



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC PETITION NO. 2 OF 2019

(AS CONSOLIDATED WITH KITALE ELC NO. PETITION NO. 3 OF 2019 -

JACKSON EKARU NAKUSA & 32 OTHERS -vs- NATIONAL LAND COMMISSION,

THE ATTORNEY GENERAL AND THE TURKANA COUNTY GOVERNMENT)

COUNTY GOVERNMENT OF TURKANA.....PETITIONER

NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE ATTORNEY GENERAL2ND RESPONDENT

RULING

1. The application dated **8/3/2019** in **Petition No. 2 of 2019** (*herein after also referred to as the first petition*) seeks a conservatory order staying the implementation of the respondents' decision to compulsorily acquire what they refer to as indigenous ethnic Turkana community land in Turkana County as evinced in **Gazette Notice No. Vol. C XX1 No. 16** dated **8th February, 2019** issued by the 1st respondent titled "*Upstream Development South Lokichar Basin Oil Project*" and **Gazette Notice Volume CXXI-NO.21** dated **15/2/2019** also by the 1st respondent titled "*Construction of Lapsset Corridor Project and Ancillary Facilities*" pending the hearing and determination of the petition.
2. The application also seeks an order certifying the petition herein as raising a substantial question of law and it be referred to the Chief Justice for empanelment of a bench of an uneven number of judges to determine it.
3. The application dated **8/3/2019** in **Petition No. 3 of 2019** (*herein after also referred to as the second petition*) contained numerous prayers, and to be precise **9** prayers but the total effect of those prayers is, just like the application in the first petition, to seek a conservatory order staying the implementation of the 1st respondent's decision to compulsorily acquire parcel of land named in **Gazette Notice No. 1157 of 8/2/2019** pending the hearing and determination of the petition. In my view it matters not that the 2nd - 34th applicants have alternately referred to the orders they seek as "*stay*", "*injunction*" or "*conservatory orders*" as the effect would be the same as that of the application filed in the first petition.
4. The two petitions impugn the same decision of the 1st respondent and are based more or less on the same grounds and on **8/4/2019** they were consolidated by consent of all parties without exception, hence this ruling on the two application as consolidated.
5. The application in the first petition is supported by the sworn affidavit of **Esther Lokwei Lokiyo, County Executive Committee Member (CEC) for Land Energy Housing and urban Areas Management** in the Turkana County Government, dated **8/3/2019** which reiterates the grounds set out at the foot of the application as well as supplementary affidavit sworn by one **Vincent Palor Jacob**, the 1st respondent head of Liaison Office in Nairobi. The application in the second petition is supported by the sworn affidavit of **Jackson Ekalu Nakusa**, the 2nd petitioner, dated **11/3/2019** which reiterates the grounds set out at the foot of the application.
6. All the petitioners filed their submissions on **8/4/2019**. The 1st respondent never filed any submissions but at the hearing on **8/4/2019**, **Ms. Njuguna** submitted orally on its behalf, while the 2nd respondent filed its submissions on **5/4/2019**. I have considered the applications, the responses and the filed submissions.
7. The main pillars supporting the applications are that Turkana County comprises mostly unadjudicated land; that it is occupied by the predominately pastoralist Turkana community and is therefore community land within the meaning of **Article 63** of the Constitution of Kenya and the **Community Land Act No. 27 of 2016**; that the respondents have disregarded the **Constitution**, the **Land Act No. 6 of 2012** and the **Community Land Act No. 27 of 2016** in failing to engage the petitioners in the acquisition process; that in **High Court at Nairobi**

Constitution petition No. 32 of 2017 Kelly Malenya -vs- Attorney General & Others a constitutional challenge has been mounted with regard to the **Community Land Act No. 27 of 2016** on the basis that it takes away critical roles of county governments in managing community land and that there is an order made in that petition suspending **Sections 8, 9, 15, 21, 38 and 48** of that Act; that by the suspension of **Section 8** of the **Community Land Act** the procedure by which recognition and adjudication of community land, which includes *inter alia* a requirement that the Cabinet Secretary consult with the County Government to ensure that the process of documenting mapping and developing of the inventory of community land is transparent cost-effective and participatory, was suspended; that by the initiation of the compulsory acquisition process complained of during pendency of the **Constitution Petition No. 32 of 2017** and before its determination the respondents intend to prejudice the petitioners as there is purportedly no framework to enable consultation with the county governments to ensure that the process of documenting, mapping and developing of the inventory of community land is transparent cost-effective and participatory; that it is unlawful for the respondents to convert indigenous ethnic Turkana community land into public land for compulsory acquisition in contravention of the constitution and the two land statutes mentioned above; that the people of Turkana who have not been engaged in the process of public participation; that the *plan to pay* only a handful of people would cause tension and open animosity between the people of Turkana; that the acquisition and subsequent privation of land would interfere with their pastoralist and traditional land use system; that there is secrecy and the petitioners suspect the possibility of exploitation of the local people by what they refer to as “*a huge multinational company*”; that the County Government of Turkana has not embarked on a process of physical planning and it is therefore premature to initiate the process of compulsory acquisition; that the 1st respondent has failed or neglected to comply with the **Section 107 (8)** of the **Land Act** requiring that all land to be compulsorily acquire is to be geo-referenced and authenticated by the authority responsible for survey at both national and county government levels in that it has failed to engage the county government of Turkana in such an exercise; that the petition raises substantial questions of law requiring certification and referral to the Chief Justice for empanelment of a bench of an uneven number of judges to hear and determine it. The ultimate aim of the petitioners is to have the two gazette notices and the decision the compulsorily acquire land declared illegal null and void.

8. The supplementary affidavit of **Vincent Palor Jacob** filed on **8/4/2019** disputes the allegation by the respondents that there has been consultation between them and the 1st petitioner or any public participation involving the Turkana community in the implementation of the impugned gazette notices; however he admits that on **20/3/2019** the 2nd respondent wrote to the Turkana County Assembly seeking support towards mobilization of its members to conduct workshops for sensitization regarding the compulsory acquisition process. It is further deponed that on **27/3/2019** the clerk of the Turkana County Assembly responded, advising that involvement of the executive arm of the Turkana County Government was required in the matter. It is further deponed that despite lack of framework required under the **Land Act** and the **Community Land Act** to enable a transparent process towards compulsory acquisition, the 2nd respondent has nevertheless secured the participation of the Turkana County Assembly in a public participation exercise held between **28th and 31st March, 2019** in disregard of the executive arm of the Turkana County Government.

9. The 1st respondent's response to the two application is contained in two sets of grounds of opposition dated **15/3/2019** each filed separately in the two petitions and two replying affidavits of one **Brian Ikol** Deputy Director Legal Affairs and Enforcement in the Commission sworn on **1/4/2019** also filed separately in the two petitions. The 2nd respondent's response is contained in grounds of opposition and a preliminary objection both dated **18/3/2019**, filed separately in each Petition, two replying affidavits of **Andrew N. Kamau** sworn on **26/3/2019** filed separately in each of the Petitions as well as submissions filed on **5/4/2019**.

10. Generally for the respondents, the main grounds on which the applications are opposed are that the applications do not raise matters of public interest that would necessitate the grant of conservative orders; that it only seeks to frustrate the acquisition for public use contrary to the state's right to eminent domain reserved under **Article 40(3)** of the **Constitution** and **Part 3** of the **Land Act**; that the application does not meet the threshold to warrant grant of conservatory injunctive reliefs; that the principle of proportionality in the grant of conservatory order does not tilt in favour of the applicants for the reason that the acquisition is for a public purpose and the public body for which the said acquisition is being done has been clearly identified and the construction of petroleum infrastructure without unreasonable delay is in the greater public interest; that the 1st petitioner is a direct beneficiary of the revenue that would be generated from the project; that the law governing revenue sharing generated from oil production has already been enacted thus necessitating early commencement of production of petroleum resources; that the 1st respondent was satisfied prior to the gazette notices that the acquiring authority had complied with all provisions of the law upto the Gazette notice stage-including public participation and stakeholders sensitization; that the LAPSSET Corridor is one of the flagship Vision 2030 projects intended to spur economic development by creating new opportunities, unlocking both patent and latent economic potential in the larger hinterland of northern northeaster and northwestern parts of Kenya which traverse seven counties; that the LAPSSET Corridor Development Authority is in the process of implementing the infrastructure components that constitute the LAPSSET programme; that the various components of the programme are being developed in an integrated basis and they include oil fields, fields storage transportation through crude oil pipeline which have all been factored into what is referred to as the LAPSSET Programme; that both the petroleum project and the LAPSSET corridor land acquisition exercises are being undertaken simultaneously by the 1st respondent and that the project is of great international significance especially to the landlocked states of Ethiopia and Southern Sudan; that consultation between the national government and the six county governments involved in LAPSSET have already been ongoing for a long time and stakeholder identification; that mapping and mobilization was done following consultation between the national and county governments; that the preliminary notice under **Section 107** of the **Land Act** is not an administrative decision and hence is not subject to the supervisory jurisdiction of this court; that substantial loss of public funds is likely to be incurred if conservatory orders issue; that the application should be declined as it seeks to stop the respondents from exercising their statutory mandate conferred under **Part 8** of **Land Act** and other statutes and is pre-emptive and speculative as the alleged actions are yet to take place and that in any event the petitioner has failed to demonstrate any current threat of violation of any constitutional rights; that the preliminary notice under **Section 107** of the **Land Act** does not allow the issuance of conservatory orders herein as the reasons advanced for seeking those orders are based on issues that will be resolved in subsequent stages of the acquisition process; that the notice merely brings the intended acquisition to public attention and further invites affected parties to inspect the plans depicting the land for purposes of public scrutiny and public participation; that a public inquiry under **Section 112** of the **Land Act** will follow in order to ventilate issues relating to the propriety of the acquisition and claims for compensation; that it is at that inquiry stage that the petitioners' concerns will be addressed and that the respondents have so far adhered to the law on compulsory acquisition in the exercise. The petition is also faulted on the basis that it does not disclose any violation or threat to the constitution or fundamental rights or freedom of the petitioners. In particular, the 1st respondent also posits that this court lacks jurisdiction to determine this matter in view of the express provision of **Article 6 (2)** and **189(3)** and **(4)** of the Constitution and **Sections 30, 31, 32, 33, 34** and **35** of the **Intergovernmental Relations Act No. 12 of 2012**. It is further stated the provision of **Section 104** of **County Governments Act** are not meant to stop the national government from undertaking compulsory acquisition. It is said that the 1st respondent

has been engaged at all stages of the process and that the classification of land as community land cannot stop compulsory acquisition as long as it complies with the law. Further, it is also stated that the applications have not demonstrated any loss the petitioners are likely to suffer. Regarding the suspension of various statutory provisions in **High Court at Nairobi Constitution petition No. 32 of 2017 Kelly Malenya - vs- Attorney General & Others** the respondents aver that the suspension was lifted on **23/10/2018** and that even if the suspension was still in place nothing would stop compulsory acquisition as the same is provided for under **Section 22** of the **Community Land Act**.

11. The issue of jurisdiction is raised in the replies of the respondents and in their submissions. I must deal with the issue of jurisdiction as a preliminary issue raised in this matter as it is clear from the case of **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1**, that "...*jurisdiction is everything.*" In that case the court stated as follows regarding jurisdiction:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

"By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given" See Words and Phrases Legally defined - Volume 3: I - N Page 113"

12. The oral submissions of the parties closely followed their written submissions and responses without major deviations.

13. In this case the determination of the question as to whether there is a dispute between one County and the National Government to which the dispute resolution mechanism under the **Intergovernmental Relations Act** and **Article 189** of the constitution is vital.

14. Noting that the Intergovernmental Relations Act contains no definition of an intergovernmental dispute, Wakiaga J. in case of **Council Of County Governors Vs Cabinet Secretary Land, Housing & Urban Development & Another 2017 eKLR** relied on the Intergovernmental Relations Framework Act of South Africa which defines an "*intergovernmental dispute*" as:

"a dispute between different governments or between organs of state from different governments concerning a matter

a. arising from

(i) Statutory powers or function assigned to any of the parties

(ii) an agreement between the parties regarding the implementation of a statutory power or function and

b. which is justiciable in a court of law and include any dispute between parties regarding a related matter."

15. I am in full agreement with the criteria required for a dispute to fall within the ambit of the Act that Wakiaga J has laid down in that case, to wit, that it must fulfil some basic requirements as follows:

(a) The dispute must involve a specific disagreement concerning a matter of fact, law or denial of another.

(b) It must be of a legal nature, that is a dispute capable of being the subject of a judicial proceedings.

(c) It must be an intergovernmental one in that it involves various organs of state and arises from the exercise of powers of function assigned by the Constitution, a statute or an agreement or instrument entered into pursuant to the Constitution or a statute.

16. The facts in the filed documents will testify as to whether it is an intergovernmental dispute within the context of the **Intergovernmental Relations Act** or not.

17. Two Gazettes Notices dated **8/2/2019** and **15/2/2019** respectively were published by the 1st respondent giving notice of the intention of the ministry to acquire land described in the co-ordinates named therein.

18. Whereas the first Gazette Notice relates to land intended to be acquired for the **Ministry of Petroleum and Mining, State Department of Petroleum**, the second Notice relates to land intended to be acquired on behalf of **LAPSSET Corridor Development Authority**.

19. Both sides in this case agree that there were previous consultations between both levels of government in respect of the acquisition of land in Turkana County. Mr. Havi maintains that correspondences exchanged between the ministry, Tullow and the 1st petitioner show that it has been acknowledged the 1st petitioner has a role in acquisition of the land and that the land is being acquired by the ministry on behalf of Tullow which is not borne out by the impugned Gazette Notices; Mr. Eredi maintains that though it is evident that the two levels have been in communication regarding the issue and that though the county government maybe involved under **Article 40 (3) of the Constitution** its concurrence is not necessary.

20. In the context of the instant case disagreement between the two levels of Government appears to have begun with the gazettelement of the notices of **8/2/2019** and **15/2/2019** complained of. The 1st petitioner is a county Government established under the constitution.

21. The 1st respondent is a constitutional commission established under **Article 67** of the Constitution of Kenya 2010.

22. The 2nd respondent is the Chief Legal Adviser of the National Government of Kenya and is enjoined in these proceedings on behalf of the Ministry Of Energy And Petroleum, State Department of Mining in the National Government of Kenya.

23. While Mr. Havi's view is that the principal respondent in the proceedings is the 1st respondent, this court does not share it for the reason that the actions of the 1st respondent with regard to the acquisition are being carried out at the instance of the national government due to the need for land for public purpose though the purpose is doubted by the petitioners. In my opinion therefore, the Commission itself has no interest in the land and the real actor, with whom the 1st petitioner was initially engaged in discussions, and who is the beneficiary of the proposed land acquisition, is the national Government. Besides the complaint by the 1st petitioner is that it was ignored in the land geo-referencing, which it claims to be its sole duty, and other parts of the process of land acquisition.

24. Having Mr. Havi's submission as above in mind, I must draw from the dicta of Okongo J. who observed as follows regarding failure of the national government to consult the petitioner in **Council Of County Governors Vs Cabinet Secretary Land, Housing & Urban Development & Another 2017 eKLR**:

“I am in agreement with the respondents that the dispute that led to the filing of this petition falls within section 30(1) of the Act and as such should have been subjected to the dispute resolution mechanism provided in the Act. The dispute is between the County Governments and the National Government. The dispute arose as a result of the alleged failure by National Government to consult the County Governments while reconstituting Land Control Boards in the country. The issue at the core of the dispute is whether the functions performed by the Land Control Boards are devolved functions or not.”

25. Alleged failure to involve the Turkana County Government in the acquisition process is at the core of this petition. Two levels of government are therefore involved in this dispute.

26. Further, the submissions of both parties make it clear that, besides the issue of violation of any rights of the 2nd to 34th petitioners, there may arise at the main hearing, if this matter progresses up to that point, the issue of for and on behalf of whom the land is being acquired and whether the concurrence of the 1st respondent at every stage is necessary in such an acquisition process. These are vital factual and legal questions that are capable of being determined by this court. All the above factors render this to be an intergovernmental dispute within the province of the Act.

27. Ms. Njuguna submitted that this court lacks jurisdiction to determine this matter in view of the express provisions of **Article 6 (2) and 189(3) and (4)** of the Constitution and **Sections 30, 31, 32, 33, 34 and 35** of the **Intergovernmental Relations Act No. 12 of 2012**. She relied on the decision in **Isiolo County Assembly Board and Another Vs Principal Secretary Devolution Ministry of Devolution And Planning And Another 2016 eKLR**.

28. In the **Isiolo case** (supra) the court observed that:

“There is no doubt that the jurisdiction of this court is unlimited: see Article 165 of the Constitution. Such jurisdiction should not be limited in any way by statute, it can only be supplemented: See Article 165(3)(e) of the Constitution. However, where the Constitution has itself clawed- back the jurisdiction or held back the jurisdiction then such constitutional claw-back must be respected: see the Court of Appeal in Jefferson Kalama Kengha & 2 Others vs. Republic [2015] eKLR. Thus 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.”

29. The submission on want of jurisdiction of this court was made by the 2nd respondent in his written submissions. Mr. Eredi for the 2nd Respondent submitted that **Section 3(1)** of the **Intergovernmental Relations Act** provides that one of the objectives and purposes of the Act is to provide for mechanisms for the resolution of intergovernmental disputes whenever they arise; it is further averred that it was the intention of parliament to have all disputes between county governments *inter se* and county governments and national government resolved through alternative dispute resolution mechanism and that that mechanism is clearly anchored in the constitution.

30. The question is whether the statutory provisions in the **Intergovernmental Relations Act** as read together with the provisions of **Article 189(3) and (4)** of the Constitution oust the jurisdiction of this court to hear and determine this matter, though Mr. Eredi took a moderate view in his oral submissions and submitted that this court may opt to *stay* these proceedings and refer the matter to the alternative dispute resolution process envisaged by the 1st respondent as above.

31. Mr. Eredi relied on **Muranga County Public Service Board vs Grace N. Makori & 178 others 2015 eKLR (Nyeri CA No 137 of 2015)** in which the Court of Appeal stated as follows:

“We think, with respect, that to proceed on the basis of autonomy as opposed to integrity of institutions and functions is misconceived and erroneous. The whole tenor of Part 5 of Chapter Eleven of the Constitution which is titled Relationship between the National and County Governments within the larger rubric of devolved government as a constitutional pillar of governance is one of co-operation and consultation based on equality and mutual respect. This is consistent with Article 6 which speaks of the two levels of government as being distinct and interdependent and commands the said consultation and co-operation. Thus, for instance, Article 189(1) (c) requires Government at either level to:

“Liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.”

Article 189(2) provides:

“Government at each level, and different governments at county levels, shall co-operate in the performance of functions and exercise of power and, for that purpose, may set up joint committees and joint authorities”.

In the same spirit they are required under clauses (3) and (4) to make every effort to settle any inter-governmental disputes through alternative dispute resolution mechanisms including negotiation, mediation and arbitration. The Inter-Governmental Relations Act, 2012, was enacted to establish the legal framework for consultation and co-operation between the national and county governments and amongst county governments.

It is clear, then, that our constitutional architecture did not create, in the name of devolution, a wall of separation - high and impregnable - between national and county governments, with the latter being enclaves of insularity. Rather, it created a bridge - strong and vibrant - to ensure and encourage constant communication, consultation and co-operation within a diverse, devolved but united nation, between, amongst and within the levels of government.”

32. On the other hand, Mr. Havi, citing the decision in **County Government of Nyeri vs Cabinet Secretary Ministry of education science and technology & another 2014 eKLR**, submitted that the dispute relates to a violation of rights under the bill of rights and the petitioner has a right to approach court since this is a dispute between the Commission and persons affected by a project while the cases cited by the respondents relate to intergovernmental disputes. He submitted that no alternative dispute resolution such as that suggested by the 2nd respondent under **Intergovernmental Relations Act** could resolve the issue. Referring **Petition No. 3 of 2014 (supra)** he submitted that the Commission admits that there is jurisdiction of the part of this court to hear and determine this matter.

33. Mr. Bosek on behalf of the 2nd to 34th petitioners submitted that under provisions of **Article 162** this Court has the same authority as the High Court and that under **Section 13(2)** of the **Environment and Land Court Act** this Court has jurisdiction as that Section includes matters of environmental planning, minerals and other natural resources. He relied on the case of **Patrick Musimba -vs- National Land Commission** for the proposition that neither the **Environment and Land Court Act** nor the Constitution limits the jurisdiction of this court. I agree with Mr. Bosek that this court while dealing with environment and land litigation may also hear and determine claims of breaches of fundamental rights touching on those two subjects. However the main attack on the petition with regard to jurisdiction is in respect of the applicability of the provisions of the **Intergovernmental Relations Act** (especially **Part IV** thereof) and **Article 189** of the constitution.

34. The wellspring of all local jurisprudence regarding interdependence and comity between the different levels of government and between county governments is **Article 6(2)** of the constitution which states as follows:

“(2)”The Governments at the National and County levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation.”

35. This is supported by **Article 189(3)** and **(4)** provide as follows:

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

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

36. The desire to maintain interdependence between levels of government as expressed in the Constitution is added more strength by **Sections 30, 31, 32, 33, 34** and **35** of the **Intergovernmental Relations Act No. 12 of 2012** in which a dispute resolution mechanism is provided for in respect of disputes arising either between the national government and a county government, or between county governments.

37. **Section 30** of the Act provides as follows:

“(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.”

38. Under Section 31 of the said Act it is provided that :

“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.”

39. It is evident from the above that the provisions of the **Intergovernmental Relations Act** have their root in provisions of the Constitution and that the constitution has therefore clawed back some of the jurisdiction of this court.

40. Section 33 of the Act requires the formal declaration of a dispute and provides as follows:

(1) Before formally declaring the existence of a dispute, parties to a dispute shall, 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 an intermediary.

(2) Where the negotiations under subsection (1) fail, a party to the dispute may formally declare a dispute by referring the matter to the Summit, the Council or any other intergovernmental structure established under this Act, as may be appropriate.”

41. Sections 34 and 35 provide as follows:

“34. Procedure after formal declaration of a dispute

(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, including a mechanism or procedure provided for in this Act, other legislation or in an agreement, if any, between the parties; or

(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.

35. Judicial proceedings

Where all efforts of resolving a dispute under this Act fail, a party to the dispute may submit the matter for arbitration or institute judicial proceedings.”

42. In the case of **International Legal Consultancy Group & Another -vs- Ministry of Health & 9 others [2016] eKLR (NBI HC Petition No. 99 of 2015)** International Legal Consultancy Group and the Council of Governors challenged the National Government’s Act of entering into an arrangement with some medical service providers for the provision of certain medical equipment to selected medical facilities at the county government level. It is noteworthy that the 1st petitioner therein was not a governmental body at either level but described itself as a “public interest organization that champions the observance of the rule of law.”

43. In that case **Mumbi Ngugi J** cited the case of **Peter Ochara Anam and 3 Others -vs- Constituencies Development Fund Board and 4 Others, Kisii High Court Petition No. 3 of 2010**, in which it was stated as follows:

“I have no doubt at all that under article 165(3) of the Constitution, I have unlimited and inherent jurisdiction. I am also aware that under article 23(1) of the same constitution this court has jurisdiction, in accordance with article 165 to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights. I also agree as pointed out by counsel for the petitioner that any interpretation of the Constitution that seeks to curtail such wide and unfettered jurisdiction would be contrary to the spirit and letter of the constitution and would thus render itself invalid.”

and also as follows:

“I do not think that it is right for a litigant to ignore with abandon a dispute resolution mechanism provided for in a statute and which would easily address his concerns and rush to this court under the guise of a constitutional petition for alleged breach of constitutional rights under the bill of rights.

... Coming to court by way of a constitution petition is not excepted either much as the Constitution is superior law to the statute aforesaid. In view of this provision and there being no allegations or evidence that the petitioner exhausted these remedies, in bringing this petition, the petitioners have deliberately avoided the procedure and remedy provided for under the Act. They have not proffered any explanation as to why they did not refer any of the complaints they have raised to the 1st respondent as required by law. It has been stated constantly that where there exists sufficient and adequate legal avenue, a party ought not trivialize the jurisdiction of the court pursuant to the Constitution. Indeed, such a party ought to seek redress under the relevant statutory provision, otherwise such available statutory provisions would be rendered otiose.”

44. The Court took the view that the petition was defective for want of compliance with the provisions of **Article 189** of the Constitution and **Sections 31-35** of the **Intergovernmental Relations Act** and dismissed it on that ground. In that case the hearing of the main petition had proceeded substantively in contrast with this case where no hearing has taken place.

45. In the **International Legal Consultancy Group case (supra)** the court stated as follows:

“I observe, also, from the depositions on behalf of the respondents by Dr. Muraguri, which were not disputed by the petitioners, that many of the county governments had signed the MOU with the national government for the supply of medical equipment for health facilities within their jurisdiction. Further, that the roll out of the equipment to the county health facilities had started and was in progress. Which brings me to what I alluded to earlier: was there a dispute between the national government and the county government, or, as suggested by the respondents in their Grounds of Opposition, the 1st petitioner was a busy body with no *locus standi* to lodge this petition, and only brought in the 2nd petitioner in order to deal with the question of *locus*?”

On the material before me, and given, in particular, that county governments had accepted the medical equipment and entered into MOUs with the national government with respect thereto, and that the 2nd petitioner and interested parties had not attempted, at least from the material before me, to resolve such dispute as they deemed to be subsisting between themselves and the national government, I can only conclude that this petition had no merit from the beginning.”

In the circumstances, it is hereby dismissed. Each party shall bear its own costs.

46. The court in the **International Legal Consultancy Group case (supra)** also quoted with approval the cases of **The Speaker of the National Assembly -vs- The Hon. James Njenga Karume, Civil Application No. NAI 92 of 1992 [NAI 40/92 UR] (unreported)** and **Stanley Mungathia Daudi and 4 Others vs Hon. Cyprian Kubai and Others, Meru Petition No.5 of 2013**, where similar sentiments were voiced with regard to the need to follow dispute resolution mechanisms provided for under different statutes. In the **Speaker case (supra)** the dispute resolution mechanisms envisaged in **Sections 19 and 20** of the then **Elections Act** was directly linked to the provisions of **Section 44** of the repealed Constitution in that the Act required a petition challenging the Speaker’s declaration that a parliamentary seat had become vacant to be filed in the High Court. While considering the application the Court of Appeal noted that:

“There is considerable merit in the submission 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. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

47. The relationship between **Sections 19 and 20** of that Act closely resembles that between **Part IV** of the **Intergovernmental Relations Act** and **Article 189** of the Constitution of Kenya 2010 save that the provisions of the Act directed the dispute to the High Court while the more imperatively framed provisions of the **Intergovernmental Relations Act** and **Article 189** of the Constitution direct intergovernmental disputes to alternative dispute resolution mechanisms as the first stop before any judicial proceedings can be lodged by any of the parties.

48. In the final analysis I find that in this petition, there is an intergovernmental dispute as envisaged by **Intergovernmental Relations Act** and the Constitution. I also find that before instituting these proceedings the 1st petitioner never invoked the provisions of the Act to declare a dispute and therefore it can not be said to have exhausted the peremptory statutory and constitutional mechanisms provided for the resolution of that dispute.

49. However, I must consider that initially two separate petitions were filed, which were subsequently consolidated by consent of the parties into one on **8/4/2019** which merger envisages a single decision. One petition is by the Turkana County Government and the second petition was filed by bona fide members of the Turkana ethnic community. As I make this ruling they are inseparably intertwined by virtue of consolidation.

50. Consolidation of the two petitions having occurred, would it be proper for this court to apply equally against all parties, as was done in the final decision in **International Legal Consultancy Group** case (supra), the provisions of **Article 189 (3) and (4)** of the constitution and the alternative dispute resolution mechanisms in the **Intergovernmental Relations Act**? Does the fact that the 2nd-34th petitioners, as individual citizens, obviously have no place in the scheme of things envisaged in **Article 189(3) and (4)** and **Sections 30, 31, 32, 33, 34 and 35** of the **Intergovernmental Relations Act No. 12 of 2012**.

51. Mr. Bosek submitted that the second petition was filed by the petitioners who “*are indigenous people living on the community land which is jointly and indivisibly owned by them.*” However it is clear that the land is held in trust by the 1st petitioner for the community, and a claim by the 1st petitioner is in my view indistinguishable from the claim by the 2nd to 34th petitioners, the beneficiaries to the land. In my view, the their case is now inextricably joined at the hip with the 1st petitioner’s for being similar in terms of content and remedies sought. The petitions having been consolidated by consent of the parties, they bound themselves to their decision, and that consolidation must remain; this court must now consider them as one and any order must affect all the parties who by their consent were enjoined into the consolidated petition. In any event, from the provisions of **section 6(1) and (2) of the Community Land Act** which prescribe the role of the 1st respondent in matters of acquisition of community land it is clear that agitation of the claim of the 2nd -34th petitioners ineluctably requires the involvement of the 1st respondent whom they have in any event enjoined as an interested party. Further, I view it as necessary for this court to hold the parties equally affected by orders since the alternative holding may render the court process to abuse by litigants who, having failed to abide by constitutional and statutory provisions, may crave such consolidation to avoid the consequences.

52. The objection on the basis of want of jurisdiction succeeds. However I am also not inclined to strike out the petitions herein as I have observed that the jurisdiction of this court has only been partly clawed back by the constitution and the petition was only filed prematurely. If the dispute resolution mechanism set out in the Act and the **Constitution** fails the petitioners may have recourse to litigation.

53. The denouement of this interlocutory battle is not all doom and gloom for the petitioners. Mr. Eredi has aptly submitted in favour of a stay of these proceedings, and decisions have been cited wherein the court merely stayed the proceedings rather than dismiss or strike them out, to enable the parties in default to access and exploit the alternative dispute resolution mechanisms under **Article 189** and the Act. These are **Isiolo County Assembly Board and Another Vs Principal Secretary Devolution Ministry of Devolution And Planning And Another 2016 eKLR** and **Council of County Governors Vs Cabinet Secretary Land, Housing & Urban Development & Another 2017 eKLR**.

54. For the above reasons this court orders that this petition shall be stayed for a period of one (1) year. In that period the 1st petitioner shall initiate and pursue the alternative dispute resolution mechanism set out under the **Intergovernmental Relations Act** and in any event in default on its part to initiate that mechanism within **90** days of this order, this petition shall stand automatically dismissed.

55. Each party shall bear their own costs of the application.

Dated, signed and delivered at Kitale on this 29th day of April, 2019.

MWANGI NJOROGE

JUDGE

29/4/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Eredi and Fatuma and Kamunya for the 2nd Respondent

Mr. Eredi holding brief for Ms. Njuguna for 1st Respondent

N/A for the Petitioners/Applicants

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

29/4/2019