



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**CONSTITUTION AND HUMAN RIGHTS DIVISION**

**PETITION AND HUMAN RIGHTS DIVISION**

**PETITION NO. 14 OF 2019**

**IN THE MATTER OF: ARTICLES 2,10,19,20,21,22,23,26,28,29,**

**39,40,47,175 AND 258 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL RIGHTS**

**AND FREEDOMS GUARANTEED UNDER THE CONSTITUTION OF KENYA 2010:**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS**

**AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF: SECTION 48 OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012**

**BETWEEN**

**THE COUNTY GOVERNMENT OF TANA RIVER.....PETITIONER**

**VERSUS**

**THE COUNTY GOVERNMENT OF KITUI.....1<sup>ST</sup> RESPONDENT**

**THE MINISTER OF INTERIOR AND**

**COORDINATION OF ANTIONAL GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT**

**RULING**

1. The **County Government of Tana River**, the Petitioner herein has sued the **County Government of Kitui**, the 1st Respondent, the **Cabinet Secretary** of Interior and Co-ordination of National Government-2<sup>nd</sup> Respondent and the Attorney General of Kenya- the 3<sup>rd</sup> Respondent.

2. The basis of the petition is an apparent border dispute between the Petitioner and the 1st Respondent. In particular, the Petitioner claims that **Kalalani** and **Ddiddaade Areas** are within Wayu Ward and inhabited by Orma Community from Tana River County and claims that the 1st Respondent with the help of Police Officers have been engaging in acts of eviction of residents in the disputed area which they term illegal and a violation of the rights of the residents of the said areas.

3. It seeks amongst other reliefs a permanent injunction against the 1st Respondent and its agents from evicting members of **Orma Community** from the disputed area and compensation for breaches of their Constitutional rights.

4. In response to the petition, the 1<sup>st</sup> & 3<sup>rd</sup> Respondents filed respective preliminary objections to the petition and given that the preliminary objections were based on matters of law with the potential of disposing the petition, this court directed that the preliminary objections be canvassed simultaneously and vide through written submissions.

5. The 1<sup>st</sup> Respondent's Preliminary Objection dated 14<sup>th</sup> June 2021 is premised on the following grounds;

*i. That on the strength of the express provisions of Article 189 of the Constitution and Section 30 of the Inter-Governmental Relations Act No.2 of 2012, this Honourable Court lacks jurisdiction to hear and determine this matter on its merit*

*ii. That the Petitioner has not fully exhausted all available alternative Dispute Resolution Mechanism to resort to invoking the inherent jurisdiction of this Honourable Court and therefore the Jurisdiction of this Honourable Court has been invoked prematurely and this Court has no jurisdiction to hear and determine this Petition*

*iii. That this suit contravenes the well settled doctrines of constitutional avoidance and exhaustion of statutory provided dispute resolution mechanisms*

*iv. That this suit amounts to a total abuse of the court process and the law in that there is no constitutional issue involved.*

6. The 3<sup>rd</sup> Respondent's Notice of Preliminary Objection dated 12<sup>th</sup> October 2020 is premised on the following grounds;

*i. That by virtue of the express mandatory provisions of Article 189 (3) and (4) of the constitution and Part IV of the Inter-Governmental Relations Act Cap 5G, the jurisdiction of this Honourable Court to hear and determine the matter on its own merit has been improperly and immaturely.*

*ii. The Petitioner has not demonstrated that all reasonable measures to resolve the dispute amicably before instituting the instant judicial proceedings were or have been made by the parties as provided for under the law*

*iii. The instant judicial proceedings have been undertaken contrary to the letter and spirit of the constitution as provided for under Article 159 of the Constitution*

*iv. That this Petition is premature and an abuse of process of the Court.*

7. In its written submissions through Counsel, the 1st Respondent contends that the Constitution clearly prescribes a procedure for resolution of disputes between County Government. It points out that **Article 189(3)** specially provides that;

***“Governments shall make every reasonable effort to settle disputes including by means of procedures provided under National***

*Legislation.’’*

8. It submits that **Section 33 (1) of Intergovernmental Relations Act No. 2 of 2012 under Section 33 (1)** spells out the procedure of dealing with disagreements and disputes between both levels of government that the statute provides that every reasonable effort should be made to amicably resolve the matter through open negotiations with each other or through an intermediary.

9. The 1<sup>st</sup> Respondent has invoked Article 189 (3) & (4) of the Constitution as well as Section 31 of the Inter-Governmental Resolution Act which provide for resolution of inter-governmental disputes. The 1<sup>st</sup> Respondent has placed reliance on the case of **Daniel Muthama Muoki v Ministry of Health & Another; Shenzhen Mindray Bio-Medical Electronics Co. LTD & 5 Others 2020** where the court found that the matter involved a dispute revolving around devolution of the function of health care services. As such the dispute fell under the resolution mechanism provided for under the ***Inter-Governmental Resolution Act***.

10. The 1<sup>st</sup> Respondent contends that the petitioner did not exhaust the mechanism provided and that this petition is premature.

The 3<sup>rd</sup> Respondent concurred with the 1st Respondent’s submissions made by the 1st Respondent adding that the Petitioner has not fully exhausted all the available ***Alternative Dispute Resolution Mechanisms*** to resort to invoking the inherent jurisdiction of this Hon. Court and that this court has been moved prematurely and that this court has no jurisdiction to hear and determine this petition at this stage.

11. It further contends that the petition herein contravenes well settled doctrines of Constitutional avoidance and exhaustion and that the suit is a total abuse of court process.

12. In response to the Preliminary Objections raised, the Petitioner through submissions dated 21<sup>st</sup> January 2022 submits that the Preliminary Objections raised do not meet the threshold because the Preliminary Objection is not purely on points of law but contains contentious facts which require to be tested by way of evidence.

13. The Petitioner has argued that the Petition is premised on the contravention of the constitutional rights of the people Kalalani and Ddiddaade. The Petitioner has relied on the case of **County Governors vs Lake Basin Development Authority & 6 Others (2017) eKLR** where the court held that every person has the right to institute court proceedings when a right or fundamental freedom has been denied, violated or infringed.

14. On whether the dispute before court is an inter-governmental dispute, the Petitioner submits that the matter at hand should not be regarded as such just because of the parties involved. The Petitioner argues that the issue at hand pertains to enforcement of fundamental rights and freedoms provided for under the constitution. The Petitioner has relied on the case of **Kenya Ports Authority vs William Odhiambo Ramogi & 8 Others (2019) eKLR** where the Court of Appeal cited the case of **Independent Electoral and Boundaries Commission (IEBC) Ex parte National Super Alliance (NASA) Kenya & 6 Others**. *In the matter, the court considered that the test for determining the matter as an inter-governmental dispute was simply not to look at who the parties to the dispute were but the nature of the claim in question.*

15. The Petitioner has also relied on the case of **County Government of Nyeri v Cabinet Secretary, Ministry of Education Science & Technology & Another (2014) eKLR**, where the court found that the Petition before it did not fall under an inter-governmental dispute as it related to selection of form one students in county schools within Nyeri County. The Court stated that it was not persuaded that the dispute was in respect to functions of County Government. The court found that a dispute under the Inter-Governmental Relations Act must fulfill the following requirements;

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

*ii. Must be of a legal nature. That is a dispute capable of being the subject of a judicial proceeding*

*iii. Must be an inter-governmental 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.*

*iv. The dispute may not be subject to any of the previous enumerated exceptions.*

16. It is the Petitioner's position that the dispute does not relate to inter-governmental issues and that this court has jurisdiction to hear and determine it.

17. This court has considered the Preliminary Objection (P.O). raised and the response made by the Petitioner.

The Preliminary Objection raised by Respondents has brought up the following issues;

*i. Whether the dispute before court amounts to an inter-governmental dispute.*

*ii. Whether this court has jurisdiction to hear and determine the dispute.*

18. The Petitioner's case is that the matter before the court is not an inter-governmental dispute but rather a constitution petition where the Petitioner is alleging contravention of fundamental rights and freedoms of the residents of Kalalani and Ddidaade area. They have cited infringements of **articles 26,27,28, 40 and 47 of the Constitution of Kenya**. Specifically, they contend that the Petition is in respect to evictions and destruction of the properties belonging to the Orma Community.

19. The Petition speaks to the infringement of the constitutional rights of the people of Kalalani and Ddidaade, i.e. the Right to human dignity and freedom and security freedom of residence and protection of right to property right to (article 39 & 40), right to life (**article 26**) and right to equality before the law (**article 27 (1)**). The Petitioner has also pleaded that the 1st Respondent is threatening the residents' right to fair administrative action (**article 47**) and further infringing on the principle of devolved government (**article 175**).

20. The Petitioner has stated in the Petition that the 1st Respondent has been conducting illegal evictions against the Orma Community members specifically the residents of Kalalani and Ddidaade as a result the Petitioner has been unable to collect revenue from the residents restricting its ability to deliver services effectively to its people. Thereby affecting its functions as the county government.

21. The Petition further refers to the evictions stating that they arose from boundary disputes between the counties. The same is reflected in the Letter dated 4th June 2018 from the Governor of the Petitioner County addressed to the Chairperson of the Justice Legal Affairs Committees and referenced as "**Boundary Dispute**" between Tana River and Three Counties.

22. **Part IV of the Inter-Governmental Relations Act No. 2 of 2012** defines an inter-governmental dispute as follows;

*(1) In this Part, unless the context otherwise requires, "dispute" means an intergovernmental dispute.*

*(2) This Part shall apply to the resolution of disputes arising—*

*(a) between the national government and a county government; or*

*(b) amongst county governments.*

The question posed is whether the issues brought up by the

Petition constitute a dispute within the meaning of the above statute.

23. Hon. Justice Mativo defined inter-governmental disputed in the case of **Council of County Governors vs. Lake Basin Development Authority & 6 others (2017) eKLR** as follows;

*What constitutes a dispute within the context of the Intergovernmental Relations Act [30] 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 [31] 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.....”*

24. Further to the above position, the court in *County Government of Nyeri versus Cabinet Secretary, Ministry of Education Science & Technology & Another [2014] eKLR* enumerated basic requirements for a dispute to be regarded as a dispute falling under the Inter-Governmental Relations Act framework as follows;

- 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 a 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.*

25. Looking at the petition herein, it is evident that, the dispute is boundary related which ultimately affects the functions of the Petitioner. The Fourth Schedule of the Constitution on Distribution of Functions between the National Government and The County Governments Part 2 lists at paragraph 8 the role of county governments in county planning and development to include;

- a) *Statistics*
- b) *Land survey and mapping*
- c) *Boundaries and fencing*

26. The root of the dispute in my opinion relates to boundaries between the two counties (Kitui and Tana Counties) whose mapping and survey is a function of county governments making the dispute an inter-governmental dispute. The Petitioner in its letter to Parliament acknowledges the dispute as a “**a boundary dispute.**”

27. *The 1<sup>st</sup> and 3<sup>rd</sup> Respondents contend that the Petitioner has not fully exhausted all available **Alternative Dispute Resolution Mechanism** before invoking the inherent jurisdiction of this Honourable Court and therefore the Jurisdiction of this Honourable Court to them has been invoked pre-maturely.*

28. *The jurisdiction of the High Court is provided for under **Article 165** of the Constitution as follows;*

*(3) Subject to clause (5), the High Court shall have—*

- a) *unlimited original jurisdiction in criminal and civil matters;*
- b) *jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;*
- c) *jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;*
- d) *jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—*

- (i) *the question whether any law is inconsistent with or in contravention of this Constitution;*
- (ii) *the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;*
- (iii) *any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government;”*

29. On its part, the Petitioner is relying on **Article 23(1)** of the Constitution which provides that:-

**“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”**

30. However, this being an inter-governmental disputes, the court is guided by **Section 3(f) of the Intergovernmental Relations Act**, which provides that one of the objects and purposes of the Act are to provide mechanisms for the resolution of intergovernmental disputes where they arise.

31. *The Court is also guided by Article 189(2) (3) and (4) of the Constitution* provides for the measures to be undertaken in case a dispute arises between governments as follows;

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

**(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.”**

32. Further, although the jurisdiction of this Court is well established under the Constitution to hear and determine matters pertaining to the violations, breaches, infringement of fundamental rights and freedoms, **Article 159(2) of the Constitution** obligates this Court in exercising judicial authority to be guided by the following principles:

- a) *justice shall be done to all, irrespective of status;*
- b) *justice shall not be delayed;*
- c) *alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);*
- d) *justice shall be administered without undue regard to procedural technicalities; and*
- e) *the purpose and principles of this Constitution shall be protected and promoted.”*

33. It is apparent from the documents exhibited by the Petitioner and in particular a letter dated 4th June 2018 where the Governor of the Petitioner addressed his concern to Justice, Legal and Affairs Committee of Parliament and invited the chair to visit the locality with a view to getting clarification on boundary dispute with a view to finding a lasting solution. The Petitioner has not provided information on the results of the visit if there was one but at least the Petitioner appears to have known that the viable option was first to exhaust the avenues provided under **Alternative Dispute Resolution Mechanism (ADR)**. The provisions of **Section 31 to 35 of Intergovernmental Relations Act** clearly provides for the said **Alternative Dispute Resolution Mechanism (ADR)** as contemplated under **Article 189 (3) (4) of the Constitution of Kenya**.

This court finds that the doctrine of avoidance and exhaustion clearly applies to the circumstances obtaining in this petition. *Section 35* of the said Act provides;

*“Where all efforts of resolving a dispute under this Article fail, a party to the dispute may submit the matter for Arbitration or institute Judicial Proceedings.”*

34. The Petitioner has not exhausted all avenues provided to resolve whatever dispute it has over the disputed area. The jurisdiction of this court can only be invoked once all avenues have been exhausted as a matter of law.

In the premises this court finds that the preliminary objections raised by the respondents are well taken and founded. The same is sustained for the reasons advanced above. The **petition** herein is hereby **struck out** but I shall make **no Order as to costs**, since this is a public interest litigation. **Each party to meet its own costs.**

**DATED, SIGNED AND DELIVERED AT KITUI THIS 16TH DAY OF MARCH 2022.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**



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