**Narok County Council v Trans Mara County Council**

**Division:** Court of Appeal of Kenya at Kisumu

**Date of judgment:** 7 April 2000

**Case Number:** 25/

**Before:** Kwach, Akiwumi and O’kubasu JJA

**Sourced by:** LawAfrica

**Summarised by:** H K Mutai

*[1] High Court – Jurisdiction – Local authorities – Dispute – Apportionment of assets between two local*

*authorities – Apportionment to be on a fair and equitable basis as agreed between parties – Statute –*

*Power to apportion where there is no agreement conferred on Minister by statute – Whether High Court*

*has jurisdiction to determine dispute – Whether High Court’s jurisdiction ousted by statute –*

*Constitution section 60 – Local Government Act Chapter 265 sections 5, 28, 269, 270 and 399.*

**JUDGMENT**

**KWACH JA:** By the Local Government (County Council of Trans Mara) Order 1994 (LN number 285 of 1994) made on 11 August 1994, Honourable William Ole Ntimama, the Minister for Local Government (hereinafter called “the Minister”) created out of Narok County Council a new county council called the County Council of Trans Mara (Trans Mara). This order was made by the Minister pursuant to the powers conferred upon him by sections 5, 28 and 399 of the Local Government Act (Chapter 265) (hereinafter called “the Act”). The apportionment of rights, liabilities, properties, etc between Narok County Council (Narok) and Trans Mara had to be undertaken in accordance with the provisions of section 270(*b*) of the Act the relevant portion of which states: “(b) . . . and any apportionment of rights, liabilities, property, assets or any 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”. One of the things Narok and Trans Mara were unable to agree upon was the division of the entry fees collected from the following game reserves: (1) Kichwa Tembo Camp (2) Mpata Club (3) Mara Serena Lodge (4) Olkarruk Lodge (5) Little Governors Camp from 11 August 1994 although it is erroneously stated in the plaint as 4 August 1994. The fees were collected by the Kenya Association of Tour Operators, the Second Respondent, on behalf of Narok. Following this disagreement, Trans Mara filed a suit in the superior court against Narok and the Association seeking the following among other reliefs: (1) a declaration that it was entitled to its rights under the agreement between Narok and the Association; (2) that the Plaintiff was entitled to the entry fees collected by the Second Defendant from the five lodges; (3) an injunction to restrain Narok, their servants and agents from receiving for its own use revenue from the areas of jurisdiction from the Masai Mara Reserve; (4) an injunction restraining the association from remitting collections from Masai Mara to the First Defendant and have the same deposited in an interest-earning account for the Plaintiff; (5) the Second Defendant to refund all monies collected from the Plaintiff’s area of jurisdiction from 4 August 1994 (sic); (6) damages and interest. Narok filed a defence in which it denied owing Trans Mara any money and admitted having refused to remit the sum of KShs 69 362 400 to Trans Mara. In paragraph 6 of the defence of Narok, it was pleaded that the court had no jurisdiction to entertain the claim by Trans Mara. In its defence, the Association admitted that it had collected the fees in dispute and had paid them over to Narok in accordance with the agreement between it and Narok. When the case came up for hearing before Mbaluto J, counsel for Narok raised a preliminary objection that the suit was incompetent, misconceived and bad in law in that the provisions of section 270 of the Act had not been complied with. The Learned Judge dismissed the preliminary objection and said, *inter alia*: “Nowhere in that section or indeed in the entire Act is it stated that the jurisdiction of the High Court to hear disputes involving local authorities or between them is ousted. Section 60 of the Constitution of Kenya confers upon this Court unlimited jurisdiction in civil and criminal matters. In the case of *Miller v Miller* the Court of Appeal had this to say about the interpretation of section 60(1) of the Constitution: ‘The unlimited and original jurisdiction of the High Court can be ousted only by an express provision in the Constitution.’ Regarding the matter before me nothing has been said by counsel for the Defendants which remotely shows that the unlimited civil jurisdiction of this Court granted by the constitution has been taken away by the provisions of section 270 of the Local Government Act”. Section 60 of the Constitution does give the High Court unlimited jurisdiction but I do not understand it to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by a Minister as part of his statutory duty. Clearly if section 270(*b*) of the Act had simply provided that the two local authorities should agree on the apportionment without indicating what is supposed to be done in the event of a disagreement, then in that case I would agree with the Learned Judge that even without an express provision that in that event the dispute should be taken to court, the High Court would have jurisdiction under section 60 of the Constitution of Kenya to deal with the matter and make a determination. But in the present case, the law expressly, states that in default of agreement between the two councils, the apportionment of assets and liabilities would be undertaken as directed by the Minister. It seems to me to be plain beyond argument that the jurisdiction of the High Court can only be invoked if the Minister (as in the present case) refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter case, his decision can be challenged by an application to the High Court for a writ of *certiorari* because under the relevant section the division is to be made on a fair and equitable basis. But if, as in this case, the Minister simply refuses to discharge his statutory duty, his refusal can also be challenged in the High Court. The Learned Judge says in his judgment that by the time the suit was filed on 11 January 1996, the Minister had not deemed it fit to invoke the wide powers he had under section 270(*b*) of the Act to direct how the assets and liabilities were to be apportioned between the two local authorities. And he says the reason for this was animosity between the parties and the fact that the Minister was an interest party being a native of Narok. With respect, I cannot accept that the reasons given by the Learned Judge could justify the Minister’s failure to perform his statutory duty. When the Minister took the decision to split Narok and create Trans Mara, he must have known that the decision would be greeted with resentment in some quarters. As a native of Narok the decision to split Narok must have caused him great anxiety than the consequential step of directing how the assets and liabilities were to be apportioned. In any case, as a Minister of the government with statutory duties such mundane considerations should not weigh in his mind when he is called upon to make important decisions. The Minister was required by law to direct the apportionment of assets and liabilities if this could not be agreed between Narok and Trans Mara. Having refused or neglected to act, an application should have been made to the High Court by either party for an order of *mandamus* to compel the Minister to perform his statutory duty. The High Court does this in exercise of its special jurisdiction of judicial review of administrative action. The Minister’s refusal to act did not and could not confer any right on Trans Mara to institute proceedings against Narok to agree the apportionment could only give rise to a ministerial directive but could not render it liable to a suit at the instance of Trans Mara. The plaint in this case was filed on 11 January 1996. The hearing started before Mbaluto J on 28 October 1997 and was concluded on 30 March 1998. On 2 May 1997, after the suit had been filed but before it was heard a new Minister for Local Government, Honourable Francis Lotodo, who had replaced the Honourable William Ole Ntimama, set up a commission by *Gazette* Notice number 2183 to deal with the distribution of assets and liabilities of 18 local authorities, including County Council of Narok and County Council of Trans Mara. There is no reference to this appointment in the judgment and one cannot tell whether the Judge’s attention had been drawn to this important development. As Trans Mara was clearly aggrieved by the refusal of the Minister to direct the apportionment of the assets, the only remedy available to it in the circumstances was to apply to the High Court for an order of *mandamus* against the Minister to compel him to act. I am accordingly satisfied that the Learned Judge wrongly rejected the preliminary objection raised by counsel for Narok. The court had no jurisdiction to deal with the matter at that stage and the preliminary objection should have been upheld and the suit struck out as it was clearly incompetent. The proceedings were a nullity as the court acted without jurisdiction. I would allow this appeal, set aside the judgment and decree of Mbaluto J and substitute therefor an order striking out the suit filed by Trans Mara with costs to Narok and the Association. I would also give Narok the costs of this appeal. As the Association did not appear it is not entitled to an order for costs. As Akiwumi and O’kubasu JJA also agree, the appeal is allowed in terms of the orders I have proposed.

