



DEVOLUTION LAW REPORTS

VOLUME 1

SCOPE OF THE SERIES

These Reports contain decisions on Devolution from the Superior Courts of Record of Kenya from 2013.

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FOREWORD BY THE CHAIRMAN

Devolution is considered one of the hallmarks of transition from a previously centralized system of governance in Kenya. It is hailed as the greatest promise of the Constitution of Kenya, 2010 and the most revolutionary underway in the world, involving large-scale political, fiscal and administrative transfer of power, resources and responsibilities. Articles 185, 186 and 187 as read together with the Fourth Schedule of the Constitution provide the functions for the national and county governments.

A number of decisions on devolution have been delivered by courts since the operationalization of county governments. Whereas some of them have been posted on the National Council for Law Reporting website and library, this is the first devolution law report that has been prepared. Section 19 of the intergovernmental relations act establishes the council of governors whose mandate under section 20 is to, among others, consider matters of common interest to county governments. It is the Council that saw the need to document jurisprudence which has cemented principles and objects of devolution. This report will assist legal practitioners, scholars and other stakeholders who are keen on the implementation of the devolved system of government and in the administration of justice in Kenya.

We trust that this is the first step in a journey that will continue and that judicial decisions touching on devolution will be published on regular basis. We must ensure that devolution is protected, for this and generations to come and importantly, that we all leave devolution footprints so that those who come after us keep the momentum.

H.E. Peter Munya
Chairman, Council of Governors

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Finally I would like to thank Rosemary Njaramba at the CoG secretariat who worked tirelessly and ensured that the Digest became a reality – Asanteni.

Mrs Jacqueline A. Mogeni
Ag. CEO Council of Governors.



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Table of Contents

The Superior Courts of Record in 2015
Supreme Court, Court of Appeal and High Court x

Judges in Reported Opinions (2013-2015)
Supreme Court, Court of Appeal and High Court xii

Table of Cases Reported xiii

Table of Cases Judicially Considered xxi

Table of Texts and Journals Cited in Judgments xlv

Table of Statutes Cited in Judgments xlix

Table of International Instruments and Covenants
 Cited in Judgments lxxv

Abbreviations lxxvii

Digest of Cases lxxxix

[2015] 1 DLR 1

The Superior Courts of Record in 2015

Chief Justice

The Hon Justice (Dr) Willy Munywoki Mutunga

Deputy Chief Justice

The Hon Lady Justice Kalpana Rawal

The Supreme Court

The Hon Mr Justice PK Tunoi
The Hon Mr Justice MK Ibrahim
The Hon Justice (Prof) JB Ojwang

The Hon Justice (Dr) SC Wanjala
The Hon Lady Justice SN Ndung'u

The Court of Appeal

The Hon Mr Justice SEO Bosire
The Hon Mr Justice EO O'Kubasu
The Hon Mr Justice EM Githinji
The Hon Mr Justice PN Waki
The Hon Mr Justice ARM Visram
The Hon Mr Justice JG Nyamu
The Hon Lady Justice R Nambuye
The Hon Lady Justice KH Rawal
The Hon Lady Justice HM Okwengu
The Hon Lady Justice MK Koome
The Hon Mr Justice PK Kariuki
The Hon Mr Justice DK Maraga
The Hon Lady Justice W Karanja
The Hon Mr Justice JW Mwera
The Hon Mr Justice MA Warsame

The Hon Mr Justice GBM Kariuki
The Hon Lady Justice PM Mwilu
The Hon Mr Justice MSA Makhandia
The Hon Mr Justice D K Musinga
The Hon Mr Justice F Azangalala
The Hon Mr Justice W Ouko
The Hon Mr Justice PO Kiage
The Hon Mr Justice SG Kairu
The Hon Mr Justice K M'Inoti
The Hon Lady Justice AK Murgor
The Hon Lady Justice F Sichale
The Hon Lady Justice J Mohammed
The Hon Justice (Prof) JO Odek
The Hon Mr Justice S Ole Kantai

The High Court

The Hon Lady Justice MA Ang'awa
The Hon Mr Justice HPG Waweru
The Hon Lady Justice JW Gacheche
The Hon Mr Justice DA Onyancha
The Hon Mr Justice NRO Ombija
The Hon Mr Justice M Apondi
The Hon Lady Justice JW Lesiit
The Hon Justice JK Serгон
The Hon Mr Justice L Njagi
The Hon Lady Justice RPV Wendoh
The Hon Mr Justice GMA Dulu
The Hon Lady Justice MM Kasango
The Hon Mr Justice I Lenaola
The Hon Mr Justice MJA Emukule
The Hon Lady Justice MG Mugo
The Hon Mr Justice FA Ochieng
The Hon Mr Justice LK Kimaru
The Hon Lady Justice RN Sitati
The Hon Mr Justice JR Karanja
The Hon Lady Justice HA Omondi

The Hon Mr Justice AO Machelule
The Hon Lady Justice F Muchemi
The Hon Lady Justice MA Odero
The Hon Lady Justice A Ali-Aroni
The Hon Mr Justice SJ Chitembwe
The Hon Justice (Prof) JN Mwaura
The Hon Lady Justice GM Ngugi
The Hon Mr Justice JM Mutava
The Hon Mr Justice EM Muriithi
The Hon Lady Justice P Nyamweya
The Hon Mr Justice GK Kimondo
The Hon Mr Justice DAS Majanja
The Hon Lady Justice CW Githua
The Hon Lady Justice BT Jaden
The Hon Mr Justice WK Korir
The Hon Lady Justice GL Nzioka
The Hon Lady Justice CW Meoli
The Hon Lady Justice H Ongundi
The Hon Lady Justice SN Mutuku

The Hon Mr Justice J Wakiaga
 The Hon Lady Justice REA Ougo
 The Hon Mr Justice EKO Ogola
 The Hon Mr Justice GV Odunga
 The Hon Mr Justice HK Chemitei
 The Hon Mr Justice JA Makau
 The Hon Mr Justice F Tuiyot
 The Hon Lady Justice RCL Korir
 The Hon Mr Justice RM Mwongo
 The Hon Mr Justice A Mabeya
 The Hon Lady Justice LA Achode
 The Hon Lady Justice A Mshila
 The Hon Lady Justice LN Mutende
 The Hon Lady Justice NJN Kamau
 The Hon Mr Justice J Ngaah
 The Hon Lady Justice EN Maina
 The Hon Mr Justice F Gikonyo
 The Hon Lady Justice GW Ngenye
 The Hon Mr Justice WM Musyoka
 The Hon Mr Justice MM Muya
 The Hon Mr Justice BJ Momanyi
 The Hon Mr Justice OJL Omondi
 The Hon Lady Justice AR Ekirapa
 The Hon Mr Justice EC Mwita

The Hon Mr Justice RK Limo
 The Hon Mr Justice MC Kariuki
 The Hon Mr Justice MA Charo
 The Hon Lady Justice JN Mulwa
 The Hon Mr Justice NC Beda
 The Hon Mr Justice FAS Mohamed
 The Hon Lady Justice MW Muigai

(Appointed on May 5, 2015)

The Hon Mr Justice SN Riechi
 The Hon Lady Justice OA Sawe
 The Hon Lady Justice WA Okwany
 The Hon Mr Justice PO Okwara
 The Hon Mr Justice AK Ndung'u
 The Hon Mr Justice T Mugure
 The Hon Lady Justice MN Mwangi
 The Hon Mr Justice SG Murugu
 The Hon Lady Justice DO Chepkwony
 The Hon Mr Justice AN Ongeri
 The Hon Mr Justice KW Kiarie
 The Hon Lady Justice LM Njuguna
 The Hon Mr Justice JM Mativo
 The Hon Mr Justice RN Nyakundi

Employment and Labour Relations Court Judges

The Hon Lady Justice MW Mbaru
 The Hon Mr Justice M Njagi
 The Hon Lady Justice MA Onyango
 The Hon Mr Justice M Nderi
 The Hon Mr Justice JN Abuodha
 The Hon Lady Justice HS Wasilwa

The Hon Mr Justice SO Radido
 The Hon Mr Justice J Rika
 The Hon Lady Justice L Ndolo
 The Hon Mr Justice MO Ndumbuthi
 The Hon Mr Justice B Ongaya
 The Hon Mr Justice Nzioki Wa Makau

Environment & Land Court Judges

The Hon Lady Justice AA Omollo
 The Hon Mr Justice AO Ombwayo
 The Hon Mr Justice AK Kaniaru
 The Hon Mr Justice BN Olao
 The Hon Mr Justice EO Obaga
 The Hon Mr Justice JM Mutungi
 The Hon Lady Justice LN Gacheru
 The Hon Lady Justice LN Waithaka

The Hon Lady Justice MM Gitumbi
 The Hon Mr Justice S Munyao
 The Hon Mr Justice OA Angote
 The Hon Mr Justice PM Njoroge
 The Hon Mr Justice SO Okong'o
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 The Hon Mr Justice SM Kibunja

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The Hon Lady Justice CW Githua

The Hon Lady Justice CW Meoli

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The Hon Lady Justice HS Wasilwa

The Hon Mr Justice B Ongaya

The Hon Mr Justice SO Radido

The Hon Mr Justice MN Nderi

Environment & Land Court Judges

The Hon Mr Justice BN Olao

Table of Cases Reported

A

Attorney General & 6 others, Okioti & another v Petition No 593 of 2013	838
Attorney General & another & 3 others, Speaker of the Senate & another v Advisory Opinion Reference 2 of 2013.....	1159
Attorney General & another, Centre for Rights Education & Awareness (CREAW) v Petition No 182 of 2015	156

C

Cabinet Secretary, Ministry of Education Science and Technology & another, County Government of Nyeri v Petition No 3 of 2014	1144
Centre for Rights Education & Awareness (CREAW) v Attorney General & another Petition No 182 of 2015	156
Cereal Growers Association & another v County Government of Narok & 10 others Petition No 385 of 2013	813
Clerk County Assembly of Baringo <i>ex parte</i> William Kassait Kamket, Republic v Judicial Review Application No 1 of 2015.....	21
Clerk Kiambu County Assembly & another, Ndichu v Petition No 11 of 2014 (Formerly Petition No 90 of 2014).....	1120
Commission of Inquiry into the Petition to Suspend Makueni County Government & 8 others, Kisoi v Petition No 158 of 2015	363
Commission on Revenue Allocation & 3 others, Speaker, Nakuru County Assembly & 46 others v Petition No 368 of 2014	422

Council of Governors & 3 others v Senate & 53 others Petition Nos 381 & 430 of 2014 (Consolidated)	51
Council of Governors & 6 others v Senate Petition No 413 of 2014	210
County Assembly of Bungoma & 4 others, Nendela v Constitutional Petition No 4 of 2012.....	747
County Assembly of Embu & 4 others, Wambora & 30 others v Petition Nos 7 & 8 of 2014 (Consolidated)	537
County Assembly of Nyeri & 2 others, Kagiri v Petition No 7 of 2013	1261
County Government of Baringo & another, Kipruto & another v Cause No 30 of 2014	1100
County Government of Busia & another v Manwari & 12 others Petition No 2 of 2014.....	343
County Government of Isiolo & another, Suleiman v Cause No 76 of 2015.....	1
County Government of Kisumu & 2 others, Okeyo v Petition No 1'A' of 2014.....	887
County Government of Meru, Meru Bar, Wines & Spirits Owners Self Help Group (Suing thro' its Secretary) Ibrahim Mwika v Petition No 32 of 2014.....	663
County Government of Narok & 10 others, Cereal Growers Association & another v Petition No 385 of 2013	813
County Government of Nyeri & another v Ndungu Civil Appeal No 2 of 2015	391
County Government of Nyeri v Cabinet Secretary, Ministry of Education Science and Technology & another Petition No 3 of 2014	1144

County Government of Vihiga & another, Masinde v Petition Cause No 25 of 2014.....	101

G

Gakuru & others v Governor Kiambu County & 3 others Petition No 532 of 2013; Petition Nos 12, 35, 36, 42 & 72 of 2014 & Judicial Review Miscellaneous Application No 61 of 2014 (Consolidated)	908

Governor Kiambu County & 3 others, Gakuru & others v Petition No 532 of 2013; Petition Nos 12, 35, 36, 42 & 72 of 2014 & Judicial Review Miscellaneous Application No 61 of 2014 (Consolidated)	908

Governor, Bomet County Government & 5 others, Ng'etich & another v Petition No 415 of 2014.....	294

I

Institute of Social Accountability & another v National Assembly & 4 others Petition No 71 of 2013	469

International Legal Consultancy Group v Senate & another Constitutional Petition No 8 of 2014.....	1061

K

Kagiri v County Assembly of Nyeri & 2 others Petition No 7 of 2013	1261

Kenya County Government Workers Union v Kisumu County Assembly Public Service Board Cause No 50 of 2014.....	899

Kenya County Government Workers Union v Kisumu County Government & 95 others Petition No 270 of 2014	643

Kiambu County Government & 7 others <i>ex parte</i> Samuel Thinguri Waruathe, Republic v Judicial Review Miscellaneous Application No 355 of 2014.....	200

Kipruto & another v County Government of Baringo & another Cause No 30 of 2014	1100

Kisoi v Commission of Inquiry into the Petition to Suspend Makueni County Government & 8 others Petition No 158 of 2015.....	363

Kisumu County Assembly Public Service Board, Kenya County Government Workers Union v Cause No 50 of 2014.....	899

Kisumu County Government & 95 others, Kenya County Government Workers Union v No 270 of 2014	643

L

Law Society of Kenya v Transition Authority & 2 others Petition No 190 of 2013	1320

M

Manwari & 12 others, County Government of Busia & another v Petition No 2 of 2014	343

Masinde v County Government of Vihiga & another Petition Cause No 25 of 2014.....	101

Meru Bar, Wines & Spirits Owners Self Help Group (Suing thro' its Secretary) Ibrahim Mwika v County Government of Meru Petition No 32 of 2014	663

N

Nairobi City County & 4 others, Okiiti & 3 others v Petition Nos 143 & 142 of 2014; Judicial Review No 140 of 2014 (Consolidated)	702

National Assembly & 4 others, Institute of Social Accountability & another v Petition No 71 of 2013.....	469

Ndichu v Clerk Kiambu County Assembly & another Petition No 11 of 2014 (Formerly Petition No 90 of 2014)	1120

Ndungu, County Government of Nyeri & another v Civil Appeal No 2 of 2015	391
Nendela v County Assembly of Bungoma & 4 others Constitutional Petition No 4 of 2012.....	747
Ng’etich & another v Governor, Bomet County Government & 5 others Petition No 415 of 2014.....	294
O	
Okeyo v County Government of Kisumu & 2 others Petition No 1‘A’ of 2014.....	887
Okoiti & 3 others v Nairobi City County & 4 others Petition Nos 143 & 142 of 2014; Judicial Review No 140 of 2014 (Consolidated)	702
Okoiti & another v Attorney General & 6 others Petition No 593 of 2013	838
R	
Republic v Clerk County Assembly of Baringo <i>ex parte</i> William Kassait Kamket Judicial Review Application No 1 of 2015	21
Republic v Kiambu County Government & 7 others <i>ex parte</i> Samuel Thinguri Waruathe Judicial Review Miscellaneous Application No 355 of 2014.....	200
Republic v Secretary County Public Board & another <i>ex parte</i> Abdille Review Application No 271 of 2014	131
Republic v Tana River County Assembly & 2 others Judicial Review Miscellaneous Civil Application No 10 of 2013	1132
Republic v Transition Authority & another <i>ex parte</i> Crispus Fwamba & 4 others Judicial Review No 110 of 2013.....	1290

S

Secretary County Public Board & another <i>ex parte</i> Abdille, Republic v Review Application No 271 of 2014.....	131
Senate & 53 others, Council of Governors & 3 others v Petition Nos 381 & 430 of 2014 (Consolidated)	51
Senate & another, International Legal Consultancy Group v Constitutional Petition No 8 of 2014.....	1061
Senate, Council of Governors & 6 others v Petition No 413 of 2014	210
Speaker of the Senate & 5 others, Wambora & 4 others v Petition No 3 of 2014	953
Speaker of the Senate & 6 others, Wambora & 3 others v Civil Appeal No 21 of 2014	778
Speaker of the Senate & another v Attorney General & another & 3 others Advisory Opinion Reference 2 of 2013	1159
Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 others Petition No 368 of 2014.....	422
Suleiman v County Government of Isiolo & another Cause No 76 of 2015.....	1

T

Tana River County Assembly & 2 others, Republic v Judicial Review Miscellaneous Civil Application No 10 of 2013.....	1132
Transition Authority & 2 others, Law Society of Kenya v Petition No 190 of 2013	1320
Transition Authority & another <i>ex parte</i> Crispus Fwamba & 4 others, Republic v Judicial Review No 110 of 2013.....	1290

W**Wambora & 3 others v Speaker of the Senate & 6 others**

Civil Appeal No 21 of 2014 778

Wambora & 30 others v County Assembly of Embu & 4 others

Petition Nos 7 & 8 of 2014 (Consolidated) 537

Wambora & 4 others v Speaker of the Senate & 5 others

Petition No 3 of 2014 953

Table of Cases Judicially Considered

A

<i>Adieno, Wycliffe Indalu v Attorney General & 2 others</i> Petition No 315 of 2014	363
<i>Akelerio, James Alias Muguu & another v Moses Kasaine Lenolkilal & 3 others</i> Petition No 17 of 2014.....	1
<i>Akintola v Aderemi</i> (1962) 1 All NLR 442	537
<i>Aliviza, Mary & another v Attorney General of Kenya & another</i> Application No 3 of 210.....	1120
<i>Aliwa, Barrack Omudho & another v Salome Arodi & another</i> Succession Cause No 38 of 2008.....	210
<i>Aluochier, Isaac Aluoch Polo v Uhuru Muigai Kenyatta & another</i> Petition No 360 of 2013	210
<i>Amalgamated Society of Engineers v Adelaide Steamship Company Ltd & others</i> (1920) 28 CLR 129.....	391
<i>Amax Potash Ltd v Government of Saskatchewan</i> [1977] 2 SCR 576.....	1159
<i>Anarita Karimi Njeru v Republic (No 1)</i> [1976–1980] 1 KLR 1272; [1979] KLR 154	294, 813, 953
<i>Andres Sarmiento et al v The Treasurer of the Phillipines</i> (GR No 125680 & 126313, September 4, 2001).....	537
<i>Asanyo, Geoffrey Makana v Nakuru Water & Sanitation Services Company & 6 others</i> Petition No 4 of 2014	1
<i>Asif Hameed & others v State of Jammu & Kashmir & others</i> (1989) AIR 1899; 1989 SCR (3) 19.....	1159

<i>Associated Provincial Picture Houses Ltd v Wednesbury Corporation</i> [1947] 2 All ER 680.....	391

<i>Association of Gaming Operators Kenya & 41 others v Attorney General & 3 others</i> Petition No 56 of 2014.....	294

<i>Athi River Services Board v Nairobi City Water & Sewerage Co Ltd</i> Civil Application 135 of 2010.....	953

<i>Attorney General v Sumair Bansraj</i> (1985) 38 WIR 286.....	363

<i>Ayuma, Satrose & 11 others v Attorney General & 3 others</i> Petition No 65 of 2010	838

B

<i>Bagatsing v Ramirez</i> , GR No L-41631	702

<i>Barasa, Nancy v Judicial Service Commission & 9 others</i> Petition No 23 of 2012	778

<i>Barasa, Walter v Cabinet Secretary Ministry of Interior & 6 others</i> Petition No 488 of 2013	537

<i>Baraza, Nancy v Judicial Service Commission</i> Petition No 23 of 2013	1290

<i>Baraza, Nancy v Judicial Service Commission & 9 others</i> Petition No 23 of 2012	953

<i>Bautista v Court of Appeals</i> GR No 143375	747

<i>Bhim Singh v Union of India & 7 others</i> [2010] INSC 358.....	51

<i>Bihar v Abdul Majid</i> (1954) SCR 786.....	391

<i>Birir, Richard Bwogo v Narok County Government & 2 others</i> Petition No 1 of 2014	21, 391

<i>Birir, Richard Bwogo v Narok County Government & 2 others</i> Petition No 9 of 2014	747

<i>Biti & another v Minister of Justice, Legal and Parliamentary Affairs and another</i> (46/02) (2002) ZWSC 10.....	1159
<i>BP Singhal v Union of India & another</i> (2010) INSC 365.....	391
<i>Bradhaugh v Gosset</i> (1884) 12 QBD 271; 32 WR 552; 53 LJQB 209; 50 LT 620	210
<i>British Airways Board v Laker Airways Ltd</i> [1984] QB 142; [1985] AC 58	1159
<i>British Railways Board & another v Pickin</i> [1974] 1 All ER 609.....	1159

C

<i>Center for Rights Education and Awareness (CREW) & 7 others v Attorney General</i> Petition No 36 of 2011	953
<i>Center for Rights Education and Awareness (CREW) & another v John Harun Mwau & 6 others</i> Civil Appeal No 74 of 2012	537
<i>Certification of the Constitution of the Republic of South Africa</i> [1996] ZACC 26; 1996 (4) SA 744.....	210
<i>Chokolingo v Attorney General of Trinidad and Tobago</i> [1981] 1 WLR 106; [1981] 1 All ER 244	838
<i>City of Manila v Teotico</i> , GR No L-23052	702
<i>Clarke & others v Chadburn & others</i> [1985] 1 All ER 211	953
<i>Coalition for Reform and Democracy (CORD) & 2 others v Attorney General and 10 others</i> Petition Nos 628 & 630 of 2014; Petition No 12 of 2015 (Consolidated)	51, 156
<i>Coetzee v Government of the Republic of South Africa</i> 1995 (4) SA 631	469

<i>Commercial Bank of Africa Ltd v Ndirangu</i> [1990-1994] EA 64.....	953
<i>Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others</i> Petition No 454 of 2012	51, 294, 469, 537
<i>Consumer Federation of Kenya (COFEK) v Public Service Commission & another</i> Petition No 263 of 2013	469
<i>Council of Governors & 6 others v Senate</i> Petition No 413 of 2014	51
<i>County Government of Meru v Ethics and Anti-Corruption Commission</i> Petition No 177 of 2014.....	422
<i>Criticos, Basil v Attorney General & 12 others</i> Petition 258 of 2011	953
<i>Cusack v Harrow London Borough Council</i> [2013] 4 All ER 97.....	391
D	
<i>Damian Belfonte v Attorney General of Trinidad and Tobago</i> Civil Appeal No 84 of 2004	131, 343
<i>David Dunsmuir v New Brunswick</i> [2008] 1 SCR 190	391
<i>Davies & another v Mistry</i> [1973] EA 463.....	778
<i>Democratic Alliance v President of South Africa & others</i> [2011] ZASCA 241.....	1159
<i>Dickson, Anthony John & 2 others v Municipal Council of Mombasa</i> Miscellaneous Application No 96 of 2000	200
<i>Doctors for Life International v Speaker of the National Assembly and others</i> [2006] ZACC 11; 2006 (12) BCLR 1399.....	469, 537, 908, 953, 1061, 1159
<i>DT Dobie & Company (Kenya) Ltd v Muchina</i> [1982] KLR 1	363

E

<i>East African Community v Railways African Union (Kenya) & others</i> [1974] EA 425	131
<i>Ephantus Mwangi v Duncan Mwangi Wambugu</i> [1982-88] 1 KAR 278.....	778
<i>ET v Attorney General & another</i> [2012] 1 KLR 129	210
<i>Evan Rees & others v Richard Alfred Crane</i> [1994] 2 WLR; [1994] 2 AC 173.....	747
<i>Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000 (Liquor Bill Case)</i> [1999] ZACC 15; 2000(1) BCLR 1	838, 1061
<i>Executive Council of the Western Cape Legislature and others v President of the Republic of South Africa and others</i> [1995] ZACC 8.....	469

F

<i>Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another</i> Petition 102 of 2011	101, 838, 1261
<i>Fitzleet Estates v Cherry</i> [1971] 1 WLR 1345; [1977] 3 All ER 996; (1977) 51 TC 708	210
<i>Frankline v Interim Clerk of Machakos County Assembly & 4 others</i> Election Petition No 5 of 2013	1290

G

<i>Gachagua, Nderitu v Thuo Mathenge</i> Civil Appeal No 14 of 2013	1144
<i>Gacheche, Jeanne W & 6 others v Judges and Magistrates Vetting Board & 2 others</i> , Judicial Review No 295 of 2011	953
<i>Gakuru, Robert & another v Governor Kiambu County & 3 others</i> Petition No 532 of 2013	294, 537, 663

<i>Garden Cottage Food Limited v Milk Marketing Board</i> [1984] AC 130; [1982] QB 1114	1120
<i>Giella v Cassman Brown & Co Ltd</i> [1973] EA 358.....	899
<i>Glenister v President of the Republic of South Africa and others</i> [2011] ZACC 6; 2011 (7) BCLR 651.....	908
<i>Greco Antonius Beba Belgica and 3 others v Executive Secretary Raquito n Ochoa JR Secretary of Budget and Management Florencio B Abad and another</i> GR No 208566.....	469

H

<i>Hadkinson v Hadkinson</i> [1952] 2 All ER 211	953
<i>Henderson v Henderson</i> (1843-60) All ER 378.....	838

I

<i>In Matter of the Principle of Gender Representation in the National Assembly & the Senate</i> [2012] 3 KLR 720.....	101, 1159
<i>In re Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General</i> [2011] 1 KLR 458.....	363
<i>In re Manitoba Language Rights</i> (1985) 1 SCR 721	1159
<i>In re the Matter of the Interim Independent Electoral Commission</i> [2011] 2 KLR 32	51, 156, 210, 422, 469, 778, 813, 953, 1159
<i>In the Matter between the Speaker of the National Assembly and Patricia De Lille (MP) & another</i> [1999] ZASCA 50; [1999] 4 All SA 241	778
<i>Inakoju & 17 others v Adeleke & 3 others</i> (2007) 4 NWLR (Pt1025) 423	537
<i>India v Tulsiram Patel</i> (1985) 3 SCC 398.....	391

Institute of Social Accountability & another v National Assembly & 4 others Petition No 71 of 2013 51, 294

International Center for Policy and Conflict & 5 others v Attorney General Petition No 552 of 2012 953

International Legal Consultancy Group v Senate & another Constitutional Petition No 8 of 2014 51, 210

J

Jabane v Olenja [1986] KLR 661 778

Joho, Hassan Ali & another v Suleiman Said Shahbal
Petition No 10 of 2013 391

Judicial Service Commission v Gladys Boss Shollei & another Civil Appeal No 50 of 2014 1

Judicial Service Commission v Speaker of the National Assembly & another Petition No 518 of 2013 747, 953

K

Kaluma, Peter v Attorney General Petition No 79 of 2011 1320

Kamau, Jesse & 25 others v Attorney General
Miscellaneous Application No 890 of 2004 1320

Karia & another v Attorney General & others [2005] 1 EA 83 838

Kariuki & 2 others v Minister for Gender, Sports, Culture & Social Services & 2 others [2004] 1 KLR 588 953

Kenya Association of Stock Brokers and Investment Banks v Attorney General Petition No 22 of 2015 156

Kenya Bus Service Ltd & 2 others v Attorney General & 2 others Miscellaneous Civil Suit No 413 of 2005 210, 422

Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others
Civil Appeal No 266 of 1996 131, 156, 953, 1132

<i>Kenya Pipeline Limited v Hyosung Ebara Company Limited & 2 others</i> Civil Appeal No 145 of 2011	953
<i>Kenya Section of the International Commission of Jurists v Attorney General</i> Criminal Appeal No 1 of 2012	1159
<i>Kenya Small Scale Farmers Forum & 6 others v Republic & another</i> [2013] 3 KLR.....	51, 469
<i>Kenya Tea Growers Association v Francis Atwoli & 5 others</i> Petition No 64 of 2010	953
<i>Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers v Kenya Revenue Authority & 3 others</i> Petition No 544 of 2013	537
<i>Keroche Industries Limited v Kenya Revenue Authority & 5 others</i> [2007] KLR 240	131
<i>Kibunja v Attorney General & 12 others (No 2)</i> [2002] 2 KLR 6	537
<i>Kigula & others v Attorney General</i> [2005] AHRLR 197	422
<i>Kileleshwa Service Station Limited v Kenya Shell Ltd</i> [2008] KLR 55	953
<i>Kilifi Lands Disputes Tribunal v Resident Magistrate Kaloleni & 2 others</i> Miscellaneous Application No 117 of 2004.....	702
<i>Kimani, Joseph & 2 others v Attorney General & 2 others</i> Petition No 669 of 2009	537
<i>Kimutai v Lenyongopeta & 2 others</i> [2005] 2 KLR 317	838
<i>Kingoina, Peter M v County Assembly of Nyamira</i> Constitutional Petition No 8 of 2014.....	21
<i>Kinuthia, Rumba v Attorney General</i> Civil Case 1408 of 2004.....	953

<i>Kiprop, Arap Biegon v John Arap Bii & another</i> Civil Suit No 38 of 2003.....	838
<i>Kituku, Godfrey Kilatya & 6 others v Malindi Municipal Council</i> Civil Case No 45 of 2005	953
<i>Knight v Indian Head School Division No 19</i> (1990) 1 SCR 653.....	391
<i>Kones v Republic & another ex parte Kimani Wanyoike & 4 others</i> [2006] 2 KLR 266; (2008) 3 KLR [EP] 291	131, 1290
<i>Kumenda, JAS & another v Clerk Municipal Council of Kisii & 6 others</i> Miscellaneous Civil Application No 3 of 2013	343
<i>Kuria & 3 others v Attorney General</i> [2002] 2 KLR 69	131
<i>Kuya, Moses Tompu & 5 others v Attorney General & 2 others</i> Petition No 65 of 2008	838
L	
<i>Law Society of Kenya v Attorney General & 2 others</i> Petition No 318 of 2012	294, 469, 663
<i>Law Society of Kenya v Transition Authority & 2 others</i> Petition No 190 of 2013	838
<i>Law Society of Kenya v Attorney General of Kenya & 2 others</i> [2013] 1 KLR	51
<i>Lewis v Heffer & others</i> [1978] 3 AII ER 354.....	953
M	
<i>Macharia & another v Kenya Commercial Banks & 2 others</i> [2012] 3 KLR 199	1159, 1290
<i>Maharashtra State Board of Secondary and Higher Secondary Education & another v Kurmarstheb</i> [1985] LRC (Const) 1083.....	537

<i>Mambo, Rose Wangui & 2 others v Limuru Country Club & 17 others</i> Constitutional Petition No 160 of 2013.....	101
<i>Maqoma v Sebe & another</i> 1987 (1) SA 483	537
<i>Marbury v Madison</i> 5 US 137 (1803)	778, 953, 1159
<i>Masefield Trading (K) Limited v Rushmore Company Limited and another</i> [2007] 2 EA 288	537
<i>Matatiele Municipality and others v President of the Republic of South Africa and others (No 2)</i> [2006] ZACC 12; 2007 (1) BCLR 47	537, 908
<i>Matembe & others v Attorney General</i> [2005] 2 EA 200	953
<i>Matemu, Mumo v Trusted Society of Human Rights & 5 others</i> Civil Appeal 290 of 2012	210, 537, 747, 778, 908, 953, 1061, 1290
<i>Mati & another v Attorney General & another</i> [2011] 2 KLR 1	51, 469
<i>Matiso and others v Commanding Officer, Port Elizabeth Prison, and others</i> [1995] ZACC 7; 1995(4) SA 631	469
<i>Mburu, Kinyua v Gachini Tuti</i> [1976-80] 1 KLR 790; [1978] KLR 69	838
<i>Meixner & another v Attorney General</i> [2005] 2 KLR 189.....	1132
<i>Merafong Demarcation Forum and others v President of the Republic of South Africa and others</i> [2008] ZACC 10; 2008 (5) SA 171; 2008 (10) BCLR 968	908
<i>Michael Dapianlong v Chief (Dr) Joshus Chibi Dariye</i> Supreme Court of Nigeria SC 39/2007 (UR)	953
<i>Minerva Hills Ltd & others v Union of India and others</i> [1980] 3 SCC 625	469

<i>Minister of Health and another v New Clicks South Africa (Pty) Ltd and others</i> 2006 (2) SA 311; [2005] ZACC 14.....	294, 469
<i>Minister of Health and others v Treatment Action Campaign and others</i> (2002) 5 LRC 216; 2002 (5) SA 721.....	469
<i>Minister of Health and another v New Clicks South Africa (Pty) Ltd</i> [2005] ZACC 14; 20006 (8) BCLR 872; 2006 (2) SA 311	537
<i>Momanyi v Attorney General & another</i> [2012] 1 KLR 661	469, 537
<i>Mombasa Maize Limited v Hassan Sura Dele & another</i> Civil Appeal No 37 of 2012	838
<i>Morella Ltd v Wakeling</i> [1955] 1 All ER 708; [1955] 2 WLR 672; [1955] 2 QB 379	210
<i>Moti Ram v NE Frontier Railway</i> AIR [1964] SC 600.....	391
<i>Mount Kenya Bottlers Limited & 3 others v Attorney General & 3 others</i> Petition No 72 of 2011	51
<i>Moyo and others v Zvoma and another</i> [2010] ZWHHC 28.....	1290
<i>Mrao v First American Bank of Kenya Ltd and 2 others</i> [2003] KLR 125	1120
<i>Mugendi, Daniel N v Kenyatta University and 3 others</i> Civil Appeal No 6 of 2012	1, 953, 1120
<i>Muigua, David Kariuki v Attorney General & another</i> Petition No 161 of 2011	1100
<i>Mukweluine, Dickson v Attorney General & 4 others</i> Petition No 390 of 2012	838
<i>Municipal Council of Mombasa v Republic & Umoja Consultants Ltd</i> Civil Appeal No 185 of 2001	131

<i>Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others</i> Application No 5 of 2014	363
<i>Munyaka, John Kinyua & 11 others v County Government of Kiambu & 3 others</i> Petition No 3 of 2014	663
<i>Munyasya, Tom Luusa & another v Governor of Makueni County & another</i> Cause No 103 of 2014	391
<i>Munyendo & 908 others v Attorney General & another</i> [2013] 1 KLR	294, 469, 663
<i>Murang'a Bar Operators & another v Minister of State for Provincial Administration and Internal Security & 2 others</i> [2011] 1 KLR 543	469, 537
<i>Mureithi & 2 others (for Mbari ya Murathimi Clan) v Attorney General & 5 others</i> [2006] 1 KLR 443	200, 537
<i>Mureithi, Benson Riitho v JW Wakhungu, Cabinet Secretary Ministry of Environment & 2 others</i> Petition No 19 of 2014	702
<i>Mureithi, John Peter & others v Attorney General</i> Petition No 398 of 2006	1261
<i>Musau, Florence v Minister for Health & 2 others</i> Miscellaneous Application No 12 of 2007	953
<i>Musinga, Daniel t/a Musinga & Co Advocates v Nation Newspapers Limited</i> Civil Appeal (Application) No 120 of 2008	101
<i>Muslims for Human Rights (MUHURI) & 2 others v Attorney General</i> [2011] 1 KLR 322	363
<i>Muthama v Minister for Justice and Constitutional Affairs and another</i> [2012] 1 KLR 832	469
<i>Mutitika v Baharini Farm Limited</i> [1985] KLR 227	953

<i>Muyiwa Inakoju & 17 others v Abraham Adeolu Adeleke & 3 others</i> (2007) 4 NWLR Pt 1025; (2007) 1 NILR 121.....	778, 953
<i>Mwanasokoni v Kenya Bus Services</i> [1982-88] 1 KAR 870	778
<i>Mwangi, John Muraya & 495 others & 6 others v Minister for State for Provincial Administration and Internal Security & 4 others</i> Petition Nos 3 of 2011; 21 & 24 of 2013 (Consolidated)	101
<i>Mwau, Harun John & 3 others v Attorney General & 2 others</i> Petition No 65 of 2011	953, 1320
N	
<i>Nabori & 9 others v Attorney General</i> [2007] 2 KLR 331	838
<i>Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County Government of Nairobi & 3 others</i> Civil Application No 16 of 2014.....	663
<i>Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County of Nairobi Government & 3 others</i> Petition No 486 of 2013	294, 702, 813, 908, 953
<i>Nakuru County Human Rights Network v Nakuru County Government & another</i> Petition 30 of 2014	131
<i>Narok County Council v Trans Mara County Council & another</i> Civil Appeal No 25 of 2000	838
<i>National Conservative Forum v Attorney General</i> [2013] 3 KLR.....	51
<i>National Gambling Board v Premier of Kwazulu Natal & others</i> [2001] ZACC 8; 2002 (2) BCLR 156; 2002 (2) SA 715	838, 1144
<i>Ndichu, Nick Githinji v Clerk, Kiambu County Assembly & another</i> Petition No 11 of 2014	21

<i>Ndiema, John Kilei & 26 others v Matasi Cooperative Society Ltd</i> Civil Case No 59 of 2012.....	838
<i>Ndyanabo v Attorney General</i> [2001] 2 EA 485.....	51, 469, 537
<i>Ng'ok, Joseph Nathaniel v Attorney General & another</i> Civil Suit No 565 of 2004.....	1261
<i>Ngoge v Kaparo & 5 others</i> [2012] 2 KLR 419.....	210
<i>Ngoge, Peter O v Francis Ole Kaparo & 4 others</i> Miscellaneous Civil Application No 22 of 2004	1290
<i>Ngugi, Isaac v Nairobi Hospital & another</i> Petition No 461 of 2012	131
<i>Nguruman Ltd v Shompole Group Ranch & another</i> Civil Application No 90 of 2013 (UR 60/2013)	210
<i>Nixon v United States</i> , 506 US 224 (1993).....	537, 953, 1120
<i>Njangu, Mwangi v Meshack Mbogo Wambugu & another</i> Civil Case No 2340 of 1991.....	210
<i>Njenga, Mwangi & another v Truth Justice and Reconciliation Commission & 4 others</i> Petition No 286 of 2013.....	953
<i>Njeru v Republic</i> [1976-1980] 1 KLR 1272.....	1261
<i>Njuguna, Stephen & others v Lewis Nguyai & others</i> Petition No 118 of 2011	908
<i>Noor Mohamed, Hanmohamed v Kassamali Virji Madhani</i> (1953) 20 EACA 8.....	1120
<i>Nyaga, John Njue v Nicholas Njiru Nyaga & another</i> Civil Appeal No 175 of 2010	1144
<i>Nyakina, Wycliffe Gisebe & another v Institute of Human Resource Management & another</i> Petition No 450 of 2013	537

Nyarangi & 3 others v Attorney General [2008] KLR 688..... 838

O

Ochino & another v Okombe [1989] KLR 165..... 953

*Ogada, Peter Odoyo & 9 others v Independent Electoral
& Boundaries Commission & 14 others*
Civil Appeal No 307 of 2012 1261

*Ogendo, Richard Dickson & another v Attorney General
& 5 others* Petition No 70 of 2014 294

*Okoiti, Okiya Omtatah & 3 others v Attorney General
& 5 others* Petition No 227 of 2013 422

*Okoiti, Okiya Omtatah & another v Attorney General
& 3 others* Petition No 593 of 2013 813

*Okoiti, Okiya Omtatah & another v Attorney General
& 7 others* Petition No 446 of 2013 210

Okpisz v Germany, No 59140/00 101

Olum v Attorney General of Uganda [2002] 2 EA 508 1061

*Omanga, Charles & another v Independent Electoral
& Boundaries Commission & 2 others* Petition No 2 of 2012..... 778

Omondi, George v Republic Criminal Appeal No 5 of 2005 778

Omondi v National Bank of Kenya Ltd & others
[2001] EA 177 210, 838

Onyango Oloo v Attorney General [1986-1989] EA 456..... 953

Orengo, James v Attorney General & another
Civil Suit No 207 of 2002..... 51, 210

*Owners of the Motor Vessel "Lillian S" v Caltex Oil
(Kenya) Ltd* [1989] KLR 1..... 210, 813, 838, 953, 1061, 1159, 1120

P

- Parsimei, Francis Gitau & 2 others v National Alliance Party & 4 others* Petition Nos 356 and 359 of 2012 (Consolidated) 131, 1290
- Pastoli v Kabale District Local Government Council & others* [2008] 2 EA 300 131
- Pearlberg v Varty* [1972] 1 WLR 534 51
- PL Dhingra v Union of India* AIR 1958 SC 36 391
- Pop in (Kenya) Ltd & 3 others v Habib Bank A G Zurich* [1990] KLR 609 210
- Poverty Alleviation Network & others v President of the Republic of South Africa & 19 others* [2010] ZACC 5 537
- Premier: Limpopo Province v Speaker of the Limpopo Provincial Legislature and others* [2012] ZACC 3; 2012 (4) SA 58 469
- President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1; [1999] ZACC 11 422, 953, 1159
- Prinsloo v Van der Linde and another* [1997] ZACC 5; 1997 (6) BCLR 759; 1997 (3) SA 1012 101, 838

R

- R v Big M Drug Mart Ltd* [1985] 1 SCR 295 469, 537
- R v London Rent Assessment Panel Committee, ex parte Metropolitan Properties Co (FGC) Ltd*, [1969] 1 QB 577 537
- Rai, Jasbir Singh & 3 others v Tarlochan Singh Rai & 4 others* Petition No 4 of 2012 210, 1159
- Re Application by Bahadur* [1986] LRC (Const) 545 537
- Re Bivac International SA (Bureau Veritas)* [2005] 2 EA 43 131

<i>Regina v Knüller (Publishing, Printing and Promotions) Ltd</i> [1973] AC 435; [1972] 2 All ER 898	210
<i>Regina v Secretary of State for Education and Science ex parte Avon County Council</i> [1991] 1 QB 558; [1991] 2 WLR 702; [1991] 1 All ER 282	131
<i>Republic v Aga Khan Education Services ex parte Ali Sele & 20 others</i> Miscellaneous Application No 12 of 2002.....	953
<i>Republic v Cabinet Secretary for Transport & Infrastructure & 5 others ex parte Kenya Country Bus Owners Association & 11 others</i> Judicial Review Case No 124 of 2014	469
<i>Republic v Chairperson Business Premises Rent Tribunal ex parte Ibrahim Sheikh Abdulla & 2 others</i> Judicial Review Application No 45 of 2013.....	131
<i>Republic v City Council of Nairobi & 2 others ex parte KAKA Travellers Cooperative Savings and Credit Society Limited</i> Judicial Review Application No 323 of 2010	702
<i>Republic v Council of Legal Education</i> Miscellaneous Civil Case No 137 of 2004.....	537
<i>Republic v County Secretary Murang'a County Government ex parte Thiga Thuita</i> Judicial Review Application No 1 of 2013.....	343
<i>Republic v Gachoka & another</i> [1999] 1 EA 254	953
<i>Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 2 others ex parte Saitoti</i> [2006] 2 KLR 400; [2007] 2 EA 392	210
<i>Republic v Kenya Power & Lighting Company Limited & another</i> Judicial Review No 88 of 2013	131

<i>Republic v Kenya Revenue Authority ex parte Yaya Towers Limited</i> Miscellaneous Civil Application No 374 of 2006	131
<i>Republic v Kenya Roads Board ex parte John Harun Mwau</i> Miscellaneous Civil Application No 1372 of 2000.....	210
<i>Republic v MacFarlane</i> [1923] 32 CLR 518.....	422
<i>Republic v Minister for Agriculture & 16 others</i> Judicial Review Miscellaneous Application No 78 of 2012	838
<i>Republic v Minister for Finance & another ex parte Charles Lutta Kasamani t/a Kasamani & Co Advocates & another</i> Civil Appeal (Application) No 281 of 2005.....	21
<i>Republic v National Environmental Management Authority</i> Civil Appeal No 84 of 2010.....	1290
<i>Republic v National Social Security Fund Board of Trustees & another ex parte Town Council of Kikuyu</i> Judicial Review No 81 of 2013.....	21
<i>Republic v Edward Kirui</i> Criminal Case No 9 of 2008	747
<i>Republic v Registrar of Societies & 5 others ex parte Kenyatta & 6 others</i> Miscellaneous Civil Application No 747 of 2006	1261
<i>Republic v Returning Officer, Kamunkunji Constituency & another ex parte Simon Nganga Mbugua</i> Miscellaneous Civil Application No 13 of 2008	1290
<i>Republic v Stojananovic Milan alias Allan & another</i> Criminal Case No 153 of 2004	747
<i>Republic v Town Clerk of Webuye County Council & another</i> Miscellaneous Civil Application No 448 of 2006	343
<i>Republic v Transition Authority & another ex parte Kenya Medical Practitioner, Pharmacist & Dentist Board (KMPDH) & 2 others</i> Judicial Review No 317 of 2013	1144

<i>Richard William Prebble v Television New Zealand Ltd</i> [1994] 3 WLR 970	1159
<i>Ridge v Baldwin & others</i> [1963] 2 All ER 66.....	391
<i>Rigner v State of Texas</i> 310 US 141 (1940)	101
<i>RM (a Minor) & 3 others v Attorney General</i> [2006] 2 KLR 697; (2008) 1 KLR (G&F) 574	838
<i>Rookes v Benard</i> [1964] AC 1129	101
<i>Royal Media v Telkom Kenya</i> [2001] EA 210	953
<i>Russel v Duke of Norfolk & others</i> [1949] All ER 109	953
<i>Ruturi & 2 others v Ministry of Finance & another (No 2)</i> [2002] 1 KLR 54; [2001] EA 253	469
<i>Rwanyarare & others v Attorney General</i> [2003] 2 EA 663.....	953
S	
<i>S v Acheson</i> 1991 (2) SA 805.....	469, 908, 1159
<i>Sabuni, Samuel & 2 others v Court Martial</i> <i>& 8 others</i> Petition No 235 of 2014	363
<i>Samura Engineering Limited & 10 others v Kenya</i> <i>Revenue Authority</i> Petition No 54 of 2011	101
<i>Selle & another v Associated Motor Boat Co Ltd</i> [1968] EA 123	778
<i>Sergeant v Paul</i> (1949) 16 EACA 63.....	1120
<i>Shah & another t/a Lento Agencies v National</i> <i>Industrial Credit Bank Ltd</i> (2005) 1 KLR.....	953
<i>Shabbal, Suleiman v Independent Electoral and Boundaries</i> <i>Commission and 3 others</i> Petition No 3 of 2014.....	469

<i>Shariff, Towhida Awo & 2 others v Registrar of Titles & 4 others</i> Constitutional Petition No 302 of 2011	838
<i>Sheikh, Abdi Ali v County Secretary County Government of Kakamega</i> Miscellaneous Application No 10 of 2014	343
<i>Shollei, Gladys Boss v Judicial Service Commission</i> Petition No 39 of 2013	1120
<i>Siri Ram Kaura v M J E Morgan</i> [1961] EA 462	210
<i>Smith Dakota v North Carolina</i> 192 US 268 (1940)	1061
<i>Smith v Mutasa & another</i> NNO [1990] LRC (Const) 87; 1990 (3) SA 756; 1989 (3) ZLR 183.....	210, 953
<i>Southend on Sea Corporation v Hodson (Wickford) Ltd</i> [1961] 2 All ER 46; [1962] 1 QB 416	702
<i>Speaker County Assembly of Nakuru & 46 others v Commission of Revenue Allocation & 2 others</i> Petition No 368 of 2014	294
<i>Speaker of National Assembly v Karume</i> [1992] KLR 22; (2008) 1 KLR (EP) 425	1, 131, 838
<i>Speaker of the Senate & another v Attorney General & 4 others</i> Advisory Opinion Reference No 2 of 2013	663
<i>Speaker of the National Assembly & others v De Lille MP & another</i> [1999] ZASCA 50 [1999] 4 All SA 241	51, 702, 1159
<i>Speaker of the Senate & another v Attorney General & 4 others</i>	51, 210 294, 469, 702, 953, 1061, 1120
<i>Speaker, Nakuru County Assembly & others v Commission on Revenue allocation & 3 others</i> Petition No 368 of 2014.....	210
<i>Ssemogerere, Paul K & others v Attorney General</i> [2004] 2 EA 276	778, 1159

<i>State of Rajasthan v Union of India</i> [1977] 3 SCC 592.....	537
<i>State v Makwanyane & another</i> (1995) ZACC 3.....	1159
<i>Stephen Segoposto Tongoane & 3 others v National Minister for Agriculture and Land Affairs & others</i> [2010] ZACC 10	1159
<i>Stockdale v Hansard</i> (1839) 9 Ad & EL 1; [1839] EWHC QB J 21	210
T	
<i>Temoi, John Mining & another v Governor of Bungoma County & 17 others</i> Constitutional Petition No 2 & 2 “A” of 2014 of 2014 (Consolidated).....	131, 747
<i>Thomson v Canada (Deputy Minister of Agriculture)</i> (1992) 1 SCR 385.....	422
<i>Thuo, Edwin v Attorney General & another</i> Petition No 212 of 2012	838
<i>Tinyefunza v Attorney General</i> [1997] UGCC 3	210, 469, 537, 1061 1159
<i>Tononoka Steels Limited v Eastern and Southern Africa Trade Development Bank</i> Civil Appeal No 255 of 1998	778
<i>Tower Hawlets of London v Chetnik Development Ltd</i> [1988] 1 All ER 956.....	1261
<i>Trusted Society of Human Rights Alliance v Attorney General & 2 others</i> Petition No 243 of 2011	469
<i>Trusted Society of Human Rights Alliance v Attorney General & 2 others</i> [2012] 2 KLR 518	51, 953, 1261
<i>Trusted Society of Human Rights Alliance v Mumo Matemu & another</i> Petition No 229 of 2012	294

<i>Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Service Limited & another</i> Petition No 5 of 2013	1100
<i>Truth Justice and Reconciliation Commission v Chief Justice of the Republic of Kenya</i> [2012] 1 KLR 244	210
U	
<i>Uganda Law Society v Attorney General</i> [2006] 1 EA 401	200
<i>Uhuru Highway Development Ltd v Central Bank of Kenya & 2 others</i> Civil Appeal No 36 of 1996	838
<i>Union Insurance Company of Kenya Ltd v Ramzan Abdul Dhanji</i> Civil Application No Nai 179 of 1998.....	953
<i>United States International University (USIU) v Attorney General</i> Petition No 170 of 2012	1120
<i>United States v Butler</i> , 297 US 1 (1936).....	51, 537, 1159
<i>Uthekela District Municipality v President of Republic of South Africa</i> 2003(1) SA 687	1144
V	
<i>VMK v CUEA</i> Cause No 1161 of 2010	101
W	
<i>Walumbwa, Hudson Laise v Attorney General</i> Civil Case No 2714 of 1987.....	210
<i>Wambora, Martin Nyaga v Speaker, County Assembly of Embu & 5 others</i> Petition No 3 of 2014.....	210, 1120
<i>Wambora, Martin Nyaga v Speaker, County Assembly of Embu & 3 others</i> ,Petition No 7 of 2014.....	363
<i>Wananchi Group (Kenya) Ltd v The Communications Commission of Kenya</i> Petition No 98 of 201	131

<i>Waweru, Peter K v Republic</i> Miscellaneous Civil Application No 118 of 2004.....	101

<i>Wildlife Lodges Ltd v County Council of Narok & another</i> [2005] 2 EA 344	953

<i>Willis v United Kingdom</i> [2002] ECHR 488; (2002) 35 EHRR 21	101

<i>Wood v Odessa Waterworks Co</i> (1889) 42 Ch D 636.....	702

Y

<i>Young v Bristol Aeroplane Co Ltd</i> [1944] 2 All ER 293; [1994] KB 718.....	210

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Statutes

A**Advocates Act (cap 16)**

section 34..... 908

Agriculture Act (cap 318) (Repealed)

section 192A(1)..... 813

**Agriculture, Fisheries and Food Authority Act, 2013
(Act No 13 of 2013)**

section 41..... 813

section 45 813

first schedule Part 8 813

Alcoholics Drinks Control Act, 2010 (Act No 4 of 2010)

section 4..... 663

section 23..... 663

section 31(2) 663

section 31(2)(b) 663

section 37(2)(b) 663

section 44..... 663

section 45..... 663

section 46..... 663

section 47..... 663

section 48..... 663

section 49..... 663

Appellate Jurisdiction Act (cap 9)

section 3A 1261

section 3B 1261

Appropriation Act, 2008 (Act No 7 of 2008) 422

Appropriation Act, 2014 (Act No 9 of 2014) 294

B**Basic Education Act, 2013 (Act No 14 of 2013)**

section 18..... 1144

section 20..... 1144

C

Civil Procedure Act (cap 21)

section 1A	1261
section 1B	1261
section 2.....	537
section 3A	899
section 6.....	537
section 7.....	210, 838
section 63(c).....	899
section 63(e).....	899

Civil Procedure Rules, 2010 (cap 21 Sub Leg)

order 1 rule 9	21
order 40 rule 1	1144
order 40 rule 2	899, 1144
order 40 rule 3	899, 1144
order 40 rule 4	899, 1144
order 40 rule 8	899
order 51 rule 1	899, 1144
order 51 rule 2	1144
order 51 rule 3	899
order 51 rule 4	899
order 53 rule 3	21
order 53 rule 7	953
order 53 rule 7(1).....	1290

**Commission on Revenue Allocation Act, 2011
(Act No 16 of 2011)**

section 10(c).....	422

Commissions of Inquiry Act (cap 102)

section 3.....	363

Companies Act (cap 486)

section 136(2)	702
section 181.....	702
section 184.....	702
section 186.....	702

Constituencies Development Fund (Amendment) Act, 2013

(Act No 36 of 2013).....	469

Constituencies Development Fund Act, 2003 (Act No 10 of 2003) (Repealed)	469

Constituencies Development Fund Act, 2013 (Act No 30 of 2013)	
section 1(4)	469
section 3.....	469
section 4(1)	469
section 4(1)(c)	469
section 4(1)(d)	469
section 4(2)	469
section 5.....	469
section 10(1)	469
section 18.....	469
section 20.....	469
section 22.....	469
section 24(3)(a)	469
section 24(3)(b)	469
section 24(3)(c)	469
section 24(7)	469
section 28.....	469
section 30.....	469
section 31(3)	469
section 36.....	469
section 37.....	469
section 47.....	469
section 95.....	469
section 104.....	469
section 126.....	469

Constitution of Kenya (Repealed)	
section 7 of the sixth schedule	210

Constitution of Kenya, 2010	
article 1	210, 294, 422, 778, 908, 953, 1320
article 1(1)	1159
article 1(2)	469, 537
article 1(3)	51, 101, 1061
article 1(3)(a)	537
article 1(3)(b)	391
article 1(4)	51, 1061, 1159
article 2	101, 210, 422, 702, 778

Constitution of Kenya, 2010 *continued..*

article 2(1)	156, 537, 1159
article 2(2)	51, 537, 953, 1061, 1159
article 2(3)	1159
article 2(4)	747, 908
article 2(5)	537
article 2(6)	702
article 3	422, 1061
article 3(1)	101, 156, 200, 537, 953
article 3(1)(a)	838
article 3(2)	537, 778
article 4	778, 838
article 4(2)	537
article 6	422, 469, 778
article 6(1)	51, 663, 838
article 6(2)	51, 210, 643, 663, 702, 838, 953, 1061, 1144, 1159
article 6(3)	838
article 10	1, 101, 131, 422, 663, 813, 908, 1100, 1159
article 10(1)	156, 391, 537, 778, 1061
article 10(2)	51, 156, 294, 391, 469, 702, 838
article 10(2)(a)	663, 953, 1132
article 10(2)(c)	210, 1061
article 11	51, 1159
article 12	1159
article 12(1)	1261
article 19	422, 953, 1159
article 20	953, 1132, 1159
article 20(1)	422
article 20(2)	422, 1261
article 21	1159
article 21(2)	702
article 22	101, 131, 156, 363, 422, 663, 953, 1120, 1144, 1159
article 22(1)	1, 391, 747, 813, 1261
article 22(2)	813
article 23	1, 101, 469, 663, 747, 1120, 1159
article 23(1)	422, 1144
article 23(3)	131, 156, 422, 953
article 23(3)(c)	363
article 23(3)(f)	391
article 24	953, 1159

Constitution of Kenya, 2010 *continued..*

article 25	953, 1159
article 25(4)(c)	422
article 25(5)(a)	422
article 25(7)	422
article 25(8)	422
article 25(9)	422
article 25(b)	908
article 26	908, 1159
article 27	1, 422, 643, 663, 702, 778, 838, 908, 953, 1159
article 27(1)	363, 391, 422
article 27(2)	391
article 27(3)	391
article 27(4)	131, 156, 363, 422, 1261
article 27(5)	363, 422, 1261
article 27(6)	156
article 27(8)	101, 156
article 27(b)	1144
article 28	1, 101, 391, 953, 908, 1159, 1261
article 29	908, 1159
article 30	778, 908, 1159
article 31	908, 1159
article 32	908, 1159
article 33	908, 1159
article 34	908, 1159
article 35	537, 702, 887, 908, 953, 1159
article 36	908, 1159
article 37	908, 1159
article 38	156, 908, 953, 1159
article 38(1)	537
article 38(3)(c)	778
article 39	908, 1159
article 39(3)	1261
article 40	908, 1159
article 40(3)	747
article 41	1, 908, 1159
article 41(1)	391, 643, 1261
article 41(2)	643
article 41(4)	643
article 41(5)	643

Constitution of Kenya, 2010 *continued..*

article 42	887, 908, 1159
article 43	422, 908, 1159, 1261
article 43(1)(b)	702
article 43(1)(d)	702
article 44	908, 1159
article 45	908, 1159
article 45(a)	838
article 46	887, 908, 1159
article 47	101, 391, 537, 702, 747, 899, 908, 1159
article 47(1)	363, 422, 663, 953, 1261
article 47(2)	953
article 48	51, 210, 908, 1159, 1261
article 49	908, 1159
article 50	1, 21, 391, 908, 1159
article 50(1)	953, 1261
article 50(1)(a)	747
article 50(1)(c)	747
article 50(1)(g)	747
article 50(1)(k)	747
article 50(2)(a)	1261
article 50(2)(c)	953
article 51	908, 1159
article 52	1159
article 53	1159
article 53(1)(b)	1144
article 53(2)	1144
article 54	1159
article 55	156, 1159
article 56	1132, 1159
article 56(c)	131, 1261
article 57	1159
article 58	1159
article 59	1159
article 59(4)	537
article 62(1)(b)	838
article 62(2)(b)	838
article 66	702
article 70	702
article 73	953

Constitution of Kenya, 2010 *continued..*

article 73	778
article 73(1)(a)	422
article 73(1)(a)(iv)	537
article 73(2)	702
article 73(2)(b)	422
article 73(2)(c)	422
article 73(2)(d)	391
article 74	778
article 75	702, 778, 887
article 76	778
article 77	778
article 78	537, 778
article 81(b)	101, 156
article 87	1290
article 88	1290
article 93	469, 838, 1061
article 93(1)	210, 537, 1159
article 93(2)	1159
article 94	51, 156
article 94(1)	1159
article 95	51, 156
article 95(1)	469
article 95(4)	953
article 95(4)(b)	469
article 95(4)(c)	210, 1061
article 95(5)(a)	747, 1159
article 96	51, 156
article 96(1)	469, 537, 1159
article 96(2)	1159
article 96(3)	210, 1061, 1159
article 96(4)	210
article 97	156
article 97(1)	469
article 98	156
article 98(1)(e)	537
article 100(b)	156
article 106(1)	1159
article 109	156
article 109(3)	469

Constitution of Kenya, 2010 *continued..*

article 109(4)	469, 1159
article 109(5)	1159
article 110(1)	469, 1159
article 110(2)(a)(i)	1159
article 110(2)(b)	1159
article 110(3)	469, 1159
article 110(4)	1159
article 110(5)	1159
article 112(2)(b)	1159
article 113	1159
article 114(2)	469
article 114(3)	1159
article 117	537, 953, 1261
article 117(2)	210
article 118	51, 156, 469
article 118(1)(b)	537
article 119	156
article 119(1)	51
article 120(1)	908
article 122	1159
article 123(2)	1159
article 123(3)	1159
article 123(4)	1159
article 125	210, 778, 953, 1061
article 127(6)(d)	537
article 127(6)(e)	537
article 128	21
article 144	537, 953
article 145	537, 953, 1061
article 145(1)(a)	778
article 145(1)(c)	778
article 149	1061
article 150	1061
article 152(5)(b)	391
article 156	469
article 156(1)	210, 422
article 156(4)	51, 210
article 156(4)(b)	156, 422, 537
article 159	422, 778

Constitution of Kenya, 2010 *continued..*

article 159(1)	1, 747, 1061, 1120
article 159(2)(b)	1, 343
article 159(2)(d)	51, 210, 343, 747, 953, 1261, 1290
article 159(2)(e)	1, 469, 953, 1261
article 159(a)	1144
article 159(c)	1144
article 160	422, 778, 953, 1132
article 160(1)	1061
article 162(2)	21, 953, 1120
article 162(a)(i)	1
article 163(3)	1159
article 163(4)(a)	1159
article 163(6)	156, 1159
article 163(7)	156
article 165	51, 422, 663
article 165(2)(d)(ii)	537
article 165(3)	537, 1290
article 165(3)(b)	156, 747, 1144
article 165(3)(d)	131, 343, 469, 747, 838, 908, 1159, 1261
article 165(3)(d)(i)	156, 1061, 1120
article 165(3)(d)(ii)	210, 1061, 1120
article 165(3)(d)(iii)	778, 953, 1061, 1120
article 165(3)(d)(iv)	778c
article 165(4)	469
article 165(5)	1, 1290
article 165(5)(b)	953
article 165(6)	1, 747, 778, 953
article 165(6)(i)	537
article 167(4)	1159
article 174	210, 422, 294, 363, 391, 469, 643, 953, 1061, 1132, 1159, 1320
article 174(a)	51, 537, 778
article 174(c)	537, 908
article 174(e)	131
article 174(f)	663
article 174(h)	838
article 175	51, 391, 422, 643, 838, 953, 1159
article 175(b)	469, 908

Constitution of Kenya, 2010 *continued..*

article 176	51, 294, 422, 747, 899, 1100, 1159
article 176(1)	537, 663, 1144
article 176(2)	469, 663
article 177	537, 1159, 1290
article 178	537, 1159
article 178(1)	422
article 178(2)	422
article 178(2)(b)	1120
article 178(3)	1290
article 179	469, 1132, 1159
article 179(1)	51, 391, 422
article 179(2)	51
article 179(2)(b)	391, 1261
article 179(4)	51, 210, 537, 953
article 179(6)	391, 953
article 180	51, 537, 1159
article 181	51, 747, 1061, 1159
article 181(1)	953
article 181(1)(a)	778
article 181(1)(c)	778
article 181(2)	537
article 182	51, 537, 1159
article 182(1)(e)	953
article 182(2)	778
article 183	469, 1159, 1261
article 183(1)	51, 747
article 184	294, 1159
article 185	294, 343, 953, 1159
article 185(1)	422, 663
article 185(2)	422, 663, 702, 838, 908
article 185(3)	51, 210, 469, 747
article 186	422, 838, 1159
article 186(1)	469, 702, 838
article 186(2)	702
article 187	210, 838, 1159
article 187(2)	702
article 188	1159
article 189	702, 953, 1159, 1320
article 189(1)	51, 210, 422, 838

Constitution of Kenya, 2010 *continued..*

article 189(1)(a)	469
article 189(2)	838
article 189(3)	422, 1061, 1144
article 189(4)	422, 838, 1061, 1144
article 190	51, 422, 1159
article 190(1)	838, 908
article 190(3)	469, 838
article 191	702, 1159
article 191(1)	294, 663
article 191(2)(a)	663
article 191(2)(b)	422, 663
article 191(3)	663
article 191(4)	663
article 191(6)	663
article 192	1061, 1159
article 192(1)(b)	363, 537
article 192(6).....	363
article 193	1159
article 194	422, 1159
article 194(1)(c)	1290
article 195	1061, 1159
article 196	294, 953, 1159
article 196(1)(a)	908
article 196(1)(b).....	200, 294, 537, 663, 908
article 197	1159
article 197(1).....	1132
article 198	1159
article 199	1159
article 199(1)	294
article 200	747, 1159, 1290
article 200(2)(c)	391, 537
article 200(2)(d)	537
article 201	210, 294, 537, 643, 778, 887, 908
article 201(b)(ii)	422, 469, 1159
article 201(d)	51
article 202	210, 294, 1159
article 202(1)	422, 469, 908
article 202(2)	469
article 203	210, 294, 908

Constitution of Kenya, 2010 *continued..*

article 203(1)	422
article 203(2)	469, 1159
article 203(4)	1159
article 204	210, 294, 422, 469
article 204(2)	702
article 205	210, 294, 422, 1159
article 206	294, 422
article 206(1)(a)	469
article 206(1)(b)	469
article 207	294
article 207(2)	422
article 207(3)	210, 422
article 209	156, 422
article 209(3)	200, 469, 908
article 209(4)	200, 908
article 209(5).....	908
article 210	51, 422
article 210(1)	200
article 212	51
article 215	422, 1159
article 216	1159
article 216(2)	422
article 216(3)(a)	422
article 217	210, 469
article 217(1)	1159
article 218	469
article 218(1)(a)	422, 1159
article 218(1)(b)	422, 1159
article 219	469
article 220(2)	1159
article 220(2)(c)	51
article 221	1159
article 223(3)	1159
article 224	294, 422, 1159
article 225	210, 422
article 226	537
article 226(1)(b)	953
article 226(2)	210, 1061
article 226(5)	778, 953

Constitution of Kenya, 2010 *continued..*

article 227	537, 953
article 227(1)	747, 887
article 228(4)	210, 294, 422
article 228(5)	210, 422
article 228(6)	1061
article 229	210
article 229(8)	1061
article 232	101, 537, 702, 778, 887
article 232(1).....	131, 643
article 232(2)(i)	1
article 235	702, 838, 1100
article 235(1)	643
article 236	702, 1100
article 236(b)	643, 747
article 238	537, 778
article 248	422
article 248(3)(b)	210
article 249(2)	422
article 249(2)(b)	210
article 252	101
article 254	156
article 255(1)(i)	51
article 258	1, 51, 156, 469, 537
article 258(1).....	200, 838, 1144
article 258(2).....	294
article 259	51, 156, 422, 469, 747, 702, 1061, 1144, 1159
article 259(1)	210
article 259(1)(a)	156
article 259(1)(b)	156
article 259(9).....	422
article 259(11).....	778
article 259(ii)	537
article 260	391, 422, 1159
article 261(1)	156
article 261(2)	156
article 261(4)	156
article 261(5)	156
article 261(6)	156, 1159
article 261(7).....	156, 537, 1159

Constitution of Kenya, 2010 *continued..*

article 261(8)	156
article 261(9)	156
first schedule	422
first schedule section 2.....	702
fourth schedule.....	469
fourth schedule part 1 section 1-14	838
fourth schedule part 1 section 22(c)	702
fourth schedule part 1 section 23.....	838
fourth schedule part 1 section 28.....	838
fourth schedule part 2	663
fourth schedule part 2 section 2.....	838
fourth schedule part 2 section 2(a)	838
fourth schedule part 2 section 10.....	702
fourth schedule part 2 section 11(c)	702
fifth schedule section 4	156
fifth schedule section 5(1)	156
fifth schedule section 5(6)(a)	156
sixth schedule section 15	838
sixth schedule part 2 section 7(1)	702
sixth schedule part 3.....	1159
sixth schedule section 2	210
sixth schedule section 2(3)(b)	469
sixth schedule section 3(a)	537
sixth schedule section 3(b)	537
sixth schedule section 7	537, 953, 1061
sixth schedule section 7(1)	813
sixth schedule section 14	469
sixth schedule section 15	343, 643, 813
sixth schedule section 15(1)	210
sixth schedule section 15(2).....	210
sixth schedule section 15(2)(a)	1100
sixth schedule section 17	1320
sixth schedule section 33	343

Constitution of India

article 110(1)	1159
article 110(3).....	1159
article 156	391
article 310	391

**Constitution of Kenya (Protection of Rights and Fundamental
Freedoms) Practice and Procedure Rules, 2013
(Constitution of Kenya, 2010 Sub Leg)**

rule 2.....	101, 537
rule 5(a)	101
rule 5(b)	51, 101, 156
rule 10(2)(c)	953
rule 10(2)(d)	953
rule 11(1)	953
rule 11(2)	953
rule 23.....	422
rule 24.....	422
rule 26.....	953

Constitution of South Africa

section 72.....	908

Constitution of Philippines, 1987

article XI, section 6	537

Constitution of the Federal Republic of Nigeria, 1999

section 188.....	537

Constitution of the Federal Republic of Nigeria, 2004

section 188.....	747

County Allocation of Revenue Act, 2013 (Act No 34 of 2013)

section 12.....	422

County Governments (Amendment) Act, 2014

(Act No 13 of 2014).....	51

County Governments Act (cap 265)

343

County Governments Act, 2012 (Act No 17 of 2012)

1320

section 3.....	663
section 3(b)	391
section 3(f)	663
section 3(i)	391
section 3(j)	391

County Governments Act, 2012 (Act No 17 of 2012 *continued.*

section 5(2)(b)	747
section 5(2)(e)	838
section 5(6)(b).....	747
section 6.....	1261
section 6(4)	101
section 6(5)	702
section 6(6)	702
section 7.....	101, 1261
section 8(2)	101
section 8(1)(c)	537
section 8(1)(d).....	537
section 9(2)(a)	51
section 9(2)(b).....	747
section 9(4)	1120
section 11.....	537, 1120, 1290
section 11(4)	21
section 12.....	899
section 13.....	21
section 13(1)	1100
section 14.....	953
section 14(2)(a)	1290
section 15.....	21, 1132
section 16.....	1261
section 17.....	747, 953, 1261
section 19.....	1290
section 21.....	813, 838
section 23.....	813
section 24.....	294
section 24(1)	294
section 24(2)	294
section 24(3)	294
section 24(4)	294
section 24(5)	294
section 24(6)	294
section 25(1)	294
section 25(2)	294
section 27(3)	778
section 30.....	294
section 30(2)	210

County Governments Act, 2012 (Act No 17 of 2012 *continued.*

section 30(3)(a)	953
section 30(3)(f)	210, 953, 1061
section 31(a)	391, 747
section 33(1)	778, 953
section 33(2)	778, 953
section 33(3)(b)	537, 778, 953
section 33(4)	953
section 33(6)(b)	537, 953
section 33(7)	537
section 33(8)	537
section 33(9)	537, 778
section 35	391, 1261
section 35(1)(b)	1132
section 35(3)	1132
section 37	469
section 39	391
section 40	537
section 40(2)	747
section 40(4)	747
section 45	131
section 48(1)(b)	469
section 50	131
section 51	131
section 54(2)	51
section 57	643
section 58	838
section 59	21, 838, 899
section 60	643, 1100
section 62	899
section 62(2)	537
section 63	899
section 65(1)	131
section 66	131, 1132
section 68	131
section 69	131
section 72	899
section 74	643, 899
section 75	899
section 76	1, 391, 899

County Governments Act, 2012 (Act No 17 of 2012 *continued*..

section 77	131
section 77(1)	1
section 87	537, 663, 908
section 87(a)	1132
section 87(b)	1132
section 87(c)	1132
section 87(d)	537, 1132
section 88	363, 908, 1132
section 88(1)	537
section 89	363
section 90	363
section 90(1)	363
section 90(2)	363
section 91	51, 363, 908, 1132
section 91A(1)(m)	51
section 91B	51
section 91C	51
section 92	537
section 96(b)	953
section 97	1132
section 115	663, 908
section 120	908
section 123(5)	363
section 123(6)	363
section 123(7)	363
section 124	363
section 125	363
section 130	363
section 134	210
section 138	1100
section 138(1)(b)	1100
section 138(2)	1100
section 138(3)	1100, 1290
Part VII	1100
Part XI section 105(1)(f)	813
Part XI section 108	813

County Government Public Finance Management**Transition Act, 2013 (Act No 8 of 2013)**

section 3.....	953
section 22.....	813
section 23.....	813

Criminal Procedure Code (cap 75)

section 210.....	1261

Customs and Exercise Act (cap 472)

section 91A	663

D

Division of Revenue Act, 2013 (Act No 31 of 2013)	1159

Division of Revenue Act, 2014 (Act No 10 of 2014) [SA]

section 3.....	422

E**Elections (Parliamentary & County Elections)****Petition Rules, 2013 (Act No 24 of 2011 Sub Leg)**

regulation 22.....	953
rule 9.....	1290

Elections Act, 2011 (Act No 24 of 2011) 363, 469

section 21(5)	1290
section 36(4)	1290
section 75(1)	1290
section 75 (1A)	1290
section 76(1)(a)	1290

Employment Act, 2007 (Act No 11 of 2007) 391

section 2.....	21, 1120
section 10(5)	643
section 40.....	643
section 41.....	643

Employment and Labour Relations Court Act, 2011**(Act No 20 of 2011)**

section 12.....	1
section 12(1)(a)	21

Environmental Management and Co-ordination Act, 1999**(Act No 8 of 1999) 887****Ethics and Anti-Corruption Commission Act, 2011****(Act No 22 of 2011) 953****Evidence Act (cap 80)**

section 106B(2)	747

G

General Laws Act, 2002 (Act No 2 of 2002)	1159

Government Proceedings Act (cap 40)

section 12(1)	51, 210, 537
section 13A	210
section 13A(1)	51

I**Industrial Court Act, 2011 (Act No 20 of 2011)**

section 12.....	1120

Intergovernmental Relations Act, 2012**(Act No 2 of 2012) 953, 1320**

section 7.....	51, 363, 643
section 8(j)	643
section 8(k)	643
section 19.....	643
section 23.....	643
section 24.....	838
section 28.....	838
section 30.....	838
section 31.....	838, 1061
section 31(a)	1144
section 31(b)	1144
section 32.....	838

Intergovernmental Relations Act, 2012**(Act No 2 of 2012)** *continued.*

section 33.....	838
section 34.....	838
section 35.....	838

Intergovernmental Relations Frame Works Act 2005 1144**Interpretation and General Provisions Act (cap 2)** 343, 537

section 2.....	422
section 3.....	663
section 24.....	813

J**Judicature Act (cap 8)**

section 5(1)	953

L**Law of Contract Act (cap 23)**

In general	663

Law Reform Act (cap 26)..... 21, 200, 391**Local Government Act (cap 265) (Repealed)** 1159

section 145(i)	838
section 160.....	838
section 167.....	838
section 201.....	813

N**Nairobi City County Finance Act, 2013 (Act No 2 of 2013)**

section 22.....	813

Nakuru County Finance Act, 2013 (Act No 3 of 2013) 813**National Assembly (Powers and Privileges) Act (cap 6)**

section 4.....	537, 953, 1159
section 6.....	953
section 9.....	953
section 12.....	953, 1261

section 12(1)	210
section 13(a)	210
section 14.....	210, 1061
section 15.....	210, 1061
section 29.....	210, 537, 747, 953, 1159

National Government Co-ordination Act, 2013
(Act No 1 of 2013)

section 15.....	1320
section 19.....	1320
section 20.....	1320
section 21.....	838
section 35.....	1320

National Land Commission Act, 2012 (Act No 5 of 2012)

section 18(1)	101
section 18(6)	101

O

Office of the Attorney General Act, 2012 (Act No 49 of 2012)

section 5(1)	210

P

Parliament Act, 1911 [UK]

section 1.....	1159

Penal Code (cap 63) 778

section 47.....	663
section 48.....	663

Provisional Collection of Taxes and Duties Act (cap 415) 813

Public Appointments (Parliamentary Approval) Act, 2011

(Act No 33 of 2011)	101
section 7.....	1261
section 8(7)	1261
section 10.....	1261

Public Finance Management Act, 2012

(Act No 18 of 2012)	343, 469, 778, 813, 908
section 8(1)(c)	1061
section 8(1)(d)	210
section 12.....	210
section 42.....	1159
section 92.....	210
section 93.....	210
section 94.....	210
section 95.....	210
section 96(3)	210
section 97(2)	210
section 98.....	210
section 99.....	210
section 102.....	422
section 103(1)	210
section 103(3)	953
section 104.....	953
section 104(1)(a)	294, 422
section 104(1)(b)	294, 422
section 107(1)	422
section 109(3)	210
section 109(6)	210, 294, 422
section 117.....	51, 294
section 117(1)	422
section 117(2)	422
section 117(5)	422
section 117(6)	422
section 118.....	294, 422
section 123.....	294
section 125(1)	294
section 125(5)(a)	422
section 126.....	422
section 127(1)	294
section 128.....	294
section 129.....	51, 294, 422
section 129(2)(a)	294
section 129(3)	294
section 129(6)	294
section 129(7)	294
section 130.....	294

Public Finance Management Act, 2012

(Act No 18 of 2012) *continued..*

section 131.....	51, 294, 422
section 133.....	294
section 134.....	422
section 135.....	294, 422
section 135(1)	294
section 147.....	1100
section 148.....	953, 1061
section 148(3)	210
section 148(4)	210
section 149.....	537, 1061
section 149(1)	210, 953
section 149(2)(j)	702
section 162.....	537
section 163.....	210
section 164.....	210
section 164(5)	702
section 166(5)	702
section 184.....	702
section 185.....	702
section 187.....	51
schedule 2 section 12.....	294

Public Procurement and Disposal (County Governments)

Regulations, 2013 (Act No 3 of 2005)	778
regulation 5.....	887

Public Procurement and Disposal Act, 2005

(Act No 3 of 2005).....	537, 778, 953
section 2.....	887
section 3(1)(k)	887
section 3(2)	887
section 4.....	887
section 26(4)	537
section 27.....	537
section 34	537
section 43.....	887

S

Supreme Court Act, 2011 (Act No 7 of 2011)

section 3(c)	1159
section 3(d)	1159

T

Transition to Devolved Government Act, 2012

(Act No 1 of 2012)	663, 1100, 1320
section 2	210, 343
section 3	210, 343, 899
section 4	643, 1290
section 4(1)	210
section 5(a)	899
section 5(b)	899
section 5(c)	899
section 7	702, 838
section 7(1)(e)	210
section 7(2)	210
section 7(2)(m)	643
section 15(1)	343
section 21	838
section 23	838
section 24	210, 838, 899
section 33	343
section 35	210
section 35(2)	838

W

Water (Services Regulatory) Rules, 2012 (cap 372 Sub Leg)

rule 18(8)	702

Water Act (cap 372)

section 47(1)	702
section 51(1)	702
section 53	702
section 55	702

International Instruments & Covenants Cited in Judgments

A

African Charter on Human and Peoples' Rights (ACHPR), 1981

article 2	101
article 20	537

C

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979

article 1	101
article 2(e)	101
article 2(f)	101
article 2(5)	101
article 14.2(h).....	702

Convention on the Rights of Persons with Disabilities (CRPD), 2006

article 28	702

I

International Covenant on Civil and Political Rights (ICCPR), 1966

article 1	537
article 2	537
article 3	537
article 25(a)	537
article 25(b).....	537

International Covenant on Economic, Social and Cultural Rights (ICESCR), 1996

article 11	702

U

Universal Declaration on Human Rights (UDHR), 1948

article 1	101
article 2(5)	101
article 2(6)	101
article 7	101
article 21	537

Abbreviations

Contextual Abbreviations

Ag J – Acting Judge of the High Court

Ag JA – Acting Judge of Appeal

CA – Court of Appeal; Commissioner of Assize

cap – Chapter

CJ – Chief Justice

DCJ – Deputy Chief Justice

Ed – Editor

Edn – Edition

Eds – Editors

HCCC – High Court Civil Case

HCCRC – High Court Criminal Case

J – Judge of the High Court

JA – Judge of Appeal

JJ – Judges of the High Court

JJA – Judges of Appeal

Misc – Miscellaneous

NAI – Nairobi

No – Number

OS – Originating Summons

p – Page

para – Paragraph

pp – Pages

R – Republic

SCJJ – Supreme Court Judges

SCJ – Supreme Court Judge

Sch – Schedule

Sub Leg – Subsidiary Legislation

UK – United Kingdom

Vol – Volume

Law Reports Abbreviations

KLR – Kenya Law Reports

KLR (EP) – Kenya Law Reports, Election Petitions

KLR (G&F) – Kenya Law Reports, Gender & Family

AC – Law Reports, Appeal Cases

Ad & E – Adolphus & Ellis Reports

AHRLR – Africa Human Rights Law Reports

AIR – All India Reporter

All ER – All England Reports

All NLR – All Nigeria Law Reports

All SA – All South African Law Reports

BCLR – Butterworths Constitutional Law Reports

Ch D – Law Reports, Chancery Division

CLR – Commonwealth Law Reports

EA – East Africa Law Reports

EACA – East Africa Court of Appeal Reports

ECHR – European Court of Human Rights

EHRR – European Human Rights Reports

EWHC – England & Wales High Court

INSC – Law Reports, Supreme Court of India

KAR – Kenya Appeal Reports (Hancox Reports)

KB – Law Reports, King's Bench Division

LJQB – Law Journal Queens Bench

LRC (Const) – Law Reports of the Commonwealth (Constitutional)

LT – Law Times

QB/QBD – Law Reports, Queen's Bench Division

SA – South African Law Reports

SCC – Supreme Court Cases

SCNLR – Supreme Court of Nigeria Law Reports

SCR – Supreme Court Reports

TC – Reports of Tax Cases

UGCC – Uganda Constitutional Court

US – Law Reports, United States

WIR – West Indian Reports

WLR – Weekly Law Reports

ZACC – Constitutional Court of South Africa

ZASCA – Supreme Court of Appeal of South Africa

ZWSC – Zimbabwe Law Reports, Supreme Court

Digest

CIVIL PRACTICE AND PROCEDURE

Contempt of court – *when a Court can declare a party to be in contempt of court – effect of contempt proceedings on officials of the Senate – effect of decisions made in violation of court orders – Civil Procedure Rules, order 40 rules 2, 3.*

Wambora & 4 others v Speaker of the Senate & 5 others..... 953

Civil Practice and Procedure – *injunction – application for a permanent injunction to restrain the Senate from summoning County Governors to appear before it to answer questions on public financial management – whether the application had merit.*

International Legal Consultancy Group v Senate & another 1061

Civil Practice and Procedure – *institution of suits – Government proceedings – issuance of 30 days notice to the Attorney General before filing a suit against the Government – effect of failure to issue the requisite notice – Government Proceedings Act (Cap 40), section 13A(1).*

Council of Governors & 6 others v Senate 210

Injunctions – *circumstances in which an injunction would be granted – whether the Court would grant an injunction to prevent the election of a new Speaker to a County Assembly.*

Ndichu v Clerk Kiambu County Assembly & another..... 1120

Institution of suits – *parties to a suit – Government proceedings – proceedings brought against the Senate – whether it was mandatory for the Attorney General to be a party to a suit in which the National Government was being sued – Constitution of Kenya 2010, article 156(4); Government Proceedings Act (Cap 40), section 12; Office of the Attorney General Act, No 49 of 2012, section 5.*

Council of Governors & 6 others v Senate 210

Parties to a suit – *dispute on the removal of a County Assembly speaker – whether clerk of the assembly could be sued as a representative of the County Government in a suit where the speaker was the plaintiff – County Governments Act 2012, section 13; County Assembly of Baringo Standing Orders 45, 61 & 197.*

Republic v Clerk County Assembly of Baringo ex parte William Kassait Kamket 21

CIVIL PRACTICE AND PROCEDURE *continued..*

Parties to a suit – *joinder of parties – where petition was brought against the Attorney General and the Commission for the Implementation of the Constitution seeking orders of mandamus directing the respondents to prepare the relevant Bill for tabling before Parliament – whether Parliament was a necessary party to the proceedings.*

Centre for Rights Education & Awareness (CREAW) v Attorney General & another 156

Parties to a suit – *joinder of parties – whether a party that was sought to be wrongly enjoined to civil proceedings could raise an objection to the enjoiner through a petition or Civil proceedings – whether by challenging the application through a petition amounted to an abuse of court process.*

County Government of Busia & another v Manwari & 12 others 343

Parties to a suit – *parties to a suit against a County Assembly – where the Attorney General was enjoined in a suit against a County Assembly – Constitution of Kenya, 2010 article 159.*

Kagiri v County Assembly of Nyeri & 2 other 1261

Remedies – *injunction – claim that the respondents unfairly advertised for the applicants job positions without carrying a staff audit which amounted to an unfair administrative action – whether the orders sought by applicants could be granted.*

Kenya County Government Workers Union v Kisumu County Assembly Public Service Board 899

Res judicata – *circumstances in which the plea of res judicata could be raised – requirements for similar parties and similar issues in raising the plea of res judicata.*

Okoiti & another v Attorney General & 6 others..... 838

Res judicata – *requirement for same parties and same issues in a former suit – whether the doctrine of res judicata would be applicable in circumstances where the main issue was similar to that in a former suit but the instant suit also raised new issues and had different parties – Civil Procedure Act (Cap 21), section 7.*

Council of Governors & 6 others v Senate 210

CONSTITUTIONAL LAW

Advisory opinion – *advisory opinion of the Supreme Court – whether advisory opinion of the Supreme Court on legislative measures for giving effect to the one-third-to-two-thirds gender principle was binding on the High Court – Constitution of Kenya, 2010 article 163(7).*

Centre for Rights Education & Awareness (CREAW) v

Attorney General & another 156

Appointments – *appointment of the Chairman and the Board of Directors to a public corporation – appointment of the Chairman and the Board of Directors of the Nairobi Water and Sewerage Co Ltd – nature of applicable laws – Constitution of Kenya 2010, articles 10, 73 & 232; Companies Act (cap 486), section 184; Water Act, Corporate Governance Guidelines (Gazette Notice No 7045 of 2010).*

Okoiiti & 3 others v Nairobi City County & 4 others 702

Bill of rights – *jurisdiction to entertain and determine claims of breach of fundamental rights – jurisdiction of the Employment and Labour Relations Court – whether the Employment and Labour Relations Court had jurisdiction to entertain and determine claims of breach of fundamental rights under articles 22 and 23 or enforcement of the Constitution under article 258 of the Constitution as pertains to employment and labour relations matters – Constitution of Kenya 2010 articles 22, 23 and 258.*

Suleiman v County Government of Isiolo & another 1

Conservatory orders – *application for conservatory orders on the grounds that that no referendum or provision of public participation was availed during the signing of a petition to suspend the County Government of Makueni – whether the High Court could in the circumstances grant conservatory orders – Constitution of Kenya 2010, article 23, article 22.*

Kisoi v Commission of Inquiry into the Petition to Suspend Makueni

County Government & 8 others..... 363

Constitutional Law – *separation of powers – jurisdiction of the Court – removal of Speaker of a County Assembly – whether the removal of a speaker was a political process in which the Courts could not intervene – Constitution of Kenya 2010, article 162; County Assembly of Baringo Standing Order 61.*

Republic v Clerk County Assembly of Baringo ex parte William Kassait Kamket 21

CONSTITUTIONAL LAW *continued..*

County Governments – *County Public Service – Public officers – recruitment and secondment of the public officers – employment of public officers on secondment to the County Government – whether the absorption of the claimants to the County Government entitled them to permanent service of employment – whether public officers serving on secondment should be placed on probation – Constitution of Kenya, 2010 articles 176,235; section 15(2)(a) of the sixth schedule to the Constitution – County Governments Act, 2012 Part vii.*

Kipruto & another v County Government of Baringo & another..... 1100

County Government – *County Assembly – removal of a speaker – process of removal – removal by public petition – whether removal of speaker through a public petition was illegal and not recognized in law – whether a motion to remove from office a speaker could be moved before the lapse of 6 months if a similar motion had been debated and resolved during the preceding 6 months – Civil Procedure Rules 2010, order 53 rule 3; County Governments Act 2012 sections 11(4) & 15; County Assembly of Baringo Standing Orders 47, 61 & 191.*

Republic v Clerk County Assembly of Baringo ex parte William Kassait Kamket 21

County Government – *County Executive Committee members – dismissal of County Executive Committee members – procedure in which County Executive Committee members could be dismissed from office – County Governments Act, No 17 of 2012, sections 31(a) & 40.*

County Government of Nyeri & another v Ndungu..... 391

County Government – *employment disputes – disciplinary matters – appeal to the Public Service Commission – procedure to be followed under section 77 of the County Government Act, 2012 – where the Appeal process dealt with the merits or substance of the case and not procedural or legal propriety of the case – whether section 77 of the County Governments Act, 2012 ousted or restricted the jurisdiction of the Court where a party had not appealed to the Public Service Commission – County Governments Act, 2012 section 77.*

Suleiman v County Government of Isiolo & another..... 1

CONSTITUTIONAL LAW *continued..*

County Government – *petition to the President to suspend County Government of Makueni – whether the Petition met the requirements of article 192(1)(b) of the Constitution and section 123 of the County Governments Act during the signing of a petition to suspend the County Government – Constitution of Kenya 2010 articles 192(1)(b) – County Government Act, section 123.*

Kisoi v Commission of Inquiry into the Petition to Suspend Makueni

County Government & 8 others..... 363

County Government – *where the Senate had summoned the Governors and Members of the Executive Committee of Finance to appear before it to answer questions on public financial management – whether the summoning was unconstitutional – Constitution of Kenya, 2010 article 1,10,159(2), 259(2).*

International Legal Consultancy Group v Senate & another 1061

County Governments – *imposition of tax/levies by County Governments – whether County Governments could impose taxes without an enabling proper legislative framework – Constitution of Kenya 2010 article 209, 210.*

Republic v Kiambu County Government & 7 others

***ex parte* Samuel Thinguri Waruathe..... 200**

County Governments – *public officers – appointment to public office – assigning positions that were never advertised and recruiting persons who were never interviewed – whether such an act complied with the letter and spirit of the County Governments Act and the Constitution – County Governments Act sections 63, 65, 66 & 77 – Constitution of Kenya, 2010 articles 10, 27(4), 56(c) & 232(1).*

Republic v Secretary County Public Board & another *ex parte* Abdille 131

Devolution – *Constituency Development Fund – whether it had been contemplated in the statutes that a constituency had to be one of the beneficiaries of the national revenue before it was divided between the National and County Governments – Constitution of Kenya 2010, articles 93, 96(1), 110, 165, 202, 203, 259.*

Institute of Social Accountability & another v National Assembly & 4 others..... 469

CONSTITUTIONAL LAW *continued..*

Devolution – *County Assembly Public Boards – whether the County Assembly Public Boards were part of the County Governments – whether the decisions of the County Assembly Public Boards affected the County Governments – Constitution of Kenya, 2010, article 176(1) & (2).*

Kenya County Government Workers Union v Kisumu County

Assembly Public Service Board 899

Devolution – *devolved Government – County Assemblies – whether a County Assembly was a legal person capable of suing or being sued – County Government Act section 6.*

Kagiri v County Assembly of Nyeri & 2 other 1261

Devolution – *County Government appointments – whether the appointments of the Tana River County Executive members complied with the two-thirds gender rule under the Constitution – whether the list of the nominees met the cultural diversity test under the Constitution and the County Governments Act – whether the period advertised for submission of applications was adequate – Constitution of Kenya, 2010, articles 10, 174, 197; County Governments Act, sections 30, 35.*

Republic v Tana River County Assembly & 2 others 1132

Devolution – *County Governments – impeachment of a Governor – process for the removal of a County Governor from office – circumstances under which a Governor could be removed from office – whether gross violation must be proved for a Governor to be removed from office – Constitution of Kenya, 2010, article 181; County Governments Act, 2012, sections 30, 33, 34.*

Wambora & 4 others v Speaker of the Senate & 5 others 953

Devolution – *devolved government – devolution of assets and the assumption of liabilities of the defunct local authorities – whether County Governments would take up liabilities of defunct Local Authorities that were located within their jurisdiction – Transition of Devolved Government Act, (cap 265A).*

County Government of Busia & another v Manwari & 12 others 343

Devolution – *implementation of the Capacity Assessment and Rationalization of the Public Service (CARPS) programme at National and County Governments level – whether the CARPS programme had usurped the powers of the County Public Service Boards – Constitution of*

CONSTITUTIONAL LAW *continued..*

Kenya, 2010, article 6(2); County Governments Act, 2012, section 57; Inter-Governmental Relation Act, 2012, sections 7, 8 & 23.

