REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E & L. NO. 246 OF 2016

COUNTY GOVERNMENT OF UASIN GISHU.....PLAINTIFF/ RESPONDENT

-VERSUS-

ATTORNEY GENERAL.....1ST DEFENDANT/RESPONDENT

NATIONAL LAND COMMISSION.....2ND DEFENDANT/RESPONDENT

LAND REGISTRAR UASIN GISHU COUNTY.....3RD DEFENDANT/RESPONDENT

WILSON BUSIENEI.....4TH DEFENDANT/RESPONDENT

FLORENCE CHERUIYOT.....5TH DEFENDANT/RESPONDENT

SUSAN CHEPKOSGEI.....6TH DEFENDANT/RESPONDENT

TABRANDICH KIPROTICH.....7TH DEFENDANT/RESPONDENT

RODA CHEMTAI BITOK.....8TH DEFENDANT/RESPONDENT

MARY OKETCH SIMBA.....9TH DEFENDANT/RESPONDENT

DAUDI SITIENEI.....10TH DEFENDANT/RESPONDENT

KIPROP ARAP RONO.....11TH DEFENDANT/RESPONDENT

KIPTOO ARAP MAGUT.....12TH DEFENDANT/RESPONDENT

RUTH JEPKERING.....13TH DEFENDANT/RESPONDENT

ESTATE OF CLETI ARAP MAGEN.....14TH DEFENDANT/RESPONDENT

ESTATE OF KITILI ARAP NAMGAT.....15TH DEFENDANT/RESPONDENT

PRISCA CHEPKOECH KARONEI.....16TH DEFENDANT/RESPONDENT

ESTATE OF KIBIRGEN ARAP CHEPKWALEI.....17TH DEFENDANT/RESPONDENT

ESTATE OF SURA BIN ABDALLA.....18TH DEFENDANT/RESPONDENT

KIPTOO ARAP BWALEI.....19TH DEFENDANT/RESPONDENT

KIPTONY ARAP RUGUT.....20TH DEFENDANT/RESPONDENT

ESTATE OF KIBAI ARAP BUSIENEI.....21TH DEFENDANT/RESPONDENT

RULING

This is the ruling of a Notice of Preliminary Objection dated 8th December 2017 by the defendant /applicants seeking that the suit dated 24th August 2016 be struck out with costs and in the alternative these proceedings be stayed to enable parties pursue an amicable resolution as provided under the Inter-Governmental Relations Act.

Counsel relied on the Mukisa Biscuit Manufacturing Company Ltd -versus- West End Distributors Ltd (1969) E.A 696 Law LA which defined a preliminary objection as follows:

> **So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arise by dear implication out of pleadings and which if argued as a Preliminary Point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration (Emphasis added).**

Mr. Wabwire submitted that 1st and 3rd defendant's preliminary objection dated 8th December 2017 fits within the above definitions and listed the two issues as follows:

> (i) Whether the jurisdiction of the court is ousted by the provision of the Inter-Governmental Relations Act, 2012
>
> (ii) Whether the suit herein is premature, incompetent and abuse of court process.

On the 1st issue whether the jurisdiction of the court is ousted by the provisions of Inter-Governmental Relations Act, 2012, Counsel cited the case of The Owners of the Motor Vessel Lilian 'S' -versus- Caltex Kenya Ltd (1989)KLR1 where Nyarangi JA opined as follows:

> *"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 too/s in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before / 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 has to decide matters that are litigated before it or to take cognizance 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 cognizance, 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 acquired before judgment is given. ' (Emphasis added)*
>
> *See Words and Phrases Legally defined— Volume 3: 1 — N Page 113.*

Counsel submitted that the above dictum is that while this court has unlimited original jurisdiction under Article 165 of the Constitution, Articles 6(2) and 189(3) and (4) and sections 30, 31, 33, 34 and 35 of the Inter-Governmental Relations Act, 2012 (IGRA, 2012) have the effect of clawing back, suspending or ousting the jurisdiction of this court in disputes of intergovernmental nature. He stated that it is trite law that jurisdiction flows from the Constitution or statute and where alternative forum is established the jurisdiction of this court will be limited to the extent of the mechanisms so established.

Mr. Wabwire further cited Halsbury's Laws of England, Volume 10 at paragraph 319, which states as follows:

> The subject's right of access to the courts may be taken away or restricted by statute, but the language of any such statute will be jealously watched by the courts and will not be extended beyond its onerous meaning unless dear words are used to justify such extension....

Counsel further submitted that Paragraph 723 thereof requires that where a statute creates an obligation and enforces the performance of it in a specified manner only, the general rule is that performance cannot be enforced in any other manner. It provides as follows: Where a tribunal with exclusive jurisdiction has been specified by a statute to deal with claims arising under the statute, the County Court's jurisdiction to deal with those c/aims is ousted, for where an Act creates an obligation to and enforces the performance of it in a specified manner only, the genera/ rule is that performance cannot be enforced in any other manner.

Counsel cited the Court of Appeal in **Narok County Council -versus- Trans-Mara County Council (2000) 1 EA 161** where the court held that:

.....though section 60 of the Constitution gave the High Court unlimited jurisdiction, it did not cloth it with jurisdiction to deal with matters that a statute had directed should be done by a Minister as part of his statutory duty.

Further in the case of **Eliud Wafula Maelo -versus- Ministry of Agriculture & 3 others ([2016) eKLR,** the Court of Appeal unanimously upheld a High Court finding that section 31 of the Sugar Act, 2011 and section 32 of the Sugar (Arbitration Tribunal) Rules, 2008 ousted the jurisdiction of the High Court in determining disputes arising as between parties under the Act.

Thus Counsel submitted that 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 mechanisms.

Counsel submitted that the 1st and 3rd defendants contends that pursuant to the aforesaid statutory provisions of the Inter-Governmental Relations Act, 2012 this court lacks jurisdiction to entertain or determine this matter at first instance. The said provisions establish mechanisms for resolving intergovernmental disputes which have not been invoked or exhausted.

Article 189(4) recognizes avenues for resolving inter-governmental disputes as follows:

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

It was Mr. Wabwire's submission that Article 189(3) and(4) of the Constitution takes away and or limits the jurisdiction of this court under Environment and Land court Act as a court of first instance in disputes of intergovernmental nature. Instead, the said provisions require that any aggrieved party (either county or national government) must first exhaust dispute resolution mechanisms established by a national legislation before invoking the jurisdiction of this court.

Further that the provisions of IGRA, 2012 enacted under Article 189(4) clearly outlines procedures to be followed in resolution of disputes of inter-governmental nature. The relevant provisions of IGRA, 2012 which are couched in mandatory terms confirm that this court is not a court of first instance in disputes under the Act.

The Long title of this Act outlines the scope of the Act as:

> AN ACT of Parliament to establish a framework for consultation and co-operation 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.

Sections 30, 31 and 32 of the Act underscore the need for amicable resolution disputes of intergovernmental nature through alternative dispute resolution mechanisms as provided for under Article 159(2) and that judicial intervention shall be a last resort. In particular, section 31 provides as follows:

> The national and county governments shall take all reasonable measures to— (a) resolves disputes amicably; and
>
> (b) app/y 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. (Emphasis added)

Counsel submitted that Section 33 is explicit that no dispute can exist for judicial intervention unless parties demonstrate attempts to amicably resolve it. The section provides as follows:

> Before formally declaring the existence of a dispute, parties to a dispute shall, in good faith, make every reasonable effort and take al/ 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 forma//y 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.

Section 34 sets out an elaborate procedure after formal declaration of dispute and institutions that should address the dispute. Section 35 recognizes that judicial intervention shall be the last resort. It provides as follows: 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

Counsel further submitted that it is clear that for disputes of intergovernmental nature this court's jurisdiction is limited until aggrieved parties exhaust all available dispute resolution mechanisms and as presented, plaintiffs have not demonstrated any attempt to address its concerns through the mechanisms established under the aforesaid provisions. There has never been any direct negotiation between the national and county governments hence no dispute has formally been declared and the instant suit is premature and instituted in bad faith.

Counsel also submitted on what amounts to intergovernmental dispute and whether the dispute herein falls within this province of the court. It was Counsel's submission that what is at the core of this suit is the land ownership between the two levels of Government. That the provisions of Article 165 vis-à-vis Article 189(3) and (4) as well as sections 30, 31, 33, 34 and 35 on the jurisdiction of this court on disputes of intergovernmental nature have been judicially tested. In the Isiolo County Assembly Service Board case, where the court rightly faulted the petitioner for failing to follow the elaborate process under Constitution and IGRA, 2012.

On the second issue as to whether the suit herein is premature, incompetent and abuse of court process, Counsel cited the case of International Legal Consultancy & another -versus- Ministry of Health & 9 others (Nrb Constitutional Petition No. 99 of 2015) 2016 eKLR, Mumbi Ngugi J. opined as follows:

> *"Before a dispute arising between these parties can be placed before the courts, the Constitution and legislation require that a reasonable attempt at amicably resolving the matter be made. Indeed, if there was any doubt about this section 35 dears it away with specific words.*
>
> *The legislative intention was therefore that judicial proceedings could only be resorted to once efforts at resolving the dispute between the two /eve/s of Government failed. The question is whether any attempt was made in this instance to resolve the matter in accordance with the Inter-Governmental Relations Act before this petition was filed*."

Counsel therefore urged the court to find that this court lacks jurisdiction to determine this suit at first instance and strike it out or in the alternative stay the suit to enable the inter-government parties pursue an amicable resolution as provided under the inter-Government Relations Act .

Analysis and determination

Parties had agreed to canvass this Preliminary objection by way of written submissions but by the time of writing this ruling only the applicant had filed submissions. I will therefore assume that they did not intend to oppose the preliminary objection.

I agree with Mr. Wabwire that where there are laid down procedure for dispute resolution, the same must be adhered to and exhausted before you move to the next level.

At the core of this Ruling is Article **189 (3)** which provides that in any dispute between governments, the government shall make every reasonable effort to settle the dispute, including by means of procedures provided under National legislation. The legislation contemplated here is the Intergovernmental Relations Act 2012.

The Intergovernmental Relations Act was enacted pursuant to Article **189 (4)** of the Constitution and therefore its interpretation must be done purposively as it is linked to the Constitution.

Article **189 (3) & (4)** of the Constitution provides 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.*

The Intergovernmental Relations Act is an "Act of Parliament to establish a framework for consultation and co-operation 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."

> *Section **3** of the Act provides the objects and purposes of the Act which include to* provide mechanisms for the resolution of intergovernmental disputes where they arise. *Part **IV** of the Act provides for Dispute Resolution Mechanisms. Section **30 (1)** defines a Dispute under the Act unless the context otherwise requires as an "intergovernmental dispute." Section **30 (2)** provides that Part **IV** shall apply to resolution of disputes **(a)** between the national government and a County Government or **(b)** amongst County governments.*

The issue for determination is whether this suit purely and exclusively involves intergovernmental relations and whether the dispute is an intergovernmental dispute. The definition of a dispute was as stated in In **Isiolo County Assembly Service Board & another vs Principal Secretary (Devolution) Ministry of Devolution and Planning & another where Onguto J stated:**

> *"The dispute must be between the two levels of government. It must not be between one or the other on the other hand and an individual or person on the other hand. A dispute between a person or State officer in his individual capacity seeking to achieve his own interest or rights would not equate an intergovernmental dispute. A dispute between two or more county governments would however equate an intergovernmental dispute: see section 30(2)(b) of the Act. By the better reason, it would also follow that where a state officer seeks through any means to advance the interest of a government, whether county or national, against another government whether county or national, then such a dispute would rank as an intergovernmental dispute.*
>
> *What precisely amounts to an intergovernmental dispute is not expressly detailed either under the Constitution or the Act. Guidance may however be retrieved from both Articles 6 and 189 of the Constitution as well as from Section 32 of the Act. Articles 6 and 189 provide for respect, cooperation and consultation in the conduct of the two governments' mutual relations and functions. The focus appears to be performance of functions and exercise of powers of each respective level of government. Section 32 of the Act however appears to precipitate even a commercial dispute as an intergovernmental dispute when the Section expressly refers to **"any agreement"** between the two levels of government or between county governments. The agreement, in other words, is not limited to that of performing functions or powers or that of guiding relations*.'

The suit involves other parties who are neither county government nor national government. The orders sought for are against individuals who may not have an opportunity at the dispute resolution mechanism arrangement provided for under the Intergovernmental Relations Act. There is further an interested party who has been enjoined in the suit whose rights must also be determined.

Having said that and guided by the provisions of the law and precedent I find that this case does not fall under the Intergovernmental Relations Act and therefore the preliminary objection must fail. Parties to comply with order 11 and fix the matter for hearing.

DATED and **DELIVERED** at **ELDORET** this **12TH** DAY OF **NOVEMBER, 2019.**

M. A. ODENY

JUDGE

RULING read in open court in the presence of Mr.Kuria for 1st and 3rd Defendants and in the absence of Mr.Mulondo for Plaintiffs.

Mr.Mwelem – Court Assistant