**AKIWUMI JA:** The fundamental issue in this appeal is whether the Learned Judge had jurisdiction to hear the matter which is the subject of the appeal. The Trans Mara County Council, the First Respondent in this appeal, sued by means of a plaint, the Narok County Council, the Appellant in this appeal, and the Kenya Association of Tour Operators (KATO), the Second Respondent in this appeal, for the following reliefs: “1.a. The Plaintiff prays for a declaration that the Plaintiff is entitled to its rights in the agreement the First and Second Defendants. b. That the Plaintiff is entitled to the entry fees collected by the Second Defendant in the Plaintiff’s area of jurisdiction vide: i. Kichwa Tembo Camp ii. Mpata Club iii. Mara Serena Lodge iv. Olkarruk Lodge v. Little Governors Camp vi. from 4 August 1994 till payment in full. 2.a. An injunction to restrain the First Defendants, their servants and or agents or however (*sic*) from receiving for its won use revenue from areas in the Plaintiff’s area of jurisdiction from the Masai Mara Reserve. b. A n injunction restraining the Second Defendant or its agents from remitting collections from the Masai Mara to the Firstt Defendant and have the same deposited in an interest earning account for the Plaintiff. 3. T he Second Defendant do refund all monies collected from the Plaintiff’s area of jurisdiction from 4 August 1994 till the time it desists from such collection. 4. D amages and interest. 5. C osts of the suit. 6. A ny other relief the Honourable Court may deem fit to grant”. This was on the basis that, pursuant to the Trans Mara County Council having been carved out as a local council on its own, from the Narok County Council, it was entitled to an apportionment of the rights, liabilities, property and assets of the latter County Council on a fair and equitable basis. Among such assets, the newly created Trans Mara County Council had in its plaint, sought, not a fair and equitable apportionment of the collected entry fees to the Maasai Mara Game Reserve which is a common amenity to both County Councils, but, and worded confusingly, the refund of “all monies collected from the Plaintiff’s area of Jurisdiction . . .”. The Second Respondent, as agent of the Narok County Council, was the one that collected such entry fees. In paragraph 9 of the First Respondent’s plaint, it was stressed 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”. It is convenient now to consider the relevant provisions of the Local Government Act that applies to the issues raised in the plaint. Section 270(*b*) read together with section 269 of the Act, provide that where a part of a local government area in this case, that of the Narok County Council, by virtue of Legal Notice number 285 of 1994, signed by the then Minister for Local Government, William Ole Ntimama, becomes a local government area under the jurisdiction of another local government authority, in this case, the Trans Mara County Council, the apportionment of the matters mentioned in section 269 of the Act such as “fees”, shall, according to section 270(*b*) of the Act: “be 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”. In its statement of defence, the Narok County Council in paragraph 6 thereof, significantly pleaded that: “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”. It was therefore not surprising that the Narok County Council in a notice of preliminary objection filed on 2 February 1996, sought, *inter alia* the dismissal of the plaint. The Second Respondent also by notice of preliminary objection filed on 6 March 1996, sought the dismissal of the plaint in this way: “that this suit is incompetent, misconceived and bad in law in that it does not comply with the provisions of section 270 of the Local Government Act and as such should be dismissed with costs”. In his ruling of 15 March 1996, on the preliminary objection, Mbaluto J made short work of this objection by stating in reference to section 270 of the Act that: “Nowhere in that section or indeed in the entire Act is it stated that the jurisdiction of the High Court to hear disputes involving local authorities or between them is ousted”. He went on further to state that, since in conformity with section 60(1) of the Constitution which confers upon the High Court unlimited original jurisdiction in civil and criminal matters, this Court had held in the case of *Miller v Miller*, without giving its full reference, that: “The unlimited and original jurisdiction of the High Court can be ousted only by an express provision of the Constitution”. He was of the view that section 270 of the Act, had not dispossessed him of jurisdiction to hear the suit. First of all, no such dictum as quoted by the Learned Judge, exists in this Court’s judgment in the only appeal entitled *Miller v Miller* [1988] LLR 1914 (CAK). Apart from this, the Learned Judge did not make any reference to, or indeed, consider, the following additional, important and concluding words of section 60(1) of the Constitution which defines the jurisdiction including its limitation, of the High Court: “and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law”, and which in turn, means that the extent of the jurisdiction of the High Court may not only be that which is conferred or limited by the Constitution but also, that which the Constitution or any other law, may by express provisions or by necessary implication, so confer or limit. In the Rent Restriction Act, for instance, the rent tribunal established under section 4A of the Rent Restriction Act, is empowered by section 5 of the same Act, *inter alia*, to assess standard rents and the date from which they may be payable; fix service charges; make orders for the recovery of possession of premises, arrears of rent and *mesne* profits; permit the levy of distress; and to order the carrying out of repairs to dwelling houses. As regards the role of the High Court, section 4A(9) significantly provides that: “Where the chairman of a tribunal is of opinion that a question arising in any proceedings before the tribunal involves a substantial question of law, he may, and shall if any party to the proceedings so requests, adjourn the proceedings and refer that question of law to the High Court for a decision thereon, and, upon such decision being given, the tribunal shall dispose of the proceeding in accordance therewith”. Then in section 8(2) of the Act, it is provided that an appeal from a decision of a tribunal shall only lie to the High Court in certain specified cases. And finally, it is provided in section 37(2) of the Act that: “Where jurisdiction or power to deal with any matter is conferred by this Act on a tribunal, no proceedings with respect to that matter shall be taken in any court except by way of an appeal under section 8(2)”. And so, though the Rent Restriction Act does not expressly provide that the so-called unlimited original jurisdiction in civil matters conferred on the High Court by section 60(1) of the Constitution, has been ousted in the particular cases covered by the Act, the necessary implication or inference is quite clear, that the unlimited original jurisdiction of the High Court in civil matters can be, and has been, limited by the Act. Similarly, where the Local Government Act restricts the apportionment of assets to the local authorities concerned and failing which, to the Minister for Local Government, the jurisdiction of the High Court itself to undertake such action is ousted. Although, having regard to the reliefs sought in the plaint, I am unable to say with certainty that the Learned Judge erred in dismissing the notice of preliminary objection filed by the Narok County Council and KATO, he espoused doubtful legal principles which were to form the basis of his judgment in the suit. Firstly, he relied on a non-existing dictum of this Court in *Miller* (*supra*) which he obviously and happily felt bound by; and on only that part of section 60(1) of the Constitution which appeared to support his assertion of the complete unlimited original jurisdiction of the High Court in Civil matters. Secondly, even though section 270 of the Local Government Act did not empower the local authorities concerned and the Minister for Local Government to hear any judicial proceedings, they were the ones and not the High Court, who were mandatorily required to take certain actions: in the case of the local authorities: “any apportionment of rights . . . shall be made between the . . . local authorities concerned on a fair and equitable basis . . . as agreed between them . . .” and in the case of the Minister for Local Government: “any apportionment of rights . . . shall be made . . . in default of agreement (by the local authorities concerned) as directed by the Minister”. These provisions seem to me to oust the jurisdiction of the High Court to apportion rights, property, assets etc. between the local authorities namely, the Trans Mara County Council and the Narok County Council. All that the High Court can do in this respect, is to enforce by way of judicial review proceedings, the implementation of the provision of the section 270 of the Local Government Act; certainly not, in this case, to usurp the powers of the Minister for Local Government. Even though the Learned Judge did not do so in his ruling dismissing the notice of preliminary objection, he did so in the proceedings that followed and at the end of which he, on 4 June 1998, gave the judgment which is the subject of the appeal before this Court. During these proceedings, the Trans Mara County Council sought, *inter alia*, by another chamber summons dated 15 December 1996, orders to restrain KATO from remitting entry fees collected from those visiting the Maasai Mara Game Reserve to the Narok county council. In his ruling of 15 July 1997, dismissing this application, the Learned Judge made the following important and correct remark but which he unfortunately, completely ignored in his judgment of 4 June 1998, when he, wrongly, took upon himself, the task of apportioning assets between the County Councils: “Clearly the root problem between the parties herein is that of apportionment of the assets of the former Narok County Council but that task is outside the scope of this suit”. Having said this, the Learned Judge then went on (and I am not sure whether he was right), to order that: “the best solution to the immediate problem is to direct the Second Respondent or any other person who collects entry fees and/or royalties to and/or in connection with the Masai (*sic*) Mara Game Reserve to pay one half of the royalties he/it collects from the Game Reserve to each of the two local authorities i.e. the Applicant and the First Respondent pending the apportionment of the assets and liabilities of the former Narok County Council”. Another matter which is worth adverting to, is in respect of another interlocutory Chamber Summons of 15 July 1997, by the Trans Mara County Council seeking, *inter alia*, to restrain the Narok County Council from dispensing with the services of KATO. Annexed to the affidavit of the clerk of the Narok County Council in opposition to the Chamber Summons, and marked “NL –10” is *Gazette* Notice number 2183 published in the Kenya *Gazette* of 2 May 1997, wherein the then Minister for Local Government, Francis Lotodo, in exercise of his powers under section 270 of the Local Government Act, to give directions, appointed a commission of distribution of assets and liabilities to apportion assets and liabilities between the Narok County Council and the Trans Mara County Council. This *Gazette* Notice was drawn to the attention of the Learned Judge on 4 June 1997, when the chamber summons of 15 December 1996, was being argued before him and also subsequently, during the hearing of the suit, to show, among other things, that he lacked jurisdiction to hear the suit and in any case, that the suit itself, had been overtaken by events because the Minister for Local Government had given directions as required under section 270 of the Local Government Act. This did not seem to have made any impression on