Kenya County Government Workers Union v Kisumu

County Government & 95 others..... 643

Devolution – *the role of the Senate in legislation –division of revenue – whether the Senate had a role to play in the enactment of the Division and Allocation of Revenue Act – Constitution of Kenya, 2010, articles 110(3) & 112.*

Speaker of the Senate & another v Attorney General & another & 3 others 1159

Devolved Government – *budgetary making process- whether the enactment of the Bomet County Appropriation Act 2014 and the Bomet County Appropriation (Amendment) Act 2014 followed the Budgetary making process as provided for by the Constitution and the PFMA – supplementary budgets – whether the relevant Committee of the County Assembly discussed and reviewed the Budget Estimates prepared by CECF and whether, subsequently the same were properly tabled before the County Assembly and whether the Assembly then considered the Budget Estimates – Constitution of Kenya, 2010, article 196 – Public Finance Management Act, sections 125(1), 135.*

Ng’etich & another v Governor, Bomet County Government & 5 others..... 294

Devolved Government – *County Assembly – role of the assembly – nominations and appointments done by the assembly – whether the board members of the assembly acted unlawfully during the recommendations and disapproval of the petitioner – County Governments Act, section 8(2); Public Appointments (Parliamentary Approval) Act sections 6, 7.*

Masinde v County Government of Vihiga & another..... 101

Devolved Government – *County Government – impeachment of a county Governor – process for the removal of a County Governor from office – circumstances when a Governor could be impeached-impeachment for gross violation of the Constitution – definition of gross violation-standard of proof of gross violation – the constitutional threshold amounting to gross violation – whether the Court has a constitutional duty to substantively analyse a charge of gross violation of the Constitution made against a Governor – Constitution of Kenya, 2010, article 181; County Governments Act, 2012 section 33.*

Wambora & 3 others v Speaker of the Senate & 6 others..... 778

CONSTITUTIONAL LAW *continued..*

Devolved Government – *County Government – nominations and appointments of County Chief Officers – whether applicants could be discriminated against by virtue of their marital status – County Governments Act, No 17 of 2012, sections 65 and 69.*

Masinde v County Government of Vihiga & another 101

Devolved Government – *County Governments – impeachment of a County Governor – process for the removal of a County Governor from office – impeachment for gross violation of the Constitution – definition of gross violation – standard of proof of gross violation – the constitutional threshold amounting to gross violation – whether the Court had a constitutional duty to substantively analyze a charge of gross violation of the Constitution made against a Governor – Constitution of Kenya, 2010, article 181; County Governments Act, 2012 section 33.*

Wambora & 30 others v County Assembly of Embu & 4 others 537

Devolved Government – *County Governments – impeachment of a County Governor – exclusive power of the County Assembly and Senate to determine an impeachment motion – whether the High Court had a role to play in the process of impeachment of a Governor.*

Wambora & 3 others v Speaker of the Senate & 6 others 778

Devolved Government – *County Governments – legislative authority of the county assembly – distribution of functions between the National Government and the County Governments – where the legislative authority of the County Assembly was derived from the Constitution – whether the Meru County Alcoholic Drinks Control Act No 3 of 2014 could be termed as Subsidiary legislation.*

Meru Bar, Wines & Spirits Owners Self Help Group (Suing thro' its Secretary)

Ibrahim Mwika v County Government of Meru 663

Devolved Government – *County Governments – legislative authority of the county assembly – liquor licensing-conflict of laws – whether liquor licensing fell within concurrent jurisdiction of the National and County Governments – whether a conflict of laws between the National Legislation and County legislation on liquor licensing could arise where liquor licensing was an exclusive mandate of the County Government- whether the County Legislation would prevail over the National Legislation where there was a conflict – Constitution of Kenya, 2010, article 191(1).*

Meru Bar, Wines & Spirits Owners Self Help Group (Suing thro' its Secretary)

Ibrahim Mwika v County Government of Meru 663

CONSTITUTIONAL LAW *continued..*

Devolved Government – *County Governments – legislative authority of the county assembly – mandate to legislate on licensing or dealing in liquor within Counties – whether that mandate could be exercised through legislation by the County Assembly of the respective County – Constitution of Kenya, 2010, article 185(1) and (2).*

Meru Bar, Wines & Spirits Owners Self Help Group (Suing thro’ its Secretary) Ibrahim Mwika v County Government of Meru 663

Devolved Government – *County Governments entitlement to raise revenue for governance and service provision-the nature of taxes that County Governments could impose legally – Constitution of Kenya 2010, articles 175(b), 190(1), 202, 203 & 209; County Governments Act, No 17 of 2012, section 120.*

Gakuru & others v Governor Kiambu County & 3 others..... 908

Devolved Government – *distribution of functions between the National Government and the County Governments – water and sanitation services – whether both the National Government and the County Governments had a role in water and sanitation services – Constitution of Kenya 2010, Fourth Schedule to the Constitution.*

Okoti & 3 others v Nairobi City County & 4 others 702

Devolved system of government – *government relations – intergovernmental disputes – dispute between the National and County Governments – resolution of such disputes – procedure to be followed to resolve such disputes – Intergovernmental Relations Act, sections 35; National Government Coordination Act, section 19.*

Law Society of Kenya v Transition Authority & 2 others 1320

Devolved system of government – *National Governments – vis-vis County Government – distribution of functions between the National Government and County Governments – provision of healthcare facilities – provision of healthcare facilities by the National Government and the County Government – meaning of ‘national referral health facilities’ and ‘county health facilities’ – Constitution of Kenya 2010, Part 1 & Part 2 of the Fourth Schedule to the Constitution.*

Okoti & another v Attorney General & 6 others..... 838

CONSTITUTIONAL LAW *continued..*

Election – election of County Assembly Speaker – where the Speaker was elected while the seats for nominated members of the County Assembly had not been filled – whether in the circumstances the Court could nullify the election – the Constitution of Kenya, 2010, articles 165,177,178(3), 194(1)(c).

Republic v Transition Authority & another *ex parte*

Crispus Fwamba & 4 others..... 1290

Enactment of laws – enactment of laws to align with the Constitution of Kenya – whether the CDF Act was one of the contemplated laws under section 2(3)(b) of the Sixth Schedule to the Constitution relating to devolved government that were required to be enacted by the Sixth Schedule and Chapters Eleven and Twelve of the Constitution within the period stipulated in the Fifth Schedule – Constitution of Kenya, 2010, Sixth Schedule of the Constitution, section 2(3)(b).

Institute of Social Accountability & another v

National Assembly & 4 others 469

Fundamental right and freedom – claim that fundamental right was threatened by the Respondents act of not preparing and tabling a Bill on gender rule before Parliament – whether a party was required to wait for a violation of a right or a contravention of the Constitution to occur before approaching the Court for relief – Constitution of Kenya, 2010 articles 22, 258.

Centre for Rights Education & Awareness (CREAW) v

Attorney General & another 156

Fundamental rights and freedoms – enforcement of fundamental rights and freedoms – right to a fair hearing – provision of information on allegations made against a person & provision of an adequate notice period to enable a person facing allegations to prepare a defence – Constitution of Kenya 2010, article 50.

Nendela v County Assembly of Bungoma & 4 others 747

Fundamental rights and freedoms – enforcement of fundamental rights and freedoms – right to public participation – public procurement – whether County Government procurement was a major policy decision requiring public participation in the County – whether failure to follow procurement law amounted to an infringement of the Petitioner's fundamental rights and freedoms and rendered the procurement process null and void – Constitution of Kenya 2010, articles 27,42,46 75,201,210 227 & 232(1).

Okeyo v County Government of Kisumu & 2 others 887

CONSTITUTIONAL LAW *continued..*

Fundamental rights and freedoms – *equality and freedom from discrimination – whether a by-law excluding the petitioner from appointment of being a member of the county land board because of her marital status was unconstitutional and discriminatory – Constitution of Kenya, 2010, article 27, 28.*

Masinde v County Government of Vihiga & another..... 101

Fundamental rights and freedoms – *right to fair labour practices and right to equal protection and benefit of the law to all persons – whether the implementation of the Capacity Assessment and Rationalization of the Public Service (CARPS) programme infringed on the rights of the petitioner and some of its members – where the Petitioner was a representative of all staff and workers of the respective County Governments – whether the non-inclusion of the Petitioner to the various committees established under the CARPS programme was discriminatory – Constitution of Kenya, 2010, articles 27, 41, 232(1), 235(1) & 236.*

Kenya County Government Workers Union v Kisumu County

Government & 95 others 643

Interpretation of constitutional provisions – *national revenue allocation to County Governments – constitutionality of a Senate resolution for the stoppage of withdrawals of public funds by County Governments – Constitution of Kenya 2010, articles 225 & 228(4); Public Finance Management Act, No 18 of 2012, sections 93, 94 & 95.*

Council of Governors & 6 others v Senate..... 210

Interpretation of constitutional provisions – *transitional provisions – financial management of the assets and liabilities of the defunct Local Authorities – whether Governors could be summoned to answer queries on financial management in a financial year where resources were managed by the defunct Local Authorities – Constitution of Kenya 2010, section 2 of the Sixth Schedule; Transition to Devolved Government Act, 2012, section 7; County Governments Act, No 17 of 2012, section 30(3)(f).*

Council of Governors & 6 others v Senate..... 210

CONSTITUTIONAL LAW *continued..*

Interpretation of statutes – *jurisdiction of the High Court to interpret whether an Act of Parliament was inconsistent with or otherwise in contravention of the Constitution – whether the Petitioner ought to have petitioned parliament prior to filing the Petition before court – Constitution of Kenya 2010 articles 119(1), 165, 156(4)(b), 258.*

Council of Governors & 3 others v Senate & 53 others 51

Jurisdiction – *Advisory opinions – jurisdiction to give advisory opinions – whether the high court had the right to give advisory opinions as to whether a Claimant could file a Petition for an advisory opinion in the High Court – Constitution of Kenya, 2010, article 163(6).*

Cereal Growers Association & another v County

Government of Narok & 10 others 813

Jurisdiction – *petition challenging the decision of the Senate to summon County Governors and County Executive Committee Members to answer charges – whether the High Court had jurisdiction to hear and determine the matter.*

International Legal Consultancy Group v Senate & another 1061

Jurisdiction – *jurisdiction of the High Court to determine judicial review matters – where there was an alternative dispute resolution mechanism – whether it was proper to institute judicial review proceedings before the High Court before exhausting the alternative mechanism rendered the proceedings premature.*

Republic v Secretary County Public Board & another ex parte Abdille 131

Legislation – *interpretation of section 13A of the Governments Proceedings Act – whether the said provision that required issuance of 30 days prior notice before suing the Government was an impediment to access to justice and unconstitutional – whether every Act of Parliament enjoys a presumption of constitutionality until the contrary is proven – Government Proceedings Act section 13A.*

Council of Governors & 3 others v Senate & 53 others 51

Legislative process – *county legislation – failure of a Governor to assent to a bill into law – effect of Governor's failure to assent to County Legislation – County Governments Act, sections 24(1) – (4), 25.*

Ng'etich & another v Governor, Bomet County Government & 5 others..... 294

CONSTITUTIONAL LAW *continued..*

Legislature – *parliament's general procedures and rules – public access and participation – what amounted to public participation – whether the Meru County Alcoholic Drinks Control Act was enacted without public participation contrary to the Constitution.*

Meru Bar, Wines & Spirits Owners Self Help Group

(Suing thro' its Secretary) Ibrahim Mwika v County Government of Meru 663

Mandamus – *application for mandamus - directing the respondents to prepare the relevant Bill for tabling before Parliament for purposes of implementation of articles 27(8) and 81(b) of the Constitution – where application was challenged on the ground that it was filed prematurely – whether the application had merit – Constitution of Kenya, 2010 articles 27(8), (81)(b), 100, 261(5).*

Centre for Rights Education & Awareness (CREAW) v

Attorney General & another 156

National revenue – *division of national revenue – where funds are sent to the constituencies in compliance with the CDF Act – whether sending revenue to the constituencies as required by the CDF was in itself a contravention of articles 202 and 203 to the Constitution.*

Institute of Social Accountability & another v National Assembly & 4 others..... 469

National values and principles of good governance – *public participation – threshold required for public participation – facilitation, providing information and education on the intended legislation, and holding public meetings – Constitution of Kenya 2010, articles 10, 174, 196 & 201; County Governments Act, No 17 of 2012, sections 87 & 115; Bomet County Appropriation Act, 201.*

Gakuru & others v Governor Kiambu County & 3 others..... 908

National values – *public participation – the nature of consultations in the process of enacting a statute that would meet the constitutional requirements for public participation – whether there was public participation in the enactment of the Bomet County Appropriation Act 2014 and was thus unconstitutional – Constitution of Kenya 2010, articles 10 & 119.*

Ng'etich & another v Governor, Bomet County Government & 5 others..... 294

CONSTITUTIONAL LAW *continued..*

Pleasure doctrine – *applicability of the pleasure doctrine in dismissal of a County Executive Member – limitation and nature of restriction on the applicability of the doctrine of pleasure – whether a governor had discretionary powers to exercise the pleasure doctrine – Constitution of Kenya, 2010, articles 10, 47, 73(2)(d), 174 & 175; County Governments Act, No 17 of 2012, sections 31(a) & 34.*

County Government of Nyeri & another v Ndungu..... 391

Public finance – *budgetary making process – Commission on Revenue allocation – the role of the Commission in the budgetary making process – where the commission had issued a circular recommending a ceiling on allocation for all county Assemblies and all County Executives in County budgets for the financial year 2014/2015 – whether the 1st Respondent had powers to issue the Circular and if so, whether the recommended ceilings were within the law – whether recommendations made by the Commission on Revenue Allocation were binding on all the organs to which they were made.*

Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 others 422

Public finance – *principles of public finance – the budgetary and related processes in County Governments – the powers of the Commission on Revenue Allocation & the Controller of budget in revenue allocation, budget processes and budget implementation – Constitution of Kenya, 2010, articles 10, 216, 217, 218, Public Finance Management Act, sections 104, 107; County Allocation of Revenue Act; Division of Revenue Act.*

Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 others 422

Public finance – *revenue raising powers and public debt – imposition of taxes – power of the County Government to impose tax – whether the County Government could charge Agricultural Produce Cess – what were the requirements before a County could charge Agricultural Produce Cess – Constitution of Kenya, 2010 articles 209 and 210.*

Cereal Growers Association & another v County Government of Narok & 10 others 813

Public officers – *appointment of public officers – procedure prescribed for the nomination and approval of public officers – whether the rejection of the petitioner's nomination to Vihiga County Land Management*

CONSTITUTIONAL LAW *continued..*

Board based on her marital status was in violation of her Constitutional rights – Public Appointments (Parliamentary Approval) Act, sections 6, 7; County Governments Act, section 35(2); Constitution of Kenya 2010 articles 47, 50, 165 and 179(2).

Masinde v County Government of Vihiga & another 101

Public officers – *appointment of public officers – procedure prescribed for the vetting of public officers – whether the rejection of the Petitioner’s nomination to the Nyeri County Executive Committee based on previous criminal proceedings against him was in violation of his Constitutional rights – Public Appointments (Parliamentary Approval) Act section 7– County Governments Act, section 35(2) – Constitution of Kenya, 2010, articles 47, 50, 165 and 179(2).*

Kagiri v County Assembly of Nyeri & 2 other 1261

Public participation – *degree of participation in the law – making process – whether the public was accorded reasonable opportunity in the law making process – what amounted to a reasonable opportunity – whether the process leading to the enactment of the CDF Act was Constitutional.*

Institute of Social Accountability & another v National Assembly & 4 others 469

Right to health – *obligation of the government to enact legislation to protect its citizen’s health – where the Meru County Alcoholic Drinks Control Act was intended to address the problems manifested by experience in Meru County – where the Act set out the problems sought to be addressed by the enactment of the Act in the object and purpose section of the Act – whether it was illegal for the County Government to carry out the objects of the Act – Meru County Alcoholic Drinks Control Act No 3 of 2014, section 3.*

Meru Bar, Wines & Spirits Owners Self Help Group

(Suing thro’ its Secretary) Ibrahim Mwika v County Government of Meru 663

Senate – *legislative power of the Senate – where Senate introduced an amendment to the County Governments (Amendment) Act that introduced the County Development Board – whether the introduction of the County Governments Board would undermine devolution – whether the creation of the County Governments Board was unconstitutional – County Governments (Amendment) Act.*

Council of Governors & 3 others v Senate & 53 others 51

CONSTITUTIONAL LAW *continued..*

Senate – *the role of the Senate – the role of the Senate with respect to national revenue allocated to Counties – examining financial management reports and summoning any person to answer queries and provide information on the reports – Constitution of Kenya 2010, articles 95(4) (c), 96(3), 125 & 226(2); County Governments Act, No 17 of 2012, section 30(3)(f).*

Council of Governors & 6 others v Senate 210

Separation of powers – *balance of power in a democratic government – distribution of power to the Legislature, Executive and Judiciary – independence of branches of democratic government in performing functions.*

Wambora & 30 others v County Assembly of Embu & 4 others 537

EMPLOYMENT LAW – *termination of employment – where the County Service Board terminated the employment of the County Clerk.*

Kipruto & another v County Government of Baringo & another 1100

EVIDENCE – *electronic evidence – admissibility – electronic records – required form of electronic records – admissibility of electronic evidence – admissibility of a transcript and DVD relating to a programme from a radio station as evidence – Evidence Act (Cap 80) section 106B.*

Nendela v County Assembly of Bungoma & 4 others 747

GOVERNMENT RELATIONS – *intergovernmental dispute – dispute between the National and County Governments – where a dispute arose as to the guidelines issued for selection process of form one students – where the dispute touched on the relations between the two levels of government – whether the dispute was one which could be termed as an intergovernmental dispute – Intergovernmental Relations Act, sections 30, 31; Constitution of Kenya, 2010 article 189; South African Intergovernmental Relations Frameworks Act 2005.*

County Government of Nyeri v Cabinet Secretary, Ministry of

Education Science and Technology & another 1144

JUDICIAL PRECEDENT – *the binding or persuasive nature of judicial decisions – difference in the applicable facts – circumstances in which the court would seek to distinguish its decision in relation to an apparently similar decision and reach at its own separate conclusions over an issue.*

Council of Governors & 6 others v Senate 210

JUDICIAL REVIEW

certiorari prohibition – application for orders of certiorari and prohibition to quash and prohibit the decision and conduct of Kiambu enforcement officers from imposing taxes without a proper legislative framework – duty of the Court to exercise its discretion judiciously based on the evidence of sound legal principles when granting judicial review orders – whether the application had merit.

Republic v Kiambu County Government & 7 others
ex parte Samuel Thinguri Waruathe..... 200

Prerogative orders – certiorari – circumstances in which the remedy of certiorari would be issued.

Nendela v County Assembly of Bungoma & 4 others 747

Prohibition and certiorari – application for orders of prohibition and certiorari to prohibit the gazetting of the County Executive nominees and to quash the approval of the nominees by the County Assembly of Tana River County – whether the Application was merited.

Republic v Tana River County Assembly & 2 others 1132

JURISDICTION

Employment and Labour Relations Court – extent of the jurisdiction – jurisdiction under the Employment Act vis – a – vis the ELRC Act – whether the ELRC could entertain a labour dispute where there was no contract of service between the employer and the employee – whether a Speaker of Parliament or County Assembly was an employee for the purposes of the Employment Act, 2007 – Constitution of Kenya 2010, articles 128 & 162, Employment and labour Relations Court Act section 12.

Republic v Clerk County Assembly of Baringo ex parte
William Kassait Kamket 21

High Court – jurisdiction to review decisions of County Assemblies – High Court's jurisdiction to determine disputes arising out of actions taken by County Assemblies in the exercise of their Constitutional and statutory mandate – County Governments Act, section 16 – National Assembly (Powers and Privileges) Act, section 12.

Kagiri v County Assembly of Nyeri & 2 other 1261

JURISDICTION *continued.*

Intergovernmental disputes – *jurisdiction to determine intergovernmental disputes – meaning of intergovernmental disputes – whether a matter raised by private citizens could constitute an intergovernmental dispute – Constitution of Kenya 2010, articles 6, 165(3)(d) & 189; Intergovernmental Relations Act, No 2 of 2012, section 30.*

Okoiti & another v Attorney General & 6 others..... 838

Jurisdiction of the High Court – *dispute between Governors and County Commissioners -whether the High Court had jurisdiction to resolve disputes which arose out of the mandate or powers of any of the officers, or roles of respective officers of the County Governments and those of the National Government – whether the Law Society of Kenya had the authority to file a petition with a view to resolving competing interests and conflicts between the Governors and the County Commissioners – Constitution of Kenya, 2010 article 189; Transition to Devolved Government Act, 2012; Intergovernmental Relations Act, 2012 section 35; National Government Co-ordination Act, 2013; County Government Act, 2013.*

Law Society of Kenya v Transition Authority & 2 others 1320

Jurisdiction of the High Court – *jurisdiction of the High Court with respect to claims on the violation of constitutional provisions and fundamental rights and freedoms by a County Assembly – Constitution of Kenya 2010, articles 22(1), 165(3)(b) & 165(3)(d); County Governments Act, No 17 of 2012, section 17; National Assembly (Powers and Privileges) Act (Cap 6), section 29.*

Nendela v County Assembly of Bungoma & 4 others 747

Jurisdiction of the High Court – *parliamentary privilege – jurisdiction with respect to the Senate’s actions – whether the High Court had jurisdiction with respect to a suit challenging the constitutionality of the actions and resolutions of the Senate – Constitution of Kenya 2010, article 165(3).*

Council of Governors & 6 others v Senate 210

JURISDICTION *continued.*

Jurisdiction of the High Court – *scope of jurisdiction of the High Court in removal of County Assembly Speaker – where the election of the County Speaker was contested – whether in the circumstances the High Court could order removal of the Speaker – Constitution of Kenya, 2010, article 165.*

Republic v Transition Authority & another *ex parte* Crispus Fwamba & 4 others..... 1290

Jurisdiction of the High Court – *supervisory jurisdiction of the High Court – constitutional jurisdiction of the High Court – quasi-judicial nature of County Assemblies during impeachment proceedings – whether the High Court has jurisdiction to hear a substantive matter regarding the impeachment of a County Governor – Constitution of Kenya, 2010, article 165(6).*

Wambora & 3 others v Speaker of the Senate & 6 others..... 778

Jurisdiction of the High Court – *where the jurisdiction of the High Court was questioned in regard to the provisions of the Intergovernmental Relations Act – where the dispute was framed as a constitutional question – whether the High Court had jurisdiction to hear the dispute as framed – Constitution of Kenya, 2010 article 165.*

County Government of Nyeri v Cabinet Secretary, Ministry of Education Science and Technology & another..... 1144

Jurisdiction of the Industrial Court – *whether the Industrial Court had jurisdiction over a dispute concerning the removal of a County Assembly Speaker – Employment Act 2007, section 2.*

Ndichu v Clerk Kiambu County Assembly & another..... 1120

Justiciability – *impeachment of a County Speaker – whether questions concerning the impeachment of a County Assembly Speaker were justiciable and the Court could exercise jurisdiction over them.*

Ndichu v Clerk Kiambu County Assembly & another..... 1120

Jurisdiction of the High Court – *whether High Court has jurisdiction to hear a matter regarding the impeachment of a County Governor – the quasi-judicial nature of County Assemblies during impeachment proceedings-Constitution of Kenya, 2010, article 165(6).*

Wambora & 4 others v Speaker of the Senate & 5 others..... 953

JURISDICTION *continued..*

Supreme Court – *advisory opinion – jurisdiction of the court to give an advisory opinion – where the applicants moved the Supreme Court for an advisory opinion regarding the role of the Senate in legislative process leading to the enactment of the Division and Allocation of Revenue Act – claim by the interested parties that the relevant issues properly fell within the domain of the litigated cause rather than that of the advisory opinion – whether in the circumstances of the case the Supreme Court had jurisdiction to render an advisory opinion – Constitution of Kenya, 2010, article 163(6); Supreme Court Act, section 3(d).*

Speaker of the Senate & another v Attorney General & another & 3 others 1159

PROCUREMENT LAW – *public procurement-procedure for public procurement – whether County Government procurement was a matter of public policy decision which required public participation – whether failure to involve the public in county tendering process makes the whole process invalid – Public Procurement and Disposal Act sections 3(1) (k), 3(2) & 4; Public Procurement and Disposal (County Government) Regulations 2013 regulation 5.*

Okeyo v County Government of Kisumu & 2 others 887

STATUTES

Constitutionality of statutes – *constitutionality of the Kiambu Finance Act 2013 – whether the Kiambu Finance Act 2013 was enacted without public participation and violated various provisions of the Constitution – Constitution of Kenya 2010, articles 10, 163(3)(d) & 209; County Governments Act, No 17 of 2012, sections 87, 88 & 115.*

Gakuru & others v Governor Kiambu County & 3 other 908

Constitutionality of statutes – *factors to be considered in determining the constitutionality of a statute in view of conflict of laws – contention that County Legislation contravened National Legislation – Burden of proof when challenging constitutionality of a legislation – whether the Meru County Alcoholic Drinks Control Act and the regulations made thereunder were unconstitutional for differing from National Legislation – Meru County Alcoholic Drinks Control Act No 3 of 2014.*

Meru Bar, Wines & Spirits Owners Self Help Group

(Suing thro' its Secretary) Ibrahim Mwika v County Government of Meru 663

STATUTES *continued..*

Interpretation of Statutes – *interpretation of the CDF Act – whether the CDF Act duplicates and overlaps the County Governments’ functions under the Fourth Schedule of the Constitution.*

Institute of Social Accountability & another v National Assembly & 4 others 469

Interpretation of Statutes – *National Revenue Allocation Laws – Public Finance Management Act, sections 104, 107; County Allocation of Revenue Act; Division of Revenue Act.*

Speaker, Nakuru County Assembly & 46 others v Commission

on Revenue Allocation & 3 others 422

Interpretation of the County Governments Act – *constitutionality of section 33 of the County Governments Act – whether section 33 of the County Governments Act, was unconstitutional for failing to allow public participation and involvement in the removal of a County Governor hence in contravention of articles 1, 2(1) and (2); 10, 118(1)(b), 174(a) and (c) and 196(1)(b) of the Constitution – County Governments Act, 2012, section 33; Constitution of Kenya, 2010, articles 1, 2(1) and (2), 10, 118(1)(b), 174(a) and (c) and 196 (1)(b).*

Wambora & 30 others v County Assembly of Embu & 4 others 537

WORDS AND PHRASES

“Effect” – *the meaning of taking effect in County Legislation – if taken as a noun, as “a result, outcome or consequence”. If taken as a verb, it means “to bring about; to make happen” and more importantly – “effective” is defined as of a statute, order or contract etc) in an operation at a given time.*

Ng’etich & another v Governor, Bomet County Government & 5 others 294

“Effective date” is also defined as *“the date on which a statute, contract ... becomes enforceable or otherwise takes effect, which sometimes differs from the date on which it was enacted or signed”.*

Ng’etich & another v Governor, Bomet County Government & 5 others 294

Impeachment – *the word ‘impeachment’ derives from Latin roots expressing the idea of being caught or entrapped, and is analogous to the modern French verb empêcher (to prevent) and the modern English word ‘impede’. Impeachment also means prosecution, indictment or arraignment.*

Wambora & 30 others v County Assembly of Embu & 4 others 537

**Suleiman v County Government of Isiolo
& another [2015] KLR - E & LRC**

Employment and Labour Relations
Court of Kenya at Nyeri
B Ongaya, J

July 31, 2015

Cause No 76 of 2015

Brief facts

The Claimant filed the memorandum of claim and prayed for judgment against the Respondent for an order of restatement into the Claimants position of employment, a declaration that the act of relieving him from his duties was a breach of his constitutional right under article 27, 28, 41 and 50 of Constitution of Kenya, general damages for wrongful dismissal, Kshs 5,198,000.00 being dues payable to the Claimant and costs and interests.

The 1st and 2nd Respondents filed together with the memorandum of response the notice of preliminary objection praying that the claim be dismissed with costs and pleaded that any person affected by the decision of the County Public Service Board or a person exercising disciplinary control over a public officer in the County Government was required to appeal to the Public Service Commission as provided for in section 77 of the County Governments Act, 2012. Thus, it was urged for the Respondents that section 77 of the Act restricted and ousted the jurisdiction of the Court.

It was submitted for the Respondent that section 77(1) used the word “may” suggesting that the Claimant had an option to appeal to the Commission or take such other legitimate action such as filing the present suit and that the Claimant was questioning the illegal decision by the Governor which could only be handled and resolved by the Court and not the Commission.

Issues

- i. Whether section 77 of the County Governments Act, 2012 which provided that any person affected by the decision of the County Public Service Board or a person exercising disciplinary control over a public officer in the County Government was required to appeal to the Public Service Commission ousted the jurisdiction of the court where a party had not appealed to the Public Service Commission.

-
- ii. Whether the Employment and Labour Relations Court had jurisdiction to entertain and determine claims of breach of fundamental rights under articles 22 and 23 or enforcement of the Constitution under article 258 of the Constitution as pertains to employment and labour relations matters. 1
5

Constitutional Law – bill of rights – jurisdiction to entertain and determine claims of breach of fundamental rights – jurisdiction of the Employment and Labour Relations Court – whether the Employment and Labour Relations Court had jurisdiction to entertain and determine claims of breach of fundamental rights under articles 22 and 23 or enforcement of the Constitution under article 258 of the Constitution as pertains to employment and labour relations matters – Constitution of Kenya, 2010, articles 22, 23 and 258. 10

County Government – employment disputes – disciplinary matters – appeal to the Public Service Commission – procedure to be followed under section 77 of the County Governments Act, 2012 – where the Appeal process dealt with the merits or substance of the case and not procedural or legal propriety of the case – whether section 77 of the County Governments Act, 2012 ousted or restricted the jurisdiction of the Court where a party had not appealed to the Public Service Commission – County Governments Act, 2012, section 77. 15
20

Constitution of Kenya, 2010

Article 22 25

- (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. 25
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by— 30
 - (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons; 35
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members.
- (3) The Chief Justice shall make rules providing for the Court proceedings referred to in this Article, which shall satisfy the criteria that— 40
 - (a) the rights of standing provided for in clause (2) are

fully facilitated;	1
(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;	5
(c) no fee may be charged for commencing the proceedings;	
(d) the Court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and	10
(e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the Court.	15
(4) The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this article, and to have the matter heard and determined by a court.	
Article 23	20
(1) 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.	25
(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts 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
(3) In any proceedings brought under article 22, a Court may grant appropriate relief, including—	
(a) a declaration of rights;	
(b) an injunction;	
(c) a conservatory order;	35
(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24;	
(e) an order for compensation; and	40
(f) an order of judicial review.	

Article 159(1) & (2)(b)	1
(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.	
(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-	5
(b) justice shall not be delayed;	
Article 162(2)(a)	
(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-	10
(a) employment and labour relations; and	
Article 165(5) & (6)	
(5) The High Court shall not have jurisdiction in respect of matters—	15
(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or	
(b) falling within the jurisdiction of the Courts contemplated in article 162(2).	20
(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.	
Article 258	25
(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.	
(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—	30
(a) a person acting on behalf of another person who cannot act in their own name;	
(b) a person acting as a member of, or in the interest of, a group or class of persons;	35
(c) a person acting in the public interest; or	
(d) an association acting in the interest of one or more of its members.	
Article 234(2)(a)(i)	40
(2) The Commission shall—	
(a) subject to this Constitution and legislation—	
(i) establish and abolish offices in the public service;	

Suleiman v County Government of Isiolo & another **5**
(B Ongaya, J)

and 1

County Governments Act, 2012

Section 76

- (1) In exercising its disciplinary powers, the County Public Service Board shall observe the principles of natural justice. 5
- (2) No public officer may be punished in a manner contrary to any provision of the Constitution or any Act of Parliament. 10
- (3) Nothing in this section shall limit the powers conferred on the county government or any other lawful authority discharging a disciplinary function from retiring an officer from the county public service on the ground of public interest. 15
- (4) In this section, retirement on the ground of public interest may be imposed instead of any other punishment if the decision maker considers that although the misconduct has been proven—
 - (a) the officer has nevertheless raised a mitigation factor that renders imposition of a punishment too harsh in view of the circumstances of the case; or 20
 - (b) the length of service benefits accrued and previous good record of the officer justifies the retirement; or
 - (c) imposing a punishment against the officer is likely to adversely affect the reputation of the public body concerned or the county public service generally. 25
- (5) If criminal proceedings are instituted against a county public officer, disciplinary proceedings against the officer for dismissal or imposition of any other punishment on any grounds involved in the criminal charge shall not be taken until the conclusion of the criminal proceedings and the determination of any appeal therefrom has been made. 30
- (6) Nothing in subsection (5) shall be interpreted as prohibiting or restricting the power of the county government or the concerned county chief officer or other lawful authority to interdict or suspend or take any interlocutory decision against the public officer. 35
40

Section 77	1
1. Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this part referred to as the "Commission") against the decision.	5
2. The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of-	10
a. recruitment, selection, appointment and qualifications attached to any office;	
b. remuneration and terms of service;	
c. disciplinary control;	15
d. national values and principles of governance under article 10, and values and principles of public service under article 232 of the Constitution;	
e. retirement and other removal from office;	
f. pension benefits, gratuity and any other terminal benefits; or	20
g. any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.	
3. An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of Commission, the circumstances warrant it.	25
4. The Commission shall not entertain an appeal more than once in respect of one decision.	30
5. Any person dissatisfied or affected by a decision made by the Commission on appeal in a decision made in a disciplinary case may apply for review and the Commission may admit the application if-	35
a. the Commission is satisfied that that there appear in the application new and material facts which might have affected its earlier decision, and if adequate reasons for the non-disclosure of such facts at an earlier date are given; or	40
b. there is an error apparent on record of either decision.	
6. An application for review under subsection (5) shall	

be in writing and made within the time prescribed by the Commission in regulations governing disciplinary proceedings, but the Commission may entertain an application for review later if, in the Opinion of the Commission, the circumstances warrant it.

Held:

1. Article 234(2)(i) of the Constitution provided that the Public Service Commission was vested with the function and power to hear and determine appeals in respect of County Governments' public service. Article 262 defined "public service" to mean the collectivity of all individuals, other than state officers, performing a function within a state organ. 10
2. The power of the Commission to hear and determine appeals in respect of County Governments' public service constitutionally applied only to public officers, and not state officers, in the service of the county governments or any other state organ. 15
3. Section 77 of the County Governments Act, 2012 amplified and brought into operation article 234(2)(i) of the Constitution. In considering the constitutional and statutory provisions that empowered the Commission to hear and determine appeals in respect of County Governments' public service, the subject matter was set out in section 77 of the Act but the decisions the Commission may make were not set out in the Act or the Constitution. 20
4. Regarding appeals to the Commission, the Commission could only make decisions that the County Public Service Board or relevant lawful authority could have made or vary such decision by simply setting it aside or making a decision that was in the Board's or the other relevant lawful authority's jurisdiction to make. 25
5. On appeal, the Appellate authority applied the same substantive law and facts as applied by the primary authority that made the decision appealed against and generally considered facts as they were presented before the primary authority so that an appellate authority, in absence of anything else, may only set aside the decision appealed against or substitute the decision with any of the remedies that the primary authority was empowered to make. In other words, the Appeal process dealt with the merits or substance of the case and not procedural or legal propriety of the case. 30
6. In disciplinary matters, section 76 of the County Governments Act, 2012 was elaborate that punishment contrary to the Constitution could not be imposed against a public officer. The section provided 35 40

that the Rules of natural justice must be observed, and the punishment could not be contrary to provisions of the Constitution and Acts of Parliament.	1
7. It was clear that the legitimacy of the procedure or punishment imposed as measured against the section 76 of the Act would be an issue of law and therefore not appealable to the Commission but subject to the jurisdiction of the court.	5
8. It was not for the County Public Service Board or the person exercising disciplinary control in the county government, as the case may be, to determine a dispute as to its or person's compliance with section 76 of the Act, and similarly, the Commission would not have jurisdiction to decide such issue on appeal, which essentially would not be conceivable as a matter of a primary decision and therefore subject to the Commission's appellate jurisdiction under section 77 of the Act.	10 15
9. While making its primary decisions or decisions on appeals, the Commission like any other state organ or person under article 10 of the Constitution, must care and ask itself whether the decision was lawful or legitimate in view of relevant constitutional and statutory provisions, but the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions rested with the Court as vested with the appropriate jurisdiction under article 162(2)(a) as read with article 165(5) and (6) of the Constitution; article 22(1), and section 12 of the Employment and Labour Relations Act, 2011.	20 25
10. The jurisdiction to determine a dispute as to a person's compliance with section 76 of the County Governments Act and to make a primary conclusive finding thereon was vested in the court and the Commission did not enjoy constitutional or statutory jurisdiction to determine that issue and to make appropriate remedy as was prayed for by the claimant in the case.	30
11. The line was thin but clearly set apart matters that could go to the Commission as of necessity in the first instance and those that could be argued before the Court as of first instance without having to go through the Commission by reason of exhausting the prescribed alternative and statutory procedure and remedy.	35
12. It was clear that legitimacy or lawfulness of the decisions was not one of the listed appealable subject matter under section 77 of the County Governments Act and it had not been shown that such would be a matter in the constitutional or statutory competence of the Commission to decide.	40

13. The Constitution or legislation may provide that a person or public body or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions or powers as vested in the person or authority or public body by the Constitution or legislation. The Constitution or legislation may also vest in a person or authority or public body the power or function to consider or entertain given disputes or matters as of first instance or on appeal and to render decisions in that regard in accordance with the prescribed procedures. Such constitutional and legislative provisions should not be construed as precluding a court from exercising the relevant jurisdiction in relation to any question whether that person or authority or public body had exercised the powers or functions in accordance with the Constitution or any other law. 1
14. Such provisions did not oust or extinguish or adjourn the Court's jurisdiction to hear and determine a dispute about the legality or the manner of the exercise of the constitutional or statutory powers and functions by the relevant person, public body or authority as may have been vested in the person, public body or authority under the Constitution or statute. 5
15. Under article 159(2)(b) justice shall not be delayed and under article 159(2)(e) the court was guided that in exercise of judicial authority, the purpose and principles of the Constitution shall be protected and promoted. Judicial authority was vested in the judiciary under article 159(1) and issues of legality of actions or omissions was the immediate and proper primary or original province and jurisdiction of the court and not the penultimate or initially ceded jurisdiction of persons, public bodies and authorities outside the judiciary. 10
16. There were no established time lines for appealing and making of the decision by the Commission and the likely consequence was that the claimant may be subjected to irreparable harm such as rendering the cause of action to challenge the alleged illegality time barred. 15
17. Looking at the alleged claims of illegality, unconstitutionality, breach of constitutional rights and the remedies as prayed for, it was difficult to find that the cited alternative procedure and remedy under section 77 of the Act was available to the claimant. Even if it was said that it was a case of mixed jurisdiction of the Commission and the court, the legitimate path was to invoke the Court's jurisdiction to hear and determine the intertwined issues, that being the most efficient and effective manner of disposing the dispute. 20

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18. Section 77 of the County Government Act, did not oust or restrict the jurisdiction of the Court for want of exhaustion of the procedure and remedies envisaged under the section. The Employment and Labour Relations Court (ELRC) enjoyed the jurisdiction to hear and determine employment and labour relations matters alongside claims of fundamental rights (and enforcement of constitutional and statutory provisions) ancillary and incidental to those matters. 1
19. By being of equal status, the High Court therefore did not have the jurisdiction to superintend, supervise, direct, guide, shepherd, and or review the mistakes, real or perceived, of the ELRC and Environment and Land Court (ELC) administratively or judiciously as was the case in the past and *vice versa*, the ELRC and ELC were not the High Court. However, status was not the same thing as jurisdiction. The Constitution though did not define 'status' 5
20. The ELRC and ELC exercised the same powers as the High Court in performance of its judicial function, in its specialized jurisdiction but they were not the High Court. 10
21. The original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between employers and employees rested with the ELRC as vested with the appropriate jurisdiction under articles 159(1), 162(2)(a) as read with article 165(5) and (6) of the Constitution; articles 22(1) and 258(1) of the Constitution, and the provisions of the Employment and Labour Relations Act, 2011. 15
22. The jurisdiction spread to all issues in the employment relationship and related matters including the enforcement of the fundamental rights and freedoms under article 22 of the Constitution and enforcement of the Constitution under article 258 as far as the issues in dispute evolved, revolved or related to employment and labour relations. 20
23. The compass or golden test for the court's jurisdiction was the subject matter in the dispute namely disputes relating to employment and labour relations as provided for under article 162(2)(a) of the Constitution and as amplified in the Employment and Labour Relations Act, 2011 and not the remedies sought or the procedure of moving the court or the *situ* of the applicable law or any other extraneous considerations as may be advanced by or for a litigant. 25
- Preliminary objection dismissed with costs* 30
- 40

Suleiman v County Government of Isiolo & another 11
(B Ongaya, J)

Cases 1

East Africa

1. *Akelerio, James Alias Muguu & another v Moses Kasaine Lenolkilal & 3 others* Petition No 17 of 2014 – (Explained) 5
2. *Asanyo, Geoffrey Makana v Nakuru Water & Sanitation Services Company & 6 others* Petition No 4 of 2014 – (Distinguished)
3. *Judicial Service Commission v Gladys Boss Shollei & another* Civil Appeal No 50 of 2014 – (Distinguished)
4. *Mugendi, Daniel N v Kenyatta University & 3 others* Civil Appeal No 6 of 2012 – (Considered) 10
5. *Speaker of National Assembly v Karume* [1992] KLR 22; (2008) 1 KLR (EP) 425 – (Explained)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 10, 22(1); 23; 27; 28; 41;50; 159(1)(2)(b)(e);162(a)(i); 165(5)(6); 232(2)(i); 258 – (Interpreted) 15
2. County Governments Act, 2012 (Act No 17 of 2012) sections 76, 77 (1) – (Interpreted)
3. Employment and Labour Relations Court Act, 2011 (Act No 20 of 2011) section 12 – (Interpreted) 20

Advocates

None Mentioned

July 31, 2015, **B Ongaya, J** delivered the following Ruling 25
The Claimant filed the memorandum of claim on 08.05.2015 through Mbogo & Muriuki Advocates. The Claimant prayed for judgment against the Respondent for:

- a. An order of reinstatement into the Claimant's position of employment as the Chief of Staff and to remain in service of the Respondents, and to perform the attached duties in accordance with the relevant provisions of the Constitution and other laws, unless he otherwise ceases to lawfully hold office in the said position. 30
- b. A declaration that the act of the 2nd Respondent in relieving or removing the claimant of his duties is a breach of his constitutional right under article 27, 28, 41, and 50 of Constitution of Kenya and that the same is null and void for all intents and purposes. 35
- c. General damages for unlawful dismissal. 40
- d. Kshs 5,198,000.00 being dues payable to the Claimant as tabulated at paragraph 11 above.

e. Costs and interests.	1
The 1 st and 2 nd Respondents filed the memorandum of response on 03.06.2015 through Kithi & Company Advocates. The Respondent prayed that the claim be dismissed with costs.	5
At paragraph 20 and 21 of the memorandum of response the Respondents pleaded that any person affected by the decision of the County Public Service Board or a person exercising disciplinary control over a public officer in the County government is required to appeal to the Public Service Commission as provided for in section 77 of the County Governments Act, 2012. Thus, it was urged for the respondents that section 77 of the Act restricted and ousted the jurisdiction of the Court.	10
The Respondents filed together with the memorandum of response the notice of preliminary objection dated 29.05.2015 praying that the Claimant's suit be struck out or dismissed with costs to the Respondent. The grounds of preliminary objection as set out in the notice were as follows:	15
a. That the honourable court does not have jurisdiction to entertain the suit as canvassed or grant the prayers as sought by the memorandum of claim.	20
b. The suit as canvassed before the honourable court is incompetent, fatally defective in law, incurable and cannot stand in law and therefore ought to be struck out.	25
c. That the Respondents are non-suited and their names should be struck off.	
d. That the suit is an abuse of the Court process and cannot be heard or ventilated or heard by the Court for that purpose.	30
The Respondents filed on 21.04.2015 submissions on the preliminary objection. The parties' advocates were heard on 21.07.2015 in oral submissions on the preliminary objection.	
The 1 st issue for determination is whether section 77 of the County Governments Act, 2012 ousts or restricts the jurisdiction of the Court in the circumstances of the present suit. Subsections to section 77 of the Act on appeals to the Public Service Commission provide as follows:	35
1. Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any	40

**Suleiman v County Government of Isiolo & another
(B Ongaya, J)**

13

- county public officer may appeal to the Public Service Commission (in this part referred to as the “Commission”) against the decision. 1
2. The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of- 5
- a. recruitment, selection, appointment and qualifications attached to any office;
 - b. remuneration and terms of service;
 - c. disciplinary control; 10
 - d. national values and principles of governance under article 10, and values and principles of public service under article 232 of the Constitution;
 - e. retirement and other removal from office;
 - f. pension benefits, gratuity and any other terminal benefits; or 15
 - g. any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard. 20
3. An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of Commission, the circumstances warrant it. 25
4. The Commission shall not entertain an appeal more than once in respect of one decision.
5. Any person dissatisfied or affected by a decision made by the Commission on appeal in a decision made in a disciplinary case may apply for review and the Commission may admit the application if- 30
- a. the Commission is satisfied that that there appear in the Application new and material facts which might have affected its earlier decision, and if adequate reasons for the non-disclosure of such facts at an earlier date are given; or 35
 - b. there is an error apparent on record of either decision.
6. An application for review under subsection (5) shall be in writing and made within the time prescribed by the Commission in regulations governing disciplinary proceedings, but the Commission may entertain an application for review later if, in the Opinion of the 40

Commission, the circumstances warrant it.

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It was submitted for the Respondents that the Claimant had been required to proceed on compulsory leave pending investigations about the Claimant's performance so that the case was disciplinary in nature and the decision that the Claimant goes on compulsory leave was in exercise of powers of disciplinary control so that the proper action was for the Claimant to appeal to the Commission. Thus, it was submitted for the Respondents that the legitimate action was for the Claimant to appeal to the Commission and not to move the Court as it was held in the case of *James Akelerio Alias Muguu and another v Moses Kasaine Lenolkilal and 3 others* [2014] eKLR. The Respondents further relied upon the holding in *The Speaker of the National Assembly v The Hon James Njenga Karume* Civil Application No 192 of 1992 (UR) where it was held that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. It was submitted that in the present case the first port of call for the Claimant should have been the Commission, the suit was premature as the Court lacked jurisdiction and the suit should be dismissed.

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For the Claimant it was submitted that the Court enjoyed jurisdiction under section 12 of the Employment and Labour Relations Court Act and the employment relationship was not in dispute. It was submitted that on 4.05.2015 the claimant was orally dismissed by the 2nd Respondent as pleaded in paragraph 7 of the memorandum of claim. The Claimant filed the suit on 08.05.2015 and long before the alleged compulsory leave pending investigations. It was further submitted that the suit was about the manner in which the Respondents had proceeded to dismiss the claimant unlawfully, illegally, unconstitutionally and against the law as pleaded more specifically in paragraph 8 of the memorandum of claim and as the claimant had prayed for a declaration that her fundamental rights and freedoms under the Constitution had been contravened. It was further submitted that section 77(1) used the word "may" suggesting that the Claimant had an option to appeal to the Commission or take such other legitimate action such as filing the present suit. It was submitted that the Claimant was questioning the illegal decision by the Governor which could only be handled and resolved by the Court and not the Commission.

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The Court has considered the submissions made for the parties.

article 234(2)(i) of the Constitution provides that the Public Service Commission is vested with the function and power to hear and determine appeals in respect of County Governments' public service. Article 262 defines "public service" to mean the collectivity of all individuals, other than state officers, performing a function within a state organ. Accordingly, and firstly, the court holds that the power of the Commission to hear and determine appeals in respect of county governments' public service constitutionally applies only to public officers, and not state officers, in the service of the County Governments or any other state organ. Secondly, the court holds that section 77 of the County Governments Act, 2012 amplifies and brings into operation article 234(2)(i) of the Constitution.

In considering the constitutional and statutory provisions that empower the Commission to hear and determine appeals in respect of County Governments' public service, the subject matter is set out in section 77 of the Act but the decisions the Commission may make are not set out in the Act or the Constitution. It is this Court's opinion and holding that in appeals to the Commission, the Commission can only make decisions that the County Public Service Board or relevant lawful authority could have made or vary such decision by simply setting it aside or making a decision that was in the Board's or the other relevant lawful authority's jurisdiction to make. The Court has guided itself that on appeal the Appellate authority applies the same substantive law and facts as applied by the primary authority that made the decision appealed against and generally considers facts as they were presented before the primary authority so that an appellate authority, in absence of anything else, may only set aside the decision appealed against or substitute the decision with any of the remedies that the primary authority was empowered to make. In other words, the Appeal process deals with the merits or substance of the case and not procedural or legal propriety of the case.

In disciplinary matters, section 76 of the County Governments Act, 2012 is elaborate that punishment contrary to the Constitution cannot be imposed against a public officer. In particular the section provides that the rules of natural justice must be observed, and the punishment cannot be contrary to provisions of the Constitution and Acts of Parliament. It is clear that the legitimacy of the procedure or punishment imposed as measured against the provisions of section 76 of the Act would be an issue of law and therefore not appealable to the Commission but subject to the jurisdiction of the Court. This Court's

opinion is that it is not for the County Public Service Board or the person exercising disciplinary control in the county government, as the case may be, to determine a dispute as to its or person's compliance with section 76 of the Act, and similarly, the Commission would not have jurisdiction to decide such issue on appeal, which essentially would not be conceivable as a matter of a primary decision and therefore subject to the Commission's appellate jurisdiction under section 77 of the Act. This court's holding is that while making its primary decisions or decisions on appeals, the Commission like any other state organ or person under article 10 of the Constitution must care and ask itself whether the decision is lawful or legitimate in view of relevant constitutional and statutory provisions but the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions rests with the court as vested with the appropriate jurisdiction under article 162(2)(a) as read with article 165(5) and (6) of the Constitution; article 22(1), and section 12 of the Employment and Labour Relations Act, 2011.

In the present case the Claimant has alleged that the oral dismissal was illegal, unlawful and unconstitutional. It is the holding of the court that the jurisdiction to entertain that allegation and to make a primary conclusive finding thereon is vested in the Court and the Commission does not enjoy constitutional or statutory jurisdiction to determine that issue and to make appropriate remedy as is prayed for by the Claimant in this case. The Court considers that the line is thin but clearly sets apart the matters that can go to the Commission as of necessity in the first instance and those that may be urged before the Court as of first instance without having to go through the Commission by reason of exhausting the prescribed alternative and statutory procedure and remedy. It is clear that legitimacy or lawfulness of the decisions is not one of the listed appealable subject matter under section 77 of the Act and it has not been shown that such would be a matter in the constitutional or statutory competence of the Commission to decide.

The Court says it in other words as follows. The Constitution or legislation may provide that a person or public body or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions or powers as vested in the person or authority or public body by the Constitution or legislation. The Constitution or legislation may also vest in a person or authority or public body the power or function to consider or entertain given

disputes or matters as of first instance or on appeal and to render
decisions in that regard in accordance with the prescribed procedures.
In the opinion of this Court, such constitutional and legislative
provisions shall not be construed as precluding a Court from exercising
the relevant jurisdiction in relation to any question whether that person
or authority or public body has exercised the powers or functions in
accordance with the Constitution or any other law. The Court holds
that such provisions do not oust or extinguish or adjourn the court's
jurisdiction to hear and determine a dispute about the legality or the
manner of the exercise of the constitutional or statutory powers and
functions by the relevant person, public body or authority as may
have been vested in the person, public body or authority under the
Constitution or statute.

The Court is alert that under article 159(2)(b) justice shall not be
delayed and under article 159(2)(e) the Court is guided that in exercise
of judicial authority, the purpose and principles of the Constitution
shall be protected and promoted. Under article 159(1) judicial
authority is vested in the judiciary and it is the opinion of the Court
that issues of legality of actions or omissions is the immediate and
proper primary or original province and jurisdiction of the Court and
is not the penultimate or initially ceded jurisdiction of persons, public
bodies and authorities outside the judiciary. In the opinion of the
Court, it would amount to delayed justice to tell the Claimant thus:

“The Court knows your alleged case is that an illegality has
taken place; you challenge the alleged illegality; on merits
of the challenged decision you ought to appeal to the
Commission; the Commission has no jurisdiction to consider
issues of illegality as you have alleged in your case but it might
consider it and may rule in your favour; and therefore, though
this Court has the primary jurisdiction to consider the issue
of illegality as you have alleged, you ought to have gone to the
Commission in the first instance just to see if the Commission
might have considered the issue of illegality before you moved
this Court and your case is dismissed accordingly for failure
to give the Commission chance to exercise the speculative
and hopeful jurisdiction on that issue of alleged illegality.”

While making that finding the Court considers that in any event there
are no established time lines for appealing and making of the decision
by the Commission and the likely consequence is that the Claimant
may be subjected to irreparable harm such as rendering the cause of

action to challenge the alleged illegality time barred. 1

In the instant case, looking at the alleged claims of illegality, unconstitutionality, breach of constitutional rights and the remedies as prayed for, it is difficult to find that the cited alternative procedure and remedy under section 77 of the Act was available to the claimant. Even if it is said that it was a case of mixed jurisdiction of the Commission and the Court, it is the court's opinion that the legitimate path was to invoke the Court's jurisdiction to hear and determine the intertwined issues, that being the most efficient and effective manner of disposing the dispute. 5 10

In the circumstances of this case, the Court returns that the provisions of section 77 of the County Government Act, 2012 did not oust or restrict the jurisdiction of the Court for want of exhaustion of the procedure and remedies envisaged under the section. 15

The 2nd issue as stated in the respondents' submissions is whether the Employment and Labour Relations Court has jurisdiction to entertain and determine claims of breach of fundamental rights under articles 22 and 23 or enforcement of the Constitution under article 258 of the Constitution as pertains to employment and labour relations matters. 20

The Court of Appeal has resolved the issue in the case of *Prof Daniel N Mugendi v Kenyatta University and 3 others*, Civil Appeal No 6 of 2012. The Court stated thus, 25

“The question now is whether the appellant should go back and ‘sever’ the composite petition alleging violation of his fundamental rights and breach of contract of employment. Much as severance would entail time and resources to effect the necessary amendments and make due motions, we are of the view that with necessary amendments, which appear imperative to make out a clear use of breach of rights being effected, the Appellant can and should be heard by the Industrial Court on the two claims ie violation of rights and breach of contract of employment. The position that the Industrial Court can and should entertain the claim as laid by the appellant, is in line with the decision of Majanja, J in Petition No 170 of 2012 – *United States International University (USIU) v The Attorney General & others*.” 30 35 40

That this Court enjoys the jurisdiction to hear and determine employment and labour relations matters alongside claims of

fundamental rights (and enforcement of constitutional and statutory provisions) ancillary and incidental to those matters was upheld in the ruling delivered by this Court on 30.04.2014 in *Geoffrey Makana Asanyo v Nakuru Water and Sanitation Services Company & 6 others* [2014] eKLR. The Court of Appeal held as much in *Judicial Service Commission v Gladys Boss Shollei & another* [2014] eKLR.

The Court followed the opinion in those cases in the Ruling delivered on 15.05.2015 in *Geoffrey Mworio v Water Resources Management Authority and 2 others* [2015]eKLR.

Again, in *Karisa Chengo and 2 others v Republic* [2015]eKLR the Court of Appeal has stated thus,

“...By being of equal status, the High Court therefore does not have the jurisdiction to superintend, supervise, direct, guide, shepherd, and or review the mistakes, real or perceived, of the ELRC and ELC administratively or judiciously as was the case in the past. The converse equally applies. At the end of the day however, ELRC and ELC are not the High Court and vice versa. However, it needs to be emphasized that status is not the same thing as jurisdiction. The Constitution though does not define ‘status’. The intentions of the framers of the Constitution in that regard are obvious given the choice of the words they used; that the three Courts (High Court, ELRC and ELC) are of the same juridical hierarchy and therefore are of equal footing and standing. To us it simply means that the ELRC and ELC exercise the same powers as the High Court in performance of its judicial function, in its specialised jurisdiction but they are not the High Court.”

As stated by the Court earlier in this judgment, the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between employers and employees rests with this Court as vested with the appropriate jurisdiction under articles 159(1), 162(2)(a) as read with article 165(5) and (6) of the Constitution; articles 22(1) and 258(1) of the Constitution, and the provisions of the Employment and Labour Relations Act, 2011. The Court holds that the jurisdiction spreads to all issues in the employment relationship and related matters including the enforcement of the fundamental rights and freedoms under article 22 of the Constitution and enforcement of the Constitution under article 258 as far as the issues in dispute are, evolve, revolve or relate to employment and labour relations. The Court

holds that the compass or golden test for the Court’s jurisdiction is the subject matter in the dispute namely disputes relating to employment and labour relations as provided for article 162(a) of the Constitution and as amplified in the Employment and Labour Relations Act, 2011 and not the remedies sought or the procedure of moving the Court or the situ of the applicable law or any other extraneous considerations as may be advanced by or for a litigant.

In conclusion, the Respondent’s preliminary objection filed on 3.06.2015 is dismissed with costs and the parties are now invited to take directions on the hearing of the main suit.

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Republic v Clerk County Assembly of Baringo
ex parte William Kassait Kamket
[2015] KLR- E & LRC 5

Employment and Labour Relations
Court at Nakuru
S Radido, J

July 31, 2015

Judicial Review Application No 1 of 2015 10

Brief facts

On March 20, 2015, the Court granted William Kassait Kamket (*ex parte* Applicant) leave to apply for judicial review orders of prohibition and *certiorari* against the Clerk, County Assembly of Baringo (Respondent). The leave granted was to operate as a limited stay to enable the payment of such salaries/benefits payable to a Speaker on suspension and also stopped the advertising and processing of applications to fill the position of the Speaker of the County Assembly of Baringo. 15 20

The Ruling/Orders sought to be reviewed or interpreted related to a cause of action accruing on March 18, 2015 (removal from office of *ex parte* Applicant) while the judgment by the High Court in Eldoret was in respect of a cause of action accruing on November 4, 2014 (suspension from office of *ex parte* applicant). 25

The *ex parte* Applicant was elected as the first Speaker of the County Assembly of Baringo after the 2013 General Elections. On November 4, 2014, the County Assembly resolved to suspend him from office on the basis of a pending criminal case against the *ex parte* Applicant in Eldoret Criminal Case No 7031 of 2014. The reasons as outlined in the motion for suspension were that the *ex parte* Applicant had violated the Constitution, made inflammatory utterances on April 28, 2014 and April 30, 2014, displayed lack of professionalism, failed to spearhead peace building, failed to observe impartiality and objectivity in discharging his duties, abused office by sacking and disciplining employees without due process, violated procurement laws, misused public resources and failed to accord members of the County Assembly respect and dignity. The *ex parte* Applicant however moved the High Court in Eldoret to challenge the suspension and the High Court subsequently found in his favour on May 26, 2015. On February 10, 2015, the County Assembly commenced a fresh initiative to remove 30 35 40

the *ex parte* Applicant from office of Speaker. 1

According to the *ex parte* Applicant, the process followed by the Assembly in purporting to remove him commenced through a public petition was illegal in that it was contrary to section 11 of the County Governments Act. He also impugned the resolution to remove him from office on the ground that he was not given an opportunity to be heard by the Assembly and that the whole process was a charade organised by his political opponents. 5

The *ex parte* Applicant further argued that County Assemblies were covered by the definition of employer in section 2 of the Employment Act, 2007 and that the County Assembly had acknowledged previously during the suspension motion and before the High Court in Eldoret that he was an employee of the Assembly and that pursuant to article 162(2) of the Constitution, the Court had the power to deal with all employment and labour related matters. 10 15

According to the Respondent, the *ex parte* Applicant was elected by the County Assembly making him an employee of the County Assembly (article 178 of the Constitution) and therefore as between him and the *ex parte* Applicant, there was no employer/employee relationship to warrant his being sued and further argued that because the *ex parte* Applicant was removed by the County Assembly, that was the proper party to sue. The Respondent further asserted that because the *ex parte* Applicant had an alternative remedy of damages were the Court to find his removal was unfair, damages would be the appropriate remedy and not orders of judicial review and that he was not likely to suffer irreparable damage. The Respondent further stated that the position of Speaker of County Assembly of Baringo had already been declared vacant after the adoption of the recommendation of the *Ad Hoc* Committee. 20 25 30

Issues

- i. Whether a Speaker of Parliament or County Assembly was an employee for the purposes of the Employment Act, 2007 35
- ii. Whether a Clerk of the County Assembly could be sued as a representative of the County Government in a suit where the Speaker was the Plaintiff
- iii. Whether the removal of a Speaker was a political process in which the Courts could not intervene 40
- iv. Whether the Court had jurisdiction in instances where persons holding offices created by the Constitution and various statutes had

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- complaints relating to the manner of suspension or removal from office unless otherwise provided for in law, such as in the case of persons directly elected under universal suffrage 1
- v. Whether removal of Speaker through a public petition was illegal and not recognized in law 5
- vi. Whether a motion to remove from office a Speaker could be moved before the lapse of 6 months if a similar motion had been debated and resolved during the preceding 6 months

Constitutional Law – separation of powers – jurisdiction of the Court to removal of Speaker of a County Assembly – whether the removal of a speaker was a political process in which the Courts could not intervene – Constitution of Kenya, 2010, article 162; County Assembly of Baringo Standing Order 61. 10

County Government – County Assembly – removal of a speaker – process of removal – removal by public petition – whether removal of a speaker through a public petition was illegal and not recognized in law – whether a motion to remove from office a speaker could be moved before the lapse of 6 months if a similar motion had been debated and resolved during the preceding 6 months – Civil Procedure Rules 2010, order 53 rule 3; County Governments Act 2012 sections 11(4) & 15; County Assembly of Baringo Standing Orders 47, 61 & 191. 15

Civil Practice and Procedure – parties to a suit – dispute on the removal of a County Assembly speaker – whether clerk of the assembly could be sued as a representative of the County Government in a suit where the speaker was the plaintiff – County Governments Act, 2012, section 13; County Assembly of Baringo Standing Orders 45, 61 & 197. 20

Jurisdiction – Employment and Labour Relations Court – extent of the jurisdiction – jurisdiction under the Employment Act vis – a – vis the ELRC Act – whether the ELRC could entertain a labour relations dispute where there was no contract of service between the employer and the employee – whether a Speaker of Parliament or County Assembly was an employee for the purposes of the Employment Act, 2007 – Constitution of Kenya 2010, articles 128 & 162; Employment and Labour Relations Court Act section 12. 25

Constitution of Kenya, 2010
Article 128

- (1) There shall be a Clerk for each House of Parliament, appointed by the Parliamentary Service Commission with the approval of the relevant House. 40
- (2) The offices of the Clerks and offices of members of the staff

of the Clerks shall be offices in the Parliamentary Service. 1

Article 162

- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the Courts referred to in clause (2). 5
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - (a) employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land. 10
- (3) Parliament shall determine the jurisdiction and functions of the Courts contemplated in clause (2).
- (4) The subordinate courts are the Courts established under article 169, or by Parliament in accordance with that article. 15

County Assembly of Baringo Standing Orders

Standing Order 45

- (1) Except as otherwise provided by these Standing Orders, notice shall be given by a Member of any Motion which the Member or Committee proposes to move. 20
- (2) Before giving notice of Motion, the Member shall deliver to the Clerk a copy of the proposed Motion in writing and signed by the Member; and the Clerk shall submit the proposed Motion to the Speaker. 25
- (3) If the Speaker is of the opinion that any proposed Motion—
 - (a) is one which infringes, or the debate on which is likely to infringe, any of these Standing Orders;
 - (b) is contrary to the Constitution or an Act of Parliament or of the County Assembly, without expressly proposing appropriate amendment to the Constitution or the Act of Parliament or County Assembly; 30
 - (c) is too long; 35
 - (d) is framed in terms which are inconsistent with the dignity of the House;
 - (e) contains or implies allegations which the Speaker is not satisfied that the Mover can substantiate; or
 - (f) calls for the commitment of public funds for which no provision is made in the current Annual Estimates as adopted by the County Assembly, the Speaker may 40

direct either that, the Motion is inadmissible, or that notice of it cannot be given without such alteration as the Speaker may approve or that the Motion be referred to the relevant Committee of the House, pursuant to article 114(2) of the Constitution.	1
(4) A Member giving notice of a Motion approved by the Speaker shall state its terms to the House and whether the original copy received by the Clerk has been certified by a Party Leader or Party Whip for sponsorship by the Member's party.	5
(5) Unless the House resolves otherwise –	
(a) a Motion sponsored by a party shall have precedence over all other Motions on such day as the House Business Committee, in consultation with the Speaker, may determine, but where a party has sponsored two or more Motions, the Motion shall be considered in such order as sponsoring party may determine; and	10
(b) notice of an approved Motion other than those under paragraph (a) may be given to Members by means of a list to be published in such manner as the Speaker may from time to time direct and the Member giving such notice shall state its terms to the House when the Motion has acquired precedence in accordance with Standing Order 48 (Time for moving Motions), but at least one day before the Motion appears on the Order Paper.	15
Standing Order 47.	
(1) No Motion may be moved which is the same in substance as any question which has been resolved (either in the affirmative or in the negative) during the preceding six months in the same Session.	20
(2) Despite paragraph (1) –	25
(a) a Motion to rescind the decision on such a question may be moved with the permission of the Speaker; but	30
(b) a Motion to rescind the decision on a question on a Special Motion shall not be allowed.	35

Standing Order 61	1
(1) The Speaker may be removed from office by the House through a resolution supported by not less than seventy five percent of all the Members of the County Assembly.	
(2) A notice of the intention to move a Motion for a resolution to remove the Speaker shall be given in writing to the Clerk of the County Assembly signed by at least one third of all the Members of the County Assembly stating the grounds for removal.	5
(3) A Motion for a resolution to remove the Speaker shall be presided over by a Member of the County Assembly elected to act as Speaker as contemplated under Article 178(2)(b) of the Constitution.	10
(4) Before the debate and voting on a Motion under paragraph (3), the Speaker shall be accorded an opportunity to respond to the allegations on the Floor of the House.	15
Standing Order 191	
(1) There shall be a select Committee to be known as the Committee on Implementation comprising a Chairperson and not less than four and not more than six other Members.	20
(2) The Committee shall scrutinize the resolutions of the House (including adopted Committee reports), Petitions and the undertakings given by the County Executive Committee and examine-	25
(a) whether or not such decisions and undertakings have been implemented and where implemented, the extent to which they have been implemented, and whether such implementation has taken place within the minimum time necessary; and	30
(b) whether or not legislation passed by the County Assembly has been operationalized and where operationalized, the extent to which such operationalization has taken place within the minimum time necessary.	35
(3) The Committee may propose to the House sanctions against any member of the County Executive Committee who fails to report to the relevant select Committee on implementation status without justifiable reasons.	40

Standing Order 197	1
(1) A Petition to the County Assembly shall be-	
(a) submitted to the Clerk by the petitioner and reported to the County Assembly by the Speaker; or	
(b) presented by a Member on behalf of a Petitioner, with the consent of the Speaker.	5
(2) Notwithstanding paragraph (1)(b), a Member shall not be eligible to present a Petition on his or her own behalf.	
(3) The Clerk shall, within seven days of the date of receipt of a Petition, review the Petition to ascertain whether the Petition meets the requirements of these Standing Orders and of the law.	10
(4) Where the Clerk considers that a Petition does not comply with paragraph (3), the Clerk may give such directions as are necessary to ensure that the Petition is amended to comply with that paragraph.	15
(5) The Clerk shall, if satisfied that the Petition meets the requirements under paragraph (3), forward the Petition to the Speaker for laying in the House.	20

Employment and Labour Relations Court Act

Section 12

(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —	25
(a) disputes relating to or arising out of employment between an employer and an employee; (emphasis mine)	30
(b) disputes between an employer and a trade union;	
(c) disputes between an employers' organisation and a trade unions organisation;	35
(d) disputes between trade unions;	
(e) disputes between employer organizations;	
(f) disputes between an employers' organisation and a trade union;	
(g) disputes between a trade union and a member thereof;	40
(h) disputes between an employer's organisation or a federation and a member thereof;	

(i) disputes concerning the registration and election of trade union officials; and	1
(j) disputes relating to the registration and enforcement of collective agreements.	
County Governments Act 2012	5
Section 11(4)	
4) Before the debate and voting on a motion under subsection (3), the speaker shall be accorded an opportunity to respond to the allegations on the floor of the county assembly.	10
Section 13	
(1) There shall be a clerk of the county assembly, appointed by the county assembly service board with the approval of the county assembly.	15
(2) A person shall not be qualified for appointment as a clerk of the county assembly unless such person—	
(a) is a citizen of Kenya;	
(b) holds a degree from a university recognised in Kenya or its equivalent;	20
(c) has had at least five years relevant professional experience;	
(d) meets the requirements of leadership and integrity set out in Chapter Six of the Constitution.	25
(3) The functions and powers of a Clerk of Parliament shall with necessary modifications be the functions and powers of the clerk of a county assembly.	
(4) For the purposes of this Act, the clerk of a county assembly is an authorized officer.	30
(5) The office of the clerk of the county assembly and the offices of members of the staff of the clerk of the county assembly shall be offices in the county assembly service board.	
(6) The remuneration of the clerk and staff of the county assembly shall be determined by the county assembly service board upon the advice of the Salaries and Remuneration Commission.	35
Section 15	40
(1) A person has a right to petition a county assembly to consider any matter within its authority, including	

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- enacting, amending or repealing any of its legislation.
- (2) Each county assembly shall prescribe a procedure for
exercising the right under subsection (1).

Civil Procedure Rules 2010 5
Order 53

- (3) An affidavit giving the names and addresses of, and the
place and date of service on, all persons who have been
served with the notice of motion shall be filed before the
notice is set down for hearing, and, if any person who 10
ought to be served under the provisions of this rule has not
been served, the affidavit shall state that fact and the reason
why service has not been effected, and the affidavit shall
be before the High Court on the hearing of the motion. 15

Held:

1. Under the Civil Procedure Act/Rules framework and more
specifically under Order 1 rule 9, a suit would not be defeated
merely on the ground of non-joinder or misjoinder of a party. In
fact, if a party was not sure of the correct and proper person to sue, 20
he could join one or more persons as defendants. The Rules gave
the Court wide latitude as to addition and substitution of parties.
The Industrial Court Procedure Rules 2010 also had near similar
provisions.
2. The instant proceeding was not a proceeding under the Civil 25
Procedure or Industrial Court Rules framework. The Court was
dealing with a judicial review application which was proceedings
sui generis. The proceedings were commenced in the name of the
Republic.
3. Judicial review proceedings had traditionally been anchored 30
primarily on the Law Reform Act and order 53 of the Civil
Procedure Rules and under order 53 rule 3, the Court had the
power to direct that the notice of motion be served upon all persons
directly affected. No such direction was sought nor did the Court 35
at its own instance give such directions and the question whether
the application should fail in that respect was material.
4. The Clerk was an appointee of the County Assembly Service Board
(section 13 of the County Governments Act, 2012) but approved
by the County Assembly. The Clerk was given the same functions 40
and powers as the Clerk of Parliament and he was also an authorized
officer for the purposes of the County Governments Act.
5. The offices of Clerk of Parliament were given constitutional

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- underpinning in article 128 of the Constitution but the functions and powers were not expressly outlined in the Constitution. Among the functions of the Clerk who was the respondent as gleaned from the Standing Orders of the County Assembly of Baringo was the receipt of motions (standing orders 45 and 61) and public petitions and reviewing of the petitions to ascertain such petitions meet the requirements of the Standing Orders (standing order 197). 1 5
6. The motions and petitions in the instant case may have included questions of removal of a Speaker and therefore, the Clerk would be an appropriate and proper party to any judicial review application challenging the removal of a Speaker; the reason being that under Standing Order 197(3), the Respondent had a duty to review the Petition to ensure that it met the specified requirements. The requirements or considerations would have included Standing Order 47. 10 15
7. The Clerk and the Speaker represented the collective of the County Assembly. Where the Speaker himself was the complainant, the Clerk could be cited to defend and represent the collective known as the County Assembly. The Respondent ably dealt with the issues raised despite the fact that the County Assembly was not cited. 20
8. A defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties were irregularities that did not go to the substance of the appeal and were curable by amendment. The legal principle running through failure to join a party under both the civil procedure regime and judicial review framework was that the failure was an irregularity which was not fatal and could be cured. 25
9. A correct and proper party was cited and the failure to cite the County Assembly was an irregularity which was not fatal considering the role given to the Respondent by the Standing Orders. 30
10. The question of employment relationship in the case of Speakers of County Assemblies were intractably linked with the question of the extent of the jurisdiction of the Employment and Labour Relations Court. It was both a Constitutional issue as well as one of statutory application. Article 162 of the Constitution envisaged Parliament establishing a Court to hear and determine disputes relating to employment and labour relations. Parliament performed the task it was ordained to do by enacting the Employment and Labour Relations Court Act (initially the Industrial Court Act) and the jurisdiction of the Court was set out in section 12. 35 40
11. Article 162 of the Constitution and section 12(1)(a) of the Employment and Labour Relations Court Act stated that the

jurisdiction of the Court encompassed and included all disputes relating or arising out of employment. The doubt and debate arose because of the definition of employer in section 2 of the Employment Act, 2007 and more so the use of the term contract of service. Employer was defined as any person, public body, firm, corporation or company who or which had entered into a contract of service to employ any individual and included the agent, foreman, manager or factor of such person, public body, firm, corporation or company. Contract of service was also defined in the Act.

12. There were many categories of employees who did not have what was classically called a contract of service (contract of service was a term which had gone out of fashion in modern employment law and the term contract of employment was used more). The abundance of such persons could be found in offices created by the Constitution and various statutes and included holders of independent offices, members of constitutional commissions, judges, judicial officers, Speakers of Parliament and the County Assemblies. These officers did not have contract of services as ordinarily known or as envisaged under the Employment Act, 2007.

13. A Speaker of Parliament or County Assembly was not an employee for the purposes of the Employment Act, 2007 and the Court's jurisdiction could only be determined by looking outside the said Act.

14. Article 162 of the Constitution did not envisage a Court limited or restricted to dealing with disputes arising out of a contract of service as defined in the Employment Act, 2007 which in any case predated the Constitution.

15. The primary statute granting the Court universal jurisdiction was the Employment and Labour Relations Court Act (previously the Industrial Court Act). Under section 12 of the Act in granting the Court its jurisdiction, Parliament faithfully observed the command of the Constitution by using the phrase disputes relating to employment and labour relations. The jurisdiction granted included disputes relating to or arising out of employment between an employer and an employee and not only in respect of contract of service as a reading of the Employment Act, 2007 suggested.

16. The use of the term 'including' in section 12 was significant as it helped to construe the jurisdiction of the Court in a way which promoted the purposes, values and principles of the Constitution in establishing a specialist Court to deal with employment and labour relations disputes.

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17. The jurisdiction of the Court over the proceedings before the Court flows from application of article 162 of the Constitution and section 12(1)(a) of the Employment and Labour Relations Court Act rather than from an interpretation of the provisions of the Employment Act, 2007. 1
18. The definition of employer, employee and contract of service in the Employment Act, 2007 was not meant to limit or restrict the jurisdiction granted to the Court by section 12 of the Employment and Labour Relations Court Act. Such approach involving limitation or restriction was the source of the uncertainty currently being experienced. 5
19. For purposes of the Constitution and the Employment and Labour Relations Court Act, office holders were employees who had access to the Employment and Labour Relations Court and where a Speaker alleged improprieties in the removal process, that was a dispute relating to and arising out of employment. It mattered not that they were employees or servants of the people or the respective Commissions or County Assemblies. The Court therefore had jurisdiction to deal with disputes relating to removal of a Speaker of a County Assembly. 15
20. The Constitution and many other statutes had created certain offices. Appointment and removal from such offices had been provided for. Where the appointing authority/body did not comply with the applicable procedures as far as removal or discipline was concerned, the disadvantaged party had recourse to the Courts not only under private law (contract) but under public law and judicial review may in certain instances be appropriate and effective. 20
21. A county assembly was an organ of state and a public body and where allegations of procedural impropriety were made, the judicial arm had the requisite mandate to intervene. 25
22. The County Governments Act and various Standing Orders of County Assemblies had explicit procedures to be followed in the event the Assembly intended to remove the Speaker. The Assembly could not argue that removal of a Speaker was a political process in which the Courts could not intervene when they did not follow the requisite constitutional or statutory processes. There was no political thicket which the Constitution may not reach in such a case. 30
23. The County Governments Act (section 15) and the Standing Orders of the County Assembly of Baringo envisaged and allowed receipt of public petitions. That was *in tandem* with the constitutional injunction that public participation in governance 35
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- was now firmly part of national values and principles of governance. 1
24. In so far as the citizens of Arabal filed a Petition seeking the 1
removal of the *ex parte* Applicant, they were perfectly within the
constitutional and legal framework. The County Assembly was also
within its lawful mandate to entertain the Petition. 5
25. The public petition was merely one way for the citizens of Arabal
to initiate a process in governance within their community, but once
the Petition was received, the County Assembly had to scrupulously
comply with the statutory requirements. 10
26. As part of its inquiries into the Petition the *Ad Hoc* Committee
was acting with prudence to invite the *ex parte* Applicant to appear
before it. In so far as the Petition sought the removal of the *ex parte*
Applicant, it was, to use common parlance, an added advantage to
him to be invited and present himself before the *Ad Hoc* Committee. 15
That was what natural justice required. Once the *Ad Hoc* Committee
had made recommendations to the Plenary, appropriate and
applicable protections afforded the *ex parte* Applicant kicked in.
27. The removal processes to be followed after the recommendation
of the *Ad Hoc* Committee had to scrupulously comply with the 20
law, because what the Committee was involved in, was strictly
preliminary to the statutory process of removal of the *ex parte*
Applicant.
28. Pursuant to section 11(4) of the County Governments Act and
Standing Order 61(4), the *ex parte* Applicant was entitled to be 25
granted an opportunity to respond to allegations against him on
the floor of the Assembly. There was nothing placed before Court
to suggest even remotely that the *ex parte* Applicant was invited
to appear before the plenary of the Assembly to defend himself or
make representations. 30
29. The invitation to appear before the *Ad Hoc* Committee could not
substitute the legal requirement for the *ex parte* Applicant to be
given an opportunity to make representations before the plenary
of the Assembly. 35
30. The process taken by the Assembly was therefore tainted with
procedural impropriety in that the *ex parte* Applicant was not
accorded an opportunity to make representations before the plenary.
31. Natural justice or procedural fairness had become such a cardinal
principle in governance that however grievous the allegations one 40
was facing, he was entitled to an opportunity to be heard and the
body taking the decision must ensure that it observed the processes
necessary to safeguard and protect the rights of the party likely

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- to suffer the detriment. The requirement was so cardinal that if the nine horned monster were to be subjected to such action, he would be entitled to have his day and say. That was a requirement of constitutional democracy. 1
32. The motion for removal of the speaker was debated on February 11, 2015 and was defeated by a single vote. A fresh attempt was made just a month later. The grounds and reasons as outlined in the motion which failed by 1 vote on February 11, 2015 and the Petition which came on March 3, 2015 (and subsequent motion) indicated grounds/reasons that were essentially the same. 5 10
33. The County Assembly was barred from debating the question of the removal of the *ex parte* Applicant on basically the same substantial grounds which had been rejected the previous month. The County Assembly could not commence the process before expiry of 6 months and in so acting it was acting in violation of its internal procedures. 15

Orders for certiorari and prohibition granted. Each party to bear its costs.

Cases

East Africa

1. *Birir, Richard Bwogo v Narok County Government & 2 others* Petition No 1 of 2014 – (Explained) 20
2. *Kingoina, Peter M v County Assembly of Nyamira* Constitutional Petition No 8 of 2014 – (Explained) 25
3. *Ndichu, Nick Githinji v Clerk, Kiambu County Assembly & another* Petition No 11 of 2014 – (Followed)
4. *Republic v Minister for Finance & another ex parte Charles Lutta Kasamani t/a Kasamani & Co Advocates & another* Civil Appeal (Application) No 281 of 2005 – (Explained) 30
5. *Republic v National Social Security Fund Board of Trustees & another ex parte Town Council of Kikuyu* Judicial Review No 81 of 2013 – (Explained)

Statutes

East Africa

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 1 rule 9; order 53 rule 3 – (Interpreted) 35
2. Constitution of Kenya, 2010 article 50, 128, 162(2); – (Interpreted)
3. County Governments Act, 2012 (Act No 17 of 2012) sections 11(4); 13; 15; 59 – (Interpreted) 40
4. Employment Act, 2007 (Act No 11 of 2007) section 2 – (Interpreted)
5. Employment and Labour Relations Court Act, 2011 (Act No 20

of 2011) section 12(1)(a) – (Interpreted)	1
6. Law Reform Act (cap 26) In general – (Interpreted)	
Advocates	
1. <i>Mr Kipkoech</i> for the Applicant	
2. <i>Mr Yego & Mrs Manyarikiy</i> for the Respondent	5
July 31, 2015, S Radido, J delivered the following Judgment	
1. On 20 March 2015, the Court granted William Kassait Kamket (<i>ex parte</i> Applicant) leave to apply for Judicial Review orders of Prohibition and <i>Certiorari</i> against the Clerk, County Assembly of Baringo (Respondent). The leave granted was to operate as a limited stay to enable the payment of such salaries/benefits payable to a speaker on suspension. The stay also stopped the advertising and processing of applications to fill the position of the Speaker of the County Assembly of Baringo.	10 15
2. The <i>ex parte</i> Applicant thereafter filed judicial review proceedings on 23 March 2015, and the Respondent filed a replying affidavit on 27 March 2015.	20
3. On 23 April 2015, the <i>ex parte</i> Applicant filed a supplementary affidavit pursuant to leave granted on 14 April 2015.	25
4. At the same time, the Court directed the parties to file and exchange written submissions. Towards this end, the <i>ex parte</i> Applicant filed his submissions and authorities on 23 April 2015, while the Respondent filed his submissions and authorities on 5 May 2015.	30
5. The parties highlighted their respective cases/submissions on 6 May 2015 and the Court directed the Application to be mentioned on 17 July 2015 to confirm whether judgment was ready.	35
6. On 8 May 2015, the <i>ex parte</i> Applicant filed a supplementary list of authorities and on 29 May 2015, he filed a motion under certificate of urgency seeking a review/interpretation of the orders given on 20 March 2015 (granting leave to commence the judicial review application).	40
7. The Respondent filed a replying affidavit to the latter motion and it was taken on 10 June 2015. The Court reserved its ruling on the application to be delivered together with this judgment.	
8. According to the <i>ex parte</i> Applicant, the Application for review/interpretation was based on discovery of new and important matter of evidence which he did not have before the orders of 20 March	

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- 2015 were made. 1
9. The new and important matter of evidence was the judgment delivered on 26 May 2015 by the High Court in Eldoret Judicial Review Application No 8'B' of 2014, *Republic v Clerk, County Assembly of Baringo ex parte William Kamket*. 5
10. The High Court in Eldoret had in the judgment granted orders prohibiting the Respondent from implementing a motion passed on 4 November 2014 suspending the *ex parte* Applicant from office of Speaker of the County Assembly of Baringo. 10
11. In my view, it is not necessary to go into any detailed discussion of the merits of the review/interpretation application except to say that the judgment delivered by the High Court in Eldoret cannot qualify to be a new and important matter of evidence for purposes of reviewing the Ruling/Orders granting leave to commence the judicial review proceedings. 15
12. The Ruling/Orders sought to be reviewed or interpreted related to a cause of action accruing on 18 March 2015 (removal from office of *ex parte* applicant) while the judgment by the High Court in Eldoret was in respect of a cause of action accruing on 4 November 2014 (suspension from office of *ex parte* Applicant). 20
13. Further, it is clear to me that determining the review application any other way would serve no utilitarian purpose except to obfuscate the real issues for determination in the instant judicial review proceedings. 25
14. The motion therefore stands to be dismissed with no order as to costs. 30
15. Before outlining the parties' respective contestations in the present application, a very brief background would be in order.
16. The *ex parte* Applicant was elected as the first Speaker of the County Assembly of Baringo after the 2013 General Elections. On 4 November 2014, the County Assembly resolved to suspend him from office. 35
17. The basis of the Assembly's action of suspension was a pending criminal case against the *ex parte* Applicant in Eldoret Criminal Case No 7031 of 2014. 40
18. The reasons as outlined in the motion for suspension were that the

ex parte Applicant had violated the Constitution, made inflammatory utterances on 28 April 2014 and 30 April 2014, displayed lack of professionalism, failed to spearhead peace building, failed to observe impartiality and objectivity in discharging his duties, abused office by sacking and disciplining employees without due process, violated procurement laws, misused public resources and failed to accord members of the County Assembly respect and dignity

19. The *ex parte* Applicant however moved the High Court in Eldoret to challenge the suspension (the High Court subsequently found in his favour on 26 May 2015).

20. On 10 February 2015, the County Assembly commenced a fresh initiative to remove the *ex parte* Applicant from office of Speaker.

21. According to the *ex parte* Applicant, on the night of 10 February 2015 (notice is dated 10 February 2014); the Respondent served him through email with a notice to appear before the County Assembly to respond to 4 allegations. The notice was issued pursuant to Standing Order 61.

22. The 4 allegations were gross misconduct and continuous violation of the law, abuse of office, misuse of public resources and failure to accord dignity and respect to the Assembly.

23. The next day, 11 February 2015, the County Assembly debated a motion to remove the *ex parte* Applicant from office. The motion set out in *extenso* the particulars of the allegations against the *ex parte* Applicant.

24. The removal motion, according to the *ex parte* Applicant, and newspapers was defeated by one vote, a fact not denied by the Respondent.

25. However, on 3 March 2015, a Petition signed by some 209 citizens of Arabal community and seeking the removal of the *ex parte* Applicant was addressed to the Respondent.

26. On 12 March 2015, an *Ad Hoc* Committee of the Assembly wrote to the *ex parte* applicant requesting him to appear before it on 16 March 2015 at 10.00am to respond to the Petition. The invitation letter informed the *ex parte* Applicant that a copy of the Petition was enclosed.

27. The *ex parte* Applicant contended that he received the invitation letter on 14 March 2015, but a copy of the Petition was not

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- enclosed. As a consequence, his advocate wrote to the Respondent complaining that a copy of the Petition was not enclosed, the notice period was not sufficient, a motion to remove him from office had been defeated only a month earlier, the action was *sub judice* and that a public petition was not one of the methods known in law for removal of a speaker. 1
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28. Nonetheless, the County Assembly proceeded to debate a motion and ultimately voted to remove the *ex parte* Applicant from office of Speaker on 18 March 2015. This prompted the present proceedings. 10
- Ex parte* Applicant's Case
29. According to the *ex parte* Applicant, the process followed by the Assembly in purporting to remove him commenced through a public petition was illegal in that it was contrary to section 11 of the County Governments Act. The avenue, he urged was not only illegal but unlawful. 15
30. He also impugned the resolution to remove him from office on the ground that he was not given an opportunity to be heard by the Assembly and that the whole process was a charade organised by his political opponents. 20
31. The *ex parte* Applicant further contended that because a motion to remove him from office had been debated and voted on 11 February 2015, it was against the Standing Orders to bring a fresh motion for his removal before the lapse of 6 months. 25
- Respondent's Case
32. According to the Respondent, he received a public petition seeking the removal of the *ex parte* Applicant, and that by dint of article 50 of the Constitution, section 15 of the County Governments Act and Standing Order 197(1), the Assembly had the authority to receive and debate public petitions. 30
33. After receipt of the public petition, the Assembly constituted an *Ad Hoc* Committee which invited the *ex parte* Applicant through the *Sunday Nation* and *Sunday Standard Newspapers* to appear before it on 16 March 2015 but he snubbed the invitation and instead wrote a lengthy letter through his advocate. 35
34. In his affidavit, the Respondent deposed that the *ex parte* Applicant was served with a copy of the Petition through email. 40
35. According to the Respondent the *ex parte* Applicant was granted

- sufficient opportunity but failed to attend before the *Ad Hoc* Committee and so he cannot complain of being condemned unheard. 1
36. And that it is only after he snubbed the *Ad Hoc* Committee that the Assembly debated the report of the *Ad Hoc* Committee and adopted the recommendation to remove the *ex parte* Applicant. 5
37. The Respondent also contended that there was no employment relationship between the *ex parte* Applicant and himself, and so this Court had no jurisdiction. 10
38. He also asserted that the County Assembly was not a public body whose decision could be challenged by way of judicial review and that in any case the action of the Assembly was not *ultra vires*. 15
39. He further contended that the instant application lacked merit and was an abuse of court process because of the pendency of Eldoret Judicial Review No 8 of 2014. The *ex parte* Applicant was attempting to circumvent the said application before the High Court. 20
- The Submissions 20
40. The parties broadly addressed similar issues in submissions as on the papers though couched in different language. Some issues cut across and may appear repetitive.
41. According to the Respondent, the *ex parte* Applicant was elected by the County Assembly and therefore as between him and the *ex parte* Applicant, there was no employer/employee relationship to warrant his being sued. 25
42. The Respondent took the submissions further by urging that he was an employee of the County Assembly Service Board (section 13 of the County Governments Act) while the *ex parte* Applicant was an employee of the County Assembly (Article 178 of the Constitution) and so there was no employment relationship. 30
43. He also urged that because the *ex parte* Applicant was removed by the County Assembly, that was the proper party to sue. 35
44. The Respondent asserted that because the *ex parte* Applicant had an alternative remedy of damages were the Court to find his removal was unfair, damages would be the appropriate remedy and not orders of judicial review. 40
45. It was further urged that the *ex parte* Applicant was not likely to

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- suffer irreparable harm. 1
46. And the reasons for the submissions were that the position of Speaker of County Assembly of Baringo had already been declared vacant after the adoption of the recommendation of the *Ad Hoc* committee. 5
47. The Respondent cited the case of *Peter Kingoina v County Assembly of Nyamira* (2014) eKLR for the proposition that judicial review was not available in employment relationships. This authority was not filed. 10
48. The *ex parte* Applicant on the other hand urged that County Assemblies were covered by the definition of employer in section 2 of the Employment Act, 2007 and that the County Assembly had acknowledged previously during the suspension motion and before the High Court in Eldoret that the he was an employee of the Assembly. 15
49. Further, the *ex parte* Applicant submitted that pursuant to article 162(2) of the Constitution, this Court had the power to deal with all employment and labour related matters. 20
50. To support the position as urged, the *ex parte* Applicant cited the authorities of *Richard Bwogo Birir v Narok County Government & 2 others* (2014) eKLR and *Nick Githinji Ndichu v Clerk, Kiambu County Assembly & another* (2014) eKLR. 25
- Evaluation
51. The Respondent dwelt at length on certain preliminary legal issues. The Court has considered the submissions and identified the issues it needs to discuss as, whether the correct party(ies) were cited, whether the *ex parte* Applicant and in any case, Speakers of County Assemblies are employees, whether the Court's jurisdiction is ousted because of separation of powers doctrine and lastly, the hot potato question of whether the removal of the *ex parte* Applicant was lawful. 30
- Whether correct party(ies) were cited 35
52. The Respondent's case was that the *ex parte* Applicant was an employee of the County Assembly and thus that was the correct and proper party which ought to have been sued but was not cited.
53. In this regard, the Respondent urged that he was an employee of the County Assembly Service Board and there was no employment relationship as between him and the *ex parte* Applicant and therefore 40

- the Court had no jurisdiction. 1
54. Under the Civil Procedure Act/Rules framework and more specifically under order 1 rule 9, a suit would not be defeated merely on the ground of non-joinder or misjoinder of a party. In fact, if a party is not sure of the correct and proper person to sue, he may join one or more persons as defendants. 5
55. The Rules give the Court wide latitude as to addition and substitution of parties. 10
56. The rules of this Court (Industrial Court Procedure Rules 2010) also have near similar provisions. 10
57. However, the instant proceeding is not a proceeding under the civil procedure or Industrial Court Rules framework. The Court is dealing with a judicial review application which is proceedings *sui generis*. These proceedings are commenced in the name of the Republic. 15
58. Judicial review proceedings have traditionally been anchored primarily on the Law Reform Act and order 53 of the Civil Procedure Rules and under order 53 rule 3, the Court has the power to direct that the notice of motion be served upon all persons directly affected. 20
59. No such direction was sought nor did the Court at its own instance give such directions and the question whether the Application here should fail in that respect is material. 25
60. The *ex parte* Applicant had cited the Clerk of the County Assembly. The Clerk is an appointee of the County Assembly Service Board (section 13 of the County Governments Act) but approved by the County Assembly. The Clerk is given the same functions and powers as the Clerk of Parliament and he is also an authorised officer for the purposes of the County Governments Act. 30
61. The offices of Clerk of Parliament are given constitutional underpinning in article 128 of the Constitution but the functions and powers are not expressly outlined in the Constitution. 35
62. Among the functions of the Clerk (Respondent) as gleaned from the Standing Orders of the County Assembly of Baringo is the receipt of motions (standing orders 45 and 61 and public petitions and reviewing of the Petitions to ascertain such petitions meet the requirements of the Standing Orders (standing order 197). 40

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63. The motions and petitions in the instant case may include questions of removal of a Speaker and therefore in my view, the Clerk would be an appropriate and proper party to any judicial review application challenging the removal of a speaker. 1
64. This is so because under Standing Order 197(3), the Respondent had a duty to review the Petition to ensure that it met the specified requirements. The requirements or considerations would have included Standing Order 47. 5
65. And because the Clerk and the Speaker represent the collective of the County Assembly, where the Speaker himself is the Complainant, the Clerk may be cited to defend and represent the collective known as the County Assembly. 10
66. The Respondent, although raising the issue of correct party did not suggest that the County Assembly had suffered any prejudice or injustice because it was not made a party. In my view the Respondent ably dealt with the issues raised despite the fact that the County Assembly was not cited. 15
67. In *Republic v National Social Security Fund Board of Trustees & another ex parte Town Council of Kikuyu* (2014) eKLR, Odunga J cited with approval a passage by the Court of Appeal in Civil Appeal (Application) No NAI 281 of 2005, *Republic ex parte Minister for Finance & The Commissioner of Insurance v Charles Lutta Kasamani t/a Kasamani & Co Advocates & another* that suffice it to say that a defect in form in the title or heading of an appeal, **or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...** (my emphasis) Is the form or title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court. 20 25 30
68. In my view the legal principle running through failure to join a party under both the civil procedure regime and judicial review framework is that the failure is an irregularity which is not fatal and can be cured. 35
69. But all in all, it is desirable that the County Assembly as a collective be enjoined in this type of proceedings. 40
70. To enable it deal with substantial justice, the Court therefore reaches the conclusion that a correct and proper party was cited

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- and the failure to cite the County Assembly is an irregularity that is not fatal considering the role given to the Respondent by the Standing Orders. 1
- Whether *ex parte* Applicant an employee/jurisdiction of the Court 5
71. The question of employment relationship in the case of Speakers of County Assemblies are intractably linked with the question of the extent of the jurisdiction of the Employment and Labour Relations Court. It is both a Constitutional issue as well as one of statutory application. 10
72. The Respondent made much of the issue that the *ex parte* Applicant was not in an employer/employee relationship with him and therefore the Court had no jurisdiction. Article 162 of the Constitution and section 12 of the Employment and Labour Relations Court Act were referred to. 15
73. According to the *ex parte* applicant, he was an employee within the meaning of section 2 of the Employment Act, 2007. It was also urged that the County Assembly had acknowledged that he was an employee and therefore this Court had the requisite jurisdiction. 20
74. The *ex parte* Applicant cited some authorities to buttress the position he had taken.
75. One authority cited was *Nick Githinji Ndichu v Clerk, Kiambu County Assembly & another* (2014) eKLR, where Nduma Principal Judge assumed jurisdiction in a case where the Petitioner (Speaker of Kiambu County Assembly) was challenging his removal as Speaker. 25
76. The Principal Judge was of the view that the law is not concerned with the method of acquiring an employee. The law does not concern itself with whether the person was appointed or elected. Rather, the person must; 30
- i. be having an oral or written contract of service;
 - ii. be providing a service to a real or legal person;
 - iii. be receiving a wage/salary for the services rendered. 35
77. In *the Ndichu* case, the County Assembly was cited as a party.
78. In Kisumu County Assembly Service Board, *Anne Atieno Adul v Kisumu County Assembly Service Board & 4 others* (2014) eKLR, the Speaker of the County Assembly of Kisumu challenged her removal before the Employment and Labour Relations Court in Kisumu. 40
79. From the judgment, it appears that the issue of jurisdiction was

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- not raised nor discussed by the Court, but the Court assumed jurisdiction and held that the removal of the Speaker was in violation of the Constitution and law. 1
80. Article 162 of the Constitution envisaged Parliament establishing a Court to hear and determine disputes relating to employment and labour relations. 5
81. And Parliament performed the task it was ordained to do by enacting the Employment and Labour Relations Court Act (initially the Industrial Court Act) and the jurisdiction of the Court was set out in section 12. 10
82. It is in order to set out the section in *extenso*
- 12(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations **including** (emphasis mine) — 15
- (a) **disputes relating to or arising out of employment between an employer and an employee;** (emphasis mine) 20
- (b) disputes between an employer and a trade union;
- (c) disputes between an employers' organisation and a trade unions organisation; 25
- (d) disputes between trade unions;
- (e) disputes between employer organizations;
- (f) disputes between an employers' organisation and a trade union; 30
- (g) disputes between a trade union and a member thereof;
- (h) disputes between an employer's organisation or a federation and a member thereof;
- (i) disputes concerning the registration and election of trade union officials; and 35
- (j) disputes relating to the registration and enforcement of collective agreements.
83. A reading of article 162 of the Constitution and section 12(1) (a) of the Employment and Labour Relations Court Act leave no doubt in my mind that the jurisdiction of the Court encompasses and includes all disputes relating or arising out of employment. 40

84. And if the matter was left there, I believe the numerous objections regarding the Court's jurisdiction would not arise. 1
85. The doubt and debate in my view arises because of the definition of employer in section 2 of the Employment Act, 2007 and more so the use of the term contract of service. Employer is defined as means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company. 5
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86. Contract of service is also defined in the Act, but I need not outline it here.
87. Now, there are many categories of employees who do not have what is classically called a contract of service (contract of service is a term which has gone out of fashion in modern employment law and the term contract of employment is used more). 15
88. The abundance of such persons can be found in offices created by the Constitution and various statutes and include holders of independent offices, members of constitutional commissions, judges, judicial officers, Speakers of Parliament and the County Assemblies. These officers do not have contract of services as ordinarily known or as envisaged under the Employment Act, 2007. 20
89. The crucial question therefore becomes whether this Court has jurisdiction where persons holding offices created by the Constitution and various statutes have complaints relating to the manner of suspension or removal from office unless otherwise provided for in law, such as in the case of persons directly elected under universal suffrage. 25
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90. Before discussing that narrow issue, I need to restate that for myself, a Speaker of Parliament or County Assembly is not an employee for the purposes of the Employment Act, 2007 and the Courts jurisdiction can only be determined by looking outside the said Act. 35
91. Article 162 of the Constitution did not envisage a Court limited or restricted to dealing with disputes arising out of a contract of service as defined in the Employment Act, 2007 which in any case predates the Constitution. 40
92. The primary statute granting this Court universal jurisdiction is the Employment and Labour Relations Court Act (previously the

Industrial Court Act).	1
93. The most relevant provision is located in section 12 of the Act. And in granting the Court its jurisdiction, Parliament faithfully observed the command of the Constitution by using the phrase disputes relating to employment and labour relations.	5
94. The jurisdiction granted included disputes relating to or arising out of employment between an employer and an employee and not only in respect of contract of service as a reading of the Employment Act, 2007 may suggest.	10
95. And in my view, the use of the term including in section 12 is significant as it helps to construe the jurisdiction of the Court in a way which promotes the purposes, values and principles of the Constitution in establishing a specialist Court to deal with employment and labour relations disputes.	15
96. The jurisdiction of the Court over the present proceedings flow from application of article 162 of the Constitution and section 12(1)(a) of the Employment and Labour Relations Court Act rather than from an interpretation of the provisions of the Employment Act, 2007.	20
97. The definition of employer, employee and contract of service in the Employment Act, 2007, in my view, is not meant to limit or restrict the jurisdiction granted to the Court by section 12 of the Employment and Labour Relations Court Act. Such approach involving limitation or restriction is the source of the uncertainty currently being experienced.	25
98. For purposes of the Constitution and the Employment and Labour Relations Court Act, office holders are employees who have access to this Court and where a Speaker alleges improprieties in the removal process, which is a dispute relating to and arising out employment. It matters not that they are employees or servants of the people or the respective Commissions or County Assemblies.	30
99. I would therefore reach the conclusion that this Court has jurisdiction to deal with disputes relating to removal of a Speaker of a County Assembly but for reasons different to those in the <i>Ndichu</i> case.	35
Separation of Power Concerns	40
100. Kimondo J in the Eldoret case made reference to the Court being	

drawn into a political thicket.	1
101. Kenya is now a constitutional democracy. The reach of the Constitution has not yet been fully appreciated in this Country. Its reach is such that it has made inroads even into the inner sanctums of the citizens' lives.	5
102. The Constitution and many other statutes have created certain offices. Appointment and removal from such offices have been provided for.	10
103. Where the appointing authority/body does not comply with the applicable procedures as far as removal or discipline is concerned, the disadvantaged party has recourse to the Courts not only under private law (contract) but under public law and judicial review may in certain instances be appropriate and effective.	15
104. Although the Respondent suggested that the County Assembly is not a public body, that suggestion has no merit. A county assembly is an organ of state and a public body and where allegations of procedural impropriety are made, the judicial arm has the requisite mandate to intervene.	20
105. The County Governments Act and various Standing Orders of County Assemblies have explicit procedures to be followed in the event the Assembly intends to remove the Speaker.	25
106. The Assembly cannot be heard to argue that removal of a Speaker is a political process in which the Courts cannot intervene when they do not follow the requisite constitutional or statutory processes. There is no political thicket which the Constitution may not reach in such a case.	30
107. The country is now firmly a constitutional and not only a majoritarian democracy and politics must be conducted within those confines the people of Kenya have decreed for themselves in the Constitution.	35
108. The Court has jurisdiction over the process of removal of a County Speaker where procedural impropriety is alleged.	
109. I now turn to the hot potato of the moment.	
Whether process followed was Legal Public Petition	40
110. The <i>ex parte</i> Applicant urged that his removal through the route of a public petition was illegal and not recognised in law.	

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111. The County Governments Act (section 15) and the Standing Orders of the County Assembly of Baringo envisage and allow receipt of public petitions. In my view this is in tandem with the constitutional injunction that public participation in governance is now firmly part of our national values and principles of governance. 1
5
112. In so far as the citizens of Arabal filed a Petition seeking the removal of the *ex parte* Applicant, they were perfectly within the constitutional and legal framework. The County Assembly was also within its lawful mandate to entertain the petition. 10
113. The public petition was merely one way for the citizens of Arabal to initiate a process in governance within their community, but once the Petition was received, the County Assembly had to scrupulously comply with the statutory requirements. 15
114. And as part of its inquiries into the Petition, in my view, the Ad Hoc Committee was acting with prudence to invite the *ex parte* Applicant to appear before it. In so far as the Petition sought the removal of the *ex parte* Applicant, it was, to use common parlance, an added advantage to him to be invited and present himself before the Ad Hoc Committee. That is what natural justice required. 20
115. And once the *Ad Hoc* Committee had made recommendations to the Plenary, appropriate and applicable protections afforded the *ex parte* Applicant kicked in. 25
- Process within and by the County Assembly
116. On receipt of the Petition, the Respondent was under an obligation to ensure that it complied with the Standing Orders. He had 7 days to do so and forward it to the Speaker. The Petition was presented to the Respondent on 4 March 2015 but it had anomalies. 30
117. The Respondent notified the Petitioners and they supplied a list with names of 120 petitioners.
118. Thereafter, the County Assembly appointed an Ad Hoc Committee to look into the issues raised and report back. 35
119. In the meantime, one Hon Valentine Sergon had been appointed to lay the Petition on behalf of the Petitioners before the Assembly.
120. But what is material in my view is that ultimately the *Ad Hoc* Committee made recommendations to have the *ex parte* Applicant removed from office. 40

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121. The removal processes to be followed after the recommendation of the *Ad Hoc* Committee had to scrupulously comply with the law, because what the Committee was involved in, was strictly preliminary to the statutory process of removal of the *ex parte* Applicant. 1
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122. The *ex parte* Applicant urged that the procedure for removal of a Speaker was located in section 11 of the County Governments Act and that a notice of motion had to be in writing and the Assembly had to pass a resolution supported by at least 75% of the membership. 10
123. A motion was moved on 18 March 2015 by Hon Jacob Cheboiwo for the adoption of the report.
124. Pursuant to section 11(4) of the County Governments Act and Standing Order 61(4), the *ex parte* Applicant was entitled to be granted an opportunity to respond to allegations against him on the floor of the Assembly. 15
125. There was nothing placed before Court to suggest even remotely that the *ex parte* Applicant was invited to appear before the plenary of the Assembly to defend himself or make representations. 20
126. The invitation to appear before the *Ad Hoc* committee could not substitute the legal requirement for the *ex parte* Applicant to be given an opportunity to make representations before the Plenary of the Assembly. 25
127. The process taken by the Assembly in my view was therefore tainted with procedural impropriety in that the *ex parte* Applicant was not accorded an opportunity to make representations before the Plenary. 30
128. Natural justice or procedural fairness has become such a cardinal principle in our governance that however grievous the allegations one is facing, he is entitled to an opportunity to be heard and the body taking the decision must ensure that it observes the processes necessary to safeguard and protect the rights of the party likely to suffer the detriment. 35
129. The requirement is so cardinal that if the nine horned monster were to be subjected to such action, he would be entitled to have his day and say. That is a requirement of our constitutional democracy. 40

No Motion for Removal before Lapse of 6 Months

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130. The *ex parte* Applicant also urged that a motion to remove him from office as speaker could not be moved before the lapse of 6 months if a similar motion had been debated and resolved during the preceding 6 months. And for this attractive proposition, Standing Order 47 was cited. 1
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131. The Respondent did not respond in any meaningful manner to this issue either in the affidavits or the submissions.
132. There was an attempt to remove the *ex parte* Applicant from office of Speaker on 11 February 2015. The Respondent had notified the *ex parte* Applicant of the same through a notice dated 10 February 2015. 10
133. The Motion was debated on 11 February 2015 and was defeated by a single vote. 15
134. A fresh attempt was made just a month later.
135. A perusal of the grounds and reasons as outlined in the Motion which failed by 1 vote on 11 February 2015 and the Petition which came on 3 March 2015 (and subsequent Motion) indicate the grounds/reasons were essentially the same. 20
136. The substance of the allegations made in February 2015 and March 2015 were the same.
137. In my view, the County Assembly was barred from debating the question of the removal of the *ex parte* Applicant on basically the same substantial grounds which had been rejected the previous month. 25
138. The County Assembly could not commence the process before expiry of 6 months and in so acting it was acting in violation of its internal procedures. 30
- Conclusion and Orders
139. From the foregoing, the Court finds and holds that the *ex parte* Applicant has satisfied the test for grant of judicial review and the Court grants orders 1 and 2 of the motion dated 20 March 2015. 35
140. Each party to bear costs. 40

**Council of Governors & 3 others v Senate &
53 others [2015] KLR-HCK**

High Court, at Nairobi July 10, 2015 5
I Lenaola, M Ngugi & GV Odunga, JJ

Petition Nos 381 & 430 of 2014 (Consolidated)

Brief facts

The facts giving rise to the consolidated petitions were that the 10
National Assembly of Kenya had, pursuant to consultation with the
Senate, enacted the County Governments (Amendment) Act (CGAA).
The County Governments (Amendment) Act amended the County
Government Act by introducing a new provision section 91A which 15
established the County Development Boards (hereafter “CDBs”) in
each of the 47 Counties in Kenya. The CDBs were to comprise, *inter*
alia, members of the National Assembly representing constituencies
within respective counties, members of county assemblies, as well as
members of the executive operating within respective counties, and 20
were to be chaired by the Senator from the county.

Following the enactment of the CGAA and the establishment of the
CDBs, the Council of Governors (1st petitioner), a body comprising
all the Governors of the 47 Counties, lodged a Petition challenging 25
the constitutionality of the CDBs. The 1st Petitioner sought an order
to declare the provisions of section 91A of the CGAA, which vested
various functions in the CDBs, unconstitutional for violating articles
6(2); 95, 96, 174(1), 175, 179(1), 179(4), 183(1), 185(3) and 189(1)
of the Constitution. The basis of the challenge was that through the 30
CDBs, Senators and members of the National and County Assemblies
would be undertaking executive functions at the County level.

The Respondents on their part challenged the Petition, the crux of the
Respondents’ contention was that the Attorney General had to be cited
as a respondent by virtue of those provisions as well as article 156(4)(a) 35
and (b) of the Constitution and could not, as the petitioners had done,
involve him in the proceedings as an interested party; and further, that
a 30 day’s notice had to be served on the state prior to institution of
proceedings as required under section 13A(1) of the GPA. 40

Issues

- i. Whether the amendment to the County Governments (Amendment) Act 2014, which introduced the County Development Board and assigned it a role in the planning and budgetary processes of counties, was unconstitutional. 1
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- ii. Whether section 13A of the Government Proceedings Act that required issuance of 30 days prior notice before suing the Government was an impediment to access to justice and unconstitutional. 10
- iii. Whether the petitioner ought to have petitioned Parliament in accordance with the provisions of article 119(1) that gave a person the right to petition parliament on matters of legislation, prior to filing a petition before court. 15
- iv. Whether the Attorney General, rather than the Senate, the National Assembly and the individual members of the Senate, should have been made the respondent in the matter as required by section 12 of the Government Proceedings Act. 20
- v. Whether every Act of Parliament enjoys a presumption of constitutionality until the contrary is proven. 25

Constitutional Law – Senate – legislative power of the Senate – where Senate introduced an amendment to the County Governments (Amendment) Act that introduced the County Development Board – whether the introduction of the County Governments Board would undermine devolution – whether the creation of the County Governments Board was unconstitutional – County Governments (Amendment) Act. 25

Constitutional Law – legislation – interpretation of section 13A of the Governments Proceedings Act – whether the said provision that required issuance of 30 days prior notice before suing the Government was an impediment to access to justice and unconstitutional – whether every Act of Parliament enjoys a presumption of constitutionality until the contrary is proven – Government Proceedings Act section 13A. 30

Constitutional Law – interpretation of statutes – jurisdiction of the High Court to interpret whether an Act of Parliament was inconsistent with or otherwise in contravention of the Constitution – whether the Petitioner ought to have petitioned parliament prior to filing the Petition before court – Constitution of Kenya, 2010, articles 119(1), 165, 156(4)(b), 258. 35

Held:

1. The matter before court was not a civil matter relating to the affairs or property of government in the manner contemplated under the provisions of the Government Proceedings Act. The petition before 40

- the court sought the interpretation of the question whether an Act of Parliament was unconstitutional for violating the Constitution. It was brought under the provisions of article 165 and 258 of the Constitution which granted the Court the jurisdiction to interpret whether an Act of Parliament was inconsistent with or otherwise in contravention of the Constitution. It could not therefore have been deemed to be civil proceedings as contemplated in the Government Proceedings Act. The provisions of section 12 of the said Act did not apply to petitions alleging violation of constitutional rights or contravention of the Constitution. 1
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2. Article 156(4)(b) of the Constitution provided that the Attorney General shall represent the National Government in court or in any other legal proceedings to which the National Government was a party. As the National Government, through the Senate and the National Assembly, was part of the proceedings, the Attorney General was constitutionally mandated to represent the National Government and he was automatically part of the proceedings. 15
3. The Constitution, 2010 allowed the Attorney General the right to represent the National Government in Court proceedings but did not stipulate that the Attorney General should be sued in all instances where any organ of the National Government had been sued and to say otherwise would be absurd. 20
4. The office of the Attorney General should have been made a substantive party to those proceedings, instead of an interested party. However, as it was evident both from the Constitution and the rules which required that substantive justice had to be done, the joinder, misjoinder or non-joinder of a party was not sufficient to defeat a matter. As rule 5(d) of the Mutunga Rules further made it clear, the Court could make substitutions, or require the joinder of a party either as a petitioner or respondent. In the circumstances, the objection by the respondents with regard to the position of the AG on the basis of section 12 of the Government Proceedings Act was without merit. 25
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5. There was no prejudice that the Respondent had suffered by the alleged failure of the Petitioner to issue the 30 days' notice to the Attorney General as prescribed under the provisions of section 13A(1) of the Government Proceedings Act. Since the issues in contest were solely to do with the conduct of the Senate which was an organ of State that could properly be sued as such. In fact, the Senate entered appearance in its own name and by Counsel and there was no reason why the failure to either enjoin the Attorney 35
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- General as a party or failure to give him notice of the intended proceedings would advance (impair/impede) the cause of justice. 1
6. Only the Court could grant the relief that the petitioner was seeking in the matter, namely the declaration of invalidity of legislation on the basis that it was unconstitutional. The Attorney General could not have provided the petitioners with the relief that they sought and even had the court found that the 30 day notice was a requirement, it would have been a procedural step that would serve no purpose in a matter such as the instant case. Therefore the Petition was properly before the Court. 5 10
7. Under article 165(3)(d)(i), the High Court had the jurisdiction to determine the question whether any law was inconsistent with or in contravention of the Constitution. The jurisdiction of the Court to invalidate laws that were unconstitutional was in harmony with its duty to be the custodian of the Constitution, which pronounced its supremacy at article 2 by proclaiming at article 2(4) that any law including customary law that was inconsistent with the Constitution, 2010 was void to the extent of the inconsistency, and any act or omission in contravention of the Constitution was invalid. 15 20
8. The High Court was vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under article 165(3) of the Constitution. It had the duty and obligation to intervene in actions of other arms of Government and State Organs where it was alleged or demonstrated that the Constitution had either been violated or threatened with violation. In that regard, the Petition before the court alleged a violation of the Constitution by the Respondent and in the circumstances, the doctrine of separation of power does not inhibit the High Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution. Therefore the High Court had the requisite jurisdiction to determine the question whether the County Government Amendment Act 2014 was unconstitutional. 25 30 35
9. Where there was a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure ought to be strictly followed. Article 3(1) of the Constitution enjoined every person to respect, uphold and defend the Constitution. Similarly, article 258(1) thereof donated the power to every person to institute court proceedings claiming that the Constitution had been contravened, or was threatened with contravention. If the High Court were to shirk its constitutional 40

duty under article 165(3)(d), it would have failed in carrying out its mandate as the temple of justice and constitutionalism and the last frontier of the rule of law. In the circumstances, the argument that the Petitioner should have approached Parliament under article 119(1) was without merit.	1 5
10. The principle of presumption of constitutionality is a sound principle. That is so except in the case of legislation that limits fundamental rights which the Constitution had provided at article 24(3) the parameters against which the constitutionality of such legislation was to be weighed. With respect to legislation that is alleged to violate provisions of the Constitution other than the Bill of Rights, the obligation was on the petitioner to establish that the legislation violated a provision(s) of the Constitution. As the petitioners alleged a violation of the Constitution, the presumption of constitutionality applied in the case, and the petitioners had an obligation to establish that the County Governments Amendment Act was unconstitutional.	10 15
11. The principles applicable in determining the question whether an impugned legislation or part thereof meets the test of constitutionality are	20
1. The High Court was enjoined under Article 259 of the Constitution to interpret the Constitution in a manner that promoted its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributed to good governance.	25
2. The Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself.	30
3. The Court must have regard not only to its purpose but also its effect. Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.	35
4. The Constitution should be given a purposive, liberal interpretation.	
5. The provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other.	40
12. Under the Constitution and legislation, it was the responsibility of the county executive comprising the governor and the county	

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- executive committees that he constitutes under section 30(2)(e) of the CGA to prepare and develop developmental plans and budget estimates and submit them to the respective county assemblies for approval. It was therefore evident that the powers of the Senate and the National Assembly did not include the powers to legislate at county level, which powers under article 185(1), were vested in the county assembly. 1
13. The governor, who under the Constitution was the Chief Executive Officer of the County was supposed to be the vice-chair of the CDB and deputise the Senator. The CDB, though chaired by the Senator and composed of members of the national legislature and national executive, was intended to perform county functions and to be funded from county funds. Further section 91B provided that the operational expenses of the CDB would be provided for in the annual estimates of the revenue and expenditure of the respective county government. The composition and mandate of the CDBs upsets and was in violation of the framework created by the Constitution with respect to devolution and the separation of powers between the various institutions created under the Constitution which granted the approval of county development plans and budget to county assemblies. 5 10 15 20
14. The involvement of the Senate, National Assembly and national executive in the CDB violated the tenets and principles of the Constitution in three fundamental respects. 25
1. It interfered with and compromised the roles of those organs in the exercise of their oversight functions over the functioning of counties and the use of revenue allocated to them.
 2. It undermined the principle of devolution, a key cornerstone of the Constitution, 2010 and the governance structure of the country. 30
 3. It violated the principle of separation of powers.
15. What the CGAA did was to involve the Senate in the formulation of plans and budgets for counties, the same plans and budgets that it would thereafter be required to subject for scrutiny to the Senate in exercise of its oversight role. It would be to defy common sense not to expect the inevitable conflict in the exercise of the oversight function of the Senate, and the consequent impact on devolution. 35 40
16. Under article 6 of the Constitution, National and County Governments had equal status as organs of state power, and in the exercise of their respective mandates, they had to do so in a spirit

- of mutual respect. 1
17. The structure of devolved government as envisioned by the people of Kenya and encapsulated in the Constitution could not be altered without an elaborate amendment process that required the direct endorsement of such a change by the people of Kenya in accordance with the requirements of article 255(1)(i) of the Constitution. 5
18. By establishing the CDBs composed of the Senator, Members of the National Assembly and women members of the National Assembly, as well as national government officers at the county level, with the mandate to consider and make inputs into county budgets and plans, the CGAA effectively altered the structure of devolution by involving in its functioning and operations persons and officers from other levels of government and it effectively vested in the same hands the powers of planning, implementation and oversight, in clear violation of the principles of checks and balances and separation of powers principles. 10
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19. Separation of powers in its most basic form provides that the executive makes policy decisions, the legislature enacts laws and the judiciary interprets and applies the laws made by the legislature. The thinking behind separation of power was to ensure that there were checks and balances and that no-one person or institution exercised all powers within a state. Thus, the Constitution provided at article 94 that the Legislative Authority of the Republic was derived from the people and at National level was vested and exercised by Parliament. 20
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20. The national legislature could not enter into the realm of the national executive with respect to planning and implementation, neither could the national legislature and executive enter into the executive functions at the county level without usurping the roles of the counties and thus violating the principles that separate national functions from county functions. 30
21. The wording of section 91A of the County Government (Amendment) Act was clear that the CDBs had the mandate to make inputs into the development plans and budgets of counties. Such inputs, were completely outside the constitutional parameters of the functions of National Government and its structures such as the Senate and the National Assembly. 35
22. By purporting to create an oversight role for National Government in the counties, section 91A of the County Government (Amendment) Act purported to allocate to national institutions roles in the counties that were not in compliance with the Constitution. 40

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23. While the CDBs might be said to differ from the Constituency Development Fund (CDF) in that they were intended to exercise oversight functions, they were in virtually every respect analogous to the CDF. The allocation of any functions in relation to county development plans to national government institutions was not in line with the Constitution and offended the principle of devolution, separation of powers and allocation of functions. 1
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24. The parallels between the CDBs and the CDF were obvious. In the same way that the legislature sought to retain its extension of powers in the counties through the CDF, and thus control funds that constitutionally fall within the mandate of the counties, a similar attempt was being made to extend the powers of the National Legislature, the National Assembly and Senate, into the county executive by assigning to the CDBs a role in the planning and budgetary processes of counties. That not only undermined devolution, but was a direct threat to the principle of separation of powers which was one of the cornerstones of Kenya's new democratic dispensation. 10
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25. The principle of separation of powers was at the heart of the structure of Kenya's government each organ was independent of each other but acting as a check and balance to the other and also working in concert to ensure that the machinery of the state worked for the good of Kenyans. 20
26. The effect of the Constitution's detailed provision for the rule of law in processes of governance was the legality of executive or administrative actions to be determined by the Courts, which were independent of the Executive branch. The essence of separation of powers in this context was that the totality of governance powers is shared out among different organs of government, and that those organs play mutually-countervailing roles. In this set up, it is to be recognized that none of the several government organs functions in splendid isolation. 25
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27. Section 91A of the County Government (Amendment) Act was unconstitutional. By necessary extension, sections 91B and 91C, which were intended to bolster the provisions of 91A of the CGAA, were also of necessity unconstitutional. As the entire County Governments (Amendment) Act consisted of those three provisions, the entire Act was unconstitutional, and therefore null and void. 35
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The County Governments Act (Amendment) Act 2014 declared unconstitutional null and void.

Council of Governors & 3 others v Senate & 53 others (I Lenaola, M Ngugi & GV Odunga, JJ)	59

<i>Each party to bear own costs since the petition raised issues of public interest & importance.</i>	1

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1. <i>Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others</i> Petition No 454 of 2012 – (Applied)	5
2. <i>Council of Governors & 6 others v Senate</i> Petition No 413 of 2014 – (Explained)	
3. <i>Coalition for Reform and Democracy (CORD) & 2 others v Attorney General & 10 others</i> Petition Nos 628 & 630 of 2014; Petition No 12 of 2015 (Consolidated) – (Explained)	10
4. <i>International Legal Consultancy Group v Senate & another</i> Constitutional Petition No 8 of 2014 – (Applied)	
5. <i>In re the Matter of the Interim Independent Electoral Commission</i> [2011] 2 KLR 32 – (Applied)	15
6. <i>Institute of Social Accountability & another v National Assembly & 4 others</i> Petition No 71 of 2013 – (Explained)	
7. <i>Kenya Small Scale Farmers Forum & 6 others v Republic & another</i> [2013] 3 KLR – (Applied)	20
8. <i>Law Society of Kenya v Attorney General of Kenya & 2 others</i> [2013] 1 KLR – (Applied)	
9. <i>Mati & another v Attorney General & another</i> [2011] 2 KLR 1 – (Applied)	
10. <i>Mount Kenya Bottlers Limited & 3 others v Attorney General and 3 others</i> Petition No 72 of 2011 – (Explained)	25
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13. <i>Orengo, James v Attorney General & another</i> Civil Suit No 207 of 2002 – (Explained)	
14. <i>Speaker of the Senate & another v Attorney General & 4 others</i> Advisory Opinion No 2 of 2013 – (Explained)	
15. <i>Trusted Society of Human Rights Alliance v Attorney General & 2 others</i> [2012] 2 KLR 518 – (Explained)	35

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1. <i>Speaker of the National Assembly & others v De Lille MP & another</i> [1999] ZASCA 50; [1999] 4 All SA 241 – (Explained)	

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1. <i>Bhim Singh v Union of India & 7 others</i> [2010] INSC 358 – (Applied)	40

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1. <i>United States v Butler</i> , 297 US 1 (1936) – (Approved)	5
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1. Montesquieu, Baron De., (Ed) (1949) <i>The Spirit of The Laws</i> New York: Hafner Publishing Co Vol 151-52 p 1748	
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1. Constitution of Kenya, 2010 articles 1(3)(4); 2(2); 6(1)(2); 10(2); 11; 48; 94; 95; 96; 118; 119(1); 156(4); 159(2)(d); 165; 174(a); 175; 176; 179(1)(2)(4); 180; 181; 182; 183(1); 185(3); 189(1); 190; 201(d); 210; 212; 220(2)(c); 255(1)(i); 258; 259 – (Interpreted)	10
2. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya, 2010 Sub Leg) rule 5(b) – (Interpreted)	15
3. County Governments Act, 2012 (Act No 17 of 2012) sections 9(2) (a); 54(2); 91; 91A(1)(m); 91B; 91C – (Interpreted)	
4. County Governments (Amendment) Act, 2014 (Act No 13 of 2014) – (Interpreted)	20
5. Government Proceedings Act (cap 40) sections 12(1); 13A(1) – (Interpreted)	
6. Intergovernmental Relations Act, 2012 (Act No 2 of 2012) section 7 – (Interpreted)	25
7. Public Finance Management Act, 2012 (Act No 18 of 2012) sections 117, 129, 131; 187 – (Interpreted)	
Advocates	
1. <i>Prof Githu Muigai</i> , Attorney General, for the 49 th Interested Party	30
July 10, 2015 the following Judgment of the Court was delivered	
Introduction	
1. This judgment relates to two petitions. The first is Petition No 381 of 2014- <i>The Council of Governors v The Senate, The National Assembly, the Senators of the 47 Counties and the Attorney General</i> . This petition was, on 12 th September 2014, consolidated with High Court Petition No 430 of 2014- <i>Barasa Kundu, Albert Simiyu and Philip Wanyonyi Wekesa v The Speaker of the National Assembly and others</i> (formerly Bungoma High Court Petition No 11 of 2014)	35
2. At the heart of the dispute in the consolidated petitions are two cornerstones of governance in Kenya – the rule of law and devolved	40

- governance. The rule of law prescribes that state organs can only exercise powers granted to them by the law, and such law as grants powers to state organs must be in conformity with the Constitution. The Petitioners challenge the constitutionality of amendments to the County Government Act, No 17 of 2012, through the County Governments (Amendment) Act, 2014 (hereafter “the CGAA”). They allege that the provisions of the CGAA grant powers to state organs in conflict with the allocation of functions in the Constitution. 1
3. The 2010 Constitution of Kenya introduced a system of devolved governance, the impetus behind which is to ensure accountable use of state resource and to curb misuse of state power. The petitioners allege that the challenged provisions of the CGAA are in conflict with the system of devolved government and will have the effect of giving national government an unconstitutional say in county affairs. 5
- Background 10
4. The facts giving rise to the consolidated petitions are not in dispute. On 24th July 2014, the National Assembly of Kenya had, pursuant to consultation with the Senate, enacted the CGAA. The CGAA amended the County Government Act by introducing a new section 91A which establishes the County Development Boards (hereafter “CDBs”) in each of the 47 counties in Kenya. The CDBs were to comprise, *inter alia*, members of the National Assembly representing constituencies within respective counties, members of county assemblies, as well as members of the executive operating within respective counties, and were to be chaired by the Senator from the county. 15
5. Following the enactment of the CGAA and the establishment of the CDBs, the Council of Governors (hereafter the 1st Petitioner), a body comprising all the Governors of the 47 Counties, lodged Petition No 381 of 2014 challenging the constitutionality of the CDBs. The 1st Petitioner asks the Court to declare the provisions of Section 91A of the CGAA, which vests various functions in the CDBs, unconstitutional for violating articles 6(2); 95, 96, 174(1), 175, 179(1), 179(4), 183(1), 185(3) and 189(1) of the Constitution. The basis of the challenge is that through the CDBs, Senators and members of the National and County Assemblies would be undertaking executive functions at the County level. Specifically, the Court has been requested to determine the constitutionality of 20
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- section 91A and declare the creation of the CDBs null and void. 1
In the Amended Petition dated 11th August 2014, the 1st Petitioner
seeks the following orders:
- A. A declaration that within the intendment of article 6(2), 5
95, 96, 174 and 175 of the Constitution and resonating
the intention of 179(i), 179(4), 183(1), 183(1) and
189(1) of the Constitution, the provisions of section
91A(1) of County Government (Amendment) Act 2014
that establishes County Development Boards which shall 10
be comprised in the manner stated in the said Act and
undertake the functions outlined in section 91A(2) of
the Act are unconstitutional.
 - B. A declaration that within the intendment of article 6(2),
95, 96, 174(i) and 175 of the Constitution and resonating 15
the intention of 179(1), 179(4), 183(1), 185(3) and
189(1) of the Constitution, the provisions of section
91A(1) of County Government (Amendment) Act 2014
that establishes County Development Boards which shall
be comprised in the manner stated in the said Act and 20
undertake the functions outlined in section 91A(2) of
the Act are null and void.
 - C. There be no order as to costs.
6. Petition No 381 of 2014 was filed on 28th July 2014, and was 25
amended on 11th August 2014. On 26th August 2014, Bungoma
High Court Petition No. 11 of 2014 was filed. It was later transferred
to the High Court in Nairobi as High Court Petition No 430 of
2014 and consolidated with Petition No 381 of 2014. Following the
consolidation of the Petitions on 12th September 2014, the Council 30
of Governors was to be the 1st Petitioner, while Mr Barasa Kundu,
Albert Simiyu and Philip Wanyonyi Wekesa were to be the 2nd, 3rd
and 4th Petitioners respectively.
7. Like the 1st Petitioner, the 2nd, 3rd and 4th Petitioners challenge the 35
constitutionality of the CGAA and seek the following orders:
- 1. That this Honourable court declares that the Senate
and National Assembly of the Republic of Kenya
acted contrary to the provisions and principles of the
Constitution of Kenya 2010;
 - 2. That this Honourable court declares the County 40
Governments (Amendment) Act 2014 unconstitutional
and illegal

3. That this Court be pleased to grant orders barring all the 47 senators from inaugurating and chairing County Development Boards until this matter is heard and determined. 1
4. That this Honourable Court pronounces itself on the separation of power principle between the national legislature and the county executive, particularly with regard to the current conflict of functions/roles and interest between the senators, national assembly members, county assembly members and governors. 5
8. In the course of the proceedings, various applications for joinder of parties were made. Pursuant to an application made on behalf of the 47 County Speakers, the Court granted leave to the Applicants to be enjoined as the 1st - 47th Interested Parties. A similar application for joinder was made on behalf of a Mr Clement Nyamongo, who was permitted to participate in the proceedings as the 48th Interested Party. The Court also permitted the participation of the office of the Attorney General (AG) as the 49th Interested Party, the Commission on the Implementation of the Constitution (CIC) as the 50th Interested Party, and Katiba Institute (Katiba) as an *Amicus Curiae*. 10
9. Interim orders were granted in the matter on 25th August 2014 temporarily prohibiting the 3rd– 50th Respondents from convening and chairing meetings of the CDBs established in the 47 Counties under the said section 91A of the CGAA. 15
10. The Court also referred the matter to the Chief Justice, in accordance with the provisions of article 165(4) of the Constitution, to constitute a Bench of an uneven number of judges to hear the matter in light of the fact that the matter raised a substantial question of law. The Chief Justice constituted a Bench comprising Lenaola, M Ngugi and Odunga JJ. 20
- The Facts 30
11. In 2013, the County Governments (Amendment) Act (No 2) Bill was introduced in the Senate. The intention of the Bill was to establish CDBs, and upon the concurrence of the National Assembly and Senate, it was passed and received Presidential assent on 30th July 2014. The CGAA amended the County Government Act (hereafter "CGA") by inserting three new sections immediately after section 91 of the Act, namely sections 91A, 91B and 91C. These amendments provide for the establishment of the CDBs, their composition, and 35
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- sources of funds, and creates an offence for obstructing the functions of the CDBs. With respect to composition, section 91A provides that the CDB in each county comprises national and county level state and public officers, some with legislative and others with executive powers. All the permanent members of the CDBs drawn from the national government are from the legislative arm of the national government. 1
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12. The Act places the coordination and harmonisation role of county development plans and projects within the ambit of the CDBs. The Memorandum of Objects and Reasons for the CGAA also indicates that the Act intends to provide CDBs with the power to consider and adopt county integrated development plans and county annual budgets before they are tabled in the County Assemblies for approval. The Memorandum of Objects and Reasons also provide that: 10
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- “The Bill concerns county governments in terms of article 110(1) (a) of the Constitution in that the process of coordination, harmonization, adoption and approval of county development plans and county annual budgets affects the functions and powers of the county governments.” 20
13. These provisions, in the view of the petitioners, violate the Constitution by involving members of the national government in county affairs, and also by involving members of the legislature in county executive matters, thus undermining devolution and violating the principle of separation of powers. 25
- The Submissions
- Submissions by the Council of Governors
14. The 1st Petitioner submits that articles 179(1) and (2) vest the executive power of county governments in the county executive committee. Article 6(2) provides that government at national and county level are distinct and inter-dependent. Its contention is that Senators are members of the national parliament which is vested with legislative authority in terms of article 94 of the Constitution, and they have no role to play at county level. It is its contention further that as the CGAA provides powers, other than legislative powers, to Senators, which powers are outside the realm of national government, it is unconstitutional. 30
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15. With regard to devolution, it is its case that the CGAA is an affront to devolution which, in terms of article 174 has, as its aims,

to promote democratic and accountable exercise of power, and to foster national unity by recognising diversity.	1
15. The 1 st Petitioner further argues that the Constitution does not contemplate that members of the Senate and National Assembly would micro manage planning and budgeting in the counties; therefore, by giving Senators and Members of the National Assembly coordination and implementation roles in the county governments, section 91A of the CGAA violates the Constitution. In addition, it is its case that the CGAA violates article 2(2) which provides that no person may claim or exercise State authority except as authorised under the Constitution.	5 10
16. The 1 st Petitioner relies on <i>Speaker of the National Assembly & others v De Lille, MP & another</i> [297/298] [199] ZASCA, where the Supreme Court of South Africa held that no matter how formidable, efficient or well-meaning a legislature, it cannot make law or perform any act which is not sanctioned by the Constitution. Reliance is also placed on the Supreme Court judgment of <i>Speaker of the Senate v the Attorney General</i> [2013] eKLR in which it was held that the National Assembly and the Senate shall perform their respective functions in accordance with the Constitution.	15 20
Submissions by the 2 nd - 4 th Petitioners	
17. The 2 nd - 4 th Petitioners argue that under section 91A of the CGAA, the CDBs include Senators, Members of the National Assembly and women representatives, which offends the constitutional objective of devolution. They further submit that separation of powers has three elements: that the same persons should not form part of more than one of the three organs of government, meaning, for instance, that Members of Parliament or Senators should not be in the Executive; that one organ of Government should not control or interfere with the work of another, for example, that the Executive, at whatever level, should be independent of the Legislature in execution of its mandate; and finally, that one organ of government should not exercise the functions of another, meaning that the legislature, for instance, should not have executive powers.	25 30 35
The 2 nd - 4 th Petitioners further argue that under the Public Finance Management Act, the county executive is the organ mandated to manage financial matters at the county level. It is their case therefore that the attempt under section 91A of the CGAA to provide another vehicle for spending money in the county is unconstitutional.	40

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18. The 2nd-4th Petitioners, further contend that section 91A aforesaid donates executive functions to the legislative arms of both national and county governments and creates a situation where the Senate and County Assemblies, which have oversight roles over the county executives, are themselves executing county executive functions through the CDBs. 1
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19. According to the 2nd-4th Petitioners, section 91B of the CGAA provides that the operational expenses in respect of CDBs shall be provided for in the annual estimates of the revenue and expenditure of the respective county governments. It is their contention that this means that the county governments will spend money on functions performed by agents of national government. In their view, money must follow functions and you cannot devolve a function without devolving the requisite funds. They therefore urge the Court to find the CGAA unconstitutional and grant the prayers sought in the petition. 10
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- Submissions by 1st-47th Interested Parties
20. The Speakers of all the county assemblies, who were joined in the proceedings as the 1st-47th Interested Parties, also supported the petition. While underscoring the supremacy of the Constitution and the need to interpret it in a manner that promotes its purpose, values and principles, the 1st - 47th Interested Parties argue that the CGAA is unconstitutional. Their case is that the only organs of devolved government are the county assembly and county executive created by the Constitution under article 176, and with their mandates set out in articles 179(1), 183, 185, 210 and 212 of the Constitution. They submit that the very composition of the CDBs, which muddles national government organs and offices with county government organs and offices to undertake a task vested exclusively in county governments is a violation of articles 6(1) and (2) of the Constitution. 20
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21. These interested parties further submit that in enacting the CGAA without consulting county governments, Parliament breached article 189(1) that enjoins the respondent to respect the functional and institutional integrity of county governments and consult county governments in their mutual relations. It is also their contention that the CGAA is unconstitutional in that it alters the structure of county government without having conducted a referendum as required by article 255, thus creating an alien structure of county 35
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- government. 1
22. The Speakers assert, further, that the CGAA usurps the mandate of county executives and assemblies, which are set out in articles 179 and 183, as well as 185, 210 and 212 of the Constitution. Their submissions is that to the extent that the CGAA purports to mandate the CDBs to prepare and consider county development plans and budgets and to submit such plans and budgets to county assemblies for consideration, adoption, rejection or amendment, the CGAA usurps the executive authority vested in county executives by article 179(1) 5 10
23. It is also their contention that for CDBs to consider county annual budgets is to breach the mandate of county assemblies under sections 117, 129 and 131 of Public Finance Management Act (PFMA). 15
24. According to the 1st-47th Interested Parties, the CDBs create a conflict of interest and muddle up the oversight functions of the county assemblies and Senate over county executives. Such conflict, in their view, arises by requiring Senators and members of county assemblies to sit in CDBs and purport to exercise the very executive authority of county governments that they are supposed to exercise oversight over. 20
25. They further observe that in every county, there is an intergovernmental forum created under section 54(2) of the CGA, No 17 of 2012, with the mandate to harmonize services and coordinate development activities and inter-governmental functions in the counties. In their view, the CDB duplicates the role and functions of this forum. 25
26. It is also their case that the CDBs, as fora for intergovernmental consultations, breach article 189(2) of the constitution. They submit that article 189(2) contemplates the creation of the National and County Government Coordinating Summit, a forum which they submit has been created under section 7 of the Intergovernmental Relations Act, No 2 of 2012. In their view, to create the CDBs to provide the same functions as a forum for consultation and co-operation between national and county governments, which the Summit is already providing, is an imprudent use of public resources. They therefore ask the court to grant the prayers sought in the petition. 30 35 40

Submissions by CIC	1
27. CIC agrees with the petitioners that the CGAA, specifically section 91A thereof, is unconstitutional and must be struck out for being unconstitutional. It is its contention that the CGAA contravenes articles 1(3), 2, 6, 10, 11, 94, 95, 96, 174, 175, 179, 183, 185, 189, 190, 201, 259 as well as the Fourth Schedule and sections of the Sixth Schedule of the Constitution.	5
28. CIC further contends that the CGAA is ambiguous as there is no clarity as to how the body it establishes is to be a consultative forum between national and county governments whilst its membership consists largely of Members of Parliament, County Assembly Members and County Government officials; and there is also no clarity as to which office is referred to in section 91A(1)(m). This provision makes reference to the “head of a department of the national government or the county government or any other person invited by the Board to attend a specific meeting of the Board.”	10 15
29. According to CIC, by giving Senators, members of the national and county assemblies and county and national government administrators the role of coordination and implementation of functions designated to the county government executive, the CGAA muddles up the constitutional functions and responsibilities of the executive and the legislature on the one hand, and the national and county governments on the other, thereby offending the principle of separation of powers.	20 25
30. CIC further contends that there has been insufficient public participation in the enactment of the CGAA, which violates the requirements of article 10 and 118 of the Constitution.	30
Submissions by the Respondents	
31. In opposing the petition, the respondents submit that the role of courts to declare legislation unconstitutional is circumscribed. They rely on the decision in <i>Law Society of Kenya v Attorney General of Kenya & 2 others</i> [2013] eKLR for this proposition.	35
32. It is also their submission that the consolidated petitions are incompetent for failure to comply with the mandatory provisions of sections 12(1) and 13A(1) of the Government Proceedings Act. The crux of the respondents’ contention in this regard is that the Attorney General has to be cited as a respondent by virtue of these provisions as well as article 156(4)(a) and (b) of the Constitution and	40

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- cannot, as the petitioners have done, involve him in the proceedings as an interested party; and further, that a 30 days' notice must be served on the state prior to institution of proceedings as required under section 13A(1) of the GPA. The intention behind these requirements, according to the respondents, is to avoid unnecessary litigation in the event that a matter is capable of settlement or resolution without the necessity of engaging the courts. 1 5
33. The Respondents further contend that there is a presumption of constitutionality with respect to legislation, and to justify the nullification of legislation, there must be a clear and unequivocal breach of the Constitution. They rely on the decision of the Court of Appeal of Tanzania in *Ndyanabo v Attorney General* [2001] 2 EA 485 and the decision of Majanja J in *Law Society of Kenya v Attorney General and 2 others* [2013] eKLR to submit that the CGAA is presumed to be constitutional unless the petitioners can show the contrary. 10 15
34. The Respondents further argue that the overall objective and reasons for the passage of the CGAA is critical in determining constitutional compliance. According to the respondents, the functions of the CDB are found in section 91A(2) which is to "provide a forum, at the county level, for consultation and coordination between the national government and the county government matters of development and projects in accordance with the Constitution, and, more specifically, article 6(2), article 10 and article 175"; "consider and give input on any county development plans before they are tabled in the county assembly for consideration"; "consider and given input on county annual budgets before they are tabled in the county assembly for consideration" and "consider and advise on any issues of concern that may arise within the county". 20 25 30
- The Respondents submit that the language is clear that there is no executive power or authority to make executive decisions in this context, and that the role of the CDBs is purely advisory. 35
35. The Respondents further submit that the CDBs provides an excellent forum for the Senator to obtain first hand information at the county level on the financial requirements of the county which shall, in turn, inform debate at the national level when the Division of Revenue Bill and the County Allocation of Revenue Bills are being debated and passed by Parliament. They submit that there 40

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- are, moreover, several other examples of such co-ordination boards in the county context, for example, the Inter-Governmental Budget and Economic Council and the National and County Government Co-ordinating Summit created by the Intergovernmental Relations Act, 2012. It is their case that the CGAA is part of the national legislation contemplated by article 220(2)(c) of the Constitution to prescribe “the form and manner of consultation between the national government and county governments in the process of preparing plans and budgets” and accordingly, CGAA is firmly grounded on express provisions of the Constitution. 1
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36. The respondents contend that if there is duplication of roles, it is the role of Parliament to repeal, modify or amend legislation so as to avoid any unnecessary duplication, and duplication of roles per se cannot render an Act of Parliament unconstitutional. They rely on the decision in *United States v Butler* 297 US 1 (1936) cited with approval in *National Conservative Forum v Attorney General* [2013] eKLR; *Kenya Small Scale Farmers Forum v R* [2013] eKLR and *CIC v Parliament* [2013] eKLR for the proposition that “for the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government.” 15
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37. With regard to the complaint that there was no public participation in the enactment of the CGAA, the respondents submit that the Bill was published in the Kenya Gazette of 16th August 2013 and on 11th October 2013, an advertisement in the *Daily Nation* newspaper called for public participation in accordance with article 10 and 118 of the Constitution, and that members of the public and several institutions did send written memoranda. 25
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38. The Respondents further argue that the Petitioners’ contention that the CGAA interferes with the principle of distinctiveness and autonomy envisaged under articles 6 and 189(1)(a) of the Constitution, which require that the national and county government operate independently but with mutual cooperation, has no basis. Their argument is that articles 6 and 189 require the governments at the national and county level to consult, cooperate, coordinate and liaise with each other so as to achieve optimal delivery of service, conduct their mutual relations on the basis of consultation and cooperation with coordinated policies and administration; and that the Constitution expressly provides for setting up of joint authorities. It is their case therefore that the CDB is a classical 35
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illustration of such joint authorities which create a multi-sectoral forum for consultation and cooperation. The respondents rely on the decision in <i>International Consultancy Group v Senate & Clerk of the Senate</i> [2014] eKLR to support their submissions with respect to the need for the two levels of government to work together in the delivery of services to the people.	1 5
39. The Respondents deny the contention by the petitioners that the CGAA breaches the principle of separation of powers. They submit that CDBs were created to provide a consultative forum at the county level and accords with various constitutional provisions. In particular, they cite article 189 of the Constitution which requires mutual cooperation and interdependence between the different levels of government. It is their submission that the CDBs do not have any executive powers and do not make executive decisions, and in their view, the levels of separation of powers the Petitioners seek are unrealistic. The respondents rely on the decision of the Supreme Court of India in <i>Bhim Singh v UOI & 7 others</i> (2010) INSC 358 and the decision of the Supreme Court of Kenya in <i>Re the Matter of the Interim Independent Electoral Commission</i> [2011] eKLR Constitutional Application No 2 of 2011 for the proposition that functions of the different arms of Government must inevitably overlap, and that in modern governance, a strict separation of powers is neither possible nor desirable.	10 15 20 25
Submissions by the 48 th Interested Party	
40. The 48 th Interested Party, Mr Clement Nyamongo, opposed the Petition. Though he did not appear at the hearing of the matter, he had filed submissions in opposition to the Petition. His argument as set out in his submissions and affidavit is that the shared governmental responsibilities do not deprive Governors of their constitutional powers; that the CGAA will bring about the harmonisation of development projects at the county level and thereby translate into a constitutional right to cooperate. It was his case that there was no overlap of statutory duties of the legislative and executive branches of government.	30 35
Submissions by the Attorney General	
41. The Attorney General supported the position taken by the respondents. In his opposition to the Petition, the AG makes two main submissions. First, he argues that the presumption is that any legislation promulgated by the legislature is constitutionally sound	40

and that it is upon the person alleging that it is unconstitutional to prove it is unconstitutional. He relies for this principle on the decision in *Ndyanabo v Attorney General* [2001] EA 495. He further relies on the decision in *Pearlberg v Varty* [1972] 1 WLR 534 in which it was stated that:

“One should not start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown.”

42. The AG also opposes the invitation to the Court to declare the CGAA unconstitutional, placing reliance on the dictum in *Mount Kenya Bottlers Limited & 3 others v Attorney General and others* [2012], that “courts cannot act as ‘regents’ over what is done in Parliament because such an authority does not exist”.

43. The AG opposes the petitions, secondly, on the basis that article 119(1) of the Constitution provides that any person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation. According to the AG, the petitioners ought to have approached Parliament before filing the present petition. He therefore prays that the consolidated petitions should be dismissed.

Submissions by Katiba

44. The *Amicus Curiae* submits that the CGAA and the CDBs that it establishes are unconstitutional for two reasons. It contends, first, that they offend the constitutional principle of division and separation of powers and secondly, that the conceptualisation and passage of CGAA is inimical to the constitutional principles of good governance and rule of law.

45. Katiba sets out the constitutional framework that provides for separation of powers and devolution of functions. It submits that the Senate’s power to deal with county matters are circumscribed to limited instances by the Constitution, and it does not have the power to supervise or authorise development plans at the county level. In CIC’s view, the Senate’s role in relation to matters of counties is limited to those matters that are at the purview of or to be undertaken at the level of national government and not those relating to the business of or functions exclusively reserved for county governments. In enacting a law that gives Senate and National Assembly members a key role with regard to the executive business

of counties, Parliament has enacted a law that is unconstitutional.

46. In addition, Katiba contends that CGAA allows members of Parliament and county assemblies to perform implementation and administrative roles as well as oversight roles; that this makes parliamentarians and county assembly members both legislators as well as executors of legislation; that this weakens the ability of the legislator to hold the county executive accountable for its use of state authority and financial management, and that this goes against the principle of separation of powers, as well as the provisions of the County Government Act which at section 9(2)(a) provides that “A member of the county assembly shall not be directly or indirectly involved in the executive functions of the county government and its administration”. Katiba relies on the Supreme Court judgment *In Re the Matter of the Interim Independent Electoral Commission* Constitutional Application No 2 of 2011 and *Jayne Mati & another v Attorney General and another*, Nairobi Petition No 108 of 2011 in support of this argument.

47. Katiba contends, further, that section 91A(2)(a) is unconstitutional because CDBs have been created to provide forums for collaboration and consultation between the two levels of government yet other statutory mechanisms exist to facilitate collaboration between the two levels of government. Katiba specifically refers to section 187 of the Public Finance Management Act which established the Inter-governmental Budget and Economic Council for cooperation and consultation on financial matters, and section 54(2) of the County Governments Act which creates a forum responsible for “harmonisation of services rendered in the county, coordination of development activities in the county and coordination of intergovernmental functions.”

48. Finally, Katiba refers to article 201(d) which requires, as a principle of public finance management, that public finances be prudently used. It was its submission that the duplication of structures does not adhere to this principle.

Analysis and Determination

Issues for Determination

49. We have considered the pleadings and submissions of the parties, and we take the view that the key issue for determination in this matter is whether the County Governments (Amendment) Act 2014 (also referred to in this judgment as CGAA) is unconstitutional for

being in violation of the Constitution. In determining this issue, 1
 we shall also consider and determine several collateral issues that
 were raised by the Petitioners in respect thereto, as well as certain
 preliminary issues relating to the competence of the Petition raised 5
 by the respondents. For the sake of good order, we deal first with
 the preliminary issues raised by the Respondents.

Preliminary Issues

50. The Respondents have raised several questions relating to the
 competence of the Petition before us, the first two of which relate 10
 to the provisions of the Government Proceedings Act (GPA).

