



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**  
**PETITION NO. 270 OF 2014**

(Before Hon. Justice Hellen S. Wasilwa on 12<sup>th</sup> January, 2015)

KENYA COUNTY GOVERNMENT

WORKERS UNION ..... PETITIONER

**-VERSUS-**

KISUMU COUNTY GOVERNMENT ..... 1ST RESPONDENT

KISUMU COUNTY PUBLIC SERVICE BOARD ..... 2ND RESPONDENT

KAKAMEGA COUNTY GOVERNMENT ..... 3RD RESPONDENT

KAKAMEGA COUNTY PUBLIC SERVICE BOARD..... 4TH RESPONDENT

BUNGOMA COUNTY GOVERNMENT ..... 5TH RESPONDENT

BUNGOMA COUNTY PUBLIC SERVICE BOARD..... 6TH RESPONDENT

BUSIA COUNTY GOVERNMENT ..... 7TH RESPONDENT

BUSIA COUNTY PUBLIC SERVICE BOARD ..... 8TH RESPONDENT

TRANS-NZOIA COUNTY GOVERNMENT ..... 9TH RESPONDENT

TRANS-NZOIA COUNTY PUBLIC SERVICE BOARD.....10TH RESPONDENT

MIGORI COUNTY GOVERNMENT..... 11TH RESPONDENT

MIGORI COUNTY PUBLIC SERVICE BOARD ..... 12TH RESPONDENT

MINISTRY OF DEVOLUTION AND PLANNING ..... 13TH RESPONDENT

THE ATTORNEY GENERAL ..... 14TH RESPONDENT

MOMBASA COUNTY GOVERNMENT ..... 15TH RESPONDENT

MOMBASA COUNTY PUBLIC SERVICE BOARD ..... 16TH RESPONDENT

KWALE COUNTY GOVERNMENT ..... 17TH RESPONDENT  
KWALE COUNTY PUBLIC SERVICE BOARD ..... 18TH RESPONDENT  
KILIFI COUNTY GOVERNMENT ..... 19TH RESPONDENT  
KILIFI COUNTY PUBLIC SERVICE BOARD ..... 20TH RESPONDENT  
TANA COUNTY GOVERNMENT ..... 21ST RESPONDENT  
TANA COUNTY PUBLIC SERVICE BOARD ..... 22ND RESPONDENT  
LAMU COUNTY GOVERNMENT ..... 23RD RESPONDENT  
LAMU COUNTY PUBLIC SERVICE BOARD ..... 24TH RESPONDENT  
TAITA COUNTY GOVERNMENT ..... 25TH RESPONDENT  
TAITA COUNTY PUBLIC SERVICE BOARD ..... 26TH RESPONDENT  
GARISSA COUNTY GOVERNMENT..... 27TH RESPONDENT  
GARISSA COUNTY PUBLIC SERVICE BOARD ..... 28TH RESPONDENT  
WAJIR COUNTY GOVERNMENT ..... 29TH RESPONDENT  
WAJIR COUNTY PUBLIC SERVICE BOARD ..... 30TH RESPONDENT  
MANDERA COUNTY GOVERNMENT ..... 31ST RESPONDENT  
MANDERA COUNTY PUBLIC SERVICE BOARD ..... 32ND RESPONDENT  
MARSABIT COUNTY GOVERNMENT ..... 33RD RESPONDENT  
MARSABIT COUNTY PUBLIC SERVICE BOARD ..... 34TH RESPONDENT  
ISIOLO COUNTY GOVERNMENT ..... 35TH RESPONDENT  
ISIOLO COUNTY PUBLIC SERVICE BOARD ..... 36TH RESPONDENT  
MERU COUNTY GOVERNMENT ..... 37TH RESPONDENT  
MERU COUNTY PUBLIC SERVICE BOARD ..... 38TH RESPONDENT  
THARAKA-NITHI COUNTY GOVERNMENT ..... 39TH RESPONDENT  
THARAKA-NITHI COUNTY PUBLIC SERVICE BOARD....40TH RESPONDENT  
EMBU COUNTY GOVERNMENT ..... 41ST RESPONDENT  
EMBU COUNTY PUBLIC SERVICE BOARD ..... 42ND RESPONDENT  
KITUI COUNTY GOVERNMENT ..... 43RD RESPONDENT  
KITUI COUNTY PUBLIC SERVICE BOARD ..... 44TH RESPONDENT

MACHAKOS COUNTY GOVERNMENT .....	45TH RESPONDENT
MACHAKOS COUNTY PUBLIC SERVICE BOARD .....	46TH RESPONDENT
MAKUENI COUNTY GOVERNMENT .....	47TH RESPONDENT
MAKUENI COUNTY PUBLIC SERVICE BOARD .....	48TH RESPONDENT
NYANDARUA COUNTY GOVERNMENT .....	49TH RESPONDENT
NYANDARUA COUNTY PUBLIC SERVICE BOARD .....	50TH RESPONDENT
NYERI COUNTY GOVERNMENT .....	51ST RESPONDENT
NYERI COUNTY PUBLIC SERVICE BOARD .....	52ND RESPONDENT
KIRINYAGA COUNTY GOVERNMENT .....	53RD RESPONDENT
KIRINYAGA COUNTY PUBLIC SERVICE BOARD .....	54TH RESPONDENT
MURANG'A COUNTY GOVERNMENT .....	55TH RESPONDENT
MURANG'A COUNTY PUBLIC SERVICE BOARD .....	56TH RESPONDENT
KIAMBU COUNTY GOVERNMENT .....	57TH RESPONDENT
KIAMBU COUNTY PUBLIC SERVICE BOARD .....	58TH RESPONDENT
TURKANA COUNTY GOVERNMENT .....	59TH RESPONDENT
TURKANA COUNTY PUBLIC SERVICE BOARD .....	60TH RESPONDENT
WEST POKOT COUNTY GOVERNMENT .....	61ST RESPONDENT
WEST POKOT COUNTY PUBLIC SERVICE BOARD .....	62ND RESPONDENT
SAMBURU COUNTY GOVERNMENT .....	63RD RESPONDENT
SAMBURU COUNTY PUBLIC SERVICE BOARD .....	64TH RESPONDENT
UASIN GISHU COUNTY GOVERNMENT .....	65TH RESPONDENT
UASIN GISHU COUNTY PUBLIC SERVICE BOARD .....	66TH RESPONDENT
ELGEYO/MARAKWET COUNTY GOVERNMENT .....	67TH RESPONDENT
ELGEYO/MARAKWET COUNTY PUBLIC SERVICE BOARD .....	68TH RESPONDENT
NANDI COUNTY GOVERNMENT .....	69TH RESPONDENT
NANDI COUNTY PUBLIC SERVICE BOARD .....	70TH RESPONDENT
BARINGO COUNTY GOVERNMENT .....	71ST RESPONDENT
BARINGO COUNTY PUBLIC SERVICE BOARD .....	72ND RESPONDENT

LAIKIPIA COUNTY GOVERNMENT .....	73RD RESPONDENT
LAIKIPIA COUNTY PUBLIC SERVICE BOARD .....	74TH RESPONDENT
NAKURU COUNTY GOVERNMENT .....	75TH RESPONDENT
NAKURU COUNTY PUBLIC SERVICE BOARD .....	76TH RESPONDENT
NAROK COUNTY GOVERNMENT .....	77TH RESPONDENT
NAROK COUNTY PUBLIC SERVICE BOARD .....	78TH RESPONDENT
KAJIADO COUNTY GOVERNMENT .....	79TH RESPONDENT
KAJIADO COUNTY PUBLIC SERVICE BOARD .....	80TH RESPONDENT
KERICHO COUNTY GOVERNMENT .....	81ST RESPONDENT
KERICHO COUNTY PUBLIC SERVICE BOARD .....	82ND RESPONDENT
BOMET COUNTY GOVERNMENT .....	83RD RESPONDENT
BOMET COUNTY PUBLIC SERVICE BOARD.....	84TH RESPONDENT
VIHIGA COUNTY GOVERNMENT .....	85TH RESPONDENT
VIHIGA COUNTY PUBLIC SERVICE BOARD .....	86TH RESPONDENT
SIAYA COUNTY GOVERNMENT .....	87TH RESPONDENT
SIAYA COUNTY PUBLIC SERVICE BOARD .....	88TH RESPONDENT
HOMABAY COUNTY GOVERNMENT .....	89TH RESPONDENT
HOMABAY COUNTY PUBLIC SERVICE BOARD .....	90TH RESPONDENT
KISII COUNTY GOVERNMENT .....	91ST RESPONDENT
KISII COUNTY PUBLIC SERVICE BOARD .....	92ND RESPONDENT
NYAMIRA COUNTY GOVERNMENT .....	93RD RESPONDENT
NYAMIRA COUNTY PUBLIC SERVICE BOARD .....	94TH RESPONDENT
NAIROBI CITY COUNTY GOVERNMENT .....	95TH RESPONDENT
NAIROBI CITY COUNTY PUBLIC SERVICE BOARD .....	96TH RESPONDENT

## **JUDGMENT**

### **1. Background:**

The petitioner herein first approached this court *ex parte* under a certificate of urgency and through a Notice of Motion dated 1.10.2014 through the firm of Otieno Yogo, Ojuro & Co. Advocates. The petitioner sought orders that:-

1. **The application be certified as urgent and be heard forthwith and *ex parte* in the first instance in order to meet the interest of substantial justice.**
2. **Pending the hearing and determination of this petition, a conservatory order of injunction be issued prohibiting the respondents jointly and severally through any committee or body established under the 'CARPS' programme from dealing with deployment, re-deployment, termination or promotion or in any manner dealing with staff issues that are members of petitioner and workers of the County Governments who are the respondents.**
3. **Pending the hearing and determination of this application *inter partes*, a conservatory order of injunction be issued prohibiting the respondents jointly and severally through any committee or body established under the 'CARPS' programme from carrying out any duty of biometric data capturing of members of the petitioner who are workers of the County Governments named as respondents herein until the law is complied with.**
4. **Pending the hearing and determination of this petition, a conservatory order of injunction be issued prohibiting the respondents jointly and severally through any committee or body established under the 'CARPS' programme from carrying out any duty of biometric data capturing of members of the petitioner who are workers of the County Governments named as respondents herein until the law is complied with.**
5. **Pending the hearing and determination of this petition, a conservatory order of injunction be issued prohibiting the respondents jointly and severally through any committee or body established under the 'CARPS' programme from carrying out any activity under the said 'CARPS' programme until and unless the rights of the petitioner's members are protected as provided for under the Constitution and the relevant employment laws.**
6. **The court to give direction as to the hearing and disposal of the petition.**

On 1.10.2014, the court granted orders in terms of prayers 1 and 3. The application was to be heard *inter partes* on 6.10.2014. When the application came up for *inter partes* hearing, the parties sought extension of time to file their replies. Further applications were made to enjoin other parties by the petitioners as respondents and in the end all the 47 Counties were also enjoined as respondents. The AG, the 14th respondent also applied and was allowed to enjoin the Transition Authority and the Kenya Union of Civil Servants as interested parties. The parties however agreed to collapse the application and allow the court to deal with the substantive petition.

#### **The Petition:-**

The petitioner is a workers union representing workers and staff of the respondents and is a duly registered union to so act in accordance with the laws of Kenya. The respondents are County Governments and their respective County Public Service Boards duly established pursuant to the Constitution of Kenya 2010, and the AG, the Chief Legal adviser of the Government of Kenya and the Ministry of Devolution and Planning the Ministry responsible for the devolved government structures.

It is the petitioner's contention that Article 232(1) of the Constitution provides for values and principles of public service *inter alia*:-

- a) **Involvement of the people in the process of policy making.**
- b) **Accountability**
- c) **Transparency and provision to the public of timely accurate information.**

The petitioner further contends that Article 235(1) of the Constitution gives the County Government, the exclusive right in handling of staff issues serving under the County Government and not the National Government. Article 236(b) of the Constitution also protects public officers (staff of County Government included) from dismissal, removal from office, demotion in rank or otherwise being subjected to disciplinary action without due process of the law. The petitioner also contends that S. 60 of the County Government Act 2012, gives the County Public Service Boards, the exclusive duty to establish offices for staffing needs of the County Government and no such duty can be delegated to the National Government. Further S. 74 of the County Government Act 2012 gives the County Public Service Boards the authority to engage staff for County Governments on contract, as volunteers, casuals, on attachment or as interns.

The petitioner also contends that Article 41(1) & (2) & (4) protects the workers rights to fair labour practices. The petitioners have however contended breach of the Constitution and threatened rights of the petitioners and its' members due to the fact that contrary to Articles 235(1) and 236(b) of the Constitution, the respondents have jointly and severally engaged in what is described as capacity Assessment and Rationalization of the public service (herein after referred to as 'CARPS' at the National and County Governments beginning 15.9.2014 and engaged consultants who developed a training manual which came up with a framework on how the same is to be undertaken. This framework is now being adhered to by the respondents as a tool for implementation as a manual. The petitioner contends that this manual at Part 6 titled "Efficient and Effective Redeployment of under-utilized 'personnel' KRA-3 states:-

**"The CRPS programme will effect staff in different ways, this include deployment, redeployment and transfers within and across ministries, departments and counties. It may also lead to separation of staff who may not fit in the new and rationalized structure."**

The strategic objectives are stated in the manual at page 6.2 part 6 as follows:-

**"Smooth administration of the separation process."**

The petitioner contends that the functions described above are the exclusive functions of the County Public Service Boards as enshrined in Article 235 and 236 of the Constitution as read with the County Government Act that establishes the said boards. The petitioner further submits that the manual establishes various committees amongst them the inter governmental steering committee described as the apex institution whose members are:-

**i. Cabinet secretaries responsible for;**

- **Devolution & Planning**
- **The National Treasury**
- **Labour, Social Security & Services**

**ii. Chairperson, Council of Governors**

**iii. Chairperson - Human Resource & Labour Sub-Committee, Council of Governors**

**iv. Chairperson, Public Service Commission**

**v. Chairperson - Transition Authority**

**vi. Chairperson of Salaries & Remuneration Commission**

**vii. Chairperson - Commission on implementation of the Constitution.**

**viii. Chairperson - Commission on Revenue Allocation**

ix. **The A.G.**

The petitioner contends that the Committee has no representation by the petitioner as the workers union contrary to Article (1) & (2) of the Constitution.

The petitioner also submits that the manual also establishes the "County Rationalization Technical Team" whose membership include:-

- i. Chief officers of the Department**
- ii. Secretary County Public Service Board**
- iii. Secretary County Assembly Service Board**
- iv. Transition Authority County Co-ordinator**
- v. County Commissioners**
- vi. Representative of the lead consultant**
- vii. County Secretary who shall be the secretary to the Committee.**

The petitioner submits that the committee shall be performing functions of the respondent County Public Service Boards contrary to Article 236 of the Constitution as read with S. 57 of the County Government Act. The petitioner further contends that the committee as established are in breach of Article 4(1), (2), (4) & (5) of the Constitution and the County Government Act 2012 as it takes over the mandate of County Public Service Board hence infringes on the rights of the workers and staff of the County Governments.

The petitioner also contend that these committees are discriminatory against the county workers, staff and members of the petitioner contrary to Article 41(1), (2), (4) & (5) of the Constitution in that:-

- a) It denies participation of the petitioner who by law is mandated to represent it's members in all matters affecting it's members' terms and condition of work.**
- b) It usurps the constitutional and legal duty of the County Public Service Boards.**
- c) It creates a body not known in law to make decisions that will affect the contract of employment of the petitioners' members.**
- d) It has persons not authorized by law to deal with county workers' issues such as;**
  - (1) County Commission**
  - (2) Lead Consultants.**
- e) It purports to take over the duties of the County Public Service Boards contrary to law.**

The petitioner further avers that the 'CARPS' programme goes against the spirit of the Constitution on public participation despite it having public financial expenditure contrary to Article 201 of the Constitution in that the programme:-

- (1) Failed to seek public participation**
- (2) Failed to seek public comments on the programme before its' implementation.**

The same programme, the petitioner avers has failed to take into account members of the petitioner who:-

- a) Are on suspension or facing disciplinary actions.**
- b) Having various civil and criminal litigations whose rights are yet to be determined or in the process of effecting or executing judicial decision.**
- c) Are out of the Country on study leave or other official engagements.**

The petitioner therefore submits that the programme is not being carried out in a fair or equitable transparent manner and in accordance with the Constitution and therefore seeks the following prayers:-

**(a)That pending the hearing and determination of this petition a conservatory order of injunction be issued prohibiting the respondents jointly and severally through any committees or body established under the 'CARPS' programme from dealing with deployment, redeployment, termination or promotion or in any manner dealing with staff issues that are members of petitioner and workers of the County Government who are respondents.**

**(b)That pending the hearing and determination of this petition a conservatory order of injunction be issued prohibiting the respondents jointly and severally through any committees or body established under the 'CARPS' programme from carrying out any duties of biometric data capturing of members of the petitioner who are workers of the County Governments named as respondents herein until the law is complied with.**

**(c) That pending the hearing and determination of this petition a conservatory order of injunction be issued prohibiting the respondents jointly and severally through any committees or body established under the 'CARPS' programme from carrying out any activity under the said CARPS programme until and unless the rights of the petitioner's members are protected as provided for under the Constitution and the relevant employment laws.**

**(d)That an order of permanent injunction restraining the respondents jointly and severally through any committees or body established under the 'CARPS' programme from dealing with deployment, redeployment, termination or promotion or in any manner dealing with staff issues that are members of the County Governments who are respondents herein pending hearing and determination of this petition.**

**(e)That a declaration that the 'CARPS' programme in so far as it relates to County Government workers working under the 1st, 2nd, 3rd, 4th, 5th, 7th, 9th, and 11th various respondents herein other than 13th and 14th respondents is in violation of the Constitution, the County Government Act, the Employment Act and is thus null and void.**

**(f) That a declaration that it is only the various County Public Service Boards of the various respondents other than 13th and 14th respondent 2nd, 4th, 6th, 8th, 10th and 12th who are mandated to handle deployment, redeployment, termination or promotion of the petitioner's members under their respective jurisdiction.**

**(g)That a declaration that the actions carried out by the respondents under the 'CARPS' programme in so far it relates to biometric data entry, deployment, redeployment, termination, promotion or transfer as regards petitioners members working under the respondents other than 13th and 14th respondents are null and void.**

**(h)That an order compelling the 2nd, 4th, 6th, 8th, 10th and 12th various respondents**

**other than 13th and 14th respondent to carry out their mandate as per the Constitution and the law through its legally mandated bodies and institutions.**

**(i) Costs of this petition be borne by the respondents jointly and severally.**

**(j) Interest on (i) above.**

**Respondents Case:-**

Various respondents entered their appearances and filed responses to the petition. The Hon. A. G filed his appearance on 2nd October 2014.

The A. G also filed their submissions and on behalf of the 13th respondent on 15.12.2014. In their submissions, the AG contends that in view of Kenya's new Constitution with a devolved structure, there was need to re-examine the role of the public service in meeting the expectation of Kenyans. This was examined through the 'CARPS' programme whose objectives the AG submits is noble and clearly within the policy interests of the National and County Governments being:-

**i. Transformation for Effective Service Delivery: ensuring that the public service responds to internal and external dynamics for change in the delivery of services for the welfare of its citizenry,**

**ii. Cost Reduction: The total estimated wage bill is slightly over 12% of GDP, and is well above the internationally accepted standard of 7% accounting for almost half of the revenue collected by Government.**

**iii. Fit for Purpose: The need to re-organize the structures of government to achieve the three E's- Economy; Efficiency and Effectiveness. The rationalization of the public service will seek to fit into the aspirations and objectives of the reorganization of government.**

**iv. Transition to Devolved Government: Involving the secondment, transfer and release of officers to and from national and county governments following the principle of "resource following function".**

The AG also submitted that the inception of the CARPS programme brought together the leadership of the two levels of Government as provided for under S. 7 of the Inter Government Relations Act (No. 2 of 2012) - IGRA known as the National and County Government coordinating summit (NCGCS) comprised of the President, the Deputy President, and the Governor of the 47 Counties. That it is the two leaderships that resolved to undertake a joint rationalization exercise for both the National and County Government levels in order to achieve the objectives of devolution, within the constitutional set time lines which is 3 years after the first general elections under the new Constitution.

The AG also submitted that in order to respond to the Constitutional dictates outlined in the Constitution, parliament enacted the Transition to Devolved Government Act (TDGA). The Transition Authority - TA one of the interested parties herein is established under the TDGA, is mandated to facilitate and coordinate the transition to the devolved system of government as provided under S. 15 of the Sixth Schedule to the Constitution. The AG submits that the process of devolution and it's time lines are well anchored in the Constitution and the laws as envisaged herein above, and the process has the blessings and support of both the National and County Government and that the respondents have not forsaken the law but are undertaking their patriotic duty of implementing the Constitution.

The AG submits that the assertion by the 3rd and 4th respondents in their replying affidavit that they are not engaged in the CARPS programme and that it was initiated by the National Government alone is misleading. The AG submits that the CARPS programme is a lawful process and in it's framework has various stakeholders including unions to represent the Labour relations including the petitioner

herein.

The 3rd and 4th respondents filed their submissions on 15.12.2014 through the firm of Lusweti & Nabutola Advocates. In their submissions they denied the petitioner's contention that the CARPS programme was specifically initiated by the AG pursuant to the 4th Schedule and the role of 3rd and 4th respondents is to implement it. They also deny that the CARPS programme usurps the statutory functions and powers of the County Public Service Boards. They contend that in fact the CARPS programme is intended to assist the County Public Service Boards to realize their human resource capacity needs and co-ordinate and collaborate with other Ministries and/or Counties in rationalization and redeployment of employees to ensure a balanced deployment of available technical and professional public service personnel. They asked the court to weigh the rights of the petitioners against public interest and reject the petition.

The 7th and 8th respondents filed their submissions on 15.12.2014 through Alex George Etyang Advocate. They submitted that the petition has no basis and denied that the CARPS programme is usurping the powers of the County Public Service Boards. They also denied that the programme violates or threatens to violate the rights of the members of the petitioner. They contend that the petitioner has not annexed to their pleadings the list of their members who they are representing as such it cannot be a blanket assumption that they represent all staff employed by the County Governments.

The 67th and 68th respondents filed their submissions through the firm of Tororei & Co. Advocates on 15.12.2014. They submitted that the objectives of CARPS was never to deal with deployment, redeployment, termination or promotion of petitioners staff but to recommend and facilitate the exercise. They deny that it usurps the powers and functions of the various County Public Service Boards. It is their position that CARPS is a collaborative programme and its' membership includes the secretary of County Public Service Boards.

For the 61st and 62nd respondents and interested parties, Irene Kapchebai Mbiti filed the response. They submitted that the petitioners did not provide them with a list of its' members who were to be excluded from the exercise as such the exercise was done and completed.

The 93rd and 94th respondents filed their submissions through Esther Asati Advocate. They submitted that by the time the case was filed the exercise had been overtaken by events as the 93rd respondent had already finalized it.

The 87th and 88th respondents filed their submissions through the firm of Otieno & Co. Advocates. They submitted that they have not ceded any of their constitutional or statutory mandate to the committees established under the CARPS programme. It is their position that they have not infringed on any rights of the petitioners and they asked the court to dismiss this petition.

The 5th and 6th respondents filed their submissions on 15.12.2014 through the firm of Wekesa and Simiyu Advocates. They contend that the petitioner has no *locus standi* to institute the petition against them as there is no recognition agreement between them. They also submitted that the petitioner has failed to adduce evidence of members of their union who are in the employment of the 5th and 6th respondents. They asked the court to dismiss this petition.

On behalf of the 45th and 46th respondents, the firm of J. Muoki & Co. Advocates filed their response on 1.12.2014. They submitted that the petitioner did not disclose any constitutional violations by the respondents.

#### **Issues for determination:-**

Upon considering submissions from both parties, the issues for determination by this court are as follows:-

- 1. Whether the CARPS programme is a forced project of the National Government**

**without consideration of the needs of the County Government.**

- 2. Whether in implementing the CARPS programme, rights of the petitioners have been infringed upon.**
- 3. Whether the CARPS programme has usurped the powers of the County Public Service Boards.**
- 4. Whether the petitioners have been discriminated upon in deciding on the membership of the Committees handling the CARPS programme.**
- 5. Whether the CARPS programme discriminates upon certain members of the petitioners.**
- 6. What remedies this court can grant.**

**The CARPS programme:**

On the 1st issue, the respondents - the AG in particular submitted at length on the background; scope and rationale of the CARPS programme. In principle the AG submitted that this programme is anchored in the Constitution of Kenya 2010 and the National & Devolution Laws namely the Inter Governmental Relation Act 2012 (IGRA) and the Transition to Devolved Governments Act 2012 (TDGA). The AG pointed out that the programme brought together the leadership of the two levels of Government provided under S. 7 of Inter Governmental Relation Act 2012. S. 7 of Inter Governmental Relation Act provides as follows:-

- 1. There is established a National and County Government co-ordinating summit which shall be the apex body for inter governmental relations.**
- 2. The summit shall comprise:-**
  - a) the President or in the absence of the President the Deputy President who shall be the chairperson, and**
  - b) the governors of the forty - seven counties.**
- 3. The chairperson of the council elected under S. 19 shall be vice - chairperson of the summit."**

The functions of the summit are provided under S. 8 of the Inter Governmental Relation Act as follows:-

**"The summit shall among other things provide a forum for;**

- a) Consultation and Co-operation between the National and County Governments.**
- b) Promotion of National values and principles of governance.**
- c) Promotion of national cohesion and unity.**
- d) Consideration and promotion of matters of national interest.**
- e) Consideration of reports from other inter governmental forums and other bodies on matters of national interest.**
- f) Evaluating the performance of national and County Governments and**

**recommending appropriate action.**

**g) Receiving progress reports and providing advise as appropriate.**

**h) Monitoring the implementation of National and County Development plans and recommending appropriate action.**

**i) Considering issues relating to inter governmental relations referred to the summit by a member of public and recommending measures to be undertaken by the respective County Government.**

**j) Co-ordinating and harmonizing the development of County & National Governments Policies.**

**k) Facilitating and co-ordinating the transfer of functions, powers or competences from and to other level of government and**

**l) Performing any other function that may be conferred on it by this Act or any other legislation or that it may, consider necessary or appropriate."**

From the reading of this S. 7 and 8, the import is that the AG may be referring to S. 8(j) & (k) above where the summit sought to harmonize what was happening at the National & County Governments. This is in tandem with Article 6(2) of the Constitution which provides that:-

**"The governments at the national and county levels are distinct and inter - dependent and shall conduct their mutual relations on the basis of consultation and cooperation."**

The need for the two levels to work together is further emphasized under Article 189 of the Constitution of which provides that:-

**"(1) Government at either level shall—**

**(a) perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level; Cooperation between national and county governments.**

**(b) assist, support and consult and, as appropriate, implement the legislation of the other level of government; and**

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

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

The law therefore recognizes the need for the two levels of government to work together and this underpins the background of the CARPS programme initiated by both the national and county government.

The objectives of the CARPS programme are noble and there is not doubt about it. This is further buttressed by the provision of S. 4 of the TDGA 2012 which provides the functions of the Transition Authority (TA) amongst them:-

**"(i) Carry out an audit of the existing human resource of the government and the local**

authorities.

**(j) Assess the capacity needs of national and county governments.**

**(k) ....**

**(l) ....**

**(m) Advise on the effective and efficient rationalization and deployment of the human resource to either level of government.**

**(n) ---"**

Under the guidelines provided by the Transition Authority in their Transition to Devolved Government, rationalization of staff for both national and county governments for purposes of restructuring and organizing the national government and the county government structures is contemplated.

S. 5 of the guidelines provide as follows:-

**"The Transition Authority shall advise the summit (established at the Intergovernmental Relations Act) on the effective and efficient capacity assessment rationalization and deployment of public officers in the national and county governments as contemplated in S. 7(2)(m) of the TDGA 2012.**

**(2) The summit shall guide the preparation and implementation of the policy on the capacity assessment and rationalization contemplated in sub-guideline(1) and publish an intergovernmental staff rationalization report,**

**(3) The report contemplated in sub-guideline(2) shall include the summit's recommendation on transfer of seconded officers to county governments on the release of seconded officers back to the national government as the case may be,**

**(4) The PSC, the County Public Service Boards and the County Assembly Service Boards shall oversee the implementation of the rationalization report.**

**(5) The rationalization report shall be implemented during the transition period by;**

**(a) the national government**

**(b) any other relevant person, body or institution.**

**(6) The summit, in consultation with the PSC, the CPSBs, the CASBs and any other relevant person, body or institution shall publish a report of the implementation of the rationalization report."**

The nobility of the CARPS programme cannot be underestimated, what is in issue is whether the programme is being implemented without the support of the County Government. The respondents who replied to this petition submitted that they are part and parcel of this programme and support it to the fullest as being complementary to their role and function.

It is therefore not true that the CARPS programme is being implemented by the national government exclusive to the County Government.

**(B) The petitioners have contended that they too ought to be members of the various committee established under the CARPS programme as their members' rights stand to be trampled upon in their**

absence. As enunciated above, the law is clear on membership of the summit. However under S. 23 of IGRA 2012;

**"The national or a county government may establish a joint committee with a specific mandate where such a committee is necessary for the achievement of;**

**(a) the objectives and principles of devolution provided in Article 174 and 175 of the Constitution and**

**(b) the objectives and purposes of this Act."**

The petitioners contend that the committees established under the CARPS programme have excluded them from their membership and their rights stand infringed.

The objectives of the CARPS are as follows:-

- i. Provide for well organized structures, at the national and county levels, that are based on given mandates and functions.**
- ii. Establish the existing human resource capacity at the national and county government levels and make recommendations on the optimal staffing based on the re-aligned structures.**
- iii. Facilitate deployment and transfer of staff within and across the government.**
- iv. Examine and analyze the existing human resource profiles and inventories to inform the rationalization programme.**
- v. Recommend modalities for undertaking the rationalization exercise in accordance with relevant laws, statutes and conventions and implement the recommendations."**

The results expected from the CARPS programme include the following:-

**"(i) All Ministries and County Governments will have comprehensively rationalized functions, structures and optimal staffing levels.**

**(ii) Biometric inventory - taking of all personnel - enabling each Ministry and County Government to undertake an Human Resource Audit and Skills Assessment.**

**(iii) Balance distribution of technical and professional public service personnel across the Ministries and Counties.**

**(iv) Every Ministry and County Government to produce it's rationalization plan (with costs and budget) for implementation.**

**(v) A competency assessment framework is in place to enable Ministries and Counties to appraise the competencies of their employees.**

**(vi) A coordinated national programme of options and incentives for redeployment of staff, including one for enhancing livelihoods for those who opt to exit the service and,**

**(vii) Ministries and County Governments provided with data and information to enable them to make policy determinations on deployment of personnel capacity building for improved and sustained efficiency and effectiveness in service delivery."**

The question is whether what is expected as key deliverables will infringe on the rights of the

petitioners. Will the envisaged deployment, redeployment, transfers and even separation have an impact on the membership of the petitioners. Of the deployment, or redeployment or transfer of an employee affects them in one way or another. Section 10(5) of the Employment Act 2007 in reference to an employment contract states that:-

**"Where any matter stipulated in subsection (1) changes, the employer shall in consultation with the employee revise the contract to reflect the change and notify the employee of the change in writing."**

It is envisaged that an employee's terms of engagement should not be altered without consulting him and this must be in writing. If the positions of the employees would change, then they have a right to be consulted of the same. The same applies to instances of separation better known as redundancy or termination or dismissal. In this case again, S. 40 of Employment Act 2007 must come into play in case of redundancy and S. 41 of Employment act in case of termination or dismissals.

Article 41 of the Constitution envisages a right to fair labour practices including a right to form, join or participate in the activities and programmes of a trade union. If any person chooses to join a union then it is that union that is expected to represent them in any decision the employer chooses to effect against or for the employee. The petitioner has averred that they have been left out in the CARPS programme and therefore the rights of their members are being infringed upon.

The CARPS manual at Annex 1 states the membership to it's various committees. A representative from the County Government Workers Union is a member. If however the petitioner has been excluded in the actual formation of the committee, then the rights of the petitioner's members have either been infringed upon or threatened with infringement and this situation must of necessity be corrected.

**(C)** The petitioners also submitted that the CARPS programme has usurped the powers of the CPSBs. In their submissions, the respondents - CPSBs denied this allegation. It is also clear from the membership of the committees, they are also members. It is also the CPSBs who can have *locus* to complain about such an omission if any. It is therefore this court's finding that this assertion is not correct and that the functions of the CPSBs have not been usurped by the CARPS programme.

**(D)** The petitioners also complained that they have been discriminated upon in the process of choosing membership of the various committees established under the CARPS programme. I have already discussed this aspect under **(B)** above. However, if at all the petitioners have been excluded from membership of the technical committees established under this programme, that would amount to discrimination. The manual envisages that they should be members. The assertion that they cannot be members because they had no CBA with the various respondents cannot stand as this was still and may have been the position when the manual was put in place and this was coming in the transition period before structures were fully established.

**(E)** As to whether CARPS discriminated against certain members of the petitioner, the petitioner submitted that the teams set up to capture information on the biometric kits are declining to do so on persons currently on suspension or having criminal or civil cases whose rights or liabilities are yet to be determined.

The Constitution is clear under Article 27:-

**"Every person is equal before the law and has the right to equal protection and equal benefit of the law."**

The members of the petitioner who are on suspension or facing any disciplinary process therefore deserve to be protected and the tools envisaged should be such that they can capture such details. It is therefore this court's finding that there should be no discrimination against any employee whether on suspension or whether facing any disciplinary proceedings or on leave.

(F) After analyzing as above, the court makes the following orders:-

- 1) **That the petitioners be included in the committees set up under the CARPS programme as envisaged by the law in order to cater for the rights of their members.**
- 2) **The tools for data capture to include all workers, the petitioners members whether on suspension or facing any disciplinary proceedings or whether on leave.**
- 3) **The order granted stopping the whole CARPS programme against the respondents be lifted forthwith on conditions granted under (1) and (2) above.**
- 4) **As this matter is of great public interest, each party to bear it's own costs.**

**HELLEN S. WASILWA**

**JUDGE**

**12/1/2015**

**Appearances:-**

Yogo for petitioner present

Brian Otieno for petitioner present

Miss Langat for 13th and 14th respondents and interested parties present

Nabutola for 3rd & 4th respondents present

Rodi for 1st and 2nd respondents present

Kirui for 65th and 66th respondents present

CC. Wamache