THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 91 OF 2021

BOARD OF MANAGEMENT, FRERE TOWN PRIMARY SCHOOL.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....DEFENDANT

RULING

The defendant has raised a preliminary objection dated 22nd June 2021 that the Application and the suit as drawn and filed offends Article 6,159(c) and 189 (3) & (4) of the Constitution (all read together) and therefore a non-starter and should be dismissed and/or referred to an alternative dispute resolution forum in this case the Intergovernmental Technical Relations Committee. That this application and suit is an inter-governmental dispute whose resolution is envisaged and provided for differently under the Constitution and Statute. The Application and suit is filed contrary to the Constitution and Section 30-35 of the Intergovernmental Relations Act No.2 of 2012 which provides that National and County Governments to have mutual relations on the basis of consultation and cooperation and settle disputes amicably. That this Application and suit is premature and this Honourable court ought to decline to hear it as provided for under the Constitution of Kenya and Section 35 of the Intergovernmental Relations Act No. 2 of 2012 and the inherent powers of this Honourable Court refer this matter for hearing and determination by alternative dispute resolution mechanisms. The Defendant pray that the Application and suit (Plaint) dated 18th May 2021 be dismissed.

The plaintiff submitted that the issue for determination is whether the matter is an intergovernmental dispute under the section 30-35 of the Intergovernmental Relations Act. That the intergovernmental relations act defines an intergovernmental dispute to being a dispute between two levels of governments. Section 3 Intergovernmental Relations Act provides the objects and purposes of the which include to provide mechanisms for the resolution of intergovernmental disputes where they arise. Part IV of the Act provides for Dispute Resolution Mechanisms. Section 30 (1) defines a Dispute under the Act unless the context otherwise requires as an "intergovernmental dispute.

"Section 30 (2) provides that Part IV shall apply to resolution of dispute

(a) between the national government and a County Government or,

(b) amongst County governments."

That the Court in Petition No. 370 of 2015, Isiolo County Assembly Service Board & another vs Principal Secretary (Devolution) Ministry of Devolution and Planning A. another (2016) eKLR Onguto J stated:-

"The dispute must be between the two levels of government. It must not be between one or the other on the other hand and an individual or person on the other hand. A dispute between a person or State officer in his individual capacity seeking to achieve his own interest or rights would not equate an intergovernmental dispute. A dispute between two or more county governments would

however equate an intergovernmental dispute: See section 30(2) (b) of the Act. By the better reason, it would also follow that where a state officer seeks through any means to advance the interest of a government, whether county or national, against another government whether county or national, then such a dispute would rank as an intergovernmental dispute."

That the definitions of what constitutes government are laid down elaborately within the constitution. The Constitution does not include every institution in the country as a vestige of the level of government either County or National government. The Board of Management of Primary Schools are established under the Basic education act section 56.The comprehensive role of the board is provided there under including promoting the best Interests of the institution and ensure its development, ensure and assure the provision of proper and adequate physical facilities for the institution among others. That the intention of Parliament was to give authority to the Board of Management to oversee all affairs in relation to day to day management of schools. The School Board in its capacity is to ensure implementation of Government Education policy while liaising together with various institutions within the government and outside the government.

This court has considered the preliminary objection and the submissions therein. The preliminary objection to be determined is whether or not this court has jurisdiction to entertain the same. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

"…… 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"

In the same case, Sir Charles Newbold said:

"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 had to be ascertained or if what is sought is the exercise of judicial discretion".

J.B. Ojwang, J (as he then was) in the case of Oraro vs. Mbajja (2005) e KLR had the following to state regarding a 'Preliminary Objection'.

"*I think the principle is abundantly clear. A "preliminary objection", correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement …….. that, "where a court needs to investigate facts, a matter cannot be raised as a preliminary point.".*

The issue as to whether or not this has jurisdiction is therefore properly raised as a Preliminary Objection and the court will consider the same.

On the issue of jurisdiction of this court, it is a finding of fact that the subject matter of the current matter is between a school and the County Government of Mombasa. In the case of "The MV Lilian "S" (1989)KLRI, the court stated as follows;

"Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment that it holds the opinion that it is without jurisdiction".

In the instant case the the defendant stated that this Application and suit is premature and this Honourable court ought to decline to hear it as provided for under the Constitution of Kenya and Section 35 of the Intergovernmental Relations Act No. 2 of 2012 and the inherent powers of this Honourable Court refer this matter for hearing and determination by alternative dispute resolution mechanisms.

This court is fully aware that w**here a specific dispute resolution mechanism is prescribed by the Constitution or a statute, parties should to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.** Article **189 (3) & (4)** of the Constitution provides as follows:-

"(3) In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.

(4) National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration."

*The legislation contemplated above is the Intergovernmental Relations Act a*n Act of Parliament to establish a framework for consultation and co-operation 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.

*Section **3** of the act provides the objects and purposes of the act which include to* provide mechanisms for the resolution of intergovernmental disputes where they arise. *Part* **IV** *of the Act provides for Dispute Resolution Mechanisms. Section* **30 (1)** *defines a Dispute under the Act unless the context otherwise requires as an "intergovernmental dispute." Section* **30 (2)** *provides that Part* **IV** *shall apply to resolution of disputes* **(a)** *between the national government and a County Government or* **(b)** *amongst County governments.*

What constitutes a dispute within the context of the Intergovernmental Relations Act has received judicial construction by the High Court**.** In *Isiolo County Assembly Service Board & another vs Principal Secretary (Devolution) Ministry of Devolution and Planning & another* Onguto J stated that;

'The dispute must be between the two levels of government. It must not be between one or the other on the other hand and an individual or person on the other hand. A dispute between a person or State officer in his individual capacity seeking to achieve his own interest or rights would not equate an intergovernmental dispute. A dispute between two or more county governments would however equate an intergovernmental dispute: see section 30(2)(b) of the Act. By the better reason, it would also follow that where a state officer seeks through any means to advance the interest of a government, whether county or national, against another government whether county or national, then such a dispute would rank as an intergovernmental dispute.

*What precisely amounts to an intergovernmental dispute is not expressly detailed either under the Constitution or the Act. Guidance may however be retrieved from both Articles 6 and 189 of the Constitution as well as from Section 32 of the Act. Articles 6 and 189 provide for respect, cooperation and consultation in the conduct of the two governments' mutual relations and functions. The focus appears to be performance of functions and exercise of powers of each respective level of government. Section 32 of the Act however appears to precipitate even a commercial dispute as an intergovernmental dispute when the Section expressly refers to **"any agreement"** between the two levels of government or between county governments. The agreement, in other words, is not limited to that of performing functions or powers or that of guiding relations.'*

To buttress the above reliance has been placed in the case of *County Government of Nyeri v Cabinet Secretary, Ministry of Education Science & Technology & another (2014) eKLR*, where the Court at paragraph 10 while relying on *Intergovernmental Relations Frame Works Act 2005 of South Africa* gave basic requirements for a dispute to fall within the ambit of Intergovernmental Relations Act, it must fulfil the following requirements;

"a) The dispute must involve a specific disagreement concerning a matter of fact, law or denial of another.

b) Must be of a legal nature. That is a dispute capable of being the subject of judicial proceedings.

c) Must be an intergovernmental one in that it involves various organs of state and arises from the exercise of powers of function assigned by the Constitution, a statute or an agreement or instrument entered into pursuant to the Constitution or a statute.

d) The dispute may not be subject to any of the previously enumerated exceptions."

In the case of *International Legal Consultancy Group & another v Ministry Of Health & 9 others* (2016) eKLR, it was held that the provision for dispute resolution between governments under the Act and the Constitution is intentionally established a consultative and amicable process in preference to court procedures, resort to which is only as last measure, if the alternative dispute resolution mechanism fail. The learned judge had this to say;

65. "It is, in my view, apparent that the constitutional and legislative intent was to have all disputes between the two levels of government resolved through a clear process established specifically for the purpose by legislation, a process that emphasizes consultation and amicable resolution through processes such as arbitration rather than an adversarial court system. As a result, a separate dispute resolution mechanism for dealing with any disputes arising between the national and county governments, or between county governments, has been established.

66. Before a dispute arising between these parties can be placed before the courts, the Constitution and legislation require that a reasonable attempt at amicably resolving the matter be made. Indeed, if there was any doubt about this, section 35 of the Act clears it away with specific words. ….

67. The legislative intention was therefore that judicial proceedings would only be resorted to once efforts at resolving the dispute between the two levels of government failed…."

This suit involves a party which is a Board of management of Frere Town Primary School which are neither County Government nor National Government. Guided by the provisions of the law and precedent I find that this case does not fall under the Intergovernmental Relations Act and therefore the preliminary objection must fail. Parties to comply with order 11 and fix the matter for hearing.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 20TH JANUARY 2022.

N.A. MATHEKA

JUDGE