Non-Compliance with the Government Proceedings Act

51. The respondents have argued that the Petition is incompetent
 as it has not complied with the requirements of the Government
 Proceedings Act. Their submissions are, first, that the Attorney
 General, rather than the Senate, the National Assembly and the
 individual members of the Senate, should have been made the
 Respondent in this matter as required by section 12 of the Government
 Proceedings Act. They also impugn the Petition on the basis that the
 petitioners did not give the 30 day notice required under section 13A
 of the said Act prior to instituting the proceedings. 20

52. The preamble to the Government Proceedings Act states that it is:
 An Act of Parliament to state the law relating to the civil
 liabilities and rights of the Government and to civil proceedings 25
 by and against the Government; to state the law relating to the
 civil liabilities of persons other than the Government in certain
 cases involving the affairs or property of the Government; and
 for purposes incidental to and connected with those matters. 30

53. Section 12(1) of the Act, which is relevant for present purposes,
 provides as follows:

Subject to the provisions of any other written law, civil
 proceedings by or against the Government shall be instituted
 by or against the Attorney-General, as the case may be. 35

54. It must be observed, first, that the present matter is not a civil
 matter relating to “the affairs or property of government” in the
 manner contemplated under the provisions of the Government
 Proceedings Act. The Petition before us seeks the interpretation of
 the question whether an Act of Parliament is unconstitutional for
 violating the Constitution. It is brought under the provisions of 40

- article 165 and 258 of the Constitution which grant the Court the jurisdiction to interpret whether an Act of Parliament is inconsistent with or otherwise in contravention of the Constitution. It cannot therefore be deemed to be “civil proceedings” as contemplated in the Government Proceedings Act. In our view, the provisions of section 12 of the said Act do not apply to petitions alleging violation of constitutional rights or contravention of the Constitution. 1
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55. However, even if the said Act was found to be applicable, we take the view that any shortcomings in terms of process is cured both by the Constitution itself and the rules of procedure made pursuant thereto. Article 156(4)(b) of the Constitution provides that the Attorney General: 10
- “...shall represent the national government in court or in any other legal proceedings to which the national government is a party.” 15
56. As the national government, through the Senate and the National Assembly, is part of these proceedings, the Attorney General is constitutionally mandated to represent the national government and he is automatically part of these proceedings. In any case as this Court recently held in *The Council of Governors and others v The Senate* Petition No 413 of 2014: 20
- “The Constitution, 2010 allows the Attorney General the right to represent the National Government in Court proceedings but does not stipulate that the Attorney General should be sued in all instances where any organ of the National Government has been sued and to say otherwise would be absurd.” 25
57. In addition, rule 5(b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (The Mutunga Rules) states that: 30
- “A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.” 35
58. Ideally, the office of the Attorney General should have been made a substantive party to these proceedings, instead of an interested party. However, as is evident both from the Constitution and the rules which require that substantive justice be done, the joinder, misjoinder or non-joinder of a party is not sufficient to defeat a matter. As rule 5(d) of the Mutunga Rules further makes clear, the Court can make substitutions, or require the joinder of a party either 40

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- as a Petitioner or respondent: 1
- “The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—
- (i) order that the name of any party improperly joined, be struck out; and 5
 - (ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added”. 10
59. These rules are in accord with the requirements of the Constitution that in exercising judicial authority, the Court should seek to do substantive justice, hence the provisions of article 159(2)(d) that “justice shall be administered without undue regard to procedural technicalities.” In the circumstances, we find that the objection by the respondents with regard to the position of the AG on the basis of section 12 of the Government Proceedings Act is without merit. 15
60. The second objection, also on the basis of the Government Proceedings Act, is founded on the provisions of section 13A of the said Act. The respondents argue, on the authority of the case of *Orengo v Attorney General* (2007) eKLR, that the 30 day notice period required under section 13A of the Government Proceedings Act is absolute and cannot be derogated from. We take the view that two responses to this argument suffice. First, it must be observed that there are instances in which litigation against the government must be commenced on an urgent basis, when the 30 day notice period would defeat the purpose of the litigation. Secondly, the question of section 13A has been considered with respect to constitutional petitions, and found to be unconstitutional for violating the provisions of article 48 which provides that “The State shall ensure access to justice for all persons...”. 20 25 30
61. In interpreting the constitutionality of section 13A(1) of the Government Proceedings Act and having addressed his mind to the decisions in *Orengo v Attorney General* (*supra*), *Hudson Laise Walumbwa v Attorney General* HCCC No 2714 of 1987 and *Barrack Omudho Aliwa and another v Salome Arodi and another* Succession Cause No 38 of 2008, Majanja, J in *Kenya Bus Services Ltd and Another v Minister for Transport & 2 others* (*supra*) expressed his mind as follows; 35 40

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- “The strictures imposed by these provisions must be considered in light of the right of access to justice. The right of access to justice protected by the Constitution involves the right of ordinary citizens being able to access remedies and relief from the Court. In *Dry Associates v Capital Markets Authority and another* Nairobi Petition No 328 of 2011 (unreported), the Court stated, “Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one’s rights; equal right to the protection of those rights by the law enforcement agencies, easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal series; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.”
62. The learned judge went on to say that;
- “By incorporating the right of access to justice, the Constitution requires us to look beyond the dry letter of the law. The right of access to justice is a reaction to and a protection against legal formalism and dogmatism. (See ‘*Law and Practical Programme for Reforms*’ (1992) 109 SALJ 22) article 48 must be located within the Constitutional imperative that recognizes the Bill of Rights as the framework for social, economic and cultural policies. Without access to justice the objects of the Constitution which is to build a society founded upon the rule of law, dignity, social justice and democracy cannot be realized for it is within the legal processes that the rights and fundamental freedoms are realized. Article 48 therefore invites the Court to consider the conditions which clog and fetter the right of persons to seek the assistance of Courts of law.”
63. He observed, further, that;
- “The provisions for demanding [prior notice before suing the Government] is justified on the basis that the government is a large organization with extensive activities and fluid staff and it is necessary for it to be given the opportunity to investigate claims laid against it and decide whether to settle or contest liability taking into account the public expense. While the objectives are laudable, the effect of mandatory notice provisions cause hardship to ordinary claimants. I am of course aware that

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- pre-litigation protocols, for example order 3 rule 2 of the Civil Procedure Rules, require that notice be given before action is commenced but the penalty for non-compliance is not to lose the right to agitate the cause of action but to be denied costs incurred in causing the matter to proceed to action.” 1
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64. The Learned Judge then concluded as follows;
“Viewed against the prism of the Constitution, it also becomes evident that section 13A of the GPA provides an impediment to access to justice. Where the state is at the front, left and centre of the citizen’s life, the law should not impose hurdles on accountability of the Government through the Courts. An analysis of the various reports from Commonwealth which I have cited clearly demonstrate that the requirement for notice particularly where it is strictly enforced as a mandatory requirement diminishes the ability of the citizen to seek relief against the government. It is my finding therefore that section 13A of the Government Proceedings Act as a mandatory requirement violates the provisions of article 48. 10
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65. We agree with the learned judge and we see no reason to depart from his finding as we find the same to be sound in law. As was held in *The Council of Governors and others v The Senate (supra)*:
“Any rule of procedure that violates a party’s fundamental right and freedom cannot be said to be sound. We do not see any prejudice that the Respondent has suffered by the alleged failure of the Petitioner to issue the 30 days’ notice to the Attorney General as prescribed under the provisions of section 13A(1) of the Government Proceedings Act. We say so because the issues in contest are solely to do with the conduct of the Senate which is an organ of State that can properly be sued as such. In fact, the Senate entered appearance in its own name and by Counsel and we completely see no reason why the failure to either enjoin the Attorney General as a party or failure to give him notice of the intended proceedings will advance (impair/impede) the cause of justice. We therefore decline to strike out the Petition as we are conscious that it serves the interests of justice to determine it on its merits and resolve the important issues that it raises.” 25
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66. It is to be observed also that only the Court can grant the relief that the petitioner is seeking in this matter, namely the declaration

of invalidity of legislation on the basis that it is unconstitutional. The Attorney General could not have provided the petitioners with the relief that they seek, and even had we found that the 30 day notice was a requirement, it would have been a procedural step that would serve no purpose in a matter such as this. In the circumstances, we find no merit in the objections by the respondents with respect to the competence of the Petition, which we find is properly before us.

Jurisdiction

67. It is also incumbent on the Court to consider its jurisdiction in relation to the present matter, which revolves around the functions and distribution of powers between the national and county governments. This is in light of the argument by the AG that the petitioner should have approached Parliament if it was dissatisfied with the provisions of the CGAA, implying that the court has no jurisdiction to deal with this matter and that any dispute with regard to its provisions should be addressed to Parliament.

68. This argument, in our view, runs counter to the constitutional provisions with respect to the jurisdiction of this Court. At article 165(3)(d)(i), this Court is given the jurisdiction to determine the question whether any law is inconsistent with or in contravention of the Constitution. The jurisdiction of the Court to invalidate laws that are unconstitutional is in harmony with its duty to be the custodian of the Constitution, which pronounces its supremacy at article 2 by proclaiming, at article 2(4), that “Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”

69. Similarly, the general provisions of the Constitution, which are set out in article 258 contain the express right to every person to “... *institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.*” As this Court held in *The Council of Governors and others v The Senate (supra)*:

“We are duly guided and this Court vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the

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- Petition before us alleges a violation of the Constitution by the Respondent and in the circumstances, it is our finding that the doctrine of separation of power does not inhibit this Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution. In fact the invitation to do so is most welcome as that is one of the core mandates of this Court". 1 5
70. It is therefore our finding that this Court has the requisite jurisdiction to determine the question whether the CGAA 2014 is unconstitutional. 10
- Whether article 119(1) of the Constitution Applies
71. It is useful, however, in closing on jurisdictional questions, to address ourselves to the provisions of article 119(1) of the Constitution. The AG submits that the petitioners ought to have approached Parliament in accordance with the provisions of article 119(1) prior to filing its petition. Article 119(1) and (2) are in the following terms: 15
- “Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal legislation. 20
2. Parliament shall make provision for the procedure for the exercise of this right.”
72. The question is whether this provision is intended to take away the right of a party to question the constitutionality of an Act of Parliament, or indeed any action taken by the legislature, guaranteed under articles 22 and 258. Further, whether it can also be taken as ousting the jurisdiction of the Court under article 165(3)(d) to determine any question respecting the interpretation of the Constitution, including “the question whether any law is inconsistent with or in contravention of” the Constitution, or under article 165(3)(d)(iii), to determine 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”” 25 30 35
73. In our view, the answer must be in the negative. Doubtless, article 119(i) will serve a useful purpose in allowing citizens to petition Parliament to consider matters of concern to them that are within the purview of Parliament, including the repeal or amendment of legislation. It appears to us, however, that article 119 is not 40

intended to cover situations such as is presently before this Court. 1
The question of the constitutionality of the impugned CGAA was
raised with Parliament prior to its enactment. As deposed by Mr
Charles Nyachae, the Chairman of CIC, in his affidavit sworn on
19th September 2014, the issue had been brought to the attention 5
of Parliament through CIC's Advisory Opinion in the month of
August 2014, prior to the enactment of the CGAA. Parliament,
nonetheless, appears to have disregarded the concerns raised
regarding its conformity with the Constitution and proceeded to 10
enact the legislation.

74. It would therefore be, in our view, for the Court to abdicate its
responsibility under the Constitution to hold that a party who
considers that legislation enacted by Parliament in any way violates 15
the Constitution is bound to first petition Parliament with respect
to the said legislation. The constitutional mandate to consider the
constitutionality of legislation is vested in the High Court, and
articles 2(4) and 165(3)(d)(i) mandate this Court to invalidate any
law, act or omission that is inconsistent with the Constitution.
This is in harmony with the mandate of the courts to be the final 20
custodian of the Constitution.

75. This Court appreciates that where there is a clear procedure for
redress of any particular grievance prescribed by the Constitution
or An Act of Parliament, that procedure should be strictly followed. 25
Article 3(1) of the Constitution enjoins every person to respect,
uphold and defend the Constitution. Similarly, article 258(1) thereof
donates the power to every person to institute court proceedings
claiming that the Constitution has been contravened, or is threatened
with contravention. If this Court were to shirk its constitutional 30
duty under article 165(3)(d), it would have failed in carrying out
its mandate as the temple of justice and constitutionalism and the
last frontier of the rule of law. In the circumstances, the argument
that the petitioner should have approached Parliament under article
119(1) is without merit. 35

Presumption of Constitutionality

76. It has been argued on behalf of the AG and the respondents that
every Act of Parliament enjoys a presumption of constitutionality
until the contrary is proved. Reliance for this proposition is placed 40
on the case of *Ndyanabo v Attorney General* [2001] EA 495 a
judgment of the Court of Appeal of Tanzania, as well as the English

case of *Pearlberg v Varty* [1972] 1 WLR 534.

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77. In the *Ndyanabo* case, the Court stated that:

“Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislations should receive such a construction as will make it operative and not inoperative”

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78. We agree, as found by the Court in *Ndyanabo*, that the principle of presumption of constitutionality is a sound principle. This is so except in the case of legislation that limit fundamental rights which, in our context, the Constitution has provided, at article 24(3), the parameters against which the constitutionality of such legislation is to be weighed. With respect to legislation that is alleged to violate provisions of the Constitution other than the Bill of Rights, the obligation is on the petitioner to establish that the legislation violates a provision(s) of the Constitution. This was the view taken by the Court in the case of *Coalition for Reform and Democracy (CORD) v Attorney General and others* [2015] eKLR in which it stated:

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“We have been called upon to declare SLAA in its entirety, or at the very least certain provisions thereof, unconstitutional for being in breach of various Articles of the Constitution. In considering this question, we are further guided by the principle enunciated in the case of *Ndyanabo v Attorney General* [2001] EA 495 to the effect that there is a general presumption that every Act of Parliament is constitutional. The burden of proof lies on any person who alleges that an Act of Parliament is unconstitutional.

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However, we bear in mind that the Constitution itself qualifies this presumption with respect to statutes which limit or are intended to limit fundamental rights and freedoms. Under the provisions of article 24 which we shall analyse in detail later in this judgment, there can be no presumption of constitutionality with respect to legislation that limits fundamental rights: it must meet the criteria set in the said article.”

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79. As the Petitioners allege a violation of the Constitution, the presumption of constitutionality applies in this case, and the petitioners have an obligation to establish that the CGAA is unconstitutional.

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Applicable Principles

80. Before considering the allegation by the petitioners that the CGAA is unconstitutional, however, it is important to set out the principles applicable in determining the question whether an impugned legislation or part thereof meets the test of constitutionality. 5

81. This Court has considered these principles in various decisions - see for instance the decision of the five-judge bench of the High Court in *Coalition for Reform and Democracy & others v The Attorney General (supra)*. 10

82. In the case of *Institute of Social Accountability & another v National Assembly & 4 others* High Court Petition No 71 of 2014 [2015] eKLR, the Court stated as follows at paragraphs 57 – 60: 15

[57] “[This Court is enjoined under article 259 of the Constitution to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, this Court is obliged under article 159(2)(e) of the Constitution to protect and promote the purpose and principles of the Constitution. 20

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[I]n determining whether a Statute is constitutional, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (*see Murang’a Bar Operators and another v Minister of State for Provincial Administration and Internal Security and others* Nairobi Petition No 3 of 2011 [2011] eKLR, *Samuel, Momanyi v Attorney General and another (supra)*). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. The Canadian Supreme Court in the *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 enunciated this principle as follows; 30

Both purpose and effect are relevant in determining

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- constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity. 1
- [59] Fourth, the Constitution should be given a purposive, liberal interpretation. The Supreme Court in *Re The Matter of the Interim Independent Electoral Commission* Constitutional Application (*supra*) at para 51 adopted the words of Mohamed AJ in the Namibian case of *State v Acheson* 1991 (20 SA 805, 813) where he stated that; 5
- “The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship government and the governed. It is a mirror reflecting the “national soul” the identification of ideas and.....aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion”. 10
- Lastly and fundamentally, it is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see *Tinyefuza v Attorney General of Uganda* Constitutional Petition No 1 of 1997 (1997 UGCC 3)). 15
- We are duly guided by the principles we have outlined and we accept that while interpreting the impugned legislation alongside the Constitution, we must bear in mind our peculiar circumstances. Ours must be a liberal approach that promotes the rule of law and has jurisprudential value that must take into account the spirit of the Constitution. “As this is a matter that 20
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82. At paragraph 136 of the *Institute of Social Accountability* case, the Court concluded as follows:
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83. These are the principles that will guide our consideration of the question whether section 91A of the CGAA meets constitutional muster.
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- Whether the County Governments (Amendment) Act 2014 is Unconstitutional.
84. Having disposed of the preliminary issues raised in opposition to the Petition and considered the applicable principles in interpreting the issue before us, we now turn to consider the issue at the heart of the matter: whether section 91A of the County Government (Amendment) Act violates the provisions of the Constitution.
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85. The Petitioners and CIC have argued that it does, for various reasons. First, that it provides for the involvement of the national and county legislatures in executive functions at the counties, thus violating the principle of separation of powers, in several respects. It is also in conflict with various legislation providing for devolution, and leads to a multiplicity of bodies dealing with devolution matters. In dealing with this substantive issue therefore, we shall start by considering the role of Parliament and Senate in devolved government.
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86. In dealing with this question, it is important to bear in mind the constitutional provisions with regard to the exercise of power by state organs. In particular, we are cognisant of the provisions of article 10 with respect to the national values and principles that govern the exercise of state power. Among these principles is the cardinal principle of the Rule of Law, which requires that only powers given under the Constitution or the law is exercised by any body or person. In this regard, article 2(2) of the Constitution provides that “no person may claim or exercise State authority except as authorised under this Constitution”. The effect of this is that if a certain power is granted to a specific organ, body or level of government, then no other entity can lawfully exercise that power.
87. From the outset, the Constitution sets out and recognises the basic principles with respect to separation of powers between respective arms and organs of government. Chief among these is the principle of devolution. At article 1(3) and (4) of the Constitution, the people of Kenya delegate their sovereign power in the following terms:
- (3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—
 - (a) Parliament and the legislative assemblies in the county governments;
 - (b) the national executive and the executive structures in the county governments; and
 - (c) the Judiciary and independent tribunals.
 - (4) The sovereign power of the people is exercised at—
 - (a) the national level; and
 - (b) the county level.
88. The respective powers of the organs of government are set out in the Constitution. With respect to the National Assembly, its powers are set out at article 95, and, so far as is relevant for present purposes, are as follows:
- 95(1) The National Assembly represents the people of the constituencies and special interests in the National Assembly.
 - (2) The National Assembly deliberates on and resolves issues of concern to the people.
 - (3) The National Assembly enacts legislation in accordance with Part 4 of this Chapter.
 - (4) The National Assembly—

(a) determines the allocation of national revenue between the levels of government, as provided in Part 4 of Chapter Twelve; (b) appropriates funds for expenditure by the national government and other national State organs; and (c) exercises oversight over national revenue and its expenditure.	1
(5) The National Assembly— (a) ... ; and (b) exercises oversight of State organs.	5
89. With respect to the Senate, the Constitution provides at article 96 as follows:	
96(1) The Senate represents the counties, and serves to protect the interests of the counties and their governments. (2) The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in articles 109 to 113. (3) The Senate determines the allocation of national revenue among counties, as provided in article 217, and exercises oversight over national revenue allocated to the county governments. (4) The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with article 145.	10
90. Thus, the constitutional mandate of both the National Assembly and Senate are circumscribed by the Constitution and limited to those areas expressly placed within their mandate. With respect to the Senate, its constitutional mandate is that of representation of counties and protection of the interests of counties at the national level; law-making in relation to matters concerning counties at the national level; and allocation of revenue to counties, and oversight over national revenue allocated to counties. Its mandate, like that of the National Assembly, does not extend to matters or functions reserved by the Constitution to counties at the county level.	15
91. The principles of devolution, which are at the heart of devolved government under the Constitution, are set out at article 174 as follows:	20
174. The objects of the devolution of government are-	25
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(a) to promote democratic and accountable exercise of power;	1
(b) to foster national unity by recognising diversity;	
(c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;	5
(d) to recognise the right of communities to manage their own affairs and to further their development;	
(e) to protect and promote the interests and rights of minorities and marginalised communities;	10
(f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;	
(g) to ensure equitable sharing of national and local resources throughout Kenya;	15
(h) to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and	20
(i) to enhance checks and balances and the separation of powers.	
92. With regard to the exercise of powers at the county level, articles 179-185 are instructive. Article 179(1) provides that the executive authority of the county is vested in and exercised by the county executive committee comprising, as provided under article 179(2) (a), the county governor and the deputy county governor, and members appointed by the county governor, with the approval of the county assembly, from among persons who are not members of the assembly.	25
93. With respect to its functions, the county executive committee is vested with power, under article 183(1) to, inter alia, implement county legislation; implement within the county national legislation to the extent that the legislation so requires; manage and coordinate the functions of the county administration and its departments; and perform any other functions conferred on it by the Constitution or national legislation.	35
94. Such “other functions” are expressly conferred by the County Governments Act (CGA) and the Public Finance Management Act (PFMA) on the county executive committee by sections 30(3)	40

- (a) and 30(2)(f), 37, 104 and 105 of the CGA as well as sections 126, 129 and 130 of the PFMA. Thus, under the Constitution and legislation, it is the responsibility of the county executive comprising the governor and the county executive committees that he constitutes under section 30(2)(e) of the CGA to prepare and develop developmental plans and budget estimates and submit them to the respective county assemblies for approval. 1
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95. It is thus evident that the powers of the Senate and the National Assembly do not include the powers to legislate at county level, which powers, under article 185(1), are vested in the county assembly. They do not also, as is evident from Article 179 and 183, as well as the provisions of the CGA and the PFMA, include the preparation and development of plans and budgets for counties. 10
96. Further, under article 189(1), the Constitution specifically requires the performance of functions by the two levels of government in a manner that respects their independence by providing as follows: 15
- Government at either level shall 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 of institutions of government at the other level and, in the case of county governments, within the county level. 20
97. It is against this background that Parliament enacted the County Governments (Amendment) Act 2014. The Act is a four-section enactment which amended the County Governments Act by introducing three new provisions, sections 91A, 91B and 91C. Section 91A, which is what has precipitated the present dispute, is in the following terms: 25
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- “There is established, for each county, a board to be known as the County Development Board, consisting of the following persons-
- (a) The member of the Senate for the county elected under article 98(1)(a) of the Constitution, who shall be the chairperson of the Board and convener of the Board’s meetings. 35
- (b) the members of the National Assembly elected under article 97(1)(a) of the Constitution representing the constituencies located in the county. 40
- (c) the woman member of the national Assembly for the

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County elected under article 97(1)(b) of the Constitution.	1
(d) the governor as the chief executive officer of the county government, who shall be the vice-chairperson of the Board, and in his absence, the deputy governor of the county shall be the vice-chairperson.	5
(e) the deputy governor of the county;	
(f) the leader of the majority party in the county assembly;	
(g) the leader of the minority party in the county assembly;	
(h) the chairperson of the county assembly committee responsible for finance and planning;	10
(i) the chairperson of the county assembly committee responsible for budget;	
(j) the chairperson of the County Public Service Board, who shall be an ex-officio member;	15
(k) the County Secretary, who shall be the secretary of the Board and shall also provide Secretariat services to the Board, as an ex-officio member;	
(l) the county commissioner, as an ex-officio member;	
(m) the head of a department of the national government or the county government or any other person invited by the Board to attend a specific meeting of the Board.	20
98. The functions of the CDBs are provided at section 91A(2) as follows:	
(2) The County Development Board for each County shall:-	25
(a) Provide a forum at the county level, for consultation and coordination between the national government and the county government on matters of development and projects in accordance with the Constitution, and more specifically, article 6(2), Article 10, and article 174 of the Constitution.	30
(b) Consider and give input on any county development plans before they are tabled in the county assembly for consideration.	35
(c) Consider and give input on county annual budgets before they are tabled in the county assembly for approval;	
(d) Consider and advise on any other issues of concern that may arise within the County.	40
99. Section 91B makes provisions with respect to the operational expenses of the CDBs. It states that:	

- “The operational expenses in respect of the County Development Board shall be provided for in the annual estimates of the revenue and expenditure of the respective county government.” 1
100. The CGAA then creates an offence with respect to the operations of the CDBs and sets out a penalty under section 91C by providing as follows: 5
- ‘Any person who knowingly and unlawfully obstructs, hinders, undermines or prevents the County Development Board from discharging its functions under this Act commits an offence and is liable on conviction, to punishment by a fine not exceeding one million shillings or imprisonment for a term not exceeding one year or both.’ 10
101. It will be noted that section 91A(2)(b) has vested in the CDBs the mandate to give input on county development plans and county annual budgets before they are tabled in the county assembly for consideration. Noteworthy also is the composition of the CDB, which consists of a large number of members of the national legislature—its Chair is the Senator of the County, and the members of Parliament of constituencies within the County, as well as the women representative of the County, are members. The governor who, under the Constitution, is the Chief Executive Officer of the County, is the vice-chair of the CDB and deputises the Senator. Finally, it cannot escape notice that the CDB, though chaired by the Senator and composed of members of the national legislature and national executive, is intended to perform county functions, and to be funded from county funds, section 91B providing that the operational expenses of the CDB shall be provided for in “the annual estimates of the revenue and expenditure of the respective county government.” 15
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102. In our view, the composition and mandate of the CDBs upsets and is in violation of the framework created by the Constitution with respect to devolution and the separation of powers between the various institutions created under the Constitution which leaves the approval of county development plans and budget to county assemblies. 35
103. Neither the Senate, members of the National Assembly or members of the national executive such as county commissioners have a role to play in the planning and budgeting for county 40

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- development plans. The Senate's role, as is evident from the provisions of Article 96, is to represent the counties at the national level, and to protect their interests and governments; to participate in the law-making function of Parliament by considering, debating and approving Bills concerning counties, and to determine the allocation of national revenue to and among counties. Further, and more importantly, the Senate plays a critical oversight role with respect to the functioning of counties. In *The Council of Governors and others v The Senate* (*supra*), a three-judge bench of this Court considered the meaning of the term "oversight" and stated as follows:
- [125] "...while the Senate has an oversight role over national revenue allocated to County Governments, the issue in that regard, as we understand it, is the scope, extent and nature of the said oversight role.
- [126] In answering that question, we must first explain the meaning of the word, "oversight", in its ordinary English meaning before we determine the extent of its applicability. The plain English meaning of the word "oversight" as defined in the *Concise Oxford English Dictionary*, 10th Edition is; "the action of overseeing". "Oversee" has then been defined by the same dictionary as, "supervise" or "look at from above".
104. The Court then concluded as follows with respect to the oversight role of the Senate:
- [127] "Taking the above meanings and as can be seen in the context of article 96(3) of the Constitution, in our interpretation, oversight implies a procedural and substantive function for the Senate. Procedural in the sense that the Senate is involved in the process leading to division and sharing of national revenue as between the National and County Governments as envisaged under articles 202 and 203 of the Constitution. The Senate thus gets involved in the enactment of the legislation contemplated in that regard and in particular as provided for under article 205 of the Constitution - See *Speaker of the Senate & another v Attorney General*, Advisory Opinion No 2 of 2013.
- [128] After allocation of national revenue to Counties, the Senate exercises what we would call substantive oversight by ensuring that the revenue so allocated has been

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- and within which the people of Kenya have delegated their sovereign power as spelt out in article 1(3)(b) and 1(4) of the Constitution. 1
108. In addition, under article 6 of the Constitution, national and county governments have equal status as organs of state power, and in the exercise of their respective mandates, they must do so in a spirit of mutual respect. Article 6(2) provides that: 5
- “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 co-operation”. 10
109. As though to underline the critical place of devolution in the new constitutional dispensation, as well as to make specific provision with regard to the operations of county governments, the Constitution devotes to it an entire chapter, Chapter 11 of the Constitution. In Chapter 12, the Constitution sets out, among other things, the principles of public finance and the manner of sharing revenue between national and county governments. It can properly be said that the commitment to devolution and sharing of power runs throughout the entire Constitution like a golden thread. 15 20
110. Thus, the structure of devolved government as envisioned by the people of Kenya and encapsulated in the Constitution cannot be altered without an elaborate amendment process that requires the direct endorsement of such a change by the people of Kenya people in accordance with the requirements of article 255(1)(i). 25
111. By establishing the CDBs composed of the Senator, Members of the National Assembly and women members of the National Assembly, as well as national government officers at the county level, with the mandate to consider and make inputs into county budgets and plans, the CGAA effectively alters the structure of devolution by involving in its functioning and operations persons and officers from other levels of government. As we illustrate below, this is not the only shortcoming of this legislation. It effectively vests in the same hands the powers of planning, implementation and oversight, in clear violation of the principles of checks and balances and separation of powers, principles which we shall consider in the following section. 30 35
- Separation of Powers 40
112. One of the objects of devolution set out in article 174(i) is “to enhance checks and balances and the separation of powers.”

Separation of powers, in its most basic form, provides that the executive makes policy decisions, the legislature enacts laws and the judiciary interprets and applies the laws made by the legislature. The thinking behind separation of power is to ensure that there are checks and balances, and that no-one person or institution exercises all powers within a state. Thus, the Constitution provides at article 94 that “the Legislative Authority of the Republic is derived from the people and at National level is vested and exercised by Parliament.”

113. Article 130 of the Constitution provides that the Executive Authority is vested in the President, Deputy President and the Cabinet. Legislative and executive authority at the national and county level is thus vested in different bodies, with the executive authority at the county level lying with the governor, the deputy governor, and the county executive committee, while the legislative authority is vested in the respective county assemblies. In High Court Petition No 229 of 2012- *Trusted Society of Human Rights v The Attorney General and others*, the Court, while considering the principle of separation of powers in relation to the judiciary and the legislature, observed as follows at paragraph 63 and 64 of the judgment:

[63] “....we begin by re-stating that the doctrine of separation of powers is alive and well in Kenya. Among other pragmatic manifestations of the doctrine, it means that when a matter is textually committed to one of the coordinate arms of government, the Courts must defer to the decisions made by those other coordinate branches of government. Like many modern democratic Constitutions, the New Kenyan Constitution consciously distributes power among the three co-equal branches of government to ensure that power is not concentrated in a single branch. This design is fundamental to our system of government. It ensures that none of the three branches of government usurps the authority and functions of the others. This constitutional design is a direct influence from Montesquieu, the noted French Philosopher who is often called the father of modern constitutionalism. Noting that separation of powers was essential to the liberty of the individual, Montesquieu famously said:

When the legislative and executive powers are united in the same person, or in the same body of magistrates,

- arguments with respect to the Constituency Development Fund Act. It observed as follows at paragraph 100: 1
- “100.” It is therefore argued that through the CDF Act, Parliament has created an oversight role over the funds allocated under CDF and that CDF finances activities not supported by county governments such as education bursaries to needy students and security.” 5
117. The Court then observed with respect to the executive authority of a county at paragraph 106 that: 10
- “Executive authority of a county, including implementing legislation and managing and coordinating the functions of the county administration are roles bestowed on the county executive committee (CEC) under Article 183 of the Constitution. Indeed, both the Constitution and the law requires the CEC to submit reports regarding affairs of the county to the county assembly. Further, article 179(4) of the Constitution designates the county governor and deputy governor as the chief executive and deputy chief executive of the county respectively. Additionally, Part XI of the County Government Act has provided for the statutory framework to be used in the county planning. Section 104 of that Act has made it mandatory for counties to plan for everything being implemented in the County.” 15
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118. By purporting to create an oversight role for national government in the counties, section 91A purports to allocate to national institutions roles in the counties that are not in compliance with the Constitution. In the *Institute of Social Accountability* case (*supra*), the Court held at paragraph 107 that: 30
- “Article 186(1) of the Constitution has set out that national and county governments are to share certain functions within the County and those functions are clearly stipulated in the Fourth Schedule to the Constitution. The creation and assignment of roles to an entity outside the structures of governance established under the Constitution is antithetical to the principles of the Constitution as it threatens to violate the functional competencies of county government within which CDF operates.” 35
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119. While the CDBs may be said to differ from the CDF in that they are intended to exercise “oversight” functions, they are in virtually

every respect analogous to the CDF. The allocation of any functions in relation to county development plans to national government institutions is not in line with the Constitution and offends the principle of devolution, separation of powers and allocation of functions. This was clearly articulated in the <i>Institute of Social Accountability</i> case when the Court observed at paragraph 122 that:	1
“Article 1(4) of the Constitution recognises two levels of government, the national and county governments. Each of these levels exercises power derived from the Constitution itself. Under article 1 of the Constitution, the county government does not derive its power from the national government but directly from the People of Kenya and under the Constitution. These two levels of governments are therefore, in theory, equal and none is subordinate to the other. MPs and cabinet secretaries involved in the management or implementation of the CDF constitute the executive and legislative organs of the national government. Their involvement in development activities at the county level not only threatens to undermine the functions of the government at the county level but also blurs the executive and legislative divide that underlies the principle of separation of powers. We therefore find that it is unconstitutional for the national government to extend its mandate in the counties beyond its mandate under the Constitution through the artifice of the CDF.	5 10 15 20 25
120. The parallels between the CDBs and the CDF are obvious. In the same way that the legislature sought to retain its extension of powers in the counties through the CDF, and thus control funds that constitutionally fall within the mandate of the counties, a similar attempt is being made to extend the powers of the national legislature, the National Assembly and Senate, into the county executive by assigning to the CDBs a role in the planning and budgetary processes of counties. This, we reiterate, not only undermines devolution, but is a direct threat to the principle of separation of powers which is one of the cornerstones of our new, democratic dispensation. We fully agree with the view of the Court in the <i>Institute of Social Accountability</i> case when it observed:	30 35
[127] “The principle of separation of powers is at the heart of the structure of our government; each organ is independent of each other but acting as a check and balance to the other and also working in concert to ensure that the machinery of the state works for the	40

good of Kenyans. The Apex Court in the *Matter of the Interim Independent Electoral Commission (supra)* expressed itself as follows; 1
 “The effect of the Constitution’s detailed provision for the 5
 rule of law in processes of governance, is the legality of executive or administrative actions to be determined by the Courts, which are independent of the Executive branch. The essence of separation of powers, in this context, is that the totality of governance powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set up, it is to be recognized that none of the several government organs functions in splendid isolation.” 10

121. We need say no more, we believe, to demonstrate how patently antithetical to the spirit of devolution, the principles of separation of powers and good governance, as well as the rule of law, the county development boards established under the County Governments (Amendment) Act, are. We therefore find and hold that section 91A of the County Government (Amendment) Act is unconstitutional. By necessary extension, sections 91B and 91C, which are intended to bolster the provisions of 91A of the CGAA, are also of necessity unconstitutional. As the entire County Governments (Amendment) Act consists of these three provisions, we have no hesitation in holding the entire Act unconstitutional, and therefore null and void. 15
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Disposition

122. The Petitioners in the consolidated petitions sought similar prayers with respect to the constitutionality of the CGAA. In the case of the 1st Petitioner, it sought the following orders: 30

- A. A declaration that within the intendment of article 6(2), 95, 96, 174 and 175 of the Constitution and resonating the intention of 179(i), 179(4), 183(1), 183(1) and 189(1) of the Constitution, the provisions of section 91A(1) of County Government (amendment) Act 2014 that establishes County Development Boards which shall be comprised in the manner stated in the said Act and undertake the functions outlined in section 91A(2) of the Act are unconstitutional. 35
- B. A declaration that within the intendment of article 6(2), 95, 96, 174(i) and 175 of the Constitution and resonating the intention of 179(1), 179(4), 183(1), 185(3) and 189(1) of the Constitution, the provisions of section 40

91A(1) of County Government (Amendment) Act 2014 that establishes County Development Boards which shall be comprised in the manner stated in the said Act and undertake the functions outlined in section 91A(2) of the Act are null and void.	1
C. There be no order as to costs.	5
123. As is evident from the prayers set out above in respect of the 1 st Petitioner, as well as those of the 2 nd -4 th Petitioners set out earlier in this judgment, the Petitioners substantially seek a declaration that the entire County Governments (Amendment) Act 2014 is unconstitutional. We see no purpose in granting the two prayers and instead grant the following final orders:	10
i. The County Governments (Amendment) Act 2014 is hereby declared unconstitutional, null and void;	15
ii. As the Petition raised issues of great public interest and importance, let each party bear its own costs of the Petition.	
124. We are grateful to all the parties for their very extensive submissions and authorities, and for the diligence with which they presented their respective parties' positions on the issues in dispute.	20
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**Masinde v County Government of Vihiga
& another [2015] KLR-HCK**

High Court, at Kakamega
AC Mrima, J

July 9, 2015

Petition Cause No 25 of 2014

Brief facts

Following the advertisement for the positions of Members of the County Management Boards by the National Land Commission (“the Commission”), the Petitioner applied for such in respect to Vihiga County Land Management Board (“the Board”). She was shortlisted with about 20 other people and eventually interviewed by a panel comprised of members of the Commission and the Vihiga County Service Board. The Petitioner was successful in the interview and was selected among 6 other candidates for the final approval by the Vihiga County Assembly (the Assembly). The Assembly delegated the vetting process to the Committee on Land, Housing and Urban Planning, hereinafter referred to as “the Committee”.

The Petitioner appeared before the Committee on 31/10/2014 and despite the Committee noting that she was properly vested with the knowledge and expertise for the position it instead recommended against her appointment on grounds that though born in Emuhaya, she was married and lived in Mumias and as such she was not able to represent the interests of the people of Emuhaya. The Assembly eventually adopted the Committee’s recommendation and further directed that the position for a representative of Emuhaya sub-County be accordingly re-advertised.

The Petitioner filed a Petition alleging that the recommendation by the Committee and the subsequent adoption thereof by the Assembly was discriminatory as the only reason given for her not being recommended for appointment despite being a suitable candidate was that she was married in Mumias within the neighboring Kakamega County. That, she argued, was discriminatory based on her marital status more so given that the proximity of where she lived and Vihiga County could not inhibit her to discharge her duties as a member of the Vihiga County Land Management Board. She indicated that if that was the only hitch, then given an opportunity, she would have relocated back to Emuhaya. The Petitioner further contended that she was the only one whose marital status became an issue whereas several others

were also married and not resident within the County. She cited the example of the nominee who was married and lived in Nairobi over 350 km away from the Vihiga County among others. It was further contended that the Petitioner was the only woman candidate and the Committee raised the issue of her marriage to her disadvantage and to the advantage of her male counterparts whose vetting did not touch on their status at all.

Issues

- i. What was the role of the County Assembly in approval proceedings in the process of appointments of nominees;
- ii. What amounted to discrimination;
- iii. Whether the Petitioner's rights were infringed either as alleged or otherwise during the nomination and vetting process

Constitutional Law – fundamental rights and freedoms – equality and freedom from discrimination – whether a by-law excluding the petitioner from appointment of being a member of the county land board because of her marital status was unconstitutional and discriminatory – Constitution of Kenya, 2010, article 27, 28

Constitutional Law – public officers – appointment of public officers – procedure prescribed for the nomination and approval of public officers – whether the rejection of the petitioner's nomination to Vihiga County Land Management Board based on her marital status was in violation of her Constitutional rights – Public Appointments (Parliamentary Approval) Act, sections 6, 7; County Governments Act, section 35(2); Constitution of Kenya 2010 articles 47, 50, 165 and 179(2).

Constitutional Law – Devolved Government – County Assembly – role of the assembly – nominations and appointments done by the assembly – whether the board members of the assembly acted unlawfully during the recommendations and disapproval of the Petitioner – County Governments Act, section 8(2); Public Appointments (Parliamentary Approval) Act sections 6, 7.

Constitutional Law – Devolved Government – County Government – nominations and appointments of County Chief Officers – whether applicants could be discriminated against by virtue of their marital status – County Governments Act, sections 65 and 69.

Constitution of Kenya, 2010, article 27

- “27(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights

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and fundamental freedoms.	1
(3) Women and men have the right to equal treatment, Including the right to equal opportunities in political, economic, cultural and social spheres.	
(4) The State shall not discriminate directly or indirectly Against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth.	5
(5) A person shall not discriminate directly or indirectly Against another person on any of the grounds specified or contemplated in clause (4).	10
(6) To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programs and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.	15
(7) Any measure taken under clause (6) shall adequately Provide for any benefits to be on the basis of genuine need.	20
(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.	25

National Land Commission Act, section 18

1. The Commission shall, in consultation and co-operation with the national and county governments, establish county land management boards for purposes of managing public land.	30
(2) A county land management board shall comprise—	
(a) not less than three and not more than seven members appointed by the Commission; and	
(b) a physical planner or a surveyor who shall be nominated by the county executive member and appointed by the governor.	35
3. A member of the board, unless ex officio, shall be appointed for a single term of five years and shall not be eligible for re-appointment.	40
4. The chairperson of the board shall be elected by the members in their first sitting.	

5.	The secretary to the board shall be appointed by the Commission.	1
6.	The appointment of the members shall be approved by the county assembly and shall take into account the national values referred to in article 10 and article 232 of the Constitution and shall reflect gender equity and ethnic diversity within that county.	5
(7)	The chairperson, members and the secretary of the board shall, before assuming office, make and subscribe, before a judge, to the oath or affirmation set out in the Third Schedule.	10
(8)	In the discharge of their functions, the boards shall comply with the regulations made by the Commission under this Act.	15
(9)	The boards shall—	
	(a) subject to the physical planning and survey requirements, process applications for allocation of land, change and extension of user, subdivision of public land and renewal of leases; and	20
	(b) perform any other functions assigned by the Commission or by any other written law.	
 Public Appointments (Parliamentary Approval) Act (the Approval Act), section 7		
i.	Upon receipt of a notification of appointment, the Clerk shall invite the Committee to hold an approval hearing.	25
ii.	The Committee shall determine the time and place for the holding of the approval hearing and shall inform the Clerk.	
iii.	The Clerk shall notify a candidate of the time and place for the holding of an approval hearing.	30
iv.	The Committee shall notify the public of the time and place for holding an approval hearing at least seven day prior to the hearing.	35
v.	Subject to this Act, all Committee proceedings on public appointments shall be open and transparent.	
vi.	Despite subsection (5), a Committee may, on its own motion or on the application of a candidate or any other concerned person, determine that the whole or part of its sittings shall be held in camera.	40
vii.	An approval hearing shall focus on a candidate's academic	

credentials, professional training and experience, personal integrity and background.	1
viii. The criteria specified in the Schedule shall be used by a Committee during an approval hearing for the purposes of vetting a candidate.	5
ix. Any person may, prior to the approval hearing, and by written statement on oath, provide the Clerk with evidence contesting the suitability of a candidate to hold the office to which the candidate has been nominated.	10
x. A candidate may, at any time, by notice in writing addressed to the Clerk, withdraw from the approval process and the candidate's nomination shall thereupon lapse.	15
xi. Issues for consideration.	15
The issues for consideration by the relevant House of Parliament in relation to any nomination shall be—	
a. the procedure used to arrive at the nominee;	
b. any constitutional or statutory requirements relating to the office in question; and	20
c. the suitability of the nominee for the appointment proposed having regard to whether the nominee's abilities, experience and qualities meet the needs of the body to which nomination is being made."	25
Held.	
1. Under sub-section (6), of section 18 of the National Land Commission Act, the role of the Assembly was clearly given as 'to approve the appointment of the Board members'. The Assembly was to take into account the national values under articles 10 and 232 of the Constitution and also endeavor to reflect gender equity and ethnic diversity within that County. It was hence clear that the Assembly was not interested in the process towards the nomination of the Board Members that only came in during the approval proceedings and with a clear mandate towards the finalization of the appointment process.	30
2. The Assembly, in the absence of its own statute guiding the process of approval of the nominee rightly and pursuant to section 8(2) of the County Governments Act relied on the Public Appointments (Parliamentary Approval) Act (herein referred to as the Approval Act).	40
3. Whereas section 6 of the Approval Act provided for the process	

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- of approval or vetting, section 7 thereof provided for the issues for consideration by the Assembly in relation to any nomination. The Assembly was required to comply with all the requirements in section 7 of the Approval Act which included a consideration of the procedure used to arrive at the nominee, the suitability of the nominee for the appointment and further relooking at any constitutional or statutory requirements relating to the office. The effect thereof was that a nominee being vetted was effectively taken through the entire process that led to the nomination. However, that was buttressed by the Questionnaire in the Schedule of the Approval Act. The Court was therefore unable to find that the Assembly conducted an interview upon the Petitioner but that it carried out its mandate under the law. 1
4. The Committee on the vetting exercise of the nominees identified the ages and marital status of the nominees who appeared before it. It also identified their diverse experiences and in some cases where they resided. None of the nominees recommended by the Committee for appointment and eventually approved by the Assembly were so recommended and approved on the considerations of their marital status and their places of residence except the Petitioner who on those considerations was not approved for the appointment. 5
5. Whereas the Committee had the mandate to consider various issues as so required in law, it was incumbent upon it to treat all the nominees equally especially on the issues of marital status, residences and their ability to discharge their duties for those who were not residing within the County; if those issues were to form the basis of the approval of the nominees. Therefore the Petitioner was treated differently from the other nominees who were all in comparable situations and without any reasonableness or objectivity. 10
6. When the report was laid before the Assembly the same was debated and eventually approved in line with the committee's recommendation. The debate in the Assembly provided an opportunity which the Assembly was to revisit the relevant constitutional provisions *viz-a-vis* the recommendations made on the part of the Petitioner. The Hansard was quiet that the Assembly directed any efforts on the Constitution of Kenya. 15
7. The recommendation by the Committee and the subsequent adoption thereof by the Assembly which was the subject of the Petition therefore had a discriminatory effect as it tended to exclude the appointment of women who though competent and were born within the Vihiga County but married outside of the County from 20
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- serving in any public appointment within the Vihiga County. That was clearly antithetical to the provisions of clauses (3) and (5) of article 27 which stipulated that women and men had the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. 1
8. The recommendation of the Committee and the subsequent adoption of the said recommendation by the Assembly in rejecting the approval of the Petitioner to the appointment as a Member of the Board on grounds of her marital status were discriminatory and offended articles 27 and 28 of the Constitution of Kenya, 2010. 5
9. Article 23 mandated the Court to grant appropriate reliefs in redressing violations under article 22 to include declaration of rights, injunctions, conservatory orders, compensation, judicial review orders or a declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom. 10
10. It remained conspicuously clear that the purpose of the right against discrimination on grounds of, *inter alia* marital status or sex was to preserve human dignity that in itself was a right recognized under article 28 of the Constitution. Courts had taken the trend of compensating the victims of such violations. 15
11. The grounds for her disapproval were purely discriminatory on her marital status, her feelings were truly hurt, humiliated and ultimately portrayed as a lesser being who no longer had any meaningful purpose and worth within Vihiga County. She so missed the opportunity to serve her people and build her career further. All that was on the sole reason that she was married in the neighboring Kakamega County. On the other hand, the Respondents ought to remain clear of the provisions of article 3(1) of the Constitution to the effect that every person had an obligation to respect, uphold and defend the Constitution. 20
12. The Respondents ought to have remained alive to the provision of article 2(1) thus the Constitution is the supreme law of the Republic and bound all persons and all state organs at both levels of government. Failure by the Assembly to confront its despicable conduct in deliberately avoiding to abide by the Constitution, proved that this was a perfect case for an award of damages for the breach of the Petitioner's rights. 25
13. Whereas the Petitioner had prayed for an order that the Assembly approves her name and forwards the same for gazettment as a member of the Board, it was highly probable that the position was already filled through readvertisement. Therefore, the relief would 30
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not serve any meaningful purpose in the circumstances.

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Orders

- a. *A declaration issued that the recommendation of the Committee on Land, Housing and Urban Planning which was eventually approved by the Vihiga County Assembly in not approving the Petitioner for the appointment as a Member of the Vihiga County Land Management Board was contrary to articles 27 and 28 of the Constitution hence unconstitutional null and void and thereby quashed.* 5
- b. *An award of Kshs 3,000,000 made as compensation in respect to the discrimination of the Petitioner on the basis of her marital status and violation of her human dignity.* 10
- c. *Costs ere to be borne by the second Respondent.*

Cases

East Africa

15

1. *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another* Petition No 102 of 2011 – (Explained)
2. *In Matter of the Principle of Gender Representation in the National Assembly & the Senate* [2012] 3 KLR 720 – (Followed)
3. *Mambo, Rose Wangui & 2 others v Limuru Country Club & 17 others* Constitutional Petition No 160 of 2013 – (Explained) 20
4. *Musinga, Daniel t/a Musinga & Co Advocates v Nation Newspapers Limited* Civil Appeal (Application) No 120 of 2008 – (Followed)
5. *Mwangi, John Muraya & 495 others & 6 others v Minister for State for Provincial Administration and Internal Security & 4 others* Petition Nos 3 of 2011; 21 & 24 of 2013 (Consolidated) – (Explained) 25
6. *Samura Engineering Limited & 10 others v Kenya Revenue Authority* Petition No 54 of 2011 – (Followed)
7. *VMK v CUEA* Cause No 1161 of 2010 – (Followed) 30
8. *Waweru, Peter K v Republic* Miscellaneous Civil Application No 118 of 2004 – (Explained)

South Africa

1. *Prinsloo v Van Der Linde* [1997] ZACC 5; 1997 (6) BCLR 759; 1997 (3) SA 1012 – (Explained) 35

United Kingdom

1. *Rookes v Benard* [1964] AC 1129 – (Explained)
2. *Willis v United Kingdom* [2002] ECHR 488; (2002) 35 EHRR 21 – (Explained) 40

Germany

1. *Okpizs v Germany*, No 59140/00 – (Explained)

United States of America 1

1. *Rigner v State of Texas* 310 US 141 (1940) – (Explained)

Statutes

East Africa

1. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya, 2010 Sub Leg) rules 2, 5(a)(b) – (Interpreted) 5
2. Constitution of Kenya, 2010 articles 1(3); 2; 3(1); 10; 22; 23; 27(8); 28; 47; 81(b); 232; 252 – (Interpreted)
3. County Governments Act, 2012 (Act No 7 of 2012) sections 6(4); 7; 8(2) – (Interpreted) 10
4. National Land Commission Act, 2012 (Act No 5 of 2012) section 18(1)(6) – (Interpreted)
5. Public Appointments (Parliamentary Approval) Act, 2011 (Act No 33 of 2011) In general – (Interpreted) 15

International Instruments & Covenants

1. African Charter on Human and Peoples’ Rights (ACHPR), 1981 article 2
2. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979 articles 1, 2(e)(f)(5) 20
3. Universal Declaration on Human Rights (UDHR), 1948 articles 1; 2(5)(6); 7

Advocates

None mentioned 25

July 9, 2015, **AC Mrima, J** delivered the following Judgment

Introduction

1. This Petition is a cry for justice by Mary Mwaki Masinde on allegations of discrimination on grounds of her marital status. Mary, hereinafter referred to as “the Petitioner”, was born 35 years ago or thereabout-in Emuhaya District within Vihiga County and is currently pursuing her Masters in Business Administration (MBA) at Masinde Muliro University. She is the Funds Account Manager for Butula Constituency and is happily married in Mumias within the neighbouring Kakamega County. 30
 2. In the Petition the Petitioner enjoined the County Government of Vihiga and the Vihiga County Assembly as Respondents and the National Lands Commission as an interested party. 35
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The Petition

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3. On 02/12/2014, the Petitioner moved to this Court and simultaneous with filing of the Petition filed a Notice of Motion seeking conservatory orders. This Court certified the matter as urgent, issued some preservatory orders and directed service for directions on 10/12/2014. The parties herein then opted to instead pursue the main Petition and as such the interlocutory application was abandoned. Parties filed affidavits and submissions on the main Petition. The Respondents however tendered oral submissions instead. The *status quo* pursuant to the conservatory orders was agreed to be maintained accordingly. 5 10
4. The Petition was brought under articles 22, 27, 28, 47 and 252 of the Constitution of Kenya alongside the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Freedom Rules, 2013. 15
5. By the Affidavit in support of the Petition, the Petitioner deponed that she became aware of the advertisement for the positions of Members of the County Management Boards by the National Land Commission (hereinafter referred to as “the Commission”) as carried out in the internet and print media. Being interested and qualified, the Petitioner applied for such in respect to Vihiga County Land Management Board (hereinafter referred to as “the Board”). She was shortlisted with about 20 other people and eventually interviewed by a panel comprised of members of the Commission and the Vihiga County Service Board. The Petitioner passed the interview and was picked among 6 other candidates for the final approval by the Vihiga County Assembly (hereinafter referred to as “the Assembly”). The Assembly delegated the vetting process to one of its committees the Committee on Land, Housing and Urban Planning, hereinafter referred to as “the Committee”). 20 25 30
6. The Petitioner appeared before the Committee on 31/10/2014 and despite the Committee noting that she was properly vested with the knowledge and expertise for the position it instead recommended against her appointment on grounds that though born in Emuhaya, she was married and stays in Mumias and as such she was not able to represent the interests of the people of Emuhaya. The Assembly eventually adopted the Committee’s recommendation and further directed that the position for a representative of Emuhaya sub-County be accordingly re-advertised. 35 40

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7. The Petitioner then ran into the corridors of justice alleging that the recommendation by the Committee and the subsequent adoption thereof by the Assembly was discriminatory as the only reason given for her not being recommended for appointment despite being a suitable candidate was that she was married in Mumias within the neighbouring Kakamega County. That, she argued, is discriminatory based on her marital status more so given that the proximity of where she lives and Vihiga County cannot inhibit her to discharge her duties as a member of the Vihiga County Land Management Board. She indicated that if that was the only hitch, then given an opportunity, she would have relocated back to Emuhaya. The Petitioner further contended that she was the only one whose marital status became an issue whereas several others were also married and not resident within the County. She cited the example of the nominee who was married and lived in Nairobi over 350 km away from the Vihiga County among others. It is further contended that the Petitioner was the only woman candidate and the Committee raised the issue of her marriage to her disadvantage and to the advantage of her male counterparts whose vetting did not touch on their status or at all.
8. It was the Petitioner's further contention that the Assembly further contravened the Constitution in directing the County Government of Vihiga to re-advertise for the position as the duty to appoint such members was only vested on the Commission by dint of article 252 of the Constitution.
9. The Petitioner held that the decisions of the Assembly were *ultra-vires* and unlawful as they infringed her constitutional right to equal treatment before the law and freedom from discrimination and that she is entitled to a fair affirmative action that is lawful and reasonable in the circumstances as envisaged under article 47 of the Constitution further to the fact her right to dignity was equally infringed. She also filed a List of Documents and a Reply to the Answer to the Petition.
10. On remedies, the Petitioner prayed for a declaration that the Committee and the Assembly in rejecting to approve her to the membership of the Vihiga Land Management Board on grounds of marital status is discriminatory and against the Bill of Rights and a further declaration that the Respondents' actions in conducting an interview instead of vetting her is in contravention of article 252 of

the Constitution hence *ultra vires* and void. She prayed for a further order that the Assembly do approve her name to be forwarded to the Commission for gazettelement as a Member of the Board. An order that the Assembly acted *ultra vires* the Constitution in rejecting the Petition and ordering a fresh advertisement was also sought and a further declaration that she is entitled to affirmative action and that the Assembly acted *ultra-vires* the Constitution by abrogating the powers of the Commission. The Petitioner also sought for costs and any other order that the Court shall deem fit to meet the ends of justice. The Petitioner filed written submissions in buttressing of the foregone.

The Response:

11. The Respondents opposed the Petition and filed a joint Answer to Petition and an Affidavit by the Clerk to the Assembly. In supporting the deliberation and approval by the Assembly, the Respondents contend that the deliberation were conducted in accordance with the law and in particular in respect to the Natural Land Commission Act, the Public Appointments (Parliamentary Approval) Act No 33 of 2011 and the Constitution and took all considerations into account hence the decision was based in law and not discriminatory at all. Indeed the Respondents explained that the rejection by the Assembly of the Petitioner was not that she was married but rather that she failed to persuade the Committee that her marital commitments away from the County would not affect her performance as a Board Member. It is further contended that the Petitioner failed to name the alleged candidates who worked outside the County and as such those averments remained bare allegations.

Further, it was contended that the Petitioner never protested that she was not being vetted but being examined and that the Assembly discharged the duty in the approval of the nominees as required in law and that the composition of the Board with regard to gender equality was the responsibility of the Commission which was instead brought in as an interested party and not a substantive party. The allegation that she was the only woman could not therefore hold if she never passed the approval of the Assembly and that they are still other positions to be filled and hence the issue of gender is not concluded.

12. The Respondents further contended that they never acted outside the Commission in law in the approval proceedings and that grant

of any of the orders sought would infringe upon the independence of the Assembly and the doctrine of separation of powers under article 1(3) of the Constitution. The Respondents also availed the communication for the Assembly on the approval proceedings in support of its position that the Petition lacked in merit and is for dismissal with costs. Counsel for the Respondents also tendered oral submissions in support of this position.

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Analysis and Determination:

13. Having carefully looked at the Petition, the Answer to the Petition, the Reply to the Answer to the Petition, the Affidavits on record and the parties' submissions, I hereby tailor the following main issues for consideration and determination.

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i. The role of the Assembly in approval proceedings;

ii. Whether the Petitioner's rights were infringed either as alleged or otherwise?

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iii. Remedies; if any.

14. Before embarking on an analysis of the matters raised in this Petition in regard to the issues set out above, this Court do believe that it is necessary to first determine the issue of joinder and misjoinder of parties which has been raised by the Respondents in this matter.

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Preliminary Issue: Joinder and Misjoinder of Parties.

15. It is the Respondents' position that the County Government of Vihiga is wrongly enjoined as a party in the Petition since it did not take part in the vetting process as that is the preserve of the Assembly. It was also urged that the Petitioner ought to have enjoined the Commission as a Respondent and not as an Interested Party since some of the prayers sought are only within the mandate of the Commission including the appointment of a Board Member and the interview process and by bringing the Commission as a mere interested party, the Petition has no legal leg to stand on and is for rejection.

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16. Rule 2 of the Constitution (Protection of Fundamental Rights and Freedoms) Practise and Procedure Rules, 2013 (hereinafter referred to as "the Rules") defines the name 'Respondent' to mean:-
"a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right to fundamental freedoms."

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- Rule 5(a) states that: 1
- “Where a petitioner is in doubt as to the person from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what, extent, may be determined as between all parties. 5
- It is clearly stated under rule 5(b) that:-
- “A Petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every proceeding deal with the matter in dispute.” 10
17. Under rule 5(d) the Court at any stage of the proceedings (either upon or without the application of either party) may order the name of a party improperly joined be struck out and that the name of any person who ought to have been joined or whose presence before the Court may be necessary be added to enable the Court adjudicate upon and settle the matter at hand. 15
- From the definition of the term “Respondent” set out above, it is clear that any person can be joined as a respondent as long as there is an allegation that the person has infringed or threatens to infringe the Petitioner’s rights and/or fundamental freedoms. 20
- Section 18(1) of the National Land Commission Act (hereinafter referred to as the ‘Commission Act’) states as follows:- 25
- “The Commission shall, in consultation and co-operation with the national and county governments, establish county land management boards for purposes of managing public land.”
18. The law therefore places that duty squarely upon the Commission, the national as well as the county governments for purposes of establishing the Boards. The Petitioner on the other hand contends that her rights in respect to the appointment into the Board were violated by the Respondents. The County Government of Vihiga cannot therefore be divorced from such proceedings in this clear calling of the law. It then becomes the duty of the Court to make a determination as to whether or not such party is liable for the alleged violations. The contention that the County Government of Vihiga has been wrongly enjoined as a Respondent is therefore rejected. I do find that it is properly before Court as a party against whom claims are made regarding infringement of the Petitioner’s 30 35 40

fundamental rights since the County government is under a clear duty in constituting and co-operating with both the Commission and the National government in establishing the Boards. For now it matters not whether the said allegations will stand the test of interrogation.

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19. On the issue of the interested party, rule 2 defines such as follows:-

“A person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.”

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It can be deduced that an interested party as opposed to an *amicus curiae* or a friend of the Court may not be wholly indifferent to the outcome of the proceedings in question. It is a party with an identifiable stake or legal interest in the proceedings and as such might be wholly non-partisan. As opposed to a Respondent, an interested party may move the Court on its own volition to be made a party to the proceedings upon demonstration of a stake or legal interest.

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A Respondent is however sued on allegations of violation or threats thereof of the Petitioner's rights. The Court, as aforesaid, reserves the right to bring in a party at anytime as a Respondent, an interested party or even an *amicus curiae*.

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20. In the Petition, the Petitioner has not made any specific allegations that the Commission 'denied, violated, infringed, or threatened to deny, violate or infringe' any of her rights or fundamental freedoms. Instead the Petitioner contends it is the Assembly, which usurped the powers of the Commission by taking out the mandate of recruiting Board Members. Be that as it may, section 18(6) of the Commission Act gives the Assembly a specific role in the recruitment process, which role we will deal with herein below. Having not tendered any allegation against the Commission, the Petitioner was within her rights to bring in the Commission as an interested party since the duty to establish the land boards is jointly vested upon the Commission and other entities. I do believe that the Petitioner so wanted to bring the Commission, as an interested party in the proceedings in full glare of her claim at hand and that position ought to be respected. Likewise, that contention equally fails.

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The Role of the Assembly in the Approval Proceedings.	1
21. Section 18 of the Commission Act deals with the establishment and composition of County Land Management Boards. For purposes of clarity, I will reproduce the entire section as follows:-	
1. The Commission shall, in consultation and co-operation with the national and county governments, establish county land management boards for purposes of managing public land.	5
2. A county land management board shall comprise—	
(a) not less than three and not more than seven members appointed by the Commission; and	10
(b) a physical planner or a surveyor who shall be nominated by the county executive member and appointed by the governor.	15
3. A member of the board, unless <i>ex officio</i> , shall be appointed for a single term of five years and shall not be eligible for re-appointment.	
4. The chairperson of the board shall be elected by the members in their first sitting.	20
5. The secretary to the board shall be appointed by the Commission.	
6. The appointment of the members shall be approved by the county assembly and shall take into account the national values referred to in article 10 and article 232 of the Constitution and shall reflect gender equity and ethnic diversity within that county.	25
7. The chairperson, members and the secretary of the board shall, before assuming office, make and subscribe, before a judge, to the oath or affirmation set out in the Third Schedule.	30
8. In the discharge of their functions, the boards shall comply with the regulations made by the Commission under this Act.	
9. The boards shall—	35
(a) subject to the physical planning and survey requirements, process applications for allocation of land, change and extension of user, subdivision of public land and renewal of leases; and	40
(b) perform any other functions assigned by the Commission or by any other written law.	

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22. Under sub-section (6), the role of the Assembly is clearly given as
 ‘to approve the appointment of the Board members’. And, in doing
 so, the Assembly is to take into account the national values under
 articles 10 and 232 of the Constitution and shall also endeavour
 to reflect gender equity and ethnic diversity within that County.
 It is hence clear that the Assembly is not interested in the process
 towards the nomination of the Board Members for only comes in
 during the approval proceedings and with a clear mandate towards
 the finalisation of the appointment process. The Assembly, in
 the absence of its own statute guiding the process of approval of
 the nominee rightly and pursuant to section 8(2) of the County
 Governments Act relied on the Public Appointments (Parliamentary
 Approval) Act, Chapter 136 of the Laws of Kenya (hereinafter
 referred to as ‘the Approval Act’). Whereas section 6 of the Approval
 Act provides for the process of approval or vetting, section 7 thereof
 provides for the issues for consideration by the Assembly in relation
 to any nomination. It is worth reproducing the said twin sections
 of the Approval Act and I do so as under:-
- “6. Approval hearing:
1. Upon receipt of a notification of appointment, the
 Clerk shall invite the Committee to hold an approval
 hearing.
 2. The Committee shall determine the time and place for
 the holding of the approval hearing and shall inform
 the Clerk.
 3. The Clerk shall notify a candidate of the time and
 place for the holding of an approval hearing.
 4. The Committee shall notify the public of the time
 and place for holding an approval hearing at least
 seven day prior to the hearing.
 5. Subject to this Act, all Committee proceedings on
 public appointments shall be open and transparent.
 6. Despite subsection (5), a Committee may, on its own
 motion or on the application of a candidate or any
 other concerned person, determine that the whole or
 part of its sittings shall be held in camera.
 7. An approval hearing shall focus on a candidate’s
 academic credentials, professional training and
 experience, personal integrity and background.
 8. The criteria specified in the Schedule shall be used
 by a Committee during an approval hearing for the

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- purposes of vetting a candidate. 1
9. Any person may, prior to the approval hearing, and by written statement on oath, provide the Clerk with evidence contesting the suitability of a candidate to hold the office to which the candidate has been nominated. 5
10. A candidate may, at any time, by notice in writing addressed to the Clerk, withdraw from the approval process and the candidate's nomination shall thereupon lapse. 10
7. Issues for consideration.
The issues for consideration by the relevant House of Parliament in relation to any nomination shall be—
- a. the procedure used to arrive at the nominee; 15
 - b. any constitutional or statutory requirements relating to the office in question; and
 - c. the suitability of the nominee for the appointment proposed having regard to whether the nominee's abilities, experience and qualities meet the needs of the body to which nomination is being made.” 20
23. Pursuant to section 6(4) of the Approval Act, the Assembly informed the members of the public through the print media and scheduled the hearing in respect of the Petitioner on 31/10/2014 at Emuhaya Church of God. It also called all the members to avail several original documents during the hearing. I have perused the Petitioner's List of Documents and seen the Report of the Committee on Lands, Housing and Urban Planning on the vetting of the nominees to the Land Board of Vihiga County. Though the same is not signed, it is not controverted in anyway by the Respondents and its contents are corroborated by the Hamsard. The Report gives the background of the matter and sets out under 3.0 how the vetting process was undertaken. The Committee relied on the provisions of the Approval Act aforesaid and carried out the process from 30th October, 2014 to 3rd November, 2014. I have also seen how each of the nominees was vetted and the considerations taken into account. 25
24. When the report was eventually presented to the Assembly, the same was subjected to intense debate and eventually put to a vote and effectively adopted with amendments by deleting the Vihiga County Government and replacing it with the National Lands Commission. 30
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25. I have carefully addressed my mind to the requirements of the Approval Act and the Commission Act in respect to the approval proceedings and noted that the Assembly is required to comply with all the requirements in section 7 of the Approval Act which includes a consideration of the procedure used to arrive at the nominee, the suitability of the nominee for the appointment and further to relooking at any constitutional or statutory requirements relating to the office. The effect thereof is that a nominee being vetted is effectively taken through the entire process, which led to the nomination. This is buttressed by the Questionnaire in the Schedule of the Approval Act. That explains why the Petitioner contends that when she appeared before the Committee of the Assembly she was instead re-interviewed and not vetted as required in law. I am therefore unable to find that the Assembly conducted an interview upon the Petitioner but that it carried out its mandate under the law. It carried out the approval proceedings which its constitutionality shall be analyzed later in this judgment. I have also noted that when the report was adopted by the Assembly, it was amended with the mandate to appoint the other Board members being rightly bestowed upon the Commission and not on the County Government of Vihiga.

Whether the Petitioner's Rights were Violated as alleged or otherwise.

26. The main contention by the Petitioner is that though she had done well in the interview and the proceedings before the Committee, she was not approved for appointment on grounds that that she was married in Mumias even though she came from Emuhaya and as she would not effectively represent the interests of the people of Emuhaya. She sees this as discriminatory on account of her marital status and given that the other nominees were not subjected to such a standard as indeed their marital status did not come up at all during the approval proceedings and that others do work and stay away from the Vihiga County just like the Petitioner.

27. Article 27 of the Constitution enshrines the right to equality and freedom from discrimination in the following terms:-

- “27(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, Including the right to equal opportunities in political,

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economic, cultural and social spheres.	1
(4) The State shall not discriminate directly or indirectly Against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.	5
(5) A person shall not discriminate directly or indirectly Against another person on any of the grounds specified or contemplated in clause (4).	
(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.	10 15
(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.	
(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two- thirds of the members of elective or appointive bodies shall be of the same gender.”	20
28. The Supreme Court in its majority opinion in Advisory Opinion No 2 of 2012 had the following to say on gender representation.	25
“47. This Court is fully cognizant of the distinct social imperfection which led to the adoption of articles 27(8) and 81(b) of the Constitution; that in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of practices, or gender indifferent laws, policies and regulations. This presents itself as a manifestation of historically unequal point relations between men and women in Kenyan Society Thus, the Constitution sets out to redress such aberrations, not just through affirmative action provisions such as those in articles 27 and 81 but also by way of a detailed and robust Bill of Rights, as well as a set of ‘National values and principles of governance (Article 10).”	30 35 40

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29. But what is Discrimination? 1
 A three-judge bench in *Rose Wangui Mambo & 2 others v Limuru County Club & 17 others* (2014) eKLR addressed itself to this aspect and in borrowing from the case of *Peter K Waweru v Republic* (2006) eKLR defined discrimination as follows:- 5
 “...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by...sex whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description...Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured” 10
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30. The Court went ahead and considered article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) which defines discrimination against women in the following terms:- 20
 “Discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” 25
31. The Court went further to express itself on the following manner on the subject:- 30
93. “In *Willis v The United Kingdom*, No 36042/97, ECHR 2002 – IV and *Okpiz v Germany*, No 59140/00, 25th October 2005, the European Court of Human Rights observed that discrimination means treating differently, without any objective and reasonable justification, persons in relevantly similar situations. 35
94. The principle of equality and non-discrimination has its underpinnings in various International Conventions which now form part of our laws by dint of article 2(5) and (2)(6). The United Nations Universal Declaration on Human Rights (UDHR) provides at article 1 40

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- that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” article 7 of the UDHR further states that, “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” 1
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95. The preamble to the Convention on Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) captures the effect of discriminatory practices against women in the following terms; 10
- “[D]iscrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.” 15
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96. Under article 2 of CEDAW, States parties bind themselves to condemn discrimination against women in all its forms, and to pursue by all appropriate means a policy of eliminating discrimination against women. To this end, they bind themselves to among other things; ‘take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise’ and to ‘take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.’ 25
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97. In CEDAW General Recommendations Nos 19 and 20, adopted at the Eleventh Session, 1992 (contained in Document A/47/38) at No 9; 35
- “It is emphasized, however, that discrimination under the Convention is not restricted to action by or on behalf of Governments (see articles 2(e), 2 (f) and 5). For example, under article 2(e) the Convention calls on States parties to take all appropriate measures 40

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to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.” 98. Article 2 of the African Charter on Human and Peoples’ Rights stipulates that every individual is entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, or sex. Article 28 goes further to state that; “Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.” 99. It is thus evident that both under the Constitution of Kenya and international and regional treaties to which Kenya is a party, the principle of equality of the sexes is recognized, and discrimination on any basis prohibited.” 32. Anyara Emukule, J in <i>John Muraya Mwangi & 495 others & 6 others v Minister for State for Provincial Administration and Internal Security & 4 others</i> (2014) eKLR also addressed himself on the issue of discrimination as follows:- 40. In the American case of <i>Rigner v State of Texas</i> (1940) 310 US 141, the Court held - “The Fourteenth Amendment enjoins equal protection of the laws, and laws are not abstract propositions. They do not relate to abstract units, A, B, and C, but are expressions of policy arising out of specific difficulties addressed to the attainment of specific ends by use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.” 41. In the South African Case of <i>Prinsloo v Van Der Linde</i> [1998] 1 LRC 173- “If each and every differentiation made in terms	1 5 10 15 20 25 30 35 40

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- of the law amounted to unequal treatment that had to be justified by means of resort to section 33, or else constituted discrimination which had to be shown not to be unfair, the courts would be called upon to review the justifiability or fairness of just about the whole legislative program and almost all executive conduct..... the courts would be compelled to review the reasonableness or the fairness of every classification of rights, duties, privileges, immunities, benefits or disadvantages flowing from any law. Accordingly, it is necessary to identify the criteria that separate legitimate differentiation from differentiation that has crossed the border of constitutional impermissibility and is unequal or discriminatory "in the constitutional sense" Taking as comprehensive a view as possible of the way equality is treated in s8, we would suggest that it deals with differentiation in basically two ways: differentiation which does not involve unfair discrimination and differentiation which does not involve unfair discrimination." 1
42. The Court then proceeded to describe what amounts to unfair discrimination as follows- 5
- "It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its peoples for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently..... Differentiation which falls into this category very rarely constitutes unfair discrimination in respect of persons subject to such regulation, without the addition of a further element.... It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as "mere differentiation". In regard to mere differentiation, the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate governmental purpose, for that 10
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- would be inconsistent with the Rule of law and the fundamental premises of the constitutional state. For the purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner....Accordingly, before it can be said that mere differentiation infringes section 8, it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is preferred to validate it. In the absence of such rational relationship, the differentiation would infringe section 8. But while the existence of such a rational relationship is a necessary condition for the differentiation not to infringe section 8, it is not a sufficient condition; for the differentiation might still constitute unfair discrimination if that further element.... is present.”
43. In the Kenya case of *Federation of Women Lawyers Kenya (Fida-K) & 5 others v Attorney General & another* [2011] eKLR, the Court of Appeal stated-
- “On the other hand, the requirement of equal protection of the law does not mean that all laws passed by a legislature must apply universally to all persons and that the law so passed cannot create differences as to the persons to whom they apply and the territorial limit within which they are enforced. We are aware that individuals in any society differ in many respects such as age, ability, education, height, size, colour, wealth, occupation, race and religion. In our view any law made, must of necessity be clear as to the making of the choice and difference as regards its application in terms of persons, time and territory. Since the constitution can create differences, the question is whether these differences are constitutional. If the basis of the difference has a reasonable connection with the object intended to be achieved therefore the law which contains such a provision is constitutional and valid. On the other hand, if there is no such relationship, the difference is stigmatized as discriminatory and the provision can be rightly said to be repugnant to justice and therefore invalid.

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- The purpose of the Constitution may be either the elimination of a public mischief or the achievement of some positive public good. It can therefore be stated that discrimination is the essence of classification and that equality is violated if it rests on unreasonable basis. The concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Equality is among equals and classification is therefore to be founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved. There is also no denial of equality of opportunity unless the person who complains of discrimination is equally suited with the person or persons who allege to have been favoured.” 1 5 10 15
44. Thus the law on equality does not mean that everyone should be treated the same way, that is, the substantive law should be the same for all persons, or that the law should be applied to all persons equally without discrimination as this would not only be unreasonable but unjust. 20
45. The provision is therefore violated by a difference in treatment between persons who are in comparable situations which is neither objective nor reasonable. Where such differential treatment is on account of factual differences with a legitimate aim taking into account the principles of legality proportionality and democratic practice, then the derogation from the right is deemed legitimate.” 25 30
33. I have carefully perused the report by the Committee on the vetting exercise of the nominees. It is worth-noting that the Committee identified the ages and marital status of the nominees who appeared before it. It also identified their diverse experiences and in some cases where they resided. For instance Evans Asena who hailed from Sabatia sub-county was the serving Deputy Director of Agriculture in Kakamega County; Erick Madete from Hamisi sub-county was a contractor in Nairobi and resided thereat; the Petitioner was from Emuhaya sub-county and the Funds Account Manager in Butula 35 40

Constitutency married and residing in Mumias within Kakamega County. In some instances, the Committee did not identify where the nominee resided. This was the case with Hilary Keverenge who hailed from Sabatia sub-county and was working with Intrahead which was an organisation dealing with reproductive health as well as Francis Ndooli from Vihiga sub-county who had previously worked with various government ministries.

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34. I have equally noted that none of the nominees recommended by the Committee for appointment and eventually approved by the Assembly were so recommended and approved on the considerations of their marital status and their places of residence except the Petitioner herein who on those considerations was not approved for the appointment. Whereas the Committee had the mandate to consider various issues as so required in law, it was incumbent upon it to treat all the nominee equally especially on the issues of marital status, residences and their ability to discharge their duties for those who were not residing within the County; if those issues were to form the basis of the approval of the nominees. It is therefore open that the Petitioner was treated differently from the other nominees who were all in comparable situations and without any reasonableness or objectivity. When the report was laid before the Assembly, the same was debated and eventually approved in line with the Committee's recommendations. This was after the Assembly put the report to a vote. On the recommendation on the part of the Petitioner, out of the 31 honourable members present 3 abstained from voting, 12 opposed the recommendation and 16 stood for the recommendation. The debate in the Assembly provided an opportunity which the Assembly was to revisit the relevant constitutional provisions *vis-a-vis* the recommendations made on the part of the Petitioner. The Hansard is quiet that the Assembly directed any efforts on the Constitution of Kenya, which the people of Kenya overwhelmingly gave unto themselves.

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35. The recommendation by the Committee and the subsequent adoption thereof by the Assembly which is the subject of this Petition before Court therefore has a discriminatory effect as it tends to exclude the appointment of women who though competent and were born within the Vihiga County but married outside of the County from serving in any public appointment within the Vihiga County. That is clearly antithetical to the provisions of clauses (3) and (5) of article 27 which stipulates that:-

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- “(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. 1
- (5) A person shall not discriminate directly or indirectly Against another person on any of the grounds specified or contemplated in clause (4). 5
36. I therefore find and hold that the recommendation of the Committee and the subsequent adoption of the said recommendation by the Assembly in rejecting the approval of the Petitioner herein to the appointment as a Member of the Board on grounds of her marital status as discriminatory and offends articles 27 and 28 of the Constitution. 10
- Remedies:- 15
37. The next issue for consideration relates to the appropriate reliefs to be granted to the Petitioner herein in light of the Court’s findings hereinabove. Article 23 mandates this Court to grant appropriate reliefs in redressing violations under article 22 to include declaration of rights, injunctions, conservatory orders, compensation, judicial review orders or a declaration of invalidity of any law that denies, violates, infriges or threatens a right or fundamental freedom. 20
38. Whereas the Petitioner has prayed for an order that the Assembly approves her name and forwards the same to the interested party for gazetteement as a member of the Board, the Court learnt during the hearing of the Petition that the Respondents though ordered not to take any action towards re-advertising or recruiting any other person to fill in the position which the Petitioner was to fill, the Commission had on 08/01/2015 carried out a re-advertisement to fill the position among others. It remains not clear if the Commission was served with the orders of the Court made on 02/12/2014 and the Court equally remains in the dark as to how far that process has gone. 25
- Further, the Petitioner did not pursue the aspect of any alleged disobedience of the orders of the Court. Going by the proposals on the time-lines by the Assembly that the Board be fully constituted by 30/01/2015 and that the re-advertisement was carried out on 8/01/2015, it is highly probable that the position is filled by now. It would therefore not serve any meaningful purpose to grant the relief as sought by the Petitioner and in the circumstances of this case. 35
39. As already found out by the Court, the Petitioner’s rights were 40

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- violated. It remains conspicuously clear that the purpose of the right against discrimination on grounds of *inter alia* marital status or sex is to preserve human dignity, which in itself is a right recognised under article 28 of the Constitution. Courts have so far taken the trend of compensating the victims of such violations. In the case of *Samura Engineering Limited & 10 others v Kenya Revenue Authority* (2012) eKLR the Court upon finding that the Petitioner's right to privacy had been violated proceeded to award Kshs 1.2 million as compensation. In the case of *VMK v CUEA* (2013) eKLR, the Court made an award of Ksh 5,000,000 being exemplary damages for the discrimination of a Petitioner on the basis of her HIV/AIDS status and for gross violation of her human dignity.
40. In *Rookes v Benard* (1964) AC 1129, Lord Derlin, CJ discussing exemplary damages stated as follows:-
- “that first it is awarded against tortious intrusions or trespasses that are profit motivated i.e. wrongful landlords evictors of their tenants or secondly where there is oppressive conduct by government organs and thridly where the act of the defendants has caused distress and intolerable anxiety and to be awarded as a punishment.”
- In the case of *David Musinga t/a Musinga & Co Advocates v Nation Newspapers Limited* (2006) eKLR, the Court in awarding the Plaintiff Kshs 10,000,000 damages for defamation stated that:-
- “The Court has to look at the whole conduct of the parties before action, after action and in compensatory damages such sum, as will compensate him for the wrong he has suffered.
- An award of damages must cover injured feelings, the anxiety undergone during the court trial.”
41. In this case, the Petitioner was duly interviewed and was successful. She was later on subjected to approval proceedings and again the Committee found nothing to disapprove her except on considerations which have been found to be unconstitutional. The matter was debated in the Assembly and thereafter the Petitioner who thought that justice would be done had no option but to come to Court. Orders were issued but again the process went on and now the Petitioner appears to be utterly helpless. In view of the foregone and given that the grounds for her disapproval were purely discriminatory on her marital status, her feelings were truly hurt, humiliated and ultimately potrayed as a lesser being who no

longer has any meaningful purpose and worth within Vihiga County. She so missed the opportunity to serve her people and build her career further. All that was on the sole reason that she was married in the neighbouring Kakamega County. On the other hand, the Respondents ought to remain clear of the provisions of article 3(1) of the Constitution to the effect that:-

“Every person has an obligation to respect, uphold and defend this Constitution.”

42. Further, the Respondents ought to remain alive to the provision of article 2(1) thus:-

“This Constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government.”

43. On the above considerations and the failure by the Assembly to confront its despicable conduct in deliberately avoiding to abide by the Constitution, this Court is of the considered view that this is a perfect case for an award of damages for the breach of the Petitioner’s rights aforesaid.

44. Consequently, this Court now makes the following orders:-

- a. A declaration is hereby issued that the recommendation of the Committee on Land, Housing and Urban Planning which was eventually approved by the Vihiga County Assembly in not approving the Petitioner herein, Mary Mwaki Masinde, for the appointment as a Member of the Vihiga County Land Management Board on the grounds that though she was born in Emuhaya sub-county, she is married, works and stays in Mumias and thus cannot represent the interests of the people of Emuhaya on the Board adequately; is contrary to articles 27 and 28 of the Constitution hence unconstitutional null and void and is hereby quashed.
- b. An award of Kshs 3,000,000 is hereby made as compensation in respect to the discrimination of the Petitioner on the basis of her marital status and violation of her human dignity. This award shall be borne by the Vihiga County Assembly, the second Respondent herein;
- c. Costs shall also be borne by the second Respondent herein.

Orders accordingly.

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**Republic v Secretary County Public Board
& another *ex parte* Abdille [2015] KLR-HCK**

High Court, at Nairobi
GV Odunga, J

July 7, 2015

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Judicial Review Application No 271 of 2014

Brief facts

The County Government of Wajir wished to recruit competent and qualified persons to fill vacant positions in the County. The Applicant was interested in two positions namely Sub County Administrator's and Deputy Sub County administrator's and decided to apply for the Sub County Administrator's which had 6 vacant posts and avoided the Deputy Sub County Administrators which had only 4 vacant posts since, according to her, she met all the qualifications outlined. The Applicant was amongst the candidates shortlisted for the position of Sub County Administrators and was invited for an interview on the same. The Applicant was however surprised from the list of officers appointed to learn that she had not been included in the list and no communication was relayed to her. She was however shocked that despite the Respondents having declared and advertised only 4 vacant positions for Sub County Administrators they actually recruited 8 officers to fill in the positions. The Applicant averred that the person picked as a sub county administrator for Wajir East Sub County was junior to her in relation to years of service as a teacher.

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The Applicant stated that the Respondent in a bid to circumvent the transparent process, went ahead to assign positions that were never advertised and recruited persons who were never interviewed or shortlisted for any positions

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The Applicant therefore sought *inter alia* an order of *certiorari* to quash the decision of the Respondent to appoint Sub County Administrators, deputy Sub County Administrators and the appointments of the non advertised positions

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The Respondent on their part submitted that the proceedings were premature and defective as the Applicant had sought to challenge the decisions made by the 1st Respondent in exercise of its mandate under section 63 of the County Governments Act. The Respondent further submitted that since the Applicant had not appealed to the Public Service Commission as required under section 77 of the County

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Government Act, before filing proceedings before the High Court, the proceedings ought to be struck out with costs to the Respondents. 1

Issues

- i. Whether the act of the Respondent of assigning positions that were never advertised and recruiting persons who were never interviewed or shortlisted for any positions contravened article 10 of the Constitution that provided for non-discrimination, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. 5
- ii. Whether by instituting proceedings at the High Court before appealing the decision of the County Public Board to the County Public Service Board rendered the proceedings premature. 10
- iii. Whether the appointment of the alleged successful candidates by the Wajir County Public service complied with the letter and spirit of the County Governments Act and the Constitution. 15
- iv. Whether the decision by the Public Service Board to make the said appointments was tainted with both illegality and procedural impropriety.
- v. Whether the decision to appoint the Sub County and Deputy Sub County Administrators was within the County Public Service Board statutory jurisdiction and therefore fell outside the ambit of judicial review. 20

Constitutional law – County Governments – public officers – appointment to public office – assigning positions that were never advertised and recruiting persons who were never interviewed – whether such an act complied with the letter and spirit of the County Governments Act and the Constitution – County Governments Act, sections 63, 65, 66 & 77 – Constitution of Kenya, 2010, articles 10, 27(4), 56(c) & 232(1). 25

Constitutional law – jurisdiction – jurisdiction of the High Court to determine judicial review matters – where there was an alternative dispute resolution mechanism – whether instituting judicial review proceedings before the High Court before exhausting the alternative mechanism rendered the proceedings premature. 30

Held:

- 1. The purpose of the remedy of judicial review was to ensure that the individual was given fair treatment by the authority to which he had been subjected and that it was no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. 40

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- Unless that restriction on the power of the court was observed, the court would under the guise of preventing abuse of power be itself guilty of usurpation of power. 1
2. Judicial review was concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. 5
3. The Court was not concerned with the merits of the decision not to appoint the Applicant to the position of Sub County Administrator unless it was shown that the failure to do so was as a result of the Respondents' abuse of their powers, in that the Respondents in doing so took into account irrelevant matters or failed to take into account relevant matters. If the Respondents took into account such factors as corruption, tribalism, nepotism and other malpractices in the recruitment process that would amount to considering irrelevant factors and would justify the High Court in interfering in the said process. However apart from the bare averments by the Applicant there was no evidence that the said appointment was laced by the aforesaid malpractices. 10 15 20
4. Had it been that the High Court was the one conducting the said interviews, it might have considered the Applicant's application more favourably, that did not warrant the Court substituting its discretion for that of the Board unless it was proved to the satisfaction of the Court that in arriving at its decision the Board committed acts of illegality, irrationality and procedural impropriety. 25
5. Judicial review or prerogative writs as they were known in the past, were orders of serious nature and could not and should not be granted lightly. They should only be granted where there were concrete grounds for their issuance. It was not enough to simply state that grounds for their issuance existed, there was a need to lay basis for alleging that there existed grounds which justified the grant of the said orders. 30
6. Section 69 of the County Governments Act only applied to officers of the County Government. It did not apply to applicants who had applied for positions and were yet to be absorbed in the County Government. To the contrary the Board resolved that those positions be filled from the pool of candidates who had already been interviewed for the positions of Sub County Administrators and Deputy Sub County Administrators. If the Board intended to fill the said position it ought to have followed section 66 of the Act which provided that if a public office was to be filled, the County Public 35 40

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- Service Board ought to invite applications through advertisement and other modes of communication so as to reach as wide a population of potential applicants as possible and especially persons who for any reason had been or might have been disadvantaged. 1
7. Article 10 of the Constitution bound all State organs, State officers, public officers and all persons whenever any of them *inter alia* made or implemented public policy decisions. In filling the positions in the County Government, the Board was making or implementing public policy decisions as recognized in section 63 of the Act. Therefore the Board was under a constitutional obligation to adhere to the values and principles of governance enunciated under the said article including good governance, integrity, transparency and accountability. Similarly, section 65(1) of the Act enjoined Public Service Board, in selecting candidates for appointment to consider *inter alia* the standards, values and principles set out in articles 10, 27(4), 56(c) and 232(1) of the Constitution as well as the need for an open and transparent recruitment of public servants. 5 10 15
8. A process which was shrouded in secrecy could not be said to have met the set criteria under article 10 and section 65 of the County Governments Act. Transparency and accountability demanded that public officers make public their intended decisions and thereafter strictly adhere to their publicised intentions. Where the board intended to fill certain advertised positions, only the advertised positions ought to have been filled and if they intend to fill further positions, they ought to have advertised the same so that those who might have felt that for any reason they did not stand a chance in the earlier advertised positions might apply for the subsequently advertised positions. 20 25
9. Filling new positions with persons who applied for earlier positions but for some reasons were not considered worthy of the same was an abhorrence to the values and principles of governance in so far as transparency and accountability was concerned. Similarly, there was no justification in advertising fewer posts but when it comes to appointments, more appointments than the advertised ones were made. To do that without any rational basis could only lead to a conclusion that the appointments were opaque and informed by ulterior motives. Such actions could not find justification in section 69 of the County Governments Act, since those who failed to be absorbed in the advertised positions could not by any stretch of imagination be considered as officers for the purposes of re-designation. For one to be re-designated, he or she had to have 30 35 40

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- been designated in the first place. 1
10. The appointment of Deputy Sub County Administrators, Deputy
Director Sub County Administrative Units and Assistant Director
County Administrative Units, contravened the provisions of article
10 of the Constitution as well as sections 65 and 66 of the County
Governments Act. 5
11. Section 77 of the County Governments Act provided that any
person dissatisfied or affected by a decision made by the County
Public Service Board or a person in exercise or purported exercise of
disciplinary control against any county public officer may appeal to
the Public Service Commission against the decision. Therefore where
a statute provided a remedy to a party, the Court had to exercise
restraint and first give an opportunity to the relevant bodies or State
organs to deal with the dispute as provided in the relevant statute. 10
12. Whereas the Applicant could have appealed against the said
decision with respect to qualifications, experience and achievements
of the persons who applied for the various positions and their
conduct as well as ethnic consideration and individual performance,
it had to be appreciated that judicial review had become the most
powerful enforcer of constitutionalism, one of the greatest promoters
of the rule of law and perhaps one of the most powerful tools against
abuse of power and arbitrariness. 15
13. The Applicant instituted the instant proceedings claiming breach of
her rights and fundamental freedoms. The mandate and jurisdiction
to determine that question lay in the High Court under articles 22,
23(3) and 165(3)(d) of the Constitution. The Board did not have
the jurisdiction to determine alleged violations of the Constitution. 20
14. The appointment of the Deputy Sub County Administrators,
Deputy Director Sub County Administrative Units and Assistant
Director County Administrative Units contravened the provisions
of article 10 of the Constitution as well as section 66 of the County
Governments Act, the decision by the Public Service Board to
make the said appointments was tainted with both illegality and
procedural impropriety. 25
- An order of certiorari to quash the decision of Wajir County Public
Service Board to appoint Deputy Sub County Administrators, Deputy
Director Sub County Administrative Units and Assistant Director County
Administrative Units granted* 30
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2. *Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge and 9 others* Civil Appeal No 266 of 1996 – (Explained) 5
3. *Keroche Industries Limited v Kenya Revenue Authority & 5 others* [2007] KLR 240 – (Affirmed)
4. *Kones v Republic & another ex-parte Kimani Wanyoike & 4 others* [2006] 2 KLR 266; (2008) 3 KLR [EP] 291 – (Mentioned) 10
5. *Kuria & 3 others v Attorney General* [2002] 2 KLR 69 – (Mentioned)
6. *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* Civil Appeal No 185 of 2001 – (Considered)
7. *Nakuru County Human Rights Network v Nakuru County Government & another* Petition 30 of 2014– (Mentioned) 15
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9. *Parsimei, Francis Gitau & 2 others v National Alliance Party & 4 others* Petition Nos 356 and 359 of 2012 (Consolidated) – (Mentioned) 20
10. *Pastoli v Kabale District Local Government Council & others* [2008] 2 EA 300 – (Considered)
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1. Hogg, QM., (Lord Hailsham) *et al* (Eds) (1987) *Halsbury's Laws of England* London: Butterworths 4th Edn Vol 1(1) para 60

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1. Constitution of Kenya, 2010 articles 10, 22, 23(3); 27(4); 56(c); 165(3)(d); 174(e); 232(1) – (Interpreted) 10
2. County Governments Act, 2012 (No 17 of 2012) sections 45, 50, 51, 65(1); 66; 68; 69; 77 – (Interpreted)

Advocates

1. *Mr Mugisha* for *Ms Odia* for the Applicant 15
2. *Miss Mugo* for *Mr Issa* for the Respondents

July 7, 2015, **GV Odunga, J** delivered the following Judgment.

Introduction

1. By a Notice of Motion dated 16th July, 2014 the *ex parte* Applicant herein, Hulbai Gedi Abdille, seeks the following orders: 20

1. An order of *certiorari* to remove to the High Court for purposes of quashing the decision to appoint Sub County Administrators deputy Sub County Administrators and the non advertised positions of deputy director sub county admin units and assistant director sub county admin units pursuant to a list of the officers appointed on 9th June 2014 and published on 12th June 2014. 25

2. An order of Prohibition or prohibit the 2nd Respondent from implementing and or Gazetting the decision of recruitment/appointment of 9th June 2014 and subsequently carrying out such unlawful and unprocedural recruitment exercises in future without any legal justification. 30

3. Any other order that the Honourable Court may deem fit and just to grant. 35

4. The costs of this Application are provided for.

Applicant's Case 40

2. The Application was based on the following grounds:
 - a. That the Respondents arrived at their decision they

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did not comply with the qualification requirements highlighted in the vacancy advertisement and ended up recruiting an individual with inferior qualifications compared to that of the Applicant.	1
b. That the Respondents failed to declare and advertise all the positions available and ended recruiting staff for the other positions which were listed and other positions carried out in the advertisement.	5
c. That the Respondents have further recruited persons who were not publicly shortlisted in the dailies and never attended the interview because of high level connection with the public service board Wajir.	10
d. The Applicant have a constitutional right to an expeditious, efficient, lawful, reasonable administrative action that adheres to the principles procedural fairness, including a right to be given reasons for an act that is likely to affect them adversely.	15
e. The decision was a blatant abridgment of the claimant's constitutional right to fair procedural practices and fair administrative procedure.	20
f. The Respondents acted unlawfully in arriving at its decision carried in a list of appointment dated 9 th June 2014 and circulation on 12 th June 2014 and a subsequent appointing of Sub County Administrators deputy Sub County Administrators and deputy director sub county admin units and assistant directors admin units since the said appointments are irregular unfair and unprocedural.	25
g. The said decision on the part of the Respondents was made in transgression of the rules of natural justice in that it never afforded the Applicant an opportunity to be conducted in a fair, competitive and orderly manner before the decision was made.	30
h. The said decision is an abuse of the power granted to the Respondent by the enabling statute as it was not made in conformity with the law.	35
i. The said decision was arrived at in a bias way which picked candidate based on their connections and tribal affiliation <i>vis-à-vis</i> merit and qualification.	40
3. The Application was supported by verifying and supplementary Affidavits sworn by the Applicant on 10th July, 2014 and 1st

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- December, 2014 respectively. 1
4. According to the Applicant, she was a professionally trained teacher with a degree in BED/ARTS and the Head Teacher at Township Primary School Wajir County with a teaching career for over 20 years. On the 24th July, 2013 she came across an advertisement on the *Daily Nation* newspaper whereby the County Government of Wajir wished to recruit competent and qualified persons to fill vacant positions as per the Constitution of Kenya 2010, Cap 11 section 45, 50 and 51 of the County Government Act No 17 of 2012 (hereinafter referred to as “the Act”). 5 10
5. After perusing the said advertisement she got interested in two positions namely Sub County Administrators and deputy sub-county administrators and decided to apply for the Sub County Administrators which had 6 vacant posts and avoided the deputy Sub County Administrators which had only 4 vacant posts since, according to her, she met all the qualifications outlined. On the 29th April 2014, she was amongst the candidates shortlisted for the position of Sub County Administrators and was invited for an interview on the 14th day of May 2014 at 10:00 am. She was however surprised from the list of officers appointed to learn that she had not been included in the list and no communication was relayed to her to date. She was however shocked that despite the Respondents having declared and advertised only 4 vacant positions for Sub County Administrators they actually recruited 8 officers to fill in the positions. The Applicant averred that the person picked as a sub county administrator for Wajir East sub county was junior to her in relation to years of service as a teacher. 15 20 25 30
6. She disclosed that the Respondent in a bid to circumvent the transparent process, went ahead to assign positions that were never advertised and recruited persons who were never interviewed or shortlisted for any positions such as that of Deputy Director sub county one Shallow Adan Ali. 35
7. In the Applicant’s view, the conduct and action of the Respondents was a deliberate effort to lock her from the County Government since he come from the minority Somali clan of Wajir hence the action and conduct of the Respondents in the recruitment exercise is a blatant contravention of the principles of natural justice and that the same should not be allowed to stand. 40

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8. The Applicant contended based on his counsel's advice that the issue of gender equality has been abused since out of the 24 shortlisted applicants for the position of the Sub County Administrators in the entire Wajir County and invited for interviews on the 14th, 15th & 16th May 2014 the only lady, the Applicant, was left out of any administrative position in the entire county. 1
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9. It was therefore the Applicant's case that the said decision relating to the outcome of the recruitment exercise held in Wajir County was made in blatant transgression of the established procedures and should be removed into this honourable court for quashing and that an order of prohibition do issue to stop the Respondent from recognizing, Gazetting and posting the officer appointed to the sub counties and administrative units Wajir County. 10
10. The Applicant maintained that the 2nd Respondent was properly sued on behalf of the Wajir County Government and as he has deposed he was the in charge of the public service of the county government an equivalent of a cabinet secretary to the County government. As the person in charge of the public service of the County Government, the Applicant contended that he ought not to have watched an irregularity in the appointment process and received staff who had been unlawfully recruited. 15
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11. It was therefore the Applicant's contention that this judicial review application is properly before Court and the same should be entertained as nothing stops the Court from intervening in the illegal and unconstitutional actions of the Respondents. 25
12. It was her case that the recruitment process was highly discriminative, full of nepotism and that most of the recruits were absorbed on the basis of being related to the officials of the Respondents and that this was the key basis for not advertising key positions under challenged herein. To her, the minutes dated June 6th 2014 was afterthought created to defeat the intention of the Application before Court and an effort to cover up an irregularity already committed. Her position was that the Respondents failed, avoided and neglected to advertise the positions of a deputy director and assistant deputy directors in a deliberate move to bar her from applying and being considered for the same. 30
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13. Based on legal advice the Applicant averred that both the Respondents should be held jointly and severally liable for their

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- actions and that the resultant decision should be quashed and her application be allowed with costs to her. It was submitted on behalf of the Applicant that since the person appointed to the position of sub county administrator as opposed to the Applicant had never held a position of a Head Teacher but was first employed as a P1 Teacher in 2006 and therefore his appointment could only be linked to corruption, tribalism, nepotism and other malpractices in the selection process. 1
14. It was further submitted that the Respondents having emerged with positions which were never advertised such as Deputy Director Sub County Administrative Units and Assistant Director rendered the recruitment process flawed. In support of this submission the Applicant relied on sections 66 and 68 of the County Governments Act No 17 of 2012. It was therefore submitted that the Respondent's action contravened article 10 of the Constitution which calls for non-discrimination, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised. According to the Applicant the principle of gender equality was not considered since 6 male persons were appointed without a single female. It was the Applicant's view that there was no explanation why a person whose performance was ranked below her was appointed and she was left out. 5 10 15 20
15. Since no communication was given to the Applicant, it was the Applicant's position that whereas an appeal is available to the Applicant, she was compelled to seek the remedy of judicial review since she was challenging the process. The Applicant relied on *Republic v Chairperson Business Premises Rent Tribunal ex parte Ibrahim Sheikh Abdulla & 2 others* [2015] eKLR for the holding that there is no requirement that an applicant for judicial review must exhaust all other available remedies. 25 30
16. According to the Applicant the Respondent's action was contrary to article 174(e) of the Constitution which provides that the objects of the devolution of government are, inter alia, to protect and promote the interests and rights of minorities, marginalised communities. The same was also contrary to article 232 thereof which sets out the values and principles of public service which include accountability for administrative acts and representation of Kenya's diverse communities as well as affording adequate and equal opportunities for appointments. 35 40

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17. The Applicant therefore sought an order quashing the decision to appoint Sub County Administrators, Deputy Sub County Administrators and the non advertised positions of Deputy Director Sub County Administrative Units and Assistant Director County Administrative Units as done on 9th June 2014. In support of her position the Applicant relied on *John Mining Temoi & another v Governor of Bungoma County & 17 others* [2014] eKLR. 1
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- 1st Respondent's Case
18. In response to the Application, the 1st Respondent, Shukri Alasow Mohamed, filed a replying Affidavit sworn on 14th August, 2014. 10
19. According to him, the proceedings were premature and defective as the *ex parte* Applicant sought to challenge the decisions made by 1st Respondent in exercise of its mandate under section 63 of the County Governments Act and that as the Applicant had not appealed to the Public Service Commission as required under section 77 of the County Government Act before filing proceedings before this Court, these proceedings ought to be struck out with costs to the Respondents. 15
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20. According to the 1st Respondent, on 24th July, 2013 County Public Service Board of Wajir (hereinafter referred to as "the Board") placed advertisements in the local dailies advertising the positions for the sub-County Administrators and the Deputy Sub-county Administrators. He explained that the Sub County Administrators and Deputy Sub-county Administrators are responsible for the management and supervision of the general administrative functions at the sub-county unit; developing policies and plans, ensuring effective service delivery, co-ordinating developmental activities, and exercise of any functions and powers delegated by the County Public Service Board and that their offices are established under section 50 of the County Government Act (hereinafter referred to as "the Act"). 25
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21. He disclosed that by a meeting held by the Board on 13th December 1013 it was agreed that the qualification and experience requirements would be adhered to strictly and Applicants who did not attach evidence of or establish their experience would not be considered. During the meeting it was established that there were a total of 142 Applicants for the 6 Sub-county Administrator positions whereafter 33 were short-listed and 47 Applicants who met the qualifications threshold were short listed for the positions of Deputy 35
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- Sub County Administrators. Thereafter the Board published the short listed candidates for the County Administrators and Deputy Sub County Administrators and the schedule for the interviews and after the interview process, the board held a meeting on 6th June, 2014 where the score sheets for the interviews were tabled and discussed and the following resolutions made:
- i. The highest ranked interviewees in each sub-county would be selected for the positions of the sub-county Administrators and Deputy Sub-County Administrators save where other constitutional criteria to cater for the gender, disability, ethic balancing and minorities were considered. 10
 - ii. Wajir North and Wajir South sub counties would receive two Sub-County Administrators and 2 Deputy Sub County Administrators owing to the vast area of the two sub counties. 15
 - iii. To establish an office at the County Headquarters to co-ordinate the activities of the sub-counties and, in the future, the wards to be manned by a Deputy Director in charge of Sub County Administration Units and 3 Assistant Directors in charge of sub county administration units. 20
 - iv. The Deputy in charge of Sub County Administration Units and 3 Assistant Directors in Charge of Sub County Administration Units would be equivalent in rank to the Sub County Administrators and Deputy Sub County Administrators respectively. 25
 - v. In order to save on time and resources, the Board decided to select the Deputy Director and Assistant Directors from the pool of candidates who had already interviewed for the positions of sub-county administrators and Sub County Administrators respectively in observance of section 69 of the Act. 30
22. The 1st Respondent deposed that by letters dated 9th June, 2014 the Board forwarded appointment letters to the successful candidates as required by Section 67 of the Act and thereafter issued the appointees with letters of posting dated 17th June, 2014. He asserted that the board did not lower the qualification threshold as alleged as the selected candidates were all eminently qualified as confirmed by their testimonials. 35

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23. He therefore believed that the Board complied with the letter and spirit of the Act and the Constitution of Kenya in the discharge of its constitutional mandate in the recruitment and appointment of the Sub County Administrators and Deputy Sub-county administrators. He denied that Board and the 2nd Respondent had discriminated against women as alleged or at all and was, to the contrary, one of the few counties in the region striving for gender equity in the appointment of women to various posts within the Wajir County Government. 1
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- 2nd Respondent's Case
24. The 2nd Respondent opposed the Application vide a replying Affidavit sworn by its secretary and Head of County Civil Service, Abdirizak Sheikh, on 8th August, 2014. 15
25. According to the deponent, the 1st Respondent is an independent entity free to carry out its mandate autonomously from the 2nd Respondent under the provisions of section 63 of the Act. 20
26. It was therefore contended that the Applicant was non-suited as against the 2nd Respondent as it did not play any role in the recruitment process and the subsequent appointment of the Sub-County Administrators and Deputy Sub-County Administrators hence this application should be struck out with costs. 25
27. To the 2nd Respondent, the proceedings herein were premature as the Applicant had not appealed to the Public Service Commission as required under section 77 of the Act hence the Application ought to be dismissed. 30
28. It was submitted on behalf of the Respondents that since under section 63 of the Act, the County Public Service Board has the power to make appointments to various offices in the County Public Service, the 1st Respondent is an independent entity free to carry out its mandate autonomously from the 2nd Respondent; and as the application seeks to challenge the 1st Respondent's exercise of statutory power, the Applicant has no cause against the 2nd Respondent. 35
29. It was submitted that the Wajir County Public Service in the exercise of its mandate complied with the letter and spirit of the County Governments Act and the Constitution since the successful candidates appointed were highly qualified and competent to serve in the positions appointed. It was submitted that the said County 40

Government adhered to the constitutional demand for gender equity and there was no discrimination.	1
30. It was submitted that since the complaint raised by the Applicant fell within section 77(2) of the Act, as touched on issues of recruitment, selection and appointment and qualification of the Sub County Administrators, the Applicant should have appealed to the County Public Service Board before instituting these proceedings and relied on <i>Speaker of the National Assembly v Karume</i> [1990-1994] EA 549 and <i>Nakuru County Human Rights Network v Nakuru County Government & another</i> [2014] eKLR.	10
31. Based on <i>Kenya National Examination Council v Republic ex parte Geoffrey Njoroge Gathenji and 9 others</i> [1997] eKLR, it was submitted that since the decision to appoint the Sub County and Deputy Sub County Administrators was within its statutory jurisdiction and mandate and was procedural, in so far as the Application challenges the merits of the decision, it fell outside the ambit of judicial review and was hence baseless and without merit.	15
Determinations	20
32. I have considered the Application, the various Affidavits filed in support of and in opposition to the Application as well as the submissions filed.	
33. It was contended that the failure to appoint the Applicant, who was the only female applicant shortlisted for the post of Sub County Administrator in the whole of Wajir County could only be linked to corruption, tribalism, nepotism and other malpractices in the recruitment process. The Respondents however contended that the appointments were based on qualification and experience and that a total of 143 applicants applied for the 6 Sub-County Administrators' positions out of which 17 were female and 126 were male. A total of 33 applicants were shortlisted. On the other hand 47 candidates were short-listed for the position of Deputy Sub-County Administrators and out of these 38 were male while 9 were female. It was submitted that there were 6 Sub County Administrators' positions to be filled and that the <i>ex parte</i> Applicant was the second best qualified interviewee in respect of Wajir East Sub County and it was unanimously decided that the top scorers in each sub county would be selected for the position of Sub County Administrator. From exhibit GAM-4, the minutes of the Board meeting held on 6 th June, 2014, the Applicant scored 85.57 while one Omar Daud	40

scored 90.57 and it was resolved that the latter be appointed to the said position. In fact from the Applicant's own exhibit, it was this same person who was appointed to the said position. The Applicant however contends that he was not as qualified as the Applicant and that the decision to appoint him to the position was informed by corruption, tribalism, nepotism and other malpractices in the recruitment process.

34. At this stage it is important to revisit the parameters of judicial review jurisdiction. The said parameters were set out by the Court of Appeal in *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* Civil Appeal No 185 of 2001 in which it was held that:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters... The Court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."

35. In *Republic v Kenya Revenue Authority ex parte Yaya Towers Limited* [2008] eKLR it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the Application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the Court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *Halsbury's Laws of England* 4th Edition Vol (1)(1) Para 60.

36. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but

with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See *R v Secretary of State for Education and Science ex parte Avon County Council* (1991) 1 All ER 282, at P. 285.

37. The broad grounds, though not exhaustive, on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of *Pastoli v Kabale District Local Government Council and Others* [2008] 2 EA 300. In that case the Court cited with approval *Council of Civil Unions v Minister for the Civil Service* [1985] AC 2 and *An Application by Bukoba Gymkhana Club* [1963] EA 478 at 479 and held:

“In order to succeed in an application for judicial review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

38. Therefore, in this application we are not concerned with the merits of the decision not to appoint the Applicant to the position of Sub County Administrator unless it is shown that the failure to do so was as a result of the Respondents’ abuse of their powers in that they in

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- so doing took into account irrelevant matters or failed to take into account relevant matters. If the Respondents took into account such factors as corruption, tribalism, nepotism and other malpractices in the recruitment process that would amount to considering irrelevant factors and would justify this Court in interfering in the said process. However apart from the bare averments by the Applicant there is no evidence that the said appointment was laced by the aforesaid malpractices. The Applicant contends that since she was the only female applicant shortlisted for the position, in line with the principles of gender equality she ought to have been handed the position automatically. Whereas, it may well be that this Court had it been the one conducting the said interviews may have considered the Applicant's application more favourably, that does not warrant this Court substituting its discretion for that of the Board unless it is proved to the satisfaction of the Court that in arriving at its decision the Board committed acts of illegality, irrationality and procedural impropriety. In *East African Community v Railways African Union (Kenya) and others (No 2)* Civil Appeal No 41 of 1974 [1974] EA 425, it was held by the East African Court of Appeal that the onus lies on a person seeking the grant of a prerogative order to establish that it is essential for it to issue since these are not orders that are lightly made. Judicial review or prerogative writs as they were known in the past, it has been held are orders of serious nature and cannot and should not be granted lightly. They should only be granted where there are concrete grounds for their issuance. It is not enough to simply state that grounds for their issuance exist; there is a need to lay basis for alleging that there exist grounds which justify the grant of the said orders.
39. I associate myself with the holding in *Republic v Kenya Power & Lighting Company Limited & another* [2013] eKLR to the effect that:
 "It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted."
- See also *Kuria & 3 others v Attorney General* [2002] 2 KLR 69.
40. I am not satisfied that the Applicant's allegations as to the basis upon which she was not appointed to the position she applied for are valid.

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41. It was however the Applicant's case that whereas only 4 posts were advertised in respect of the position of Deputy Sub County Administrators, 8 appointments were in fact made to the said position. I have however reviewed the documents on record and it is apparent that only 7 appointments were actually made to the position though as will become apparent later in this judgement nothing turns on that discrepancy. It is noteworthy that no explanation has been proffered why the Board decided to appoint 7 persons to the said position as opposed to the advertised 4.
42. It was further contended that the Respondents proceeded to appoint persons to the positions of Deputy Director Sub County Administrative Units and Assistant Director County Administrative Units yet the said positions were never advertised and no interviews were conducted in respect thereof. That the said positions were never advertised and no specific interviews were conducted in respect thereof has not been denied. The Respondent's justification for taking the said course is however based on the need to save on time and resources, in observance of section 69 of the Act. Section 69 aforesaid which deals with re-designation of officers provides:
- “(1) In selecting public officers for re-designation, the criteria for appointment as prescribed under this Part shall apply.
 - (2) A public officer shall not be re-designated to hold or act in a public office if—
 - (a) the office is not vacant;
 - (b) the public officer does not meet all the qualifications, except for experience at a lower grade in the relevant cadre, attached to the public office;
 - (c) the decision to re-designate the officer may disadvantage any public officer already serving in the relevant cadre; or
 - (d) the officer subject to re-designation has not consented to the re-designation.
 - (3) If a public officer is re-designated, the officer shall not in any way suffer reduction in remuneration.”
43. In my view section 69 of the Act only applies to officers of the County Government. It does not apply to applicants who have applied for positions and are yet to be absorbed in the County Government. In this case, it is not contended that those who were appointed to fill the positions of Deputy Director Sub County Administrative Units and Assistant Director County Administrative

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- Units were already officers in the County Government. To the contrary the Board resolved that these positions be filled from the pool of candidates who had already been interviewed for the positions of sub-county administrators and deputy Sub County Administrators. If the Board intended to fill the said position it ought to have followed section 66 of the Act which provides:
- “If a public office is to be filled, the County Public Service Board shall invite applications through advertisement and other modes of communication so as to reach as wide a population of potential applicants as possible and especially persons who for any reason have been or may be disadvantaged.”
44. Article 10 of the Constitution binds all State organs, State officers, public officers and all persons whenever any of them *inter alia* makes or implements public policy decisions. In filling in the positions in the County Government, the Board was making or implementing public policy decisions as is very clearly recognised in section 63 of the Act. Therefore the Board was under a constitutional obligation to adhere to the values and principles of governance enunciated under the said Article including good governance, integrity, transparency and accountability. Similarly, section 65(1) of the Act enjoins Public Service Board, in selecting candidates for appointment, to consider *inter alia* the standards, values and principles set out in articles 10, 27(4), 56(c) and 232(1) of the Constitution as well as the need for an open and transparent recruitment of public servants.
45. A process which is shrouded in secrecy cannot be said to meet the set criteria under article 10 and section 65 of the Act. Transparency and accountability demands that public officers make public their intended decisions and thereafter strictly adhere to their publicised intentions. Where they intend to fill certain advertised positions, it is my view that only the advertised positions ought to be filled and if they intend to fill further positions, they ought to advertise the same so that those who may have felt that for any reason they did not stand a chance in the earlier advertised positions may apply for the subsequently advertised positions. To fill new positions with persons who applied for earlier positions but for some reasons were not considered worthy of the same in my view is an anathema to the values and principles of governance in so far as transparency and accountability is concerned. Similarly, there is no justification in advertising fewer posts but when it comes to appointments,

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- more appointments than the advertised ones are made. To do that without any rational basis can only lead to a conclusion that the appointments were opaque and informed by ulterior motives. Such actions cannot find justification in section 69 of the Act since those who fail to be absorbed in the advertised positions cannot by any stretch of imagination be considered as officers for the purposes of re-designation. For one to be re-designated, he or she must have been designated in the first place. 1
46. I therefore have no hesitation in finding that the appointment of Deputy Sub County Administrators, Deputy Director Sub County Administrative Units and Assistant Director County Administrative Units contravened the provisions of article 10 of the Constitutions as well as sections 65 and 66 of the County Governments Act. In arriving at this decision I associate myself with the decision of Mabeya, J in *John Mining Temoi & another v Governor of Bungoma County & 17 others* [2014] eKLR. 5 10
47. The Respondents however contended that the Applicant ought to have invoked the provisions of section 77 of the Act. The said section provides as follows: 15 20
- “(1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the “Commission”) against the decision. 25
- (2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of— 30
- (a) recruitment, selection, appointment and qualifications attached to any office;
- (b) remuneration and terms and conditions of service;
- (c) disciplinary control; 35
- (d) national values and principles of governance, under article 10, and values and principles of public service under article 232 of the Constitution;
- (e) retirement and other removal from service;
- (f) pension benefits, gratuity and any other terminal benefits; or 40
- (g) any other decision the Commission considers to fall within its constitutional competence to hear and

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- determine on appeal in that regard.” 1
48. It is now trite that where a statute provides a remedy to a party, the Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in *Speaker of National Assembly v Njenga Karume* [2008] 1 KLR 425, where it held that; 5
- “In our view there is considerable merit...that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.” 10
- See also *Kipkalya Kones v Republic & another ex-parte Kimani Wanyoike & 4 others* (2008) 3 KLR (EP) 291 and *Francis Gitau Parsime & 2 others v National Alliance Party & 4 others* Petition No 356 and 359 of 2012. 15
49. I agree that where there exist an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first. 20
50. I am however also aware of the principle established by the Court of Appeal of Trinidad and Tobago in the case of *Damian Belfonte v The Attorney General of Trinidad and Tobago* CA 84 of 2004 that where there is a means of redress that is inadequate, the Court should not exercise restraint. In that case the Court held: 25
- “The opinion in *Jaroo* has recently been considered and clarified by the Board in *AG v Ramanoop*. Their lordships laid stress on the need to examine the purpose for which the application is made in order to determine whether it is an abuse of process where there is an available common law remedy. In their lordship’s words: 30
- “Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the Court’s process. Atypical, but by no means exclusive, example of such a feature would be a case where there has been an 35 40

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- arbitrary use of state power...Another example of a special feature would be a case where several rights are infringed, some of which are common law rights and some for which protection is available only under the constitution. It would not be fair, convenient or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights”.” 1 5
51. I entirely agree and confronted with a question as to which remedy a litigant ought to seek, a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant’s grievance. Whereas I agree that the Board’s decision on qualifications, experience and achievements of the persons who applied for the various positions and their conduct as well as ethnic consideration and individual performance are matters which are more merit oriented, in this case theA pplicant contests the Board’s decision on the grounds that it contravened the provisions of the Constitution. Whereas the Applicant could have appealed against the said decision with respect to qualifications, experience and achievements of the persons who applied for the various positions and their conduct as well as ethnic consideration and individual performance, it must be appreciated that judicial review has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. See *Re Bivac International SA (Bureau Veritas)* [2005] 2 EA 43. 10 15 20 25
52. The right to access this Court should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms except in the circumstances noted in *Belfonte (supra)*. The Applicant instituted these proceedings claiming breach of her rights and fundamental freedoms. The mandate and jurisdiction to determine that question lies in this Court under articles 22, 23(3) and 165(3)(d) of the Constitution. The Board, in my view, does not have the jurisdiction to determine alleged violations of the Constitution -See *Wananchi Group (Kenya) Ltd v The Communications Commission of Kenya* Petition No 98 of 2012. Majanja J in *Isaac Ngugi v Nairobi Hospital and another* Petition No 461 of 2012 found on the same lines when he expressed himself as follows: 30 35 40
- “For instance, the Court will be reluctant to apply the Constitution directly to horizontal relationships where

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- specific legislation exists to regulate the private relations in questions. In other cases, the mechanisms provided for enforcement are simply inadequate to effectuate the Constitutional guarantee even though there exists private law regulating a matter within the scope of the Application of the Constitutional right or fundamental freedoms. In such cases, the Court may proceed to apply the provisions of the Constitution directly." (Emphasis added). 1 5
53. I associate myself with the decision of Nyamu, J (as he then was) in *Keroche Industries Limited v Kenya Revenue Authority & 5 others* Nairobi HCMA No 743 of 2006 [2007] KLR 240 where he held: 10
- "On the issue of discretion Prof Sir William Wade in his Book *Administrative Law* has summarized the position as follows: The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose the merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The Rule is necessary in order to protect the people 15 20 25 30 35 40

from arbitrary interference by those set in power over them... 1
when litigants come to the Courts it is the core business of
the Courts and the courts role is to define the limits of their
power. It is not for the Executive to tell them when to come 5
to court! It is the constitutional separation and balance of
power that separates democracies from dictatorships. The
Courts should never, ever, abandon their role in maintaining
the balance...From the above analysis this is a case which has
given rise to nearly all the known grounds for intervention in 10
judicial review, that is almost the entire spectrum of existing
grounds in judicial review. It seems apt to state that public
authorities must constantly be reminded that ours is a limited
government – that is a government limited by law – this in
turn is the meaning of constitutionalism. 15

54. I am satisfied therefore that for the above reasons that this
Application is properly before this Court.

55. Having found that the appointment of the Deputy Sub County
Administrators, Deputy Director Sub County Administrative Units 20
and Assistant Director County Administrative Units contravened
the provisions of article 10 of the Constitutions as well as section
66 of the I have no hesitation in finding that the decision by the
Public Service Board to County Governments Act, make the said
appointments was tainted with both illegality and procedural 25
impropriety.

Order

56. In the premises I hereby grant an order of certiorari removing
into this court for the purposes of being quashed the decision of 30
Wajir County Public Service Board to appoint Deputy Sub County
Administrators, Deputy Director Sub County Administrative Units
and Assistant Director County Administrative Units pursuant to
the minutes dated 6th June, 2014 and published on 12th June 2014
which decision is hereby quashed. 35

57. The costs of the Application are awarded to the Applicant to be
borne by the 1st Respondent.

58. It is so ordered

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**Centre for Rights Education & Awareness
(CREAW) v Attorney General & another
[2015] KLR- HCK**

High Court, at Nairobi
M Ngugi, J

June 26, 2015

Petition No 182 of 2015

Brief facts

The Petitioner brought a Petition before the High Court alleging failure on the part of the Respondents to prepare a bill for giving effect to the one-third-to-two-thirds gender principle, for tabling before Parliament for purposes of implementation of articles 27(8) and 81(b) of the Constitution. The Petitioner also sought an order of *mandamus* directing the Respondents to prepare the bill and table it before parliament.

The Petition was brought pursuant to the Supreme Court's advisory opinion dated 11th December 2012 in Reference Number 2 of 2012, that the said legislative measures for giving effect to the one-third-to-two-thirds gender principle, under article 81(b) of the Constitution in relation to the National Assembly and Senate, should be taken by 27th August, 2015.

The Petitioner submitted that in order to give effect to the Supreme Court's Advisory Opinion as well as the respective constitutional and legal provisions, certain legislative actions, possibly with a bearing on constitutional amendments, were required to be taken by 27th August 2015.

The Respondents on their part submitted that the Petition was filed before the constitutional timeline had reached and that article 261(2) of the Constitution provided that the timelines within which legislative measures were to be taken could be extended by Parliament for one year.

Issues

1. Whether the advisory opinion of the Supreme Court was binding on the Court as well as the respondents
2. Whether the petitioner had approached the High Court prematurely, and whether it should have waited for the 27th of August 2015 to dawn before approaching the Court.
3. Whether Parliament was a Necessary Party to the Proceedings

4. Whether there had been a violation or threatened violation of a Constitutional right for not preparing and tabling a Bill on gender rule before Parliament by the respondents. 1

Constitutional Law – advisory opinion – advisory opinion of the Supreme Court – whether advisory opinion of the Supreme Court on legislative measures for giving effect to the one-third-to-two-thirds gender principle was binding on the High Court – Constitution of Kenya, 2010 article 163(7). 5

Constitutional Law – mandamus – application for orders of mandamus – directing the respondents to prepare the relevant Bill for tabling before Parliament for purposes of implementation of articles 27(8) and 81(b) of the Constitution – where application was challenged on the ground that it was filed prematurely – whether the application had merit – Constitution of Kenya, 2010 articles 27(8), (81)(b), 100, 261(5). 10

Constitutional Law – fundamental rights and freedoms – claim that a fundamental right was threatened by the Respondent’s act of not preparing and tabling a Bill on gender rule before Parliament – whether a party was required to wait for a violation of a right or a contravention of the Constitution to occur before approaching the Court for relief – Constitution of Kenya, 2010 articles 22, 258. 15

Civil Practice and Procedure – parties to a suit – joinder of parties – where petition was brought against the Attorney General and the Commission for the Implementation of the Constitution seeking orders of mandamus directing the respondents to prepare the relevant Bill for tabling before Parliament – whether Parliament was a necessary party to the proceedings. 20

Constitution of Kenya, 2010

Article 81 30

The electoral system shall comply with the following principles—

- (a) freedom of citizens to exercise their political rights under article 38;
- (b) not more than two-thirds of the members of elective public bodies shall be of the same gender; 35
- (c) fair representation of persons with disabilities;

Article 100

Parliament shall enact legislation to promote the representation in Parliament of - 40

- (a) women;
- (b) persons with disabilities;

(c) youth;	1
(d) ethnic and other minorities; and	
(e) marginalised communities.	
Article 261(5) provides that:	5
(5) If Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter.	
(6) The High Court in determining a petition under clause (5) may—	10
(a) make a declaratory order on the matter; and	
(b) transmit an order directing Parliament and the Attorney-General to take steps to ensure that the required legislation is enacted, within the period specified in the order, and to report the progress to the Chief Justice.	15
(7) If Parliament fails to enact legislation in accordance with an order under clause (6)(b), the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament.	20

Held:

1. Decisions of the Supreme Court have binding effect on all persons in the land in light of the hierarchy of courts and the doctrine of precedent. In accordance with the provisions of article 163(7) which provided that all courts other than the Supreme Court were bound by the decisions of the Supreme Court, the High Court was constitutionally bound by the Advisory Opinion of the Supreme Court on the question of gender representation in the national Assembly and Senate. Equally bound were the Respondents.	25
2. A party did not require to wait for a violation of a right or a contravention of the Constitution to occur before approaching the Court for relief. The intent behind the use of the word “threatened” in both articles 22 and 258 was to preempt the violation of rights, or of the Constitution. If a clear threat to either was made out, it could not be properly argued that the petitioner should have waited for the violation or contravention to occur, and then seek relief. Therefore the instant petition was not premature, it was properly before court.	35
3. Parliament’s role as contemplated under article 261(1), required some prior action on the part of the Attorney General and the Commission for the Implementation of the Constitution. Any	40

- orders directed at the two entities, therefore in respect of the obligation under article 261(4) could not have been binding on Parliament. From the provisions of article 261, it was apparent that the responsibility of Parliament to enact Bills pursuant to article 261(1) was premised on the AG and CIC originating Bills, hence the provisions of article 261(4) that “For the purposes of clause (1), the Attorney-General, in consultation with the Commission for the Implementation of the Constitution, shall prepare the relevant Bills for tabling before Parliament.
4. Rule 5(b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, provided that a petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court might in every proceeding deal with the matter in dispute. In the instant case, the petitioner enjoined the proper parties to the Court.
5. The requisite legislation to entrench the two thirds gender rule to ensure that the principle that not more than two thirds of the membership of the National Assembly and Senate shall be of the same gender should have been enacted by the 27th of August 2015. That requirement, which all parties accepted and which the High Court found binding by virtue of the fact that the Supreme Court was the highest court in the land and its decisions were accordingly binding on all, had not yet been implemented.
6. The date set by the Supreme Court was according with the constitutional provisions in the Fifth Schedule of the Constitution. Under the said Schedule, timelines were given for the enactment of various legislation. With respect to promotion of representation of marginalized groups under article 100 for instance, the time limit was five years from the promulgation of the Constitution. Where no specific timeline was provided in respect of a matter, the Constitution provided that any other legislation required by the Constitution had to be enacted within 5 years from the date of promulgation.
7. The intention of the people of Kenya in overwhelmingly voting for the 2010 Constitution, was that all legislation that was required to be enacted in order to bring into being their vision of a just and democratic society should have been enacted within 5 years from the date they promulgated the Constitution. The people required under article 261(1) that Parliament should enact the said legislation within the said time period and that in order for Parliament to do so, as provided under article 261(4), the AG, in consultation with

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- CIC would have prepared the requisite Bills. 1
8. The steps that the AG and CIC had taken as they emerged from their affidavits could not be described as being reasonable and practicable, or as intended to achieve the timeline in the Advisory Opinion. There was an apparent failure on their part to exercise their constitutional mandate under article 261(4) as directed in the Advisory Opinion. The AG, who did not deny the responsibility of his office to originate Bills, took refuge in the provisions of article 261(2), which granted to the National Assembly the power to extend the time prescribed for taking action in terms of article 261(1) and the Fifth Schedule. However, the provisions of article 261(2) were clear, and it was important to set them out alongside article 261(1). 5 10
9. It was not the mandate of the High Court in the Petition to enquire generally into how far the AG and CIC had met their mandate under article 261(4) and section 5(6) of the Sixth Schedule, nor did it fall upon it to inquire how far there had been compliance with the constitutional timelines set out in the Fifth Schedule. It was also not the mandate of the Court to say how the two thirds gender rule should have been implemented whether by way of constitutional amendment, or by legislation. However, the Court had the mandate to state that in so far as the two thirds gender rule and the binding Advisory Opinion of the Supreme Court was concerned, there was an apparent failure by the respondents to exercise their mandate under the Constitution. 15 20 25
10. The argument by the Respondents that the period for enacting the requisite legislation could be extended by the National Assembly could not really ameliorate the situation. It would only be in the province of the Speaker should the question of extension of time arise to certify the special circumstances that justified the extension of time, and for the National Assembly to vote on whether to extend the time or not. 30
11. There was a threatened violation of the Constitution by the Respondents with respect to their exercise of their mandate(s) under article 261(4) and section 5(6) of the Sixth Schedule to the Constitution. 35
12. In promulgating the 2010 Constitution, the people of Kenya were optimistic that they had put in place the institutions processes and procedures for the just and effective governance that would implement their hopes and aspirations through the implementation of the Constitution, thus leading to the just and equitable society that they aspired to. It would appear at least in so 40

- far as the equitable representation of women and other marginalized groups contemplated under articles 27(8), 81(b) and 100 was concerned, that their hope might not be realized. The Constitutional Implementation Oversight Committee of Parliament appeared to be somewhat moribund. CIC seemed to wish to wash the matter off its hands, and the AG, who sought the Advisory Opinion in the first place, seemed keen on waiting for the eleventh hour to act. It was rather late in the day for implementation of the rule, but not too late.
13. The Attorney General had a constitutional duty under article 261(4) of the Constitution in consultation with CIC to prepare the relevant Bills for tabling before Parliament as soon as reasonably practicable to enable Parliament to enact the legislation within the period specified. Even if it were accepted that the obligation under article 261(4) was solely on the AG, CIC could not escape responsibility if one considered the provisions of section 5(6)(a) of the Sixth Schedule which gave one of its functions as being to monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution. The Respondents had not discharged their mandate under the Constitution, and had not given reasonable explanations for failing to do that which they were under a constitutional duty to do.
14. The people of Kenya in their wisdom had foreseen the danger that various promises that they made to themselves might be postponed or abandoned altogether. They therefore made very specific provisions with regard to their realization. Under the general provisions of the Fifth Schedule all legislation required by the Constitution should have been enacted within 5 years of the effective date of the Constitution. In terms of the Advisory Opinion of the Supreme Court, the legislation to implement the two thirds gender rule should have been in place before 27th August 2015.
15. The AG, in consultation with CIC, was under a constitutional duty to prepare for tabling before Parliament, legislation to effect the gender equity rule. Thereafter, should Parliament fail to act then doubtlessly a vigilant Kenyan could invoke the provisions of article 261(5)-(7). However, the AG and CIC had to first act to prepare and present the necessary Bill(s) to Parliament. They could not pass the responsibility to others, as CIC had sought to do under the provisions of article 119 of the Constitution, which made provision with respect to petitions to Parliament. The constitutional obligation under article 261(4) and the Fifth and Sixth Schedule with respect to the implementation of the Constitution lay squarely upon them.
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16. **Obiter** “There had been various processes undertaken in the last year or so which ought to culminate in legislation for presentation to Parliament for consideration. Bearing in mind also the fact that the 27th of August 2015 is barely 60 days away, the timeline should allow the National Assembly, should it not be possible to consider and enact the requisite legislation, to consider the question of extension of time with respect to the two third gender principle in accordance with the provisions of article 261(2).”

Petition allowed 10

Declarations

1. *Respondents violated their obligation under article 261(4) of the Constitution to “prepare the relevant Bills for tabling before Parliament as soon as reasonably practicable to enable parliament to enact the legislation within the period specified”.* 15
2. *The failure, refusal and or neglect by the 1st and 2nd Respondent was a threat to a violation of articles 27(8) and 81(b) as read with article 100 of the Constitution and the Supreme Court Advisory Opinion dated 11th December 2012 in Reference Number 2 of 2012.* 20
3. *An order of Mandamus issued directed at the 1st and 2nd Respondents directing them to, within the next Forty (40) days from the date of the judgment, prepare the relevant Bill(s) for tabling before Parliament for purposes of implementation of articles 27(8) and 81(b) of the Constitution as read with article 100 and the Supreme Court Advisory Opinion dated 11th December 2012 in Reference Number 2 of 2012.* 25
4. *Each party ordered to bear own costs of the Petition.*

Cases

East Africa

1. *Coalition for Reform and Democracy (CORD) & 2 others v Attorney General and 10 others* Petition Nos 628 & 630 of 2014; Petition No 12 of 2015 (Consolidated) – (Explained) 30
2. *In re the Matter of the Interim Independent Electoral Commission* [2011] 2 KLR 32 – (Followed) 35
3. *Kenya Association of Stock Brokers and Investment Banks v Attorney General* Petition No 22 of 2015 – (Distinguished)
4. *Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others* Civil Appeal No 266 of 1996 – (Explained) 40

Texts & Journals 1

1. Garner, BA., (Ed) (2009) *Black's Law Dictionary* St Paul Minnesota: West End Publishers 9th Edn
2. Hog, QM., (Lord Hailsham) *et al* (Eds) (1973) *Halsbury's Law of England* London: Butterworths 4th Edn Vol 1 p 111 para 89 5

Statutes

East Africa

1. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya, 2010 Sub Leg) rule 5(b) – (Interpreted) 10
2. Constitution of Kenya, 2010 articles 2(1); 3(1); 10(1)(2); 22; 23(3); 27(4)(6)(8); 38; 55; 81(b); 94; 95; 96; 97; 98; 100(b); 109; 118; 119; 156(4)(b); 163(6)(7); 165(3)(b)(d)(i); 209; 254; 258; 259(1)(a)(b); 259(9); 261(1)(2)(4)(5)(6)(7)(8)(9); Fifth Schedule sections 4, 5(1)(6)(a) – (Interpreted) 15

Advocates

1. *Mrs Judy Thongori, Mr Ongoya & Ms Wangechi* for the Petitioner
2. *Mr Kaumba* instructed by the State Law Office for the 1st Respondent
3. *Ms Kilonzo* for the 2nd Respondent 20
4. *Mr Gitonga* for the 1st Interested Party
5. *Mr Mwenesi & Mr Gitonga* for the 2nd Interested Party.

June 26, 2015, **M Ngugi, J** delivered the following Judgment of the Court 25

Introduction

1. The Constitution of Kenya has been described as one of the most progressive in the world. It envisions a society based on the rule of law, non-discrimination and social justice. At its core is the belief that there can only be real progress in society if all citizens participate fully in their governance, and that all, male and female, persons with disabilities and all hitherto marginalized and excluded groups get a chance at the table. 30
2. The Constitution, which was promulgated on 27th August 2010, therefore contains specific provisions on how the inclusion and participation of all is to be achieved. At article 10, the Constitution contains the national values and principles of governance in the following terms: 35
 - 10(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them— 40

(a) applies or interprets this Constitution;	1
(b) enacts, applies or interprets any law; or	
(c) makes or implements public policy decisions.	
(2) The national values and principles of governance include—	5
(a) Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;	
(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;	10
(c) good governance, integrity, transparency and accountability; and	
(d) sustainable development.	15
3. Article 27 sets out the non-discrimination provisions as follows:	
27(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.	
(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.	20
(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.	
(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.	25
(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).	30
(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.	35
(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.	40
(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to	

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- implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.
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4. With regard to the electoral system, the Constitution provides at article 81, so far as is relevant for present purposes, that:
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81. The electoral system shall comply with the following principles—
- (a) freedom of citizens to exercise their political rights under article 38;
- (b) not more than two-thirds of the members of elective public bodies shall be of the same gender;
- (c) fair representation of persons with disabilities; (Emphasis added)
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5. Article 100, which is titled “Promotion of Representation of Marginalized Groups”, provides as follows:
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100. Parliament shall enact legislation to promote the representation in Parliament of—
- (a) women;
- (b) persons with disabilities;
- (c) youth;
- (d) ethnic and other minorities; and
- (e) marginalised communities.
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6. It is the question of how to bring into reality what the Petitioner describes as the promise to the women of Kenya contained in the above provisions, their participation in the National Assembly and Senate, that is at the core of the petition now before me.
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- Background
7. In 2012, prior to the general elections scheduled for 2013, and which were eventually held on 4th March 2013, the Attorney General sought an Advisory Opinion from the Supreme Court in Advisory Opinion No 2 of 2012 In the matter of Gender Representation in the National Assembly and the Senate. In the said Reference, the Attorney General sought the Court’s opinion on two disparate issues, the first of which relates to the present petition and was as follows:
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- A. Whether article 81(b) as read with article 27(4), article 27(6), article 27(8), article 96, article 97, article 98, article 177(1)(b), article 116 and article 125 of the Constitution of the Republic of Kenya require progressive realization of the enforcement of the one-third gender
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- rule or requires the same to be implemented during the
general elections scheduled for 4th March, 2013” 1
8. In its Advisory Opinion dated 11th December 2012, the Supreme
Court held, *inter alia*, as follows at paragraphs 70, 71, 74, 78 and 79: 5
- “[70] We consider that article 81(b), which stands generally
as a principle, would only transform into a specific,
enforceable right after it is supported by a concrete
normative provision....
- [71] When, however, we examine article 81(b) in the context 10
of articles 97 [on membership of the National Assembly]
and 98 [on membership of the Senate], then we must
draw the conclusion that it has not been transformed into
a full right, as regards the composition of the National
Assembly and Senate, capable of direct enforcement. 15
Thus, in that respect, article 81(b) is not capable of
immediate realization, without certain measures being
taken by the State. Article 81(b) is also not capable, in our
opinion, of replacing the concrete normative provisions
of articles 97 and 98 of the Constitution: these two 20
articles prescribe in clear terms the composition of the
National Assembly and the Senate. For articles 97 and
98 to support the transformation of article 81(b) from
principle to right, the two would have to be amended 25
to incorporate the element which learned counsel, Mr
Kanjama referred to as the “hard gender quota.” In the
alternative, a legislative measure [as contemplated in
article 27(8)] would have to be introduced, to ensure
compliance with the gender-equity rule, always taking 30
into account the terms of articles 97 and 98 regarding
numbers in the membership of the National Assembly
and the Senate.
- [72]
- [73] Only an adjustment to article 81(b) following the path 35
we have described above, will fall within the terms of the
main clause in article 81, that “the electoral system shall
comply with [the principles enumerated in paragraphs
(a) – (e) of the Article].”
- [74] As article 81(b) of the Constitution standing as a general 40
principle cannot replace the specific provisions of Articles
97 and 98, not having ripened into a specific, enforceable

right as far as the composition of the National Assembly and Senate are concerned, it follows – and this is the burden of our Opinion on this matter – that it cannot be enforced immediately. If the measures contemplated to ensure its crystallization into an enforceable right are not taken before the elections of 4 March 2013, then it is our opinion, article 81(b) will not be applicable to the said elections. The effect is that article 81(b) of the Constitution is amenable only to progressive realization – even though it is immediately applicable in the case of County Assemblies under article 177. 1
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9. Having thus expressed itself, the Supreme Court then posed the following question at paragraph 75 of its Advisory Opinion:
 [75] “That leaves open the question: if article 81(b) is not applicable to the March 2013 general elections, in relation to the national legislative organs, then at what stage in the succeeding period should it apply?”” 15

10. Its response to this question is contained in paragraphs 77-80 of its Advisory Opinion: 20

[77] “We see as the requisite manner to develop the principle in article 81(b) of the Constitution into an enforceable right, setting it on a path of maturation through progressive, phased-out realization. We are, in this regard, in agreement with the concept urged by learned amicus Mr Kanjama, that hard gender quotas such as may be prescribed, are immediately realizable, whereas soft gender quotas, as represented in article 81(b) with regard to the National Assembly and Senate, are for progressive realization....” 25
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[78] This, we believe, answers the compelling question raised in contest to the case for progressivity, by learned counsel Mr Nderitu and Ms Thongori: When will the future be, as baseline of implementation of the gender-equity rule” 35

[79] Bearing in mind the terms of article 100 [on promotion of representation of marginalised groups] and of the Fifth Schedule [prescribing time-frames for the enactment of required legislation], we are of the majority opinion that legislative measures for giving effect to the one-third-to-two-thirds gender principle, under article 81(b) of the Constitution and in relation to the National Assembly 40

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- and Senate, should be taken by 27 August, 2015. 1
- [80] The foregoing opinion is a basis for action in accordance with the terms of article 261(6), (7), (8) and (9) under the “Transitional and Consequential Provisions” of the Constitution: by way of the High Court being duly moved to issue appropriate orders and directions. (Emphasis added) 5
11. It is pursuant to the above pronouncements by the Supreme Court that the Petitioner has now approached this Court, alleging a failure on the part of the Respondents to abide by the Advisory Opinion and take the requisite measures for the realization of the gender equity rule. 10
- The Petition 15
12. The Petitioner contends that in order to give effect to the Supreme Court’s Advisory Opinion as well as the respective constitutional and legal provisions, certain legislative actions, possibly with a bearing on constitutional amendments, were required to be taken by 27th August 2015. They observe that we are now counting days to the date set by the Supreme Court, the 27th of August 2015, and legislative measures are yet to be taken to bring into force the two-thirds gender representation rule in the National Assembly and Senate. They lay the blame for this failure on the Respondents. 20
13. They assert that article 261(4) of the Constitution imposes on the 1st Respondent, in consultation with the 2nd Respondent, the constitutional obligation to prepare the relevant Bills for tabling before Parliament as soon as reasonably practicable to enable Parliament enact the legislation within the stipulated period. They contend that from the date of the Advisory Opinion on 11th December 2012, and indeed from the date of promulgation of the Constitution on 27th August 2010, the 1st and 2nd Respondents are yet to prepare the relevant Bill for tabling before Parliament for implementation of articles 27(8) and 81(b) of the Constitution. They contend that there is therefore a threat of violation of the Constitution, and they seek the following orders from the Court: 25
- a. A declaration that to the extent that the 1st and 2nd Respondent have this far failed, refused and or neglected to prepare the relevant Bill(s) for tabling before parliament for purposes of implementation of articles 27(8) and 81(b) of the Constitution as read with article 100 and the 30 35 40

Supreme Court Advisory Opinion dated 11 th December 2012 in Reference Number 2 of 2012, they have violated their obligation under article 261(4) of the Constitution to “prepare the relevant Bills for tabling before Parliament as soon as reasonably practicable to enable parliament to enact the legislation within the period specified”.	1
b. A declaration that the foregoing failure, refusal and or neglect by the 1st and 2nd Respondent is a threat to a violation of articles 27(8) and 81(b) as read with article 100 of the Constitution and the Supreme Court Advisory Opinion dated 11 th December 2012 in Reference Number 2 of 2012.	5
c. An order of <i>mandamus</i> directed at the 1 st and 2 nd Respondents directing them to within such time as this Court shall direct prepare the relevant Bill for tabling before Parliament for purposes of implementation of articles 27(8) and 81(b) of the Constitution as read with article 100 and the Supreme Court Advisory Opinion dated 11 th December 2012 in Reference Number 2 of 2012.	10
d. Costs of or incidental to this Petition.	15
e. Such other order or relief as this Court may deem just or expedient.	20
The Response	25
14. The Respondents do not oppose the factual basis of the Petition. They agree that the Supreme Court in its Advisory Opinion did state that the two-thirds gender rule provisions in the Constitution should be effected by the 27 th of August 2015. They however, oppose the Petition on two disparate grounds. For the 1 st Respondent, the Office of the Attorney General (hereafter “AG”) established under article 156 of the Constitution, this petition is premature as the 27 th of August 2015 has not yet arrived, and Parliament has the mandate to extend the time for enacting any legislation required under the Constitution. It is also the AG’s contention that his office has taken reasonably practicable steps to enable Parliament enact the requisite legislation.	30
15. The 2 nd Respondent, the Commission for the Implementation of the Constitution (hereafter “CIC”), takes the position that it has no obligation under the Constitution for the enactment of the requisite legislation, and it is its case therefore that it is improperly	35
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- joined in this Petition. Its case is that the petition should have been filed against Parliament; that article 261(4) is not justiciable; that the Petition is premature, and finally, that CIC is not subject to the control or authority of any person. 1
16. On 5th May 2015, the Kenya Women Parliamentary Association (KEWOPA) and the Centre for Multiparty Democracy (CMD) applied and were granted leave to participate in the proceedings as interested parties. The petition was argued before me on 6th June 2015. 5
- The Submissions 10
- Submissions by the Petitioner
17. The Petitioner's case is set out in the Petition dated 5th May 2015, an affidavit sworn by Ms Ann Njogu on the same date, and submissions dated 19th May and 3rd June 2015. Oral submissions were made on its behalf by Learned Counsel, Mr Elisha Ongoya. 15
18. The Petitioner's position is that it has lodged the present Petition in order to realize the promise made to the women of Kenya, and to translate that promise to a reality. It poses the question how long the promise can be postponed, and whether the legitimate expectation that the promise given to women by the people of Kenya in their capacity as sovereign will come to a reality. 20
19. According to the Petitioner, this Petition is about the realization of three provisions of the Constitutions. These are article 81(b) which provides, with respect to the representation of the people, the principle that "not more than two-thirds of the members of elective public bodies shall be of the same gender." The second is article 27(8) of the Constitution which provides that the state shall take legislative and other measures to put in place the principle that not more than two thirds of elective and appointive bodies shall be of the same gender. The third is article 100 which requires the enactment of legislation to provide for representation of marginalized groups. 25
20. The Petitioner submits that the Constitution must be construed to give effect to the intention of the drafters. It observes that article 27(8) is in the Chapter on the Bill of Rights, and in this regard, it relies on the provisions of article 259 of the Constitution which provides for the manner in which the Constitution should be interpreted, chief among its provisions, at article 259(a), being that the Constitution shall be interpreted in a manner which promotes 30
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- the values, purposes and principles of the Constitution, and at article 259(b), that it shall be interpreted in a manner that advances the Rule of Law and human rights. 1
21. Mr Ongoya asked the Court to be guided by the decision in the case of *Coalition for Reform and Democracy & others v The Attorney General* High Court Petition No 628 of 2014 on the principles applicable in constitutional interpretation. 5
22. The Petitioner further submits that the provisions of article 81(b) have been the subject of interpretation by the Supreme Court in Advisory Opinion No 2 of 2012. It contends that at para 78 of the opinion, the majority opinion of the Court was that the legislative measures with respect to article 81(b) should be taken by 27th August 2015. 10
23. According to the Petitioner, because of the hierarchical order of our courts, this Court is bound to give effect to the decision of the Supreme Court. The Petitioner relied on the decision of the Supreme Court in Constitutional Opinion No 2 of 2011 (Advisory Opinion) *In the Matter of the Interim Independent Electoral Commission* with respect to the binding nature of the Supreme Court's Advisory Opinions. 15
24. With respect to the implementation of the Supreme Court's Opinion on the two thirds gender rule, Mr Ongoya submitted that such execution is specifically vested in the Respondents by the Constitution under article 261(4). According to Mr Ongoya, article 261(4) imposes an obligation on the AG in consultation with CIC to prepare Bills for tabling before Parliament; such Bills to be prepared as soon as reasonably practicable to enable Parliament pass the legislation within the period specified, with respect to the gender rule, the 27th of August 2015. 20
25. The Petitioner submits that the AG and CIC have failed to exercise their constitutional mandate under article 261(4). It contends that the Court has therefore the jurisdiction to compel them to exercise their statutory power by the issue of an order of *Mandamus*, placing reliance on the decision in *Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR. It is its position that the AG and CIC are legally bound to originate the requisite Bills, they have failed to do so, and the Court should order them to do that which they are required by law to do. 25
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26. According to the Petitioner, the failure of the Respondents to prepare for presentation to Parliament the necessary Bill threatens a violation of article 81(b) and 27(8). This is what has precipitated this Petition which, according to the Petitioner, is not premature as it is intended to avoid a violation of articles 81(b) and 27(8). It is its case that article 258 gives a party the right to come to court to claim that the Constitution is threatened with violation. It terms as strange the argument by the Respondents that the Court should wait until the 27th of August 2015, when the violation would have occurred, to act. It contends that a party should not wait for a violation to occur before seeking redress. 1
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27. The Petitioner further submits that it has established that the Respondents have failed the test of reasonableness with respect to the preparation of Bills for presentation to Parliament for implementation of article 81(b); that inevitably, these Bills will have an impact on articles 97 and 98, which requires a minimum of 90 days for the readings before Parliament; and that the Court should make remedial interventions and issue an order of *mandamus* to re-energize the AG and CIC to perform their mandate. 15
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- Submissions by KEWOPA
28. KEWOPA supports the Petition. It filed an affidavit sworn by Ms Cecily Mbarire on 12th May 2015 as well as submissions of the same date. It describes itself as an organization of women Parliamentary members, elected and nominated, who are beneficiaries of affirmative action. It notes that its membership has risen over the years, from 3 in 2001, 18 in 2007 and 47 members today. It also has 18 senators as members, and it attributes the rise in its membership to affirmative action. 25
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29. Mr Githinji, Learned Counsel for KEWOPA, observed that there were, on the date of hearing of the Petition, only 85 days left to the 27th of August 2015, and it was therefore not humanly possible to comply with the timelines for bringing a Bill before Parliament. Counsel submitted further that since the Advisory Opinion was rendered in 2012, the AG and CIC have not taken any steps to execute their mandate, and have not given an adequate explanation for the failure. 35
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30. With regard to the value of an Advisory Opinion of the Supreme Court, KEWOPA submits that an Advisory Opinion is an order as good as any and binds the Respondents, and by its opinion,

the Supreme Court had sought to change the gender rule from a principle to a right. It is its submission that the drafters of the Constitution found it fit to increase the participation of women in Kenya's democratic processes, a position that the Respondents do not dispute. It submits therefore that the future for enforcement of the right now reposes in paragraph 79 and 80 of the Opinion, which indicates that a party can move the High Court for appropriate orders. KEWOPA asked the Court to grant the orders that the petitioner was seeking.

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Submissions by CMD

31. Through its Learned Counsel, Mr Mwenesi, the Centre for Multiparty Democracy supported the submissions made by Mr Ongoya on behalf of the Petitioners. Mr Mwenesi submitted that the issue in this Petition revolves around article 100 which requires legislation to be put in place to ensure representation of women and other groups. It was his submission that as matters currently stand, the National Assembly and Senate are insensitive on the gender question. Learned Counsel relied on the affidavit sworn by Ms Njeri Kabeberi on 11th May 2015 and submissions of the same date.

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32. CMD agrees with the Petitioner that the Advisory Opinion is to the effect that the gender rule, as read with the human rights provision in article 27(8) and article 81(b), should be implemented by 27th August 2015, and action for its implementation should be taken by the AG and CIC. Mr Mwenesi observed that it was the AG who, when faced with the principle of gender equity and pushed by the National Gender and Equality Commission (hereafter "NGEC") prior to the 2013 general elections, went to the Supreme Court for the opinion; that the Supreme Court gave its view and noted that Kenyan women have been marginalized and should no longer be marginalized; that the Supreme Court exercised its mandate under the Supreme Court Act to render its opinion and require that the gender equity rule be implemented within 5 years; and the respondents could not argue that the 27th of August 2015 had not yet arrived.

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33. Mr Mwenesi further submitted that while the Supreme Court talked of legislative measures, article 10 talks of public participation, but the respondents have not yet consulted the people. It was his submission that the AG and CIC are bound by article 10, 27, and 81. To the contention by the Respondents that they have an

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opportunity to extend the time, which article 259(9) provides for, they should be given a hearing if they can show that they are compliant with the constitutional mandate under article 10, 27, and 81. It was his submission, however, that there is a threat of violation as no Bills have been brought before the Court to show compliance.

34. CMD further observed that CIC is required under section 5(6) of the 5th Schedule to make reports to Parliament on the progress of its mandate. Mr Mwenesi submitted that CIC has not shown any progress on meeting the deadline on the gender equity rule, or any impediment to its implementation. He discounted the argument by CIC that it was working with the NGEC, noting that in its letter to CIC annexed to CIC's affidavit, NGEC urges the AG and CIC to move expeditiously to publish the requisite Bill, which has not been done. Counsel urged the Court to issue an order of *mandamus* to compel the Respondents to do what they are required to do for democracy and the women of Kenya.

Submissions by the Attorney General

35. The AG opposes the Petition. He relies on an affidavit sworn by Ms Muthoni Kimani, the Senior Deputy Solicitor General in the office of The Attorney General, on 29th May 2015 and submissions of the same date. His case is that the Petition is premature and speculative, and does not disclose any violation or threat of violation of the Bill of Rights. His case was presented by Learned Counsel, Mr Kaumba.

36. According to the AG, the question before the Court is the realization of the two thirds gender principle under article 27(8) of the Constitution. His position is that the Petitioner and interested parties have misconstrued the two thirds gender principle, which is not in respect of women but is an affirmative action principle for the benefit of any gender, and that at the moment, it is women who are disadvantaged but a time may come when the men are disadvantaged.

37. The AG further submits that the Petition has its foundation in Supreme Court Advisory Opinion No 2 of 2012, which his office had sought in the context of the 2013 elections, and the question before the Supreme Court was whether the principle was applicable in the 2013 elections. Mr Kaumba submitted that the Supreme Court restated the principle at paragraph 79-81 and held that it is applicable, and in accordance with the 5th Schedule of the Constitution, the period for implementation of the gender

- rule was 27th August 2015. It was his submission that the 27th of August 2015 has not yet arrived, that the petition was filed on 5th May 2015 before the constitutional timeline had arrived; and that article 261(2) provides that the timelines within which legislative measures are to be taken can be extended by Parliament for one year. 1
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38. With respect to the binding nature of Advisory Opinions, the AG submits, while relying on paragraph 93 of Advisory Opinion No 2 of 2011 (*supra*) that the Supreme Court is conscious that while its opinions are binding, they are not capable of implementation as other decisions of courts but are supposed to be treated as authoritative statements of the law. 10
39. Counsel maintained that the AG had taken steps, set out in the affidavit of Ms Kimani, towards achieving a legislative framework on the two-thirds gender rule. Such steps included the setting up of a technical working group on 3rd February 2014, which presented a report to the AG on 17th February 2015 outlining the options available towards achieving the two thirds gender principle; forwarding of a Cabinet Memorandum as evidenced by a letter dated 16th March 2015; the refined proposal by the Technical Working Group on amendments to the Constitution to entrench the gender principle submitted on 18th May 2015; as well as other initiatives by Parliament to entrench the gender principle as are detailed in the affidavit sworn by Ms Mbarire for KEWOPA. 15
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40. It was also the AG's submission that his office is engaged in generating consensus on the gender principle; that the process of generating consensus is entrenched in the Constitution under the principle of public participation; and it was his submission that the Petitioner and interested party should support the government's initiative rather than engage the government in Court. 30
41. With respect to the order of *mandamus* that the Petitioner is seeking, the AG submits that this is not a proper matter for an order of mandamus to issue. Further, it is his submission that the measures required are legislative and involve Parliament in view of article 209 and 118 on public participation. Mr Kaumba submitted that the question will arise of how the order of *mandamus* will take into account the constitutional measures such as public participation, which cannot be overlooked, and he prayed that the Petition should be dismissed. 35
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- Submissions by CIC 1
42. CIC filed grounds of opposition dated 18th May 2015, an affidavit sworn by its Chairperson, Mr Charles Nyachae, on 19th May 2015 as well as submissions and authorities dated 3rd June 2015. 5
43. In her submissions on behalf of CIC, Ms Kilonzo began by alluding to two questions that the Court had raised in the course of submissions by the AG. These were who should effect the Advisory Opinion of the Supreme Court, while the second was whether article 261(4) is a condition precedent to the enforcement of the right under article 261(5). It was her submission that in answering these questions, the Court would be exercising jurisdiction under article 165(3) of the Constitution, which entails the jurisdiction to answer the question whether CIC has denied, violated, or threatened any person's right or fundamental freedom and secondly, whether CIC has acted inconsistently with or in violation of the Constitution. Ms Kilonzo submitted that if the response to these questions is in the negative, then the reliefs sought against CIC do not lie. 10 15
44. The basic argument advanced by CIC is that it is Parliament which has the responsibility to enact the legislation to effect the gender rule. Ms Kilonzo submitted that under the *ejusdem generis* rule of interpretation, article 261 must be read as a whole and in conjunction with the other provisions of the Constitution; that article 261(1) requires Parliament to enact consequential legislation required by the Constitution within the effective date; while article 261(4) provides that for the purposes of article 261(1), the AG, in consultation with the CIC, shall prepare the relevant Bills. 20 25
45. Ms Kilonzo submitted that article 261(4) does not read the AG and the CIC; that it does not impose a joint obligation on the AG and CIC, and that the obligation is on the AG to prepare the Bills and consult CIC. 30
46. It was her further submission that section 5(6) of the Sixth Schedule places a responsibility on CIC to monitor, facilitate, and oversee and to coordinate with the AG for purposes of preparing consequential legislation to be tabled in Parliament, and that the Constitution does not place on CIC a duty that can be enforced by way of Mandamus, to prepare Bills. 35 40
47. Ms Kilonzo contended that the obligation of the AG to prepare Bills is not a condition precedent for a person to petition Parliament

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- to enact legislation. She submitted that under articles 94, 95, 96, 109, 100 and the Fifth Schedule to the Constitution, as well as article 261 read as a whole, the ultimate responsibility to enact legislation is placed on the National Assembly and Senate; and further, that there is a consequence if the legislation is not enacted – that Parliament can be dissolved if the Court directs it to enact legislation and it fails to do so. 1
48. It was also Ms Kilonzo’s submission that even the Petitioner and interested party have power under article 119, to prepare Bills and petition Parliament to enact legislation to implement article 100(b) and 81(b); that there are currently two pending Bills, the Two Thirds Gender Rule Amendment Bill and the Constitutions of Kenya (Amendment) Bill 2015 which, though it was not CIC’s submission that they realize the two-third gender rule, deal with articles 27(8), 81(b) and 100. 5
49. Ms Kilonzo contended further that article 261 provides that all consequential legislation must be effected by 27th August 2015, but that Parliament has power under article 261(2) and 259(a) to extend the time to 27th August 2016. It was her contention that Parliament should have been made a party to this petition; that any order that the Court made affects Parliament and it would be in breach of the rules of natural justice to make such orders in its absence. According to Ms Kilonzo, it is only Parliament which faces sanctions for failure to enact consequential legislation: that the AG will continue in office upon such failure, as will CIC till the expiry of its term, but Parliament faces the risk of dissolution. 10
50. Ms Kilonzo concluded that CIC has played its part with regard to realizing the two thirds gender rule; that it has been and still is in consultation with the AG, has coordinated with the AG and facilitated and monitored the preparation of proposals for meeting the rule; that it was part of the Technical Working Group whose proposal has been placed before the Court; and it has been working with the NGEK for the last one year to come up with potential, viable formulas and have forwarded a proposal to the AG on 19th of March 2015. It had played its part under articles 261(4), section 5 of the Sixth Schedule and article 254 of the Constitution, and it therefore prayed that the petition be dismissed. 15
- The Petitioner’s Rejoinder 20
51. In his response to the submissions by the Respondents, Mr Ongoya 25
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- observed that the efforts allegedly made by the Respondents needed to be reasonable, but it was his submission that to the extent that any efforts have been made, those efforts have been unreasonable. Counsel referred in particular to the concluding paragraphs of the letter from NGEK dated 4th May 2015, annexed to the affidavit of Mr Charles Nyachae, in which NGEK was asking for the process to be expedited. 1
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52. With respect to the submission by the AG and CIC that one of their success stories was that there are two parallel Bills by the Judicial and Legal Affairs Committee of the National Assembly and the Kenya Law Reform Commission, the Petitioner was unimpressed. Its Counsel, Mr Ongoya, dismissing these efforts as classic unreasonable conduct. 10
53. It was also Mr Ongoya's submission that Parliament is not a necessary party to these proceedings. He submitted that the obligation invoked as having been violated is imposed under article 261(4), and the duty bearers under the said article are the AG and CIC, not Parliament. Whereas Parliament has a role in the law making process, his submission was that its role does not come into play at the stage of article 261(4). In any event, in his view, if Parliament was a necessary party, it is an integral part of the national government which under article 156(4)(b) of the Constitution is duly represented by the AG. 15
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- Analysis and Determination
- The Issues Arising
54. I have considered the respective pleadings of the parties as well as the submissions which are set out above in brief. It is apparent that there is not much dispute with regard to the factual position, the central dispute revolving around the respective obligations of the respondents, and the timing of the present petition. I have therefore, distilled the following as the issues arising for determination in this matter: 30
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- i. Whether the Advisory Opinion of the Supreme Court is binding;
 - ii. Whether the present petition is premature;
 - iii. Whether Parliament was a necessary party to these proceedings; 40
 - iv. Whether there has been a violation or threatened violation of the Constitution by the Respondents;

- v. Whether the orders sought by the Petitioner should issue. 1
55. In determining the above issues, I do so while bearing in mind the uncontroverted factual situation that has led us to where we are today. In particular, I am acutely conscious of the words of the Supreme Court in its Advisory Opinion on the gender equity issue when it opined at paragraph 47 as follows: 5
- [47] “This Court is fully cognizant of the distinct social imperfection which led to the adoption of articles 27(8) and 81(b) of the Constitution: that in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of discriminatory practices, or gender-indifferent laws, policies and regulations. This presents itself as a manifestation of historically unequal power relations between men and women in Kenyan society. Learned Counsel Ms Thongori aptly referred to this phenomenon as “the socialization of patriarchy”; and its resultant diminution of women’s participation in public affairs has had a major negative impact on the social terrain as a whole. Thus, the Constitution sets out to redress such aberrations, not just through affirmative action provisions such as those in articles 27 and 81, but also by way of a detailed and robust Bill of Rights, as well as a set of “national values and principles of governance” [article 10].” 10
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56. The people of Kenya recognized the inequities and inequalities in our electoral system, the unequal power relations between men and women, and “the socialization of patriarchy” as a result of, *inter alia*, discriminatory practices, gender insensitive laws and policies. They sought to remedy these historical wrongs by the express provisions in the Constitution which are intended to ensure the equitable participation and representation of hitherto excluded groups, such as women. It is undisputed that in its Advisory Opinion in December 2012, the Supreme Court gave the 27th of August as, so to speak, the “future”, the dawn, by which date the requisite measures should have been taken to realize the constitutional threshold set for the representation of women in elective positions in the National Assembly and Senate. 30
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57. These measures have not yet been taken, and the Petitioner,

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- supported by the interested parties, seeks orders to compel the Respondents to act in accordance with the Advisory Opinion. The Respondents dismiss the Petition as premature, arguing, *inter alia*, that there has not yet been a violation as 27th August 2015 has not yet arrived, and so the orders that the Petitioner seeks should not issue. 1
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58. In a sense, the arguments by the respondents tacitly concede an obligation to abide by the Advisory Opinion, though there was some argument advanced by Mr Kaumba for the AG that seemed to cast doubt on this point. It is therefore necessary at the outset to deal with the question of the nature, impact and import of the Advisory Opinions of the Supreme Court. 10
- Whether the Advisory Opinion of the Supreme Court is binding
59. It is the Petitioner's case that the Opinion is binding on the Court, as well as the Respondents. The petitioner relies on another Advisory Opinion of the Supreme Court in which it addressed itself to the question whether its Advisory Opinions are binding. This was in Supreme Court Constitutional Application No 2 of 2011 (Advisory Opinion) *In the Matter of the Interim Independent Electoral Commission*, in which the Supreme Court expressed itself as follows: 15
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- [93] "In our discussion of the advisory jurisdiction, we have adopted a circumscribed mandate in relation to the exercise of that jurisdiction. From such a reserved position, and in view of the pragmatic and discretionary nature of the mandate as we conceive it, we perceive that the Supreme Court's decisions in this domain may significantly touch on legal, policy, political, social and economic situations. On this account, it is inappropriate that the Supreme Court's Advisory Opinion should be sought as mere advice. Where a government or State organ makes a request for an Opinion, it is to be supposed that such organ would abide by that Opinion; the Opinion is sought to clarify a doubt, and to enable it to act in accordance with the law. If the Applicant were not to be bound in this way, then it would be seeking an Opinion merely in the hope that the Court would endorse its position and, otherwise, the applicant would consider itself free to disregard the Opinion. This is not fair, and cannot be right. While an Advisory Opinion may not be capable of enforcement in the same way as ordinary decisions of the Courts (in the shape of Rulings, 25
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- Judgments, Decrees or Orders), it must be treated as an authoritative statement of the law. The Opinion must guide the conduct of not just the organ(s) that sought it, but all governmental or public action thereafter. To hold otherwise, would be to reduce article 163(6) of the Constitution to an “idle provision”, of little juridical value. The binding nature of Advisory Opinions is consistent with the values of the Constitution, particularly the rule of law. 1
- [94] For the above reasons, we decide that an Opinion of the Supreme Court is binding as much as any other decision of the Court, as herein indicated. We agree with the Chief Justice of Nauru – another common law State that provides for the advisory jurisdiction – who thus observed in an Advisory Opinion, In the Matter of article 55 of the Constitution Reference re Dual Nationality and other Questions (Constitutional Reference No 01/2004): 5
- “Such an Opinion carries legal weight, so far as it goes, but it must itself be susceptible to the normal canons of interpretation in the event of a particular disputed question brought before court.” (Emphasis added) 10
60. As the highest court in the land, it cannot be disputed that decisions of the Supreme Court have binding effect on all in the land, in light of the hierarchy of courts and the doctrine of precedence that is extant in this jurisdiction. Further, in accordance with the provisions of article 163(7) which provides that “All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court”, this Court is constitutionally bound by the Advisory Opinion of the Supreme Court on the question of gender representation in the national Assembly and Senate. Equally bound are the Respondents. The AG initiated the matter when it sought the advisory opinion of the Supreme Court, while the CIC was an active participant in the proceedings as an interested party. Indeed, all the parties involved in the present matter participated in the matter before the Supreme Court, either as the Applicants, Interested Parties, or as *amicus curiae*. It cannot therefore be seriously contended that the Supreme Court decision is not binding. 15
- Whether the Petition is Premature 20
61. Having found that the Advisory Opinion is binding, the next question is whether the Petitioner has approached this Court 25
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- prematurely, and whether it should have waited for the 27th of August 2015 to dawn before approaching the Court. 1
62. At paragraphs 79 of its Opinion which I have set out above, the Supreme Court held that: 5
- “....legislative measures for giving effect to the one-third-to-two-thirds gender principle, under article 81(b) of the Constitution and in relation to the National Assembly and Senate, should be taken by 27 August, 2015.” (Emphasis added) 10
63. At paragraph 80, the Supreme Court directed parties to seek relief from the High Court under the Bill of Rights provisions when it stated as follows:
- [80] “The foregoing opinion is a basis for action in accordance with the terms of article 261(6), (7), (8) and (9) under the “Transitional and Consequential Provisions” of the Constitution: by way of the High Court being duly moved to issue appropriate orders and directions” 15
64. This Petition has been brought, *inter alia*, under the provisions of articles 22, 23, 165 and 258 of the Constitution. Under article 22, the Constitution gives every person the right to “...institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.” Article 258 uses similar language, giving to every person the right to “...institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.” 20 25
65. The Petitioner is in this case apprehensive that there is a threat of violation of the Constitution in the alleged failure by the Respondents to implement the Advisory Opinion of the Supreme Court in accordance with the responsibility placed upon them by article 261(4). The due date as determined in the Advisory Opinion is 27th August 2015. Should the Petitioner have waited until the violation occurred before approaching the Court,” The Respondents think so. 30 35
66. However, this Court respectfully disagrees. In High Court Petition No 22 of 2015 *Kenya Association of Stock Brokers and Investment Banks v The Attorney General*, this Court cited with approval the decision of the five-judge bench in *Coalition for Reform and Democracy & others v Attorney General*, Petition No 628 of 2014 40

(the *CORD* case) and stated as follows:

[124.] "... as the Court observed in High Court Petition No 628 of 2014 *Coalition for Reform and Democracy and others v The Attorney General*, a party does not have to wait until a right or fundamental freedom has been violated, or for a violation of the Constitution to occur, before approaching the Court. The view of the Court in that matter, which I fully agree with, is that a party has a right to approach the Court for relief if there is a threat of violation or contravention of the Constitution, given the provisions of the Constitution which included a "threat" to a right or fundamental freedom as one of the conditions entitling a person to approach the High Court for relief under article 22 and 165(3)(b) and (d) (i)."

67. In the *CORD* case, the Court expressed itself as follows:

[112.] "...we are satisfied, after due consideration of the provisions of article 22, 165(3)(d) and 258 of the Constitution, that the words of the Constitution, taken in their ordinary meaning, are clear and render the present controversy ripe and justiciable: a party does not have to wait until a right or fundamental freedom has been violated, or for a violation of the Constitution to occur, before approaching the Court. He has a right to do so if there is a threat of violation or contravention of the Constitution.

[113.] We take this view because it cannot have been in vain that the drafters of the Constitution added "threat" to a right or fundamental freedom and "threatened contravention" as one of the conditions entitling a person to approach the High Court for relief under article 165(3)(b) and (d)(i). A "threat" has been defined in *Black's Dictionary*, 9th Edition as "an indication of an approaching menace eg threat of bankruptcy; a Person or a thing that might cause harm" (emphasis added). The same dictionary defines "threat" as "a communicated intent to inflict harm or loss to another..."

[114.] The use of the words "indication", "approaching", "might" and "communicated intent" all go to show, in the context of articles 22, 165(3)(d) and 258, that for

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- relief to be granted, there must not be actual violation of either a fundamental right or of the Constitution but that indications of such violations are apparent.” 1
68. I fully agree with the sentiments of the Bench in the *CORD* case. A party need not wait for a violation of a right or a contravention of the Constitution to occur before approaching the Court for relief. It appears to me that the intent behind the use of the word “threatened” in both articles 22 and 258 was to preempt the violation of rights, or of the Constitution. If a clear threat to either is made out, it cannot be properly argued that the Petitioner should have waited for the violation or contravention to occur, and then seek relief. It is therefore my finding, and I so hold, that this Petition is not premature, and is properly before me. 5
- Whether Parliament was a Necessary Party to these Proceedings; 15
69. CIC has argued that Parliament should have been made a party to these proceedings. Its argument, as advanced by Ms Kilonzo, is premised on four main grounds. It argues that it is Parliament which has the ultimate responsibility to enact the legislation to effect the gender rule; that article 261(1) requires Parliament to enact consequential legislation required by the Constitution within the effective date; that there is a consequence on Parliament if the legislation is not enacted as Parliament can be dissolved if the Court directs it to enact legislation and it fails to do so; and that any order that the Court makes would affect Parliament and it would be in breach of the rules of natural justice to make such orders in its absence. 20
70. The Petitioner responds, first, that the provision of the Constitution alleged to have been violated is article 261(4), and this provision does not involve Parliament at the stage at which the Petitioner alleges it has been violated. It is also its contention that in any event, the legislature is properly represented as the AG is a party, and under article 156(4)(b), he represents the national government, of which Parliament is a part. 25
71. I am inclined to agree with the Petitioner on this issue. Its complaint centres on the failure of the AG and CIC to act in accordance with the requirements of article 261(4), which provides that the AG in consultation with CIC “...shall prepare the relevant Bills for tabling before Parliament, as soon as reasonably practicable, to enable Parliament to enact the legislation within the period 30
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specified.”

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72. In light of the above provision, I take the view that the Petitioner is correct. Parliament’s role, as contemplated under article 261(1), requires some prior action on the part of the AG and CIC. Any orders directed at the two entities, therefore in respect of the obligation under article 261(4) cannot be binding on Parliament. From the provisions of article 261, it is apparent that the responsibility of Parliament to enact Bills pursuant to article 261(1) is premised on the AG and CIC originating Bills, hence the provisions of article 261(4) that “For the purposes of clause (1), the Attorney-General, in consultation with the Commission for the Implementation of the Constitution, shall prepare the relevant Bills for tabling before Parliament...” In the circumstances, therefore, the argument by Ms Kilonzo on this point is, in my view, untenable.

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73. In any event, as provided under rule 5(b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, “A Petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.” In this case, however, it is my finding, and I so hold, that the Petitioner has brought the proper parties to this Court.

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Whether there has been a Violation or Threatened Violation of the Constitution by the Respondents

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74. The Petitioner alleges a violation or threat of violation of the Constitution by the respondents for failing to act in accordance with article 261(4) of the Constitution. It may be useful, in considering this issue, to set out in its entirety the provisions of article 261.

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261(1) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.

(2) Despite clause (1), the National Assembly may, by resolution supported by the votes of at least two-thirds of all the members of the National Assembly, extend the period prescribed in respect of any particular matter under clause (1), by a period not exceeding one year.

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(3) The power of the National Assembly contemplated under clause (2), may be exercised—

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(a) only once in respect of any particular matter; and

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- (b) only in exceptional circumstances to be certified by the Speaker of the National Assembly. 1
- (4) For the purposes of clause (1), the Attorney-General, in consultation with the Commission for the Implementation of the Constitution, shall prepare the relevant Bills for tabling before Parliament, as soon as reasonably practicable, to enable Parliament to enact the legislation within the period specified. 5
- (5) If Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter. 10
- (6) The High Court in determining a petition under clause (5) may—
- (a) make a declaratory order on the matter; and 15
- (b) transmit an order directing Parliament and the Attorney-General to take steps to ensure that the required legislation is enacted, within the period specified in the order, and to report the progress to the Chief Justice. 20
- (7) If Parliament fails to enact legislation in accordance with an order under clause (6)(b), the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament. 25
- (8) If Parliament has been dissolved under clause (7), the new Parliament shall enact the required legislation within the periods specified in the Fifth Schedule beginning with the date of commencement of the term of the new Parliament. 30
- (9) If the new Parliament fails to enact legislation in accordance with clause (8), the provisions of clauses (1) to (8) shall apply afresh. 35
75. Pursuant to the Supreme Court Advisory Opinion, the requisite legislation to entrench the two thirds gender rule to ensure that the principle that not more than two thirds of the membership of the National Assembly and Senate shall be of the same gender should have been enacted by the 27th of August 2015. This requirement, which all parties accepted and which this Court has found was binding by virtue of the fact that the Supreme Court is the highest court in the land and its decisions are accordingly binding on all, has not yet been implemented. 40

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76. It is also worth observing that the date set by the Supreme Court accords with the constitutional provisions in the Fifth Schedule of the Constitution. Under the said Schedule, timelines are given for the enactment of various legislation. With respect to promotion of representation of marginalized groups under article 100 for instance, the time limit is five years from the promulgation of the Constitution. Where no specific timeline is provided in respect of a matter, the Constitution provides that any other legislation required by the Constitution shall be enacted within 5 years from the date of promulgation. 1
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77. It is evident that the intention of the people of Kenya, in overwhelmingly voting for the 2010 Constitution, was that all legislation that was required to be enacted in order to bring into being their vision of a just and democratic society should be enacted within 5 years from the date they promulgated the Constitution. They required, under article 261(1), that Parliament should enact the said legislation within the said time period; and that in order for Parliament to do so, as provided under article 261(4), the AG, in consultation with CIC would have prepared the requisite Bills. 15
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78. What do we have now” As observed by KEWOPA, at the time of hearing this Petition, there were about eighty-five days left to the 27th of August 2015. The legislation contemplated in the Supreme Court’s Advisory Opinion has yet to be enacted. The Petitioner states that the Respondents have failed to comply with the opinion of the Supreme Court, and a contravention of the Constitution is threatened. The Respondents dispute the allegations against them. 25
79. Let us consider the position of CIC first. Its main contention is that it has not failed in its constitutional obligation as the main responsibility is on the AG, that the responsibility under article 261(4) is not a joint responsibility: that the AG is required to prepare Bills, in “consultation with” CIC. It would appear, from the position taken by CIC, that it is seeking to wash its hands of the problem, fold its hands, so to speak, and say “we cannot move unless the Attorney General does.” 30
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80. However, given the constitutional role and mandate given to CIC under section 5(6) of the Transitional and Consequential Provisions contained in the Sixth Schedule of the Constitution, this is not an argument that CIC can validly make. 40

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81. CIC is established under section 5(1) of the said Schedule. Its functions are provided under section 5(6) as follows: 1
- (6) The functions of the Commission shall be to—
- (a) monitor, facilitate and oversee the development of legislation and administrative procedures required to implement this Constitution; 5
 - (b) co-ordinate with the Attorney-General and the Kenya Law Reform Commission in preparing, for tabling in Parliament, the legislation required to implement this Constitution; 10
 - (c) report regularly to the Constitutional Implementation Oversight Committee on—
 - (i) progress in the implementation of this Constitution; and 15
 - (ii) any impediments to its implementation; and
 - (d) work with each constitutional commission to ensure that the letter and spirit of this Constitution is respected.” (Emphasis added)
82. I have considered the submissions by CIC and the averments contained in the affidavit of Mr Charles Nyachae, its Chairman. These averments are a reflection of the written and oral submissions made by Ms Kilonzo on its behalf, the sum of which is that the CIC has not failed in its constitutional obligation as it is only Parliament which has the role to enact legislation to put into effect the two thirds gender rule. Regrettably, in light of the clear mandate of CIC under the Constitution, these arguments are unsustainable, and one gets the impression that CIC and, as I will demonstrate shortly, the AG, has dropped the ball on the gender equity issue. Their obligation was to prepare and table Bills before Parliament as soon as “reasonably practicable...” Have they done this” 20
83. *Black’s Law Dictionary*, Ninth Edition, defines the word “reasonable” as “fair, proper or moderate in the circumstances”. It defines “practicable” as “reasonably capable of being accomplished; feasible.” With regard to the preparation of the requisite legislation in respect of the gender equity rule, the question is whether the actions of the Respondents have met the test of reasonableness and practicability in terms of time. 25 30 35 40
84. The Respondents assert that they have met their constitutional obligation, and have placed various documents before the Court

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- in support of their assertion. These documents, in the case of CIC annexed to the affidavit of Mr Nyachae, are correspondence from the AG, responding to communication from CIC, and between the AG and the NGEC on the gender equity rule. The other document is referred to as a report from the Technical Working Group, established in 2014, on what is said to be the “Viable and Preferred Formula” for realization of the two third gender principle. 1
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85. I have also considered the averments on behalf of the AG by Ms Muthoni Kimani in her affidavit sworn on 29th May 2015. In the said affidavit, Ms Kimani advances the contention by the Respondent that the Petition is bad in law, premature, speculative and based on a misconstruction of the provisions of the Constitution on the gender principle and the Supreme Court in its Advisory Opinion No 2 of 2012. 10
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86. She argues that the Supreme Court did not order a constitutional amendment but emphasized the need to take legislative measures to actualize the two third gender principle in Parliament by 27th August 2015. It is her averment that the time frame in question is yet to lapse, and even if it did, it can be extended by Parliament for a further period of one year in accordance with article 261(2). 20
87. With respect to the Petitioner’s contention that it has not taken reasonable and practicable steps to formulate and present a Bill to Parliament to enable it enact the necessary legislation, Ms Kimani states that subsequent to the Advisory Opinion, the AG did, on 3rd February, 2014, constitute a Technical Working Group to develop a framework towards realization of the two thirds gender principle in political representation. According to Ms Kimani, the Technical Working Group comprises, *inter alia*, the office of the Attorney General and the Department of Justice, the Ministry of Devolution and Planning (Directorate of Gender), the NGEC which is the Convener and Secretariat of the Technical Working Group, CIC, the independent Electoral and Boundaries Commission, the Office of the Registrar of Political Parties, and the Parliamentary Constitutional Implementation Oversight Committee 25
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88. The AG states that on 7th February 2015, the Technical working Group presented its report to his office, outlining nine options for consideration based on submissions received from stakeholder consultations and expert submission. Following review thereof, a report was forwarded to the AG on 11th March 2015. Thereafter 40

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- the Technical Working Group forwarded to the AG three refined options on the realization of the two third gender principle. The AG states that he has prepared a Cabinet Memorandum on the proposals made by the Technical Working Group for consideration by the Cabinet, which was forwarded on 16th March 2015 to the Cabinet Secretary for Devolution and Planning. It is also his case that on 19th March 2015, the Technical Working Group submitted a subsequent refined proposal of amendments to the Constitution to entrench the two thirds gender principle, which proposals have also been forwarded to the Cabinet for its review and consideration.
89. The AG also alludes to other initiatives in Parliament to prepare and table Bills on the two-thirds gender principle. Such initiatives include a constitutional amendment Bill and an omnibus amendment Bill to various legislation. It is his case that his office has been engaged in a process of generating consensus on the variant positions after which the requisite action will be taken with respect to the two thirds gender principle.
90. Clearly, there has been a lot of frenetic, but apparently not too productive, activity with regard to the realization of the two-thirds gender principle in the last few months. However, such activity cannot be described as being “as soon as reasonably practicable”. Indeed, it is difficult not to wonder about the apparent laxity demonstrated by all the parties involved in this matter with regard to enactment of legislation to effect the gender equity rule in compliance with the timeline set in the Supreme Court Advisory Opinion, which timeline accords with the timeline in the Fifth Schedule of the Constitution. The Advisory Opinion was rendered in December 2012, almost three years to the deadline that will be upon us in less than sixty days. The Supreme Court was emphatic about the complex and inter-agency nature of the task ahead, which would require consultation and the participation of the public, when it observed at paragraph 65 that:
- [65] “We take judicial notice that the passage of legislation [“legislative measures”] to redress an injustice, or to deliver public goods, is not the single execution-oriented act that can be discharged immediately upon command; it is, inherently, a process and must run over time, in the context of supportive measures, and responsible exercises of discretion. It involves the conduct of studies, and the development of legislative proposals. Indeed, by the

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- Constitution, the development of legislation is no longer
the preserve of Parliament, or the legal draftspersons in
the State Law Office; public participation in the legislative
process is a constitutional imperative.”
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- 90 One cannot describe the steps that the AG and CIC have taken as
they emerge from their affidavits as reasonable and practicable, or
as intended to achieve the timeline in the Advisory Opinion. There
is thus an apparent failure on the part of the respondents to exercise
their constitutional mandate under Article 261(4) as directed in the
Advisory Opinion. The AG, who does not deny the responsibility of
his office to originate Bills, takes refuge in the provisions of article
261(2), which grant to the National Assembly the power to extend
the time prescribed for taking action in terms of article 261(1) and
the Fifth Schedule. However, the provisions of article 261(2) are
clear, and it is important to set them out alongside article 261(1):
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- (1) Parliament shall enact any legislation required by this
Constitution to be enacted to govern a particular
matter within the period specified in the Fifth Schedule,
commencing on the effective date.
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- (2) Despite clause (1), the National Assembly may, by
resolution supported by the votes of at least two-thirds
of all the members of the National Assembly, extend
the period prescribed in respect of any particular matter
under clause (1), by a period not exceeding one year.
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- (3) The power of the National Assembly contemplated under
clause (2), may be exercised—
- (a) only once in respect of any particular matter; and
- (b) only in exceptional circumstances to be certified by
the Speaker of the National Assembly. (Emphasis
added)
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91. It is not the mandate of this Court in this petition to enquire
generally into how far the AG and CIC have met their mandate
under article 261(4) and section 5(6) of the Sixth Schedule, nor
does it fall upon it to inquire how far there has been compliance
with the constitutional timelines set out in the Fifth Schedule. It is
also not the mandate of the Court to say how the two thirds gender
rule should be implemented, whether by way of constitutional
amendment, or by legislation.
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92. However, the Court has the mandate to state that in so far as the

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- two thirds gender rule and the binding Advisory Opinion of the Supreme Court is concerned, there is an apparent failure by the Respondents, both Respondents, to exercise their mandate under the Constitution. 1
93. The argument by the Respondents that the period for enacting the requisite legislation can be extended by the National Assembly does not really ameliorate the situation. It will be the province of the Speaker, should the question of extension of time arise, to certify the special circumstances that justify the extension of time, and for the National Assembly to vote on whether to extend the time or not. 5 10
94. As matters stand, however, as submitted by the petitioner and the interested parties, and bearing in mind the demands for consultation and public participation, the threat or likelihood of violation of the Constitution with respect to the two-thirds gender rule is clear. It is therefore my finding, and I so hold, that there is a threatened violation of the Constitution by the respondents with respect to their exercise of their mandate(s) under article 261(4) and section 5(6) of the Sixth Schedule to the Constitution. 15 20
95. In closing on this issue, it is worthwhile making some remarks on the role of Parliament in the implementation of the Constitution. Ms Kilonzo submitted at length about the role of Parliament in respect of the enactment of legislation under article 261 of the Constitution. While its role is, as provided under article 261(4), predicated on the acts of the respondents, it has an important and crucial oversight role, through the Parliamentary Select Committee, described in the Constitution as the Constitutional Implementation Oversight Committee, which is established under section 4 of the Sixth Schedule in the following terms: 25 30
4. There shall be a select committee of Parliament to be known as the Constitutional Implementation Oversight Committee which shall be responsible for overseeing the implementation of this Constitution and which, among other things— 35
- (a) shall receive regular reports from the Commission on the Implementation of the Constitution on the implementation of this Constitution including reports concerning— 40
- (i) the preparation of the legislation required by this Constitution and any challenges in that regard;

(ii) the process of establishing the new commissions;	1
(iii) the process of establishing the infrastructure necessary for the proper operation of each county including progress on locating offices and assemblies and establishment and transfers of staff;	5
(iv) the devolution of powers and functions to the counties under the legislation contemplated in section 15 of this Schedule; and	
(v) <u>any impediments to the process of implementing this Constitution;</u>	10
(b) <u>coordinate with the Attorney-General, the Commission on the Implementation of the Constitution and relevant parliamentary committees to ensure the timely introduction and passage of the legislation required by this Constitution; and</u>	15
(c) take appropriate action on the reports including addressing any problems in the implementation of this Constitution. (Emphasis added)	20
96. No submissions were made at the hearing hereof with respect to the role played by the Constitutional Implementation Oversight Committee, the Parliamentary Committee charged with the responsibility of overseeing the implementation of the Constitution. Ms Kimani does mention in her affidavit that the Parliamentary Constitutional Implementation Oversight Committee is a member of the Technical Working Group. However, given its pivotal role in the implementation of the Constitution as provided in section 4 of the Sixth Schedule, and the fact that there does not appear to be a timeline with respect to its constitutional role, one would have expected that it would play its role more convincingly in respect of the two thirds gender principle.	25
97. The involvement of Parliament appears to have been through the Judicial and Legal Affairs Committee of the National Assembly. The petitioner submitted that far from initiating the enabling legislation for realization of articles 27(8) and 81(b) of the Constitution as interpreted by the Supreme Court in the Advisory Opinion, however, the Chairperson of the Judicial and Legal Affairs Committee has published the Constitution of Kenya (First Amendment) Bill 2015, the net effect of which, according to the petitioner, is to restate the terms of the Supreme Court Advisory Opinion.	30
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98. In promulgating the 2010 Constitution, the people of Kenya were optimistic that they had put in place the institutions, processes and procedures for the just and effective governance, that would implement their hopes and aspirations through the implementation of the Constitution, thus leading to the just and equitable society that they aspired to. It would appear, at least in so far as the equitable representation of women and other marginalized groups contemplated under articles 27(8), 81(b) and 100 is concerned, that their hope may not be realized. The Constitutional Implementation Oversight Committee of Parliament appears to be somewhat moribund; CIC wishes to wash the matter off its hands, and the AG, who sought the Advisory Opinion in the first place, seems keen on waiting for the eleventh hour to act. It is rather late in the day for implementation of the rule, but not too late. Which leads me to the appropriate orders to grant in the matter.

Whether the Orders Sought by the Petitioner Should Issue.

99. The Petitioner seek various orders against the Respondents, including an order of mandamus directing them to prepare the relevant Bill for tabling before Parliament for purposes of implementation of articles 27(8) and 81(b) of the Constitution.

100. Article 23(3) of the Constitution grants this Court authority with respect to the Bill of Rights in the following terms:

- (3) In any proceedings brought under article 22, a court may grant appropriate relief, including—
 - (a) a declaration of rights;
 - (b) an injunction;
 - (c) a conservatory order;
 - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24;
 - (e) an order for compensation; and
 - (f) an order of judicial review.

101. The Petitioner submits that an order of *Mandamus* is an order of judicial review as contemplated under article 23(3). It relies on the decision of the Court of Appeal in *Kenya National Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 others (supra)* in which the Court stated as follows with respect to the principles to be considered in an application for orders of judicial

review:

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“The next issue we must deal with is this: What is the scope and efficacy of an Order of *Mandamus*” Once again we turn to *Halsbury’s Law of England*, 4th Edition Volume 1 at page 111 from paragraph 89. That learned treatise says:-

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“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

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“At paragraph 90 headed “the mandate” it is stated:

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“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.”

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What do these principles mean” They mean that an order of *mandamus* will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed...”
(Emphasis added)

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102. I have found that the AG has a constitutional duty under article 261(4) of the Constitution, in consultation with CIC, to prepare the relevant Bills for tabling before Parliament as soon as reasonably practicable to enable Parliament to enact the legislation within the period specified. Even if it were accepted, as Ms Kilonzo submitted, that the obligation under article 261(4) is solely on

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- the AG, CIC cannot escape responsibility if one considers the provisions of section 5(6)(a) of the Sixth Schedule which gives one of its functions as being to “monitor, facilitate and oversee the development of legislation and administrative procedures required to implement this Constitution.” The respondents have not, in my view, discharged their mandate under the Constitution, and have not given reasonable explanations for failing to do that which they are under a constitutional duty to do. 1 5
103. I accept that the Respondents have, in the last one year, set in motion some processes which appear to have been moving, except for the last 3 months, at a somewhat leisurely, one might even say, reluctant pace, towards realization of the two thirds gender rule. Nothing concrete, however, appears to have been done between the date of the Advisory Opinion on 11th December 2012, or the date of the formation of the Technical Working Group on 3rd February 2014, towards having the requisite legislation in place. 10 15
104. In the circumstances, it is my finding, and I do hold, that the Petitioner is entitled to the prayers that it seeks. 20
- Conclusion
105. At the hearing of this Petition, Counsel for the petitioner, Mr Ongoya, made an impassioned plea to this Court to help realize the promise to women with respect to their representation in the National Assembly and Senate. He impressed on the Court the need to translate the promise made to the women of Kenya in the Constitution into reality, and to ensure that the legitimate expectation that the promise made by the people of Kenya, in exercise of their sovereign power, will become a reality. 25 30
106. Mr Ongoya further asked how long the promise to the women of Kenya can be postponed, and whether there is a role for this Court to finally state that there is no more room for postponement of that promise. 35
107. The people of Kenya, in their wisdom, had foreseen the danger that various promises that they made to themselves may be postponed, or abandoned altogether. They therefore made very specific provisions with regard to their realization. As observed earlier, under the general provisions of the Fifth Schedule, all legislation required by the Constitution should have been enacted within 5 years of the effective date of the Constitution. In terms 40

- of the Advisory Opinion of the Supreme Court, the legislation to implement the two-thirds gender rule should have been in place before 27th August 2015. 1
108. In her submissions, Ms Kilonzo drew attention to the consequences on Parliament of a failure to pass the requisite legislation. Article 261(5) provides that: 5
- (5) If Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter. 10
 - (6) The High Court in determining a petition under clause (5) may—
 - (a) make a declaratory order on the matter; and
 - (b) transmit an order directing Parliament and the Attorney-General to take steps to ensure that the required legislation is enacted, within the period specified in the order, and to report the progress to the Chief Justice. 15
 - (7) If Parliament fails to enact legislation in accordance with an order under clause (6)(b), the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament. 20
109. I need not belabour the binding nature of our Constitution, which at article 2(1) is emphatic that “This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government” and at article 3(1) “Every person has an obligation to respect, uphold and defend this Constitution.” 25
110. The AG, in Consultation with CIC, is under a constitutional duty to prepare, for tabling before Parliament, legislation to effect the gender equity rule. Thereafter, should Parliament fail to act, then doubtless a vigilant Kenyan may invoke the provisions of article 261(5)-(7). 30
111. However, the AG and CIC must first act to prepare and present the necessary Bill(s) to Parliament. They cannot pass the responsibility to others, as CIC sought to do, under the provisions of article 119 of the Constitution, which makes provision with respect to petitions to Parliament. The constitutional obligation under article 261(4) and the Fifth and Sixth Schedule with respect to the implementation of the Constitution lies squarely upon them. 35
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Disposition	1
112. In the circumstances, I am satisfied that the Petition has merit, and I therefore issue the following declarations and orders:	
a. It is hereby declared that to the extent that the 1 st and 2 nd Respondent have this far failed, refused and or neglected to prepare the relevant Bill(s) for tabling before Parliament for purposes of implementation of articles 27(8) and 81(b) of the Constitution as read with article 100 and the Supreme Court Advisory Opinion dated 11 th December 2012 in Reference Number 2 of 2012, they have violated their obligation under article 261(4) of the Constitution to “prepare the relevant Bills for tabling before Parliament as soon as reasonably practicable to enable parliament to enact the legislation within the period specified”.	5 10 15
b. It is hereby declared that the foregoing failure, refusal and or neglect by the 1 st and 2 nd Respondent is a threat to a violation of articles 27(8) and 81(b) as read with article 100 of the Constitution and the Supreme Court Advisory Opinion dated 11 th December 2012 in Reference Number 2 of 2012.	20
c. An order of Mandamus be and is hereby issued directed at the 1 st and 2 nd Respondents directing them to, within the next Forty (40) days from the date hereof, prepare the relevant Bill(s) for tabling before Parliament for purposes of implementation of articles 27(8) and 81(b) of the Constitution as read with article 100 and the Supreme Court Advisory Opinion dated 11 th December 2012 in Reference Number 2 of 2012.	25 30
113. In granting order (c) above and the timeline therein, I am cognizant of the fact that there have been various processes undertaken in the last year or so which ought to culminate in legislation for presentation to Parliament for consideration. Bearing in mind also the fact that the 27 th of August 2015 is barely 60 days away, the timeline should allow the National Assembly, should it not be possible to consider and enact the requisite legislation, to consider the question of extension of time with respect to the two third gender principle in accordance with the provisions of article 261(2).	35 40

114. With respect to costs, and bearing in mind the public interest nature of this matter, I direct that each party bears its own costs of the Petition.	1
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**Republic v Kiambu County Government
& 7 others *ex parte* Samuel Thinguri Waruathé
[2015] KLR-HCK**

High Court, at Nairobi
GV Odunga, J

June 25, 2015

Judicial Review Miscellaneous Application No 355 of 2014

Brief facts

The Applicant brought an application seeking an order of *certiorari* and prohibition to quash and prohibit the decision and conduct of Kiambu enforcement officers, from harassing, arresting, intimidating, threatening and impounding as well as confiscating goods or property belonging to the Kiambu County traders, and the people of Kiambu at large in the pretext of enforcing the defunct/nullified Kiambu County Finance Act, 2013 or otherwise imposing licences and business permits or collecting fees, charges, rents, rates and/or levies without a proper legislative framework.

Issues

- i. Whether County Governments could impose taxes without an enabling proper legislative framework.
- ii. Whether the Court could refuse to grant judicial review orders even where the requisite grounds existed.

Constitutional Law – County Governments – imposition of tax/levies by County Governments – whether County Governments could impose taxes without an enabling proper legislative framework – Constitution of Kenya, 2010, article 209, 210.

Judicial Review – *certiorari* and prohibition – application for orders of *certiorari* and prohibition to quash and prohibit the decision and conduct of Kiambu enforcement officers from imposing taxes without a proper legislative framework – duty of the Court to exercise its discretion judiciously based on the evidence of sound legal principles when granting judicial review orders – whether the Application had merit.

Held:

1. Whereas the Constitution empowered the Counties to impose taxes, rates and other charges, the same Constitution required an enabling legislation to effectuate the said power. Such legislation was necessary since the power to impose rates, taxes and levies was not

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- an arbitrary power but it was required to be in compliance with the Constitution including article 196(1)(b) of the Constitution which enjoined the County Assemblies to facilitate public participation and involvement in the legislative and other business of the assembly and its committees. Therefore article 209(3) and (4) ought not to be read in isolation but had to be read together with the other provisions of the Constitution including article 210(1) in line with the rule of harmony, rule of completeness and the exhaustiveness and the rule of paramountcy of the written Constitution. 1
2. Judicial review orders were discretionary and were not guaranteed and hence a Court could refuse to grant them even where the requisite grounds existed since the Court had to weigh one thing against another and see whether or not the remedy was the most efficacious in the circumstances obtaining. Being a discretionary jurisdiction, it had to be exercised judicially and judiciously based on the evidence of sound legal principles. 5
3. The Court could not issue orders in vain even where it had jurisdiction to issue the prayed orders. It could therefore withhold the gravity of the order where among other reasons there had been delay and where the public body had done all that it could be expected to do to fulfil its duty or where the remedy was not necessary or where its path was strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application was made had already been realized. 10
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Application dismissed.

Cases

East Africa

1. *Dickson, Anthony John & 2 others v Municipal Council of Mombasa* Miscellaneous Application No 96 of 2000 – (Mentioned) 30
2. *Mureithi & 2 others (for Mbari ya Murathimi Clan) v Attorney General & 5 others* [2006] 1 KLR 443 – (Explained)
3. *Uganda Law Society v Attorney General* [2006] 1 EA 401 – (Explained) 35

Texts & Journals

1. Mackay, JPH., (Lord of Clashfern) et al (Eds) (1907) *Halsbury's Laws of England* LexisNexis 4th Edn Vo 1(1) para 12 p 270

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 3(1); 196(1)(b); 209(3)(4); 210(1); 258(1) – (Interpreted) 40

2. Law Reform Act (cap 26) In general – (Interpreted)	1
Advocates	
1. <i>Miss Ngania</i> for the Respondent	
June 25, 2015, GV Odunga, J delivered the following Judgment	5
Introduction	
1. By a Motion on Notice dated 19th September, 2014, the <i>ex parte</i> Applicant herein, Kenya National Chamber Commerce & Industry Kiambu County, seeks the following orders:	
1. That an order of <i>certiorari</i> does issue to the quash the decision and/or conduct of the Respondents whether by themselves, their agents, enforcement officers, employees, Police Officers or whosoever in harassing, arresting, intimidating, threatening and impounding as well as confiscating goods or property belonging to the Kiambu County traders, businessmen, industrialists, motorists and indeed the people of Kiambu at large in the pretext of enforcing the defunct/nullified Kiambu County Finance Act 2013 or otherwise imposing licences and business permits or collecting fees, charges, rents rates and/or levies without a proper legislative framework.	10
2. That an order of Prohibition does issue to prohibit the Respondents whether acting by themselves, their agents, enforcement officers, employees, Police Officer or whosoever from harassing, arresting, intimidating, threatening and impounding as well as confiscating goods or property belonging to the Kiambu County traders, businessmen, industrialists, motorists and indeed the people of Kiambu at large in the pretext of enforcing the defunct/nullified Kiambu County Finance Act 2013 and/or otherwise from imposing licences and business permits or collecting fees, charges, rates, rents and/or levies until a proper legislative framework to govern the collection of fees, charges, rents, rates or levies as well as licences and/or business permits has been established.	15
3. That the costs of this Application be provided for.	20
Applicant's Case	
2. According to the <i>ex parte</i> Applicant, on 17th April, 2014 this Court in Constitutional Petition Number 532 of 2013 as consolidated with others at the High Court of Kenya at Nairobi delivered a judgment	25
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- wherein it declared the Kiambu Finance Act 2013 (hereinafter referred to as “the Act”) unconstitutional and accordingly declared it null and void. 1
3. However, despite the said declaration, it was contended that the Respondents without a colour of right, arbitrarily and with an air of impunity continued to impose licences, permits, fees, charges, rates, rents fines, levies etcetera premised on the said nullified Act 2013. Similarly, the Respondents continued to so demand licences, business permits, fees charges, rates fines levies etcetera notwithstanding that they had not enacted a legislative framework to empower them impose the same and to govern such collections. 5 10
4. It was further averred that the Respondents published for debate what they are termed, ‘the Kiambu County Provisional Collection of Fees, Charges, Levies, Rents or Rates Bill’ a clear manifestation that with the nullification of the 2013 Act, there was no law empowering the Respondents to collect fees, charges, levies, rents and/or rates or governing the collection thereof. To exacerbate the situation, the Respondents have in the most unreasonable, irrational, rash, callous and oppressive manner deployed ‘enforcement officers’ to arrest, harass, intimidate and even impound as well as confiscate the properties of traders, motorists, industrialist and the people of Kiambu County in the pretext of enforcing an illusory Kiambu County Finance Act or whichever. 15 20 25
5. The Applicants, while not opposing the Respondent’s power to impose licences, business permits, fees, charges, levies, fines etcetera so long as the same is done within the ambit of the law and in particular within the framework of the Constitution as well as a properly enacted legislative framework were however aggrieved by what according to them was the Respondent’s conduct, which conduct not only smacked of impropriety, illegality, unconstitutionality, irregularity and abuse of power but the same was unjust, contemptuous and in blatant disregard of court orders and the rule of law. 30 35
- Respondent’s Case
6. The Respondent’s case on the other hand was that there was no evidence that Dr Waruath is the Chairman or that the ex parte Applicants are officials of the Kenya National Chamber of Commerce and Industry, Kiambu County Chapter; that there is no evidence that the institution of this suit has been authorised by 40

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- the Kenya National Chambers of Commerce and Industry, Kiambu County Chapter; and that there is no evidence that the businessmen in Kiambu County, on whose behalf this suit is claimed to have been instituted by the *ex parte* Applicants are members of the Kenya National Chambers of Commerce and Industry, Kiambu County Chapter. 1 5
7. According to the Respondent, it had not imposed licenses, business permits fees charges, rates, rents, fines and levies in reliance upon the nullified Kiambu Finance Act, 2013. To the contrary, the clamping notice dated 11th September, 2014 in respect of motor vehicle KBL 826 F was issued upon the owner's failure and/or refusal to pay for the use of the 1st Respondent's parking space hence the owner's failure and/or refusal to pay for the use of the 1st Respondent's parking space was not attribute to the reasons advanced by the *ex parte* Applicants. 10 15
8. It was further contended that the Respondent had neither demanded nor had the Applicants exhibited any evidence of demands by the Respondents for licenses, business permits, fees charges, rates, fines and levies in reliance upon the nullified Kiambu Finance Act, 2013. 20
9. To the Respondent, the *ex parte* Applicants' claim that they are entitled to the use of the 1st Respondent's facilities and services for free for as long as there is no Finance Act is not correct and is a recipe for anarchy and impunity. It was its position that the notices of impounded goods exhibited relate to businesses that were regulated and controlled even before the nullified Kiambu Finance Act, 2013; that it was unreasonable and unconscionable of the *ex-parte* Applicants to demand that businesses be run in Kiambu County without regulation and control; that there was no evidence whatsoever that the authors of the complaint letters or recipients of the notices of impounded goods are members of the Kenya National Chambers of Commerce and Industry, Kiambu County Chapter and/or have authorised the *ex parte* Applicants to institute this suit on their behalf;; and that the *ex parte* Applicants were unreasonably replying upon the Decree made on 17th April 2014 in Petition No 532 of 2013 as a justification for lawlessness and impunity. 25 30 35
9. It was submitted on behalf of the Respondents that article 209(3) and (4) of the Constitution empower them to impose property rates, entertainment taxes and any other tax it is authorised to impose by an Act of Parliament. Further it is empowered to impose charges 40

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- for services they provide including parking fees. It was therefore its position that it did not act in excess of jurisdiction. 1
10. It was further contended that the applicants had not exhibited any decision capable of being quashed. 5
- Determination
11. I have considered the foregoing.
12. It was contended that the authors of the complaint letters or recipients of the notices of impounded goods are not members of the Kenya National Chambers of Commerce and Industry, Kiambu County Chapter and/or have authorised the ex parte Applicants to institute this suit on their behalf. 10
13. The issue of standing was dealt with by Nyamu, J (as he then was) in *Mureithi & 2 others (for Mbari ya Murathimi Clan) v Attorney General & 5 others* Nairobi HCMCA No 158 of 2005 [2006] 1 KLR 443 as follows: “The function of standing rules include: to restrict access to judicial review; to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the Government. Such litigants do not exist in real life – if they did the requirement for leave would take care of this; to prevent the conduct of Government business being unduly hampered and delayed by excessive litigation; to reduce the risk that civil servants will behave in over cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong; to ration scarce judicial resources; to ensure that the argument on the merit is presented in the best possible way, by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together); to ensure that people do not meddle paternalistically in affairs of others...Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law...The other reason is that although initially it was feared that the relaxation of standing would open floodgates of litigation and overwhelm the Courts this has in fact not happened and statistics reveal or show that on the ground, there are very few busybodies in this area. In addition, the path by eminent jurists in many countries highlighting on the need for the courts being broadminded on the 15 20 25 30 35 40

the applicants represent themselves as individuals and the wider clan and I unequivocally hold that they have the required standing to bring the matter to this Court. Moreover in this case I find a strong link between standing and at least one ground for intervention – the claim that the land belonged to the clan and finally there cannot be a better challenger than members of the affected clan.”

14. Whereas it is true that from the documents exhibited by the applicants there is none that purports that the applicants are in fact officials of Kenya National Chamber of Commerce and Industry, Kiambu County Chapter, article 3(1) of the Constitution obliges every person to respect, uphold and defend the Constitution. Similarly article 258(1) empowers every person to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention. The applicants herein contend that in the absence of legislation the Respondent has no power to impose the impugned levies. In the circumstances of this case, I am unable to accede to the Respondent’s position that the applicants had no business instituting these proceedings.

15. Whereas it is true that article 209(3) and (4) empowers a County to impose taxes, rates and charges specified thereunder, article 210(1) of the Constitution provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation. It is therefore clear that whereas the Constitution empowers the Counties to impose taxes, rates and other charges, the same Constitution requires an enabling legislation to effectuate the said power. Such legislation is necessary since the power to impose rates, taxes and levies is not an arbitrary power but is required to be in compliance with the Constitution including article 196(1) (b) of the Constitution which enjoins the County Assemblies to facilitate public participation and involvement in the legislative and other business of the assembly and its committees. Therefore article 209(3) and (4) ought not to be read in isolation but must be read together with the other provisions of the Constitution including article 210(1) in line with the Rule of harmony, rule of completeness and the exhaustiveness and the rule of paramountcy of the written Constitution that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. See *Uganda Law Society v Attorney General* [2006] 1 EA 401.

16. I therefore wish to disabuse the Respondent’s notion that even if

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- there was no legislation in existence, the Respondent could impose the said rates, taxes and charges. 1
17. Having so found, it is however not axiomatic that as long as the grounds exist the Court must grant the said orders. The decision whether or not to grant them is an exercise of judicial discretion and whether or not the Court will grant them depends on the circumstances of the case. This position is recognised in *Halsbury's Laws of England* 4th Edn Vo 1(1) para 12 page 270 where the learned authors state: "The remedies of quashing orders (formerly known as orders of *certiorari*), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of *mandamus*)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the Court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.'" 5 10 15 20 25 30 35
18. In other words, judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining. Being a discretionary jurisdiction, it must be exercised judicially and judiciously based 40

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Council of Governors & 6 others v Senate
[2015] KLR - HCK

High Court, at Nairobi (Constitutional and
Human Rights Division)

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June 4, 2015

I Lenaola, M Ngugi & GV Odunga, JJ

Petition No 413 of 2014

Brief facts

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On August 12, 2014, the Senate through its Sessional Committee on County Public Accounts and Investments, summoned certain Governors to appear before the Committee. The Governors were summoned to answer questions on County financial management raised in the report of the Auditor General for the financial year 2012/2013. The Governors who were summoned were Isaac Ruto of Bomet County, William Kabogo of Kiambu County, Mwangi wa Iria of Murang'a County and Jack Ranguma of Kisumu County. Later, the 2nd to 7th Petitioners were also summoned.

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Notwithstanding the summons, the Governors failed to appear before the Committee. In response, on August 7, 2014, pursuant to the provisions of article 228(4) & 228(5) of the Constitution of Kenya 2010, the Senate resolved that the Controller of Budget should not authorize any withdrawal of public funds for purposes of the Counties headed by the Governors who had been summoned, until they responded to the audit queries to the satisfaction of the Senate.

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The Petitioners therefore lodged this Petition to question the Constitutionality of the summons and the Constitutional power and authority of the Senate to pass a resolution directing the Controller of Budget not to authorize withdrawal of public funds for purposes of use by the Counties that were headed by the Petitioners.

Issues

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- i. Whether the Petition was competent as it had been filed without the requisite 30 day notice being issued to the Attorney General.
 - ii. Whether the Petition was competent as it entailed a suit against the Government in which the Attorney General was not a party.
 - iii. Whether the Court had the jurisdiction to determine the matter.
 - iv. Whether the Senate had the mandate to summon County Governors to answer questions raised by the Auditor General.
 - v. Whether Senate's resolution directing the National Treasury and the
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Controller of budget not to authorize withdrawal of public funds by certain Counties was constitutional.	1
vi. Whether Governors could be asked to account for transactions in financial years in which the defunct local authorities and the Transition Authority were in-charge of County resources.	5
<i>Civil Practice and Procedure – institution of suits – parties to a suit – Government proceedings – proceedings brought against the Senate – whether it was mandatory for the Attorney General to be a party to a suit in which the National Government was being sued – Constitution of Kenya 2010, article 156(4); Government Proceedings Act (Cap 40), section 12; Office of the Attorney General Act, No 49 of 2012, section 5.</i>	10
<i>Civil Practice and Procedure – institution of suits – Government proceedings – issuance of 30 days notice to the Attorney General before filing a suit against the Government – effect of failure to issue the requisite notice – Government Proceedings Act (Cap 40), section 13A(1).</i>	15
<i>Civil Practice and Procedure – res judicata – requirement for same parties and same issues in a former suit – whether the doctrine of res judicata would be applicable in circumstances where the main issue was similar to that in a former suit but the instant suit also raised new issues and had different parties – Civil Procedure Act (Cap 21), section 7.</i>	20
<i>Constitutional Law – Senate – the role of the Senate – the role of the Senate with respect to national revenue allocated to Counties – examining financial management reports and summoning any person to answer queries and provide information on the reports – Constitution of Kenya 2010, articles 95(4)(c), 96(3), 125 & 226(2); County Governments Act, No 17 of 2012, section 30(3)(f).</i>	25
<i>Constitutional Law – interpretation of constitutional provisions – national revenue allocation to County Governments – constitutionality of a Senate resolution for the stoppage of withdrawals of public funds by County Governments – Constitution of Kenya 2010, articles 225 & 228(4); Public Finance Management Act, No 18 of 2012, sections 93, 94 & 95.</i>	30
<i>Constitutional Law – interpretation of constitutional provisions – transitional provisions – financial management of the assets and liabilities of the defunct Local Authorities – whether Governors could be summoned to answer queries on financial management in a financial year where resources were managed by the defunct Local Authorities – Constitution of Kenya, 2010, section 2 of the Sixth Schedule; Transition to Devolved Government Act, 2012, section 7; County Governments Act, No 17 of 2012, section 30(3)(f).</i>	35
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Judicial precedent – the binding or persuasive nature of judicial decisions – difference in the applicable facts – circumstances in which the court would seek to distinguish its decision in relation to an apparently similar decision and reach at its own separate conclusions over an issue. 1

Jurisdiction – jurisdiction of the High Court – parliamentary privilege – jurisdiction with respect to the Senate’s actions – whether the High Court had jurisdiction with respect to a suit challenging the constitutionality of the actions and resolutions of the Senate – Constitution of Kenya 2010, article 165(3). 5

Held: 10

1. The import of section 12 of the Government Proceedings Act was that subject to any other written law, civil proceedings by or against the Government would be instituted by or against the Attorney General. 15
2. Article 156(4) of the Constitution of Kenya 2010 and section 5 of the Office of the Attorney General Act were to the effect that the Attorney General had the right to represent the National Government in Court proceedings but the provisions did not stipulate that the Attorney General would be sued in all instances where an organ of the National Government had been sued. Therefore, it was not improper for the Petitioners to sue the Senate and not the Attorney General. 20
3. Section 13A(1) of the Government Proceedings Act provided that every person was required to give 30 days notice to the Attorney General before filing a suit against the Government. However, a rule of procedure which had the effect of violating a party’s fundamental freedoms and rights, such as the right to access to justice, could not be said to be sound. 25
4. The Respondent had not suffered prejudice by the alleged failure by the Petitioner to issue the 30 days notice to the Attorney General as prescribed in section 13A(1) of the Government Proceedings Act. 30
5. Pursuant to article 165(3) of the Constitution of Kenya 2010, the Court had the duty to intervene in the actions of other arms of Government and State Organs where it was alleged or demonstrated that the Constitution had either been violated or threatened with violation. The doctrine of separation of powers did not inhibit the Court’s jurisdiction to address the Petitioner’s grievance so long as it stemmed out of an alleged violation of the Constitution. 35
6. The Court had power to inquire into the constitutionality of the actions of the Senate notwithstanding the existence of parliamentary 40

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privilege. The place of the Constitution as the supreme law meant that the Senate had to function within the limits prescribed by the Constitution.	1
7. The doctrine of <i>res judicata</i> was provided for in section 7 of the Civil Procedure Act and it barred litigation over a matter which was substantially in issue in a former suit between the same parties. The Rule of <i>res judicata</i> was based on the principle that litigation had to come to an end and the principle that a party should not be vexed twice over the same cause.	5
8. The Petitioner in Kerugoya HC Petition No 8 of 2014 was International Legal Consultancy Group, a different entity from the Petitioners in the instant suit. Additionally, the instant suit raised issues that were not raised in the prior suit. The doctrine of <i>res judicata</i> was therefore inapplicable.	10
9. The decision in Kerugoya HC Petition No 8 of 2014 was not made <i>per incuriam</i> , the <i>obiter</i> notwithstanding, the judgment indicated that the bench considered arguments made before them and applied their collective judicial mind to the submissions made by the parties and also considered the provisions of the Public Finance Management Act, County Governments Act and the Constitution of Kenya 2010.	15
10. Given the decision of the Court in Kerugoya HC Petition No 8 of 2014, the question as to whether the Court could rehear the issue on the constitutionality of the summons issued to the Governors by the Senate arose. That question was about the legal import of judicial precedents. Generally, precedents enhanced certainty in law but certainty had to be maintained within certain limits.	20
11. A judicial precedent was either of binding or persuasive authority. However, a Court could depart from the decisions of a higher Court or its earlier findings if there was substantial cause and exceptional circumstances which compelled it to do so.	25
12. The earlier petition and the instant Petition both dealt with the issuance of summons to Governors by the Senate. However, the parties in each Petition and the facts in support thereof were substantially different and the law could also apply to each separate set of facts differently.	30
13. Pursuant to article 96 of the Constitution of Kenya 2010, the role of the Senate was to protect the interests of Counties at the national level and to exercise oversight over the national revenue allocated to Counties by the National Government. It was the constitutional duty of the Senate to guard against threats to devolution and the	35
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- interests of Counties. 1
14. Under the provisions of articles 95(4)(c), 96(3) & 226(2) of the Constitution of Kenya 2010, a County Assembly did not have an oversight role over national revenue allocated to Counties because that oversight role was the exclusive mandate of the National Assembly and the Senate. The import of article 226(2) of the Constitution was that the Accounting Officer should be able to explain his decisions on financial management to a County Assembly. 5
15. Accountability and oversight were two different terminologies and they would not mean the same thing. The term oversight with respect to the oversight role of the Senate in national revenue allocations to Counties meant the action of overseeing which meant supervising or looking from above. 10
16. In light of article 96(3) of the Constitution of Kenya 2010, oversight implied a procedural and substantive function for the Senate. The oversight would be procedural in the sense that the Senate would be involved in the process of sharing national resources between the National Government and the County Governments as envisaged in article 202 and 203 of the Constitution. Thus, the Senate would be involved in enacting legislation on national revenue allocation to Counties. 15
17. After the allocation of revenue to Counties, the Senate had a substantive oversight role in which it ensured that the revenue allocated was disbursed to Counties in accordance with the law and that County financial operations were going on normally. 20
18. The role of the National Treasury as provided for in the Constitution and section 12 of the Public Finance Management Act did not include management of national revenue allocated to Counties. Under articles 203, 204, 205, 225 and 228 of the Constitution of Kenya 2010 as well as sections 12 and 109 of the Public Finance Management Act, other bodies had the mandate to manage those revenue allocations. 25
19. An Accounting Officer for a County Government was the person appointed and designated as such by the County Executive Committee under section 148 of the Public Finance Management Act. Under section 148(3) of the Public Finance Management Act, the County Executive Committee Member for Finance was mandated to ensure that each County Government entity had an Accounting Officer as provided for under article 226(2) of the Constitution. 30
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20. Accounting Officers designated to County Government entities under section 149(1) of the Public Finance Management Act, were accountable to the County Assembly with respect to management and use of resources allocated to the County Government entity. To an extent, Accounting Officers at the County Government level could become accountable to the Senate on the management of County resources.
21. Under section 164 of the Public Finance Management Act, a County Government was *inter alia* required to submit its financial statements and summaries to the Auditor General. The Auditor General would then make a financial management report and submit it to Parliament, which included the Senate, and the County Assembly.
22. Upon receiving the financial management report, the Senate's role was to examine the financial statements and documents and to take appropriate action including making recommendations. The Senate's role in examining the reports was provided for in section 163 & 164 of the Public Finance Management Act.
23. In examining the financial reports, pursuant to article 125 of the Constitution of Kenya 2010, the Senate had powers to summon any person to appear before it for purposes of giving evidence or providing information.
24. Under section 30(3)(f) of the County Governments Act, the Governor was required to be accountable for the management and use of County resources. A Governor could appear before the Senate Committee to answer relevant questions on financial management. He could opt to appear before the Committee together with the County Executive Committee Member for Finance and the designated Accounting Officer of the relevant County entity.
25. It was lawful and constitutional for the Senate to issue summons to Governors for them to answer questions on County financial management. The Governors had a crucial role in the management of County resources.
26. Under article 225 of the Constitution and sections 93, 94 & 95 of the Public Finance Management Act, a Cabinet Secretary had powers to stop the transfer of funds to County entities subject to Parliament's approval. However, the provision did not allow the Senate to direct a Cabinet Secretary to stop the transfer of funds in exercise of the Senate's oversight role.
27. The import of article 228(4) of the Constitution was that the Controller of Budget could not approve any withdrawal from

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- a public fund unless he was satisfied that the withdrawal was authorized by law. Conversely, the Controller of Budget could not stop a withdrawal unless the stoppage was authorized by law. 1
28. In accordance with section 2 of the Sixth Schedule to the Constitution, after the first General Election under the Constitution of Kenya 2010, a transition from Local Government to County Government was to be done once the County Governments came into existence. During the transition period, under section 7 of the Transition to Devolved Government Act, the Transition Authority was the body mandated to prepare and validate an inventory of all assets and liabilities of Local Governments. The Transition Authority was also responsible for creating mechanisms for the transfer of assets. 5 10
29. In the pleadings before the Court, there was no evidence that any of the County Governments had properly taken over the assets and liabilities of Local Governments. Calling upon Governors to answer questions on the financial affairs of Local Authorities during the financial year 2012/2013 which fell in Phase One of the transition period would be an error on the part of the Senate. 15 20

Petition partly allowed.

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2. *Aluochier, Isaac Aluoch Polo v Uhuru Muigai Kenyatta & another* Petition No 360 of 2013 – (Affirmed)
3. *ET v Attorney General & another* [2012] 1 KLR 129 – (Affirmed)
4. *International Legal Consultancy Group v Senate & another* Constitutional Petition No 8 of 2014 – (Explained) 30
5. *Kenya Bus Service Ltd & 2 others v Attorney General & 2 others* Miscellaneous Civil Suit No 413 of 2005 – (Explained)
6. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal No 290 of 2012 – (Explained) 35
7. *Ngoge v Kaparo & 5 others* [2012] 2 KLR 419 – (Mentioned)
8. *Nguruman Ltd v Shompole Group Ranch & another* Civil Application No 90 of 2013 (UR 60/2013) – (Explained)
9. *Njangu, Mwangi v Meshack Mbogo Wambugu & another* Civil Case No 2340 of 1991 – (Affirmed) 40
10. *Okoit, Okiya Omtatah & another v Attorney General & 7 others* Petition No 446 of 2013 – (Considered)

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11. <i>Omondi v National Bank of Kenya Ltd & others</i> [2001] EA 177 – (Mentioned)	1
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16. <i>In re the Matter of the Interim Independent Electoral Commission</i> [2011] 2 KLR 32 – (Followed)	
17. <i>Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 2 others ex parte Saitoti</i> [2006] 2 KLR 400; [2007] 2 EA 392 – (Mentioned)	15
18. <i>Republic v Kenya Roads Board ex parte John Harun Mwau</i> Miscellaneous Civil Application No 1372 of 2000 – (Affirmed)	
19. <i>Siri Ram Kaura v M J E Morgan</i> [1961] EA 462 – (Affirmed)	
20. <i>Speaker of the Senate & another v Attorney General & 4 others</i> Advisory Opinion No 2 of 2013 – (Affirmed)	20
21. <i>Speaker, Nakuru County Assembly & others v Commission on Revenue allocation & 3 others</i> Petition No 368 of 2014 – (Mentioned)	
22. <i>Tinyefunza v Attorney General</i> [1997] UGCC 3 – (Mentioned)	
23. <i>Truth Justice and Reconciliation Commission v Chief Justice of the Republic of Kenya</i> [2012] 1 KLR 244– (Mentioned)	25
24. <i>Walumbwa, Hudson Laise v Attorney General</i> Civil Case No 2714 of 1987 – (Followed)	
25. <i>Wambora, Martin Nyaga v Speaker, County Assembly of Embu & 5 others</i> Petition No 3 of 2014 – (Affirmed)	30

Zimbabwe

1. <i>Smith v Mutasa & another</i> NNO [1990] LRC (Const) b87; 1990 (3) SA 756; 1989 (3) ZLR 183 – (Affirmed)	

South Africa

1. <i>Certification of the Constitution of the Republic of South Africa</i> [1996] ZACC 26; 1996 (4) SA 744) – (Followed)	35

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1. <i>Bradhaugh v Gosset</i> (1884) 12 QBD 271; 32 WR 552; 53 LJQB 209; 50 LT 620 – (Mentioned)	
2. <i>Fitzleet Estates v Cherry</i> [1971] 1 WLR 1345; [1977] 3 AII ER 996; (1977) 51 TC 708	40
3. <i>Morella Ltd v Wakeling</i> [1955] 1 AII ER 708; [1955] 2 WLR 672;	

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2. May, TE., (Ed) (1844) <i>Treatise on the Law, Privileges, Proceedings and Usage of Parliament</i> , London: Charles Knight & Co 24 th Edn	
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1. Constitution of Kenya, 2010 articles 1,2,6(2);10(2)(c);48; 93(1); 95(4)(c);(96(3)(4);117(2);125;156(1)(4);159(2)(d);165(3)(d)(ii);174;179(4);185(3);187; 189(1); 201;202;203;204;205;207(3); 217; 225; 226(2); 228(4)(5); 229;248(3)(b);249(2)(b);259(1); Sixth Schedule sections 2,15(1)(2) – (Interpreted)	20
2. Constitution of Kenya (Repealed) section 7 of the Sixth Schedule – (Interpreted)	
3. Civil Procedure Act (cap 21) section 7 – (Interpreted)	25
4. County Governments Act, 2012 (Act No 17 of 2012) sections 30(2)(3)(f); 134 – (Interpreted)	
5. Government Proceedings Act (cap 40) sections 12(1); 13A – (Interpreted)	
6. National Assembly (Powers and Privileges) Act (cap 6) sections 12(1); 13(a); 14; 15, 29 – (Interpreted)	30
7. Office of the Attorney General Act, 2012 (Act No 49 of 2012) section 5(1) – (Interpreted)	
8. Public Finance Management Act, 2012 (Act No 18 of 2012) sections 8(1)(d); 12;92;93;94;95;96(3);97(2);98;99; 103(1); 109(3)(6); 148(3)(4); 149(1);163;164 – (Interpreted)	35
9. Transition to Devolved Government Act, 2012 (Act No 1 of 2012) sections 2, 3, 4(1); 7(1)(e)(2); 24; 35 – (Interpreted)	
Advocates	
1. <i>Mr Ahmednassir</i> , Senior Counsel, <i>Mr Nyamu</i> , <i>Mr Wanyama & Mr Issa Mansur</i> for the Petitioners	40
2. <i>Mr Kilukumi</i> for the Respondents	

June 4, 2015 the following Judgment of the Court was delivered.	1
Introduction	
1. This Petition concerns the constitutionality of summons dated 12 th August 2014 issued to certain County Governors by the Senate through its Sessional Committee on County Public Accounts and Investments. The summoned Governors, namely; Isaac Ruto of Bomet County, William Kabogo of Kiambu County, Mwangi wa Iria of Murang'a County and Jack Ranguma of Kisumu County were to appear before the aforesaid Committee on 26 th August 2014 to allegedly answer questions on County financial management as raised in the Report of the Auditor General for the financial year 2012/2013.	5 10
2. The said Governors and later the 2 nd – 7 th Petitioners, who had likewise been summoned, did not appear before the said Committee. Consequently, the Senate, allegedly exercising powers under article 228(4) and (5) of the Constitution, on 7 th August 2014, resolved that the Controller of Budget should not authorize any withdrawal of public funds for purposes of the Counties headed by the aforementioned Governors until they had responded to the audit queries raised to the satisfaction of the Senate.	15 20
3. In their Petition dated 19 th August 2014, the Petitioners question the constitutionality of the said witness summons and the constitutional power and authority of the Senate to pass a resolution directing the Controller of Budget not to authorize withdrawals of public funds until satisfactory answers are provided by the Petitioners to the audit queries. According to the Petitioners, the summons contravene article 226(2) of the Constitution which provides that the Accounting Officer of a County public entity is accountable to the County Assembly for its financial management. They claim that in summoning the County Governors, the Senate is usurping powers of County Assemblies and in any event that County Governors are not the Accounting Officers of the County and cannot answer any audit queries.	25 30 35
4. In their Petition they therefore seek the following orders;	
“a. A declaration that in view of the provisions of 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 co-operation, the Senate cannot	40

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exercise powers under articles 125 of the Constitution in a manner that cripples County Governments.	1
b. A declaration that the Senate is bound by the provisions of article 189(1) of the Constitution to perform its functions and exercise its powers, in a manner that respects the functional and institutional integrity, as well as the constitutional status and institutions at the County level.	5
c. A declaration that resonating the intention of article 96 of the Constitution and 226(2) of the Constitution of Kenya and section 148 of the Public Financial Management Act 2012, the Senate cannot summon Governors to personally appear before it to answer questions on County Government finances in total disregard of the procedure and requirements of public finance management that is stipulated by the Public Finance Management Act, 2012.	10
d. A declaration that the Senate is bound by the methods, procedures and requirements of the Public Finance Management Act, 2012 when undertaking its oversight and summoning powers.	15
e. A declaration that resonating the intention of article 96 of the Constitution and 226(2) of the Constitution of Kenya and section 148 of the Public Finance Management Act, 2012, it is proper, legal, and constitutional for Members of the Executive Committee responsible for finance and the Chief Officers responsible for finance to appear before the Senate or any of its Committee to answer on County Government finances and to generally provide information that helps the Senate to undertake its oversight functions as stipulated in Article 96 of the Constitution.	20
f. A declaration that resonating the intention of article 6(2), 96, 174, 185(3) and 226(2) of the Constitution of Kenya, the Senate cannot summon an accounting officer of the County Government to answer questions on County financial management, at the first instance. It must first allow the oversight and legislative mechanisms at the County level to be concluded given that these Governments are functional distinct and are based on the principle of Separation of Powers.	25
g. A declaration that resonating the intention of article 6(2), 96, 174, 185(3) and 189 of the Constitution and within	30
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the meaning of article 226(2) and article 96(4) of the Constitution of Kenya, the Senate's oversight role over nationally collected revenue to Counties is not identical to the County Assembly's oversight over the Executive.	1
h. A declaration that resonating the intention of article 96(4) of the Constitution and in view of the provisions of article 185(3) and article 226(2) of the Constitution of Kenya, the Senate's power is limited to oversight over national agencies which manage national revenue allocated to Counties such as the National Treasury.	5 10
i. A declaration that resonating the intention of articles 6(2), 189(1), 174 and 96(4) of the Constitution, and in view of the provisions of article 185(3) of the Constitution of Kenya, the County Assembly is the sole organ that can undertake oversight over the County Executive.	15
j. A declaration that the Senate can only exercise its powers under article 125 of the Constitution to scrutinize County financial and other records for purposes of making a determination with regard to an impeachment, interventions in a County, suspension of a County, or for purposes of developing national legislation necessary for more prudent management of finance at the County level.	20
k. A declaration that the Senate does not have sole constitutional powers to direct National Treasury and Controller of Budget not to release funds to Counties without following the provisions of article 225 of the Constitution.	25
l. A declaration that stoppage of funds to a County public entity can only be done by following the provisions of article 225 of the Constitution.	30
m. A permanent injunction be issued to retrain the Senate from summoning County Governors to appear before it to answer questions on County public financial management.	35
n. A permanent injunction be issued to retrain the Senate from summoning accounting officers at the County level to appear before it to answer questions on County public financial management.	40
o. An order or certiorari to quash the Resolution of the Senate issued on 7th August 2014 that purports to direct	

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- the National Treasury and the Controller of Budget not to release funds to Kiambu, Bomet, Kisumu and Murang'a Counties. 1
- p. There be no order as to costs." 5
- The Petitioners' Case
5. The Petitioners' case is contained in their Petition dated 19th August 2014, the Supporting Affidavit sworn by Isaac Ruto on the same date and written submissions dated 19th August 2014 and 1st December 2014. Their case was presented by Mr Ahmednassir, SC as lead Counsel assisted by Mr Nyamu, Mr Wanyama and Mr Issa Mansur. 10
6. It was Mr Ahmednassir's submission that the Constitution at article 189(1) provides that the Government, at either level, shall perform its functions and exercise its powers in a manner that respects the functional and institutional integrity of Government at either level. Thus as an institution of the National Government, the Respondent is duty bound to respect the functional and institutional independence of Governors and their offices. 15
7. He submitted further that the Senate's role under article 96 of the Constitution is limited to the protection of the interests of Counties at the national level which includes considering, debating and approving Bills concerning Counties in Parliament and to determine allocation of national revenue among Counties as provided for under article 217 of the Constitution. That the Senate's oversight role is at the national level and not at the County level. He thus contended that the Constitution does not vest the Senate with an oversight role with respect to expenditure of devolved funds unlike the National Assembly which has an oversight role over expenditure of national funds as provided for under article 95(4)(c) of the Constitution. That the oversight role with respect to expenditure by County Governments is vested upon the County Assemblies in accordance with the provisions of article 185(3) of the Constitution. He therefore concluded on this issue that the County Assembly is the body that is constitutionally charged with the responsibility of ensuring that devolved revenue to a county government is spent in a manner that respects the principles of devolution and public finance. 20
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8. Mr Ahmednassir also submitted that the Constitution has provided for a distinct framework of accountability of County financial resources. In that regard, he submitted that the Office of the Controller of Budget under the provisions of article 228 40

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- is mandated to submit to each house of Parliament a report on the implementation of budgets of both the National and County Governments every four months. Further, that the Auditor General also submits reports to Parliament or the relevant County Assembly with regard to various audit queries for debate as provided for under article 229 of the Constitution. It was his position therefore that the Senate's mandate on public finances of a County is limited to making recommendations for improving the management of public finances as provided for under section 8(1)(d) of the Public Finance Management Act of 2012 and not otherwise. 1
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9. It was his further submission on this point that the Public Finance Management Act provides a clear and elaborate regime with respect to accountability of County financial resources. For instance, he claimed that Part 1V of the Act has set out County Government's responsibilities concerning management and control of public finances such as establishment of County Treasuries and their responsibilities; establishment of the position of County Executive Member of Finance and County Accounting Officer, and their roles. He submitted that the Senate has not been accorded any role under the Act for the management of County resources and that the issues raised by the Senate against Governors ought to be dealt with by the County Assemblies of the respective Counties as set out under the Public Finance Management Act. In any event, he submitted that where there are issues at the County level that require national intervention, the Public Finance Management Act at section 187 has established the Intergovernmental Budget and Economics Council which would adequately address any such concerns raised. 15
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10. On his part, Mr Wanyama, submitted that there is need for various levels of Government to respect distribution of power. He relied on the decision of the Constitutional Court of South Africa in *Certification of the Constitution of the Republic of South Africa* (1994) (4) SA 744 where it was held that intervention in a matter exclusively reserved for Provincial Governments by the National Government should be exercised in very exceptional circumstances. He also referred to the case of *International Legal Consultancy Group v The Senate and the Clerk of the Senate Kerugoya* Constitutional Petition No 8 of 2014 where the Court held that National and County Governments should consult each other on contested issues and avoid engaging in adversarial litigation. 30
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11. It was his further submission that the Accounting Officer of a County is not the County Governor but the County Executive member in charge of Finance who may delegate the power to accounting officers within the County. That the Accounting Officer is accountable to the County Assembly as provided for under article 226(2) of the Constitution and section 149 of the Public Finance Management Act. It was therefore his contention that there is a misconceived show of might on the part of the Senate in summoning Governors and is done in total disregard to the existing structures of County Financial Management. That County Assemblies would be undermined and be crippled when County Executives are made accountable to the Senate and not the County Assemblies. 1
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12. As regards the applicability of article 125 of the Constitution, Mr Wanyama submitted that the Senate can only exercise its power to call for evidence as provided for under article 125 of the Constitution while discharging its constitutional mandate under article 96 of the Constitution. That article 125 does not confer on the Senate the mandate to summon Governors and ask them to account for County funds and that the same power to call for evidence is also granted to the County Assemblies as provided for under article 195 of the Constitution. 15
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13. As to the power of the Senate to withhold funds under article 225 of the Constitution, he submitted that the Senate acted illegally in passing a resolution on 7th August 2014 directing the Controller of Budget and the National Treasury to withhold funds meant for Bomet, Murang'a, Kiambu and Kisumu Counties. To buttress that point, he relied on Supreme Court Advisory Opinion No 2 of 2013, *Speaker of the Senate & another v Attorney General* where it was stated that Courts have a constitutional duty to safeguard and protect devolution. 25
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14. Lastly, on the issue of *res judicata*, Mr Ahmednassir stated that the Petition is not barred by that doctrine as the parties in this case were not parties in a previous Petition. That the summons in the previous suit were issued by the Respondent's Standing Committee on Economic and Finance Affairs addressed to various Governors and their County Executive Committees to appear before it to answer queries with respect to County fiscal management for the first quarter of the financial year 2013/2014. In the instant Petition, he argued, the summons have been issued by the Respondent's 35
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Sessional Committee on County Public Accounts and Investments to various Governors to answer queries emanating from the Report of the Auditor General on the financial operations of their Counties and the defunct Local Governments for the financial year 2012/2013 (1st January to 30th June 2013).

15. Further, that the doctrine of *res judicata* does not apply because this Petition raises four fundamental issues that were not determined in the previous Petition; namely;

- Whether Governors, who are not the accounting officers of county governments, can be summoned to answer queries relating to the accounts of a county government.
- Whether the Senate can usurp and purport to exercise an oversight mandate vested in County Assemblies by virtue of article 226(2) of the Constitution.
- Whether Governors can lawfully be held accountable for transactions in the financial year during which the defunct local authorities together with the Transition Authority (in line with its functions under section 7 of the Transition to Devolved Governments, Act, 2012) were in charge of county resources.
- The Petition also seeks to challenge a resolution passed by the Respondent on 7th August 2014, purporting to ask the Controller of Budget not to release funds to County Governments, in contravention of the provisions of article 225 of the Constitution.

16. He concluded on this issue by submitting that even if the issues in this Petition were the subject matter in Kerugoya HC Constitutional Petition No 8 of 2014, that decision does not bind this Court as it was given *per incuriam*. He relied on the decision in the case of *Jagbir Singh Rai & 3 others v Tarlochan Singh Rai Estate & 4 others* (2013) eKLR where the Supreme Court set out the applicability of the principle of *per incuriam*. On the same principle he also referred the Court to the cases of; *Young v Bristol Aeroplane Co Ltd* 91944) 2 All ER 293 and *Morella Ltd v Wakeling* (1955) 1 All ER 708.

17. On his part, Mr Nyamu while associating himself with submission by the other Counsel appearing for the Petitioners, urged the Court to be guided by the values and principles of the Constitution in determining the Petition; and that the 2nd Petitioner was not a party to the Kerugoya HC Petition No 8 of 2014 and has filed the instant

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- Petition challenging the summons issued to him by the Senate allegedly exercising its powers under article 125 of the Constitution. 1
18. For the above reasons the Petitioners prayed that the Petition be amended and the Court should make findings as follows; 5
- “i. That the summons by the Senate violated the provisions of article 189(1) of the Constitution, which requires that the different levels of Government exercise their powers in a manner that respects the functional and institutional integrity as well as the constitutional status and institutions at the County level. 10
 - ii. That the Senate cannot summon governors to personally appear before it to answer questions on County Government finances in total disregard of the Constitution and the Public Finance Management Act. 15
 - iii. That article 125 of the Constitution cannot be considered in isolation and does not vest the Senate with powers to summon Governors to account for expenditure of County funds. 20
 - iv. That the resolution by the Senate to direct the National Treasury and the Controller of Budget not to release funds to Counties without following the provisions of article 225 of the Constitution is patently unlawful. 25
 - v. The witness summons dated 12th August 2014 issued by the Senate through its Sessional Committee on County Public Accounts and Investments summoning various Governors to appear before it are unconstitutional, null and void.”
- The Respondent’s case 30
19. In response to the Petition, the Respondent filed a Replying Affidavit sworn on 22nd August 2014 by Mrs Consolata Waithera Munga, a Senior Deputy Clerk of the Senate. It also filed written Submissions dated 8th December 2014. Mr Kilukumi, Learned Counsel, presented its case. 35
20. Before addressing the merits of the Petition, Mr Kilukumi raised what he considered as preliminary issues regarding the competence of the Petition and the jurisdiction of the Court to determine the same. In that regard, he submitted firstly, that the Petitioners have violated the law by citing the Senate as the Respondent to the Petition instead of the Attorney General. 40

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21. Secondly, that the Petitioners had not served the mandatory 30 days' notice upon the Attorney General before filing the Petition as provided for under sections 12(1) and 13A of the Government Proceedings Act. On that issue he relied on the case of *Orengo v Attorney General* (2007) eKLR where Visram J (as he then was) explained the rationale behind section 13A (1) aforesaid and he also cited the case of *Kenya Bus Service Ltd & another v Minister for Transport & 2 others* (2012) eKLR where Majanja J held that section 13A of the Governments Proceedings Act violates article 48 of the Constitution. He claimed in that regard that article 159(2)(d) of the Constitution cannot be invoked to excuse non-compliance with substantive provisions of the law. He further relied on the Court of Appeal decision in *Nguruman Ltd v Shompole Group Ranch & another* (2014) e KLR and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR where the Court stated that a Court cannot ignore clear rules of procedure despite the provisions of article 159(2)(d) of the Constitution. Consequently, he claimed that the Petition is incompetent and should be struck off.
22. Thirdly, that the National Assembly (Powers and Privileges) Act (The Privileges Act), limits and restricts the powers of this Court to interfere with parliamentary business. That the dispute before this Court arose out of Parliamentary proceedings and the decision taken by the Respondent to summon the Petitioners and consequently passing the resolution conditionally suspending transfer of funds to specified Counties. It was Mr Kilukumi's position that the said decision cannot be questioned in this Court by virtue of the provisions of article 117 (2) of the Constitution as read together with sections 12, 14, 15 and 29 of the Privileges Act. He relied on the decision of *Ngoge v Kaparo & others* (2007) eKLR to buttress his point.
23. Lastly, that the core issue raised in this Petition was resolved by a three judge bench in the Kerugoya H C Petition No 8 of 2014 and that the 2nd to 7th Petitioners were beneficiaries of the orders made in that Petition. Further, that the same Advocates appearing in this Petition represented the Petitioner, International Legal Consultancy Group in Kerugoya HC Petition No 8 of 2014. That all the issues being raised now, save for one, were identical with those in Kerugoya HC Petition No 8 of 2014 and that it was therefore an abuse of legal process for lawyers, to seek, through the disguise of a 'fresh' client, to have a second bite at the cherry. In addition, that the decision

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- of this Court although constituted differently is binding and a party dissatisfied with it ought to resort to an appeal and not fresh proceedings. On that submission he relied on the decision in *Pop in (Kenya) Ltd & 3 others v Habib Bank A G Zurich* (1990) eKLR. 1
24. In any event, Mr Kilukumi further claimed that the 1st Petitioner has filed a reference in the Supreme Court, being Reference No 1 of 2014 seeking an advisory Opinion on the same issues forming the subject of the Petition. He thus contended that the Petitioners are forum shopping for a different opinion from that of the High Court in Kerugoya HC Petition No 8 of 2014. 5 10
25. On the merits of the Petition, Mr Kilukumi in a very concise presentation, submitted that article 125 of the Constitution clothes Parliament with the Constitutional power and authority to summon any person to appear before it for the purposes of giving evidence or providing information; that a Governor cannot disregard a summons; and that by so disregarding it, has committed a criminal offence as provided for under section 13(a) of the Privileges Act. That Parliament enjoys the same powers as the High Court in enforcing the attendance and examination of witnesses on oath and to compel production of documents. Further, that the power to summon any person for the above purpose is not restricted, qualified or otherwise conditioned. 15 20
26. He submitted that in the order of things, Governors are the Chief Executive Officers of the Counties and a County Executive Committee Member of Finance is an appointee of the Governor albeit with the approval of the County Assembly; while an Accounting Officer is designated by the County Executive Member of Finance. That a Governor is answerable to the Senate for the portion of the national resources that the Senate has horizontally allocated to the Counties and takes personal responsibility for the reasonably foreseeable consequences of any actions or omissions arising from the discharge of the duties of the office of Governor. That as such, the Senate, in carrying out its mandate of exercising oversight over national revenue allocated to the County governments, is required to summon County Governors to ensure financial prudence and probity in usage of county funds. On that issue, he relied on the decision in Kerugoya HC Petition No 8 of 2014. 25 30 35 40
27. As regards the resolution of the Senate that the Controller of Budget ought not to authorize withdrawal of public funds by the

- four mentioned Counties, Mr Kilukumi submitted that the said resolution was provoked by the Governors' defiance of the summons. He stated that a resolution of Parliament is a declaration of opinion or purpose and cannot be challenged in Courts of law and that the doctrine of separation of powers bars the Court from barring the Senate from exercising its mandate. He also submitted that the order of Certiorari sought by the Petitioners cannot issue in the circumstances of this case as the same is issued against inferior Tribunals and the Senate is not such a tribunal. In that regard he referred the Court to the cases of *Bradhaugh v Gosset* (1884) 12 QBD 271, *Republic v The Judicial Commission of Inquiry into the Goldenberg Affair* (2007) 2 EA 392 and *Stockdale v Hansard* (1839) 9 Ad & E 210. 1 5 10
28. He also submitted that the Senate Standing Orders bar this Court from reversing the resolutions of the Senate and so the Petition cannot lie in the circumstances. 15
29. On the issue of costs, Mr Kilukumi submitted that the same should be borne by the Petitioners, who have initiated the current proceedings for the second time after the same issues had been concluded by a judgment of the High Court at Kerugoya delivered on 16th April, 2014. For that proposition, he relied on the decision of *Truth Justice and Reconciliation Commission v Chief Justice of the Republic of Kenya* (2012) eKLR. 20 25
30. For the above reasons, he urged the Court to find that the Petition is incompetent and dismiss it with costs.
- The Response
31. In response to Mr Kilukumi's submission, Mr Issa Mansur submitted that the Senate was a proper party to these proceedings and that not all proceedings must be instituted for and on behalf of the Attorney General as provided for under section 12 of the Government Proceedings Act. 30 35
32. On the issue of immunity from proceedings as provided for under article 117 of the Constitution, he submitted that it is only the President and judicial officers who are immune from Court proceedings. That the Senate does not have such immunity and in any case, the Privileges Act was enacted prior to the promulgation of the Constitution 2010 and must be interpreted in the context of the said Constitution. 40

Determination	1
33. We have considered the Pleadings and the Submissions of the parties. We are of the view that there are three issues for determination arising from the Petition and they are as follows;	
a. Whether the Petition is competent and whether the Court has jurisdiction to determine it.	5
b. Whether the Senate has the mandate to summon County Governors to answer queries raised by the Auditor General in regard to the 2012/2013 financial year.	
c. Whether the resolution by the Senate directing the National Treasury and the Controller of Budget not to authorize withdrawal of public funds by Counties was/is constitutional.	10
d. Whether Governors can lawfully be held accountable for transactions in the financial years during which the defunct local authorities together with the Transition Authority (in line with the Functions under section 7 of the Transition to Devolved Governments Act 2012) were in-charge of County Resources.	15
e. What reliefs (if any) are available to the parties.	20
Before we consider the above issues, there is one issue we must address in passing as regards the claim of forum shopping, the contention by the respondent being that the Petitioners have filed this Petition and also sought an advisory opinion from Supreme Court on the same issue. In response to this contention, Mr. Issa submitted that the advisory opinion, Reference No 1 2014, has since been withdrawn and is no consequence to these proceedings. Mr Issa is an Officer of the Court, and we have no reason to disbelieve him on that point.	25
Whether the Petition is competent and whether this Court has jurisdiction to determine it	30
34. The Respondent contended that the Petition before us is incompetent for violating the law on two fronts; firstly, that the Petitioners have violated the law by citing the Senate as the Respondent in the Petition instead of the Attorney General. Secondly, that the Petitioners had not served the mandatory 30 days' notice upon the Attorney General before filing the Petition as provided for under section 12(1) and 13A of the Government Proceedings Act. As to the jurisdiction of this Court, the Respondent submitted that the Court does not have jurisdiction to determine	35
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- the constitutionality of the acts of the Senate in summoning County Governors because the Privileges Act limits and restricts the powers of this Court to interfere with parliamentary business. Lastly, that the issues raised in the Petition are *res judicata* in view of the judgment in Kerugoya, HC Petition No 8 of 2014. 1
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35. In addressing these preliminary issues, the issue of jurisdiction is the first that a Court should determine because without it, the entire proceeding becomes a nullity - See the case of *The Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd* (1989) KLR 14. 10
36. In that regard, we shall start with the competence of the Petition and if we find that the Petition as framed is competently before us, we shall then proceed to determine the issue of applicability of the Privileges Act. We shall thereafter consider the doctrine of *res judicata* and what a decision per incuriam is, and their applicability to the present Petition. 15
- Whether the Petition is Competent
37. In addressing this issue, we shall determine whether the Attorney General ought to have been sued instead of the Senate and secondly, the applicability of the 30 days' notice upon the Attorney General before institution of the Petition. We shall start with the former issue. 20
38. Section 12(1) of the Government Proceedings Act provides thus; "Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney General as the case may be". 25
39. The question we must therefore answer is whether it is mandatory to sue the Attorney General where the conduct of the Senate or its proceedings are in issue. To answer that question, we shall be guided by the provisions of article 156(1) of the Constitution which establishes the office of the Attorney General. Article 156(4) provides the functions of that office as follows; 30
- “(1) ... 35
(2) ...
(3) ...
(4) The Attorney-General—
 (a) is the principal legal adviser to the Government;
 (b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal 40

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- proceedings; and 1
- (c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.”
40. Pursuant to the above provision, Parliament enacted the Office of the Attorney General Act of 2012 and its section 5(1) states that the functions of that office are as follows; 5
- “a. Advising Government Ministries, Departments, Constitutional Commissions and State Corporations on legislative and other legal matters; 10
- b. Advising the Government on all matters relating to the Constitution, international law, human rights, consumer protection and legal aid;
- c. Negotiating, drafting, vetting and interpreting local and international documents, agreements and treaties for and on behalf of Government and its agencies; 15
- d. Coordinating reporting obligation to international human rights treaty bodies to which Kenya is member or on any matter which member States are required to report; 20
- f. Drafting legislative proposals for the Government and advising the Government and its agencies on legislative and other legal matters;
- g. Reviewing and overseeing legal matters pertaining to the registration of companies, partnerships, business names, societies, adoptions, marriages, charities, chattels, hire functions of the purchase and coat of arms; 25
- h. Reviewing and overseeing legal matters pertaining to the administration of estates and trusts; 30
- i. In consultation with the Law Society of Kenya, advising the Government on the regulation of the legal profession;
- j. Representing the National Government in all civil and constitutional matters in accordance with the Government Proceedings Act; 35
- k. Representing the Government in matters before foreign Courts and tribunals; and
- l Performing any function as may be necessary for the effective discharge of the duties and the exercise of the powers of the Attorney General.” 40
41. Looking at the law above, it is clear that the Attorney General can represent the National Government in proceedings which it has been

sued. To our mind the provisions of article 156(4) and section 5(1) of the Office of the Attorney General Act are clear, unambiguous and it is difficult to understand the worth of the objection raised by Mr Kilukumi. In *Isaac Aluoch Polo Aluochier v Uhuru Muigai Kenyatta & another*, Petition No 360 of 2013 Lenaola J stated as follows;

“I have taken time to reflect on the matter and regarding representation by the Attorney General in Court proceedings, certainly article 156(4) (b) is crystal clear; that he shall represent the National Government in legal proceedings other than criminal proceedings. The proceedings before me are not against the National Government because the Respondents by whatever measure and whatever the significance and importance of their respective offices, cannot be “the government”. “Government” has been defined as “to signify the established system of political rule, the governing power of the Country consisting of the executive and the legislature considered as an organised entity and independently of the persons of whom it consists from time to time” – per Dixon J, in *Burns v Ransley* [1949] ALR 817.”

42. We are in agreement with the learned judge and it is clear to us that the Constitution, 2010 allows the Attorney General the right to represent the National Government in Court proceedings but does not stipulate that the Attorney General should be sued in all instances where any organ of the National Government has been sued and to say otherwise would be absurd. Obviously. Mr Kilukumi has misunderstood the law, because suing and being sued in one’s name is different from representation. In any event, the law he relied on at section 12(1) of the Government Proceedings Act is subject to the Constitution as the supreme law of the land, and any inconsistency cannot stand to the extent of that inconsistency.

43. But it must be understood and we reiterate this point, that the Attorney General also has a mandate to represent the national and public interest in Court proceedings and where organs comprising the National Government are minded to seek his representation, we see no illegality either - See *Isaac Aluoch Polo Aluochier v Uhuru Muigai Kenyatta and another (supra)* and *Okiya Omtatah Okiiti & another v Attorney General and 7 others* Petition No 446 of 2013.

44. However and having said so, one cannot reasonably fail to note that the law as it exists under section 12(1) of the Government

Proceedings Act was enacted in the era of the Repealed Constitution where there was only one level of Government and the role of the Attorney General was defined differently. We say so because the Constitution 2010 at article 2 creates two levels of Government, the National and County Government. In that regard, in *Isaac Aluoch Polo Aluochier v Uhuru Muigai Kenyatta and another (supra)* Lenaola J stated thus;

“In the Kenyan context, the two levels of Government; national and devolved, form the Government of Kenya and the Constitution deliberately limited the role of the Attorney General to legal proceedings involving the National Government, and devolved Governments are left to seek their own legal representatives. But it must be noted that his advise as opposed to representation is to “the Government” in the wider context as defined above.”

We agree and we shall say no more on this point.

45. We now turn to determine the question whether failure to serve the 30 days’ notice to the Attorney General before filing the Petition is illegal as submitted by Mr Kilukumi.

46. In that regard, section 13A(1) of the Government Proceedings Act provide as follows;

“No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing in the prescribed form have been served on the Government in relation to those proceedings”.

47. We are aware of the decisions in the case of *Orengo v Attorney General (supra)* where it was held that section 13A(1) creates a mandatory obligation on every person prior to the filing of any litigation against the Government to issue the required 30 day notice to the Attorney General. In *Hudson Laise Walumbwa v Attorney General* HCCC No 2714 of 1987 Ringera J stated as follows;

“Section 3 of the Government proceedings Act is in clear and mandatory terms that do not permit any excuses or exceptions. Its plain meaning, to my mind, is that no proceedings against the Government, under the Government Proceedings Act, can be or be instituted before the Statutory Notice has been given and expired. The dictionary meaning of the word lie in this context is, according to the Concise Oxford Dictionary, 8th edition, ‘be admissible or sustainable’.

- A suit which does not lie cannot be tried by a Court of Law. This section (section 13) is not in the nature of statutory period of limitation which must be pleaded and which could be waived by the defendant expressly or by conduct. It is in the nature of a substantive peremptory bar to institution and the trial of a suit filed in disregard of its requirements. The Attorney General cannot waive it. Neither can the Court. And it matters not why it was not complied with. As a part of substantive law, the defendant may or may not plead it.”
48. Similarly, in *Barrack Omudho Aliwa and another v Salome Arodi and another* Succession Cause No 38 of 2008, Njagi J stated as follows; “Section 13A of the Government Proceedings Act requires that no proceeding should be commenced against the Government until after the expiry of thirty day’s notice in writing upon the Government in relation to those proceedings. In the instant case, no such notice was given and in the absence of such notice, any intended proceedings against the Government cannot stand.”
49. In interpreting the constitutionality of section 13A(1) of the Government Proceedings Act and having addressed his mind to the above decisions, Majanja J in *Kenya Bus Services Ltd and another v Minister for Transport & 2 others (supra)* expressed his mind as follows; “The strictures imposed by these provisions must be considered in light of the right of access to justice. The right of access to justice protected by the Constitution involves the right of ordinary citizens being able to access remedies and relief from the Court. In *Dry Associates v Capital Markets Authority and another* Nairobi Petition No 328 of 2011 (unreported), the Court stated, “Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one’s rights; equal right to the protection of those rights by the law enforcement agencies, easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal series; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.”

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50. The learned judge went on to say that; 1
“By incorporating the right of access to justice, the
Constitution requires us to look beyond the dry letter of
the law. The right of access to justice is a reaction to and 5
a protection against legal formalism and dogmatism. (See
‘Law and Practical Programme for Reforms’ (1992) 109 SALJ
22) article 48 must be located within the Constitutional
imperative that recognizes the Bill of Rights as the framework
for social, economic and cultural policies. Without access to 10
justice the objects of the Constitution which is to build a
society founded upon the rule of law, dignity, social justice
and democracy cannot be realized for it is within the legal
processes that the rights and fundamental freedoms are
realized. Article 48 therefore invites the Court to consider 15
the conditions which clog and fetter the right of persons to
seek the assistance of Courts of law.”
51. He observed, further, that;
“The provisions for demanding [prior notice before suing the
Government is justified on the basis that the Government 20
is a large organization with extensive activities and fluid
staff and it is necessary for it to be given the opportunity to
investigate claims laid against it and decide whether to settle
or contest liability taking into account the public expense. 25
While the objectives are laudable, the effect of mandatory
notice provisions cause hardship to ordinary claimants. I am
of course aware that pre-litigation protocols, for example
order 3 rule 2 of the Civil Procedure Rules, require that
notice be given before action is commenced but the penalty 30
for non-compliance is not to lose the right to agitate the
cause of action but to be denied costs incurred in causing
the matter to proceed to action.”
52. The Learned Judge then concluded as follows;
“Viewed against the prism of the Constitution, it also 35
becomes evident that section 13A of the GP provides no
impediment to access to justice. Where the state is at the
front, left and centre of the citizen’s life, the law should
not impose hurdles on accountability of the Government
through the Courts. An analysis of the various reports from 40
Commonwealth which I have cited clearly demonstrate that
the requirement for notice particularly where it is strictly

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- enforced as a mandatory requirement diminishes the ability of the citizen to seek relief against the Government. It is my finding therefore that section 13A of the Government Proceedings Act as a mandatory requirement violates the provisions of the article 48. 1 5
53. We agree with the learned judge and we see no reason to depart from his finding as we find the same to be sound in law. In so holding we are also aware of the Court of Appeal decision in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (supra)* where the Court stated as follows; 10
- “In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases.” 15 20
54. Reading all the above findings together and while conscious of the fact that any rule of procedure that violates a party’s fundamental right and freedom cannot be said to be sound, we do not see any prejudice that the Respondent has suffered by the alleged failure of the Petitioner to issue the 30 days’ notice to the Attorney General as prescribed under the provisions of section 13A(1) of the Government Proceedings Act. 25
55. We say so because the issues in contest are solely to do with the conduct of the Senate which is an organ of State that can properly be sued as such. In fact, the Senate entered appearance in its own name and by Counsel and we completely see no reason why the failure to either enjoin the Attorney General as a party or failure to give him notice of the intended proceedings will advance (impair/impede) the cause of justice. We therefore decline to strike out the Petition as we are conscious that it serves the interests of justice to determine it on its merits and resolve the important issues that it raises. 30 35
- Whether the Privileges Act and Senate Immunity to Legal Proceedings limit the Jurisdiction of this Court. 40
56. It is not contested that the dispute, subject of this Petition, arose out of the proceedings and the decision taken by the Respondent to

summon the 2nd to 7th Respondent and the subsequent passing of a resolution suspending the transfer of funds to specified Counties. In that regard, Mr Kilukumi submitted that the said decision cannot be questioned in this Court by virtue of the provisions of article 117(2) of the Constitution as read together with sections 12, 14, 15 and 29 of the Privileges Act. We pause here to determine the issue of Parliamentary privilege and immunity from legal proceedings.

57. To our mind, and we must agree with both Mr Ahmednassir and Mr Kilukumi on their submissions on this issue, under the doctrine of separation of powers, Parliament as a distinct and independent organ is entitled to exercise its mandate without undue interference from other arms of Government. As regards the doctrine of separation of powers, article 1 of the Constitution reposes the sovereign power of the State in the people of Kenya but provides for the delegation of that power to various state organs. These include Parliament, County Assemblies, the Executive at the National and County Levels of Government, the Judiciary, Independent Tribunals and Commissions. To facilitate the proper and effective exercise of that delegated power, the Constitution has allocated functions, powers and responsibilities to all these organs. To that end, every State Organ ought to be accorded the space to perform its constitutional mandate without undue interference, and in our view that is the embedment of the doctrine of separation of powers.

58. Having said so, we are also aware of the provisions of article 2 of the Constitution which states that;

(1) This Constitution is the Supreme law of the Republic and binds all persons and all state organs at both levels of government.

(2) No person may claim or exercise state authority except as authorised under this Constitution.

59. On this issue, the words of Kasanga Mulwa J in *R v Kenya Roads Board ex parte John Harun Mwau* HC Misc Civil Application No 1372 of 2000 remain true one and half decade later when he stated;

“Once a Constitution is written, it is supreme. I am concerned beyond peradventure that when the makers of our Constitution decided to put it in writing and by its provision thereof created the three arms of Government namely the Executive, the Legislature and the Judiciary, they intended that the Constitution shall be supreme and all those organs

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- created under the Constitution are subordinate and subject to the Constitution.” 1
60. We agree and would add that when any of the state organs steps outside its mandate, this Court will not hesitate to intervene. The Supreme Court has ably captured this fact in *Re The Matter of the Interim Independent Electoral Commission* Advisory Opinion No 2 of 2011 where it expressed itself as follows 5
- “The effect of the Constitution’s detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the Courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation.” 10 15
61. Subsequently, the Supreme Court in *Speaker of National Assembly v Attorney General and 3 others* (2013) eKLR stated as follows; 20
- “Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the Supreme law of the land, it is for the Courts of law, not least the Supreme Court, to assert the authority and Supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering his Opinion, the Court does not violate the doctrine of separation of powers. It is 25 30 35 40

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- simply performing its solemn duty under the Constitution and the Supreme Court Act. ” 1
62. The Court went on to state as follows; 5
- “Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signaled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of “right” and “wrong” in such cases, short of a resolution in plebiscite, is only the Courts.” 10
63. We are duly guided and this Court vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the Petition before us alleges a violation of the Constitution and violation of the Constitution by the Respondent and in the circumstances, it is our finding that the doctrine of separation of power does not inhibit this Court’s jurisdiction to address the Petitioner’s grievances so long as they stem out of alleged violations of the Constitution. In fact the invitation to do so is most welcome as that is one of the core mandates of this Court. 15 20 25
64. The submission made by Mr Kilukumi that article 117 of the Constitution as well as the Privileges Act limit the jurisdiction of this Court to question the acts of the Senate cannot however be wished away. We say so because article 117 of the Constitution provides that; 30
- “(1) There shall be freedom of speech and debate in Parliament. 35
- (2) Parliament may, for the purpose of the orderly and effective discharge of the business of parliament provide for the powers, privileges and immunities of parliament, its committees, the leader of the majority party, the leader of the minority party, the Chairpersons of committees and members.” 40
65. On the other hand, section, 14, 15 and 29 of the Privileges Act

provides;	1
“12. Proceedings not to be questioned No proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with this Act shall be questioned in any Court.	5
14. Power to order attendance of witnesses	
(1) The Assembly or any standing committee thereof may, subject to the provisions of sections 18 and 20, order any person to attend before it and to give evidence or to produce any paper, book, record or document in the possession or under the control of that persons.	10
(2) The powers conferred by subsection (1) on a standing committee may be exercised by any other committee which is specially authorized by a resolution of the Assembly to exercise those powers in respect of any matter or question specified in the resolution.	15
15. Attendance to be notified by summons	
(1) Any order to attend to give evidence or to produce documents before the Assembly or a Committee shall be notified to the person required to attend or to produce the documents by a summons under the hand of the Clerk issued by the direction of the Speaker.	20
(2) In every summons under subsection (1) there shall be stated the time when and the place where the person summoned is required to attend and the particular documents which he is required to produce, and the summons shall be served on the person mentioned therein either by delivering to him a copy thereof or by leaving a copy thereof at his usual or last known place of abode in Kenya with some adult person; and there shall be paid or tendered to the person so summoned. If he does not reside within four miles of the place of attendance specified in the summons, such sum for his expenses as may be prescribed by Standing Orders of the Assembly.	25
(3) A summons under this section may be served by an officer of the Assembly or by a police officer.	30
29. Courts not to exercise jurisdiction in respect of acts of Speaker and officers of the Assembly neither the Speaker	35
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- nor any officer of the Assembly shall be subject to the jurisdiction of any Court in respect of the exercise of any power conferred on or vested in the Speaker or such officer by or under this Act or the Standing Orders.” 1
66. In setting out the above sections of the law verbatim, we are alive to the fact that although these provision were enacted under the Repealed Constitution, section 7 of the Sixth Schedule to the Constitution provides that any law in existence before the promulgation of Constitution 2010, shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution 2010. In that regard, article 93(1) of the Constitution establishes the Parliament of Kenya which consists of both the Senate and the National Assembly. We thus find that the provisions of the Privileges Act are applicable to the Senate to the extent established by section 7 of the Sixth Schedule aforesaid. 5
67. As to the place of the privileges and immunities provided for under article 117 and sections 12, 14, 15 and 29 of the Privileges Act, and legal proceedings in respect to acts of the Senate and a County Assembly, the High Court in *Martin Nyaga Wambora v County Assembly of Embu & 4 others* Kerugoya HC Petition No 3 of 2014 stated as follows; 10
- “We have no doubt in our minds that the Senate and the National Assembly hold, exercise and enjoy privileges, immunities and powers bestowed on them, their members and officers in terms of the provisions of the National Assembly (Powers and Privileges) Act. Indeed in so holding we are in agreement with the reasoning of Dumbutshena, Chief Justice of Zimbabwe, in *Smith v Mutasa and another* (1990) LRC 87 where he cited with approval the holding of Evans CJHC in *Re Clarke et all and AG of Canada* (1978 81DLR (3d) 33 at 51 where he stated as follows: 15
- “In dealing with the issue of parliamentary privileges, counsel for the Respondent submitted that the Courts have no jurisdiction to determine the nature and extent of such privileges. He argued that Parliament is the source and the sole judge of the privileges of its Members. This would create an interesting obstacle for the Applicants in the present case. I would point out, however, that I am asked to interpret Standing Order (SOR) /76-644. In 20
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- doing so, I am asked to determine whether SOR/76-644 overrides or abridges existing parliamentary privileges. In this respect, I do not consider that I am infringing on the jurisdiction of Parliament... Historically, there has always been some question whether the Courts have jurisdiction to determine the nature and extent of parliamentary privilege. As the Supreme law –giving body, it would seem only natural that Parliament should be the source of authoritative guidelines on the subject. On the other hand, there is something inherently inimical about Members of Parliament determining the nature and extent of their own rights and privileges. The Courts have seized on this to consistently review the nature and extent of parliamentary privilege.”
68. Dumbutshena CJ in *Smith v Mutasa Case (supra)* put the matter beyond debate when he reasoned thus;
- “...the Courts apparently have an implicit jurisdiction to deal with questions of parliamentary privilege. Notwithstanding the submission of counsel for the Respondent, I have no hesitation in proceeding to evaluate the effect of SOR/76-644 on the privileges of Members of Parliament. *Roman Corp Ltd et al v Hudson’s Bay Oil & Gas Co Ltd et al* (1971) 2 or 418, 18DLR (3d) 134 (Houlden J (Ont HC)); affirmed (1972) 1 or 444, 23 DLR (3d) 292(CA); affirmed (1973) SCR 820, 36 DLR(3d) 413 (discussed, *infra*), is sufficient authority for the proposition that the Courts of law in Canada have jurisdiction to adjudicate on matters involving the privileges of members of parliament.’
69. Having been persuaded by the reasoning in *Smith v Mutasa Case (supra)*, the High Court in the *Wambora Case (supra)* stated as follows;
- “We appreciate that privileges, immunities and powers are such as those provided for by the National Assembly (Powers and Privileges) Act are essential for the proper governance and protection of Parliament because parliament needs them for the control of its internal procedures and for complete freedom of expression in their deliberations inside the National Assembly. It is undisputed that the resolution to impeach the 1st Petitioner was made within the proceedings of the Senate. We are clear in our minds that should the

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- Senate violate the Constitution and the law in the course of its proceedings it falls upon the judiciary to say so and to pronounce such violation. The Court cannot ignore any breaches of the Constitution in favour of parliamentary privilege. The Constitution is the Supreme law of the land and it binds all persons and all state organs at both levels of Government...” 1 5
70. The Court then went on to conclude that;
 “If the Senate violates the Constitution, the Courts being the guardian of the Constitution must step in and lift the veil on the doctrine of parliamentary privilege if necessary. We have pondered deeply on the issue and we agree with the Zimbabwean Supreme Court that, Members of Parliament, the Speaker and officers in his office, can only enjoy immunity from court action if their decisions or actions are made in accordance with the letter and spirit of the Constitution. We therefore find that sections 12 and 29 of National Assembly (Powers and Privileges) Act on parliamentary privilege do not oust the jurisdiction of this Court to inquire into the legality of the 1st, 2nd, 5th and 6th Respondents actions.” 10 15 20
71. We agree entirely with the Court and adopt the same reasoning here as if it was ours. To our mind, this Court has the power to enquire into the constitutionality of the actions of the Senate notwithstanding the privilege of *inter alia*, debate accorded to members of the Senate. That finding is fortified under the principle that the Constitution is the Supreme Law of this Country and the Senate must function within the limits prescribed by the Constitution. In cases where it has stepped beyond what the law and the Constitution permit it to do, it cannot seek refuge in illegality and hide under the doctrine of parliamentary privilege. That is all there is to say on that subject. 25 30
- Whether the Petition is *res judicata* 35
72. It was Mr Kilukumi’s further submission that the issue as to whether the Senate can summon Governors has been settled by this Court in *Kerugoya* HC Petition No 8 of 2014 and as such the same issue cannot be entertained again as it is barred by the doctrine of *res judicata*. 40
73. In response to this issue, Mr Ahmednassir claimed that the Petition is not *res judicata* and that the judgment in *Kerugoya* HC Petition

No 8 of 2014 was given *per incuriam*. We shall now proceed to address the applicability of the doctrine of *res judicata* and later the meaning of a decision *per incuriam* in the context of the instant Petition. The doctrine of *res judicata* in civil law is provided for under **section 7 of the Civil Procedure Act 2010**, as follows;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

74. The rationale behind the provision of section 7 of the Civil Procedure Act is that if the controversy in issue is finally settled or determined or decided by a competent Court, it cannot be reopened. The Rule of *res judicata* is also based on two principles: that there must be an end to litigation and a party should not be vexed twice over the same cause. This was the holding of the Court of Appeal in *Omondi v National Bank of Kenya Ltd and others* (2001) EA 177.

75. Applying the above principles, can the present Petition, in the above context, be said to be barred by the principle of *res judicata*?

76. In determining this question, we shall first consider the issue as to whether the parties in this Petition are the same as those in Kerugoya HC Petition No 8 of 2014. The Petition herein has been filed by the Council of Governors and six Governors, namely; Dr Alfred Mutua, Patrick Simiyu Khaemba, Ahmed Abdullahi Mohammed, Wycliffe Oparanya, James Omariba Ongwae and Martin Nyaga Wambora as against the Senate. In Kerugoya HC Petition No 8 of 2014, the Petition had been filed by a non-governmental organization, International Legal Consultancy Group, which had described itself in that case as a public interest organization that champions the observance of the rule of law and the Respondents were the Senate and the Clerk of the National Assembly. According to Mr Kilukumi, the Petitioners in the instant Petition were the direct and immediate beneficiaries of the judgment in *Kerugoya HC Petition No 8 of 2014* and that the same advocates representing the instant Petitioners also represented the Petitioner in Kerugoya

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- HC Petition No 8 of 2014. 1
77. To begin with, we do not think that an advocate can be condemned for representing different parties or even the same parties in court proceedings as alleged by Mr Kilukumi. In any case, every litigant has a right to choose a counsel of their choice in proceedings before any Court in Kenya and we have never understood representation to be a ground for invoking the doctrine of *res judicata* attractive as the argument may seem. 5
78. Having said that, *prima facie*, we do not have any evidence before us to demonstrate the nexus between the Petitioner in Kerugoya HC Petition No 8 of 2014 ie International Legal Consultancy Group and the instant Petitioners so that we can conclusively determine that any of the Petitioners is claiming on behalf of the other or as the other's agent. Having held so, it follows that the first hurdle to the doctrine of *res judicata* can only be determined in the negative. 10 15
79. The second barrier to the doctrine of *res judicata* is the requirement that the issue in the present proceedings must have been the same as in a previous proceeding. 20
80. In that regard, we deem it appropriate to reproduce, verbatim, the prayers in both Petitions. In Kerugoya HC Petition No 8 of 2014, the Petitioners had sought the following orders;
- i. A declaration that resonating the intention of articles 2, 3, 10 and within the intendment of articles 159(1), 160(1) and 259 of the Constitution of Kenya if the Constitution makes provision as to how the legislature should conduct its internal affairs or as to the mode of the exercise of its legislative powers, a Court of law can exercise its jurisdiction to ensure the legislature comply with the Constitutional requirement. 25 30
 - ii. A declaration that resonating the intention of article 96 and 226(2) of the Constitution of Kenya and section 148 of the Public Financial Management Act 2012 and section 30 of the County Governments Act, 2012, the Senate cannot summon Governors to personally appear before it to answer questions on County Government finances. 35
 - iii. A declaration resonating the intention of article 96 and article 226(2) of the Constitution of Kenya that the Senate cannot summon an accounting officer of the 40

County Government to answer questions on County financial management. This is an exclusive power of the County Assembly.	1
iv. A declaration resonating the intention of article 96 of the Constitution and within the meaning of article 226(2) of the Constitution of Kenya, the Senate’s oversight role over nationally collected revenue to Counties is not identical to the County Assembly’s oversight over the executive.	5
v. A declaration resonating the intention of article 96 of the Constitution and within the meaning of Article 226(2) of the Constitution of Kenya, the Senators power is limited to oversight over national agencies which manage national revenue allocated to Counties such as the National Treasury.	10
vi. A declaration that the Senate can only exercise its powers under article 125 of the making a determination with regard to an impeachment, intervention in a County, suspension of a County, or for purposes of developing national legislation necessary for more prudent management of finances at the County level.	15
vii. A permanent injunction to be issued to restrain the Senate from summoning County Governors to appear before it to answer questions on County public financial management.	20
viii. A permanent injunction to be issued to restrain the Senate from summoning County Executive Committee Members to appear before it to answer questions on County public financial management.	25
ix. A permanent injunction be issued to restrain the Senate from summoning accounting officers at the County level to appear before it to answer questions on county public financial management.	30
x. There be no orders as to costs.”	35
81. In the instant Petition, the Petitioners have sought this Court’s intervention in determining the following questions;	
“(1) Considering the provisions of article 6(2) and 189(1) of the Constitution, what is the scope of oversight powers of the Senate under article 96(4) of the Constitution with respect to County Governments”	40
(2) What is the meaning of the phrase ‘the Senate represents	

the Counties and serves to protect interests of the Counties and their Governments' as provided for in article 96(1) of the Constitution"	1
(3) What is the meaning of the phrase 'the accounting officer of a County public entity shall be account table to the County Assembly for its financial management' as provided for at article 226(2) of the Constitution of Kenya"	5
(4) Resonating the intention of article 96 and 226(2) of the Constitution of Kenya whether an accounting officer of the County Government is accountable to the Senate on its financial management.	10
(5) Resonating the intention of article 96, 226(2) and in view of the provisions of article 6(2), 179 and 189 of the Constitution of Kenya whether the Senate can summon a governor to personally appear before it to answer questions on County public financial management"	15
(6) Whether in accordance with the provisions of article 179(4) of the Constitution, the governor is an accounting officer"	20
(7) Considering the provisions of article 96 and 225 of the Constitution, whether the Senate can pass a resolution to direct the National Treasury and the Controller of Budget not to release funds to Counties""	25
82. The Petitioners have then asked the Court, upon answering the above questions, to issue the following orders;	
“(a) A declaration that in view of the provisions of 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 co-operation, the Senate cannot exercise powers under articles 125 of the Constitution in a manner that cripples County Governments.	30
(b) A declaration that the Senate is bound by the provisions of article 189(1) of the Constitution to perform its functions and exercise its powers, in a manner that respect the functional and institutional integrity, as well as the constitutional status and institutions at the County level.	35
(c) A declaration that resonating the intention of article 96 of the Constitution and 226(2) of the Constitution of Kenya	40

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and section 148 of the Public Financial Management Act 2012, the Senate cannot summon Governors to personally appear before it to answer questions on County Government finances in total disregard of the procedure and requirements of public finance management that is stipulated by the Public Financial Management Act 2012.	1 5
(d) A declaration that the Senate is bound by the methods, procedures and requirements of the Public Finance Management Act 2012 when undertaking its oversight and summoning powers.	10
(e) A declaration that resonating the intention of article 96 of the Constitution and 226(2) of the Constitution of Kenya and section 148 of the Public Financial Management Act 2012 it is proper, legal, and constitutional for Members of the Executive Committee responsible for finance and the Chief Officers responsible for finance to appear before the Senate or any of its Committee to answer on County Government finances and to generally provide information that helps the Senate to undertake its oversight functions as stipulated in article 96 of the Constitution.	15 20
(f) A declaration that resonating the intention of article 6(2), 96, 174, 185(3) and 226(2) of the Constitution of Kenya, the Senate cannot summon an accounting officer of the County Government to answer questions on County financial management, at the first instance. It must first allow the oversight and legislative mechanisms at the County level to be concluded given that these Governments are functional distinct and are based on the principle of Separation of Powers.	25 30
(g) A declaration that resonating the intention of article 6(2), 96, 174, 185(3) and 189 of the Constitution and within the meaning of article 226(2) and article 96(4) of the Constitution of Kenya, the Senate's oversight role over nationally collected revenue to Counties is not identical to the County Assembly's oversight over the executive.	35
(h) a declaration that resonating the intention of article 96(4) of the Constitution and in view if the provisions of article 185(3) and article 226(2) of the Constitution of Kenya the Senate's power is limited to oversight over national agencies which manage national revenue allocated to	40

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- Counties such as the National Treasury. 1
- i. A declaration that resonating the intention of article 6(2), 189(1), 174 and 96(4) of the Constitution and in view of the provisions of article 185(3) of the Constitution of Kenya the County Assembly is the role organ that can undertake oversight over the County Executive. 5
- j. A declaration that the Senate can only exercise its powers under Article 125 of the Constitution to scrutinize County financial and other records for purposes of making a determination with regard to an impeachment, interventions in a County, suspension of a County, or for purposes of developing national legislation necessary for more prudent management of finance at the County level. 10
- k. A declaration that the Senate does not have sole constitutional powers to direct National Treasury and Controller of Budget not to release funds to Counties without following the provisions of article 225 of the Constitution. 15
- l. A declaration that stoppage of funds to a County public entity can only be done by following the provisions of article 225 of the Constitution. 20
- m. A permanent injunction be issued to retrain the Senate from summoning County Governors to appear before it to answer questions on County public financial management. 25
- n. A permanent injunction be issued to retrain the Senate from summoning accounting officers at the County level to appear before it to answer questions on County public financial management. 30
- o. An order or certiorari to quash the Resolution of the Senate issued on 7th August 2014 that purports to direct the National Treasury and the Controller of Budget not to release funds to Kiambu, Bomet, Kisumu and Murang'a Counties. 35
- p. There be no order as to costs."
83. Looking at the prayers in the two Petitions, it is clear to us that in both Petitions, the main issue for determination by the Courts were whether the summoning of Governors by the Senate together with County Executive Committee Members of Finance to answer 40

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- questions regarding County finances and fiscal management in their respective Counties, is constitutional or not. 1
84. However, Mr Ahmednassir submitted that the following issues were not the subject of determination in Kerugoya HC Petition No 8 of 2014; 5
- i. Whether Governors, who are not the Accounting Officers of County Governments, can be summoned to answer queries relating to the accounts of a County Government.
 - ii. Whether the Senate can usurp and purport to exercise an oversight mandate vested in the County Assemblies by virtue of article 226(2) of the Constitution. 10
 - iii. Whether Governors can lawfully be held accountable for transactions in the financial year during which the defunct local authorities together with the Transition Authority (in line with its functions under section 7 of the Transition to Devolved Governments, Act, 2012) were in charge of county resources. 15
 - iv. The Petition also seeks to challenge a resolution passed by the Respondent on 7th August 2014, purporting to ask the Controller of Budget not to release funds to County Governments, in contravention of the provisions of article 225 of the Constitution. 20
85. Looking at the above said issues again together with the questions the Petitioners have sought for determination as stated elsewhere above, it is clear that those issues were not in contention within Kerugoya HC Petition No 8 of 2014. In addition, there is a totally new issue before us as regards the constitutionality of the resolution passed by the Respondent purporting to ask the Controller of Budget not to authorize withdrawal of funds by specified Counties. 25 30
86. We say so well aware that the substratum of the Petitioners' case is the summoning of Governors by the Senate to answer financial management queries. Although the issue whether Governors can be summoned by the Senate was addressed considerably in all its facets in Kerugoya HC Petition No 8 of 2014, it is our finding that the questions that have been raised for interpretation now were largely not before the High Court at Kerugoya. 35
87. In *ET v Attorney General* (2013) eKLR, while considering the principle that litigation must come to an end, Majanja J stated that; 40
 "The Courts must always be vigilant to guard against litigants

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- evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the Court in another way and in the form of a new cause of action which has been resolved by a Court of competent jurisdiction.” 1
88. Similarly, the same finding was the gist of the decision in *Njangu v Wambugu and another* Nrb HCC No 2340 of 1991 where Kuloba J stated as follows as regards the importance of having a closure to litigation; 5
- “If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his aces some cosmetic face lift on every occasion he comes to Court, then I do not see the use of the doctrine of *res judicata*.” 10
89. We must agree with the reasoning of the learned judge and are also alive to the decision of the Court of Appeal in *Pop In (Kenya) Ltd & 3 others v Habib Bank AG Zurich (supra)* where the Court on the doctrine of *res judicata* stated that; 15
- “... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of *res judicata* is the judgment of Wigram VC in *Henderson v Henderson* (1843) Hare 00, 115, where the judge says: 20
- “Where given matter becomes the subject of litigation in, and of adjudication by, court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time”. 25
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90. We are guided and while we have no reason to disagree with the
above findings and in the context of our finding that there are new
issues placed before us for determination, we are also aware of the
general rule that *res judicata* is applied sparingly in constitutional
matters. In *Okiya Omtatah Okoiti and another v Attorney General*
& 2 others Petitions No 593 of 2013 Lenaola J stated as follows;
“Whereas these principles [of *res judicata*] have generally
been applied liberally in civil suits, the same cannot be said
of their application in constitutional matters. I say so because,
in my view, the principle of *res judicata* can and should only
be invoked in constitutional matters in the clearest of cases
and where a party is relitigating the same matter before the
Constitutional Court and where the Court is called upon to
redetermine an issue between the same parties and on the same
subject matter. While therefore the principle is a principle of
law of wide application, therefore it must be sparingly invoked
in rights-based litigation and the reason is obvious.”

We reiterate the same sentiments in this Petition.

91. Simply put therefore, and in the circumstances of the present case,
it is our finding that the issues raised in this Petition are not barred
by the doctrine of *res judicata* and having expressed ourselves as
above on that issue, we would have stopped there subject to what we
shall say later about the constitutionality of the summons issued to
Governors. However, Mr Ahmednassir submitted that the judgment
in Kerugoya HC Petition No 8 of 2014 was given *per incuriam* and
must we must now pause to determine that issue.

Whether the judgment in Kerugoya Petition No 8 of 2014 is *per incuriam*

92. The Supreme Court in *Jasbir Singh Rai & others v Tarlochan Rai Estate & 4 others* (*supra*) considered the meaning of a decision *per incuriam* and stated as follows in that regard;

“a decision *per incuriam* is one rendered in ignorance of
a constitutional or statutory prescription or of a binding
precedent; but if a decision be such, this, by and of itself,
does not, perforce, render it ‘inappropriate’, or ‘mistaken’,
or ‘wrong’ – for the decisions could still rest upon its own
special merits, and be in every respect sustainable as a matter
of principle.”

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93. Similarly, the House of Lords in *Young v Bristol Aeroplane Co Ltd* (1944) 2 All ER 293 stated as follows in regard to the circumstances in which a *per incuriam* decision can be ignored. 1
- “On a careful examination of the whole matter we have come to the conclusion that this Court is bound to follow previous decision of its own as well as those of Courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are [as may be summarized]; (i) The Court is entitled, and bound to decide which of two conflicting decisions of its own it will follow. (ii) The Court is bound to refuse to follow a decision of its own decision of the House of Lords. (iii) The Court is not bound to refuse to follow a decision of its own if it is satisfied that the decision was given *per incuriam*.” 5 10 15
94. Applying the above principle in the instant Petition, was the judgment in Kerugoya HC Petition No 8 of 2014 given *per incuriam* We think not. The High Court in Kerugoya in Petition No 8 of 2014 gave its judgment on the constitutionality of the Senate summoning the Governors and in doing so stated as follows; 20
- “Logically, in exercise of its powers under article 125 of the Constitution, the Senate is empowered to summon any person, including the accounting officers of the County Governments if such officers can provide information or evidence in relation to the National revenue allocated to a particular County. 25
- We have also examined section 30(3)(f) of the County Governments Act of 2012. The same states that the County Governor shall be accountable for the management and use of County resources. 30
- By implication, this provision means that the County governor as the overall head of the County is accountable for the utilization of county resources including the National revenue allocated to his or her respective county. Since the accounting officers at the County are directly answerable to the County Assembly for the management of financial resources under the Public Finance Management Act 2012, who then is the Governor accountable to under section 30(3)(f)” In our considered view, since the County Governors are not answerable to the County Assembly in terms of 35
- fiscal management of the County resources under section 149 of the Public Finance Management Act 2012, they must be held to account by the Senate for the National revenue allocated to their 40

respective Counties in view of the provisions of section 30(3)(f) of the County Governments Act, 2012 as read together with article 10(2)(c) on the National Values and Principles of Governance. The Governors being State Officers are bound by the national values of transparency, accountability and observance of good governance when performing their duties as the Chief Executive Officers of the County Governments.”

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The Court went to state that;

“It then follows that under article 125, the County Governor and the County assembly Member for Finance who belong to the executive arm of the County Government can also be summoned by the Senate in exercise of their oversight mandate under article 96(3) of the Constitution. Though the executive arm of the county Government is also answerable to the County Assemblies of their respective Counties, this does not preclude the said arm from providing information to the Senate when called upon to do so in exercise of their oversight mandate under article 96(3). Further, under article 10(2) of the Constitution, one of the values of governance enshrined in the Constitution is transparency and accountability. Every officer in every State organ and at both levels of Government must respect and comply with any mechanism of accountability established by the Constitution and the law to the fullest extent possible. The Court under article 259 must therefore interpret the Constitution in a manner that promotes good governance through transparency and accountability. Put another way, when persons in charge of managing County finances are not held to account, the objectives of devolution set out under article 174 which includes promoting democratic and accountable exercise of power; and to enhance checks and balances of powers, will be defeated.

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The position advance by the Petitioner that the County Governors cannot be summoned by the Senate by virtue of article 226(2) of the Constitution, section 148 of the Public Finance Management Act, 2012 and section 30 of the County Government Acts 2012 is therefore untenable. ”

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95. The Court then concluded on that issue at paragraph 66 as follows;

96. “In conclusion, we find that the Senate acted within its

judgment was founded on valid pillars of the law. In that regard, the words of the Supreme Court in *Jasbir Singh Rai & others v Tarlochan Rai Estate & 4 others* (*supra*) ring loud in our ears. It stated thus; 1

“Comparative judicial experience shows that the decision of a superior Court is not to be perceived as having been arrived at *per incuriam*, merely because it is thought to be contrary to some broad principle, or to be out of step with some broad trend in the judicial process; the test of *per incuriam* is a strict one – the relevant decision having not taken into account some specific applicable instrument, rule or authority. This position is illustrated by the English House of Lords judgment in *Cassell & Company Limited v Broome* [1972] 2 WLR 645, in which the Court of Appeal’s perception of *Rookes v Barnard* [1964] AC 1129 as being *per incuriam* was the subject. The relevant passage (*per Lord Reid*) reads; 5 10 15

‘I am driven to the conclusion that when the Court of Appeal described the decision in *Rookes vs Barnard* as decided *per incuriam*, or ‘unworkable’ they really only meant that they did not agree with it ... 20

When this House undertakes a careful review of the law it is not to be described as acting *per incuriam* or *ultra vires* if it identified and expounds principles not previously apparent to the counsel who addressed it or to the judges and text-book writers whose divergent or confusing expressions led to the necessity for the investigations.” 25

98. We have seen no reason to depart from the above guiding principles and having found that the decision in *Kerugoya HC Petition No 8 of 2014* was not made *per incuriam*, the next issue is whether we can rehear the issue of the constitutionality of the summons issued to Governors in the present Petition and as urged by Mr Ahmednassir, finally resolve that issue. 30

99. The question in that regard is whether we, as a bench of three judges, can depart from a decision of a similar bench of the same Court. This question, which touches on the meaning of precedence, has been repeatedly addressed by scholars and jurists in the past, and the answer to it is now obvious. In *Benjamin Cardozo’s ‘The Nature of the Judicial Process’*, New Haven; Yale University Press (1921) p 149, the learned author stated as follows; 35 40

“In these days, there is a good deal of discussion whether the rule of adherence to precedent ought to be abandoned

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- altogether. I would not go so far myself. I think adherence to precedent should be the rule and not the exception. I have already had occasion to dwell upon some of the considerations that sustain it. To these I may add that the labour of judges would be increased almost to breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." 1
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100. Further, in *R v Knuller (Publishing, Printing and Promotions) Ltd* (1973) AC 435, Fenton L J delivering the judgment of the Court stated as follows; 10
- “It was decided by this House in *Shaw v Director of Public Prosecution* [1962] AC 220 that conspiracy to corrupt public morals is a crime known to the law of England ... 15
- “I dissented in *Shaw's* case. On reconsideration I still think that the decision was wrong and I see no reason to alter anything which I said in my speech. But it does not follow that I should now support a motion to reconsider the decision. I have said more than once in recent cases that 20
our change of practice in no longer regarding previous decision of this House as absolutely binding does not mean that whenever we think that a previous decision was wrong we should reverse it. In the general interest of certainty in the law we must be sure that there is some very good reason before we so act... I think that however wrong or anomalous the decision may be it must stand and apply to 25
cases reasonably analogous unless or until it is altered by Parliament.” 30
101. We are in agreement with the above reasoning and the message sent is simply that in common law jurisdictions, certainty in law has to be maintained but within certain limits. Thus in *Fitzleet Estates v Cherry* (1971) 1 WLR 1345, Lord Wilberforce expressed himself as follows; 35
- “Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by this House with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected ... Doubtful 40
issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of

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- the ultimate tribunal. It requires much more than doubts as to the correctness of such opinion to justify departing from it.” 1
102. At home, the Supreme Court in *Jasbir Singh Rai & others v Tarlochan Rai Estate & 4 others (supra)* stated as follows on the same issue; 5
- “This is a clear perception of the doctrine of precedent in the functioning of the superior Courts in the common law tradition. The message is simply this; As a matter of consistent practice, the decisions of the higher Courts are to be maintained as precedent; and the foundation laid by such Courts is in principle, to be sustained. This, of course, leaves an opening for the special circumstances which may occasionally dictate a departure from previous decisions.” 10
103. We are guided and what emerges from the above exposition of the law is that a Court is bound to follow the decisions of a higher Court, its own decision, as well as those of Courts of co-ordinate jurisdiction. However, a Court can only depart from the decisions of a higher Court or its earlier findings, if there is a substantial cause and in exceptional circumstances which may compel it to do so. Do such exceptional circumstances arise in the instant Petition” Our answer is in the affirmative and we shall say why shortly. 15
104. As can be discerned from the pleadings in the instant Petition and from the judgment in Kerugoya HC Petition No 8 of 2014, now before the Court; the facts in the Kerugoya Petition were that nine Governors for the Counties of Bungoma, Bomet, Kiambu, Kitui, Kisumu, Nakuru, Narok, Tana River and Wajir were summoned together with their respective County Executive Committee Members for Finance to the Senate through summons dated 8th February 2014, or thereabout to respond to various issues concerning finance and fiscal issues in their respective Counties and to appear on diverse dates from 19th February 2014 onwards. In the instant Petition, on the other hand, the Senate through witness summons required the 2nd to the 7th Petitioners to appear before the Senate Committee on County Public Accounts and Investments and answer queries on County financial management as raised in the Report of the Auditor General for the financial year 2012/2013 and for financial year 2012/2013 in regard to the now defunct local authorities. 25
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105. To our collective mind therefore and as correctly pointed out by

Mr Ahmednassir, the question of powers of the Senate to question Governors in regard to financial management by the now defunct local authorities being raised in the present Petition as well as the constitutionality of the act of the Senate to order the Controller of Budget to suspend withdrawal of funds by the specified Counties in this Petition have never been determined by any competent Court and we are obligated to do so.

106. We are guided in taking this approach by the decision in *Siri Ram Kaura v M J E Morgan* [1961] EA 462 in which the then East African Court of Appeal stated as follows:

“The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of *res judicata*.... The law with regard to *res judicata* is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before.... The point is not whether the Respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.”.

107. While therefore it is clear to us that the issue of summons issued to Governors by the Senate in alleged exercise of its powers under

- article 125 of the Constitution is in dispute in both Petitions, we are inclined to find that since the parties in each Petition and the facts in support thereof are substantially different, and could not have formed the subject of the previous Petition, the law may also well apply to each of those facts differently. In saying so, we are conscious of our findings above on *res judicata* but we are also of the view that a party in a court of law should not be left without a remedy and that is the essence of the doctrine of *ubi jus ibi remedium*. In the event, this Court cannot and should not be a bar to a party's right to have a dispute that can be resolved by the application of law determined by a Court of competent jurisdiction. To find otherwise would in essence amount to denying such a party its right to access justice as provided for under article 48 of the Constitution.
108. We are also alive to the provisions of article 259(1) of the Constitution which provide that
"This Constitution shall be interpreted in a manner that... permits the development of the law".
- If this Court is to develop the law, it must have liberty to depart from its previous decisions in very exceptional circumstances - See *Jabir Singh* case (*supra*). We also note that none of the parties urged that it was not possible for this Court to depart from the decisions of any of the Courts with concurrent jurisdiction and as we also understand it, decisions of such Courts are merely persuasive and only those of a higher Court are binding.
109. Having found as we have, we now proceed to determine the merits or otherwise of the Petition before us. In that regard, we shall start by determining the first question posed for interpretation by the Petitioners; the role of the Senate *vis--vis* County Governments in financial matters.
- The Role of the Senate
110. Both Mr Ahmednassir and Mr Kilukumi were in agreement that the Senate's role is well defined in article 96 of the Constitution and is twofold; to protect the interests of the Counties at the national level and to exercise oversight of national revenue allocated to Counties by the National Government. Their point of departure is in the submission made by Mr. Ahmednassir that the Constitution does not vest the Senate with an oversight role with respect to expenditure over devolved funds, unlike the National Assembly which has an oversight role over expenditure of national funds under article 95(4)

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- (c) of the Constitution. That the oversight role now claimed by the Senate is in fact vested on the respective County Assemblies under the provisions of article 226(2) of the Constitution. 1
111. The starting point for us is therefore the provisions of article 96 of the Constitution which expresses the role of the Senate in the following terms; 5
- “1. The Senate represents the counties, and serves to protect the interests of the Counties and their Governments. 10
 2. The Senate participates in the law-making function of parliament by considering, debating and approving Bills concerning counties, as provided in articles 109 to 113. 10
 3. The Senate determines the allocation of National revenue among counties, as provided in article 217, and exercises oversight over National revenue allocated to the County Governments. 15
 4. The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with article 145.” 20
112. In interpreting the above provision, the High Court in Kerugoya HC Petition No 8 of 2014 stated as follows; 25
- “It is not in doubt that the Senate represents the Counties, and serves to protect the interests of the counties and their Governments at the National level. It is mandated to participate in the law-making function of Parliament by considering, debating and approving Bills concerning the Counties. The Senate also determines the allocation of National revenue among counties and exercises oversight over National revenue allocated to the County Governments...In our considered view, the Senate and the County Governments are constitutionally designed to work together in ensuring the fruits of devolution. It is therefore our position that the Senate, which is at the National level of Government, has a critical role in ensuring that the counties interests are protected at the National Level of Government.” 30 35
113. The Supreme Court has also interpreted the above provision in *Speaker of the Senate & another v Attorney General*, Advisory Opinion No 2 of 2013 in the following terms; 40
- “It is evident that the Senate, though entrusted with a less

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- expansive legislative role than the National Assembly, stands as the Constitution's safeguard for the principle of devolved government. This purpose would be negated if the Senate were not to participate in the enactment of legislation pertaining to the devolved units, the counties [article 96(1), (2) and (3)]."
114. We agree with the above holdings and the first question we must answer relates to the meaning of the phrase, "The Senate represents the Counties, and serves to protect the interests of the Counties". This phrase is not difficult to understand at all and we find it to be straight forward. To our mind, it means that the Senate is the organ that relates with the National Government at the national level over county interests. In so relating, it ought to provide sufficient protection to devolved Governments and ensure that operations at the county level are as near normal as possible by ensuring that Counties have sufficient resources to carry out their respective functions. In that regard the Court in Kerugoya HC Petition No 8 of 2014 stated as follows;
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115. "Under article 217 of the Constitution, the Senate is accorded the powers to determine and allocate the National revenue to, and between, counties once every five years through a resolution. The Senate makes the initial decision through requesting and considering the recommendations of the Commission on Revenue Allocation taking into account the Constitutional principles outlined in article 203 of the Constitution; considering public input, and inter alia the input of County Governors. The Senate's decision is final unless two-thirds of the National Assembly reject or change the basis of allocation."
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115. Further to the above, we find that the Senate protects the interests of the Counties by participating in the enactment of legislation concerning Counties as provided for under articles 109 - 113 of the Constitution. In that regard therefore the Senate represents the interests of the Counties at the national level and serves to advance their interest and should not ever be seen to be derailing them.
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116. We therefore sum it all up with the words of the Chief Justice, Dr Willy Mutunga, in *Speaker of the Senate & another v Attorney General*, Advisory Opinion No 2 of 2013 that; "article 96 of the Constitution represents the *raison d'être* of the Senate as 'to protect' devolution." In our view therefore, even when there is a semblance of threat to devolution and interests of the Counties, it is the constitutional duty
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- of the Senate to guard Counties jealously against such a danger as it is the body constitutionally mandated to do so. 1
117. Having answered that question as we have done, the next question relates to the meaning of “oversight powers of the Senate” over national revenue allocated to counties. 5
118. If we understood the Petitioners well, they were in agreement that the Senate has a mandate to determine allocation of national revenue to respective Counties but their quarrel seems to be over the Senate’s role to exercise oversight over expenditure of such revenue. In their view, such an oversight role is vested on the County Assemblies and the National Assembly and not the Senate. That the Senate’s role is only limited to oversight over national agencies that manage national revenue allocated to Counties such as the National Treasury. 10 15
119. In our understanding of the above issue, it is evident and clear under the provision of article 95(4)(c) of the Constitution that the National Assembly has the mandate to exercise oversight over national revenue and expenditure. This Article provides that; “The National Assembly exercises oversight over national revenue and expenditure”. 20
120. As to the power of County Assemblies to exercise oversight over County funds article 185(3) of the Constitution provides thus; 25
121. “A County Assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive organs.”
121. To our mind, this provision is limited in scope and its application is discretionarily to the County executive organs and does not apply as regards the wide powers the Senate and National Assembly have over national revenue as seen from both articles 96(3) and 95(4) (c) of the Constitution. 30
122. Further, the Petitioners made Submission to the effect that article 226(2) of the Constitution mandates County Assemblies to exercise oversight over national revenue allocated to Counties. For avoidance of doubt, article 226(2) provides that; 35
- “The accounting officer of a national public entity is accountable to the national assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management”. 40

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123. We find this provision to be plain, simple and clear; that an accounting officer for a County should be able to explain his decisions for financial management to a County Assembly. “Accountable” and “oversight” are two different terminologies. The drafters of the Constitution could not have used the two to mean the same thing. Had they intended that a County Assembly would exercise an oversight role over national revenue allocated to Counties, nothing would have been easier than for them to say so. We are aware in that regard of the rule of constitutional interpretation that several provisions of the Constitution must be read together and no one particular provision destroying each other but each sustaining the other - See *Tinyefunza v Attorney General* Petition no 1 of 19967 (1997 UGCC 3). This rule is now popularly known as the rule of harmony.
124. In our view, a Constitution does not subvert itself and we therefore find that it would be completely out of order given the clear provisions of article 95(4)(c), 96(3) and 226(2) of the Constitution to allude that County Assemblies exercise an oversight role over national revenue allocated to the Counties to the exclusivity of the Senate. This therefore in our view means that a County Assembly does not have the mandate to exercise oversight over the national revenue allocated to the Counties because that is the exclusive mandate of the National Assembly and the Senate and we shall say why, later in this judgment.
125. Having said so, we must return where we began; that while the Senate has an oversight role over national revenue allocated to County Governments, the issue in that regard, as we understand it, is the scope, extent and nature of the said oversight role.
126. In answering that question, we must first explain the meaning of the word, “oversight”, in its ordinary English meaning before we determine the extent of its applicability. The plain English meaning of the word “oversight” as defined in the *Concise Oxford English Dictionary*, 10th Edition is; “the action of overseeing”. “Oversee” has then been defined by the same dictionary as, “supervise” or “look at from above”.
127. Taking the above meanings and as can be seen in the context of article 96(3) of the Constitution, in our interpretation, oversight implies a procedural and substantive function for the Senate. Procedural in the sense that the Senate is involved in the process

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- leading to division and sharing of national revenue as between the National and County Governments as envisaged under articles 202 and 203 of the Constitution. The Senate thus gets involved in the enactment of the legislation contemplated in that regard and in particular as provided for under article 205 of the Constitution - See *Speaker of the Senate & another v Attorney General*, Advisory Opinion No 2 of 2013. 1
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128. After allocation of national revenue to Counties, the Senate exercises what we would call substantive oversight by ensuring that the revenue so allocated has been disbursed to the Counties in accordance with the law and that County financial operations are going on as normally as possible. Substantive oversight would also, in our view, mean that the Senate would be mandated to get explanations on how Counties spend the National revenue allocated to them in the event audit queries are made by the Auditor General in his report made pursuant to the provisions of article 229 of the Constitution. 10
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129. In the above regard, we recall the submission made by Mr Wanyama that the Senates oversight role is limited to oversight over national agencies that manage national revenue allocated to counties such as the treasury. The same submission was made in Kerugoya HC Petition No 8 of 2014 and the learned judges expressed themselves as follows; 20
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- “We therefore reject the argument by the Petitioner that the Senate’s power is limited to oversight over National agencies which manage National revenue allocated to the counties such as the National Treasury. To our minds, this would be against the spirit and letter of article 96(3) of the Constitution which vests a wide power on the Senate to oversee both the provision and expenditure of the national revenue allocated to the counties. In the foregoing, it is our determination that since the Senate was properly seized of the matters with regard to the issues raised by the Controller of Budget in the County Implementation Report, it had power to summon any person under article 125 for purposes of giving evidence or providing information concerning the issues raised in that report.” 30
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130. We agree with the learned judges and we have combed through the provisions of the Constitution and the Public Finance Management Act and we have been unable to identify any particular provision of the law that empowers the National Treasury to get directly involved with financial management at the County level. 1
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131. We say so say because article 207 of the Constitution establishes a Revenue Fund for each County into which shall be paid all revenue raised or received by or on behalf of the County Government. Under section 103(1) of the Public Finance Management Act, there has been established a County Treasury for each County Government. The mandate and role of the County Treasury are stipulated under section 109(3) of the Public Finance Management Act and includes the administration of the county revenue fund and ensuring that the County Government complies with the provisions of article 207 of the Constitution. As to how the county revenue fund is administered, article 207(3) and 228(4) of the Constitution as well as section 109(6) of the Public Finance Management Act stipulates that any withdrawals from Fund shall be done with the approval of the Controller of Budget. 10
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132. The National Treasury is established under the provisions of article 225 of the Constitution, as an entity of the National Government. Its responsibilities and obligations are stipulated under section 12 of the Public Finance Management Act and are as follows; 25
Subject to the Constitution and this Act, the National Treasury shall-
- a. Formulate, implement and monitor macro-economic policies involving expenditure and revenue; 30
 - b. Manage the level and composition of national public debt, national guarantees and other financial obligations of national government within the framework of this Act and develop a framework for sustainable debt control; 35
 - c. Formulate, evaluate and promote economic and financial policies that facilitate social and economic development in conjunction with other a national government entities; 40
 - d. Mobilise domestic and external resources for financing national and county government budgetary requirement;
 - e. Design and prescribe an efficient financial management

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system for the national and county governments to ensure transparent financial management and standard financial reporting as contemplated by article 226 of the Constitution;	1
Provided that the national treasury shall prescribe regulations that ensure that operations of a system under this paragraph respect and promote the distinctiveness of the national and county levels of government;	5
f. In consultation with the Accounting Standards Board, ensure that uniform accounting standards are applied by the national government and its entities;	10
g. Develop policy for the establishment, management, Operation and winding up of public funds;	15
h. Within the framework of this Act and taking into consideration the recommendations of the Commission on Revenue Allocation and the Intergovernmental Budget and Economic Council, prepare the annual Division of Revenue Bill and the County Allocation of Revenue Bill;	20
i. Strengthen financial and fiscal relations between the national government and county governments and encourage support for county governments in terms of article 190(1) of the Constitution in performing their functions; and	25
j. Assist county governments to develop their capacity for efficient, effective and transparent financial management in consultation with the Cabinet Secretary responsible for matters relating to intergovernmental relations.	30
(2) The National Treasury shall have the following functions, in addition to those in subsection (1) –	
a. Promote transparency, effective management and accountability with regard to public finances in the national government;	35
b. Ensure proper management and control of, and accounting for the finances of the national government and its entities in order to promote the efficient and effective use of budgetary resources at the national level;	40
c. Co-ordinate the preparation of annual appropriation	

accounts and other statutory financial reports by the national government and its entities;	1
d. Prepare annual estimates or revenue of the national government, and co-ordinate the preparation of the budget of the national government;	5
e. Consolidate reports of annual appropriation accounts and other financial statements of the national government and county governments and their entities	
f. Report every four months to the national assembly on the implementation of the annual national budget on areas not reported on by the Controller of Budget;	10
g. Be the custodian of an inventory of national government assets except as may be proved by other legislation or the Constitution;	15
h. Monitor the management of the finances of public enterprises and investments by the national government and its entities;	
i. Monitor the financial aspects of risk management strategies and governance structures for the national government and national government entities;	20
j. Monitor the financial performance of state corporations; and	
k. Issue guidelines to national government entities with respect to financial matters and monitoring their implementation and compliance;	25
3. The National Treasury shall take such other action, not inconsistent with the Constitution, as will further the implementation of this Act. “	30
133. As can be seen therefore, the National Treasury’s role does not include the management of national revenue allocated to the Counties. There are other bodies mandated to do so and the law as stated under articles 203, 204, 205, 225 and 228 of the Constitution as well as under sections 12 and 109 of the Public Finance Management Act is clear on that aspect.	35
The meaning of the phrase ‘Accounting Officer’	
134. The Petitioners have also sought the interpretation of the term “Accounting Officer”. In that regard, article 226 of the Constitution provides;	40
“(1) Act of Parliament shall provide for -	
(a)	

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- (b) The designation of an accounting officer in every public entity at the national and county level of government 1
- (2) The accounting officer of a national public entity is accountable to the national assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management.” 5
- Pursuant to this provision, Parliament enacted the Public Finance Management Act. The appointment and designation of a County Government Accounting Officer is provided for under section 148 of that Act, as follows; 10
- “1. A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation. 15
2. Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.” 20
135. It therefore follows that “an accounting officer” for a County Government entity is the person so appointed and designated as such by the County Executive Committee Member for Finance under section 148 of the Public Finance Management Act. Indeed, section 148(3) of the Public Finance Management Act mandates the County Executive Committee Member for Finance to ensure that each County government entity has an accounting officer as provided for under article 226(2) of the Constitution. 25 30
136. As regards the accounting officer for the County Assembly, section 148(4) of the Public Finance Management Act provides that; “The Clerk of the County Assembly shall be the accounting officer of the County Assembly”. 35
137. Having found as we have, it follows that the question posed by the Petitioners as to whether the County Governor is an Accounting Officer, must be answered in the negative. He is not an Accounting Officer and we have said why. 40
138. The next question we must give an answer to is, whether the

Accounting Officers identified above are accountable to the Senate on their financial management. In that regard, section 149(1) of the same Public Finance Management Act provides for the responsibilities of Accounting Officers designated to the County Government as follows; 1
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- (1) An accounting officer is accountable to the county assembly for ensuring that the resources of the entity for which the officer is designated are used in a way that is—
 - a. lawful and authorised; and
 - b. effective, efficient, economical and transparent. 10

In that regard, the Court in Kerugoya HC Petition No 8 of 2014 expressed itself as follows;

“We wish to point out that the first persons of contact with regard to any issue of financial management of a county would be the accounting officers appointed at the county level. We note that these officers are accountable to the County Assemblies by virtue of article 226(2) of the Constitution and section 149 of the Public Finance Management Act of 2012. Nevertheless, the Constitution provides for oversight of county public finances at two levels; by the County Assemblies at the county level and by the Senate at the National level”. 15
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We agree with the interpretation of the law above by the learned judges. We shall revert to the extent to which the Accounting Officers at the County Government level may become accountable to the Senate on management of County resources, shortly. 25

Whether the Senate can summon Governors to answer questions on County Public Finance Management. 30

139. It was the Petitioners’ contention that the Senate has no mandate to summon Governors to answer questions on financial management of the Counties by Accounting Officers. That in any case, if the Senate has any audit queries, the same should be directed to the designated Accounting Officers for County Government entities. Further, that on financial matters in a County Government, the Senate’s role is limited in scope and is primarily to make recommendations for improving the management of public finances. 35

140. We have already held that under article 96(3) of the Constitution, the Senate has an oversight role over national revenue allocated to the County Governments including the expenditure of the said revenue. A County Assembly also has an oversight role over all County 40

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- resources including the national revenue allocated to the Counties, grants, loans and revenue locally generated by the Counties. 1
141. The issue at this stage therefore is how is that oversight role to be exercised” Does it entail summoning County Governors and if so to do what” 5
142. In addition to the Senate’s and County Assemblies’ oversight role as above, we are clear in our minds that there are other independent organs which oversee the fiscal and financial management of revenue at the Counties. Firstly, under article 228(4) of the Constitution, the Controller of Budget has the mandate of overseeing the implementation of the budgets at the National and County Governments by authorizing withdrawals from public funds established under article 204, 206 and 207 of the Constitution. The Controller of Budget shall not authorize any withdrawals unless satisfied that such withdrawal is authorized by the law. Secondly, article 229 of the Constitution provides for the office of Auditor General who audits the accounts of all public bodies including those of the National and County Governments. The Auditor General after auditing such accounts submits his report to the two Houses of Parliament and the relevant County Assembly, which then debate and consider the report within three months and take appropriate action – See Petition No 368 of 2014, *Speaker, Nakuru County Assembly & others v Commission on Revenue allocation and others*. 10
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143. As can be seen from the above, the Constitution has established firm and strong structures which ensure that the principles of public finance as stipulated under article 201 of the Constitution are respected and adhered to. In our view therefore, all the above oversight mechanisms put together ensures that there is a proper checks and balances system which ensures accountability and transparency in fiscal matters in all public entities including County Governments. 30
144. In addition to the above, financial reporting by County Governments is done by both the County Treasury and by the Accounting Officer for each of the County Government entity. In that regard, section 163 of the Public Finance Management Act provides; 35
- “1. At the end of each financial year, the County Treasury shall, for the county government, consolidate the annual financial statements in respect of all the county 40

government entities in formats to be prescribed by the Accounting Standards Board.	1
2. The County Treasury shall include in the consolidated financial statements –	
a. A statement of all money paid into and paid out of the County Exchequer Account;	5
b. A summary of-	
i. The appropriation accounts and statements prepared by accounting officers under section 164, and	10
ii. The statements prepared by receivers of revenue under Section 165;	
c. A statement of payments, if any. Made out of the County Exchequer Account that are authorized by legislation other than an Appropriation Act;	15
d. A statement of the total amount of debt of the county government that is outstanding at the end of the financial year;	
e. A statement of the debt guaranteed by the national government at the end of the financial year;	20
f. Such other statements as the county assembly may require; and	
g. A statement of the summary of the accounts from the county assembly;	25
3. The County Treasury shall ensure that the statements and summarises referred to in subsection (2) are in a form that is in accordance with the accounting standards prescribed and published by the Accounting Standards Board from time to time.	30
4. Not later than four months after the end of each financial year, the County Treasury shall -	
a. Submit the financial statements and summaries referred to in subsection (1) to the Auditor General; and	35
b. Deliver a copy to the National Treasury, Controller of Budget and the Commission on Revenue Allocation.”	
145. Section 164 of the Public Finance Management Act provides for the annual reporting by Accounting Officers as follows;	40
“At the end of each financial year, the accounting officer for a county government entity shall prepare financial statements	

in respect of the entity informants to be prescribed by the Accounting Standards Board.	1
2. The accounting officer shall include in the financial statements –	
a. appropriation accounts, showing –	5
(i) the services for which the appropriated money was spent;	
iii. The amounts actually spent on each service; and	
iv. The status of each Vote compared with the appropriation for the Vote; and	10
v. A statement explaining any variations between the actual expenditure and the sums Voted; and	
vi. Any other information specified by the County Treasury;	15
b. A statement of the entity's debt that is outstanding at the end of the financial year;	
c. A statement of the entity's debt guaranteed by the national government as at the end of the financial year;	
d. A statement of the entity's assets and liabilities as at the end of the financial year in respect of-	20
h. Each Vote, clearly identifying between recurrent and development expenditure; and funds and deposits;	
e. A statement of the accounting policies followed in preparing the financial statement; and	25
f. A statement of the county government entity's performance against predetermined objectives	
3. The accounting officer shall prepare the financial statements in a form that complies with relevant accounting standards prescribed and published by the Account Standard Board from time to time;	30
4. Within three months after the end of each financial year, the accounting officer for an entity shall –	
b. submit the entity's financial statements to the Auditor-General; and	35
c. Deliver a copy of the statements to the relevant county Treasury, the Controller of Budget, and the Commission of Revenue Allocation.	
5. In the case of an entity that is a County corporation, the accounting officer shall submit a copy of the county corporation's financial statements to the County Executive Committee member responsible for that corporation who	40

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- shall approve and forward the statements to the County Executive Committee member for finance.” 1
146. Clearly, and as can be seen from the law as stated above, a County Government submits its financial statements and summaries to the Auditor General. The Auditor General would then exercise his powers as provided for under article 229 of the Constitution and make a financial management report which would subsequently be submitted to Parliament and the County Assembly. The Senate as part of Parliament receives such a report in that capacity. 5 10
147. Having said so, we are at this stage obligated to return to the core issue in the Petition and examine the manner in which the Senate exercises its oversight role over national revenue allocated to the counties. The starting point would be section 8 of the Public Finance Management Act which provides for the responsibilities of the Senate Budget Committee in public finance matters as follows; 15
- “(1) The Committee of the Senate established to deal with budgetary and financial matter’s has responsibilities for the following matters, in addition to the functions set out in the Standing Orders; 20
- (a)
- c.
- d. examine financial statements and other documents submitted to the Senate under Part IV of this Act, and make recommendations to the Senate for improving the management of Government’s public finances; and 25
- (e) ...”
148. Thus far, it is therefore crystal clear that the Senate has the mandate to receive the financial statements of a County Government as well as the audit report of the Auditor General. In regard to those reports, it was the Petitioners’ contention that the Senate’s role is limited to making recommendations on the improvement of Government public finances and we agree with the Petitioners to that extent. However, we must also state that its role under section 8 of the Public Finance Management Act is wider in scope. In receiving the reports contemplated under section 163 and 164 of the Public Finance Management Act, it is expected to examine the financial statements and documents as submitted to it and thereafter make appropriate action including making recommendations on *inter alia* the improvement of government public finances and in this regard, 30 35 40

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- the national revenue allocated to each County. 1
149. We agree with the submission made by Mr Kilukumi that in examining the financial statements and documents as submitted to it, the Senate or its Committees has the power to summon any person to appear before it for purposes of giving evidence or providing information. In that regard article 125 of the Constitution provides that; 5
- “1. Either House of Parliament, and any of its committees, has power to summon any person to appear before it for the purpose of giving evidence or providing information. 10
 2. For the purposes of clause (1), a House of Parliament and any of its committees has the same powers as the High Court —
 - (a) To enforce the attendance of witnesses and examine them on oath, affirmation or otherwise; 15
 - (b) To compel the production of documents; and
 - (c) To issue a commission or request to examine witnesses abroad.” 20
- The Court in Kerugoya HC Petition No 8 of 2014, while interpreting the above section stated as follows; 20
- “The powers to summon anyone under article 125 can only be exercised by the Senate when it is properly seized of a matter in execution of its constitutional mandate. The summons should also be issued against persons who are reasonably expected to have relevant knowledge or information necessary to assist the Senate with matters under consideration.” 25
- We agree with the learned judges and we see no reason to depart from that interpretation as it is sound. 30
150. Applying the same criteria in the instant Petition, we have seen the witness summons issued to the County Governors. One of them reads as follows; 35
- “The Senate 35
- Senate Sessional Committee on County Public Accounts and Investments
- Witness Summons 40
- To: The Hon Isaac K Ruto, Governor, Bomet County
- Whereas, the Senate has mandated the Sessional Committee

on County Public Accounts and Investments to –	1
a. Pursuant to article 96(3) of the Constitution, to exercise oversight over national revenue allocated to the County Governments,	
b. Pursuant to article 228(6) of the Constitution, to examine the report of the Controller of Budget on the implementation of the budgets of County Governments,	5
c. Pursuant to article 229(7) and (8) of the Constitution, to examine the reports of the Auditor-General on the annual accounts of the County Governments,	10
d. To examine special reports, if any, of the Auditor-General on the County Government Funds,	
e. To examine the reports, if any, of the Auditor-General on the County public investments, and	15
f. To exercise oversight over County public accounts and investments.	
And Whereas, article 125 of the Constitution and section 14 and 15 of the National Assembly (Powers and Privileges) Act (Cap 6)), as read together with section 7 of the Sixth Schedule to the Constitution empower the Senate and any of its committees to summon any person to appear before it for the purpose of giving evidence or providing information;	20
Now therefore, the Sessional Committee on County Public Accounts and Investments summons you to appear, in person, before the committee on Tuesday, 26 th August, 2014 at the Senate Committee Room 4, 1 st Floor, Main Parliament Buildings at 10.00 am.	25
The Committee further requires that you submit the following documents to the Committee on that day.	30
1. Your continuous response to the Report of the Auditor General on the Financial Operations of the County Government of Bomet and its defunct Local Authority for the Financial year 2012/2013 (1st January to 30th June, 2013); and	35
2. All other relevant documentation in your possession.	
Given under my hand, for and on behalf of the Sessional Committee on County Public Accounts and Investments, the 12 th day of August, 2014.	40

Signed	1
JM Nyegenye, CBS	
Clerk of the Senate	
Please acknowledge receipt of this witness summons as follows	5
—	
Name: Signature: Date of Service: Place of Service:	
Take Note that should you fail to attend before the Committee on the date and time specified in this Witness Summons or to produce the documentation required by the Committee, you shall be guilty of an offence in terms of section 23(a) of the National Assembly (Powers and Privileges) Act (Cap 6), as read together with section 7 of the Sixth Schedule to the Constitution, for which you shall be liable, on conviction, to a fine not exceeding two thousand shillings or to imprisonment for a term not exceeding twelve months, or to both such fine and imprisonment.”	10
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All the other summonses followed the same format.	
151. Mrs Consolata Waithera Munga in her affidavit sworn on 22 nd August 2014 explained that the Senate Committee on Finance, Commerce and Economic Affairs on 8 th February 2014, summoned fifteen Governors and the County Executive Members responsible for matters of finance requiring them to appear before the relevant Senate Committee and respond to various issues with regard to County finance and fiscal management. Subsequently, a number of County Governors appeared before the Senate Committee on various dates and responded to questions arising from the Report of the Auditor General on financial operations of certain defunct local authorities for the financial year 2012/2013 (1 st January 2013 to 30 th June 2013). That despite attendance by some County Governors, the 2 nd to 7 th Petitioner refused to attend as summoned. Fresh invitations were sent by the Senate Committee on County Public Accounts and Investments through various letters issued on diverse dates in June, July and August 2014. The Governors have to date not appeared before the Senate Committee.	20
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152. The question now arising is whether the said Governors were or are officers with the relevant information that would have entailed them to be summoned by the Senate’s Committee aforesaid. Mr Kilukumi in response to that issue submitted that the County Governors are the Chief Executive Officers of a County as provided	40

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- for under article 179(4) of the Constitution, and that fact is not 1
in dispute. But according to the Petitioners, a Governor is not the
Accounting Officer of any County entity and should not be called
upon to answer queries on financial management. We have already 5
found that an Accounting Officer of the County Government is
such an officer as designated under section 148 of the Public Finance
Management Act. But what is the role of the Governor as the Chief
Executive Officer of the County” In that regard, the functions of
the County Governor are provided for under section 30(2) of the 10
County Governments Act as follows;
- “30(2) Subject to the Constitution, the Governor shall-
- (a) Diligently execute the functions and exercise the 15
authority provided for in the Constitution and
legislation
 - a. Perform such State functions within the County as the
President may from time assign on the basis of mutual
consultations.
 - b. Represent the county in national and international for 20
a and events
 - c. Appoint with the approval of the county assembly, the
county executive committee in accordance with article
179(2) of the Constitution
 - d. Constitute the county executive committee portfolio 25
structure to respond to the functions and competencies
assigned to and transferred to each county
 - e. Submit the county plans and policies to the county
assembly for approval
 - f. Consider, approve and assent to bills passed by the 30
county assembly
 - g. Chair meetings of the county executive committee
 - h. By a decision notified in the county gazette assign to 35
every member of the county executive committee,
responsibility to ensure the discharge of the function
within the county and the provision of related services
to the people;
 - i. Submit to the county assembly an annual report on
the implementation status of the county policies and
plans
 - j. Deliver annual state of the county address containing 40
such matters as may be specified in county legislation;
and

k. (Sign and cause to be published in the county Gazette, notice of all important formal decisions made by the Governor or by the county executive committee.	1
153. In relation to financial management, section 30(3) provides that; “30(3)(f) In performing the function under subsection (2), the Governor shall-	5
a. Provide leadership in the Country’s governance and development;	
b. Provide leadership to the County executive committee and administration based on the County policies and plans;	10
c. Promote democracy, good governance, unity and cohesion within the county;	
d. Promote peace and order within the Count;	15
e. Promote the competitiveness of the County;	
f. Be accountable for the management and use of County resources; and	
g. Promote and facilitate citizen participation in the development of policies and plans, and delivery of services in the county.	20
154. In interpreting the above Section, the Court in Kerugoya HC Petition No 8 of 2014 held as follows;	
“By implication, this provision means that the County Governor as the overall head of the county is accountable for the utilization of county resources including the National revenue allocated to his or her respective County. Since the accounting officers at the county are directly answerable to the County Assembly for the management of financial resources under the Public Finance Management Act 2012, who then is the Governor accountable to under section 30(3) (f) “In our considered view, since the County Governors are not answerable to the County Assembly in terms of fiscal management of the County resources under section 149 of the Public Finance Management Act 2012, they must be held to account by the Senate for the National revenue allocated to their respective Counties in view of the provisions of Section 30(3)(f) of the County Governments Act, 2012 as read together with article 10(2)(c) on the National values and principles of governance. The Governors being State Officers are bound by the national values of transparency,	25
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accountability and observance of good governance when performing their duties as the Chief Executive Officers of the County Governments.” 1

And as to whether the Senate Committee could summon Governors, the Court held as follows; 5

“It then follows that under article 125, the County Governor and the County assembly Member for finance who belong to the executive arm of the County Government can also be summoned by the Senate in exercise of their oversight mandate under article 96(3) of the Constitution. Though the executive arm of the county Government is also answerable to the County Assemblies of their respective Counties, this does not preclude the said arm from providing information to the Senate when called upon to do so in exercise of their oversight mandate under article 96(3). Further under article 10(2) of the Constitution one of the values of governance enshrined in the Constitution is transparency and accountability. 10 15

Every officer in every State organ and at both levels of Government must respect and comply with any mechanism of accountability established by the Constitution and the law to the fullest extent possible. The Court under article 259 must therefore interpret the Constitution in a manner that promotes good governance through transparency and accountability. Put in another way, when persons in charge of the managing County finances are not held to account, the objectives of devolution set out under Article 174 which includes promoting democratic and accountable exercise of power; and to enhance checks and balances of powers, will be defeated. 20 25 30

The position advance by the Petitioner that the County Governors cannot be summoned by the Senate by virtue of article 226(2) of the Constitution, section 148 of the Public Finance Management Act, 2012 and section 30 of the County Government Acts 2012 is therefore untenable. ” 35

We are fully in agreement with the learned judges. We would however wish to say that we have seen the witness summons reproduced elsewhere above. In so appearing before the Senate’s Committee, a governor may appear with such officers as he deems necessary to answer the relevant questions under 40

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- considerations. In our view, such officers include the Executive Committee Member responsible for matters of finance and the designated accounting officers as they are the persons whom the Constitution has mandated to deal with financial matters. 1
155. However, the role of the Governor under section 30(3) (f) of the County Governments Act is critical in fiscal management at the County level. He is the Chief Executive Officer and the buck stops with him in the management of county resources. It is critical that such a provision exists so as to ensure responsibility of public resources which would ultimately enhance the national values as provided for under article 10 of the Constitution as well as the spirit and tenor of constitution. 5 10
- In a nutshell, we see no fault with the summons issued by the Senate and for avoidance of doubt, they are constitutional and lawful. 15
- Whether the resolution passed by the Senate directing the National Treasury and Controller of Budget not to release funds to counties is constitutional. 20
156. It is not in dispute that the Senate in its sitting of 7th August 2014, passed a resolution recommending that the Controller of Budget should not authorize any withdrawal of public funds by Bomet, Kisumu, Kiambu and Murang'a Counties until the mentioned County Governments had responded to the audit queries raised to the satisfaction of the Senate and the National Treasury including by the named Governors honouring the Senate Summons. 25
157. We are clear in our mind that the Senate acts and makes its decisions through resolutions and a resolution of the House is a declaration of opinion or purpose. Erskine May in his Treatise on the Law, Privileges, Proceedings and Usage of Parliament, 24th Edition, writes as follows on that aspect; 30
- “Every question, when agreed to, becomes either an order or a resolution of the House. By its orders the House directs its committees, its members, its officers, the order of its own proceedings and the acts of all persons whom they concern, by its resolutions the House declares its own opinions and purposes.” 35 40
158. The Petitioners have in that regard challenged the Resolution

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- made by the Senate and have submitted that it did not have any constitutional power to order the Cabinet Secretary, National Treasury and the Controller of Budget not to authorize withdrawal of funds to the named Counties. The question we must answer in that regard is whether the Senate has the powers to order stoppage of funds to the Counties in the manner that it did. 1 5
159. Mr Kilukumi submitted that because of the doctrine of separation of powers, the resolution of the Senate cannot be questioned in a Court of law. Further, that the Senate made the resolution pursuant to the provisions of the Constitution. 10
160. In that regard, we have already found that the Constitution is the supreme law of the land and all state organs have an obligation to uphold it and the Senate must always act in accordance with the Constitution. Its procedures and resolutions must be made within the purview of the same constitution and it cannot purport to violate the Constitution and seek refuge in the doctrine of separation of powers. This Court, under article 165(3)(d)(ii) of the Constitution is constitutionally mandated to examine whether anything done under the authority of the Constitution is well within the four corners of the Constitution. The Senate cannot therefore act in disregard of the Constitution and at the same time claim to exercise powers under the same Constitution. This Court will continue to exercise its jurisdiction and judicial authority as conferred by the people of Kenya to assert the authority and supremacy of the Constitution and when the Senate has violated the Constitution, it must be told so. 15 20 25
161. Having said so, it follows that the submission made by Mr Kilukumi that a resolution of the Senate cannot be challenged in the courts of law due to the doctrine of separation of powers is untenable and we have said why. The last issue to determine therefore is whether the said resolution is constitutional or not. 30
162. On that issue, Mr Kilukumi submitted that the Senate made said the resolution in accordance with the provisions of article 225 of the Constitution as well as under section 96 of the Public Finance Management Act. In that regard article 225 of the Constitution provides that; 35
- 163(1) An Act of Parliament shall provide for the establishment, functions and responsibilities of the national treasury. 40
- (2) Parliament shall enact legislation to ensure both expenditure control and transparency in all governments

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and establish mechanisms to ensure their implementation.	1
(3) Legislation under clause (2) may authorize the Cabinet Secretary responsible for finance to stop the transfer of funds to a State Organ or any other public entity	
a. Only for a serious material breach or persistent material breaches of the measures established under that legislation; and	5
(b) subject to the requirements of Clause (4) to (7)	
(4) A decision to stop the transfer of funds under Clause (3) may not stop the transfer of more than fifty percent of funds due to a county government	10
6. A decision to stop transfer the transfer of funds as contemplated in clause (3)	
a. shall not stop the transfer of funds for more than sixty days; and	15
b. may be enforced immediately, but will lapse retrospectively unless, within thirty days after the date of the decision, Parliament approves it by resolution passed by both Houses	20
7. Parliament may renew a decision to stop the transfer of funds but for no more than sixty days at a time	
8. Parliament may not approve or renew a decision to stop the transfer of funds unless;	
(a) the Controller of Budget has presented a report on the matter to Parliament; and	25
(b) the public entity has been given an opportunity to answer the allegations against it, and to state its case, before the relevant parliamentary Committee”	30
163. Under the above provision of the Constitution, it is clear that the Cabinet Secretary responsible for matters of finance has the mandate to stop the transfer of funds to a state organ or a public entity.	
164. Parliament has enacted the Public Finance Management Act, to govern the circumstances in which the stopping of funds can be done and the procedure to be invoked in such situations. Section 92 to 99 of that Act makes general provisions on resolution of operational and financial problems of national and County Governments entities. Of most importance in the Petition before us is section 96(1) of the Act which empowers the Cabinet Secretary to stop transfer of funds. This provision reads as follows;	35
Where the Cabinet Secretary finds a State organ which is	40

a county government entity to be in serious or persistent material breach of its obligations or financial commitments, the Cabinet Secretary shall, in accordance with article 225 of the Constitution, immediately stop the transfer of funds. 1

It is therefore clear that it is within the power of the Cabinet Secretary to stop transfer of funds to Counties. As to the Procedure for doing so, section 97 provides thus; 5

(1) Where the Cabinet Secretary makes a decision to stop the transfer of funds to a State organ or public entity in accordance with article 225(3) of the Constitution and provisions of this Act, the Cabinet Secretary shall stop the payment and inform the Controller of Budget in respect of— 10

(a) the date from when the stoppage of transfer of funds takes effect; and 15

(b) the nature of serious material breaches, or persistent material breaches, committed by the State organ or public entity.

