



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU**

CIVIL APPEAL NO. 25 OF 2000

**NAROK COUNTY COUNCIL APPELLANT
VERSUS
TRANS MARA COUNTY COUNCIL
KENYA ASSOCIATION OF TOUR OPERATORS RESPONDENTS**

**(Appeal from a judgment of the High Court of Kenya at
Kisii (Mbaluto J) dated 4th June, 1998**

JUDGMENT OF O'KUBASU, J.A.:

The dispute in this appeal was between Narok County Council (appellant) and Trans Mara County Council. The genesis of this dispute goes back to Legal Notice No. 285 dated 11th August, 1994 in which the then Minister for Local Government Hon William Ole Ntimama, in exercise of the powers conferred by Sections 5, 28 and 39 of the Local Government Act (*Cap 265 Laws of Kenya*) (hereinafter called "The Act") created a new County Council which he named the County Council of Trans Mara. The new county council was carved out of Narok County Council and its boundaries stated to be delineated edged in blue on Boundary Plan No. 328 (a) signed and deposited at the Survey Records Office, Survey of Kenya, Nairobi. There was no dispute as regards the boundaries for the two county councils.

After the creation of the County Council of Trans Mara a dispute arose as regards the distribution of assets and liabilities. As a result of this dispute, County Council of Trans Mara (plaintiff) sued County Council of Narok (1st defendant) and Kenya Association of Tour Operators (2nd defendant). The pertinent paragraphs of that plaint were as follows:

"4.The plaintiff and 1st defendant are both body corporates with perpetual succession and a common seal and capable in law of suing and being sued and acquiring, holding and alienating land.

5.The plaintiff county was carved out of the 1st defendant county and duly gazetted and promulgated on 4th of August, 1994.

6.That pursuant to the said establishment of the County Council of Trans Mara, it became entitled to the apportionment of rights liabilities, property assets from the County Council of Narok on a fair and equitable basis.

7.The plaintiff states that among the assets and rights the plaintiff is entitled to the entry fees to the game reserves which is collected by the 2nd defendant under a written agreement entered between the 1st defendant and the 2nd defendant during the current (?) of both the plaintiff county and the 1st defendant county.

8.The plaintiff states that the 2nd defendant collected revenue from the plaintiff's area of jurisdiction

KShs.69,362,400/= being entry fees to game reserves in the County Council of Trans Mara inter land. 9.The plaintiff states that despite repeated attempts to have the said revenue remitted to the plaintiff either amicably or through the direction of the Minister of Local Government, the defendants have refused, ignored and or neglected to co-operate. 10.The plaintiff states that through the aforesaid denial of revenue by the defendants, the plaintiff has suffered loss and damages."

In its statement of defence, the 1st defendant stated: "2.The contents of paragraphs 4, 5 and 6 of the plaint are admitted.

3.The first defendant partly admits the allegations contained in paragraph 7 of the plaint to the extent that they refer to the written agreement between the first and second defendants and its parameters thereof but categorically denies owing the plaintiff the alleged sum of KShs.69,362,400/= as averred in paragraph 8 thereof and shall at the hearing hereof put it to the strictest proof thereof.

4.The first defendant concedes having refused to remit to the plaintiff the alleged sum of KShs.69,362,400/= for the aforesaid reason and further contends that this suit is premature since mutual deliberations regarding the alleged indebtedness were already in progress at the time of instituting this suit.

5.The contents of paragraphs 10 and 11 of the plaint vehemently denied.

6.Without prejudice to the foregoing the second defendant shall crave the indulgence of this court to raise a preliminary objection contending that this honourable court has no jurisdiction whatsoever in the circumstances of this matter to hear the suit and/or grant the prayers sought since the dispute between the first and second defendants was not referred to the Minister for Local Government for his directions and/or resolution.

7.SAVE what is expressly stated herein the second defendant denies each and every allegation delineated in the plaint as if the same were set out verbatim and traversed seriatim."

The 2nd defendant was brought in this suit as an agent of the plaintiff and 1st defendant in collection of revenue from the gate entry fees.

From the foregoing it becomes clear that the dispute herein relates to distribution of assets arising from the carving out of the original Narok County Council a new county council known as Trans Mara County Council.

The superior court (Mbaluto J.) heard the dispute and in the end gave judgment in favour of the plaintiff. As a result of that judgment the appellant (the defendant in the superior court) appealed to this Court. When the appeal came up for hearing on 21st March, 2000, the issue of jurisdiction was taken up as it appeared that this appeal could be disposed of on that ground alone.

Mr Njagi for the appellant, argued that the High Court had no jurisdiction to entertain this dispute in view of the provisions of Section 270 of the Act . In his view the plaintiff should have referred the matter to the Minister for arbitration. He asked us to allow the appeal, strike out the cross-appeal and award costs to the applicant both in this Court and in the superior court.

Mr Otachi for the 1st defendant, was of the view that Section 270 of the Act did not oust the unlimited jurisdiction of the court and he relied on Section 60 (1) of the Constitution of Kenya .

As already indicated, County Council of Trans Mara was created by Legal Notice No. 285 in which the Minister for Local Government in exercise of the powers conferred by Sections 28 and 29 of the Act made the following order:

"THE LOCAL GOVERNMENT (COUNTY COUNCIL OF TRANS MARA) ORDER, 1994

1.This Order may be cited as the Local Government (County Council of Trans Mara) Order, 1994 and shall be deemed to have come into operation on 4th August, 19 94.

2.The area which is described in the First Schedule is declared to be the County Council of Trans Mara.

3.The County Council of Trans Mara shall be divided into eleven electoral areas specified in the Second Schedule, the boundaries of which are more particularly delineated, edged blue, on Boundary Plan No. HB. 32B (a), which is signed and deposited at the office of the Electoral Commission of Kenya, Nairobi, and a copy of which may be inspected at the office of the District Commissioner, Trans Mara."

The County Council of Trans Mara was carved out of the larger Narok County Council. This means that out of this larger Narok County Council we have by virtue of Legal Notice No 285 two county councils - Narok County Council and Trans Mara County Council. What happens to the assets and liabilities in event of this happening? The answer is to be found in Section 270 of the Act or more particularly Section 270 (b) which provides:

"With respect to the matters mentioned in paragraphs (c) to (h) of Section 269 (1), those paragraphs shall apply and have effect so far as is reasonable and practicable only as respects the afore mentioned part of the area of the first mentioned local authority, and any apportionment of rights, liabilities, property, assets or a ny other of the matters or things mentioned in those paragraphs shall be made between the several local authorities concerned on a fair and equitable basis, either as agreed between them or, in default of agreement, as directed by the Minister."

From the above it would appear that the legal position where we have two local authorities (as in the instant appeal) the distribution of assets and liabilities between the two authorities would be determined on a fair and equitable basis either as agreed between the local authorities or in case of disagreement then as directed by the Minister for Local Authority. It has already been stated that the dispute herein relates to distribution of assets. And now we find that Section 270 of the Act provides for procedure for distribution of assets between local authorities. And this procedure was followed by the then Minister for Local Government, Hon Francis Lotodo, who appointed Commissions of Distribution of Assets and Liabilities in respect of various local authorities as can be seen from Gazette Notice No 2183 appearing in the Kenya Gazette of 2nd May, 1997, which was as follows:

"THE LOCAL GOVERNMENT ACT

(Cap. 265)

APPOINTMENT OF COMMISSIONS OF DISTRIBUTION OF ASSETS AND LIABILITIES AMONG LOCAL AUTHORITIES IN EXERCISE of the powers conferred by sections 269 and 270 of the Local Government Act, the Minister for Local Government appoints - (a)Provincial Commissioners for Rift Valley Province, Eastern Province and Nyanza Province, to be chairmen;

(b)Provincial Lo cal Government Officers for Rift Valley Province, Eastern Province and Nyanza Province, to be secretaries; and (c)District Commissioners in the respective areas shown below to be members:

of the Commissions of Distribution of Assets and Liabilities of -

County Council of Narok;

County Council of Trans Mara;

County Council of Embu;

County Council of Mbeere ;

County Council of Homa Bay;

County Council of Suba;

County Council of Rachuonyo;

County Council of Marsabit;

County Council of Moyale;

County Council of Baringo;

County Council of Koibatek;

County Council of Marakwet;

County Council of Keiyo;

County Council of Kipsigis;

County Council of Bomet;

Municipal Council of Bomet;

County Council of Pokot and

Town Council of Kapenguria.

FRANCIS LOTODO,

Minister for Local Government."

It is to be noted that the plaint in this matter was filed on 11th January, 1996. Then these commissions for distribution of assets and liabilities were appointed on 2nd May, 1997. The issue of jurisdiction was raised by way of a preliminary objection and a ruling delivered in which the preliminary objection was overruled.

In my view, Section 270 of the Act provides for the method of distribution of assets and liabilities. The parties were still negotiating and even commissions had been set up to deal with the issue of distribution of assets and liabilities. These commissions' determination of assets and liabilities have not been made public. We indeed do not know whether the commissions have completed their work. As of now, there is a dispute between the two local authorities. As the law (Local Government Act) provides for procedure to be followed in distribution of assets and liabilities then the parties are bound to follow that procedure provided by the law. This had to be done before the parties could resort to a court of law. Hence the preliminary objection raised on the question of jurisdiction should have been upheld by the superior court.

In view of the foregoing, I find that the superior court had no jurisdiction to entertain this dispute in view of the provisions of Section 270 of the Act (Cap. 265) . I would therefore, allow this appeal and award costs to the appellant both in this Court and in the superior court.

Dated and delivered at Nairobi this 7th day of April, 2000.

E. O. O'KUBASU

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR