Council of Governors v Cabinet Secretary, Ministry of Lands Housing & National Planning & another (Civil Appeal 217 of 2018) [2023] KECA 760 (KLR) (22 June 2023) (Judgment)

Neutral citation: [2023] KECA 760 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 217 OF 2018

F SICHALE, LA ACHODE & PM GACHOKA, JJA

JUNE 22, 2023

BETWEEN

THE COUNCIL OF GOVERNORS ..... APPELLANT

AND

CABINET SECRETARY, MINISTRY OF LANDS HOUSING & NATIONAL PLANNING ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

(An Appeal against the Ruling of the Environment & Land Court at Nairobi (S. Okong'o, J.) dated 8th December, 2017 IN Environment and Land Court Petition No. 598 of 2016)

JUDGMENT

1. The appellant, (the then petitioner) filed a petition dated May 29, 2016. The filing of the petition was provoked by the fact that on April 27, 2016, the then Lands Cabinet Secretary, Jacob Kaimenyi through a Gazette Notice Vol CX VIII – No 46 dissolved all Land Control Boards (herein after referred as the Boards) with a view to reconstituting them. It was the appellant's contention that "... regulation of transactions in agricultural land is an exclusive function of the County Government". In the alternative, the appellant contended that the functions of establishing and constituting the Boards has to be done in consultation and approval of the County Governments.

2. Contemporaneously with the filing of the petition, the appellant filed a notice of motion dated May 29, 2016. It sought the following orders:-

    1. Spent

    2. Spent

3. Pending the hearing of this petition, a conservatory order does issue restraining the 1st Respondent from reconstituting the disbanded land control boards.

4. Spent

5. Spent.

3. The motion and the petition were supported by the affidavit of Jacqueline Mogeni, the Chief Executive Officer (CEO) of the appellant of the same date (May 29, 2016), the gist of which was that certain statutes and/or certain constitutional provisions had been infringed. There was a further supplementary affidavit of July 20, 2016 by the same deponent deponing that:-

4. That through Gazette Notice No 5180 published in the Kenya Gazette Vol CXVIII-No 74 dated July 8, 2016 the Cabinet Secretary for Lands, Housing and Urban Development has unilaterally appointed members to Land Control Boards in 16 Counties."

5. The respondents did not file a replying affidavit by way of rejoinder but instead filed a preliminary objection (the PO) dated December 9, 2016. They contended that:

1. That the petitioner by instituting this petition is in violation of article 189 (3) and (4) of the *Constitution*.

2. That the petitioner by instituting this petition is in violation of section 31 of the *Intergovernmental Relations Act*.

2. That the petitioner by instituting this petition is in violation of section 35 of the *Intergovernmental Relations Act*.

2. That the petition is incompetent, frivolous and abuse of court process and the same should be dismissed with costs."

6. It is the said motion that fell for determination by Okongo, J who in a ruling dated December 8, 2017 found in favour of the respondents. The learned judge's finding was that if there is a dispute between the National Government and the County Government, then this has to be resolved under mechanisms set up in the I*nter-Governmental Relations Act* (the Act). He further directed that:

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

7. The appellant was aggrieved by the said outcome. In a memorandum of appeal dated June 8, 2018, the appellant raised 6 grounds of appeal which we shall revert to in the course of our determination of this appeal.

8. On November 29, 2022, the appeal came up for hearing before us via the virtual platform. Mr Simiyu, learned counsel holding brief for Mr Wanyama for the appellant opted to wholly rely on the appellant's submissions dated November 5, 2018.

9. In their written submissions, the appellant condensed the grounds of appeal into three main areas. Firstly, on the issue of whether the High Court had jurisdiction to determine the petition in light of its mandate as set out in article 165(3) which defines its jurisdiction. It was contended that its

mandate includes the determination of the constitutionality of an Act of Parliament and the question of whether a legislation is inconsistent with the *Constitution* can only be determined by the High Court and not mechanisms set up in the *Act*.

10. Secondly, on the question whether the matter before the Environment & Land Court was a dispute between the County Government and the National Government, it was submitted that there was no dispute as the issue that arose was for the interpretation of the provisions of a statute *vis-à-vis* the constitutional provisions.

11. Finally, on whether alternative dispute resolution was an option, it was contended that the issue at hand was not arising from "actual governance disputes and procurement" as envisaged in S 31 of the *Act* and as stated above, constitutional issues cannot be addressed by a mechanism set up by the *Act*. The appellant maintained that there was no dispute here but a blatant violation of the *Constitution* by the respondents in the non-inclusion of the appellant in the *Constitution* of the Boards.

12. Mr. Motari Matunda, learned counsel for the respondents, having not filed written submissions, made brief oral submissions to the effect that there are mechanisms under S. 31-35 of the Act for dispute resolution which the appellant failed to invoke. In his oral highlights, Mr. Motari maintained that if the appellant's contention that the appointment of Board Members was a devolved function, then it ought to have invoked the provisions of S. 31-35 of the *Act* and taken advantage of Article 189(3) & (4) of *the Constitution* that speak to harmonious resolution of disputes between the two levels of government.

13. In a brief rejoinder, Mr. Simiyu asserted that the dispute herein was a constitutional one and under Article 165 of *the Constitution*, Environment & Land Court was properly seized of the matter.

14. We have considered the record, the appellant's written submissions, the oral highlights made before us, the authorities cited and the law. Our mandate as a 1st appellate court is as set out in *Selle v Associated Motor Boat Co. of Kenya & others* [1968] EA 123 wherein it was stated:-

> An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (*Abdul Hameed Saif –_vs- Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270."

15. As earlier stated, the appellant's grievance that led to the filing of the petition and the motion of May 29, 2016 was provoked by the Gazette Notice of 27th April, 2016 wherein the then Lands Cabinet Secretary, Prof. Kaimenyi dissolved all the Land Control Boards in the country. In its letter of 9th May, 2015, the appellant reacted to the Gazette Notice as follows:

> "9 May, 2016
>
> Prof. Jacob T. Kaimenyi Cabinet Secretary
>
> Ministry of Land, Housing and Urban Development Ardhi House
>
> Box 30450-00100 Nairobi
>
> Dear,

RE: Reconstitution of the Land Control Boards

The above matter refers

The Council of Governors appreciates and commends your efforts to ensure sound management of agricultural land in the country through your recent announcement of the immediate disbandment of all Land Control Boards.

We also wish to bring to your attention that the Land Control Act Cap 302 of 1967 that establishes the land control boards and subsequently gives powers to the minister in charge of Land to appoint such boards is part of the carryover laws from the old constitution which ought to have been repealed and therefore does not in any way conform to the *Constitution of Kenya* 2010 in so far as land management is concerned.

Further, Schedule Four of the *Constitution of Kenya* 2010 and subsequent legislation including the *Urban Areas and Cities Act*, 2011 and *County Government Act*, 2012 clearly mandates County Governments to undertake planning Including county spatial planning and development control, which functions covers the management of all public and private land within the boundaries of the County. It is therefore our opinion that Land Control Boards: which have been controlling developments in agricultural land including giving consent to subdivision, sale and change of use to agricultural land within the counties among other functions is unconstitutional and have been operating under a redundant law.

The purpose of this letter is, therefore, to propose to your Ministry to engage with the Council of Governors Land and Urban Development Committee on this matter before any step of reconstituting the said Land Control Boards.

We look forward to further consultations in this matter. Yours sincerely,

H. E. Hon. Peter Munya Chairman, Council of Governors

Copy:

H. E. Dr. Julius Malombe Chairman

COG Land and Urban Development Committee All Excellency Governors"

16. Further, it is instructive to note that in the petition, the appellant sought several prayers. These were:

b. A declaration that within the intendment of Articles 6 (2), 174, 186(1), 189 (1) (a) and the Fourth Schedule to the *Constitution*, regulation of transactions in agricultural land is an exclusive function of the county governments.

In the alternative

c. A declaration that within the intendment of Articles 6 (2) and 189 (2) of the *Constitution* establishment and constitution of land control boards must be done with the consultation and approval of counties.

d. A declaration that section 6 of the *Land Control Act* is inconsistent with the provisions of Article 6 (2), 174, 186(1) and 189 (1) (a) of *the Constitution*, and to the extent of the inconsistency, is null and void.

e. A declaration that section 5 of the *Land Control Act* is inconsistent with the provisions of Article 6 (2) and 189 (2) of the *Constitution*, and to the extent of the inconsistency, is null and void.

f. A declaration that the entirety of the *Land Control Act* is inconsistent with the provisions of Article 6 (2), 174, 186(1), 189 (1) (a) and 189(2) of *the Constitution* and is null and void.

g. There be an order as to costs."

Prayer (b) of the petition speaks to the appellant's absolute power in regulation of transactions in agricultural land whilst prayer (c), being an alternative prayer speaks to the sharing of that power. On the other hand, prayers (d), (e), (f) and (g) speak to the inconsistency of certain provisions of the Land Control Board *vis-à-vis* the *Constitution*.

17. It is clear from the prayers sought that the appellant and the respondents are fighting over the sharing of power to constitute Land Control Boards. The appellant insists that it is its exclusive power or in the alternative, it is a shared power. In our view, therein lies the dispute.

The learned judge found, and rightly so in our view that:

> Sections 31, 32, 33, 34 and 35 of the *Intergovernmental Relations Act* (the Act) which contain mechanisms for dispute resolution provide as follows:
>
> 31. Measures for dispute resolution
>
> The national and county governments shall take all reasonable measures
>
> to-
>
> a. resolve disputes amicably; and
>
> b. apply and exhaust the mechanisms for alternative dispute resolution provided under this Act or any
>
> other legislation before resorting to judicial proceedings as contemplated by Article 189(3) and (4) of the *Constitution*.
>
> 32. Dispute resolution mechanisms
>
> 1. Any agreement between the national government and a county government or amongst county governments shall-
>
> a. include a dispute resolution mechanism that is appropriate to the nature of the agreement; and
>
> b. provide for an alternative dispute resolution mechanism with judicial proceedings as the last resort.
>
> 2. Where an agreement does not provide for a dispute resolution mechanism or provides for one that does not accord with subsection (1), any dispute arising shall be dealt with within the framework provided under this Part.
>
> 33. Formal declaration of a dispute
>
> 1. Before formally declaring the existence of a dispute, parties to a dispute shall, in good faith, make every reasonable effort and take all necessary steps to amicably resolve the matter by initiating direct negotiations with each other or through an intermediary.

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

34. Procedure after formal declaration of a dispute

1. Within twenty-one days of the formal declaration of a dispute. the Summit, the Council or any other intergovernmental structure established under this

Act shall convene a meeting inviting the parties or their designated representatives-

a. to determine the nature of the dispute, including-

i. the precise issues in dispute: and

ii. any material issues which are not in dispute: and

b. to:

(i) identify the mechanisms or procedures, other than judicial proceedings, that are available to the parties to assist in settling the dispute, including a mechanism or procedure provided for in this Act, other legislation or in an agreement, if any, between the parties; or

(i) subject to Article 189 of the *Constitution*, agree on an appropriate mechanism or procedure for resolving the dispute, including mediation for 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."

18. The judge cited the decision of *Okiya Omtatah Okoiti & another vs. Attorney General & 6 others* NRB HC Petition No. 593 of 2013(2014) eKLR where Lenaola, J. (as he then was) in which the court stated that:-

> "I now turn to examine the import of the alleged ouster of the Court's jurisdiction under Article 189 of the *Constitution*. It was submitted by the Respondents and the Amicus Curiae in that regard that the Courts are not the only means through which disputes relating to devolution must be resolved. That the *Constitution* has placed great emphasis in resolving disputes relating to devolution through intergovernmental dispute resolution mechanism and that is the proper mechanism to resolve the present dispute.
>
> The starting point in addressing the issue is Article 6 of the *Constitution* which must be read with Article 189 of the *Constitution*... The legislation contemplated in Article 189(4) has already been enacted le. the *Intergovernmental Relations Act* of 2012, which has established institutions and sets out mechanisms of resolution of intergovernmental disputes. The Preamble to this *Act* state that it is:
>
> "An Act of Parliament to establish a framework for consultation and cooperation between the national and county governments and amongst county governments; to establish mechanisms for the resolution of intergovernmental disputes pursuant to Articles 6 and 189 of the *Constitution*, and for connected purposes."
>
> As can be seen from the above, the *Act* was intended inter-alia to establish mechanisms for the resolution of intergovernmental disputes pursuant to the provisions of Articles 6 and 189 of the *Constitution*. The dispute resolution mechanisms are then specifically established under sections 30 to 35 of that *Act*. Section 30 stipulates as to when a dispute can be said to have arisen between the two levels of government as it provides thus...
>
> The reasoning behind the above enactment is not hard to find; that alternative dispute resolution mechanisms should be sought in the first instance so as not to strain the relationship between the national government and the county governments and in the case of counties, among themselves. Article 6 of the *Constitution* has therefore mandated the two levels of government to conduct their mutual relations on the basis of consultation and co-operation. Section 31 has indeed provided for the measures to be undertaken in dispute resolution as follows...
>
> The place of judicial proceedings in the dispute resolution mechanism provided for under the Act is clear, that judicial proceedings are a last resort and Section 35 specifically states that...
>
> "Where all efforts of resolving a dispute under this *Act* fail, a party to the dispute may submit the matter for arbitration or institute judicial proceedings."

19. It is clear that vide its letter of May 9, 2016, the appellant complained that it had been left out by Prof. Kaimenyi in the reconstitution of the Boards. The appellant wanted either to have full control of constituting the Boards or in the alternative have a say in the *constitution* of the Boards. It is to this extent that the appellant sought to have certain provisions of the *Land Control Act* declared null and void.

20. The sections that the appellant sought to have declared null and void are those that vested the power in an entity other than itself. The sum effect of the dispute was a power tussle with the appellant wanting to have the said power exclusively to itself or at the very least, it be shared. It is for this reason that we are in agreement with the learned judge that the *Act* provided for a dispute resolution mechanism of a dispute such as the one that pitted the appellant with the 1st respondent. It is our considered view that the preliminary objection was rightly upheld and we find no merit in this appeal which is hereby dismissed. Given that the parties in this appeal are all government entities, we order that each party shall bear its own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE, 2023.

F. SICHALE

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

MWANIKI GACHOKA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR