IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & KANTAI,

JJ.A) CIVIL APPEAL NO. 236 OF 2016

BETWEEN

NAROK COUNTY GOVERNMENT.....APPELLANT

AND

THE SENATE.....1ST RESPONDENT

THE SPEAKER OF THE SENATE.....2ND RESPONDNET

(Being an appeal from the Ruling of the High Court of Kenya at Nairobi (J.L. Onguto, J.) dated 9th December, 2015

in

H.C. PETITION NO. 424 OF 2015)

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JUDGMENT OF THE COURT

[1] The singular issue for determination in this appeal, which was germane even before the trial court was whether the ***Senate Standing Committee of Finance, Commerce and Budget*** has power to scrutinize accounts, budgets and records of transactions relating to ***Mara Conservancy*** and the ***Narok County Government***. Peripheral to the main issue was whether the court had jurisdiction to determine a matter that bordered or touched on the separation of powers and whether the matter was one that should have been referred to dispute resolution mechanism that is envisaged under ***Article 189*** of the Constitution and the Intergovernmental Relations Act.

[2] The background information relating to the dispute that has given rise to the instant appeal begun with a petition that was filed on 2nd October, 2015, before the High Court Milimani by ***Narok County Government*** (appellant) against the ***Senate*** and the ***Speaker of the Senate*** (1st and 2nd respondent) respectively. The appellant was seeking conservatory prohibitory and or injunctive orders to restrain the 1st and 2nd respondents and or its committees from debating and considering any questions on revenue collection from the ***Mara Conservancy*** and the expenditure thereof. The appellant postulated that ***Mara Conservancy*** falls within its County. The Conservancy generates revenue besides being a symbol of sustainable development in so far as the environment is concerned. The appellant collects the revenue and as a result many questions were asked and answers demanded of how the revenue generated was utilized. Allegations of impropriety were also made.

[3] What raised the dust was a petition tabled before the Standing Committee of the Senate by the then Senator of Narok, ***Stephen ole Ntutu.*** The petitioner was one ***Joseph Tipanko ole Karia*** who was requesting for all manner of accounting documents; an interview with the officers of the appellant and Mara Conservancy and a forensic audit of the use and management of revenue generated among others. Arising from the said petition the following questions were put in the order paper:

> ***"I. Can Narok County government disclose how much revenue they have received from the Mara Conservancy in the months of February, March and April 2014?***
>
> ***II. Mara Conservancy on their part should also disclose the amount of revenue collected and distributed in the above three months.***
>
> ***III. Can (Narok) County government disclose how much revenue was stolen on 10th July, 2015 from one of the main gates of Masai Mara Reserve.***

IV. Were the suspects of the theft arrested and charged in court.

V. How many armed game rangers were guarding the gate that fateful night?"

The appellant contended that the request put forth as per the above questions was a contravention of his constitutional rights to wit right to fair administrative action; (***Article 47***); right to fair hearing (***Article 50(1***)) and violation of ***Article 159*** that vests judicial authority in courts or tribunals; Article ***96 (3)*** and ***226 (2)*** which restricts the 1st and 2nd respondents financial oversight role over the petitioner to national revenue allotted by the appellant whose oversight is vested in the County Assembly.

[4] The petition was opposed by the respondents who argued it was premature and also devoid of merit as the appellant did not exhaust all the dispute resolution mechanisms. The petition was also termed a serious abuse and denigration of the role of Parliament that is secured under ***Article 94*** and ***96*** of the Constitution as well as ***Article 35*** that guarantees the right of access to information that is held by a state office. Moreover, the 1st respondent has a constitutional mandate to oversee national and county revenue as per ***Article 96, 119, 216, 218*** and ***220*** of the Constitution. To answer these issues the learned trial Judge (Onguto, J.) formulated two issues: that is, whether the appellant was entitled to the orders sought being an order of injunction and prohibition and whether the application was premature there being other administrative forums established to determine the dispute or in short whether the court had jurisdiction.

[5] After considering the material before him, the learned Judge found there was no *prima facie* case that was established. This is what the Judge posited in his own words: -

"What prejudice is the Petitioner to suffer if the 1st Respondent continues with the debate and consideration of the Petitioner's locally generated income? I am presently unable to see any. The Petitioner says the Petitioner's development agenda may be slowed down or stalled altogether. The Petitioner however failed to tender evidence and demonstrate how possibly that may happen. Indeed, it may well be argued that the questions as asked may be for the benefit and in the interest of Narok County, pursuant to Article 96(1) of the Constitution.

I also have no doubt that the 1st respondent is aware of the decision of this court in International legal Consultancy Group vs. Senate & Another (supra). Counsel submitted that the 1st Respondents have preferred an appeal against that decision. For the moment though I am satisfied that the Respondents are aware that they must draw the line and not purport to superintend the Petitioner when it comes to locally generated revenue once the answers to the questions, the subject of contention herein are given.

Will the Petition or its substratum be rendered nugatory? The Petition seeks declaratory orders. The only other order is one for an injunction. The declaratory order may be made even long after the 1st respondent would have finalized debate. The effect of the declaratory orders will, if issued in favour of the petitioner, be to render void any of the proceedings and resolutions on the subject matter; that is to say revenue collection and expenditure by the Petitioner from the Mara Conservancy.

I also have no doubt that this court during trial will have opportunity to demystify what the word "oversight" under Article 96 portends. This will assist the county government as well as the Respondents to be able to clearly draw the line"

[6] As regards the second issue of the suit being premature; the Judges stated as follows: -

"There is no doubt nor controversy that where the Constitution or Statute sets or establishes a dispute resolution procedure then the procedure must be used by parties within such rubric: see Kipkalya Kones vs. Republic & Another [2008] 2 KLR 43. While I appreciate that principle of law that the court must always refrain, I must take cognizance of Article 258 of the Constitution which allows parties to prompt the court where there is a violation of or threatened violation of the Constitution. The Court should never be divested of authority and my reading of the intergovernmental Relations Act does not reveal any provision which divests this court of jurisdiction.

In the instant case, the 1st Respondent stated that the dispute resolution forum has been laid out under Article 189 of the Constitution and sections 31 – 35 of the intergovernmental Relations Act, 2012. The Constitution as well as statute encouraged a more reliable but less acrimonious way to resolving disputes between governments or government entities. Litigation is ranked last. It should come after all other forums have failed. The Petitioner contends that there is no 'dispute' as contemplated by Article 189. I would tend to agree."

[7] Ultimately the appellant's suit was dismissed thereby provoking the instant appeal that is predicated on some nine (9) grounds of appeal to wit:-

" The Learned Judge gravely erred in law and fact in failing;-

1. To detect an error apparent on the face of the Ruling delivered on 9th November, 2015.

2. In delivering a ruling which was directly inconsistent with his findings on the role of the senate as spelt out under Article 96(3) of the constitution vis-à-vis the role of the county assembly as spelt out under Article 226 (2) of the Constitution.

3. In dismissing the application by the Appellant seeking to stop the Senate from exercising oversight role over the revenue generated local (Mara Conservancy) while agreeing with the finding and holding of a three judge bench decision in NBI HCCP

No. 8 of 2013 International Legal Consultancy Group vs. senate & Clerk of the Senate (2014) eKLR that the Senates oversight role in matters concerning revenue was restricted to national revenue allocated to the County Government and that such role did not extend to revenue generated locally by the counties.

4. In imagining and crafting a set of about five questions that he thought the senate would or should ask but he did not go further to direct that the Senate should restrict itself to those questions generated by the court yet Hon. Ntutu by a statement dated 14th July, 2015 submitted to the 1st and 2nd Respondent the following questions, approved for debate and consideration on 6th October, 2015: -

> "*Can Narok County Government disclose how much revenue they have received from Mara Conservancy in the months of February, March and April, 2014?*
>
> *Mara conservancy on their part should also disclose the amount of revenue collected and distributed in the above three months*."

5. In assuming that the Senate is aware of the finding in NBI HCCP No. 8 of 2013 International legal Consultancy Group vs. Senate & Clerk of the Senate (2014) eKLR and that it would use its common sense and not ask questions related to the revenue generated locally.

6. In failing to uphold and protect the integrity of the court by departing from the holding in a decision of a three judge bench whereas there is an appeal proffered against it. This has created anarchy, disorder, confusion and embarrassment within the judicial system.

7. In failing to reach a determination that the appellant's constitutional right to fair administrative action as guaranteed under Article 47 had been breached or threatened to be breached since the leadership of the Appellant has been previously subjected to perennial judicial and quasi-judicial processes on the same issue including summoning and questioning by the Auditor-General, the Narok County Assembly, the Ethics and Anti-Corruption Commission and the office of the Director of public Prosecutions who have all absolved the leadership of the appellant of any wrong doing.

8. In failing to reach a determination that Article 189 (1) (a) of the Constitution on the cooperation between National and County Governments were being violated or threatened to be violated by the senate trying to usurp the functions of the County Assembly.

9. In failing to reach a determination that the respondents had violated or threatening to violate the objects and principles of devolution which aim to decentralize sate organs and have them operate in a manner that respects the principles of separation of power. The Respondents' conduct is perceived to be more of intimidation as opposed to cooperation and mutual agreement as is envisioned by the Constitution."

[7] During the hearing of the appeal ***Mr. Makokha***, learned counsel for the appellant relied on his written submissions and made some brief highlights. Counsel for the appellant submitted that the question that was before the trial Judge was whether the Senate had power to interrogate or oversight the use or otherwise of the locally generated revenue. He cited the provisions of ***Article 96 (3)*** of the Constitution that provides that the Senate determines the allocation of national revenue among counties, as provided in ***Article 217***, and exercises oversight over the national revenue allocated to the county governments. According to counsel revenue collected from the ***Mara Conservancy*** was locally generated revenue and its oversight remained with the county assembly. Counsel faulted the Judge for declining to grant an injunction and or conservatory orders thus allowing the Senate to violate the Constitution; first, by shunning the responsibility given to courts to protect a breach of rights that are guaranteed in the Constitution and secondly, by failing to recognize that allowing a debate about revenue generated by the county to be discussed by the house of Senate was a violation of the cardinal rule of separation of powers and undermines devolution of power to the counties as provided under ***Articles 174, 175*** and ***176*** of the Constitution.

[8] Counsel cited the case of **International Legal Consultancy Group vs. Senate & Clerk of the Senate [2014] e KLR** and the **Institute of Social Accountability & Another v National Assembly and 4 others [2015] e KLR**. In both cases counsel submitted that the courts have emphasized the role of the County Assembly in overseeing the locally collected revenue which goes to the administration and implementation of development projects in the counties whereas the role of the Senate is to oversee funds allocated by the National Government. Counsel went on to submit that the questions that were formulated by ***Hon. Ntutu*** concerned an interrogation of how locally generated revenue from the ***Mara Conservancy*** were utilized and by denying the appellants the conservatory order of injunction the Senate was allowed to exercise power which was outside the confines of the Constitution. Counsel urged us to allow the appeal.

[9] This appeal was opposed by ***Mr. Angaya*** learned counsel holding brief for ***Mr. Mwendwa*** for the 1st and 2nd respondents. He relied on the written submissions and made some brief oral highlights. Counsel maintained that the role and mandate given to Senate under ***Article 96*** of the Constitution to oversee the County governments cannot be circumscribed simply because a member of Senate had asked questions. It is the nature of the work of members of the Senate to ask questions seeking answers regarding revenue collected, and may even go as far as seeking to be told how it is spent. Counsel further submitted that the suit filed by the appellant was an affront to the Parliamentary privileges entrenched in ***Article 117*** of the Constitution by way of freedom of speech in Parliament and also fortified in ***Section 12*** of the **National Assembly (Privileges and Immunities) Act** which provides that "No proceedings or decision of the Assembly or the Committee of the Privileges acting in accordance with this Act shall be questioned in any court"

Thus a debate in Parliament cannot be curtailed, nor cam a member stopped from making a speech, voting or giving a notice of motion or presenting a petition or report from a committee.

[10] In the written submissions counsel cited some foreign cases; **Prebble v New Zealand Television Ltd (1995) 1 A C 321** in which the

Judicial Committee of the Privy Council made its pronouncements on the purpose and effect of the parliamentary privileges espoused in ***Article 9*** of the **1688 Bill of Rights of England** in the following words;

> **"The provisions of Article 9 also ensure that parties to litigation, by whomsoever commenced, cannot bring into question anything said or done in the house by suggesting (whether by direct evidence, cross-examination, inference or submission) that the action or words were inspired by improper motives or were untrue or misleading"**

The above principles of parliamentary privileges and separation of powers were augmented further in the case of **R vs. Chaytor & Others (2010) UKSC 52** the Supreme Court of England. Here at home counsel cited the case of **John Harun Mwau vs Dr. Andrew Mullei & Others Civil Appeal No 157 of 2009** where the Court of Appeal while restating the aforementioned principles reiterated that courts ought to refrain from judicial interference in regard to parliamentary proceedings. Counsel urged us to dismiss the appeal.

[11] We have considered the entire record of appeal as set out in the brief synopsis of the dispute, the submissions and authorities cited in order to place this judgment in perspective. The first issue is to determine is as set out in the opening paragraph of this judgment is whether the Judge erred by declining to grant orders sought to restrain the Senate Committee from considering the questions which were framed as follows:

> ***"Can Narok County government disclose how much revenue they have received from the Mara Conservancy in the months of February, March and April 2014? Mara Conservancy on their part should also disclose the amount of revenue collected and distributed in the above three months?"***

The respondents argued strenuously that the court lacked jurisdiction to stop Parliament from determining those questions which were within the dominion of the privileges and immunities guaranteed by the Constitution which was a matter before the trial court. The issue of jurisdiction is always addressed first as per the principles set out in the notable case of **Motor Vessel "SS Lillian", [1989] KLR 1** in which this Court succinctly set out the principles and context for determination of jurisdiction. Nyarangi, JA stated, *inter alia*:

> ***"Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".***

The Supreme Court ***In the Matter of Advisory Opinion of the Supreme Court under Article 163(3) of the Constitution*****, Constitutional Application No. 2 of 2011**: had the following to say on jurisdiction:-

> ***"The Lillian 'S' case [[1989] KLR 1] establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity".***

[12] The learned Judge did not delve deep into the issue of jurisdiction perhaps while conscious that he was dealing with an interlocutory matter but he aptly made reference to the provisions of **Article 189** of the Constitution and ***Sections 31-35*** of the **Intergovernmental Relations Act** which provide for dispute resolution mechanism in regard to disputes arising in relation to performance of functions between national and county governments or other intergovernmental bodies. The Judge did not however fault the appellant for not following this procedure as at that stage the issue was an interpretation of the constitutional mandate as opposed to a determination of a dispute. We are also conscious that the application was an interlocutory in nature, the main petition has not been heard. In the circumstances as there is no opinion on this issue of jurisdiction based on Parliamentary privilege, and there was no cross appeal by the respondents on the same, we would wish to say no more at this stage and leave the matter for the trial court.

[13] However even as we tread carefully, we have to examine whether the appellant had established a *prima facie* case to warrant the granting of the orders sought. In declining to grant the orders sought the Judge exercises discretion and the guiding principles are those set out in the case of **Mbogo vs. Shah, [1968] E.A. 93**:

> ***"….A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice."***

[13] Did the Judge err by declining to grant the injunctive orders? The ruling shows the learned Judge fastidiously addressed the relevant issues of whether the appellant had established a *prima facie* case by examining the impugned questions which in his view did not amount to the Senate overseeing the locally generated revenue, superintending, controlling or managing the county generated revenue. We agree with the learned Judge that on the face of those questions, the answers anticipated could not go into how the revenue was used but merely how much was received. It is premature to speculate on matters that the appellant feared the Senate was likely to do that is to usurp the power of the County government. We also agree that the fact that the appellant was asked questions cannot amount to a constitutional breach of a right to a fair hearing because it had time to answer the questions. In our view the learned Judge cannot be faulted in the conclusions he made. His conclusions are fortified by the position taken by Lord Diplock in the case of **American Cyanamid vs Ethicon Limited [1975] AC 396** stated that:

> ***"If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities that is the end of any claim to interlocutory relief."***

[14] On the nugatory aspect of the application this is what the learned Judge stated in a pertinent paragraph of the ruling which we agree with.

> ***"Will the Petition or its substratum be rendered nugatory" The Petition seeks declaratory orders. The only other order is one for an injunction. The declaratory order may be made even long after the 1st Respondent would have finalized debate. The effect of the declaratory orders will, if issued in favour of the Petitioner, be to render void any of the proceedings and resolutions as may be made by the Respondents concerning and touching on the subject matter; that is to say revenue collection and expenditure by the Petitioner from the Mara conservancy.***
>
> ***I also have no doubt that this court during trial will have the opportunity to demystify what the word "oversight" under Article 96 portends. This will assist the county governments as well as the Respondents to be able to clearly draw the line."***

[15] In light of the aforesaid that the appellant have an opportunity to pursue the petition for the substantive orders, we find this appeal lacking merit and order it dismissed with costs to the respondents.

Dated and delivered at Nairobi this 20th day of December, 2019

M. K. KOOME

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR