



**Gisesa v National Land Commission & 4 others; Ministry of Lands & Physical Planning & 3 others (Interested Parties) (Environment & Land Petition E001 of 2023) [2024] KEELC 1037 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1037 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA  
ENVIRONMENT & LAND PETITION E001 OF 2023  
JM KAMAU, J  
FEBRUARY 15, 2024**

**BETWEEN**

**NYAMBEGA GISESA ..... PETITIONER**

**AND**

**THE NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

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

**THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .... 3<sup>RD</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KISII ..... 4<sup>TH</sup> RESPONDENT**

**COUNTY GOVERNMENT OF NYAMIRA ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**THE MINISTRY OF LANDS & PHYSICAL PLANNING .. INTERESTED PARTY**

**CHRISTOPHER BARARE NYANG’AU ..... INTERESTED PARTY**

**FRANCIS NDABURI OYARO ..... INTERESTED PARTY**

**CHARLES OSORO KIBOI ..... INTERESTED PARTY**

**JUDGMENT**

1. This Petition over the boundary of Keroka town was filed on 14/4/2023 by one Nyambega Gisesa who undisputedly introduced himself as a public-spirited individual and a member of the County Assembly of Nyamira. The same is dated 6/4/2023. The Petitioner also described himself as a journalist, an author, an upcoming lawyer, a leader and a strong believer in the rule of law and constitutionalism. He has sued the National Land Commission for failing to resolve the simmering



boundary dispute pitting Nyamira and Kisii Counties pursuant to Section 15 of the [National Land Commission Act](#), No. 5 of 2012. He also sued the Honourable Attorney General as the Legal Advisor and Representative of the Government of Kenya for what he termed as failure to promote, protect and uphold the Rule of law and/or defend the public interest within the meaning of Article 156 of [the Constitution](#) of Kenya, 2010. The Petitioner also joined the County Government of Nyamira, County Government of Kisii and the Ministry of Lands and Physical Planning as 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties respectively. In the course of time, the Independent Electoral and Boundaries Commission was joined as a party by the Court sui moto as the 3<sup>rd</sup> Respondent due to her importance in this case as will be shown later and the County Government of Kisii was made the 4<sup>th</sup> Respondent and Nyamira County Government 5<sup>th</sup> Respondent.

2. The Petitioner brought this Petition after receiving a Petition dated 23/1/2023 signed by some 42 residents of Keroka Market Centre after which under paragraphs 5 to 14 (inclusive) of his Petition, he outlined the law that informed him to file the Petition as follows: -
  5. The Petitioner, who has received a petition signed by some 212 residents of Keroka market centre claiming harassment by Governments of Nyamira and Kisii Counties in Keroka market centre, is inviting the Honourable Court to intervene and compel:
    - 5.1. The National Land Commission (NLC) to investigate, survey and erect beacons to clearly demarcate the boundaries in issue pursuant to Article 67 of [the Constitution](#) and section 15 of the [National Land Commission Act](#), No. 5 of 2012 and resolve the simmering boundary disputes pitting Nyamira and Kisii Counties over Keroka market center.
    - 5.2. The National Land Commission to survey and erect visible beacons to clearly demarcate the boundaries of Kenya's 47 Counties, with preference being given to the boundaries between Nyamira and Kisii Counties touching on among other areas Keroka market center, Kisii Agricultural Training Center(KATC), Kenya Agricultural Research Institute-Kisii(KARI Kisii), Getare and Jogoo areas neighboring Kisii town, pursuant to Articles 129, 130, 131(1) (b) & 2(a) & (b), of [the Constitution](#) as read together with Article 69(1) and the First schedule to [the Constitution](#).
  6. It is the Petitioner's case that, since the law on County boundaries is clear, and there is enough documentary evidence to resolve them, the boundary disputes in issue herein should be resolved immediately.
  7. Under Article 3(1) of [the Constitution](#) of Kenya, the Respondents have an obligation to respect, uphold and defend [the Constitution](#).
  8. The Petitioner is a leader and Member of Nyamira County Assembly and has filed the suit herein in the public interest under Articles 3(1), 22, 23, 258 and 261 (5) of [the Constitution](#) of Kenya 2010 which vests every person with locus standi to institute proceedings for the protection of rights and fundamental freedoms in the Bill of Rights and/ or of the entire Constitution.
  9. Article 3 of [the Constitution](#) of Kenya, 2010 provides that every person has the obligation to respect, uphold or defend [the Constitution](#). Article 22 (1) and (2) (c) provides that a person can institute Court proceedings on the enforcement of the Bill of Rights while acting in their own interest or in the public interest. Article 258 (1) provides that every person has the right to institute Court proceedings, claiming that [the Constitution](#) has been contravened, or is threatened with contravention. Article 258 (2) (c) provides that a person may institute Court proceedings on enforcement of [the Constitution](#) acting in the public interest.



10. Under Article 23, 159, 160(1), 162(2)(b), and 165(5) of *the Constitution* of Kenya, Section 13 of the *Environment and Land Court Act* No. 19 of 2011, and a catena of case law, this Honourable Court has original and appellate jurisdiction to hear and determine all land disputes referred to it relating to the violation of rights, and the interpretation of *the Constitution*, including questions of any contradiction between any law and *the Constitution*, and whether anything said to be done under the authority of *the Constitution* or of any law is inconsistent with, or in contravention of, *the Constitution*.
11. Article 162(2)(b) of *the Constitution* sets up the ELC and vests it with the jurisdiction to hear and determine disputes relating to the environment and the use of and occupation of, and title to, land
12. Since the instant petition concerns the occupation Keroka market center, the ELC has the jurisdiction to hear and determine this suit.
13. Section 13 of the *Environment and Land Court Act* empowers Environment and Land Court to hear matters, that are also in the nature of constitutional Petitions and in which there is allegation of denial, violation or infringement or threat to a right or fundamental freedom in the Bill of Rights in matters falling within its jurisdiction.
14. It is only this Court that is vested with the authority to determine issues pertaining to constitutional violation and infringement as far as land and land use is concerned. This is only a preserve of this Court.

After laying the foundation of the law he wishes to rely upon, Mr. Gisesa then narrated the facts his Petition is hinged on as follows: -

15. The Petitioner received a petition dated 23rd January, 2023 from some 212 residents of Keroka market center asking him to intervene and help them find a solution to the boundary disputes which have been simmering for a long time before the promulgation of *the Constitution* of Kenya, 2010.
16. Enclosed in the said letter were statements and copies of Minutes of Meeting between Leaders of Kisii and Nyamira Counties on Administration and Management of Keroka Town and other letters attached, (formerly Keroka Town Council under the repealed Constitution of Kenya) illustrating long standing boundary disputes pitting Nyamira and Kisii Counties (formerly Nyamira and Kisii districts), over Keroka market center.
17. The statements demonstrate harassment of the residents of Keroka market centre, officials from the said Counties competing for control of the market center resulting to destruction of property and injury to members of the public. Further and in particular, the residents are forced to pay the same taxes twice to two different Counties and, due to the confusion, they don't know from which County they should demand services and accountability for the taxes they pay.
18. According to the Minutes of Meeting between Leaders of Kisii and Nyamira Counties on Administration and Management of Keroka Town and other letters attached, (formerly Keroka Town Council under the repealed Constitution of Kenya) has had long standing boundary disputes pitting Nyamira and Kisii Counties (formerly Nyamira and Kisii districts), and all previous efforts to resolve them have failed.

Further and in particular:



- 18.1. There is a boundary dispute between Nyamira and Kisii Counties over the location of Keroka market center, which lies on what used to be the boundary between the former Nyamira and Kisii districts of the repealed Constitution of Kenya. Whereas, on the one hand, Nyamira County claims that over 90 per cent of the town belongs to it, Kisii, on the other hand, claims that part of the town belongs to it pursuant to existing documentation and recent history and has since encroached into about 50 per cent of the market center.
- 18.2 There are no beacons clearly demarcating the boundaries between Nyamira and Kisii Counties.
19. From the minutes, the leaders agreed that the two Counties should form a joint management of the town.
20. The joint management was never established making the people exposed to more disruptions.
21. The boundary disputes do not just concern the actual boundaries of Nyamira County; they are also based on the allegation that the current County boundaries are unfair because they are based on historical injustices.
22. At the centre of the disputes is the question of who collects levies in the disputed market centre which are key tax collections points. The question of which County collects taxes is a key source of conflict in Kenya's devolved governance system.
23. The disputes have created tension on the market which has in the past turned violent leading to the loss of lives and livelihoods. Hence, if left unresolved, these disputes have the potential of undermining the objects of devolution and National security.
24. As a result of the dispute, Kisii County officials have destroyed public property belonging to Nyamira County including a boda boda shed formerly constructed at Ichuni junction costing Sh700,000, a public toilet estimated at Sh 2,000,000 and a van No. KAV 337E belonging to Nyamira County Government which was a matter before Court. These actions have resulted to loss of taxpayers' funds.
25. As a result of the dispute, Nyamira County officials have demolished kiosks and other properties where Kisii County was levying taxes leading not only to destruction of property but also injuring a police officer.
26. As a result of the dispute, residents and traders of Keroka market centre have lost a lot in development since the town is yet to be upgraded to a town status and or municipality pursuant to the [Urban Areas and Cities Act](#) of 2012 despite meeting all the requirements.
27. The foregoing state of affairs calls for urgent action by the National Land Commission which alone is under Article 67 of [the Constitution](#) vested with the jurisdiction and responsibility to resolve such boundary disputes through investigating, surveying and erecting beacons to clearly demarcate the boundaries in issue.
28. That section 15 of the [National Land Commission Act](#), No. 5 of 2012 Act provides for historical land injustices further, pursuant to Article 67 (3) of [the Constitution](#), the Commission shall receive, admit and investigate all historical land injustice complaints and recommend appropriate redress.
29. [The Constitution](#) provides a very clear, elaborate, inclusive and complex but secure procedure in Article 67 for managing public land on behalf of the National and County Governments



and to initiate investigations into past and present historical land injustices and recommend appropriate redress.

30. The Petitioner is aggrieved that, whereas the mandate to adjudicate issues touching on present and historical land injustices vests on the National Land Commission as provided in Article 67 of *the Constitution*, the National Land Commission has not been able to look into the boundary disputes between the two Counties, or for any other County, and recommend the way forward. Hence, the National Land Commission has abdicated its duties.
31. The Petitioner is aggrieved that some 10 years after the promulgation of *the Constitution* of Kenya, 2010 on 27th August 2010:
  - 30.1 The National Land Commission has not solved any single present or historical boundary dispute involving any County as provided under section 5 of the *National Land Commission Act*, 2012.
  - 30.2 The National Land Commission has not with Parliament (both National Assembly and Senate) come up with appropriate legislation to provide for investigation and adjudication of claims arising out of historical land injustices for the purposes of Article 67 (2) (e) of *the Constitution* as provided under section 15 of the *National Land Commission Act*, 2012.
  - 30.3 The National Executive of Kenya and the National Land Commission has not surveyed and erected visible beacons to clearly demarcate the boundaries of Kenya's 47 Counties.
32. Parliament has also not enacted a law that will adjudicate disputes concerning County boundaries, yet, in order to resolve the disputes comprehensively. Worryingly, little has been done to implement Article 188 of *the Constitution*.
33. The Petitioner is aggrieved that, whereas the National Land Commission Act, 2012 Section 5 (1) Pursuant to Article 67 (2) of *the Constitution* empowers the Commission to manage public land on behalf of the National and County Governments and further in Section 5(2) in addition and in accordance with Article 67 (3) of *the Constitution*, powers on behalf of, and with the consent of the National and County Government alienate public land, this power was only restricted to within five years of the commencement of the *National Land Commission Act*, 2012 as guided by the *National Land Commission Act*, 2012 Section 14 (1) hence there is no provision in law for a member of the public like the Petitioner to petition the National Land Commission to handle a boundary dispute involving two Counties.
34. Hence, only this Court can compel the National Land Commission to investigate and erect beacons in the boundary dispute between Nyamira and Kisii Counties.
35. The Petitioner posits that these disputes ought not to be there since the law is clear and there are historical maps and documents which clearly show where the boundaries are or ought to be, and the National Land Commission has the mandate to resolve them as provided for in Article 67 of *the Constitution*.
36. In the circumstances, the Petitioner urges this Honourable Court to compel the National Land Commission to initiate the process for resolving the boundary through investigating, surveying and erecting beacons to clearly demarcate the boundaries in issue as provided for in Articles 67 of *the Constitution*.



37. The Petitioner is also aggrieved that some twelve years since the Constitution was promulgated, the National Land Commission and the National Government have failed to lessen County boundary disputes by surveying and erecting visible beacons to clearly demarcate the boundaries of Kenya's 47 Counties, pursuant to Articles 129, 130, 131 (1)(b) & (2)(a) & (b), as read together with Article 6(1) and the First Schedule to the Constitution.
  38. Hence, the Petitioner prays for orders compelling the National Land Commission and the National Executive of Kenya to survey and erect visible beacons to clearly demarcate the boundaries of Kenya's 47 Counties, with preference being given to the boundaries between Nyamira and Kisii Counties.
  39. Finally, the Petitioner prays for the costs of this suit to be awarded to him against the Respondents.
3. The Petitioner then meticulously juxtaposed the facts relied upon in his Petition to the law. First the Constitution of Kenya, 2010 and secondly, statute law. Under the Constitution, the Petitioner laid down the following legal foundations: -
1. The Constitution of Kenya, 2010 is the fountainhead from which all our laws derive their authority and force.
  2. In the Preamble, the people of Kenya have aspirations for a Government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.
  3. Under Article 1, the People of Kenya are sovereign.
  4. Under Article 2, the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of Government. The Supremacy of the Constitution basically means the supremacy of the rule of law.
  5. Under Article 3, every person has an obligation to respect, uphold and defend the Constitution, and any attempt to establish a Government otherwise than in compliance with the Constitution is unlawful. Further and specifically:
    - 43.1. Kenya is a Constitutional state: all state authorities are ultimately subject to judicial control vide the sovereign people's authority vested in the Judiciary as the final arbiter of disputes, and as the institution with exclusive authority and power to make binding interpretations of the Constitution and the law.
    - 43.1. The primacy of the basic rights in the Bill of Rights, the definition of the principles of a democratic and open State, and the foundation of an independent Judiciary which watches over and ensure adherence to the Constitution are the basic cornerstones of Kenya's democracy.
    - 43.2. Among other things, the basic rights guarantee the accountability of all, freedom to act within the law, equality before the law, including access to justice.
    - 43.3. The Petitioner has a reasonable and legitimate expectation by dint of Articles 2(3) and 2(4) that public officials can only act legitimately if they act in compliance with the Constitution and don't contravene it in any way.
  6. Article 4(2) states that the — The Republic of Kenya shall be a ... State founded on the National values and principles of governance referred to in Article 10.



7. Article 6(1) states that the territory of Kenya is divided into the Counties specified in the First Schedule.
8. Article 10 of *the Constitution* sets out National values and principles of governance that bind all state officers, state organs, and public officers. All persons are required to apply the National values and principles of governance, including inter alia the rule of law, democracy and participation of the people, social justice, equity, nondiscrimination, inclusiveness, protection of the marginalized, good governance, integrity, transparency, accountability and sustainable development. The Respondents in the issues herein are bound to apply the aforesaid values and principles.
9. Under Chapter Four of *the Constitution*, various fundamental rights have been declared to belong to all persons in Kenya (Article 19, 20), including inter alia the following:
  - 47.1 Article 19(1) makes the Bill of Rights an integral part of Kenya's democratic state and the framework for social, economic and cultural policies.
  - 47.2 Article 19(3)(a) provides that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the state.
  - 47.3 Article 20(2) provides that every individual shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.
  - 47.4 Article 20(4)(a) provides that in interpreting the Bill of Rights, a Court, Tribunal or other authority shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom.
  - 47.5 Article 21 (1) states that it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.
  - 47.6 Article 22 vests the locus standi for the enforcement of the Bill of Rights in inter alia the Petitioner herein.
  - 47.7 Under Article 23, this Court has jurisdiction, in accordance with Articles 162(2)(b) and al 65(5), 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. The appropriate relief a Court may grant include an order for an injunction or an order for compensation.
  - 47.8 Article 24, a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity.
  - 47.9 Article 25, the right to a fair trial cannot be limited.
  - 47.10 Article 27 (1), every person is equal before the law and has the right to equal protection and equal benefit of the law.
  - 47.11 Article 27 (2), equality includes the full and equal enjoyment of all rights and fundamental freedoms.



- 47.12 Article 40 declares the rights to property, but which do not extend to any property that has been found to have been unlawfully acquired.
- 47.13 Article 47, declares the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- 47.14 Article 50(1), the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial Tribunal or body.
- 47.15 That the only emergency situations that can oust constitutional provisions are those contemplated in Article 58, as read with Article 132 (4) (d).
10. *The Constitution* of Kenya, 2010 dedicates a whole Chapter 5 to address the issues of land.
11. Article 67 (1) of *the Constitution* establishes the National Land Commission thus:
1. There is established the National Land Commission.
  2. The functions of the National Land Commission are:
    - a. To manage public land on behalf of the National and County
    - b. To recommend a National land policy to the National Government;
    - c. To advise the National Government on a comprehensive program or the registration of Title in land throughout Kenya;
    - d. To conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;
    - 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;
    - g. To assess tax on land and premiums on immovable property in any area designated by law; and
    - h. To monitor and have oversight responsibilities over land use planning throughout the country.
12. Specifically, Article 67(2) (e) of *the Constitution* empowers The National Land Commission "to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress."
13. Section 15 of the *National Land Commission Act*, No.5 of 2012 provides for historical land injustices that pursuant to Article 67 (3) of *the Constitution*, the Commission shall receive, admit and investigate all historical land injustice complaints and recommend appropriate redress with a historical land injustice meaning a grievance which: -
- a. Was occasioned by a violation of right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement;
  - b. Resulted in displacement from their habitual place of residence;



- c. Occurred between 15th June 1985 when Kenya became a Protectorate under the British East African Protectorate and 27th August, 2010 when *the Constitution* of Kenya was promulgated;
  - d. has not been sufficiently resolved and subsists up to the period specified under paragraph (c);
14. Whereas Article 188 of *the Constitution* deals exclusively with the process of altering County boundaries, the issue at hand is on demarcation and confirmation of boundaries, a matter that does not fall under the purview of Article 188 of *the Constitution*.
15. Further, there is a clear step by step for altering of County Boundaries in adherence to the provisions of Article 188 of *the Constitution* and thus neither Nyamira nor Kisii Counties can willingly alter territorial County boundaries that are fixed, neither does the National Executive has any role in altering or demarcating County boundaries just like the Independent Electoral and Boundaries Commission which can only delimit constituencies and wards and has no role or authority to alter or demarcate County boundaries.
16. This dispute cannot be resolved as provided for under the ambit of Article 189(3) of *the Constitution* of Kenya and the provisions of the *Intergovernmental Relations Act* since the Petitioner and the residents of Keroka Town are in their individual capacities claiming harassment by County officials occasioning into the gross infringement, and violations of their fundamental rights onto right to property under Articles 40 and 47 of *the Constitution* and are not representing the National or any County Government to be subjected to the dispute resolution mechanisms under Article 189(3) and ( 4 ) of *the Constitution* and Sections 30, 31, 32, 33 34 and 35 of the *Intergovernmental Relations Act* No. 20 of 2012.
17. This Honourable Court is the primary custodian of *the Constitution* and has inherent power to uphold and defend *the Constitution*. Further and in particular:
  - 55.1 Under Article 160(1), in the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.
  - 55.2 Under Article 159(1) judicial authority is derived from the people and vests in, and shall be exercised by, the Courts and Tribunals established by or under this Constitution.
  - 55.3 Under Article 159(2), in exercising judicial authority, the Courts and Tribunals shall be guided by the following principles—(a) justice shall be done to all, irrespective of status; (b) justice shall not be delayed; (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3); (d) justice shall be administered without undue regard to procedural technicalities; and (e) the purpose and principles of this Constitution shall be protected and promoted.
  - 55.4 Article 162(2)(b) allows Parliament to establish this Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.
  - 55.5 Article 165(5)(b) gives this Court jurisdiction as the custodian of *the Constitution* and Article 259 states how that jurisdiction is to be exercised.



55.6 Article 165(6) vests this Court with supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior Court.

18. Under Article 258, on the enforcement of *the Constitution*, any person, acting in their own interest, or on behalf of another person, or as a member of, or in the interest of, a group or class of persons, or acting in the public interest, has the right to institute Court proceedings, claiming that *the Constitution* has been contravened, or is threatened with contravention.

19. Under Article 259(1) *the Constitution* shall be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good Governance.

4. He then stated that the above constitutional provisions are supported by statute as shown below: -

20. The aforesaid Articles of *the Constitution* are also supported by statute law that was in force as follows:

a. Kenya's 47 Counties were established based on the then 47 districts of Kenya, including the Nyamira district, established under the *Districts and Provinces Act*, 1992 Chapter 105 of the Laws of Kenya), which clearly and comprehensively delineated the boundaries of the districts.

b. Section 6 of The Provinces and Districts Act, 1992, defines the boundaries of Nyamira District, which is the present day Nyamira County, as

"Commencing at the confluence of the Nyatutu and Sondu rivers; thence generally southerly and up-stream by the centre of that river to confluence with the Kipsonoi River; thence generally south-westerly and up-stream by an un-named tributary of the Kipsonoi/Sondu rivers for a distance of approximately  $\frac{1}{2}$  a mile; thence continuing generally south-westerly by a straight line to the intersection of the eastern (or south-eastern) boundary of the Kericho-Sotik road reserve; thence generally southerly by that road reserve boundary to its intersection with the Kisii-Sotik road reserve; thence generally south-westerly by the north-western boundary of that road reserve to its intersection with the south-western boundary of L.R. NO. 5411; thence south-easterly by part of the latter boundary and by the south-western boundaries of L. R. Nos. 946/1 and 10099/2 to a beacon at the most easterly corner of L.R. NO. 5460/ 1; thence south-westerly by the south-eastern boundaries of L.R. Nos. 5460/ 1, 5460/3 and 3644/ 10 to a beacon at the most southerly corner of the last portion; thence north-westerly and westerly by the southern boundaries of L.R. No. 3644/ 10 to a beacon at its south-west corner; thence generally southerly, north-westerly and again generally, southerly by the Manga Hill Ridge to the trigonometrical point Gelegele at the most southerly corner of original L.R. No. 8997; thence north-westerly by a straight line to its intersection with south-western boundary of East Kitutu Location; thence northwesterly by that boundary and continues with north-westerly, northeasterly, easterly by Central Kitutu Location boundary to its intersection with western boundary of Ekerubo Location; thence northerly by the western boundary



of that location and continuing northerly by western boundary of Keera and West Mugirango Location to its intersection with common boundary between Homa Bay, Kisii and Nyamira Districts; thence north-easterly by northern boundary of West Mugirango, North Mugirango Chache to the point of Commencement.

- c. Section 6 of The Provinces and Districts Act, 1992 defines the boundaries of Kisii District, which is the present day Kisii County

“Commencing at the trigonometrical point Gelegele at the most southerly comer of original L.R. No. 8997;

Thence on a true bearing of  $256^{\circ} 05' 53''$  for a distance of 55,521 feet to a beacon Kisuna;

Thence on a true bearing of  $255^{\circ} 04' 49''$  for a distance of 16,076 feet to a beacon Gap;

Thence on a true bearing of  $256^{\circ} 03' 24''$  for a distance of 10,561 j' feet to a beacon Onanja;

Thence on a true bearing of  $255^{\circ} 04' 21''$  for a distance of 11,070 feet to a beacon Nyabitunya;

Thence on a true bearing of  $254^{\circ} 05' 56''$  for a distance of 3,435 feet to a beacon Nyabitunya W;

Thence on a true bearing of  $256^{\circ} 03' 37''$  for a distance of 15,293 feet to a beacon Makenche;

Thence on a true bearing of  $253^{\circ} 04' 37''$  for a distance of 6,219 feet to a beacon T;

Thence on a true bearing on  $262^{\circ} 04' 45''$  for a distance of 4,669 feet to a beacon R at the source of the Sare River;

Thence generally westerly and downstream by the course of that river to the intersection of the south-eastern boundary of L.R. No. 8059 on the south side;

Thence continuing generally westerly, northerly by general-ly western boundary of Gitenga, South Mugirango Central, South Mugirango Chache, South Wanjare and North Wanjare locations which forms the common boundary between Kisii, Migori and Homa Bay districts to its intersection with north-western comer of Bugesero Location;

Thence north-easterly by northern boundary of Bogusero, Kiomooncha, Mwamonari, Kegogi to the point of intersection between West Mugirango and Kegogi Locations; thence southerly by generally eastern boundary of Kegogi, Ngenyi and continuing westerly by that location boundary and continuing generally southerly over Manga Ridge by eastern Boundary of Sensi and Nyatieko Location to its intersection with Kisii Municipality boundary; hence generally southerly by that municipality boundary.



And continuing generally south-easterly by generally north-eastern boundary of Nyaribari Kiogoro, Nyaribari Keumbu, Nyaribari central. Nyaribari Masaba to the point of commencement.”

5. The Petitioner went on to show how *the Constitution* has been violated in as far as the boundary between Kisii and Nyamira Counties is concerned: -
  21. Forcing the residents of Keroka town to pay double taxes is a gross violation of the affected traders' property rights under Article 40 (3) of *the Constitution*, which provides categorically that, “The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description.”
  22. The said double taxation also violates Article 47(1) of *the Constitution* which provides that, "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. "
  23. The National Land Commission's failure to initiate the process for resolving historical land disputes to be specific County boundary disputes violated Article 67 (1) of *the Constitution*.
  24. Parliament's failure to enact legislation on the process for resolving County boundary disputes violated Articles 94(3) and 188 of *the Constitution*.
  25. The National Executive's failure to survey and erect visible beacons to clearly demarcate the boundaries of Kenya's 47 Counties as per the *Districts and Provinces Act*, 1992 offends Articles 129, 130, and 131(1)(b) & (2)(a) & (b) of *the Constitution*.
  26. Article 47 was violated to the extent that the National Executive's failure to survey and erect visible beacons to clearly demarcate the boundaries of Kenya's 47 Counties as per the *Districts and Provinces Act*, 1992 is NOT administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
6. The Petitioner declares that this is the only suit filed in Court between the parties herein over the subject matter i.e. Kisii – Nyamira Boundary. He then concludes his Petition by seeking the following prayers: -
  - a. A declaration be and is hereby issued that forcing the residents of Keroka town to pay double taxes is a gross violation of the affected traders' property rights under Article 40 (3) of *the Constitution*.
  - b. A declaration be and is hereby issued that the double taxation to the residents of Keroka town violates Article 47 (1) of *the Constitution*.
  - c. A declaration be and is hereby issued that the National Land Commission should investigate and erect beacons in Keroka town so as to solve the border dispute between Nyamira and Kisii Counties over the town.
  - d. A declaration be and is hereby issued that the Parliament of Kenya should enact enabling legislation to implement Articles 94 (3) and 188 of *the Constitution*.
  - e. A declaration be and is hereby issued that the National Executive of Kenya has failed to lessen County boundary disputes by surveying and erecting visible beacons to clearly demarcate the boundaries of Kenya's 47 Counties, pursuant to Articles 129, 130, 131 (1) (b) & (2) (a) & (b), as read together with Article 6 (1) and the First Schedule to *the Constitution*.



- f. A declaration be and is hereby issued that the National Executive of Kenya should survey and erect visible beacons to clearly demarcate the boundaries of Kenya's 47 Counties, pursuant to Articles 129, 130, 131 (1) (b) & (2) (a) & (b), as read together with Article 6 (1) and the First Schedule to *the Constitution*.
  - g. A mandatory order compelling the National Land Commission to investigate and erect beacons in the disputed territory in Keroka town, within three months from the date of this Order, so as to resolve the simmering boundary disputes pitting Nyamira and Kisii Counties.
  - h. A mandatory order compelling Parliament and the respective County assemblies of Nyamira and Kisii, after the boundary disputes have been resolved, to direct how the County Governments of Nyamira and Kisii will utilize the money held in the joint accounts they opened for revenue collections in Keroka town as ordered by the Court at the beginning of these proceedings.
  - i. A mandatory order compelling the Parliament of Kenya to enact, within six months from the date of this Order, enabling legislation to implement Articles 94 (3) and 188 of *the Constitution*.
  - j. A mandatory order compelling the National Executive to, within twelve months from the date of this Order, survey and erect visible beacons clearly demarcating the boundaries of Kenya's 47 Counties as per the *Districts and Provinces Act*, 1992, with preference being given to the boundaries between Nyamira and Kisii Counties.
  - k. A mandatory order compelling the National Land Commission to file in this Honourable Court Affidavits demonstrating compliance with the Court Orders at the expiry of the periods within which they have been ordered to act.
  - l. A mandatory order compelling the Respondents to pay the Petitioner's costs of this Petition.
  - m. The Honourable Court be pleased to issue any other or further remedy that the Honourable Court shall deem fit to grant.
7. The Petition is supported by the Affidavit of the Petitioner, Nyambega Gisesa alongside 2 other Affidavits one by Ombati Ronald Mogaka, a resident and a businessman in Keroka Town and also the Secretary of Keroka Town Committee representing traders of Keroka Town in the Leadership of the town and the other one by George Otiso Mochama, a resident and businessman in Keroka Town and who used to work as a casual labourer with the defunct Keroka Town Council and later Nyamira County. All the 3 Affidavits were sworn on 6/4/2023. Attached to the Supporting Affidavit of the Petitioner are the following: -
- a. A Copy of the National Identity Card of the Petitioner.
  - b. A copy of the Petition to the Petitioner herein made by Keroka Town Residents and Traders over the Keroka Town boundary dispute between Nyamira and Kisii Counties.
  - c. Letters (Statements) of complaint wrongly referred to as an Affidavit of Double Taxation and inefficient service delivery by a Resident and businessmen.
    - i. Evans Abuga
    - ii. Ombati Ronald Mogaka.
    - iii. Joel Osoro Ontari
    - iv. Evans Mose.



- v. Ronald Ondeyo Apima.
- vi. Herbert Kiage David.
- vii. Jared Bosire Bagaka.

All of who are residents and businessman at Keroka town.

- d. Electronic media coverage of the tension, altercation and fighting in Keroka town over the boundary dispute in April 2023.
- e. An agreement entered into between Nyamira County and Kisii County over Keroka Boundary on 21/5/2014 at Nairobi Club between leaders from both Counties.
- f. Correspondence over the same from the Senator, Kisii County Honourable Christopher M. Obure, EGH, MP dated 14/7/2015 and 20/8/2015 respectively.
- g. A letter dated 5/1/2016 from the Transition Authority addressed to a County Executive Committee Member, Kisii and copied to his counterpart at Nyamira.
- h. Minutes of a consultative meeting between officers from both Counties dated 19/3/2018 in the aforesaid Supporting Affidavits.

Whereas the Petitioner swore his Affidavit to buttress the averments in the Petition, the other Deponents Ombati Ronald Mogaka and George Otiso Mochama, residents and businessmen at Keroka Town, the coveted town by both Counties, lament that they have been harassed by Revenue Collection Officers from both Counties in the course of their businesses due to confusion as to where the boundary between the two Counties lies. They are forced to pay taxes to both Counties contrary to the law. Services are also inadequate and they do not know where to channel their grievances and requests. They depone that with no clear boundary demarcation, conflicts have erupted leading to personal injury and loss of property. In particular, Mr. Mochama depones that on or about 22/3/2016 while collecting garbage in the town, they were attacked by goons and he was grievously injured on his head and had to be treated at Keroka Town but sustained a permanent injury. He reported the matter to Keroka Police Station and he fears that if the boundary dispute is not resolved peace at the town would be disturbed.

On 5/6/2023 the 4<sup>th</sup> Respondent, the County Government of Kisii filed an Affidavit in response to the Petition. The same was sworn on 31/5/2023 by her County Secretary and Head of Public Service at the County, Mr. Ntabo who dismissed the Petition as a mere after-thought and an abuse of the process of the Court “meant to embarrass, drag and disrupt the discharge of functions and collection of revenue by the 4<sup>th</sup> Respondent.” He further deponed that the Petitioner has not exhausted the existing dispute resolution mechanisms or the appropriate organ, the Independent Electoral Boundaries Commission (hereinafter referred to as IEBC) pursuant to Articles 89 and 188 of *the Constitution* of Kenya, 2010 to review the boundary in dispute which is the only body that has the preserve of giving directions or making pronouncements in regard to the delimitation of boundaries. He further depones that Section 4 (c) of the Independent Electoral & Boundaries Commission Act provides that the delimitation of constituencies and wards in accordance with *the Constitution* is the preserve of the IEBC. He says that this matter should have been viewed as an Intergovernmental dispute falling within the ambit of the County Government Act and the *Intergovernmental Relations Act*. He does not agree with the Petitioner that parliament has failed to enact legislation for the resolution of County boundaries under Article 26 (1) of *the Constitution* of Kenya, 2010,



since the same is not provided for by law. He agrees with advice from the 4<sup>th</sup> Respondents' Advocate on record that the *Districts and Provinces Act*, 1992 is the prevailing law as a result of the transitional clauses. The 4<sup>th</sup> Respondent likewise accuses the Petitioner of not pleading his case with specificity and for failure to produce Title Deeds, receipts or documents pertaining to public properties, valuation reports, construction approvals to demonstrate any public properties at Keroka referred to by the Petitioner. Citing the unconstitutionality of the orders sought and arguing that such orders would polarize and jeopardize her affairs in contravention with Article 209 of *the Constitution* of Kenya, 2010, Mr. Ntabo urges this Court to dismiss the Petition for the same has not been proved.

8. The 4<sup>th</sup> Respondent filed Replying Affidavit and a Cross-Petition to the Petition, the latter dated 06/04/2023. The same was filed on 30/08/2023 and reads as follows:
  7. The Petitioner lodged the instant Petition alleging violation of Articles 40 (3); and 47 (I) of *the Constitution* of Kenya, 2010 and has sought various orders including but not limited to mandatory orders compelling Parliament to enact, within six months, from the date of the Court's order, enabling legislation to implement Articles 94 (3) and 188 of *the Constitution*; a mandatory order compelling the National Land Commission to investigate and erect beacons in the disputed territory in Keroka town, within three months from the date of the Court's order; a mandatory order compelling the National Executive to, within twelve months from the date of the Court's order, survey and erect visible beacons clearly demarcating the boundaries of Kenya's 47 Counties as per the District and Provinces Act, 1992, with preference being given to the boundaries between Nyamira and Kisii County.
  8. The subject matter of the Petition is the boundaries of Keroka Town. Whereas was reserved Site for original Keroka market, business activity, habitation and general growth has sprung up all across its environs to propel the area to its current Town status, and ready for elevation to a Municipality,
  9. The Town lies on the left side of the Kisii- Nairobi Highway. Keroka is accordingly beyond its original market status as it clearly spreads into the territories of both Kisii as well as Nyamira Counties whose residents interact freely in practically all spheres of their lives.
  10. In a meeting of 21<sup>st</sup> May, 2014, held at Nairobi Club the Kisii and Nyamira County Governments deliberated and passed Resolutions between Leaders of Kisii And Nyamira Counties on Administration and Management of Keroka Town, with a view of achieving a lasting settlement.
  11. Prior to the above meeting, a Joint Working Committee established by both County Governments had prepared a Joint Working Committee Report on Keroka Town dated 12<sup>th</sup> June; 2013, on the joint working of the two Counties over the territories and boundaries in question. The Report is still in force.
  12. The case of Keroka Town is not a case of historical land injustice as alleged by the Petitioner and hence does not fall within the ambit of the National Land Commission under Article 67 of *the Constitution* of Kenya, 2010.
  13. The present Petition falls within the ambit of boundary demarcation and delimitation of County boundaries under Article 88 of *the Constitution* of Kenya, 2010 and the governance and management of urban areas and cities as contemplated under Article 184 of *the Constitution* of Kenya, 2010.



9. The Cross- Petitioner then laid down the legal constitutional and Statutory Foundations of her case as follows:
14. Article 2(1) of *the Constitution* of Kenya pronounces the supremacy of *the Constitution* and provides that *the Constitution* binds "all persons and all State organs at both levels of Government".
  15. Article 2(5) of *the Constitution* provides among other things that any act or omission in contravention of *the Constitution* is invalid.
  16. Article 3 of *the Constitution* of the Republic of Kenya obligates every person to respect, uphold and defend *the Constitution*.
  17. Article 10 of *the Constitution* provides for National values and principles of governance. It stipulates thus:-
    1. The National values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them-
      - a. applies or interprets this Constitution;
      - b. enacts, applies or interprets any law; or
      - c. makes or implements public policy decisions
    2. The National values and principles of governance include
      - a. Patriotism, National unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
      - b. Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
      - c. Good governance, integrity, transparency and accountability; and
      - d. Sustainable development.
  18. Article 21 of *the Constitution* of Kenya, 2010 provides that:-
    1. It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.
    2. The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.
    3. All State organs and all public organs have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginal bed communities, and members of particular ethnic, religious or cultural communities.
    4. The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms
  19. Article 27 of *the Constitution* of Kenya, 2010 guarantees every person the right to equal protection of the law and prohibits discrimination on any grounds stipulated therein.



20. Article 40 of *the Constitution* of Kenya, 2010 guarantees every person the right to own property.
21. Article 43 of *the Constitution* of Kenya, 2010 guarantees every person the right to accessible and adequate housing and to reasonable standards of sanitation.
22. Article 47 of *the Constitution* of Kenya, 2010 as read with the provisions of the *Fair Administrative Action Act* guaranteeing every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. It provides that:-
  1. Every person has the right to administrative action that is expeditious, eminent, lawful, reasonable and procedurally fair.
  2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
  3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-
    - a. Provide for the review of administrative action by a Court or, if appropriate, an independent and impartial Tribunal; and,
    - b. Promote efficient administration.
23. Article 88 of *the Constitution* of Kenya, 2010 provides that:-
  1. There is established the Independent Electoral and Boundaries Commission.
  2. ....
  3. ....
  4. The Commission is responsible for conducting or supervising referenda and elections to any elective body or once established by this Constitution, and any other elections as prescribed by an Act of Parliament and. In particular, for —
    - a. The continuous registration of citizens as voter;
    - b. The regular revision of the voters' roll;
    - c. The delimitation of constituencies and wards;
    - d. ....
    - e. ....
    - f. ....
    - g. ....
    - h. ....
    - i. ....
    - j. ....
    - k. ....



5. The Commission shall exercise its powers and perform its functions in accordance with this Constitution and National legislation.
24. Article 89 (10) and (11) of *the Constitution* of Kenya, 2010 is to the effect that;
10. A person may apply to the High Court for review of a decision of the Commission made under this Article.
  11. A Petition for the review of a decision made under this Article shall be filed within thirty days of the publication of the decision in the Gazette and shall be heard and determined within three months of the date on which it is filed.
25. Article 174 of *the Constitution* provides for the objects of devolution as follows:-
- The objects of the devolution of Government are —
- a. To promote democratic and accountable exercise of power;
  - b. To foster a moral unity by recognizing diversity;
  - c. To give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
  - d. To recognize the right of communities to manage their own affairs and to further their development;
  - e. To protect and promote the interests and rights of minorities and marginalized communities;
  - f. To promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
  - g. To ensure equitable sharing of National and local resources throughout Kenya;
  - h. To facilitate the decentralization of State Organs, their functions and services, from the capital of Kenya; and
  - i. enhance checks and balances and the separation of powers.
26. Article 184 of *the Constitution* of Kenya provides that:
1. National legislation shall provide for the governance and management of urban areas and cities and shall, in particular —
    - a. Establish criteria for classifying areas as urban areas and cities,
    - b. Establish the principles of governance and management of urban areas and cities; and
    - c. Provide for participation by residents in the governance of urban areas and cities.
  2. National legislation contemplated in clause (1) may include mechanisms for identifying different categories of urban areas and cities, and for their governance.
27. Article 209 of *the Constitution* provides for the principles of public finance. It states that;
1. Only the National Government may impose —



- a. Income tax;
  - b. Value-added tax;
  - c. Customs duties and other duties on import and export goods, and
  - d. Excise tax.
2. An Act of Parliament may authorize the National Government to impose any other tax or duty, except a tax specified in clause (3) (a) or (b).
  3. A County may impose —
    - a. Property rates;
    - b. Entertainment taxes; and
    - c. Any other tax that it is authorized to impose by an Act of Parliament.
  4. The National and County Governments may impose charges for the services they provide.
  5. The taxation and other revenue-raising powers of a County shall not be exercised in a way that prejudices National economic policies, economic activities across County boundaries or the National mobility of goods, services, capital or labour.
28. Section 4 of the *Independent Electoral and Boundaries Commission Act*, which provides thus:-
- As provided for by Article 88 (4) of *the Constitution*, the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by *the Constitution*, and any other elections as prescribed by an Act of Parliament and, in particular, for —
- a. ....
  - b. ....
  - c. The delimitation of constituencies and wards in accordance with *the Constitution*;
  - d. ...
  - e. ...
  - f. ....
  - g. ....
  - h. ....
  - i. ....
  - j. ....
  - k. ....
  - l. ....
  - m. ....
  - n. Such other functions as are provided for by *the Constitution* or any other written law.



29. The *Urban Areas and Cities Act* No. 13 of 2011 was enacted to operationalize Article 184 of *the Constitution* of Kenya, 2010. Section 4A of the Urban Areas and Cities (Amendment) Act, 2019 provides as follows: -
1. Delineation of boundaries of urban areas or cities may be initiated by the Cabinet Secretary or by the relevant County Government making a written request to the Cabinet Secretary to appoint the ad hoc committee in the manner provided under subsection (2).
  2. The Cabinet Secretary shall, on receipt of a request under subsection (1) or on considering it necessary, appoint by notice in the Kenya Gazette an ad hoc committee to delineate the boundaries of an urban area or a city.
  3. The ad hoc committee appointed by the Cabinet Secretary under subsection (2) shall comprise —
    - a. A representative of the Independent Electoral and Boundaries Commission, who shall be the chairperson;
    - b. Three representatives from the National Government drawn from —
    - c. The Ministry for the time being responsible for urban development;
    - d. The Ministry for the time being responsible for
    - e. environment;
    - f. The Ministry for the time being responsible for agriculture; and
    - d. Three representatives from the County Government drawn from —
  4. The Department for the time being responsible for urban development; The Department for the time being responsible for environment; iii. The Department for the time being responsible for agriculture; and  
(Two representatives from the following professional associations —
    - (i) Institute of Surveyors of Kenya; and
    - (ii) Kenya Institute of Planners
  - (4) Where an ad hoc committee is appointed under sub section (2)
    - a. The governor shall nominate the three representatives referred to under subsection (3) (c) for appointment by the Cabinet Secretary; and
    - b. Each of the relevant professional associations shall nominate its representative referred to under subsection (3) (d) for appointment by the Cabinet Secretary.

The representative from the National Government drawn from the Ministry for the time being responsible for urban development appointed under subsection (3) (b) (i) shall serve as the secretary to the ad hoc committee.
  5. Where the boundaries of an urban area extend to more than one County, membership of the ad hoc committee shall include representatives of the relevant Counties and



the proposal for delineation of the boundaries shall be handled by the Council of Governors.

30. The Preamble of the *Urban Areas and Cities Act* is to the effect that: it is "An ACT of Parliament to give effect to Article 184 of *the Constitution*; to provide for the, classification, governance and management of urban areas and cities; to provide for the criteria of establishing urban areas, to provide for the principle of governance and participation of residents and for connected purposes'

She then demonstrated how *the Constitution* and Statutes have been contravened to her detriment:

31. The Petitioner has neither demonstrated that he has attempted to utilize the existing dispute resolution mechanisms or the appropriate organ namely, the Independent Electoral and Boundaries Commission, pursuant to Article 89 and 188 of *the Constitution* of Kenya, 2010, to review the boundary he alleges is in dispute between Nyamira and Kisii Counties.
32. It is apparent from the Petitioner's averments that the instant dispute revolves around the question of delimitation of the boundaries delineating Kisii and Nyamira Counties. The Petitioner asserts thus:

"Para 3 of Petition: "the Petitioner received a petition dated 23<sup>rd</sup> January, 2023, from some 212 residents of Keroka asking him to intervene and help them find a solution to the boundary disputes between Kisii and Nyamira Counties over Keroka town."

Para 5.1 of the Petition, and Para 18.1 of Petition: "There is a boundary dispute between Kisii and Nyamira Counties over the location of Keroka town, which lies on what used to be the boundary between the former Kisii and Nyamira districts of the repealed Constitution of Kenya. Whereas, on the one hand, Nyamira County claims that over 90 per cent of the town belongs to it, Kisii, on the other hand, claims that part of the town belongs to it pursuant to history."

Para 5.2 of the Petition: "That Keroka town became part of Nyamira district upon establishment of the district in 1992 which until, then belonged to Kisii district as per paragraph 5 above under the District and Provinces Act, Act No. 5 of 1992 laws of Kenya."

Para 5.3 of the Petition and Para 18.2 of the Petition: "There are no beacons clearly demarcating the boundaries between Kisii and Nyamira Counties."

Para 6 of the Petition: "The dispute herein would not have arisen had the National Government and the National Land Commission surveyed and erected visible beacons to clearly demarcate the County boundaries in Keroka and other parts of Kenya and the dispute could have resolved the historical land dispute between Nyamira and Kisii Counties over the Keroka Market Centre."

33. The totality of the Petition herein revolves around boundary delimitation, and the Petitioner in fact, further alleges at Para 7 Of the Petition and 21 of the Petition, that the existing delimitation is "unfair" and hence this Court cannot make a finding pertaining to how the boundary is to be demarcated,
34. The role of the Court is limited under Articles 89 (10) and (11) of *the Constitution* of Kenya, 2010 to reviewing the decision of such demarcation and delineation by the Independent Electoral and Boundaries Commission.



35. Contrary to the Petitioner's assertions, the instant dispute as discerned from Paragraph 5 of the Petition pertains to delimitation of boundaries, demarcation of wards and ascertaining the areas around Keroka Market Centre, Kisii Agricultural Training Centre (KATC), Kenya Agricultural Research Institute-Kisii (KARI Kisii), Getare and Jogoo areas neighbouring Kisii town. These areas are contained in various Wards, within the Constituencies/ Counties and hence any such delimitation and demarcation must be guided by the principles enshrined under Article 89 and Article 188 of the Constitution of Kenya, 2010, The Petitioner in fact concedes as much under Paragraph 6 of the Petition.
36. The allegations of any dispute as to the collection of taxes between Kisii and Nyamira Counties, constitute an Intergovernmental dispute that falls within the ambit of the County Government Act and the Intergovernmental Relations Act. At paragraph 22 Of the Petition, the Petitioner concedes by stating that the question of which County collects taxes is a key source of conflict in Kenya's devolved governance system.
37. As pointed out by the Petitioner at Para 33 of his Affidavit, the limitation on the powers of the National Lands Commission to five years is by inference informed by the provisions of Article 89 as read with Article 188 of the Constitution of Kenya, 2010.
38. Contrary to the Petitioner's assertion at Para 32.4, there is no such requirement under the Constitution of Kenya for Parliament to enact any such law to adjudicate County Boundaries, and if the framers of the Constitution intended so, they would have stated so either under Article 89 (10) and (11) as read with Article 188 of the Constitution of Kenya, 2010.
39. Where the Constitution intended specific legislation to be enacted to give effect to certain provisions, the same is expressly stated and a schedule is further provided under the Fifth Schedule of the Constitution pursuant to Article 261 (1) thereof. The Court should therefore reject the allegation by the Petitioner that Parliament has failed to enact legislation for the resolution of County boundaries. Article 261 (1) is to the effect that:
- Parliament shall enact any legislation required by the Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule commencing on the effective date.
- Neither Parliament nor the Executive can therefore be blamed for failing to undertake that which is not provided for by law or required of it.
40. Contrary to the Petitioner's assertions, Section 7 of the Second Schedule to the Constitution of Kenya, 2010 is to the effect that:
- (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications, and exceptions necessary to bring it into conformity with this Constitution.
  - (2) If, with respect to any particular matter —
    - a. A law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and
    - b. A provision of this Constitution that in effect assigns responsibility for that matter to a different State organ or public officer,

The provisions of this Constitution prevail to the extent of the conflict.



41. As a result of the transitional clauses, the provisions of Articles 88, 89, 184, and 188 of *the Constitution* of Kenya, 2010 prevail over issues pertaining to boundary delimitation and demarcation and as such, the *Districts and Provinces Act*, 1992 is to be construed in light of the transitional clauses of *the Constitution* of Kenya, 2010.
  42. The jurisdiction of this Honourable Court is thus ousted by the foregoing provisions of Articles 88; 89; 184, and 188 of *the Constitution* of Kenya, 2010, and more specifically, under the *Urban Areas and Cities Act*, which is to the effect that:
    - (1) Where the boundaries of an urban area extend to more than one County, membership of the ad hoc committee shall include representatives of the relevant Counties and the proposal for delineation of the boundaries shall be handled by the Council of Governors.
  43. The jurisdiction of this Honourable Court is ousted by virtue of the nature of the dispute being the delimitation, demarcation, and recognition of the boundaries of Keroka town, and more specifically pursuant to Articles 88 (4); 89; 184; and 188 of *the Constitution* of Kenya, 2010 as read with Sections 4A of the *Urban Areas and Cities Act* (Amendment) 2019.
  44. Further to the foregoing, pursuant to Section 27 of the Sixth Schedule to *the Constitution* of Kenya, 2010, any such boundary issue is to be determined in accordance with *the Constitution*, including boundaries of constituencies and wards.
  45. There is an existing Resolution passed on 21<sup>st</sup> May, 2014 and a Report prepared jointly between Nyamira and Kisii Counties on Keroka Town and the boundary in question in the instant suit dated 12<sup>th</sup> June; 2013 pertaining to the boundary in question in these proceedings and over the years, the County Government of Nyamira and the County Government of Kisii have been implementing and enforcing the said Agreement.
  46. The County Governments of Kisii and Nyamira have over the years worked in harmony and on the understanding of the said Resolution and joint Report and hence there is a greater public interest in the Court upholding the same and ensuring the maintenance of the current status quo.
  47. No such dispute has arisen under the said Agreement and the same is not the subject of challenge before this Honourable Court. The instant Petition is therefore aimed at disrupting the continued smooth implementation Of the Resolution and Agreement by the two Counties as passed on 21<sup>st</sup> May, 2014 and an invitation for the Honourable Court to engage in a moot academic exercise.
10. The 4<sup>th</sup> Respondent accordingly sought the following prayers in the Cross-Petition: -
1. That the Petition dated 06/04/2023 be dismissed with costs.
  2. A Declaration be and is hereby issued to the effect that the aforesaid Petition is pre-mature and that this Honourable Court lacks jurisdiction to hear and determine the same at this stage.
  3. A Declaration be and is hereby issued to the effect that the jurisdiction of this Honourable Court is ousted by virtue of the nature of the dispute being the delimitation, demarcation and recognition of the boundaries of KEROKA TOWN and more specifically pursuant to Articles 88 (4), 89, 184 and 188 of *the Constitution* of Kenya, 2010 as read with Sections 4A of the Urban Areas and Cities (Amendment) Act, 2019.



4. The costs of the Petition and Cross-Petition herein be awarded to the 4<sup>th</sup> Respondent.
5. Any such other orders that the Court shall deem fit and appropriate.
11. The said Cross-Petition is also supported by an Affidavit sworn by the County Secretary, Mr. James Ntabo on 20/08/2023 who once again attached the following documents in support of the Cross-Petition:  
SUBPARA a.  
Minutes of meeting leaders of Kisii and Nyamira Counties on Administration and Management of Keroka Town, held at Nairobi Club on 21/05/2014.  
SUBPARA b.  
Joint working Committee Report on Keroka Town.
12. On 07/11/2023, the 5<sup>th</sup> Respondent filed a Replying Affidavit sworn by Erastus Menge Orina, her County Attorney who is also an Advocate of the High Court of Kenya who depones that there is indeed a dispute as to where the boundary between the 4<sup>th</sup> and 5<sup>th</sup> Respondents specifically at Keroka lies with each party taking a different position. He further depones that the 4<sup>th</sup> Respondent does not indicate any of her constitutional rights that have been violated, the nature of injury caused or likely to be caused to the Cross-Petitioner as demanded by *the Constitution*. He further says that the Joint Report attached to the 4<sup>th</sup> Respondents' Affidavit has never been implemented and that the issue of jurisdiction raised in the Cross-Petition was determined by this Court. The 5<sup>th</sup> Respondent therefore urges this Court to dismiss the Cross-Petition.
13. The 3<sup>rd</sup> Respondent opposed the 4<sup>th</sup> Respondent's Cross-Petition on the Grounds that: -
  1. The Cross Petition is res judicata as the issue of the Court's Jurisdiction was heard and determined vide the Court's Ruling delivered on 25<sup>th</sup> May, 2023.
  2. The Cross Petition is misconceived as it has no basis in law and is an attempt to frustrate progress of the case.
  3. The Cross Petition is scandalous, frivolous and vexatious and would otherwise be an abuse of the Court process.
14. The 5<sup>th</sup> and 6<sup>th</sup> Interested parties, former councillors Keroka Town Council and now Ichuni ward and residents of Keroka opposed the Petition on the grounds below:
  1. As former County legislators, it is their case that they are conversant with the existing boundary dispute between Kisii and Nyamira County, they are equally conversant with the maps of the locality in dispute and the boundary demarcations as they are well indicated on the maps the same lying behind the following places Keroka Health Center, Keroka Police Station, Gusii Deluxe and Keroka Society all the way up to Dondori.
  2. The 5<sup>th</sup> & 6<sup>th</sup> Interested Parties submit that Keroka Town was established as an urban council in 1979 courtesy of the then area MP John Andrew Omanga whose area of jurisdiction was within the former Kisii district currently Kisii County.
  3. That Keroka later became a Town Council in 1997, where the 5<sup>th</sup> Interested Party served as its first mayor whose jurisdiction was entirely within the former Kisii District in Kisii County.



4. That during the tenure of the 5<sup>th</sup> Interested Party before and after the devolved system of governance, there were no boundary disputes between Kisii and Nyamira as the same were clearly indicated on the maps and residents adhered to the same without any squabbles.
5. It is the 5<sup>th</sup> & 6<sup>th</sup> Interested Parties' submissions that Ichuni ward is currently demarcated by the Independent Electoral and Boundaries Commission (IEBC) as entirely falling within Kisii County by the allocation of Keroka Farmers Union Polling station and Keroka Bus Park polling station with votes tallied for various administrative seats within Kisii County.
6. That further, the 2019 census conducted through the then Assistant Chief Christopher Barare within Ichuni was tallied as part of Kisii County population.
7. The 5<sup>th</sup> and 6<sup>th</sup> Interested Parties submit on the background that there have been previous deliberations between the two Counties Kisii and Nyamira which have resulted to the peaceful coexistence of the residents of Keroka since 2014 and even before that.
8. The 5<sup>th</sup> and 6<sup>th</sup> Interested Parties herein pray that it will only be just and fair and in the interest of justice that the Court do consider the deliberations of the meeting held on 21<sup>st</sup> May 2014 together with the Report by the joint working Committee established by the two County Governments dated 12<sup>th</sup> June 2013.
9. Ascertaining a boundary which is politically charged will serve to disrupt the peaceful coexistence of the clans and indigenous communities residing and carrying their businesses within Keroka Town. The Mwamangera and Bomobea people are one community in Kisii and a boundary dispute should therefore not divide that peace and thus an urgent need to refer the matter to mediation as envisioned in *the Constitution*.
16. The 5<sup>th</sup> & 6<sup>th</sup> Interested Parties submit that the following are the issues for determination by the Honourable Court;
  - a) Whether the Honourable Court has jurisdiction to hear and determine the instant Petition.
  - a. Whether the allegation of double taxation in Keroka Town have been substantiated.
17. From the onset, the 5<sup>th</sup> & 6<sup>th</sup> Interested Parties submit that the instant Petition is premised on Article 88 of *the Constitution* of Kenya as it squarely deals with the boundary of Keroka town.
18. Article 88 of *the Constitution* of Kenya provides that;
 

“ 88 (1) There is established the Independent Electoral and Boundaries Commission.

  - (4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—
    - (a) ....
    - (b) .....
    - (c) the delimitation of constituencies and wards;



19. Article 188 of *the Constitution* of Kenya provides that;

“ 188.

188. The boundaries of a County may be altered only by a resolution—

- (1)
  - 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 of 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.”

20. The 5<sup>th</sup> & 6<sup>th</sup> Interested Parties submit that the Petition as presented seeks to delineate the boundaries of Kisii and Nyamira Counties. In the Petition, he states that he received instructions to intervene since there is an alleged boundary dispute between the two Counties.

21. *The Constitution* under Article 89 provides that;-

“(10) A person may apply to the High Court for review of a decision of the Commission made under this Article.

(11) An application for the review of a decision made under this Article shall be filed within thirty days of the publication of the decision in the Gazette and shall be heard and determined within three months of the date on which it is filed.”

22. Equally, the 5<sup>th</sup> & 6<sup>th</sup> Interested Parties will refer the Honourable Court to the provisions under Article 184 *the Constitution* of Kenya which provide that;

“ 184. (1) National legislation shall provide for the governance and management of urban areas and cities and shall, in particular—



- a. establish criteria for classifying areas as urban areas and cities,
  - b. establish the principles of governance and management of urban areas and cities; and
  - c. provide for participation by residents in the governance of urban areas and cities.”
23. The 5<sup>th</sup> & 6<sup>th</sup> Interested Parties therefore submit that by dint of the express provision spelt above, the jurisdiction of this Honourable Court is deposed and on that aspect of jurisdiction, the 5<sup>th</sup> & 6<sup>th</sup> Interested Parties will place reliance on the decision of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR;
 

“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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. “
24. The 5<sup>th</sup> & 6<sup>th</sup> Interested Parties further submit that the instant Petition in its entirety is an affront of various principles of constitutionalism and the rule of law specifically;
  - a. The doctrine of separation of powers;
  - b. The well laid principles of pleading constitutional petitions laid down in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR; and
  - c. The doctrine of exhaustion;
25. The High Court in Paragraph 272 of its judgement in *Matindi & 3 others v The National Assembly of Kenya & 4 others; Controller of Budget & 50 others (Interested Parties) (Petition E080, E084 & E150 of 2023 (Consolidated))* [2023] KEHC 19534 (KLR) (Constitutional and Human Rights) (3 July 2023) (Judgment) (with dissent - HI Ong'udi, J) declined an invitation to delve into an arena which by the principle of separation of powers, falls within the realm of policy, and rightly belongs to the other relevant arms of Government as may be appropriate.
26. In respect to the holding above, the High Court relied on the rationale in *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* [2016] eKLR stating thus-
 

“ [99]. The political question doctrine focuses on the limitations upon adjudication by Courts of matters generally within the area of responsibility of other arms of Government....

[100] According to the political question doctrine, certain sets of issues categorized as political questions, even though they may include legal issues, are considered to be external to the Judiciary as an arm of Government. Such issues are handed over to other branches of Government for adjudication. The political question doctrine therefore focuses on limiting of adjudication of disputes by Courts in favour of the legislative and the executive interventions. It is underpinned by the concept of separation of powers. All that the Courts are doing in such situations is assigning discretion on the issue to another branch of Government.”



27. The reasoning in the above dicta, the facts of this case have other remedies in *the Constitution* to which the Honourable Court should desist from determining since; delimitation of boundaries is a preserve of the Independent Electoral and Boundaries Commission, the Petitioner in Paragraph 5.1 of the instant Petition concedes that there is a boundary dispute between the 4<sup>th</sup> and 5<sup>th</sup> Respondent whose resolution mechanisms is a pure preserve of Article 189(3) of *the Constitution*. Article 188 and 94(3) further vests parliament with the sole authority to come up with a commission for the sole purpose of altering the said boundaries.
28. The 5<sup>th</sup> & 6<sup>th</sup> Interested Parties submit that the basis upon which the 1<sup>st</sup> Respondent is enjoined in this suit on to delimit the said contested boundaries is wholly misconceived since; the Commissions mandate is limited to making inquiries into land injustices in addition to managing public land on behalf of our National and County Governments.
29. The instant Petition in its totality necessitates the participation of the Independent Electoral and Boundaries Commission under Article 89 of *the Constitution* since it is tasked with delimitation of electoral units. A decision resulting from boundaries of the 4<sup>th</sup> and 5<sup>th</sup> Respondents will thus affect the boundaries of constituencies and wards thus usurp clearly enumerated powers of the said commission.
30. Your Lordship, the description of the mandate of the 1<sup>st</sup> Respondent by the Petitioner to include delimitation of boundaries is antithetical to the provisions of Article 67 of *the Constitution* as well as the *National Land Commission Act*, 2015. In the foregoing, the only tenable mandate which the Petitioner can invite the Honourable Court to decide on is for the 1<sup>st</sup> Respondent to make an inquiry into any historical injustice if any or, facilitate dispute resolution on land. This we submit does not exist.
31. It is therefore submitted that the Honourable Court has no jurisdiction from the onset delving into the delimitation of boundaries between the two Counties as it has been asked to do by the Petitioner.
32. As earlier stated, 5<sup>th</sup> & 6<sup>th</sup> Interested Parties are people of rich history as regards Keroka Town. As a former County legislator, it is their case that they are conversant with the existing boundary dispute between Kisii and Nyamira County they are equally conversant with the business dealing in the town by virtue of them being businessmen and traders as well.
33. The 5<sup>th</sup> & 6<sup>th</sup> Interested Parties submit that a careful look at the Petition, the alleged violations regarding taxation have not been stated with precision. Such that a claim made as being a violation cannot fly on the face of it same has to be pleaded with specificity and precision. From the evidence relied upon by the Petitioner, it is unfortunate that that has not been attained.
34. The 5<sup>th</sup> & 6<sup>th</sup> Interested Parties submit that it is actually the instant said Petition which interferes with the 5<sup>th</sup> Respondent's constitutional mandate under Article 209(3) to collect tax as read together with Section 157 of the *Public Finance Management Act*. This has greatly prejudiced service delivery and development for Keroka residents and the residents in Kisii County at large hence wholly intended to frustrate the 5<sup>th</sup> Respondent.



35. The 5<sup>th</sup> & 6<sup>th</sup> Interested Parties refer to the case of Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others C.A No. 290 of [2013] eKLR where the Court of Appeal stated as follows;
- “(39) The issue was raised that the 1<sup>st</sup> Respondent had omitted to frame their case or complaint with precision as required under the High Court’s pronouncement in Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272. Counsel for the appellant submitted that the petition failed the requirement as it did not state the alleged constitutional provisions violated and the acts or omissions complained of with reasonable precision. Apart from citing omnibus provisions of *the Constitution*, the petition provided neither particulars of the alleged complaints, the manner of alleged infringements or the jurisdictional basis of the action before the Court. He maintained that such failure to draft the petition with precision had prejudiced the appellant and the other Respondents.
- (41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a Court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”
36. It is therefore not the business of the Honourable Court nor that of other parties in the matter to try and guess what exactly the Petitioner is claiming. We have not been told which taxes have been paid by the said traders, which ones have been taxed if at all twice and what are the guiding principles regarding the said taxes. We submit that Keroka town has been existing for sometime and traders have heard a very smooth transaction of business including the 5<sup>th</sup> and 6<sup>th</sup> Interested Parties herein.
37. The 5<sup>th</sup> & 6<sup>th</sup> Interested Parties submit that the allegations by the Petitioner on double taxation have not met the required standard of proof. Those allegations can only be termed as hearsay and rumours from fictitious characters who have not identified themselves with documentation to show that indeed they represent the said traders at all. For instant an allegation by one George Otiso Mochama that they were attacked in 2016, seven years down the line has resulted to no prosecution at all. That cannot be considered as evidence for double taxation.
38. That even in an event this Court is properly seized of a matter and there are other remedies, a litigant should first explore them before approaching an Honourable Court of law for the appropriate remedies.



39. The above position was enunciated by the supreme Court in paragraph 118 of *Ibert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* [2019] eKLR which provided–
- “In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior Courts is not a substitute for known legal procedures. Even where superior Courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, Tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.”
40. It is on the same basis that, the Petitioner should have sought the dispute resolution mechanisms under Articles 67(f), and 189(3) of *the Constitution* if at all the claim on double taxation is anything to go by.
41. It is therefore submitted that the Petitioner has prematurely moved the Honourable Court, without adequate evidence to seek the prayers sought.
42. The Petitioners herein has no legitimate cause of action in law and is wrongly before this Honourable Court as the Honourable Court lacks jurisdiction to entertain a petition brought under the provisions of Article 88 and 189 of *the Constitution* of Kenya.
43. Finally, the 5<sup>th</sup> & 6<sup>th</sup> Interested Parties submit that the boundaries of Keroka Town are well spelt and the operations of business has been smooth ever since a resolution was arrived at by the two Counties. Making any other order that will be against the wishes of the residents other than enforcing that which they have been used to will now result to the said conflicts envisioned by the Petitioner.
13. The cross-Petitioner’s prayers are mainly on the issue of the Court lacking jurisdiction. Earlier, this Court had made a finding on jurisdiction to determine the issues in this Petition. This issue was heard and determined in the Ruling dated 24/05/2023 and I wish to reproduce part of the Ruling:
- “This Court derives its authority from Article 162 (2) (b) of *the Constitution* of Kenya, 2010:
- “Parliament shall establish Courts with status of the High Court to hear and determine disputes relating to the Environment and the use and occupation and Title to land.”
- The *Environment and Land Court Act*, No. 19 of 2011 is preambled:-
- “An act of parliament to give effect to Article 162 (2) of *the Constitution* to establish a Superior Court to hear and determine disputes relating to the environment and the use and occupation of and title to land, and to make provision for its jurisdiction functions and powers and for connected purposes.”



Section 13 (2) (a) (c) and (e) of the Act provides that: -

“In exercise of its jurisdiction under Article 162 (2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes.

- (a) relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources
- (b) Relating to land administration and management
- (c) Any other dispute relating to environment and land.”

Among the issues raised in this Petition is who should collect revenue in Keroka Town. Such revenue include rates and rents by the 2 County Governments that have a common boundary on the said town. The other issue is where the boundary is. The 2<sup>nd</sup> Interested Party admits that the issue of the boundary between the Petitioner’s ward Rigomba in Nyamira and that of Ichuni in Kisii County is in issue. Should this Court determine prayer numbers (c) (g) and (k) of the Petition which fall under Article 162 (2) (b) of *the Constitution* it will have discharged its mandate. This is in fact the dominant issue. It falls under occupation of land. This Court therefore has jurisdiction under Article 162 (2) (b). Once the same is sorted out, all other issues will take their shape, including the collection of revenues. Unless there are other underlying issues not brought out before this Court.”

14. To help make a finding as to whether the residents of Keroka are forced to pay “double taxes”, a gross violation of the traders' property rights under Article 40 (3) of *the Constitution*, this Court had to first establish the boundaries which is invariably the dominant issue. I applied the law on the determination of the issue of boundary disputes. This Court is awake to the reality that the Resolution of boundary disputes has always been in the purview of experts such as Surveyors and Land Registrars as well as specialists from the Ministry of Lands and Physical Planning and the 3<sup>rd</sup> Respondent. Accordingly, and with the above in mind, on 06/06/2023, the Court made the following orders: -
  1. That, by consent the Application dated 05/06/2023 is hereby granted. The 3 Interested parties are hereby admitted as Interested Parties No. 4, 5 and 6.
  2. That the Court and all the parties in this case including Mr. Begi will visit the Locus in Quo on 16/06/2023 at 2.30p.m. for the ascertainment of the boundary in Keroka between Kisii and Nyamira Counties. Also present will be the experts from the Ministry of Lands and Physical Planning, Regional Surveyor, Nyanza and Land Registrars and County Surveyors from both Kisii and Nyamira Counties.
  3. That the 2<sup>nd</sup> Respondent will also provide any other expert from the Ministry who is not from either County to show the parties where the boundary is. Each party in the case is also at liberty to bring his/her private Surveyor for the exercise.
  4. That the O.C.P.D. Keroka to provide security for the exercise.
  5. That the I.E.B.C. and experts from Survey of Kenya and Ministry of Lands and Physical Planning to visit the Locus in Quo with security from OCPD Keroka to agree on the boundaries on 16/06/2023 at 9.00a.m. The M.C.A. Ichuni Ward in Kisii County Mr. Wycliffe Siocha to participate in the exercise.
15. In response to the said Order, the parties herein visited the locus in Quo and a joint Report by I.E.B.C, Directorate of Surveys, State Department for lands on the dispute dated 29/06/2023 was compiled.



On 30/6/2023 the joint Report by the 3<sup>rd</sup> Respondent, Commission and Directorate of Survey State Department for Lands on the Boundary between Kisii and Nyamira Counties at Keroka dated 29/6/2023 was filed in Court which gave the status of the Boundary at Keroka as follows: -

1. Electoral Boundaries: -
  - a. The Kisii and Nyamira County Boundary.
  - b. Nyaribari Masaba and Kitutu Masaba Constituency Boundary.
2. Administration Boudaries:-
  - a. The Kisii and Nyamira County Boundary
  - b. Masaba South (Kisii County) and Masaba North (Nyamira County) Sub-County boundary,
  - c. Ichuni (Kisii County) and Keroka Township (Nyamira County) Location boundaries.
  - d. Ichuni (Kisii County) and Bocharia Kegogi and Nyasare (Nyamira County) sub-location boundaries.

The findings of the Report were as follows; -

The southerly part of ascertained boundary is overshoot by building by about give (5) meters (from Beacon AX9 to Beacon P46 – Nyamira County side of the boundary toward Kisii County side) Union cooperative Society Building used as an Electoral Voting Center for Kisii County transcend the boundary. See illustration below between beacon E30 and P36.

Conclusion; -

The ascertainment of the boundary was based on existing records (data referenced above) kept by the office of the Director of Surveys. Therefore, the position thus ascertained are factual and reproducible.

Recommendation; -

It is prudent to have the boundary line at Keroka market center defined with permanent beacons for the knowledge of the general public and for the administrators and service providers to know their areas of jurisdiction.

- a. Land Registration section Boundaries: - Bomobea Registration section in Kisii County Mwamangera Registration section in Nyamira County.

The Administrative Boundaries are defined by the *Districts and Provinces Act*, No. 105A of 1992, revised 2012.

Counties were created out of the then districts described in the above referenced act, hence they have the same respective boundaries.

Land registration units are fitted within administrative boundaries.

Effective, all the three categories boundaries at Keroka Market coincide, i.e, The Kisii and the Nyamira County, Electoral and Administrate Boundaries are one and the same.

At Keroka Market center, the Boundary between The Kisii and Nyamira Counties is shared. So are the Electoral Boundary between Nyaribari Masaba



and Kitutu Masaba Constituency, Ichuni (Kisii County) and Rigoma (Nyamira County) ward as well as land registration section boundaries of Bomobea Registration Section in Kisii County and Mwamang'era Registration Section in Nyamira County.

By determining one category of boundary, the other two categories would be determined.”

16. This Report is clear and unequivocal. The same settles the boundary issue. The Court therefore adopts the said Report and further states that although the 3rd Respondent has only been given powers to delineate boundaries of Constituencies and wards and not that of Counties, by delineating the aforesaid boundaries it is then quite easy to tell each County's boundary since every County has a specific number of constituencies and wards and I wish to take judicial Notice of the fact that no single constituency falls within 2 Counties. The same applies to wards. Kisii County has the following constituencies:

This Report is clear and unequivocal. The same settles the boundary issue. The Court therefore adopts the said Report and further states that although the 3

261. Bonchari. 262. South Mugirango. 263. Bomachoge Borabu. 264. Bobasi. 265. Bomachoge Chache. 266. Nyaribari Masaba. 267. Nyaribari Chache. 268. Kitutu Chache North. 269. Kitutu Chache South.

As for Nyamira County, these are the 4 constituencies the same is comprised of:

270. Kitutu Masaba. 271. West Mugirango. 272. North Mugirango. 273. Borabu.

On the wards, Kisii County has 45 wards viz:



Ward Name	Constituency
1. Borabu/Chitago	South Mugirango
2. Ibeno	Nyaribari Chache
3. Majoge Bassi	Bomachoge Chache
4. Bogeka	Kitutu Chache South
5. Monyerero	Kitutu Chache North
6. Nyakoe	Kitutu Chache
7. Marani	Kitutu Chache North
8. Tabaka	South Mugirango
9. Boikang'a	South Mugirango
10. Moticho	South Mugirango
11. Bogusero	Kitutu Chache South
12. Ichuni	Nyaribari Masaba
13. Bokimonge	Bomachoge Borabu
14. Birongo	Nyaribari chache
15. Masige East	Bobasi
16. Kegogi	Kitutu Chache North
17. Masimba	Nyaribari Masaba
18. Kiamokama	Nyaribari Masaba
19. Keumbu	Nyaribari chache
20. Bombaba	Bomachoge Borabu
21. Gesusu	Nyaribari Masaba
22. Bassi Central	Bobasi
23. Bobasi Boitangare	Bobasi
24. Bomorenda	Bonchari



25. Sensi	Kitutu Chache North
26. Sameta/Mokwerero	Bobasi
27. Masige West	Bobasi
28. Nyacheiki	Bobasi
29. Riana	Bonchari
30. Kitutu Central	Kitutu C. South
31. Bomariba	Bonchari
32. Bogetenga	South Mugirango
33. Bogiakumu	Bonchari
34. Bobasi Chache	Bobasi
35. Getenga	South Mugirango
36. Boochi Borabu	Bomachoge Borabu
37. Kiogoro	Nyaribari chache
38. Bobaracho	Nyaribari chache
39. Nyamasibi	Nyaribari Masaba
40. Boochi-Tendere	Bomachoge Chache
41. Bosoti-Sengera	Bomachoge Chache
42. Magenche	Bomachoge Borabu
43. Nyatieko	Kitutu Chache South
44. Bassi Bogetaoria	Bobasi
45. Kisii Central	Nyaribari Chache Bottom of Form On the other hand, Nyamira County has 20 wards as follows:

1. Rigoma Kitutu Masaba Constituency
2. Gachuba Kitutu Masaba Constituency



3. Kembra Kitutu Masaba Constituency
  4. Magombo Kitutu Masaba Constituency
  5. Manga Kitutu Masaba Constituency
  6. Gesima Kitutu Masaba Constituency
  7. Nyamaiya West Mugirango Constituency
  8. Bogichora West Mugirango Constituency
  9. Bosamaro West Mugirango Constituency
  10. Bonyamatuta West Mugirango Constituency
  11. Township West Mugirango Constituency
  12. Bomwagamo North Mugirango Constituency
  13. Bokeira North Mugirango Constituency
  14. Magwagwa North Mugirango Constituency
  15. Ekerenyo North Mugirango Constituency
  16. Itibo North Mugirango Constituency
  17. Mekenene Borabu Constituency
  18. Esise Borabu Constituency
  19. Nyansiongo Borabu Constituency
  20. Kiabonyoru Borabu Constituency
17. The boundary at Keroka cuts across Rigoma Ward, Kitutu Masaba Constituency in Nyamira County and Ichuni Ward, Nyaribari Masaba Constituency in Kisii County. The Residents of the town know where they vote and in which County. There should therefore be no confusion over the boundary between the 2 Counties. Simple logic. You do not require rocket science to determine this. If that is not enough, Kenya's 47 Counties were established based on the then 47 districts of Kenya, including the Nyamira district, established under the *Districts and Provinces Act*, 1992, (Chapter 105 of the Laws of Kenya), which clearly and comprehensively delineated the boundaries of the districts. Section 6 of the Provinces and Districts Act, 1992, defines the boundaries of Nyamira District, which is the present day Nyamira County, as

“Commencing at the confluence of the Nyatutu and Sondu rivers; thence generally southerly and up-stream by the centre of that river to confluence with the Kipsonoi River; thence generally south-westerly and up-stream by an un-named tributary of the Kipsonoi/Sondu rivers for a distance of approximately  $\frac{1}{2}$  a mile; thence continuing generally south-westerly by a straight line to the intersection of the eastern (or south-eastern) boundary of the Kericho-Sotik road reserve; thence generally southerly by that road reserve boundary to its intersection with the Kisii-Sotik road reserve; thence generally south-westerly by the north-western boundary of that road reserve to its intersection with the south-western boundary of L.R. NO. 5411; thence south-easterly by part of the latter boundary and by the south-western boundaries of L. R. Nos. 946/1 and 10099/2 to a beacon at the most



easterly corner of L.R. NO. 5460/ 1; thence south-westerly by the south-eastern boundaries of L.R. Nos. 5460/ 1, 5460/3 and 3644/ 10 to a beacon at the most southerly corner of the last portion; thence north-westerly and westerly by the southern boundaries of L.R. No. 3644/ 10 to a beacon at its south-west corner; thence generally southerly, north-westerly and again generally, southerly by the Manga Hill Ridge to the trigonometrical point Gelegele at the most southerly corner of original L.R. No. 8997; thence north-westerly by a straight line to its intersection with south-western boundary of East Kitutu Location; thence northwesterly by that boundary and continues with north-westerly, northeasterly, easterly by Central Kitutu Location boundary to its intersection with western boundary of Ekerubo Location; thence northerly by the western boundary of that location and continuing northerly by western boundary of Keera and West Mugirango Location to its intersection with common boundary between Homa Bay, Kisii and Nyamira Districts; thence north-easterly by northern boundary of West Mugirango, North Mugirango Chache to the point of Commencement.

Section 6 of the said Act, 1992 defines the boundaries of Kisii District, which is the present day Kisii County as:

“Commencing at the trigonometrical point Gelegele at the most southerly corner of original L.R. No. 8997;

Thence on a true bearing of  $256^{\circ} 0' 53''$  for a distance of 55,521 feet to a beacon Kisuna;

Thence on a true bearing of  $255^{\circ} 0' 45''$  for a distance of 16,076 feet to a beacon Gap;

Thence on a true bearing of  $256^{\circ} 0' 33''$  for a distance of 10,561 feet to a beacon Onanja;

Thence on a true bearing of  $255^{\circ} 0' 42''$  for a distance of 11,070 feet to a beacon Nyabitunya;

Thence on a true bearing of  $254^{\circ} 0' 52''$  for a distance of 3,435 feet to a beacon Nyabitunya W;

Thence on a true bearing of  $256^{\circ} 0' 37''$  for a distance of 15,293 feet to a beacon Makenche;

Thence on a true bearing of  $253^{\circ} 0' 41''$  for a distance of 6,219 feet to a beacon T;

Thence on a true bearing on  $262^{\circ} 0' 42''$  for a distance of 4,669 feet to a beacon R at the source of the Sare River;

“Thence generally westerly and downstream by the course of that river to the intersection of the south-eastern boundary of L.R. No. 8059 on the south side;

Thence continuing generally westerly, northerly by generally western boundary of Gitenga, South Mugirango Central, South Mugirango Chache, South Wanjare and North Wanjare locations which forms the common boundary between Kisii, Migori and Homa Bay districts to its intersection with north-western corner of Bugesero Location;

Thence north-easterly by northern boundary of Bogusero, Kiomooncha, Mwamonari, Kegogi to the point of intersection between West Mugirango and Kegogi Locations; thence southerly by generally eastern boundary of Kegogi, Ngenyi and continuing westerly by that location boundary and continuing generally southerly over Manga Ridge by eastern Boundary of Sensi and Nyatieko Location to its intersection with Kisii Municipality boundary; hence generally southerly by that municipality boundary.



And continuing generally south-easterly by generally north-eastern boundary of Nyaribari Kiogoro, Nyaribari Keumbu, Nyaribari central. Nyaribari Masaba to the point of commencement.”

18. I did invite Counsel to file written submissions and highlight the same in Court which they did and I have considered the same before writing this Judgment.

Coming to the Cross-Petition, it is important to look at the Report of the Joint working committee on Keroka Town dated 22/6/2013. First, the historical background of this Report. At the heart of the Report is Keroka Town, a fast-growing cosmopolitan town with a robust economy in the middle of Gusiiland.

It has a very hardworking population, the Kisii Bomet -Narok – Maai-, Mahiu -Nairobi road passes through the town. It is also a busy trading Centre. According to the joint Report the name Keroka comes from a shrub that surrounded the town – Emeroka. It has a population of close to 100,000. From the above Report Nyamira District was hived off from Kisii in 1992. The Report suggested that the town be planed as one unit for the purposes of guiding and coordinating developments of infrastructural facilities and services. Collection of revenue and provision of services was to be joint.

On 21/5/2012 the first Governors of Kisii and Nyamira H.E, James Ongwae and H. E. John Nyagarama respectively held a meeting of leaders from the two Counties on the administration and management of Keroka Town. Among the resolutions that the leaders came up with were: -

That the leaders recognize that there is no boundary dispute relating to Keroka town between the two Counties as the conventional boundaries were well known and understood.As a leadership, we recognize.....That the management committee can only report to one centre of authority. It has been decided that the committee reports to the Governor of Nyamira who will share the regular reports with the Governor of Kisii County.The 2 Governors would appoint a town administrator and Deputy town administrator who would administer the town on a day to day basis.The elected members present from the 2 Counties were to ensure effective service delivery to the residents and would continue meeting on a quarterly basis.

19. Honourable Chris Obure who was the then Senator of Kisii is not the Senator today, the then Governor of Kisii has completed his 2 terms. The then Governor of Nyamira is deceased. Kennedy Okongó is no longer the Senator of Nyamira and so is Hon. Elijah Moindi who is no longer member of parliament for Nyaribari Masaba nor is Hon. Timothy Bosire the MP for Kitutu Masaba today.

*The Constitution* of Kenya, 2010 under Article 259 (1) (d) provides that *the Constitution* shall be interpreted in a manner that contributes to good governance. Agreements such as this one are very important particularly for border towns mainly because of the cost implication and efficiency. Where there are conurbations falling within bordering Counties, certain categories of joint service delivery are inevitable. Such services as garbage collection, firefighting and water provision etc. can be jointly carried out. Even the National Government cannot afford 2 police stations, 2 Court stations, 2 high schools etc. for each side of the divide. People must learn to co-exist. Keroka town has no choice but to serve both Counties. Its centrality is an asset and although it comes with its own challenges, such challenges are no doubt manageable. The above arrangement seems to have worked so perfectly due to the goodwill of the eminent Abagusii leaders who came up with the recipe for joint service delivery. Unfortunately, the joint provision of services seems to have ultimately failed. By the time the Petitioner moved this Court, the situation had deteriorated to the extent that the residents demanded separate provision of services by the National Government as well. Suspects arrested from one side of the divide would protest being taken to the other side of the town that belongs to the other County. I will say no more. No wonder, no one has shown to the Court that the arrangement still works and who is in



charge of Keroka town. A new crop of leaders had emerged who felt that the said memorandum of understanding does not serve their interests and is an affront to their constitutional rights. One of such leaders is the Petitioner herein, the member of Nyamira County Assembly representing Ichuni ward. The Court can't shut him out but to listen to his case and determine whether the same is valid.

Is the agreement that was arrived at by both Counties provided for by law? Parliament, in its undoubtedly enormous wisdom passed the [County Governments Act](#), Cap 265 Laws of Kenya, an Act of Parliament to give effect to Chapter Eleven of [the Constitution](#); to provide for County Governments' powers, functions and responsibilities to deliver services and for connected purposes.



Under	<p>Section 116 of the <i>County Governments Act</i>, the basic responsibility of service delivery in the County belongs to the County.</p> <table border="1" data-bbox="858 344 1385 739"> <tr> <td data-bbox="858 344 1123 739">(1)</td> <td data-bbox="1123 344 1385 739"> <p>A County Government and its agencies shall have an obligation to deliver services within its designated area of jurisdiction.</p> <p>However, under Section 118,</p> </td> </tr> </table>	(1)	<p>A County Government and its agencies shall have an obligation to deliver services within its designated area of jurisdiction.</p> <p>However, under Section 118,</p>
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20. But there is no provision in law for any two or more Counties to collect revenue within the same jurisdiction or place. Article 209 of *the Constitution* provides for the principles of public finance. It states that;
6. Only the National Government may impose —
    - e. Income tax;
    - f. Value-added tax;
    - g. Customs duties and other duties on import and export goods, and
    - h. Excise tax.
  7. An Act of Parliament may authorize the National Government to impose any other tax or duty, except a tax specified in clause (3) (a) or (b).
  8. A County may impose —
    - e. Property rates;
    - f. Entertainment taxes; and
    - g. Any other tax that it is authorized to impose by an Act of Parliament.
  9. The National and County Governments may impose charges for the services they provide.
  10. The taxation and other revenue-raising powers of a County shall not be exercised in a way that prejudices National economic policies, economic activities across County boundaries or the National mobility of goods, services, capital or labour.
21. As there was no evidence that either County Government ever authorised her agents, officers, employees, staff and/or servants to collect revenue whether licenses, rates, rents or by whatever name I will not make any adverse or compensatory orders against either of them but should such people be hiding behind the Respondents' cloak, the Respondents should smoke them out. And in any case, in the agreement arrived at by both Counties, there is no mention of cross-boundary collection of revenue and anybody purporting to use the said agreement to collect revenue beyond his area of jurisdiction is a criminal and ought to be dealt with as such.



No wrong is without redress. If the Petitioner feels that the implementation of the above agreement has caused any violation of his rights where should he go for redress?

This Court is alive to the dispute resolution mechanism stipulated under Article 189(2) of *the Constitution* and the provisions of Part IV of the Inter-Government Relations Act No. 2 of 2012.

22. The Petitioner is faulting the 4<sup>th</sup> and 5<sup>th</sup> Respondents for willful failure to provide services. Article 189(2)(3) and (4) of *the Constitution* provides that: -

“

- “(2) Governments 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 inter-Governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.”

Section 30 of the *Intergovernmental Relations Act*, 2012 provides: -

30.

- (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.”

23. Looking at Article 189(3) and (4) of *the Constitution* it is clearly stated that Intergovernmental disputes are supposed to be settled through procedures of alternative dispute resolution such as negotiations, mediation and arbitration.

24. The issue for consideration is whether the dispute herein qualifies as an Inter-Governmental dispute. According to Article 189 (3) and (4) of *the Constitution*:

- “(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.”



25. In Isiolo County Assembly Service Board & another v Principal Secretary (Devolution) Ministry of Devolution and Planning & another Onguto J stated: -

“..... The general principle, in this regard, now laid down by the Courts is that where it is possible to decide any case or dispute without reading a constitutional issue then that is the recourse to be followed. Likewise, where through statute an alternative dispute resolution mechanism as well as remedy is provided then it is such alternate mechanisms which parties to a dispute ought to pursue first.....In my view, there is certainly nothing unconstitutional or untoward when statute provides for alternative dispute resolution forums. Indeed, such statutory provisions can only be deemed to be in promotion of Article 159(2) of *the Constitution*. Besides, it is also to be noted that such provisions do not deny any party to the specified dispute the access to Court or justice. The provisions merely provide less adversarial avenues to be followed by the parties where there is a dispute and such avenues ought to be followed by the parties..... *The Constitution* clearly requires organs of State to avoid litigation and appears to empower Courts to refer disputes back to the parties. There is also no doubt that the Act provides an avenue as well as procedure for resolving disputes between the two levels of Government. There is also no doubt that the Act does not oust the jurisdiction of the Court. Indeed, and with a view to promoting the provisions of Article 189(3) of *the Constitution*, the Act expressly exhorts the two levels of Government to utilize and exhaust the avenues of dispute resolution provided under the Act before resorting to judicial proceedings. The Court is deemed as the last resort.....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.....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 latter Act as clearly enumerated earlier provides that where there exists an Intergovernmental dispute the parties must not only seek to resolve the dispute amicably but also exhaust all the dispute resolution mechanisms provided under the Act or any other legislation before resorting to Court action. The Petitioners have been accused of resorting to Court action as the first port of call.....The process must be followed before parties resort to Court. There has to be an attempt firstly to resolve the dispute amicably and when this fails the parties must seek to convene before the Summit or the Council of Governors, which are both bodies established under sections 7 and 19 of the Act to assist in resolving the dispute.....The Petitioners have not contested that they did not attempt to follow the process, under the Act prior to moving to Court. The Petitioners have not



accused the Respondents of adamantly failing to concede any ground on the dispute. Neither have the Petitioners indicated that the Respondents are unwilling to engage in the process availed by statute.

The learned Judge then went ahead to caution the parties as I do hereunder:

“.....There must however be the rider that the alternative dispute resolution mechanism is not intended to lock parties including both levels of Governments from accessing the Courts. Where it is clear that one party is definitely not ready and willing to adopt the mechanism availed for settling a dispute then the “last resort” which is Court process must then be followed by the aggrieved party. What must be demonstrated by the aggrieved party is that every reasonable effort to secure a less acrimonious way of resolving the dispute has failed.....”

26. Although the dispute herein is between an individual person on the one hand and 2 neighbouring County Governments and 3 departments of the National Governments on the other among others, it is clear from the Petition that the Petitioner did not wake up one morning and decided that his rights had been trampled upon. It was the naggings and pleas from the people he represents (some of who have sworn Affidavits) that informed him to move the Court. He is actually responding to their cries and the miseries caused upon them by an agreement which they feel has ceased to be useful. Honourable Gisesa is therefore doing what any of the 2 County Governments ought to have done. Somebody had to act and as a responsible leader, he decided to lead.

27. Is the agreement of service provision between the 2 Counties a dispute under Article 189 of *the Constitution* of Kenya, 2010 to qualify a place in the *Intergovernmental Relations Act*?

What precisely amounts to an Intergovernmental dispute is not expressly exhaustively 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.

28. What then is the procedure to be followed once a dispute has been identified as one falling under the *Intergovernmental Relations Act*?

Sections 31, 32, 33, 34 and 35 of the *Intergovernmental Relations Act* which has provisions related to mechanisms for dispute resolution provides 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.”

29. It is noteworthy that /Section 3(f) of the *Intergovernmental Relations Act*, provides that one of the objectives and purposes of the Act is to provide mechanisms for the resolutions of Intergovernmental disputes whenever they arise. In the case of International Legal Consultancy Group & another v Ministry of Health & 9 others, NRB HC Petition 99 of 2015 [2016 eKLR, Honourable Justice Mumbi Ngugi as she then was, stated thus:-

“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.”

30. In the Council of County Governors v Cabinet Secretary Land, Housing & Urban Development & another [2017] eKLR, a matter related to the one before this Court, Okong’o J. had this to say:

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 v 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 proceeding.
- 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..... 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. 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.....”

31. Accordingly, due to the well settled doctrines of constitutional avoidance and exhaustion of statutory provided dispute resolution mechanisms, the issue of the service delivery agreement entered into



between Kisii County and Nyamira County in respect to Keroka Town on 21/5/2014 is hereby identified to be an Intergovernmental dispute and the same should be referred to the dispute resolution machinery under the *Intergovernmental Relations Act* No. 2 of 2012, failure to which the aggrieved residents are at liberty to refer the matter to the Court that has jurisdiction to redress grievances emanating from deprivation of constitutional rights over provision of services by the respective Governments. Suffice it to say that for the hard-working people of Kisii and Nyamira living in Keroka town, they have a right to demand services from their respective Governments. And I urge the leadership of the 2 Counties, both the executive and legislative arms to step back from the trees and look at the forest. Procrastination and prevarication shall henceforth be unacceptable.

32. Before I pronounce the Judgment, I wish to commend the Petitioner herein for the efforts he has made in a well thought idea whose time has come by ensuring that the people he represents get the services they deserve and that the confusion caused at Keroka town does not lead to the wrong people collecting revenue from them or that they don't pay the same in proliferates. I also wish to commend Mr. Maeche, Advocate and Ms. Bundi, Advocate who filed this suit whose pleadings are meticulously drawn. The same goes to all other Advocates who participated in this Petition.
33. Finally, I wish to thank the people of Keroka town who decided to down their stones, arrows and spears in order to give the rule of law and this Court the opportunity to solve this problem. This could not have become a reality without the sobriety of their leaders and particularly the 2 Governors H.E. Amos Nyaribo and H.E. Simba Arati respectively. I plead with all to give the Intergovernmental relations committee an opportunity. The 2 County Governments are also at liberty to re-kindle the service provision agreement.
33. This Court therefore makes the following Declarations and Orders as the upshot of this Petition: -
  - (a) A declaration be and is hereby issued that forcing the residents of Keroka town to pay rates, rents or any other dues to both Kisii and Nyamira Counties is a gross violation of the affected traders' property rights under Article 40 (3) of *the Constitution*.
  - (b) The Boundary between Nyamira and Kisii specifically at Keroka Town having been determined pursuant to earlier Orders of this Court, a mandatory order be and is hereby issued to the effect that each County confines itself within its territory in respect to the collection of Rents, Rates, licenses and other statutory Revenues.
  - (c) For accountability's sake, a mandatory Order be and is hereby issued compelling the respective County Governments of Nyamira and Kisii to give an account to their respective County Assemblies on how they have utilized the money held in the joint accounts they opened for revenue collections in Keroka since the year 2013. This exercise shall be conducted within the next 90 days from the date hereof.
  - (d) Should any party feel that the service delivery agreement entered into between Kisii County and Nyamira County in respect to Keroka Town on 21/5/2014 under Section 118 of the *County Governments Act* is not working, has outlived its purposes or that the same ought to be brought to an end or that there is a dispute arising from the said agreement or for any other reason(s) whatsoever, such a dispute ought to and should be first referred to mediation, arbitration or resolution under the *Intergovernmental Relations Act* No. 20 of 2012.



- (e) As to Parliament's failure to enact legislation on the process for resolving County boundary disputes under Articles 94(3) and 188 of the Constitution, as I have demonstrated above, there is no lacuna in law.
- (f) As to the mandatory order compelling the Government of Kenya to survey and erect visible beacons clearly demarcating the boundaries of Kenya's 47 Counties as per the Districts and Provinces Act, 1992, no resident from the other 45 Counties in the country has complained and no evidence has been tendered to show that other than the 4th and 5th Respondents herein, there are other Counties that are unable to tell where their boundaries are.
- (g) For a mandatory order compelling the National Land Commission to file in this Court Affidavits demonstrating compliance with the Court Orders at the expiry of the periods within which they have been ordered to act, the said Commission as well as the 2nd and 3rd Respondents and 3rd Interested Party have already discharged this burden by marking the boundary features on the ground between the 4th and 5th Respondents and by filing a Report on the same in Court.
- (h) The Petitioner will have the costs of the Petition against the 4th and 5th Respondents jointly and severally.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 15TH DAY OF FEBRUARY 2024.**

**MUGO KAMAU**

**JUDGE**

In the presence of:

Court Assistant - Brenda

Petitioner – Mr. Maeche, Ms. Bundi and Mr. Mokaya

Respondents -Nderitu for the 2<sup>nd</sup> Respondent and 3<sup>rd</sup> interested party.

Mr. Anyoka for the 3<sup>rd</sup> Respondent

Mr. Oginga with Ms. Kwamboka for the 4<sup>th</sup> Respondent

Mr. Angwenyi , Mr. Nyambane & Ms. Kerubo for the 5<sup>th</sup> Respondent

Mr. Bonuke for the 5<sup>th</sup> and 6<sup>th</sup> Respondents.

