



Council of Governors v Attorney General & another; Water Resources Management Authority & another (Interested Parties) (Constitutional Petition 523 of 2016) [2025] KEHC 1106 (KLR) (Civ) (28 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1106 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CONSTITUTIONAL PETITION 523 OF 2016

EC MWITA, J

FEBRUARY 28, 2025

BETWEEN

COUNCIL OF GOVERNORS PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF WATER AND

SANITATION 2ND RESPONDENT

AND

WATER RESOURCES MANAGEMENT AUTHORITY INTERESTED PARTY

KIAMBU MULTI PURPOSE CO-OPERATIVE SOCIETY . INTERESTED PARTY

RULING

1. This is a ruling on the preliminary objection dated 16th January 2017 on the jurisdiction of this court to hear and determine this petition.
2. Council of Governors filed this petition against the respondents seeking several declarations and orders. The Attorney General, the 1st respondent, filed raised a preliminary objection arguing that this being a dispute between county governments and the national government, the petition was filed prematurely contrary to Articles 159, 189(3) and (4) of *the Constitution* as read with section 31 (a) and (b) of the Inter Governmental Relations Act. According to the 1st respondent, the petitioner did not exhaust the alternative mechanisms for intergovernmental disputes as required by Article 189 of *the Constitution* read with section 31 of the Act, rendering the petition premature.



3. The interested party supported the preliminary objection. The respondents and interested party relied on several decisions to argue that the petition was filed prematurely without taking into account the provisions of *the Constitution* and the *Intergovernmental Relations Act*. The decisions cited in support of the petition, included Council of Governors v Lake Basin Authority & another (Petition No 280 of 2017) [2021] eKLR and Council of Governors v Energy Regulatory Commission & others (Petition No. 279 of 2017) [2023] (KLR).
4. The petitioner opposed the preliminary objection, arguing that it is not well founded; that the Court has jurisdiction and that each case should be decided on its own peculiar facts. According to the petitioner, the issues in this petition are different from those in the decisions relied on. Reliance was placed on Council of Governors v National Environmental Management Authority & 11 others (Petition No. 277 of 2017) [2023] KLR. The court was urged to overrule the preliminary objection and dismiss it.
5. I have considered the preliminary objection and arguments for and in opposition. I have also considered the decisions relied on. The respondents raised a preliminary objection citing non exhaustion of other available dispute resolution mechanisms. The interested party supported the preliminary objection.
6. The principles for determining what amounts to a preliminary were stated in the often-cited case of Mukisa Biscuits Manufacturing Company Limited v West End Distributors [1969] EA 696, thus:

A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
7. A preliminary objection must be one that consists of a point of law which if argued as a preliminary point may dispose of the suit at that preliminary stage without the need for the matter to go for full hearing.
8. The respondents' argument is that the petition was filed prematurely thus, offending Article 189(3) and (4) as read with section 31 of the *Intergovernmental Relations Act* and therefore this court should decline to exercise its jurisdiction and dismiss the petition.
9. Article 189 under the heading cooperation between national and county governments, provides at clause (3) that in any dispute between governments, governments should make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation. Clause (4) states that the legislation should provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.
10. Article 189 (3), (4) does not state that the court should not hear disputes between the two levels of government. The emphasis is on making efforts to amicably resolve the disputes through other means. This is in line with the principles in Article 159(2) of *the Constitution* on alternative dispute resolution.
11. Section 31 of the *Intergovernmental Relations Act* further provides that the national and county government shall take all reasonable measures to-
 - a. Resolve disputes amicably; and



- b. Apply and exhaust the mechanisms for alternative dispute resolution provided for under this Act or any other legislation before resorting to any judicial proceedings as contemplated by Article 189(3) and (4) of *the Constitution*.
12. Section 31 does not oust the jurisdiction of this court to hear disputes between national and county governments. It only postpones court actions by encouraging the two levels of government to try and resolve their disputes through a negotiated settlement, including mediation and arbitration. Where those mechanisms fail, parties have no alternative but to approach the court for resolution of such disputes.
13. The disputes between the two levels of government that have to be resolved as demanded by Article 189 as read with section 31 of the *Intergovernmental Relations Act*, must be those that can be easily resolved without necessarily involving the court. However, where a dispute is one that mediation, negotiation or arbitration cannot assist in resolving, such a dispute has to be brought to court for resolution. In other words, whether a dispute is one that can be resolved in the manner contemplated by Article 189(3) and (4) as read with section 31 of the *Intergovernmental Relations Act*, will depend on the facts and peculiar circumstances of the case.
14. In this petition, the petitioner sought the following declarations and orders:
- A conservatory order precluding the 2nd respondent from implementing or continuing the implementation of the *Water Act*, 2016 until the determination of the petition;
 - a declaration that the *Water Act* is inconsistent and incompatible with the devolved system of government set out in *the constitution* of Kenya 2010 and, accordingly, null and void;
 - alternatively, and without prejudice to prayers (a) and (b) above, a declaration that the provisions of sections 6, 8, 12 to 14, 22, 27, 30 to 32, 36 to 38, 40 to 54, 57 to 62, 65, 66, 69, 74 to 78, 84 to 91, 95 to 101, 109, 117, 126, 130, and 148 of the *Water Act* are inconsistent with several articles of *the constitution* as read with sections 10 and 11 of the Fourth Schedule to *the Constitution*.
 - in the alternative and without prejudice to prayers (a), (b) and (c) above, an order directing the respondents to secure such necessary amendments as may be necessary to bring the impugned Act into conformity with the devolved system of government as set out in *the Constitution*.
15. The petitioner sought declarations that the *Water Act* is inconsistent and incompatible with the devolved system of government set out in *the constitution* and is therefore null and void; that sections 6, 8, 12 to 14, 22, 27, 30 to 32, 36 to 38, 40 to 54, 57 to 62, 65, 66, 69, 74 to 78, 84 to 91, 95 to 101, 109, 117, 126, 130, and 148 of the Act are inconsistent with several Articles of *the Constitution* as read with sections 10 and 11 of the Fourth Schedule to *the Constitution* and an order directing the respondents to make necessary amendments to bring the Act in conformity with the devolved system as set out in *the Constitution*.
16. The core of the petition is that the *Water Act* is inconsistent with the principles of devolution, or that several sections of the Act are inconsistent with *the Constitution*. This is an issue that falls within the jurisdiction of the Court under Article 165(3)(d)(i) of *the Constitution* which requires the Court to determine the question whether any law is inconsistent with or in contravention of *the Constitution*.
17. The issue raised in this petition are not, in my respectful view, an ordinary dispute that can be referred to a forum other than this Court for resolution as contemplated by Article 189 as read with section 31 of the *Intergovernmental Relations Act*.



18. The respondents did not demonstrate that it is possible for mediation to resolve the issue of the constitutionality of impugned sections of the *water Act* and how, given that this calls for interpretation of *the Constitution* and the Act to determine whether there is any inconsistency.
19. In short, a reading of the preliminary objection alongside the prayers in the petition yields a clear view, that the issues raised are for this Court's determination and not any other body as the respondents wanted the Court to believe.
20. Consequently, and for the above reasons, the preliminary objection is overruled and dismissed.
21. Leave to appeal granted, if necessary.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY 2025

E C MWITA

JUDGE

