and the **County Governments Act**, while the 2nd Interested Party is an independent commission established pursuant to **Section 15** of the **National Cohesion and Integration Act, 2008** with the core purpose of encouraging national cohesion and integration.

Historical Background of the Dispute

10. While the genesis of this Petition can be traced to the actions of the 1st Respondent in constituting a committee to adjudicate on the boundary dispute between Isiolo and Meru Counties, the crux of the subject matter is a historical boundary dispute dating back to 1924 where is it averred that the boundary between Meru and Isiolo districts was erroneously marked.

11. It is contended by the Petitioners in the above regard that the people of Isiolo County were also never invited to participate in the boundary discussions during the proceedings of the Boundary Commission of 1962 due to the secessionist's war with Somalia. Consequently, the indigenous communities living in the region covering the County of Isiolo have persistently sought for a new boundary survey to be undertaken on the common boundaries between Isiolo and Meru to verify and correct these historical injustices. They have in addition sought that the historical maps and documents concerning communication over disagreements over the borders between the Meru and the pastoral communities of Isiolo should serve as a basis for making boundary corrections. That there have in any event been numerous complaints about the Isiolo-Meru boundary by the Borana and other pastoral communities since 1932.

12. The present grievances have been aggravated by two major events namely: that the Petitioners as a predominantly pastoral community who directly depend on access to communal grazing lands have come worse off due to the encroachment by the neighboring county on their grazing lands; and that the historical injustices arise from the exclusion of the Borana and other pastoralists from the Border Commission of 1962, and as a consequence, their voices have been missing on claims for their rights to land.

13. It is also documented according to the Petitioners that in the District Annual Report of 1970, the District Commissioner for Isiolo District in a statement confirmed that the Borana claim that the Meru had illegally procured their land was true for the reason that during the Boundary Commission of 1962, they were not represented in the Commissions proceedings as their political party, the NPPP [Northern Peoples Progressive Party] had then boycotted the said proceedings. Further, that apart from the Isiolo airstrip, the Borana community living in Isiolo County has claimed all the portion of land between the existing district boundary and land west of Isiolo/Garba Tulla road bordering the NGA (Native Grazing Area) in Meru.

14. Furthermore, since mid-2013, it is reported that, there have been a series of incidents that included ordering of residents of the disputed areas to pay land rates or face eviction, removal of cess collection stations, and inflamed political rhetoric and attempts to address these differences by the National Government and a group of elders drawn from other parts of the Country, did not achieve the desired outcome.

15. In addition, on or about 20th October, 2015 there were attacks involving cattle rustlers perceived to be from the Meru community against the community at the border of Isiolo/Meru region which attacks precipitated counter attacks between the two communities, with herds of livestock (mainly cows and goats) being stolen between the two communities amid exchange of gun fire and other forms of attacks. Prior to these attacks, it is averred that the differences between communities living in Isiolo and Meru counties had been on the rise since the launch of the Vision 2030 projects (Isiolo International Airport, the Lamu Port-South-Sudan-Ethiopia Transport (LAPSSET) Corridor and the Isiolo Resort City) and the establishment of County Governments.

16. Lastly, it is alleged that the fighting between these two (Borana and Ameru) neighboring communities caught the attention of the National Government and the Cabinet Secretary in the Office of the President and in the Ministry of Interior and Coordination of National Government, Hon. Joseph Nkaissery visited Isiolo town on 1st November, 2015, accompanied by senior elected leaders of both Meru and Isiolo Counties. In his address to the citizenry during the visit, Hon. Nkaissery touched on a number of issues of concern that had necessitated his visit which included:

> *1. the issuance of national identity cards to the citizens of both Counties who had attained age of majority, had applied for the same and were yet to be issued with the cards.*
>
> *2. an ultimatum for those holding and owning guns and other firearms illegally to surrender them with immediate effect;*
>
> *3. a warning to cattle rustlers and other thieves to stop their heinous acts or face the long arm of the law including collective punishment;*
>
> *5. a plea to the people in both counties to live in harmony regardless of their tribal differences; and*
>
> ***5. a formation of a Task force for purposes of surveying and demarcation of the Boundary between Isiolo and Meru counties.***

18. It is this last issue of formation of a task force for surveying and demarcating the boundaries between the two Counties that is subject of this Petition.

<u>The Petition</u>

19. The Petitioners aver that the issue (the formation of a task force for surveying and demarcating the boundaries between the two counties) has increased tension between the two communities for the following reasons:

- that the Cabinet Secretary (CS) in charge of Interior and Coordination of National Government has constituted a Task Force single-handedly without involving, informing the people of the two Counties, rather, without informing the citizenry of Isiolo County;
- that the CS has no mandate to adjudicate on issues touching on boundaries;
- that in forming the task force, the CS did not consult the people of Isiolo County either through their elected leaders or directly through the citizenry;
- that in forming the task force, the CS seeks to impose a decision against the people of the County and create deeper

disputes against the neighboring communities;

- that there was no complaint that was raised about boundary disputes or even a petition to the National Government, or atleast the Ministry of Interior and Coordination of National Government to warrant the formation of a task force on demarcation and survey by the CS, the issue on boundaries was raised by the Governor of Meru County at the Baraza and he sought the same to be addressed by the CS, thus suggesting a possible conspiracy between the Governor and the CS to illegally influence the demarcation of the land to the advantage of the County Government of Meru; and
- that there is still a pending Bill on Demarcation of Boundaries on all counties in the Senate, hence is the impugned Task Force formed by the CS founded in law? What should be the composition of such a pertinent committee?

20. These reasons form the crux of this Petition. It is averred by the Petitioners that the purported dispute is a creation of some leaders of the Meru County communities with ill agendas of taking away the lucrative and ongoing upgrade of Isiolo Airstrip into an International Airport, a project set for Nine hundred Million Kenya shillings (Ksh. 900 000 0000). That there are also rife intentions from some leaders of the Meru County to use government machinery to claim the 6, 200 acres of land mapped out by the government on which the proposed Isiolo Resort City will be constructed. That land was valued at Ksh. 6 Billion in 2012. Also that the sudden development of interest by the 1st respondent, CS, the 1st petitioner and the 1st Interested Party, reeks of ill motive and that the same is influenced by the impeding development of the LAPSSET corridor project, which is scheduled to pass through Isiolo.

21. It is worth noting that in response to the Petition, the 1st and 2nd respondents filed Grounds of opposition on 24th November 2015. In their grounds of opposition they urged the Petition is unmerited and premature and should be dismissed. Some of the grounds raised in opposition were:

> *i. that the Petitioners have not initiated or failed to obtain justice under the internal dispute mechanism envisaged in the Intergovernmental Relations Act with regard to alternative dispute resolution prior to invocation of the jurisdiction of the Court. Hence, that it is not pleaded whether the 1st petitioner, a county government, had exhausted this mechanism.*
>
> *ii. that the law dealing with demarcation of administrative boundaries is the Districts and Provinces Act of 1992, that that law is still in force and until it is repealed, it will remain the main reference point about the administrative boundaries.*
>
> *iii. that because of the security exigencies, the Cabinet Secretary Ministry of the Interior has power to take the measures that he took.*

22. On its part, the 1st interested Party, Meru County government, filed a preliminary objection dated 27th November, 2015 on 30th November, 2015. In its preliminary objection, it averred that the Court lacked jurisdiction in this matter since the petitioners had approached court without first exploring the alternative dispute resolution mechanisms as is mandatory required under the salient provisions of **Article 189(3)** of the **Constitution** and sections 31-35 of the Intergovernmental Relations Act. It also averred that the nature of the dispute beforehand does not fall under the ambit of **Article 188** of the **Constitution**: that **Article 188** provides for the procedure for altering the boundaries of a County, while the issue herein is marking the boundary as it exists.

Litigation Procedural Posture

23. This matter first came before this Court, *Mumbi Ngugi, J* on 18th November 2015 where it was certified urgent and interim orders sought in the application granted ex parte. The learned Judge directed that the petition and application be served on the respondents for hearing and parties appear for directions on 20th November 2015 before Onguto, J. The matter was then mentioned on 20th November, 2015 and further on 24th November, 2015 when an order was made that the parties do consider resolving the issue of the constitution of the Task Force amicably.

24. On 2nd December, 2015 the matter was mentioned before *Mumbi Ngugi, J* and it was ordered that as the parties had been unable to agree on an amicable resolution of the issue, the Court would proceed with the hearing of the application and the preliminary objection, which had been file. It was also ordered that while no orders were to issue restricting the Committee from proceeding with its work, orders issued restraining the publication of its report or implementation thereof pending the hearing of the application and or the orders of the Court.

25. The matter came before me on 8th December, 2012 when Counsel for the Petitioners, Mr. Munene holding brief for Mr. Kitui addressed the Court on the applications and its grounds. Upon listening to the Petitioners' Counsel the Court gave an order thus: "*having read the application against Article 188 of the Constitution, I direct counsel to seek instructions on whether or not the petition is pre-mature and whether or not the Boundary Dispute Committee can be reconstituted to co-opt members from the Isiolo County to bring parity in expertise*".

26. The matter was subsequently mentioned before me on 16th December, 2015 where consent was recorded to the effect that submissions were to be filed by 13th January 2016. In the meantime, since the report of the Boundary dispute Committee had been prepared, the orders of *Mumbi Ngugi, J* issued on 2nd December 2015 were varied to the extent that "a copy of the report shall be availed to the petitioner within 7 days and the petitioner shall not publicise the report".

27. On 3rd February, 2016, the hearing of the application commenced, however on 11th March, 2016 by consent the application was marked as dispensed with and therefore withdrawn. This set the ground for the hearing of the main petition.

Petitioners' case

28. The Petition was canvassed before me on 2nd September 2016 and the Petitioners framed four issues for consideration:

i. whether the 1st respondent had powers to appoint the Taskforce on the boundary dispute;

ii. whether there was public participation in the attempt to resolve the boundary dispute;

iii. whether the Petitioners' rights under Article 47 of the Constitution were breached;

iv. whether ADR should have been used in resolving the dispute; and

v. Reliefs available to them.

Illegality: whether 1st Respondent had the powers to form the Taskforce

29. The Petitioners challenge the legality of the Task Force and state that the 1st Respondent on 4th November, 2015 in his statement to the Senate informed the House that he had constituted a border resolution team named the 'Meru/Isiolo' boundary dispute committee. That in doing so he was purporting to take over the roles of Parliament and, the Independent Electoral and Boundaries Commission (IEBC) and single handedly also purport to appoint a team to survey and demarcate the boundaries between two communities which action is an illegality and an abuse of the law.

30. It was submitted that **Article 47** of the **Constitution** entitles citizens to lawful administrative action and that the 1st Respondent has no power to do what he purported to do and has failed to rebut that assertion because in any event authority is always given by law and without it any action is unlawful. It was submitted further that the 1st Respondent had failed to state which provision of law granted him the power to mark, demarcate or alter boundaries of Counties since the **District and Provinces Act Cap 105A** of the **Laws of Kenya and Section 7(2)** of the **Sixth Schedule** of the **Constitution** under which the 1st Respondent purport to act does not give him such powers. In this regard, the Petitioners cited the case of ***Republic v District Education Board of Kericho & Another, Ex Parte Sacred Heart Catholic Primary School, Kericho [2007] eKLR*** in which *Nyamu J* quashed the decision of the Kericho District Education board in closing the school on the ground that it did not have powers to do so. The Petitioners urged that the Court thus ought to find that the 1st Respondent acted *ultra vires* the Constitution in usurping powers not vested in his office.

31. As a corollary, it was also submitted that having acted *ultra vires*, the Committee's finding is also illegal and ultra vires since the whole transaction was tainted and steeped in illegality. That whether the report of the Task Force has been overtaken by events is of no consequence as out of nothing comes nothing. They cited ***Republic v District Education Board*** **(supra)** in urging the Court to adopt the maxim *exhibito nihil fit- out of nothing comes nothing*. They also cited the case of ***Keroche Industries Limited v Kenya Revenue Authority & 5 Others [2007] eKLR*** in urging the point that a decision tainted by illegality is still tainted and illegal and issues such as security, peace and the need to save life and limb does not suffice to validate the 1st Respondent's acts for *"nothing is to be done in the name of justice which stems from abuse of power"*. They further cited the case of ***Centre for Rights Education & Awareness & 8 Others v Attorney General and another [2012] eKLR*** where *Mumbi Ngugi J* quashed an unlawful decision and reiterated that there is no principle in law predicated on the need to save life and limb by wrongly invoking the law. They lastly cited ***Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 3 others, Ex Parte Mwalulu & 8 Others [2004] eKLR*** in submitting that an abuse of power is akin to an unlawful decision and therefore since the Respondents have no powers to mark boundaries, their decision is illegal *ab initio*.

Adherence to the Constitution 2010

32. It was submitted in the above regard that the new constitutional dispensation has abolished the provincial system of administration under **CAP 105A of the Laws of Kenya**. The **Constitution 2010** does not provide for **Districts and Provinces Act**. The new system of governance with two levels: the National and Devolved Governments, creates inter-dependence as opposed to the wholly dependent provincial administration system of the past era. That since there are no districts and provinces in the new devolved system, it cannot be said that the current Counties are Districts for any lawful purpose and the Counties have different functions, powers and also subsume the previous local Governments and thus are a completely different creature.

33. Further, it was submitted that **Section 7(1)** of the **Sixth Schedule** to the **Constitution** requires that any previous law ought to be read with necessary alterations, adaptations, qualifications and expectations to bring it into conformity with the Constitution and therefore even if the 1st Respondent had powers to alter, mark and/or demarcate boundaries under **Cap105A,** under the new system, he cannot now act alone since the boundaries of the Counties have not been set out in the Constitution and the same Constitution essentially abolishes the provincial administration system which provided for Districts.

34. It was also submitted that the Constitution established new structures such as the Senate and other independent bodies to protect the interests of Counties and ensure a smooth and orderly transition from the old system and that these institutions ought to be involved in monumental decisions such as marking of boundaries of Counties. The Petitioners furthermore submitted that the Constitution provides for transition from the former provincial system of governance to the devolved system of governance and in this regard, they cited **Section 17** of the **Sixth Schedule** to the **Constitution** which provides that:

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

In effect, it is the Petitioners' case that the 1st Respondent acted in breach of the **Constitution 2010.**

Breach of Article 47 of the Constitution: public participation

35. The Petitioners submitted that they were never consulted before the undertaking of the impugned actions of the 1st Respondent; and they were negatively affected by those acts. They urged in that regard that the process leading to Nanyuki Accord regarding the issues in contest and to which the Respondents submit that the Petitioners were consulted, had 10 resolutions but none has been adhered to. That the key resolutions included the one that the boundary dispute is resolved through constant dialogue with keen respect to the rule of law, but the process was taken over by the 1st Interested Party and the 1st Respondent thereafter to the exclusion of the Petitioners.

36. They argued further that there was no public participation in the entire process of setting up the Task Force for various reasons. First, that from the impugned report of the Taskforce, the stakeholders meeting scheduled on 3rd March, 2015, that was to discuss the boundary issue never took off due to "unavoidable circumstances" Further, that the meeting was only known to the 1st Interested Party, a key player to the boundary issue and yet the meeting would have dealt with the issue of composition and membership of the Taskforce that would have resolved the boundary issue.

37. Secondly, that the report was generated by the 1st Interested Party and not the 1st Respondent and in this regard it was submitted that when the 1st Respondent made a report to the Senate on the composition of the committee, he gave the names of the 14 members forming the committee. It was submitted however, that the purported report is unsigned, does not have minutes of meetings of the Boundary Committee and does not include the names of any of 14 mentioned members presented to the Senate. That the report is also a sham as it is only the 1st Interested Party that had details of all the boundary resolution material and that the purported report admits that the whole exercise was financed by the Meru county government, yet there is no evidence produced to show that the Isiolo County was approached and refused to participate in the process including co-financing it.

38. To further buttress lack of public participation of the Isiolo people in the process, the Petitioners submitted that of the 14 members of the team presented to the Senate by the 1st Respondent 4 are purportedly representatives of Isiolo County while 8 are representatives of Meru County. That this manifest skewed representation and a bid to sabotage, stifle and/or silence the voice of the Petitioners and the communities they represent was a blatant violation of the Constitution and all known canons of law. Hence, it was argued that if this Court does not come in to redress such brazenly disregard of the rule of law, the affected citizens will continue to suffer violation of their rights. That the communities in Isiolo are many but the largest are the Samburu, Turkana, Borana and Somali who ought to be considered in any team to adjudicate on land issues and boundaries in a bid to obtain ethnic balancing, fairness and protection of the marginalized.

39. The Petitioners cited the case of ***Robert W. Gakuru & others v The Governor Kiambu County and 3 Others,*** *Petition No. 532 of 2013(Consolidated with) Petition Nos. 12, 35, 36, 42 & 74 of 2014*, in which *Odunga J,* in giving the meaning of public participation, stated interalia:

> ***"In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates…"***

40. In that context, it was submitted that no reasonable steps were taken to involve the locals who would be affected by the decision to demarcate the boundaries and that on the basis of the impugned report, some woke up in one County only to be told that they were actually living in another County. That in the report, the members of the Taskforce admitted that there was a language barrier in communicating with locals as no local was involved in the process and so the Petitioners also cited the ***Keroche Industries Limited v KRA*** case in urging that the process of arriving at an administrative decision cannot be shrouded in mystery and all affected parties must in any event be heard. On this issue the Petitioners therefore concluded that **Article 47** of the **Constitution** was violated.

Whether alternative dispute resolution (ADR) was an option

41. The Petitioners refuted the argument by the Respondents that this dispute should have first been subjected to alternative dispute resolution before being brought to Court as contemplated under **Section 31** of the **Intergovernmental Relations Act, Cap 5G** of the **Laws of Kenya**. First, they submitted that what the 1st Respondent did was an illegality and thus not subject to an ADR mechanism and because also an illegality ought to be brought before the Court for quashing and not subjected to an ADR mechanism for resolution. They relied on the ***Goldenberg Case (supra)*** where it was stated thus:

> ***"We find that it would be serious abdication of jurisdiction and powers of this court if we were to shy away from quashing a nullity because in essence the doctrine of ultra vires permits the courts to strike down decisions or acts made or done by bodies exercising public functions which they have no power to make. The courts have a specific mission and a duty to uphold the rule of law."***

42. In the above context, it is submitted that it is the fundamental duty of this Court to quash nullities and uphold the rule of law and that it would be a remiss for the Petitioners to attempt to resolve a nullity or an illegality by ADR rather than bring it before the Court for purposes of being quashed.

43. Secondly, the Petitioners argued that not all Petitioners are County Governments. That the 2nd to 11th Petitioners are individuals who brought the Petitions under **Article 22(2)(b)** of the **Constitution** and therefore the right to ADR under the Intergovernmental Relations Act is not enforceable as against them. That there is also no requirement in law that disputes involving community of interests or individuals representing them on one side and the government on the other side should be referred to ADR. In any event, they urged, the Petition is about breach of fundamental freedoms and rights under the Bill of Rights and is not about relations between two levels of government. In effect that ADR is not appropriate in resolving the present dispute.

In concluding their submissions, the Petitioners have urged this Court to allow their Petition as prayed.

1st Interested Party's case

44. The case for the Respondents and the 1st Interested Party was orally argued by its learned Counsel, Mr. Makokha, who opposed the Petition. He relied on the replying affidavit on record, the supplementary affidavit and submissions of the respondents and interested parties. Counsel framed three issues for determination: *interpretation of the Constitution, illegality and the subject of and judicial review.*

Constitutional interpretation

45. Elaborating on its written submissions filed on 17th August 2016, the 1st Interested Party submitted that **Article 188** of the **Constitution** deals exclusively with the process of altering county boundaries. However, it was submitted that the issue at hand in this matter was demarcation and confirmation of boundaries; which the matter does not fall under the purview of **Article 188** of the **Constitution**.

46. To draw the distinction, the 1st Interested Party relied on Black's Law Dictionary 4th edition definition of the words '*Alter'* and '*delimit'* thus:

> ***Alter: to make a change in, to modify; vary in some degree; to change some of the elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected.***

That '*demarcate'* is a synonym to '*delimit'* and '*delimit'* means:

> ***To mark or lay out the limits or boundary line of a territory or country; to fix or to mark the limits of; to demarcate; bound.***

47. Consequently, it was submitted that the process that was to be undertaken to settle the Meru-Isiolo conflict falls under the definition of the words' 'delimit' and 'demarcate' and cannot be subjected to the process in Article 188 of the Constitution as it has nothing to do with the alteration of boundaries. It cited the case of ***The People (Director of Public Prosecutions) v O'shea [1982] IR 384*** in which *O'Higgins CJ* made the following observation concerning interpretative techniques:

> ***"The Constitution, as the fundamental law of the State, must be accepted, interpreted and construed according to the words which are used; and these words, where the meaning is plain and unambiguous, must be given their literal meaning. Of course, the Constitution must be looked at as a whole and not merely in parts and, where doubts or ambiguities exists, regard may be had to other provisions of the Constitution and to the situation which obtained and the laws which were in force when it was enacted. Plain words must, however, be given their plain meaning unless qualified or restricted by the constitution itself."***

48. It was argued in the above context that the Petitioners had misunderstood the dispute by placing it under **Article 188** of the **Constitution** and that demarcation of County boundaries in this case is a security policy question and the committee was merely set up to identify the boundary as it is and **Article 188** was therefore not applicable to this matter.

Illegality

49. As regards the legality of the 1st Respondent's actions, it was denied that the dispute resolution committee was un-procedurally and illegally constituted and the 1st Interested Party relied on **Section 31** of the **Intergovernmental Relations Act** and submitted that the joint Isiolo/Meru dispute resolution team was long overdue. That the communities living along the border of Meru and Isiolo counties have had perennial disputes between them on the location of the boundary occasioning violence leading to death and loss of property. **Section 31** of the **Act** provides:

> ***"The national and county governments shall take all reasonable measures to-***
>
> ***a. resolve disputes amicably; and***
>
> ***b. apply and exhaust the mechanisms for alternative dispute resolution provided under this Act or any other legislation before resorting to judicial proceedings as contemplated by Article 189(3) and (4) of the Constitution."***

50. It was thus submitted that the National Government, under the Constitution, has the function of granting security to citizens and that under **Article 189(3)** of the **Constitution**, where there is a dispute between the National Government and the County Government, alternative dispute resolution mechanisms should be invoked. In this regard, a preliminary objection was raised and argued that there is no jurisdiction for this Court to intervene in this matter and that the Petition is prematurely before it.

51. It was also submitted that whether districts or provinces exist is neither here nor there because the Districts and Provinces Act still exists and the authority to create Districts is reposited therein.

52. On public participation, it was submitted that when the disputed boundary was marked, there was public participation prior to that action and this submission was made in urging the Court to find that the task force was not mandated to mark the boundary, but simply to identify the boundary, which in the 1st Interested Party's submissions, is already marked.

53. Further, that to resolve the dispute, the community and elected leaders from the two counties met at Sportsman Arms Hotel, Nanyuki on 20th December 2013 and the Nanyuki Accord was made after nine (9) months of negotiations with representatives from both Counties who

engaged in negotiations in the period between March 2013 and December 2013. It was thus submitted that the 1st Petitioner was a party to the Accord and was the product of public participation. It was in any event pursuant to the Accord. That the leaders present agreed that the 1st Respondent was then tasked to mark the boundary as it was.

54. It was submitted that following the Nanyuki Resolution, the PS for Interior and Coordination of National government in a letter dated 15th January 2014 addressed to the PS of Lands, Housing and Urban Development and copied to the CS Interior and Coordination of National Government and to the CS Lands, Housing and Urban Development requested that the PS coordinates the agencies with the aim of identifying and marking the boundary; thus amicably settling the dispute. Unfortunately this letter did not elicit any response. Meanwhile, security situation deteriorated and another letter was written on 26th June, 2014 to revisiting the issue, but again to no avail.

55. The 1st Interested Party thus urged, that thereafter, the Meru County Commissioner wrote a letter to the Principal Secretary, Ministry of the Interior on 26th September, 2014 requesting him to intervene and implement the Nanyuki Resolution, which implementation he opined would bring the dispute to an end. A further letter was written on 29th September, 2014 explaining the nature of the dispute and which letter over-emphasised on the need to set up a team to mark the boundaries as was resolved by leaders of the two Counties in the Nanyuki Resolution. The latter action was thereafter undertaken.

56. It was submitted in the above context that the Petitioners misconstrued and/or misunderstood the nature, composition, competency, efficiency, legality and function of the Joint/Isiolo Boundary Dispute Committee because whereas the Petitioners, are of the skewed understanding that the same should comprise of equal representation of members from the two antagonizing counties, the team actually comprises of competent technocrats and land experts with necessary expertise to resolve the dispute. Consequently, it was submitted that whatever the committee did was based on good intentions and that public interest was in favour of resolution of the issue by the 1st Respondent and that a policy decision cannot be challenged in the manner the Petitioners are asking this Court to do and that lastly security issues are paramount in addressing disputes such as the present. That therefore no illegality was committed by the Respondents as alleged.

Whether 1st Respondent acted ultra vires his mandate

57. As to whether the 1st Respondent acted *ultra vires*, his mandate, it was submitted that the Ministry is charged with the responsibility of public administration as well as internal security and that the 1st Respondent has never imposed himself on the teams representing both Counties within the committee. That the said teams actually appointed him as its chairperson and he accepted the good gesture and constituted a team from both Counties, tasked with demarcation of boundary that is in dispute between the two Counties. It was thus argued that the 1st Respondent has not usurped the powers of the IEBC because he has not conducted any delimitation or demarcation of any boundary. Instead, that he was only mediating between the parties in the dispute and at all times acted in good faith and upon lawful and relevant grounds of public interest and has exercised his discretion for furtherance of public good.

58. In that regard, the 1st Interested Party made reference to the case of ***Keroche Industries Limited v Kenya Revenue Authority & 5 others*** (which was cited in the case of ***Republic v Kenya National Examinations Council Ex parte Ian Mwamuli [2013] eKLR***) to distinguish between the issue of exercise of discretion for public authorities and private persons where it was held *inter alia* that:

> ***"On the issue of discretion Prof. Sir William Wade in his Book administrative Law has summarized the position as follows: The powers of public authorities are…essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land…regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law…"***

59. It was also submitted that members of the Committee constituted by the 1st Respondent are all holders of public office and the formula of gender equity and geographical balance cannot thus be observed. Further, that the 1st Respondent acted in good faith in constituting the team and the case of ***Re Hardial Singh and Others [1979] KLR 18*** (which was cited in the case of ***Central Organization of Trade Unions (K) v Cabinet Secretary, Ministry of Labour Social Securities & Services & 2 Others [2014] eKLR***; where the Court held *inter alia*:

> ***"The court can therefore interfere with the decision of a Minister if the Minister does not act in good faith, or if he acts on extraneous consideration which ought not to influence him, or if he plainly misdirects himself in fact or in law…"***

In effect, the 1st Interested Party submitted that the 1st Respondent did not act *ultra vires* his mandate.

Whether Judicial Review orders are available to the Petitioners

60. As to whether judicial review orders are available to the Petitioners, reference was made to the purview of judicial review as was set out by Lord Diplock in ***Council for Civil Service Unions v Minister for Civil Service [1985] A.C. 374*** (cited in ***Republic v Tanathi Water Services Board & 2 Others ex parte Senator Johnstone Muthama [2014] eKLR***). In that regard, it was argued that the three grounds set out for subjecting an administrative action to control of judicial review by Lord Diplock were: illegality, irrationality and procedural impropriety. On this basis, it was submitted that there is no decision made by any of the respondents, hence orders of certiorari, orders of prohibition and mandamus as sought cannot stand and were not available to the petitioners.

61. It was also argued that the Petitioners have not shown how the Respondents have acted illegally, unreasonably and in breach of natural justice. Reference was thus made to ***Republic v Kenya Power & Lighting Company Limited & Another [2013] eKLR*** where it was held that*: "[i]t is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted."*

62. Lastly, it was urged that faulting the joint Meru/Isiolo Boundary Dispute Committee on grounds of ethnicity and regionalism is against the public interest as the aspiration of the joint committee was for it to be independent, professional and competent in its work. There was also no resolution made that the said committee should have membership shared between the two Counties, neither was there any resolution on the ethnic composition of the committee.

For the above reasons, it was urged that the Petition lacks merit and should be dismissed with costs.

Analysis And Determination

63. This matter presents the following key issues for determination;

a. whether this Court has jurisdiction to determine the dispute;

b. whether this matter should have been subjected to ADR under the Intergovernmental Relations Act;

c. whether the 1st Respondent had powers to form the Meru/Isiolo Boundary Committee;

d. whether the Petitioner's rights were infringed;

e. remedies, if any.

a. Whether this Court has jurisdiction to determine this matter

64. The question of the jurisdiction of this Court was raised by the 1st Interested Party and it was the basis of its preliminary objection. It contended that this Court has no jurisdiction since this dispute should first have been subjected to alternative dispute resolution as provided for under **Article 189(3)** of the **Constitution** and **Sections 31-35** of the **Intergovernmental Relations Act.** Secondly, that the dispute does not fall under the purview of **Article 188** of the **Constitution** as it does not deal with alteration or delineation of a boundary but it is concerned with demarcation and making of a boundary which process, in the 1st Interested Party's submission, amounts to merely identifying an already existing boundary.

65. In reply, the Petitioners' case is that the dispute herein is not one between Governments hence Sections 31-35 aforesaid do not apply. That the matter is about the quashing of an illegality which claim cannot be subject of any ADR mechanism.

66. In that regard it is a settled principle of law flowing from the **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd 1989 e KLR** case that any question regarding jurisdiction has to be addressed and determined upfront and where a Court finds that it has no jurisdiction, it should down its tools. The preliminary objection herein is anchored in **Articles 188** and **189(3)** of the **Constitution and Sections 31-35** aforesaid and it is the only prudent that I should *reprose* those provisions.

Article 188 provides:

1. The boundaries of a county may be altered only by a resolution-

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

b. passed by-

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

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

2. The boundaries of a county may be altered to take into account-

a. population density and demographic trends;

b. physical and human infrastructure;

c. historical and cultural ties;

d. the cost of administration;

e. the views of the communities affected;

f. the objects of devolution of government; and

g. geographical features. (Emphasis added)

Article 189(3) provides:

> ***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.***

68. Evidently, it is not express that the Constitution decrees that disputes of a nature contemplated under those provisions should be subjected 'first' to ADR. Hence it cannot be sustained that under the Constitution, this Court has no jurisdiction in this matter. The Constitution only states that dispute(s), under **Article 189**, should be settled through use of *reasonable efforts*, and that such procedures as may be applied should include procedures provided for under legislation.

69. However, it is also imperative to note that the disputes contemplated herein are those between "governments". In the new constitutional dispensation, the governments contemplated therein are the National and the County Governments.

70. Be that as it may, the legislation contemplated under **Article 189** is the **Intergovernmental Relations Act. Part IV** of the **Act** deals with "Dispute Resolution Mechanisms". **Section 31** provides for "measures for dispute resolution, thus:

> ***The national and county governments shall take all reasonable measures to—***
>
> ***(a) resolve disputes amicably; and***
>
> ***(b) apply and exhaust the mechanisms for alternative dispute resolution provided under this Act or any other legislation before resorting to judicial proceedings as contemplated by Article 189(3) and (4) of the Constitution.***

71. Indeed, **Section 31(b)** therefore requires that in case of a dispute, parties (National or County Governments are expected to exhaust all mechanisms of ADR before resorting to Court (judicial litigation).

However, the question that begs an answer is which parties in dispute is this provision referring to? To answer the question, the first point of reference is the Constitution. **Article 188** deals with 'boundaries of counties' with **Article 188(2)** providing on how they may be altered. It is however **Article 189** that is emphatic as it provides for: "Cooperation between National and County Governments" suffice it to say then that this part of the Constitution does not provide for the governance of relations as between individual persons, but 'governments' under the Constitution.

A clearer picture is to be found in the Intergovernmental Relations which in the Act the preamble is clear that it is:

> ***"An Act of Parliament to establish a framework for consultation and cooperation between the national and county governments and amongst county governments; to establish mechanisms for the resolution of intergovernmental disputes pursuant to Articles 6 and 189 of the Constitution, and for connected purposes."***

72. Outrightly, this Act caters for disputes as between the national government on the one hand and a county government on the other hand, and/or where on the either sides of the conflict, we have county governments.

It is no wonder then the 1st Interested Party did not cite **Section 30** of the said **Act** which Section is also emphatic as to whom **Part IV** of the **Act** (on Dispute Resolution Mechanisms) applies. **Section 30** provides:

> **"(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."**

73. Having then established that the regime provided for under the Constitution and the Act is in reference to disputes as between and among 'governments', I now turn to answer the question; who are the parties in this dispute? At the beginning of this Judgment, I deliberately defined all the parties involved and apart from the 1st Petitioner, Isiolo County, all the other Petitioners are natural persons. It is obvious therefore that these other Petitioners do not fall under the ambit of the Act and neither do the provisions of the Act that disputes be first subjected to ADR apply to them.

74. Even though we have a County Government on either side of the conflict, this Petition as framed is anchored on **Articles 22** and **47** of the **Constitution** and the crux of the Petitioners' case is that: the 1st Respondent had no locus to form the task force, and the Petitioners' rights (more so public participation under **Article 47**) were violated. Consequently, I find that the preliminary objection is misplaced and should be disallowed as this Court has jurisdiction to deal with matters related to alleged violations of rights under the Bill of Rights aside

from the fact that ADR is not necessarily the only mechanism to resolve the dispute, a matter I shall address substantively shortly.

75. In addition, the dispute is also about the resolution of the question whether the 1st Respondent had the legal authority to form the task force. This question squarely falls within the jurisdiction of this Court because **Article 165(3)(d)(ii)** of the **Constitution**. It provides:

> ***3. Subject to clause (5), the High Court shall have-***
>
> ***…***
>
> ***(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-***
>
> ***…***
>
> ***iii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution."***

76. In a nutshell, it is my finding that this Court has jurisdiction to hear this matter as brought by the Petitioners and consequently, the second limb of the preliminary objection that this Petition is premature also fails.

b. Whether this matter should have been subjected to ADR under the Intergovernmental Relations Act

77. Having found that this dispute does not fall within the realm of the **Intergovernmental Relations Act**, the second issue framed for determination can be dealt with summarily.

While **Article 159(2)(c)** of the **Constitution** provides for 'alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution', I do not find that this constitutional provision in anyway decrees that ADR must be first pursued. In fact the language of the Constitution in this provision is 'promotional'. It urges parties to consider ADR. Hence having removed this dispute from the legal regime under the Intergovernmental Relations Act, I find no any other legal mandatory requirement to subject this matter to ADR.

78. I also recall that at the initial stages of the litigation of this matter, on 24th November, 2015, the hearing was adjourned with the Court ordering the parties to pursue ADR mechanisms to settle this issue. It is on record that on 2nd December, 2015, this Court proposed ADR did not yield any fruits. Suffices it to say that this is evidence that even if this Court was desirous at proposing ADR, the same might fail again.

79. Lastly, I agree with the Petitioners submissions that matters of illegality cannot be mediated upon. The crux of the petitioners' case is that the 1st respondent had no legal mandate to perform an act that he did. Outrightly, such a legal question cannot be subject of ADR. In the case of ***Mike Sonko Gidion Kioko v Attorney General & 8 Others [2014] eKLR*** I cited with approval the decision of the Court of Appeal of Uganda thus:

> *"More fundamentally, and in addition in* ***Makula International Ltd v His Eminence Cardinal Nsubuga and Another (1982) HCB II****, the Court of Appeal of Uganda held as follows;*
>
> ***"… a Court of law cannot sanction what is illegal and illegality once brought to the attention of the court, overrides all questions of pleadings, including admissions made thereon."***

80. Consequently, a question of illegality once raised, as herein raised in this matter, overrides all other considerations such as subjection of a matter to alternative dispute resolution. It befalls upon a court to which such an issue is addressed to consider the question of illegality before any other consideration. Hence this matter could not and cannot be subjected to ADR under the Act or under any law.

c. whether the 1st Respondent had powers to form the Meru/Isiolo Boundary Committee;

81. This issue forms the crux of the Petitioners' case because the Petitioners contend that in forming a committee for purposes of surveying and demarcating of the boundary between Isiolo and Meru County, the 1st Respondent acted outside his legal mandate and in so doing usurped the powers of the IEBC and the Senate. That demarcation of County boundaries in any event falls within the realm of the functions of an independent commission and not his office.

82. On the other hand it is the Respondents' and 1st interested party's contention that the 1st respondent acted within his powers as legally provided in the laws and in their submissions, the 1st Respondent exercised powers under the Provinces and Districts Act which empowers him to form a committee to identify a boundary for the sake of resolving a dispute regarding it the 1st Interested Party was also emphatic that because of the volatile situation at the time the 1st Respondent acted in good faith as the welfare of the people is paramount and security is the preserve of the Executive Arm of Government under the docket of the 1st Respondent. They also submitted that infact what the task force was to do was to 'identify/demarcate/delimit' the boundary and to them this meant that the boundary was already in existence having been marked and the task force was only meant to identify it. That this identification process is not what is contemplated by **Articles 188(2)** of the **Constitution** which provides for 'alteration' of boundaries.

83. The Petitioners' case in reply to the latter contentions is that the Provinces and Districts Act cannot supersede the Constitution. And that under **Section 17** of the **Sixth Schedule** to the **Constitution 2010** as the provincial system of Government was in place before the said Constitution was within five years of the promulgation of the **Constitution 2010** expects to be restricted and to be in the devolved system of Government under the said Constitution. That the Provinces and Districts Act cannot therefore be a basis for the 1st Respondent to demarcate boundaries.

84. In that regard all parties to this dispute agree that there is a dispute as relates to 'where exactly the boundaries of the two Counties are' and alteration thereof if necessary. It is also common ground that this uncertainly has caused havoc among the communities that live in the borders between the two Counties. The 1st Respondent in an attempt to resolve the dispute formed a task force to demarcate the boundary and settle the dispute. This mandate has not been challenged by the Petitioners hence this judgment.

85. To add meat to the above finding, the **County Boundaries Bill, 2015** has been brought to my attention by the Petitioners. That Bill was published on 21st August 2015 to give effect to **Article 188** of the **Constitution** by providing the procedure for alteration of County boundaries and one of the proposals made therein by the Senate is the establishment of "an independent County Boundaries Commission established in accordance with **Section 7**" of that Bill. In my view that is the correct procedure to be followed where a dispute arises as to County boundaries.

86. In making the above finding, I must restate the fact that the 1st Respondent in setting up the Committee to resolve the boundary dispute may have purposed that the said boundary is identified and marked but all evidence before me points to the fact that the boundary was altered to suit one party and certainly not the Petitioners. No such mandate is in law reposited in the 1st Respondent or the committee aforesaid. It belongs only to a boundary commission set up for that purpose. That finding then takes me to the underlying issue of land ownership in Kenya.

87. In the above context, land and land related disputes remain very emotive issues in our Country. Land has for that reason has been the basis of many disputes, displacement and bloodshed in the Country and that fact was not lost on the drafters of the Constitution 2010 as they had to dedicate a whole chapter to land. The Supreme Court in ***Advisory Opinion No. 2 of 2014****, In the Matter of the* ***National Land Commission [2015] eKLR*** captured this when it stated thus:

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

88. In the above advisory opinion, the Supreme Court succinctly traced the history of the so called 'land question' in Kenya: from the Traditional African land tenure system, through the colonial period and the post-independence debacles in an attempt to dissect the question: *when did the rain start beating us as a country on the issue land?* The various Commissions on land (Akiwumi Commission, Njonjo Commission & the Ndungu Commission) and the various constitutional drafts were then evaluated by the Supreme Court in illustrating the process that culminated in **Chapter 5** of the **Constitution, 2010** and whenever a Court deals with a dispute that relates to land, it is now imperative that the court does not disengage from the Constitution, particularly Chapter 5. At paragraph 213 of the above advisory, the Supreme Court had this to say:

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

89. It is therefore on the basis that principally the issue before this Court is about boundaries between two Counties and occupation of land by residents of the said Counties that this matter ought to be addressed. This is the basis upon which this matter should be determined.

90. In that context, all parties agree that an 'independent commission' has the power to alter the boundaries of Counties as provided for in **Article 188** of the **Constitution** because they have argued (particularly the Petitioners) that on the basis of **Article 188** of the **Constitution**, the parties are of the opinion that the 'independent commission' being referred to is the IEBC. I disagree. IEBC is an *Independent* ***'Constitutional'*** *Commission* established by **Article 88** of the **Constitution** and among its responsibilities under **Article 88(4)** are: *(c) the delimitation of constituencies and wards.* **Article 89** then specifically provides on how the IEBC will carry out: "Delimitation of electoral units". Clearly, the boundaries alluded to, which IEBC has the power to review, are constituency and ward boundaries. The Constitution gives the IEBC no such power to 'alter' boundaries of Counties.

It is my opinion therefore that while the parties are right that **Article 188** allows for an independent commission to alter a County's boundary, that is not the IEBC. The Article provides for an 'independent commission' set up for that purpose by Parliament (Senate and National Assembly). In my understanding, this is a separate 'independent commission' set up the Parliament and it is not IEBC, a Constitutional Commission, the rationale being that County boundaries go to the core of the territory of the Republic of Kenya as provided for in **Articles 5, 6** and the **First Schedule**, hence the high threshold for altering the boundaries as stated in **Article 188(1)** of the **Constitution**.

The Supreme Court defined the holistic principle of interpretation in the Advisory Opinion of ***In the Matter of the Kenya National Human Rights Commission***, [2014] eKLR, [at paragraph 26] as follows:

> ***"…But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."***

91. The next controversy is whether the residents of the said Counties that this matter ought to be addressed and the mandate of such a Commission includes the power to 'demarcate' land. Quoting from the **Black's Law Dictionary**, **4th Edition** the 1st Interested Party argued that the two acts are different and while I agree with the 1st Interested Party that the definition of the two terms is distinct as stated in the *Black's Law Dictionary*, the words of the Retired Chief Justice, Dr. Willy Mutunga ring true on the interpretation of our Constitution in his concurring opinion in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others,*** *Supreme Court Petition No. 2B of 2014*, [at paragraph 232] where he stated thus:

> ***"To emphasize, our Constitution cannot be interpreted as a legal-centric letter and text. It is a document whose text and spirit has varied content, as amplified by the Supreme Court Act, that is not solely reflective of jural phenomena. This content has historical, economic, social, cultural, and political contexts of the country, and also reflects the traditions of our country. References to*** *Black's Law Dictionary* ***will not, therefore, always be enough, and references to foreign cases will also have to take into account these peculiar Kenyan needs and contexts."***

92. I am guided and in the peculiar circumstances of the case before me, both this Court and the Supreme Court are now replete with precedents on how to interpret the new Constitution and it is now settled that the Constitution should be interpreted holistically bearing in mind the historical, economic, social, cultural and political contexts of the Country. The Supreme Court defined the holistic principle of interpretation in the Advisory Opinion of ***In the Matter of the Kenya National Human Rights Commission***, [2014] eKLR, [at paragraph 26] as follows:

> ***"…But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."***

93. Further in quoting the case of ***The People (Director of Public Prosecutions) v O'shea (supra)*** and urging the point that the Constitution must be accepted, interpreted and construed according to the words used, the 1st Interested Party stops at a very crucial turning point in its submissions. It should take the turning point and take the submissions further by bearing in mind that our Constitution has its own regime of interpretation within which it should now be construed. More so, one cannot disengage from **Article 259,** and the principles in **Article 10** of the **Constitution** in doing so. The answer to the question before me cannot in the circumstances lie in words and semantics alone.

94. It is with this in mind that I now consider the functions of 'independent commission' *vis-à-vis* the role of the 1st Respondent in the matter at hand as it was argued that the 1st Respondent drew his mandate to set up the Committee from the Districts and Provinces Act. In that regard I must agree with the Petitioners on their submission that the said Act give no one (not even the 1st Respondent) the power to mark, demarcate or alter the boundary of a district and/or province. The short title of the Act is conclusive enough as it states that it is; ***"An Act of Parliament to prescribe the districts and provinces into which Kenya is divided".*** It is quite clear that the Act is descriptive in nature. It leaves no room for any person to create, demarcate or alter a boundary. Suffice it to say that under the old constitutional dispensation, when the Act was fully in force, it was only Parliament that would have legislated to alter the districts and provincial boundaries as described in this Act. Apart from its various schedules, the Act only has five Sections and has no mention of 'Minister' (the equivalent of Cabinet Secretary, a position, such as that of the 1st Respondent under the new Constitution). Simply put, I find no basis for the 1st Respondent's exercise of power under that Act.

95. Having found that indeed this Act is in no way applicable to this matter, as it donates no power to demarcate and/or alter boundaries to anybody, I do not think it necessary to consider the Petitioners' submission that the Act had to conform to the new Constitution save to state that more than 6 years after the promulgation of the **Constitution 2010**, it is expected that any Act that was to be enacted under the **Fifth Schedule** ought to have been enacted by now. A thorough examination of the **Fifth Schedule** to the Constitution shows that the longest period provided, for the enactment of a piece of legislation necessary for operationalization of the new Constitution is five years. It is expected that today, 6 years after the said promulgation, the entire Constitution is now in force and we do not have to continue seeking recourse in transitional clauses under the **Sixth Schedule**.

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

97. In that regard, the functions of the NLC are provided for in **Article 67(2)** of the **Constitution** *inter alia*:

> **"(a) to manage public land on behalf of the national and county governments;**
>
> **b. to recommend a national land policy to the national government**
>
> **…**

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

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

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

> ***We also note that the petitioners claim to the land is predicated on what the petitioners claim were historical injustices visited on the community by the colonial masters who required that they move out of what they claim were ancestral lands to pave way for white settlement. We do not think the court would be the right forum for the petitioners to ventilate their claim which is founded on historical injustices.***
>
> ***The constitution acknowledged there could have been historical injustices in the manner land issues were handled by past regimes and hence among the functions and mandate of the National Land Commission established under Article 67(1) of the Constitution is to investigate historical injustices and to make recommendations for redress.***
>
> ***Article 67(2) (e) provides that among the functions of the National Land Commission is to:-***
>
> > ***"(e) initiate investigations, on its own initiative or on a complaint, into present or historical land injunstices, and historical land injustices, and recommend appropriate redress".***
>
> ***In our view it is (sic) the National Land Commission that has the mandate to investigate into historical land injustices and make appropriate recommendations for redress. The court is not the appropriate organ to carry out the investigation and/or inquiry and where the law has made provision for a state organ or institution to carry out a specific function that institution should be allowed to carry out its mandate. The court should not usurp the roles of other state institutions. We therefore are of the view, it was premature on the part of the petitioners to come to court without either exhausting the process of obtaining a degazettment of Ngong Hills Forest as a state forest under the provisions of the Forest Act and/or having the National Land Commission exercise its mandate under Article 67(2) (e) of the Constitution."***

99. While in the case above, the High Court declined jurisdiction in the matter referring the parties to the NLC, it is also my opinion that in the matter before me, the issues raised, particularly the demarcation of the boundary between the two Counties, are matters to be handled by the NLC within the scope of the Constitution and not by the 1st Respondent, however well-intentioned he might have been. It is therefore the NLC that is well suited to investigate the issue of any historical injustice that may have been committed by the 1960 and 1962 Boundary Commissions or any other agency thereafter as against the Petitioners and the people of Isiolo County and make recommendations on how the same ought to be resolved. Thereafter, on the basis of those recommendations and through the comity of constitutional institutions and State organs the issue will be legitimately resolved.

100. To further buttress my opinion above **Section 38** of the ***Land Laws (amendment) Act, 2016, No. 28 of 2016*** has amended **Section 15** of the ***National Land Commission Act*** by deleting that section and enacting a new section which puts issues of historical land injustices squarely with the mandate of the NLC. The new **Section 15(1)** provides:

> ***"Pursuant to Article 67(3) of the Constitution, the Commission shall receive, admit and investigate all historical land injustice complaints and recommend appropriate redress."***

101. In a nutshell, it is my finding that referral of the matter to NLC is the only legal and legitimate route to resolving the issue at hand under our new constitutional dispensation. No amount of good intention can circumvent this new course of doing things. The old order is gone and while it might take time for individuals institutions to realize that we have a new constitutional order with new institutions and a new way of doing things, this Court and all Courts in general have a constitutional obligation to remind them of the need to adhere to this new constitutional order. In this regard, in his concurring opinion, Mutunga CJ (Rtd) in ***Reference No. 2 of 2013, Speaker of the Senate and another v Attorney General & 4 Others [2013] eKLR*** stated as follows:

> *"[160] [160] The Constitution of 2010 was a bold attempt to restructure the Kenyan State. It was a radical revision of the terms of a social contract whose vitality had long expired and which, for the most part, was dysfunctional, unresponsive, and unrepresentative of the peoples' future aspirations. The success of this initiative to fundamentally restructure and reorder the Kenyan State is not guaranteed. It must be nurtured, aided, assisted and supported by citizens and institutions. This is why the Supreme Court Act imposes a transitional burden and duty on the Supreme Court. Indeed, constitutional relapses occur in moments of social transition, when individual or institutional vigilance slackens.*
>
> *[161] The Supreme Court has a restorative role, in this respect, assisting the transition process through interpretive vigilance. The Courts must patrol Kenya's constitutional boundaries with vigor, and affirm new institutions, as they exercise their constitutional mandates, being conscious that their very infancy exposes them not only to the vagaries and fragilities inherent in all transitions, but also to the proclivities of the old order. This principle is well depicted in the words of Mahamed, AJ in the Namibian case,* ***S v. Acheson****, 1991 (2) SA 805 (NM):*
>
> > ***"The law requires me to exercise a proper discretion having regard, not only to all the circumstances of the case and the relevant statutory provisions, but against the backdrop of the constitutional values now articulated and enshrined by the Namibian Constitution of 1990.***

The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul', the identification of ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation…"

102. I am duly guided and I further opine that while the old constitutional order might have given Ministers (now Cabinet Secretaries) immense powers it is time that we all realized that the old order is gone. Our Constitution is a transformative charter, and like any other transformation it comes with change and re-alighment of functions and duties. However we cannot wish away these constitutional transformations on such grounds as good faith and security and stability as the Respondents and 1st Interested Party have argued. *Ngcobo J*, (as he was then) captured this in the Constitutional Court of South Africa's case of ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism***, *CCT 27/03*, thus:

"No one would dispute the need to maintain stability in the industry. Otherwise there would be nothing to transform. But transformation is required by both the Constitution and the Act. And that change sometimes comes at a cost. I have pointed out earlier that there are profound challenges facing our nation in meeting our constitutional commitment to transformation. The transformation process will inevitably have an adverse impact on some individuals, particularly those that have always been advantaged and, at times, on the industry. These are some of the challenges we will have to confront as a nation in transition. But transformation cannot be sacrificed at the altar of stability. It must be carried out responsibly and its adverse impact must be minimized."

103. I am attracted to the above reasoning and in concluding on this issue, it is my firm finding that while the 1st Respondent has the mandate to set up any committee within the law, he had no mandate to set up a committee to alter or demarcate the boundaries of Isiolo and Meru Counties. He also had no mandate to purport to redress historical land injustices such as have been raised by the Petitioners.

d. Breach of fundamental rights and freedoms of the petitioners.

104. Having found that the acts of the 1st Respondent in forming the task force with the mandate explained above was null and void, I am of the opinion that there is no need to delve into the issue of breach of any of the Petitioners' rights and freedoms under the Constitution, especially whether the right to public participation as provided under **Article 47** of the **Constitution** was breached. Having nullified the formation of the task force, it follows that there is no act in law that can be said to have been done by the 1st Respondent, upon which basis this Court can evaluate breach of constitutional rights and freedoms. That is all to say on that matter, important as it generally is.

e. Remedies

105. It was argued by the Respondents that the remedies for judicial review cannot issue in this matter. To buttress their argument, they cite the two cases of. ***Council for Civil Service Unions v Minister for Civil Service (supra)*** on the purview of judicial review: illegality, irrationality and procedural impropriety; and ***Republic v Kenya Power & Lighting Company Limited & Another (supra)*** on the need to state with particularity the sins of the administrative entity whose decision one seeks to review.

106. In that regard the matter before this Court was not brought as a judicial review application under the **Civil Procedure Rules** but as a Constitutional Petition and the crux of the Petitioners' plea was that the 1st Respondent contravened the Constitution in constituting the task force. The focus of the Petition is therefore on the remedies available for issue by a Court in a constitutional petition and not in strictly judicial review proceedings.

107. In that regard, **Article 22** of the **Constitution** provides for the enforcement of the Bill of Rights. The remedies available to a Court faced with a Constitutional Petition are in **Article 23** thus:

"23(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including-

a. a declaration of rights;

b. an injunction;

c. a conservatory order;

d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of rights and is not justified under Article 24;

e. an order for compensation; and

f. an order of judicial review."

108. Clearly therefore, under the Constitution, a Court is at liberty to issue an order of judicial review such as certiorari, orders of prohibition and mandamus where breach of the Bill of Rights is concerned because the Constitution has now elevated judicial review orders and remedies and given them a constitutional grounding. This was well stated by *Odunga J* in the case of ***Republic v County Government of Kiambu Ex parte Robert Gakuru & Another [2016] eKLR***. The Judge in demystifying judicial review remedies stated thus:

*"38. According to **Judicial Review Handbook**, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.*

*39. It is therefore clear that judicial review remedies presently have a constitutional basis in Kenya by virtue of Articles 10, 25, 27, 47 and 50 of the Constitution and the conventional grounds for judicial review take a secondary role after the constitutional benchmarks. I must however hasten to draw attention of legal practitioners and litigants to the decision of the South African Constitutional Court, in **Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health** (supra) that:*

"The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims — thus, the command that law be developed and interpreted by the courts to promote the "spirit, purport and objects of the Bill of Rights." This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply. What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. The same is true of constitutional law and common law in respect of the validity of administrative decisions within the purview of section 24 of the interim Constitution. What is "lawful administrative action," "procedurally fair administrative action" and administrative action "justifiable in relation to the reasons given for it," cannot mean one thing under the Constitution, and another thing under the common law…Although the common law remains relevant to this process, judicial review of the exercise of public power is a constitutional matter that takes place under the Constitution and in accordance with its provisions. Section 167(3)(c) of the Constitution provides that the Constitutional Court "makes the final decision whether a matter is a constitutional matter". This Court therefore has the power to protect its own jurisdiction, and is under a constitutional duty to do so. One of its duties is to determine finally whether public power has been exercised lawfully. It would be failing in its duty if it were to hold that an issue concerning the validity of the exercise of public power is beyond its jurisdiction."

*40. In my view since the Constitution is incremental in its language, what the current constitutional dispensation requires is that both the grounds and remedies in judicial review applications be developed and the grounds for granting relief under the Constitution and the common law be fused, intertwined and developed so as to meet the changing needs of our society so as to achieve fairness and secure human dignity. It is within those prescriptions that judicial review is seen in our context. But care should be taken not to think that the traditional grounds of judicial review in a purely judicial review application under the **Law Reform Act** and Order 53 of the **Civil Procedure Rules** have been discarded or its scope has left the airspace of process review to merit review except in those cases provided in the Constitution. In other words the categories of judicial review grounds are not heretically closed as opposed to their being completely overtaken or that the Court's jurisdiction under Order 53 of the **Civil Procedure Rules** should include merit review. Once that distinction is made, there shall be little difficulty for this Court to maintain that it should and shall be concerned with process review rather than merit review of the decision of the Respondent. It is however incorrect to contend that the Court in a judicial review application cannot apply the constitutional benchmarks in order to award an otherwise deserved relief."*

109. I agree with the learned Judge and disagree with the Respondents' and the 1st Interested Party's submissions that in Constitutional Petitions proceedings, a Court cannot issue the classical judicial review remedies of certiorari, orders of prohibition and mandamus.

110. Turning back to the orders sought in the Petition, prayers (i) and (ix) seek interim orders which for obvious reasons have been overtaken by events. Prayers (ii) and (iv) seek the judicial review orders of prohibition and certiorari to quash the 1st Respondent's actions.

111. In view of my findings above, they must be granted. Prayers (iii) and (v) seek declarations that the committee set up to resolve the boundary dispute was unlawfully set up and that its role should have been played by an independent Commission. Those orders are warranted. Prayer (vi) seeks declarations regarding violation of fundamental rights. I have declined to address that issue having firmly determined the main issue in connection. Prayer (viii) seeks orders directed at the police but I do not see the need to direct that agency to do what it is lawfully required to do.

112. On costs, whereas the Petitioners have succeeded, the nature of this matter, the public interests involved and the larger issue of the interests of justice would demand that each party ought to bear its own costs.

113. Lastly, I owe the Parties an apology for late delivery of this Judgment arising to exigencies of duty including my elevation to the Supreme Court.

Orders

114. In conclusion, I have reached a finding that the 1st Respondent acted *ultra vires* his mandate in constituting the taskforce to demarcate the boundary of Isiolo and Meru Counties. The interests of justice would therefore beckon me to the making of the following orders:

1. The Petition dated 18th November, 2015 is hereby allowed in the following terms only;

a. The Cabinet Secretary, Ministry of Interior and Co-ordination of Local Government's acts of constituting the Meru/Isiolo Boundary dispute Committee is hereby declared illegal, irregular and therefore null and void and is hereby quashed and the implementation of the said Committee's report is hereby prohibited.

b. An order doth issue that the boundary disputes between Isiolo and Meru Counties shall be resolved by an Independent Commission to be set up by Parliament under Article 188 of the Constitution.

c. That any claims of historical injustice regarding the presently land occupied by the People of Isiolo and Meru Counties shall be referred to the National Land Commission for investigation and recommendation to Parliament to deal in terms of order (b) above;

d. That this Judgment be brought to the attention of the National Land Commission forthwith for its action on (c) above.

(2) On costs, noting the nature of the matter and the larger public interest as well as the interests of justice, each Party shall bear its own costs.

115. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 5TH DAY OF JUNE, 2017

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 6TH DAY OF JUNE, 2017

JOHN M. MATIVO

JUDGE