the Learned Judge in his ruling of 15 July 1997, already referred to, and where he had emphatically observed that the apportionment of assets was outside the scope of the suit. Another significant document which was produced during the hearing of the suit and contained in the record of proceedings, is the letter Ref Number 134974/56 of 11 March 1996, some three months after the Trans Mara County Council had filed its plaint, from the then Minister for Local Government, William Ole Ntimama, to the clerks of the Trans Mara and the Narok County Councils. This letter which relates to the validity of the suit filed by the Trans Mara County Council, and which deserves to be fully set out, is as follows: “County Council Of Transmara ............................Plaintiff Versus Narok County Council ..........................................1st Defendant Kenya Association Of Tour Operators...................2.nd Defendant It has come to my notice that there is a dispute between the two councils which is as a result of the ongoing division of assets and liabilities occasioned by the creation of the County Council of Transmara out of the Narok County Council. Several attempts have been made by my PLGO at Nakuru to get a fair and equitable (*sic*) distribution of the assets and liabilities between your two councils. Indefault of an amicable agreement by your councils, I have now taken over the dispute under powers conferred to me by virtue of section 270(*b*) of the Local Government Act. The Ministry will be issuing directions in the matter in due course”. This important letter which shows that the Minister for Local Government was taking action under section 270(*b*) of the Local Government Act, was also ignored by the Learned Judge. The Chamber Summons of 15 July 1997, was subsequently, on 28 October 1997, withdrawn with costs to the Narok County Council. The proceedings before the Learned Judge during which evidence was adduced as to the fair and equitable apportionment of the assets of the Narok County Council between it and the Trans Mara County Council, then continued unabated. The *Gazette* Notice and the letter from the Minister for Local Government might, however, not have affected the jurisdiction of the superior court, if, contrary to what was sought in the plaint, the Learned Judge had not in his judgment, done what he was not entitled to do, namely, the apportionment of assets between the Narok County Council and the Trans Mara County Council. The following excerpts from the judgment of the Learned Judge illustrate his conception of the suit before him: “Ordinarily disputes between local authorities regarding the distribution of their assets and liabilities are low key affairs which normally do not end up to courts. In fact this case is the first one of its type that I have come across. Nonetheless there are serious issues to be determined, not the least of which is the way revenue from the Maasai Mara Natural Reserve, one of the most famous tourist destination in the world, is to be shared out . . . so in reality this suit is about the distribution of revenue accruing from Maasai Mara Natural Reserve between the Plaintiff and the First Defendant . . . Looking at all those figures, the Second Defendant considered that a fair and reasonable basis for sharing the revenue of the two country councils would be in the ratio 32% in favour of Narok. Given the various factors that influenced the second determination of the ratio it arrived at, one of which I must observe was its experience in these matters and doing the best I can in the circumstances I find the ratio of 32% to 68% suggested by DW 6 to be the fairest and most equitable method of distributing the assets and liabilities, including revenue from Maasai Mara Natural Reserve, between the two local authorities . . . From the above gross revenue the commission payable to the Second Defendant (4%), royalties to group ranchers (19%) and contributions to Maa Development Association (½%) amounting to KShs 171 717-30 according to my calculations must be deducted leaving a balance of KShs 529 171 109-70 which on the basis of two ratio aforesaid must be apportioned between the two authorities as follows: Narok (68%) K Shs 359 836 354-60 Trans Mara (32%) KShs 169 334 755-10 Total KShs 529 171 109-70 The evidence available shows that apart from the sum of KShs 60 565 178 which the First Defendant paid directly to the Plaintiff, it retained all the above collections. Consequently it is bound to pay to the Plaintiff the sum of KShs169 334 775-10 less KShs 60 565 178 = KShs108 769 577-10 . . . For the above reasons there will be judgment for the Plaintiff against the Defendant for KShs 108 769 557-10 together with costs and interest”. These excerpts also fortify the view that the Learned Judge must have intended to apportion the assets of the former Narok County Council, in this case, the Maasai Mara Game Reserve entry fees, between it and the Trans Mara County Council all along, though he had no jurisdiction to do so, and in fact, did do so. Even though it is conceded that the resort to the judicial review process, in this case, an application for *mandamus* to make the Minister for Local Government to take action under sections 269 and 270 of the Local Government Act, may in appropriate cases not be a bar to other proceedings such as the plaint of the Trans Mara County Council, this would not apply in the peculiar circumstances of the present case, so as to entitle the Learned Judge by way of the plaint brought by the Trans Mara County Council, to do not only, what he had not been requested in the plaint to do, but also, to do what he had no jurisdiction to embark upon, namely, the apportionment of revenue accruing from the fees charged for entry into the Maasai Mara Game Reserve, between the two County Councils. I would, for the reasons set out herein above, allow the appeal, declare the judgment of the Learned Judge to be a nullity, and set it aside. There will be costs for the Narok County Council in this Court and in the High Court.

**O’KUBASU JA:** 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 number 285 dated 11 August 1994 in which the then Minister for Local Government Honourable William Ole Ntimama, in exercise of the powers conferred by sections 5, 28 and 39 of the Local Government Act Chapter 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 number 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 (First Defendant) and Kenya Association of Tours Operators (Second Defendant). The pertinent paragraphs of that plaint were as follows: “4. The Plaintiff and First 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 4 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 Second Defendant under a written agreement entered between the First Defendant and the Second Defendant during the current . . . of both the Plaintiff county and the First Defendant county. 8. The Plaintiff states that the Second 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 or 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 First Defendant stated: “2. The contents of paragraphs 4, 5 and 6 of the plaint are admitted. 3. T he 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. T he First Defendant concedes having refused to remit to the Plaintiff the alleged sum of KShs 69 362 400 for the aforestated 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. T he contents of paragraphs 10 and 11 of the plaint vehemently denied. 6. W ithout 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. S ave 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 Second Defendant was brought in this suit as an agent of the Plaintiff and First 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 21 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 Appellant both in this Court and in the superior court. Mr *Otachi* for the First 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 number 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 Transmara) 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 4 August 1994. 2. T he 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 number 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. We have by virtue of Legal Notice number 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 any 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, Honourable Francis Lotodo, who appointed Commissions of Distribution of Assets and Liabilities in respect of various local authorities as can be seen from *Gazette* Notice number 2183 appearing in the Kenya *Gazette* of 2 May 1997, which was as follows: “The Local Government Act (Chapter 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 – Provincial commissioners for Rift Valley province, Eastern province and Nyanza province, to be chairmen; Provincial Local Government officers for Rift Valley province, Eastern province and Nyanza province, to be secretaries; and 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; Page 174 of [2000] 1 EA 161 (CAK) 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 11 January 1996. Then these commissions for distribution of assets and liabilities were appointed on 2 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 (Chapter 265). I would therefore, allow this appeal and award costs to the Appellant both in this Court and in the superior court.

For the Appellant:

*Mr Njagi*

For the First Respondent: