



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 598 OF 2016**

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

**VERSUS**

**THE CABINET SECRETARY LAND,**

**HOUSING & URBAN DEVELOPMENT.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

The petitioner brought this suit against the respondents by way of a petition dated 29<sup>th</sup> May, 2016 alleging violation of various provisions of the Constitution by the 1<sup>st</sup> respondent. The petitioner's complaint as set out in the petition is as follows. On 27<sup>th</sup> April, 2016, the 1<sup>st</sup> respondent dissolved all Land Control Boards in the country through a Gazette Notice and notified the public that it would reconstitute the same within two weeks from the date of dissolution. On 9<sup>th</sup> May, 2016, the petitioner wrote to the 1<sup>st</sup> respondent proposing that it be consulted before the reconstitution of the new Land Control Boards. The 1<sup>st</sup> respondent did not respond to the petitioner's said letter but instead, it dispatched a letter to all County Commissioners asking them to nominate persons for appointment to the new Land Control Boards and proceeded to reconstitute the said Land Control Boards without the petitioner's involvement. The petitioner has contended that the Land Control Act, Chapter 302 Laws of Kenya (hereinafter referred to as "the Land Control Act") which establishes Land Control Boards and gives the 1<sup>st</sup> respondent power to appoint members of such boards is part of a carryover of laws from the old Constitution which ought to have been repealed by the new land laws namely, the Land Act, 2012 and the Land Registration Act, 2012. The petitioner has contended that the Land Control Act does not conform with the new Constitution in so far as land management is concerned.

The petitioner has contended that the County Governments are mandated under the Fourth Schedule of the Constitution and subsequent legislation such as the County Governments Act, 2012 and Urban Areas and Cities Act, 2011 to undertake planning including county spatial planning and development control. The petitioner has contended that the planning function covers the management of agricultural land transfers within the counties. The petitioner has contended that regulation of agricultural land is a devolved function. The petitioner has contended that under the Fourth Schedule of the Constitution, the role of the National Government in agriculture has been restricted to agricultural and veterinary policy.

The petitioner has contended that the Land Control Act is incompatible with the current devolved system

of governance and that this fact is apparent from the composition of the membership of the various boards. The petitioner has contended that although agriculture has been devolved to counties, the Land Control Act does not recognize the need for the counties to be involved in the management of agricultural land. The petitioner has contended that the Land Control Boards are unconstitutional and have been operating under a law which is redundant. The petitioner has contended that in constituting the said Land Control Boards, the 1<sup>st</sup> respondent has violated the provisions of Articles 6(2), 10, 174, 186(1), 189(1)(a), 189(2) and 259(11) of the Constitution.

The petitioner has sought among others; a declaration that the regulation of transactions in agricultural land is an exclusive function of the county governments; in the alternative to the foregoing, a declaration that the establishment and constitution of Land Control Boards must be done in consultation and with approval of counties; a declaration that sections 5 and 6 of the Land Control Act are inconsistent with the constitution and to that extent null and void and a declaration that the Land Control Act in its entirety is inconsistent with the Constitution and as such is null and void.

Together with the petition, the petitioner filed an application of the same date seeking conservatory orders. In response to the petition, the respondents filed a notice of preliminary objection dated 9<sup>th</sup> December, 2016 and a replying affidavit by Peter Kangethe Kahuho sworn on 14<sup>th</sup> December, 2016. In their replying affidavit the respondents contended that in reconstituting the new Land Control Boards they took into consideration the provisions of the new Constitution and involved the County Governments in the process. The respondents contended that the mandate of County Governments is limited only to planning of agricultural land. The respondents contended that the mandate of the County Governments does not extend to regulation of transactions in agricultural land such as, transfers, charges and leases which is a function of the National Government. The respondents denied that the Land Control Act is incompatible with the devolved system of governance and that the same is in any way inconsistent with the Constitution.

In their preliminary objection, the respondents contended that this petition has been instituted in contravention of Articles 189(3) and (4) of the Constitution and sections 31 and 35 of the Intergovernmental Relations Act, 2012. The respondents have contended that the petition is incompetent, frivolous and as abuse of the court process. It is this preliminary objection which is the subject of this ruling. The preliminary objection was argued by way of written submissions. The respondents in their submissions dated 12<sup>th</sup> April, 2016 referred to Article 189 of the Constitution and sections 30 and 35 of the Intergovernmental Relations Act (hereinafter referred to as “the Act”) and argued that in disputes between the National and County Governments, judicial proceedings is the dispute resolution mechanism of last resort. The respondents submitted that if the petitioner was dissatisfied with the appointment of members of the Land Control Boards by the 1<sup>st</sup> respondent, the proper procedure would have been to formally declare the existence of a dispute and thereafter refer the matter to the Summit, Council or any other intergovernmental dispute resolution machinery established under section 33 of the Act.

The respondents have argued that there is no evidence that attempts had been made to resolve the issues before the court through the dispute resolution mechanism provided under the Act and for that reason, the petition and application for conservatory orders before the court are premature. The respondents cited the case of Narok County Council vs. Trans Mara County Council & another CA No. 25 of 2000 where the Court of Appeal stated that parties are bound to follow procedures provided by law before resorting to court for redress. The respondents also cited the decision of Majanja J. in the case of Dickson Mukweluine vs. Attorney General & 4 others NRB HC Petition No. 390 of 2012 where the judge stated that alternative dispute resolution processes are complementary to the judicial process and under Article 159(2)(c) of the Constitution the court is enjoined to promote alternative modes of dispute resolution. The court stated further that it is not inconsistent with Articles 22 and 23 of the Constitution for a party to insist that statutory processes aimed at realizing, promoting and protecting certain rights be followed.

The petitioner filed its submissions on 26<sup>th</sup> April, 2017. The petitioner has not contested the respondent’s contention that inter-governmental disputes should be subjected to the dispute resolution mechanism provided for under the Act before being brought to court. The petitioner has submitted that its proposal to

the 1<sup>st</sup> respondent to consult and engage the petitioner before reconstituting the Land Control Boards did not elicit any response from the 1<sup>st</sup> respondent. The petitioner submitted further that, the 1<sup>st</sup> respondent's letter dated 23<sup>rd</sup> May, 2016 requesting the County Commissioners to nominate persons to be appointed as members of the various Land Control Boards before responding to its proposal aforesaid was a clear indication that the 1<sup>st</sup> respondent was not ready for consultation and cooperation required of the National and County governments in their dealings under Articles 6(2) and 189(2) of the Constitution. The Petitioner referred to the Supreme Court Advisory Opinion Reference No. 2 of 2013 and submitted that devolution is hinged on cooperation and interdependence as articulated in Article 6(2) of the Constitution.

The petitioner contended that by writing to the 1<sup>st</sup> respondent, the petitioner had shown commitment to promote consultation and cooperation. The petitioner argued that the dispute herein is not between the National and County government but a violation by the 1<sup>st</sup> respondent of the spirit of mutual relations based on consultation and cooperation as enshrined under Article 6(2) of the Constitution.

The petitioner cited Article 162(2)(b) of the Constitution and submitted that this court has jurisdiction to determine the issues raised in the petition. The petitioner referred to the cases of John Kipng'eno Koech & 2 others vs. Nakuru County Assembly & 5 others (2013) eKLR and Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 others (2012) Eklr and submitted that this court has jurisdiction to pronounce itself on the legal issues which have been raised by the parties. The petitioner submitted that the entire Constitution must be read in harmony as an integrated whole. In support of this submission, the petitioner cited the Ugandan case of Olum vs. Attorney General of Uganda (2002) 2E.A.508. The petitioner submitted that Articles 6(2), 174, 186(1), 189(1)(a) and 259(11) of the Constitution should be read together with Article 189(3) and (4) of the Constitution.

I have considered the respondents' preliminary objection and the submissions made in support thereof. I have also considered the submissions by the petitioner in opposition to the preliminary objection. As I have stated earlier in this ruling, the respondents' preliminary objection is anchored on Articles 189(3) and (4) of the Constitution and sections 31 and 35 of the Intergovernmental Relations Act (the Act). Article 189 of the Constitution provides as follows:

*“189. (1) Government at either level shall—*

*(a) perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level; (b) assist, support and consult and, as appropriate, implement the legislation of the other level of government; and*

*(c) liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.*

*(2) Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.*

*(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 intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.*

Sections 31, 32, 33, 34 and 35 of the Intergovernmental Relations Act (the Act) which contain mechanisms for dispute resolution provide as follows;

*“31. Measures for dispute resolution*

*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.*

### *32. Dispute resolution mechanisms*

*(1) Any agreement between the national government and a county government or amongst county governments shall—*

*(a) include a dispute resolution mechanism that is appropriate to the nature of the agreement; and*

*(b) provide for an alternative dispute resolution mechanism with judicial proceedings as the last resort.*

*(2) Where an agreement does not provide for a dispute resolution mechanism or provides for one that does not accord with subsection (1), any dispute arising shall be dealt with within the framework provided under this Part.*

### *33. Formal declaration of a dispute*

*(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.*

### *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.”*

Section 3 (f) of the Intergovernmental Relations Act (the Act) provides that one of the objectives and purposes of the Act is to provide mechanisms for the resolution of intergovernmental disputes whenever they arise. 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 is clearly echoed in the provisions of Article 189(3) and (4) and sections 31 to 35 of the Act which I have reproduced above. In the case of Murang’a County Public Service Board vs. Grace N Makori & 178 others Nyeri CA No. 37 of 2015 (2015) eKLR, the Court of Appeal stated that:

*“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.”*

In the case of International Legal Consultancy Group & another vs. Ministry of Health & 9 others, NRB HC Petition 99 of 2015 (2016) eKLR, Mumbi Ngugi J , stated that:

*It is, in my view, apparent that the constitutional and legislative intent was to have all disputes between the two levels of government resolved through a clear process established specifically for the purpose by legislation, a process that emphasizes consultation and amicable resolution through processes such as arbitration rather than an adversarial court system. As a result, a separate dispute resolution mechanism for dealing with any disputes arising between the national and county governments, or between county governments, has been established.*

*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 of the Act clears it away with specific words. 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.”*

*The legislative intention was therefore that judicial proceedings would only be resorted to once efforts at resolving the dispute between the two levels of government failed. The question is*

*whether any attempt was made in this instance to resolve the matter in accordance with the Intergovernmental Relations Act before this petition was filed.”*

In the case of Okuya Omtatah Okoiti & another vs. Attorney General & 6 others NRB HC Petition No. 593 of 2013(2014) eKLR Lenaola J(as he then was) stated that:

*“I now turn to examine the import of the alleged ouster of the Court’s jurisdiction under Article 189 of the Constitution. It was submitted by the Respondents and the Amicus Curiae in that regard that the Courts are not the only means through which disputes relating to devolution must be resolved. That the Constitution has placed great emphasis in resolving disputes relating to devolution through an intergovernmental dispute resolution mechanism and that is the proper mechanism to resolve the present dispute.*

*The starting point in addressing the issue is **Article 6** of the **Constitution** which must be read with **Article 189** of the **Constitution**... The legislation contemplated in **Article 189(4)** has already been enacted i.e. the **Intergovernmental Relations Act of 2012**, which has established institutions and sets out mechanisms of resolution of intergovernmental disputes. The Preamble to this Act state 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.”*

*As can be seen from the above, the Act was intended inter-alia to establish mechanisms for the resolution of intergovernmental disputes pursuant to the provisions of **Articles 6** and **189** of the **Constitution**. The dispute resolution mechanisms are then specifically established under Sections 30 to 35 of that Act. Section 30 stipulates as to when a dispute can be said to have arisen between the two levels of government as it provides thus...*

*The reasoning behind the above enactment is not hard to find; that alternative dispute resolution mechanisms should be sought in the first instance so as not to strain the relationship between the national government and the county governments and in the case of counties, among themselves. Article 6 of the Constitution has therefore mandated the two levels of government to conduct their mutual relations on the basis of consultation and co-operation. Section 31 has indeed provided for the measures to be undertaken in dispute resolution as follows...*

*The place of judicial proceedings in the dispute resolution mechanism provided for under the Act is clear; that judicial proceedings are a last resort and Section 35 specifically states that...*

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

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. In the case of, County Government of Nyeri vs. Cabinet Secretary, Ministry of Education Science & Technology Another, Nyeri Petition No. 3 of 2014 (2014) eKLR, Wakiaga J. stated as follows;

*“Is this dispute therefore one between County and National Government to which dispute settlement mechanism under Intergovernmental Relations Act applies and for which this court ought to postpone or decline the exercise of its jurisdiction to enable the parties exhaust the procedures set therein? In answering this question I note that what amounts to Intergovernmental*

*dispute is not defined in our Act which provides as follows:*

***section 30(1) in this part unless the context otherwise requires 'dispute' means an Intergovernmental dispute.***

*To get the definition thereof I had to look at the South African Act:- INTERGOVERNMENTAL RELATIONS FRAME WORKS ACT 2005 which defines Intergovernmental Disputes as follows:*

***“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”***

*For a dispute to fall within the ambit of IGR framework Act it must fulfill for basic requirements:*

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

***b. Must be of a legal nature. That is a dispute capable of being the subject of a judicial proceedings.***

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

***d. The dispute may not be subject to any of the previously enumerated exceptions.”***

The definition and scope of what constitutes a dispute in the South African Intergovernmental Relations Frame Works Act 2005 set out in the foregoing decision of Wakiaga J. fortifies my finding that the dispute before me is a dispute within the meaning of section 30(1) of the Act. The petitioner has contended that it made attempts to reach out to the 1<sup>st</sup> respondent to have the dispute resolved amicably but the 1<sup>st</sup> respondent by its conduct turned down the overture. The procedure for resolving intergovernmental disputes is set out in the provisions of the Act that I have reproduced above. If the petitioner had approached the 1<sup>st</sup> respondent with a view to resolve the dispute and the 1<sup>st</sup> respondent showed no interest, the petitioner was supposed to invoke the dispute resolution mechanism in the Act by declaring a dispute and having it resolved through the machinery provided in the said Act. It could not be said that the 1<sup>st</sup> respondent was unwilling to resolve the dispute through the machinery provided under the Act before a dispute was declared under section 33(2) of the Act, the 1<sup>st</sup> respondent summoned and it failed to cooperate.

I have said enough to show that the petition herein was brought to court prematurely. The respondents asked the court to dismiss the petition as an abuse of the court process. I am of the view that the petition is not frivolous as claimed by the respondents. Since the petitioner has recourse to the court in the event that the alternative mode of resolving disputes set out in the Act fails, the order that commends itself to me is to stay the proceedings and give the petitioner an opportunity to exhaust the dispute resolution machinery under the Act.

In conclusion, the respondents' preliminary objection succeeds. This petition is stayed for a period of one (1) year from the date hereof within which the petitioner shall set in motion the dispute resolution mechanism set out under the Act in case it still wishes to pursue the dispute. In the event that no steps are taken under the Act to resolve the dispute with one (1) year from the date hereof or the dispute is resolved to the satisfaction of the parties, this petition shall stand dismissed with each party bearing its own costs. Each party shall bear its own costs of the preliminary objection.

**Delivered and signed at Nairobi this 8<sup>th</sup> day of December 2017**

**S.OKONGO**

**JUDGE**

Ruling read in open court in the presence of:

Ms. Kaburu h/b for Wanyama      for the Petitioner

Ms. Ndundu                              for the Respondents

Catherine                              Court Assistant