(2) Not later than seven days after the date of the decision to stop the transfer of funds, the Cabinet Secretary shall seek approval from Parliament. 20

165. Looking at the law above, it is clearly within the powers of the Cabinet Secretary to stop transfer of funds to county entities for the reasons stated under section 93 and 94 of the Public Finance Management Act. He can however only do so with the approval of Parliament as can be seen from the provisions of section 97(2). In the instant Petition, it is the Senate that initiated the stoppage of withdrawal of funds and directed the Cabinet Secretary to stop the said withdrawal. The question therefore is whether the Senate has the powers to direct the Cabinet Secretary to stop the transfer of funds allegedly while exercising its oversight role under article 96(3) of the Constitution. 25
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166. The answer to the question can only be a resounding No. The manner in which funds can be withheld or withdrawals stopped is clear and we have set out law above. The grounds for doing so are also clear and one of them is not refusal by Governors to honour summons by the Senate. Article 125 of the Constitution provides that where summons are issued by either House of Parliament and any of their committees, the House shall have the “same powers 35
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- as the High Court – to enforce the attendance of witnesses and examine them on oath, affirmation or otherwise.” 1
- Stoppage of withdrawal funds is certainly not one of the ways that this Court enforces the attendance of witnesses neither should the Senate purport to have such powers. 5
167. In making the above finding, we are also aware that the Controller of Budget under article 228(4) of the Constitution cannot:
- “approve any withdrawal from a public fund unless satisfied that the withdrawal is authorized by law”. 10
- Conversely he cannot stop a withdrawal unless the stoppage is also authorized by law as set out above. That office is also enjoined by article 249(2)(b) as read with article 248(3)(b) to be “independent and not subject to direction or control by any person or authority” including the Senate unless the latter is acting within its own lawful mandate. How then can the Senate give directions that are not supported by the Constitution or any law” 15
- It is our finding that the Resolution of the Senate directed at the Cabinet Secretary for finance and the Controller of Budget was not grounded in law and cannot stand. 20
- Whether Governors can lawfully be held accountable for transactions in the financial year during which the defunct local authorities together with the Transition Authority (in line with its functions under section 7 of the Transition to Devolved Governments Act 2012) were in charge of County resources 25
168. It is uncontested that the summons issued to certain county Governors raised questions regarding the financial management for financial year 2012/2013 as raised in the Report of the Auditor General for that financial year. 30
169. None of the Parties addressed us in their submissions on the above issue. However, it behoves upon us to address it as it was framed as a question for interpretation. 35
170. In that regard section 2 of the Sixth Schedule to the Constitution provides as follows as regarding the transition from local Government to devolved Government – 40
- “(1) The following provisions of this Constitution are suspended until the final announcement of all the results of the first elections for Parliament under this

Constitution—	1
a. Chapter Seven, except that the provisions of the Chapter shall apply to the first general elections under this Constitution.	
b. Chapter Eight, except that the provisions of the Chapter relating to the election of the National Assembly and the Senate shall apply to the first general elections under this Constitution; and	5
c. Articles 129 to 155 of Chapter Nine, except that the provisions of the Chapter relating to the election of the President shall apply to the first general elections under this Constitution.	10
(2) The provisions of this Constitution relating to devolved government, including article 187, are suspended until the date of the first elections for county assemblies and governors held under this Constitution.	15
(3) Despite subsection (2)—	
a. elections for county assemblies and governors shall be held in accordance with articles 177 and 180 of this Constitution; and	20
c. the laws relating to devolved government, required by this Schedule and Chapters Eleven and Twelve of this Interpretation. Suspension of provisions of this Constitution. Constitution, shall be enacted within the period stipulated in the Fifth Schedule.	25
(4) Article 62(2) and (3) is suspended until the National Land is established.”	
171. Section 15(1) of the Sixth Schedule for the Constitution makes provisions for devolution of functions to be made by an Act of Parliament. The legislation to be enacted pursuant to section 15(2) of the Sixth Schedule was intended to make provisions as follows; “15(1) ...	30
(2) The legislation mentioned in subsection (1) shall—	35
a. provide for the way in which the national government shall—	
(i) facilitate the devolution of power;	
(ii) assist county governments in building their capacity to govern effectively and provide the services for which they are responsible; and	40
iii. support county governments;	

b.	establish criteria that must be met before particular functions are devolved to county governments to ensure that those governments are not given functions which they cannot perform;	1
c.	permit the asymmetrical devolution of powers to ensure that functions are devolved promptly to counties that have the capacity to perform them but that no county is given functions it cannot perform; and	5
d.	provide mechanisms that ensure that the Commission on the Implementation of the Constitution can perform its role in monitoring the implementation of the system of devolved government effectively.	10
172.	Parliament in the above regard enacted the Transition to Devolved Government Act, 2013. Its preamble reads thus;	15
	“An Act of Parliament to provide a framework for the transition to devolved Government pursuant to section 15 of the Sixth Schedule to the Constitution.”	20
	The objects and purpose of that Act are stated at section 3 of Transition to Devolved Government Act as follows;	
a.	Provide a legal and institutional framework for a co-ordinated transition to the devolved system of government while ensuring continued delivery of services to citizens;	25
b.	Provide, pursuant to section 15 of the Sixth Schedule to the Constitution, for the transfer of powers and functions to the national and county governments;	
c.	Provide mechanisms to ensure that the Commission for the implementation of the Constitution performs its role in monitoring and overseeing the effective implementation of the devolved system of government effectively;	30
d.	Provide for policy and operational mechanisms during the transition period for audit, verification and transfer to the national and county governments of-	35
i.	assets and liabilities;	
ii.	human resources;	
iii.	pension and other staff benefits of employees of the government and local authorities; and	40
iv.	any other connected matters;	
e.	provide for closure and transfer of public records; and	
f.	provide for the mechanism for capacity building	

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- requirements of the national government and the county governments and make proposals for the gaps to be addressed.” 1
173. The transition to County Governments was to be overseen by a body known as the Transition Authority established under section 4(1) of the Transition to Devolved Government Act, 2012. The functions of the Authority are then provided for under section 7(2) of that Act as follows; 5
174. We have combed through the Transition to Devolved Government Act and its provisions as relates to transition. It is clear that the Act has sufficient provisions over transfer of functions from the National to County Governments. However the Act has little provision on transition from Local Governments to County Governments especially as regards financial management during the transition period. However, our reading of all the above provisions of the law is clear that after the 1st General Election, there was to be a transition from local Government to County Government once the County Governments came into existence in accordance with section 2 of the Sixth Schedule to the Constitution. Before that transition, the body responsible for facilitating and co-ordinating the transition was the Transition Authority. We say so because section 2 of the Transition to Devolved Government Act has made it clear that phase one of the transition was to be carried from the date of the commencement of the Transition to Devolved Government Act, which was assented to by the President on 27th February 2012 and commenced on 9th March 2012. 10
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175. It is also certain that the Local Governments continued to exist until 4th March 2013 and we say so because the provisions of section 134 of the County Government Act No 17 of 2012 are in certain words that; 30
- “1. The Local Government Act is repealed upon the final announcement of all the results of the first elections held under the Constitution. 35
2. All issues that may arise as a consequence of the repeal under Subsection (1) shall be dealt with and discharged by the body responsible for matter relating to transition.”
176. In addition, it can be seen from the provision of section 7(1)(e) of the Transition to Devolved Government Act, that the Transition Authority was the body mandated to prepare and validate an 40

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- inventory of all the assets and liabilities of Local Governments during the transition period. It was also responsible for creating mechanisms for transfer of assets. section 24 of the Transition to Devolved Government Act is also clear that the transfer of a function would be done if the County Government had satisfied the criteria established thereto. Relevant to the issue before us is the establishment of the necessary financial management system post the transition and in that regard, our interpretation of the law would be that County Governments would become responsible for the fiscal management and planning of County Governments immediately after the Transition Authority has handed over the assets and liabilities of Local Governments to the said County Governments. 1
177. Before any hand over has been done, it means that The Transition Authority would be the body responsible for all assets and liabilities of Local Governments. Indeed the provisions of section 35 of the Transition to Devolved Government Act bears that out clearly. This section provides thus; 5
- “1. A State organ, public office, public entity or local authority shall not transfer assets and liabilities during the transition period. 20
 2. Despite subsection (1), a State organ, public office, public entity or Local authority shall—
 - a. During Phase One, transfer assets or liabilities with the approval of the Authority, in consultation with the National Treasury, the Commission on Revenue Allocation, the Ministry of Local Government and the Ministry of Lands; or 25
 - b. During Phase Two, transfer assets or liabilities with the approval of the Authority, in consultation with the National Treasury, the Commission on Revenue Allocation and the Cabinet Secretary responsible for matters relating to intergovernmental relations; and 30
 - c. Transfer immovable property, with the approval of the Authority, in consultation with the National Treasury, the Commission on Revenue Allocation and the Cabinet Secretary responsible for matters relating to intergovernmental relations and lands. 35
 3. The Authority may, on its own motion or on a petition by any person, review or reverse any irregular transfer of assets or liabilities in contravention of subsection (1). 40

4. Any transfer of assets or liabilities made in contravention of subsection (1) shall be invalid.”

178. From the pleadings before us, there is no evidence that any of the County Governments have properly taken over the assets and liabilities of Local Governments and to call upon any Governor to answer questions on the financial affairs of Local Authorities during the financial year 2012/2013 which fell in Phase One of the Transition period, would be an error or the part of the Senate. Such questions ought to be addressed to the Transition Authority which was never a party to this Petition.

What reliefs are available to the Petitioners”

179. We have addressed the three substantive questions arising from the Petition. Earlier in the judgment, we reproduced verbatim the four issues that were never addressed in Kerugoya HC Petition No 8 of 2014 and we are satisfied that we have given out answers to them.

180. It is our findings therefore that looking at the declarations and orders sought, prayers (a), (b), (d), (g), and (i) are all a reproduction of the law and we do not deem it fit to grant orders in that regard. Prayers (c), (f), (h), (j), (m), and (n) cannot be granted for reasons given above.

181. In the end only Prayers (e), (k), (l) and (o) should be granted.

182. As for costs, this matter raised important issues relating to the role of the Senate *vis-vis* County Governments on matters of financial oversight. The Parties and the wider public are the beneficiaries of the orders to be made and further, any costs to be paid would ultimately come from public coffers. Let each Party therefore bear its own costs.

Final Orders

183. From what we have said above, the following prayers are denied and are consequently Dismissed:

a. A declaration that in view of the provisions of 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 co-operation, the Senate cannot exercise powers under article 125 of the Constitution in a manner that cripples County Governments.

d. A declaration that resonating the intention of article 96 of

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the Constitution and 226(2) of the Constitution of Kenya and section 148 of the Public Financial Management Act 2012, the Senate cannot summon Governors to personally appear before it to answer questions on County Government finances in total disregard of the procedure and requirements of public finance management that is stipulated by the Public Finance Management Act, 2012.	1
f. A declaration that resonating the intention of articles 6(2), 96, 174, 185(3) and 226(2) of the Constitution of Kenya, the Senate cannot summon an accounting officer of the County Government to answer questions on County financial management, at the first instance. It must first allow the oversight and legislative mechanisms at the County level to be concluded given that these Governments are functional distinct and are based on the principle of Separation of Powers.	5
g. A declaration that resonating the intention of article 6(2), 96, 174, 185(3) and 189 of the Constitution and within the meaning of article 226(2) and Article 96(4) of the Constitution of Kenya, the Senate's oversight role over nationally collected revenue to Counties is not identical to the County Assembly's oversight over the executive.	10
h. A declaration that resonating the intention of article 96(4) of the Constitution and in view of the provisions of article 185(3) and Article 226(2) of the Constitution of Kenya, the Senate's power is limited to oversight over national agencies which manage national revenue allocated to Counties such as the National Treasury.	15
i. A declaration that resonating the intention of article 6(2), 189(1), 174 and 96(4) of the Constitution and in view of the provisions of article 185(3) of the Constitution of Kenya the County Assembly is the sole organ that can undertake oversight over the County Executive.	20
m. A permanent injunction be issued to restrain the Senate from summoning County Governors to appear before it to answer questions on County public financial management.	25
n. A permanent injunction be issued to restrain the Senate from summoning Accounting Officers at the County level to appear before it to answer questions on County public financial management.	30
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The following prayers are mere restatements of the law:	1
b A declaration that the Senate is bound by the provisions of article 189(1) of the Constitution to perform its functions and exercise its powers, in a manner that respects the functional and institutional integrity, as well as the constitutional status and institutions at the County level.	5
d A declaration that the Senate is bound by the methods, procedures and requirements of the Public Finance Management Act 2012 when undertaking its oversight and summoning powers.	10
The following prayers are Granted:	
e. A declaration that resonating the intention of article 96 of the Constitution and 226(2) of the Constitution of Kenya and section 148 of the Public Finance Management Act, 2012, it is proper, legal, and constitutional for Members of the Executive Committee responsible for finance and the Chief Officers responsible for finance to appear before the Senate or any of its Committee to answer on County Government finances and to generally provide information that helps the Senate to undertake its oversight functions as stipulated in article 96 of the Constitution.	15
(k) A declaration that the Senate does not have sole constitutional powers to direct National Treasury and Controller of Budget not to release funds to Counties without following the provisions of article 225 of the Constitution.	25
(l) A declaration that stoppage of funds to a County public entity can only be done by following the provisions of article 225 of the Constitution.	30
(o) An order or certiorari to quash the Resolution of the Senate issued on 7th August 2014 that purports to direct the National Treasury and the Controller of Budget not to release funds to Kiambu, Bomet, Kisumu and Murang'a Counties.	35
184. Each Party shall bear its own costs.	
185. We apologise for the delay in delivering this judgment as members of this Bench were involved in other pressing matters. We thank counsel and the Parties for understanding.	40
186. Orders accordingly.	

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**Ng’etich & another v Governor, Bomet County
Government & 5 others [2015] KLR – HCK**

High Court at Nairobi (Constitutional
and Rights Division)
I Lenaola, J

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May 29, 2015

Petition No 415 of 2014

Brief facts

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The Petition sought to impugn the budget making process undertaken by relevant organs of the Bomet County Government for allegedly having flouted the Constitution, The Public Finance Management Act (PFMA) of 2012 and the County Government Act of 2012. It was alleged that the 1st, 2nd, 3rd and 4th Respondents breached article 201 of the Constitution by passing a law that was in clear violation of sections 125, 126, 128, 129, 130 and 131 of PFMA. Further, it was argued that the County Assembly of Bomet violated article 196 of the Constitution by not conducting public participation on the budget estimates for the financial year ending 2015 and therefore failed to subject the Appropriation Act to public scrutiny contrary to article 10(2) of the Constitution. The following were the summary facts;

- a. After the resubmission of the budget estimates on 5th June 2014, a report recommending amendments to the Budget estimates was made by the Budget and Appropriation Committee to the Assembly on 24th June 2014. The County Assembly approved the proposed amendments. 25
- b. The CECF did not publish the budget estimates as approved by the County Assembly in violation of section 129(6) of the PFMA. 30
- c. On 30th June 2014, the Bomet County Appropriation Bill dated 27th June 2014 was tabled in the County Assembly and it was passed with amendments in order to bring it to conformity with the budget estimates approved by the County Assembly. 35
- d. On 2nd July 2014, the Governor of Bomet County referred the Bomet County Appropriation Bill passed on 30th June 2014 back to the County Assembly with a memorandum indicating reasons why he could not assent to it. 40
- e. The County Assembly considered the Memorandum on 16th July 2014 and passed the Bomet County

Appropriation Bill, 2014, for a second time without taking into considerations the concerns raised by the Governor.

f. The Bill was resented to the Government on 17th July 2014 for assent but he refused to do so.

The budgetary process was later restarted afresh through submission of fresh budget estimates which were referred to the Committee on Budget and Appropriation which in its report tabled on 28th July 2014 rejected the estimates. However, on the same day, the Leader of the Majority moved a motion for revisiting the Budget Estimates which motion was overwhelmingly supported by a majority of the members. The Budget and Appropriation Committee Report tabled earlier in the House was expunged and the Budget Estimates were approved as submitted and the Bomet County Appropriation (Amendment) Bill, 2014 was passed.

Issues

- Whether the enactment of the Bomet County Appropriation Act 2014 and the Bomet County Appropriation (Amendment) Act 2014 followed the Budgetary making process as provided for by the Constitution and the PFMA .
- Whether the Bomet County Government had an Appropriation Act governing its financial management for the financial year 2014/2015
- Whether there was public participation in the enactment of the Bomet County Appropriation Act 2014.
- Whether the relevant Committee of the County Assembly discussed and reviewed the Budget Estimates prepared by CECF and whether, subsequently the same were properly tabled before the County Assembly and whether the Assembly then considered the Budget Estimates.
- Effect of Governor's failure to assent to a County Legislation?
- What was the effect of non-gazettment of a County legislation?
- What was the procedure for a supplementary budgetary process?
- What reliefs were available to the Petitioners?

Constitutional Law – Devolved Government – budgetary making process – whether the enactment of the Bomet County Appropriation Act 2014 and the Bomet County Appropriation (Amendment) Act 2014 followed the Budgetary making process as provided for by the Constitution and the PFMA – supplementary budgets – whether the relevant Committee of the County Assembly discussed and reviewed the Budget Estimates prepared by CECF and whether, subsequently the same were properly tabled before the

County Assembly and whether the Assembly then considered the Budget Estimates – Constitution of Kenya 2010, article 196 – Public Finance Management Act, sections 125(1), 135. 1

Constitutional Law – legislative process – county legislation – failure of a Governor to assent to a bill into law – effect of Governor’s failure to assent to County Legislation – County Governments Act, sections 24(1)-(4), 25. 5

Constitutional Law – national values – public participation – the nature of consultations in the process of enacting a statute that would meet the constitutional requirements for public participation – whether there was public participation in the enactment of the Bomet County Appropriation Act 2014 effect of enacting such an Act without public participation – Constitution of Kenya, 2010, articles 10 & 119; Bomet County Appropriation Act, 2014. 10

Words and Phrases – “effect” – the meaning of taking effect in County Legislation – if taken as a noun, as “a result, outcome or consequence”. If taken as a verb, it means “to bring about; to make happen” and more importantly – “effective” is defined as of a statute, order or contract etc) in an operation at a given time. 15

Words and Phrases – “Effective date” is also defined as “the date on which a statute, contract ... becomes enforceable or otherwise takes effect, which sometimes differs from the date on which it was enacted or signed”. 20

The County Government budget process under section 125(1) of the **Public Finance Management Act (PFMA)**; 25

“(1) ...

- a. Integrated development planning process which shall include both long term and medium term planning;
- b. Planning and establishing financial and economic priorities for the County over the medium term; 30
- c. Making an overall estimation of the County Government’s revenues and expenditures;
- d. Adoption of County Fiscal Strategy Paper;
- e. Preparing budget estimates for the County Government and submitting estimates to the County Assembly; 35
- f. Approving of the estimates by the County Assembly;
- g. Enacting an appropriation law and any other laws required to implement the County Government’s budget; 40
- h. Implementing the County Government’s budget; and

i. Accounting for, and evaluating, the County Government’s budget revenues and expenditures.	1
(2) The County Executive Committee member for Finance shall ensure that there is public participation in the budget process.”	5
The law on the manner that a County Bill becomes law is contained in section 24 of the County Government Act and it provides as follows;	
“(1) The Speaker shall, within fourteen days, forward a Bill passed by the County Assembly to the Governor	10
(2) The Governor shall within fourteen days after receipt of a Bill –	
(a) assent to the Bill; or	
(b) refer the Bill back to the County Assembly with a memorandum outlining reasons for the referral.	15
(3) If the Governor refers a Bill back to the County Assembly, the County Assembly may, following the appropriate procedures under this Section –	
(a) amend the Bill taking into account the issues raised by the Governor; or	20
(b) pass the Bill without amendment.	
(4) If County Assembly amends the Bill taking into consideration the issues raised by the Governor, the Speaker shall within fourteen days submit the Bill to the Governor for assent.	25
(5) If a County Assembly passes the Bill a second time, without amendment, or with amendments which do not accommodate the Governor’s concerns by a vote supported by two-thirds of members of the County Assembly, <u>the Speaker shall within seven days re-submit the Bill to the Governor and the Governor shall within seven days assent to the Bill.</u>	30
(6) If the Governor does not assent to a Bill or refer it back within the period referred to under this Section, the Bill shall be taken to have been assented to on the expiry of that period.” (Emphasis added)	35
Supplementary budgets under section 135 of the PFMA	
“(1) A County Government may spend money that has not been appropriated if the amount appropriated for any purpose under the County Appropriation Act is insufficient or a need has arisen for expenditure for a	40

purpose for which no amount has been appropriated by that Act, or money has been withdrawn from the County Government Emergency Fund.	1
(2) A County Government shall submit a supplementary budget in support of the additional expenditure for authority for spending under subsection (1).	5
(3) In complying with subsection (2), a County Government shall describe how the additional expenditure relates to the fiscal responsibility principles and financial objectives.	10
(4) Except as provided by subsection (5), the approval of the County Assembly for any spending under this Section shall be sought within two months after the first withdrawal of the money.	15
(5) If the County Assembly is not sitting during the time contemplated in subsection (4), or is sitting but adjourns before approval has been sought, approval shall be sought within fourteen days after it next sits.	20
(6) when the County Assembly has approved spending under subsection (2), a supplementary Appropriation Bill shall be introduced for the appropriation of the money spent.	25
(7) In any financial year, the County Government may not spend under this Section more than ten percent of the amount appropriated by the County Assembly for that year unless that County Assembly has, in special circumstances, approved a higher percentage."	30
Section 25(1) and (2) of the County Governments Act stipulates that;	
"25(1) A legislation passed by the County Assembly and assented to by the governor shall be published in the County Gazette and Kenya Gazette within seven days after assent.	35
(2) Subject to subsection (3), the County Assembly legislation shall come into force on the fourteenth day after its publication in the County Gazette and Kenya Gazette whichever comes earlier, unless the legislation stipulates a different date on or time at which it shall come into force."	40
Held:	
1. Under article 258(2) of the Constitution, a person acting on his own behalf or on behalf of another person had a right to institute	

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- court proceedings claiming that the Constitution had been violated. 1
In that regard, the Petitioners’ had filed the Petition claiming a
violation of articles 10, 174, 176, 196, 199, 201, 202, 203, 207 and
126 of the Constitution in respect of the Bomet County budgetary 5
process for the financial year 2014/2015. In the circumstances, the
Petitioners had the *locus standi* to file/institute a claim alleging that
the Constitution had been violated.
2. It was an established principle in constitutional litigation that
where a person sought redress from the High Court for an alleged 10
violation of the Constitution, he had to set out with a reasonable
degree of precision the article of the Constitution that he alleged
to have been violated, the manner in which it had been violated,
the facts in support of that allegation and the reliefs he was seeking
from the Court. It was clear that the Petitioner had fulfilled the rule 15
established in Anarita Karimi Njeru.
3. Section 104(1)(a)(b) of the PFMA provided that it was the
responsibility of the County Treasury to prepare the Annual Budget
for a County and co-ordinate the preparation of Estimates of
Revenue and Expenditure of a County Government. The procedure 20
for the budgetary process was then provided for in section 117
of the PFMA. It started with the preparation of a County Fiscal
Strategy Paper which was then submitted for approval to the County
Assembly by 28th February of each financial year. In preparing the
County Fiscal Strategy Paper, the County Treasury was obligated 25
to specify the broad strategic priorities and policy goals that would
guide the County Government in preparing its budget for the
coming financial year. Thereafter, under section 118 of the PFMA,
the County Treasury prepared a County Budget Review and
Outlook Paper in respect of the County for each financial year and 30
submitted the paper to the County Executive Committee by 30th
September of that year. The County Executive Committee was then
obligated to discuss that Outlook Paper and after approval, it was laid
before the County Assembly before it was published and publicised. 35
4. It was within the mandate of the County Treasury, the County
Executive and the County Assembly to prepare and approve budgets
for a County. However, all the above actions had to be taken within
the set and strict timelines. In that regard, under sections 117, 125,
129 and 133 of the PFMA, the following instruments had to be 40
passed during the budgetary process in each financial year;
- a. On 30th August of each year, the County Executive

County Government would prepare an annual cash flow projection for the County for the next financial year, and;	1
g. Submit the cash flow projection to the Controller of Budget with copies to the Intergovernmental Budget and Economic Council and the National Treasury.	5
h. Following approval by the County Executive Committee, the County Executive Committee Member for Finance would by the 30 th April submit to the County Assembly the budget estimates, supporting documents, and any other Bills required implementing the budget, except the Finance Bill. The CECF ensured that the estimates submitted were in accordance with the resolutions adopted by the County Assembly on the County Fiscal Strategy Paper.	10
i. Each County Assembly Clerk had to prepare and submit to the County Assembly the budget estimates for the County Assembly and a copy had to be submitted to the County Executive Committee Member for finance. (Section 129(3) PFMA, 2012). The County Executive Committee Member for Finance had to prepare and present his comments on the budget estimates presented by the County Assembly clerk.	15
j. The CECF had to within reasonable time after submission publish and publicise the budget estimates.	20
k. Upon approval of the budget estimates by the County Assembly, the County Executive Committee Member for Finance had to prepare and submit a County Appropriation Bill to the County Assembly of the approved estimates.	25
l. The County Assembly had to consider the County Government budget estimates with a view to approving them, with or without amendments, in time for the relevant appropriation law and any other laws required to implement the budget to be passed by the 30 th June in each year. (Section 131 PFMA, 2012)	30
5. Applying the law in the instant Petition, the Speaker of the County Assembly should have forwarded to the Governor the appropriation Bill within seven days of its assent and the Governor had seven days upon receipt of the Bill to assent it to the law. The Bill was first passed on 30 th June 2014. It was sent to the Governor for assent but on 2 nd July 2014, he declined to do so but instead sent it back	35
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- with a memorandum explaining his reasons for not passing it. On 16th July 2014, the County Assembly rejected his reasons for non-assent and passed the Bill for a second time and on 17th July 2014, it was sent back to the Governor for assent, a second time. All those processes were well within section 24(1) – (4) of the County Government Act. Once it was sent to him a second time, then under section 24(5), he had seven days to assent to it and failure to do so would mean that the Bill would become law under section 24(6) aforesaid. Because the Governor did not assent to the Bill by 25th July 2014 but instead chose to write his letter of 22nd July 2014 in rejection of the Bill, there was no doubt that the Bill became law. 1
6. From the facts on record, it was evident that the County Assembly reconvened during the course of the day and the Leader of the Majority moved a motion for revisiting the Budget Estimates which motion was overwhelmingly supported by a majority of the members. The Budget and Appropriation Committee's report and its recommendations earlier tabled was expunged and the Budget Estimates were approved as submitted and the Bomet County Appropriation (Amendment) Bill, 2014 was purportedly passed. Having found that the Bomet County Appropriation Bill originally passed on 16th July 2014, although not assented to, had become law, could it therefore be said that there were two Appropriation Acts for Bomet County? 5
7. Sections 24 of the County Government Act showed that the said law envisaged a situation where the Governor could on two occasions refuse to assent to a Bill becoming law. However, on the second occasion, he had no choice but to assent to a Bill referred to him "without amendment or with amendments which do not accommodate his concerns" and which Bill had been supported by two-thirds of members of the County Assembly. Failure to do so would render the Bill as law by virtue of section 24(6) of the County Government Act. The obvious reason for that provision was that there had to be an end to the legislative process and more specifically, when it related to the budget making process which as shown had strict timeframes embedded in the law. 10
8. The Governor of Bomet County's objection to the Appropriation was partly because of the failure by the County Assembly to adhere to the ceilings set by the Commission on Revenue Allocation and his insistence that the Assembly ought to pass a vote on account that tally with the estimates submitted. The Court in *Speaker County Assembly of Nakuru & 46 others v The Commission of Revenue* 15
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- Allocation & 2 others* Petition No 368 of 2014 had addressed the issue of the CRA ceilings and the Governor’s position was vindicated but that was all that could be said of his decision to act as if he had the mandate to superintend, supervise or direct the County Assembly on the exact law to enact. Although a Governor was entitled to disagree with the County Assembly, he had to do so within the law as set out in sections 24 and 30 of the County Government Act and that was by a memorandum outlining his reasons for referral of a Bill back to the Assembly. 1
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9. A reading of section 135 of the PFMA revealed that it provided for supplementary budgets. It appeared that the budgetary process was in fact restarted afresh through submission of fresh budget estimates which were referred to the Committee on Budget and Appropriation which in its report tabled on 28th July 2014 rejected the estimates. However, the County Assembly Hansard proceedings produced in evidence by the 2nd Respondent demonstrated that on the same day, the Leader of the Majority moved a motion for revisiting the Budget Estimates which motion was overwhelmingly supported by a majority of the members. The Budget and Appropriation Committee Report tabled earlier in the House was expunged and the Budget Estimates were approved as submitted and the Bomet County Appropriation (Amendment) Bill, 2014 was passed. 10
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10. The approach taken to restart the budget process with fresh estimates appeared to have been the most convenient one in the political circumstances obtaining at that time. However, the title of the end product of that process being Bomet County Appropriation (Amendment) Bill was misplaced. Since the Appropriation Bill had become law, it was inconceivable that before the said Bill had properly become a County Act and monies expended under it, an amendment as envisaged by section 135 of the PFMA could properly be made. 20
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11. Public participation as a national value under article 10 of the Constitution, was an expression of the sovereignty of the people articulated under article 1 of the Constitution. Article 185 vested legislative authority of a County Government in a County Assembly. Article 196(1)(b) obligated a County Assembly to facilitate public participation in its legislative business. Public participation in matters of public finance was also reinforced under article 201(a) in that it provided that there shall be openness and accountability, including public participation in financial matters. The County Government Act had also set out elaborate parameters on public 30
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- the 5th Respondent was to oversee the implementation of the budgets of the National and County Governments by authorizing withdrawals from public funds under articles 204, 206 and 207 of the Constitution. Under article 228(5), the Controller of Budget was not to approve any withdrawal from a public fund unless that withdrawal was authorized by law. Further, section 109(6) of the PFMA provided that the County Treasury was to obtain the approval of the Controller of Budget before withdrawing money from the County Revenue Fund under the authority of an Act of the County Assembly appropriating money for a public purpose, an Act of Parliament or county legislation that imposed a charge on that fund or in accordance with section 134 and 135 of the PFMA. The 5th Respondent could not approve withdrawals from the County Revenue Fund for Bomet County without a properly gazetted Appropriation Act. It had been argued that a letter indicating that the Appropriation Act as enacted on 25th July 2014 had been sent to the Government Printer for publication and there was therefore a presumption of gazettment, however, no Gazette Notice was produced to support that presumption.
16. It was the responsibility of the 5th Respondent to only authorize withdrawals from the County Revenue Fund if the law and the budgetary process as envisaged by the Constitution and the Public Finance Management Act, 2012 had been adhered to. In instances where the 5th Respondent was of the opinion that the budget process leading to the enactment of Appropriation Act had been flawed, it had to seek a remedy from the Court as the ultimate guardian of the Constitution and not authorize a withdrawal that was based on an equally flawed legislation.
17. Under article 199(1) of the Constitution, a County legislation “does not take effect” unless published in the Gazette. Article 199(1) envisaged both a date of enactment of a law and the date it takes effect. In the present circumstances, there was all evidence that the Appropriation Act was enacted once it became law by the failure of the Governor to assent to it. However, it could only become enforceable once it was gazetted. “Enforcement” meant “the act or process of compelling compliance with a law, mandate, command, decree or agreement”
18. Without the Appropriation Act being properly gazetted, it could not be acted upon and in effect no withdrawal of public funds could be properly made under it. Gazettement was not a mere formality, a constitutional obligation could not be a formality and the 5th

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- Respondent had no lawful reason to act without the Act being gazetted. That fact rendered the Appropriation Act unconstitutional to the extent that it was implemented in breach of article 199(1) of the Constitution. 1
19. The office of the 5th Respondent was the organ constitutionally created to ensure that the principles of public finance which were stipulated under article 201 of the Constitution were observed and fulfilled. It had to therefore be very keen in performing its function as the watchdog of the people on public finance. Had it observed its duties faithfully, the Petition would perhaps have been avoided and saved the taxpayers money that had already been expended in implementing a budget without a properly effective law in support thereof. 5 10
20. (**Obiter**) “I have come to the end of this judgment, but, I am in the very untidy position of having to craft appropriate remedies given the flaws in the Bomet County Budgetary process and the blatant violations of the Constitution and the PFMA as I have shown above. I say so because on the one hand I am concerned about the failure to adhere to the Constitution and the law in preparing the Bomet County budget, and on the other hand I am aware that Bomet County has implemented the projects it set out to undertake in the 2014/2015 financial year and the County Government has spent money in that regard. I should also not forget the fact that the financial year is coming to an end in a few weeks’ time.” 15 20 25
- Petition partly allowed*
- a. *The Budget making process of Bomet County for the financial year 2014-2015 declared unlawful and unconstitutional.*
- b. *The Bomet County Appropriation Act of 2014 and the Bomet County Appropriation [Amendment] Act of 2014 declared unprocedural, unconstitutional, null and void.* 30
- c. *Prayers (c), (d) (e) and (g) of the Petition dismissed.*
- d. *Each Party to bear its own costs as the matter was in the best interests of the residents of Bomet County and the Public at large* 35

Cases

East Africa

1. *Anarita Karimi Njeru v Republic (No 1)* [1976–1980] 1 KLR 1272; [1979] KLR 154 – (Followed)
2. *Association of Gaming Operators Kenya & 41 others v Attorney General & 3 others* Petition No 56 of 2014 – (Mentioned) 40
3. *Commission for the Implementation of the Constitution v Parliament*

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- of Kenya & 5 others* Petition No 454 of 2012 – (Mentioned) 1
4. *Gakuru, Robert & another v Governor Kiambu County & 3 others*
Petition No 532 of 2013 – (Mentioned)
5. *Institute of Social Accountability & another v National Assembly &
4 others* Petition No 71 of 2013 – (Followed) 5
6. *Law Society of Kenya v Attorney General & 2 others* Petition No 318
of 2012 – (Explained)
7. *Munyendo & 908 others v Attorney General & another* [2013] 1
KLR – (Mentioned)
8. *Nairobi Metropolitan PSV Saccos Union Limited & 25 others v
County Government of Nairobi & 3 others* Petition No 486 of 2012
– (Mentioned) 10
9. *Ogendo, Richard Dickson & another v Attorney General & 5 others*
Petition No 70 of 2014 – (Mentioned)
10. *Speaker County Assembly of Nakuru & 46 others v Commission of
Revenue Allocation & 2 others* Petition No 368 of 2014 – (Explained) 15
11. *Speaker of the Senate & another v Attorney General & 4 others*
Advisory Opinion No 2 of 2013 – (Mentioned)
12. *Trusted Society of Human Rights Alliance v Mumo Matemu & another*
Petition No 229 of 2012 – (Mentioned) 20

South Africa

1. *Minister of Health and another v New Clicks South Africa (Pty) Ltd
and others* 2006 (2) SA 311; [2005] ZACC 14 – (Mentioned)

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Statutes

East Africa

1. Appropriation Act, 2014 (Act No 9 of 2014) In general – 30
(Interpreted)
2. Constitution of Kenya, 2010 articles 1,10,(2); 174; 176; 184; 185;
191(1); 196; 196(1)(b); 199(1); 201- 207; 224; 228(4); 258(2) –
(Interpreted)
3. County Governments Act, 2012 (Act No 17 of 2012) sections 24,
24(1)-(6); 25(1)(2); 30 – (Interpreted) 35
4. Public Finance Management Act, 2012 (Act No 18 of 2012) sections
104(1)(a)(b); 109(6); 117; 118; 123; 125,(1)-127,(1); 128; 129,(2)
(a),(3),(6),(7); 130; 131; 133; 135; 135,(1); schedule 2 section 12
– (Interpreted) 40

Advocates

1. *Mr Matwere* for 1st, 3rd and 4th Respondent

2. *Mr Sang* H/B for for 2nd Respondent 1

May 29, 2015, **I Lenaola, J** delivered the following Judgment. 5
Introduction

1. This Petition seeks to impugn the budget making process undertaken by relevant organs of the Bomet County Government for allegedly having flouted the provisions of the Constitution, The Public Finance Management Act (PFMA) of 2012 and the County Government Act of 2012. It has been alleged that the 1st, 2nd, 3rd and 4th Respondents breached article 201 of the Constitution by passing a law that was in clear violation of the provisions of sections 125, 126, 128, 129, 130 and 131 of PFMA. Further, that the County Assembly of Bomet violated article 196 of the Constitution by not conducting public participation on the budget estimates for the financial year ending 2015 and therefore failed to subject the Appropriation Act to public scrutiny contrary to the provisions of article 10(2) of the Constitution.. 10
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The Petitioners' case

2. The facts leading to this Petition are outlined in the Petitioners' Petition dated 18th August 2014 as follows;

3. That as at 31st August 2013, the County Executive Committee Member for Finance (CECF) had not issued any budget circular detailing the requirements of the budget for the 2014-2015 financial year. That he also did not submit the annual development plan to the County Assembly for approval and the budget estimates presented on 30th April 2014 to the County Assembly did not identify the Appropriations by Vote and programme as required by the law. Further, that in fact the revised budget estimates for the County Government were presented to the County Assembly on 5th June 2014. On 24th June 2014, the County Assembly approved the report of the Budget and Appropriation Committee which proposed amendments to the estimates as submitted by the CECF. It was their case therefore that the CECF ignored the approved budget estimates by the County Assembly and the said estimates were not reflected in the Appropriation Bill Supplement No 14 of 2014, which was enacted by the County Assembly on 30th June 2014. In addition, that the Governor declined to assent to the Appropriation Bill into law and on 2nd July 2014, returned it to the Speaker of the County 25
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Assembly with a memorandum stating that the Budget estimates had exceeded the budgetary ceilings set by the Commission on Revenue Allocation.	1
4. Thereafter on 16th July 2014, the County Assembly passed the Bill a second time and forwarded it to the Governor who failed to assent to it for the second time. A suit was thereafter filed by the County Assemblies Forum challenging the legality of the ceilings prescribed by the Commission on Revenue Allocation and Controller of Budget. On 25th July 2014, the County Assemblies Forum, The Council of Governors, the Commission on Revenue Allocation and Controller of Budget entered into a consent that a vote on account be taken by each County to provide for recurrent expenditure pending the determination of the Petition.	5 10
5. The County Assembly on 30th June 2014 passed a vote on account on the approved budget estimates allowing for the withdrawal of money to cater for recurrent expenditure. On 22nd July 2014, a vote was passed by the County Assembly based on the budget estimates submitted by the CECF. On the same date, the Governor wrote to the Speaker of the County Assembly asking that the Assembly revisit the Appropriation Bill. On 24th July 2014, the Deputy Governor wrote to the Speaker of the County Assembly giving notice that the County Government would not pay the salaries of staff of the County Assembly recruited by County Assembly Service Board.	15 20 25
6. On 24th July, 2014 the CECF submitted new budget estimates to the Assembly and on 28th July 2014, the County Assembly Committee on Budget and Appropriations reported to the Assembly that on the strength of legal advice by the Assembly’s Legal Department the new Budget Estimates ought not to be considered as the Appropriation Bill passed by the Assembly had already become law.	 30
7. On 28th July, 2014 the Appropriation (Amendment) Bill County Gazette Number 15 was tabled before the County Assembly. The Speaker ruled against the debate of the Bill citing it as unlawful as he considered that an Appropriation Bill can only be amended or modified through a Supplementary Appropriation or nullification by a Court of law. The County Assembly resumed its sittings at 5.00pm and proceeded to approve and pass the Budget Estimates submitted by CECF on 24th July 2014. The Assembly thereafter passed the Bomet County Appropriation (Amendment) Bill Supplement No 14.	 35 40

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8. The Petitioners, based on the above facts, submitted that the estimates approved by the Assembly on 28th July, 2014 did not involve public participation and the estimates were prepared contrary to the provisions of the PFMA and that they do not conform with the County Integrated Development Plan and Fiscal Strategy Paper. Further, that the County Appropriations (Amendment) Bill was not programme-based as the Annual Development Plan for Bomet County had yet to be approved by the County Assembly for purposes of the budget making process as provided under the PFMA. Further, that the discussion of the Appropriation Bill was not on the Order Paper for the afternoon session on 28th July 2014 and the Petitioners also claimed that if the law is to be strictly interpreted, Bomet County has two parallel and contradictory appropriation laws for the financial year 2014/2015 thus violating article 224 of the Constitution and section 135(1) of the PFMA. That the two Acts deal with matters which are not devolved such as the creation of the County Higher Education Board and lastly, they submitted that the Appropriation Acts were not gazetted as contemplated under article 199(1) of the Constitution.
9. The Petitioners have therefore prayed for the following declarations and orders;
- “(a) A declaration that the Budget making process of Bomet County for the financial year 2014-2015 be declared unlawful and unconstitutional.
 - (b) A declaration that the Bomet County Appropriation Act of 2014 and Bomet County Appropriation [Amendment] Act of 2014 are unprocedural, unconstitutional, null and void.
 - (c) A declaration that the CEC Finance Bomet County and the Governor of Bomet violated the Constitution by hijacking the budget making process for the year 2014-2015.
 - (d) An order that the Bomet County begins the Budget process afresh in full compliance of the Constitution and the Public Finance Management Act, 2012.
 - (e) An order that the Controller of Budget only release one-half of the amount included in the budget estimates submitted to the County Assembly on the 5th of June 2014 pending the passing of a new Appropriation Act that complies with the Constitution and statutes.

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- Respondents' Case 5

13. On the issue of public participation, he submitted that the public was involved in the budget making process and in the enactment of the Bomet County Appropriation Bill No 14 of 2014, which was later amended as the Bomet County Appropriation (Amendment) Bill No 15 of 2014. That advertisements were carried out in local newspapers of national circulation and members of the public were invited to participate in public forums held at the sub-County level to discuss inputs in the Bomet County budget estimates. In addition to the public forums held in the sub-counties, the budget estimates were also posted on the 4th Respondent's website and members of the public were invited to make inputs on the budget estimates. He further stated that the Bomet County Budget and Appropriation Committee specifically also carried out public participation at the sub-County level and added that the Bomet County Assembly

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- Budget and Appropriation Committee took into account the views of members of the public before making its recommendations to the County Assembly. Further, that members of the public and the media were not excluded from any of the County Assembly sessions in respect of the Budget Estimates and Appropriation Bill for the financial year 2014/2015. 1
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14. He also contended that he specifically ensured that the Bomet County Government Budget making process was conducted in a manner and within a time frame that was sufficient to permit public participation. 10
15. Mr Cheruiyot was emphatic that there is only one Appropriation Bill for Bomet County for the financial year 2014/2015 and that the Appropriation Bill No 14 of 2014 revealed that it had exceeded the ceilings developed by the Commission on Revenue Allocation and there was therefore need to have it amended. That the Appropriation Bill No 14 of 2014 had in any event not been approved by the Governor and on 28th July, 2014, the Bomet County Assembly passed the Bomet County Appropriation (Amendment) Bill No 15 of 2014 having taken into account the recommendations of the Controller of Budget. He claimed that there are no legal provisions requiring public participation at the stage of amending the Appropriation Bill. 15
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16. It was the further submission of the 1st, 3rd and 4th Respondents that there was adequate and appropriate public participation prior to the enactment of the Bomet County Appropriation Bill. On that point, they relied on the cases of *Commission for the Implementation of the Constitution v Parliament of Kenya and 2 others* Petition No 454 of 2012, *Moses Munyendo & 908 others v Attorney General and another* Petition No 16 of 2013 and *Law Society of Kenya v Attorney General* Petition No 312 of 2012. They thus submitted that they had all complied with the provisions of article 10, 184 and 196 of the Constitution on public participation, in the governance of Counties and in their legislative making processes. 25
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17. In concluding their case, they submitted that the Petitioners had not set out with some degree of precision the provisions of the Constitution they alleged to have been violated and even if they had done so, they had no *locus standi* to file the Petition. They therefore prayed that the Petition be dismissed with costs to the Respondents. 40

- The 2nd Respondent's case 1
18. The 2nd Respondent, the Speaker Bomet County, Mr GK Kipngetich, replied to the Petition through his Affidavit sworn on 5th September 2015. 5
19. He stated that the CECF submitted three different budget estimates to the County Assembly regarding the budget for the 2014/2015 financial year on diverse dates ie firstly on 30th April 2014, he forwarded the County Budget Estimates for the Budget Estimates of the County Assembly and those of the County Executive. Secondly, and as a result, on 5th June 2014 CEC member for Finance submitted budget estimates to the Budget and Appropriation Committee of the County Assembly. That the estimates submitted on 5th June 2014 were not in conformity with the Medium Term County Fiscal Strategy Paper approved by the County Assembly on 14th March 2014. 10 15
20. That between the 10th to the 12th of June 2014, the County Committee on Budget and Appropriation held five public participation forums in the five sub-Counties of Bomet County where members of the public gave their views on budget estimates. He stated that he received a letter dated 6th June 2014 from the Controller of Budget forwarding a report on the Bomet County draft budget estimates. In that report, it had been observed that the budget should be revised so as to conform to the budget approach and the County Planning Framework. Subsequently, the Budget Appropriation Committee invited the CECF Finance to clarify various aspects of the budget estimates but instead, he sent his Finance Officer who was unable to answer most of the questions put to him. That the County Assembly then invited all the CEC members for a consultative meeting which was held from 16th to 17th June 2014 and in that meeting, it was agreed that Members would forward an itemized budget for the development expenditure for the budget estimates to fully conform to the requirements of the PFMA and enable the Budget Appropriation Committee to finalize its report. However, the CEC members failed to submit the documents on time forcing the Budget Appropriation Committee to work on the estimates on their own. On 24th June 2014, the Budget Appropriation Committee tabled its report before the County Assembly recommending some amendments to the budget estimates which were approved by the County Assembly but the Budget estimates as approved by the County Assembly were not 20 25 30 35 40

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- published. 1
21. On 30th June 2014, the Bomet County Appropriation Bill dated 27th June 2014 prepared by the County Executive was tabled in the County Assembly and it was passed with amendments in order to bring it into conformity with the Budget Estimates approved by the Assembly. That the Governor then referred the said Bill back to the County Assembly together with a memorandum indicating reasons as to why he could not assent to the Bill as submitted and principally because, in his view, they had not adhered to the budgetary ceilings earlier referred to. On 16th July 2014, the County Assembly considered the Memorandum and passed the Bomet County Appropriation Bill 2014 for a second time and it was again submitted to the Governor for assent. On 22nd July, 2014 the Governor revisited the issue and stated that he did not agree with the budget estimates approved by the Assembly. Mr Kipngetich then replied to the Governor's letter informing him of the precarious position the County would find itself in, if it revisited the budget as the Budget Estimates and the Appropriation had been considered twice and the County Assembly had completed its legislative role after passing the Appropriation Bill a second time and had thus exhausted all legal avenues of revisiting the budget. He also informed him that the seven days' period within which he had to assent to the Bill and for it to become law had lapsed and as such the Bill had automatically become an Act by operation of law. 5 10 15 20 25
22. Thereafter, on 24th July 2014, and despite the above prevailing situation, the CECF submitted fresh budget estimates to the Assembly which was completely different from the estimates approved on 30th June 2014. The budget estimates as presented included the budget of the County Assembly and were tabled before the Assembly on 24th July 2014 and committed to the Committee of Budget and Appropriation to deliberate and present a report to the Assembly. On 28th July 2014, the Committee on Budget and Appropriation presented its report rejecting the purported estimates as being unlawful, un-procedural and having been overtaken by events. That on the same day, despite the absence of proper Budget Estimates, a Bill titled, "The Bomet County Appropriation (Amendment) Bill" dated 26th July 2014, was tabled before the County Assembly. Mr Kipngetich stated that he gave a ruling that the proceedings on the purported estimates were unlawful, irregular and not sustainable. The Assembly consequently stood adjourned 30 35 40

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- but that the House convened the same day to deliberate on the Annual Development Plan which did not proceed as it emerged that the Committee on Finance and ICT had sought more time to study the same. The Leader of the Majority in the Assembly then stood up and moved a motion for revisiting the purported budget estimates which was overwhelmingly supported by most members of the County Assembly thus overruling the Speaker's earlier ruling on the matter. 1 5
23. Mr Kipnetich claimed that immediately after the reading of the order to adopt the report of the Budget and Appropriation Committee, a motion was adopted expunging the recommendations by the Committee hence allowing the purported budget Estimates to be approved as submitted and the County Assembly went on to pass the Bomet County Appropriation (Amendment) Bill, 2014. He admitted that the Amendment Bill was similar to the Bomet County Appropriation Bill that had been rejected twice earlier save that the figures for the County Executive had been further broken down. Further, he admitted that the Budget Estimates approved on 28th July 2014, were not subjected to public participation and did not conform to the County Fiscal Strategy Paper approved by the County Assembly on 13th March 2014. That the Bill was taken through the first reading, second reading, committee stage and third reading all in one evening session. In addition, that the mutilation of the Budget and Appropriation Committee report took place while both the Chair and the Vice Chairperson of the Committee were absent and the Governor of Bomet County was following the proceedings as he was within the precincts of the County Assembly. 10 15 20 25
24. He claimed that the Budget for Bomet County for 2014/2015 financial year which has been uploaded in the Integrated Financial Management System (IFMS) and which is in operation does not bear any resemblance to any budget that has been passed by the Bomet County Assembly. 30 35
25. It was also the 2nd Respondent's submission that the 5th Respondent, the Controller of Budget, has abdicated her constitutional duty by approving withdrawals from the Bomet Revenue Fund without any law or by establishing the legality of that law. That the withdrawals from the Fund had also been approved and made based on a law that has never been gazetted as required by article 199 of the Constitution. 40

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26. In the end, the 2nd Respondent supported the Petition but opposed the Petitioner's prayer for costs and urged that the same be borne by the 3rd and 5th Respondents as they bear the greatest responsibility for the bungled budget process. 1
- The 5th and 6th Respondents' case 5
27. The 5th and 6th Respondents opposed the Petition through the Affidavit of Waweru Tuti, the Legal Officer in the office of Controller of Budget, sworn on 3rd October 2014.
28. He deponed that his office undertook investigations into the budget making process in Bomet County for the financial year 2014/2015 and that he was a member of the investigation team. The team conducted a desk review to examine the policy documents that guided the budget process in Bomet County and from their investigations, they were able to find that the CECF issued a budget circular to all accounting officers of all County entities save the Clerk of the County Assembly who denied having received the circular. He stated that the Circular was not dated and therefore it was impossible to establish whether it was issued within the statutory timeline of 30th August 2013. That the circular also complied with the requirements of section 128 of PFMA but did not outline the procedures to be followed for public participation in the budget making process. 10
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29. He also stated that the Bomet County Government did not prepare the Annual Development Plan as required to guide the budget for the financial year 2014/2015 and that the County Assembly passed the Annual Development Plan on 7th August 2014 in breach of the law. Further, that the County Fiscal Strategy Paper approved by the County Assembly differed from the one printed by the CECF. The investigative team could not however establish when the Debt Management Strategy Programme was submitted to the County Assembly or passed by the Assembly but as at 13th March, 2014, there was no evidence that it had been submitted to the County Assembly. 25
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30. He deponed that the County submitted the cash flow projections to the 5th Respondent on 12th June 2014 with copies to the National Treasury and the Intergovernmental Budget and Economic Council as required under section 127(1) of PFMA and the CECF had submitted the Budget Estimates for the financial year 2014/2015 while the Clerk of the County Assembly had also submitted the 40

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- Assembly's Budget Estimates for the same financial year to the County Assembly on 30th April, 2014 as required by law. He stated that during the investigations, they established that before the submission of the Budget Estimates on 30th April 2014, the County Treasury had conducted public participation forums in Chepalungu sub-County at Sigor Market, Bomet East sub-county at Longisa market, Sotik sub-County at Sotik market, Konoin sub-county at Mogogosiek Pavilion and Bomet Central sub-county at Silibwet market center, between 22nd April, 2014 and 24th April, 2014. 1
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31. It was also his position that the budget estimates submitted on 30th April 2014 were a line budget and contravened the provisions of the PFMA and were further not aligned with the County Fiscal Strategy Paper approved by the County Assembly. That the investigations also established that the budget process as stipulated in law was not strictly adhered to in Bomet County as statutory timelines were not met and some policy documents were not prepared and therefore concluded that the Bomet County Appropriation Act, the product of that flawed process, is irregular and therefore its implementation was contrary to the law. 15
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32. On the Amendment of the Appropriation Act, Mr Waweru stated that an Appropriation Act can only be amended in special circumstances such as those envisaged under section 135 of the PFMA and by way of a Supplementary Act. Even so, he stated that the Bomet County Appropriation (Amendment) Act did not comply with section 135(1) of the PFMA and consequently was not in conformity with the law. 25
33. Lastly, Mr Waweru claimed that had the Petitioners raised their complaints with the 5th Respondent before commencing the instant proceedings, they would have recommended for further investigations and that the Annual Development Plan would have been put in place and Budget Estimates for the financial year 2014/2015 reviewed with the aim of aligning them with the Annual Development Plan and the County Fiscal Strategy Paper approved by the County Assembly. He stated that the 5th Respondent authorizes withdrawal of funds from the County Revenue Fund based on an Appropriation Acts and she acted in good faith and on the assumption that the Appropriation Act had been enacted following proper budget process and evidence of a letter forwarding the Act to the Government Printer presupposes its legality and 30
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- constitutionality. 1
34. In its written submissions, the 5th Respondent submitted that from the Investigation Report filed in Court by the 5th Respondent, it was clear that the Bomet County Budget in issue was not prepared according to the law and the budget process was flawed since the statutory timelines had not been not adhered to prior to its enactment. 5
35. On the issue of public participation, the 5th Respondent submitted that the Investigation Report established that there was public participation in the process of preparation of the budget in Bomet County contrary to the allegation by the Petitioners. They relied on the case of *Association of Gaming Operators Kenya & 41 others v Attorney General & 3 others* Petition No 56 of 2014 and *Minister of Health and another v New Clicks South Africa (Pty) Ltd and others* (2006) (2) SA 311 (CC) in that regard. 10 15
36. On the issue of two Appropriations Act, the 5th Respondent submitted that by operation of the law, it is not practical to have two Appropriation Acts but that an amendment to an existing Act is permissible. Further, that the Appropriation Act can only be amended through a Supplementary Act which is only enacted where the amount appropriated for a certain program is insufficient or money has been withdrawn from the emergency fund. In addition, that under section 135 of the PFMA an amendment to the Appropriation Act should not exceed 10% of the budget. That the Bomet County Appropriation (Amendment) Act adhered to that provision as the amendment was limited to 4% of the total budget but it did not otherwise comply with section 135(1) of the PFMA as earlier stated and consequently it did not comply with the law. 20 25 30
37. On the legal effect of non-compliance with the statutory budgetary timelines and procedures, the 5th Respondent submitted that the processes are not fatal and can be cured through the recommendations made in their report. She therefore urged the Court to not to stop the withdrawal of funds to the County but to allow the County Government to correct the anomalies in the process as per the recommendations made within a timeframe and it submitted so because of the dire consequences a decision to suspend funds would have on the County. On that point he relied on the decision of the Supreme Court in Advisory Opinion Reference No 2 of 2013, *The Speaker of the Senate and another v The Hon Attorney* 35 40

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- General & 3 others.* He therefore urged the Court to specifically order that Counties should adhere to the Constitution and all relevant statutes in the budget making process. 1
- Determination 5
38. Having set out the Parties’ submissions as above, I am of the view that there are only three issues to determine in this Petition and they are as follows;
- i. Whether the Bomet County Appropriation Act 2014 and the Bomet County Appropriation (Amendment) Act 2014 are unprocedural, unconstitutional and therefore null and void. 10
 - ii. Whether the 5th Respondent had abdicated her constitutional duty by approving withdrawals based on non-existent law. 15
 - iii. What reliefs are available to the Petitioners?
39. Other issues raised in the Petition will be determined within the above three main issues but before I do so, I recall that there were two other issues raised by the 1st, 3rd and 4th Respondent that require determination *in limine*; firstly, that Petitioners have no *locus standi* to institute this Petition and secondly, that the Petition does not meet the constitutional threshold established in the case of *Anarita Karimi v Republic (supra)*, for it has not pleaded with precision how the Constitution has been violated. I shall pause here to address those two issues. 20 25
40. On the issue of *locus standi*, article 258(2) of the Constitution is to the effect that a person acting on his own behalf or on behalf of another person has a right to institute court proceedings claiming that the Constitution has been violated. In that regard, the Petitioners have filed this Petition claiming a violation of articles 10, 174, 176, 196, 199, 201, 202, 203, 207 and 126 of the Constitution in respect of the Bomet County budgetary process for the financial year 2014/2015. In the circumstances, I do find that the Petitioners have the *locus standi* to file institute a claim alleging that the Constitution has been violated and there is little more to say on the matter. 30 35
41. Secondly, it is now an established principle in constitutional litigation that where a person is seeking redress from the High Court for an alleged violation of the Constitution, he must set out with a reasonable degree of precision the article (provision) of the 40

Constitution that he alleges to have been violated, the manner in which it has been violated, the facts in support of that allegation and the reliefs he is seeking from the Court - See *Annarita Karimi Njeru v Republic (supra)* and *Trusted Society of Human Rights v Mumo Matemu and Another* (2013) eKLR .

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42. The Petitioners in the Petition before me have at pages 2 to 6 of their Petition, set out the legal foundation of the Petition and have set out the specific provisions of the Constitution as well as the PFMA on which the Petition is founded. At pages 6 to 9, they have pleaded the factual background to the Petition and at page 9, they have set out the particulars on the manner in which the Respondents have allegedly acted in violation of the Constitution and lastly, the reliefs they are seeking in this Court are set out at page 10. Looking at the Petition therefore, it is clear that the Petitioner has fulfilled the rule established in *Anarita Karimi Njeru (supra)*. In any event, the Respondents did not seem to have any difficulty in understanding the allegations of violation of the Constitution made by the Petitioners against them and it was on that understanding that they all replied to the Petition and answered the allegations made against them. I am therefore satisfied that the rule in *Anarita Karimi Njeru (supra)* has been met by the Petitioners. Having so held, I now turn to determine the issues framed elsewhere above.

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Whether the Bomet County Appropriation Act 2014 and the Bomet County Appropriation (Amendment) Act 2014 are unprocedural, unconstitutional and null and void

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43. It appears to me that this Petition spins largely around the issue of constitutionality of the Bomet County Appropriation Act, 2014 and also the Bomet County Appropriation (Amendment) Act, 2014. To determine the constitutionality or otherwise of the said County Statutes, I will have to consider the budgetary process in Bomet County which led to the enactment of the impugned Statutes and determine whether the said process adhered to the provisions of the Constitution and the PFMA. I will also consider the documents prepared in the budgetary process against the yardstick of the strict statutory timeframes envisaged under the PFMA. I will further resolve the issue whether the Bomet County Government has an Appropriation Act governing its financial management for the financial year 2014/2015 and lastly I will address my mind to the issue of public participation as a corollary to the above issue.

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44. The starting point would be the provisions of section 104(1)(a) 1
 (b) of the PFMA which provides that it is the responsibility of the
 County Treasury to prepare the Annual Budget for a County and co- 5
 ordinate the preparation of Estimates of Revenue and Expenditure
 of a County Government. The procedure for the budgetary process
 is then provided for in section 117 of the PFMA. It starts with
 the preparation of a County Fiscal Strategy Paper which is then 10
 submitted for approval to the County Assembly by 28th February of
 each financial year. In preparing the County Fiscal Strategy Paper,
 the County Treasury is obligated to specify the broad strategic
 priorities and policy goals that will guide the County Government in
 preparing its budget for the coming financial year. Thereafter, under
 section 118 of the PFMA, the County Treasury prepares a County
 Budget Review and Outlook Paper in respect of the County for 15
 each financial year and submits the paper to the County Executive
 Committee by 30th September of that year. The County Executive
 Committee is then obligated to discuss that Outlook Paper and
 after approval, it is laid before the County Assembly before it is
 published and publicised. 20
57. The County Government budget process therefore consists of the
 following stages as stipulated under section 125(1) of the PFMA;
 “(1) ...
- a. Integrated development planning process which 25
 shall include both long term and medium term
 planning;
 - b. Planning and establishing financial and economic
 priorities for the County over the medium term;
 - c. Making an overall estimation of the County 30
 Government’s revenues and expenditures;
 - d. Adoption of County Fiscal Strategy Paper;
 - e. Preparing budget estimates for the County
 Government and submitting estimates to the
 County Assembly; 35
 - f. implement Approving of the estimates by the
 County Assembly;
 - g. Enacting an appropriation law and any other laws
 required to the County Government’s budget;
 - h. Implementing the County Government’s budget; 40
 and
 - i. and Accounting for, and evaluating, the County

Government's budget revenues expenditures.	1
(2) The County Executive Committee member for Finance shall ensure that there is public participation in the budget process."	
58. As can be seen from the law above, it is within the mandate of the County Treasury, the County Executive and the County Assembly to prepare and approve budgets for a County. However, all the above actions must be taken within the set and strict timelines. In that regard, under the provisions of sections 117, 125, 129 and 133 of the PFMA, the following instruments must be passed during the budgetary process in each financial year;	5
i. On 30 th August of each year, the County Executive Committee member for finance issues a budget circular to all county entities. (Section 128 of the PFMA, 2012). The circular should contain key dates in the budget cycle; limits of each sector as recommended and key policy areas and issues to be taken into consideration when preparing the budgets.	10
ii. By 1 st September of each year, the County Executive Member for Planning submits an Annual Development Plan to County Assembly for approval, with a copy to the Commission on Revenue Allocation (CRA) and the National Treasury, (section 126(3) of the PFMA, 2012).	15
iii. On 30 th September, the County Executive Member for Finance prepares and submits the County Budget Review and Outlook Paper to the County Executive Committee (section 118 PFMA 2012).	20
iv. The County Treasury shall prepare and submit to the County Executive committee the County Fiscal Strategy Paper (CFSP) for approval and the County Treasury shall submit the approved Fiscal Strategy Paper to the County Assembly, by the 28 th February of each year. In preparing the CFSP, the County Treasury shall ensure that the CFSP is aligned with the national objectives in the Budget Policy Statement. (Section 117 PFMA, 2012). Not later than fourteen days after submitting the CFSP to the County Assembly, the County Assembly shall consider and may adopt it with or without amendments. The County Treasury must consider any recommendations made by the County Assembly	25
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when finalizing the budget proposal for the financial year concerned. The County Treasury shall publish and publicise the County Fiscal Strategy Paper within seven days after it has been submitted to the County Assembly.	1
v. On or before the 28 th February in each year, the County Treasury shall submit to the County Assembly a statement setting out the debt management strategy of the County Government over the medium term with regard to its actual liability and potential liability in respect of loans and its plans for dealing with those liabilities. (Section 123 PFMA, 2012)	5 10
vi. Not later than the 15 th June of each financial year, every County Government shall prepare an annual cash flow projection for the County for the next financial year, and;	15
vii. Submit the cash flow projection to the Controller of Budget with copies to the Intergovernmental Budget and Economic Council and the National Treasury.	
viii. Following approval by the County Executive Committee, the County Executive Committee Member for Finance shall by the 30 th April submit to the County Assembly the budget estimates, supporting documents, and any other Bills required implementing the budget, except the Finance Bill. The CECF ensure that the estimates submitted are in accordance with the resolutions adopted by the County Assembly on the County Fiscal Strategy Paper.	20 25
ix. Each County Assembly Clerk shall prepare and submit to the County Assembly the budget estimates for the County Assembly and a copy shall be submitted to the County Executive Committee Member for finance. (Section 129(3) PFMA, 2012). The County Executive Committee Member for Finance shall prepare and present his comments on the budget estimates presented by the County Assembly clerk.	30 35
x. The CECF shall within reasonable time after submission publish and publicise the budget estimates.	
xi. Upon approval of the budget estimates by the County Assembly, the County Executive Committee Member for Finance shall prepare and submit a County Appropriation Bill to the County Assembly of the approved estimates.	40

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f.	The CECF submitted budget estimates for the County Government on 30 th April 2014 as required by section 129(2) (a) of the PFMA to the Clerk of the County Assembly and the Clerk submitted budget estimates for the County Assembly for the financial year 2014/2015 to the County Assembly with a copy to the CECF as provided by section 129(3) of the PFMA.	1 5
g.	There were public participation forums between 22 nd April to 24 th April 2014 on the budget estimates.	10
h.	The budget estimates submitted on 30 th April 2014 were a line budget and therefore contravened section 12 of schedule 2 of the PFMA. The Budget and Appropriation Committee on 19 th May, 2014 resolved that the CECF should re-submit a programme-based budget. A programme-based budget was thereafter resubmitted on 5 th June 2014 in line with the recommendations made by the Controller of Budget.	15
61.	The above findings of the investigations by the 5 th Respondent were also confirmed by the Petitioners in the Affidavit of the 1 st Petitioner as well as the 2 nd Respondent in the Affidavit of Mr Kipng'etich. In addition, from the Affidavit of Mr Kipng'etich, the Speaker of the County Assembly, the following facts are discernible;	20
i.	After the resubmission of the budget estimates on 5 th June 2014, a report recommending amendments to the Budget estimates was made by the Budget and Appropriation Committee to the Assembly on 24 th June 2014. The County Assembly approved the proposed amendments.	25 30
ii.	The CECF did not publish the budget estimates as approved by the County Assembly in violation of section 129(6) of the PFMA.	35
iii.	On 30 th June 2014, the Bomet County Appropriation Bill dated 27 th June 2014 was tabled in the County Assembly and it was passed with amendments in order to bring it to conformity with the budget estimates approved by the County Assembly.	40
iv.	On 2 nd July 2014, the Governor of Bomet County referred the Bomet County Appropriation Bill passed on 30 th June 2014 back to the County Assembly with a memorandum indicating reasons why he could not	

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- assent to it. 1
- v. The County Assembly considered the Memorandum on 16th July 2014 and passed the Bomet County Appropriation Bill, 2014, for a second time without taking into considerations the concerns raised by the Governor. 5
- vi. The Bill was resent to the Government on 17th July 2014 for assent.
62. The Petitioners, 2nd, 5th and 6th Respondents are therefore in agreement that the Budget process as stipulated in law was not strictly adhered to in Bomet County. The thorny issue however relates to the allegation that there are two Appropriations Acts for the financial year 2014/2015 in Bomet County. 10
- Whether there are two Appropriation Acts for Bomet County 15
63. In that regard, section 129(7) of the PFMA provides that after the budget estimates are approved by the County Assembly, the CECF shall prepare the Appropriation Bill of the approved estimates. It is not disputed that the Bomet County Appropriation Bill was tabled in the County Assembly on 16th July 2014 for the second time without taking into consideration the concerns raised by the Governor. It is also not disputed that the 2nd Respondent thereafter immediately submitted the said Bill to the Bomet County Governor for assent but he failed to do so. The question therefore is whether the said Bill had become law” 20 25
64. The law on the manner that a County Bill becomes law is contained in section 24 of the County Government Act and it provides as follows; 30
- “(1) The Speaker shall, within fourteen days, forward a Bill passed by the County Assembly to the Governor
- (2) The Governor shall within fourteen days after receipt of a Bill –
- (a) assent to the Bill; or 35
- (b) refer the Bill back to the County Assembly with a memorandum outlining reasons for the referral.
- (3) If the Governor refers a Bill back to the County Assembly, the County Assembly may, following the appropriate procedures under this Section – 40
- (a) amend the Bill taking into account the issues raised by the Governor; or

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- (b) pass the Bill without amendment. 1
- (4) If County Assembly amends the Bill taking into consideration the issues raised by the Governor, the Speaker shall within fourteen days submit the Bill to the Governor for assent. 5
- (5) If a County Assembly passes the Bill a second time, without amendment, or with amendments which do not accommodate the Governor's concerns by a vote supported by two-thirds of members of the County Assembly, the Speaker shall within seven days re-submit the Bill to the Governor and the Governor shall within seven days assent to the Bill. 10
- (6) If the Governor does not assent to a Bill or refer it back within the period referred to under this Section, the Bill shall be taken to have been assented to on the expiry of that period." (Emphasis added) 15
65. Applying the law above in the instant Petition, it is clear that the Speaker of the County Assembly should have forwarded to the Governor the Appropriation Bill within seven days of its assent and the Governor had seven days upon receipt of the Bill to assent it to the law. I have seen a letter dated 17th July 2014 and annexed to the Affidavit of Mr Kipyegon forwarding the Bill to the Governor. That letter was received in the office of the Governor on 18th July 2014. The letter reads thus; 20
- “Ref BCA/GOV/13/8/14
- 17th July, 2014
- The Governor 30
- County Government of Bomet
- PO Box 19-20400
- BOMET
- Dear 35
- Ref: The Bomet County Appropriation Bill 2011
- The aforementioned subject matter refers.
- Following the tabling of the memorandum urging the County Assembly to reconsider the appropriation bill on the grounds set out therein, the County Assembly at its Morning 40

Sitting of the 16 th July 2014 at 9.00 am resolved to reject the memorandum and subsequently passed the Bill without any amendments. Attached herein are the votes and proceedings of the hansard and the order paper of the sitting.	1
I therefore forward the same for your further action.	5
Yours	
Signed	
Gk Kipng'etich	10
Speaker of the County Assembly”	
66. Upon receipt of the Bill, the Governor did not assent to the Bill but referred it back to the Assembly. In his letter dated 22 nd July 2014, he therefore wrote as follows;	15
“22 nd July, 2014	
Hon Speaker	
County Assembly of Bomet	20
PO Box 590-20400	
BOMET.	
Dear	
Vote on Account	25
The Assembly in its sitting on the 30 th June 2014 passed the Appropriation Bill 2014 with amendments. The Assembly on the same day passed the Vote on account based on the estimates done and passed by the Assembly. The same was done without regard to the PMF Act specifically section 134. Accordingly the estimates attached are not the estimates the Executive forwarded to the Assembly as required by the said section.	30
Section 134(2)(b) of the Public financial Management Act which provides thus;	35
“(b) Money withdrawn under sub-section (1) may not exceed, in total, one-half of the amount included in the estimates of expenditure submitted to the County Assembly for that year”.	40
It is my contention that the Assembly did not correctly	

interpret the law and the circular issued by Commission on Revenue Allocation setting the ceilings for Assemblies. 1

I therefore do not agree with the adjusted budget and the reduction on budget submitted based on the exact figures in the critical sectors such as health, Roads, Education and Social Services. The thirty Eight Million Shillings reduced in Health for example, is equivalent to the cost of drugs for a whole quarter. On roads there is a likelihood of heavy rains this season and roads will require heavy maintenance that will cost the County substantial sums of money. The Education and Social sectors are based on actual figures that cannot be reduced. (Attached please find the tabulated list of differences made on the submitted budget). 5 10

The Assembly therefore should note the following: 15

1. That the allocation to the County Assembly remain at 265 Million as per the ceiling set by CRA and not 699 as passed by the Assembly.
2. That in the last financial year the Assembly spent only 256 Million shillings and were able to execute its functions effectively; 20
3. Employment of staff should be maintained at the same figure of 32 employees as captured in the last Financial year budget which is inclusive of subordinate staff; 25
4. That Car loan and Mortgages and building of the chamber and other development is outside the 265 Million ceiling and will be dealt with separately;
5. That in the appropriation Bill, the recurrent amount for the Assembly of Kshs 265 Million is already factored in the total figure of R 101 because salaries and allowances are maintained in the County centrally and therefore the figure contained in R103 and R104 has not been included in the final tally of 4.6 billion. 30

In view of the foregoing the Assembly ought to pass a vote on account that tallies with the estimates submitted. 35

However, I still believe that the Assembly should pass the Appropriation Bill because it would be selfish for the people of Bomet not to receive services while we are paid salaries. Service in the critical sectors should continue. Drugs in our hospitals are getting depleted. Old people are expecting to 40

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- be paid and many other sectors will greatly suffered if the Bill is not passed. I therefore urge the Assembly to consider passing the Bill. 1
- Signed 5
- HE Isaac Ruto, EGH
- Governor
- County Government Of Bomet.” 10
67. The above letter was received by the County Assembly on 23rd July 2014 and the Speaker replied through a letter of the same date explaining the chronology of events leading to the enactment of the Appropriation Bill and the delays caused by the County Executive on the same. The Governor replied in a letter dated 24th July 2014 forwarding adjusted budget estimates for consideration by the County Assembly. The Speaker responded through a letter dated 28th July 2014 explaining to the Governor that the Bill had already become law once it was passed for the second time by the County Assembly. 15 20
68. At this juncture, I must revisit my initial question; had the Bill become law once the County Assembly passed it a second time and the Governor refused to assent to it but instead sent his letter of 22nd July 2014” The answer to that question is straight forward; the Bill was first passed on 30th June 2014. It was sent to the Governor for assent but on 2nd July 2014, he declined to do so but instead sent it back with a memorandum explaining his reasons for not passing it. On 16th July 2014, the County Assembly rejected his reasons for non-assent and passed the Bill for a second time and on 17th July 2014, it was sent back to the Governor for assent, a second time. So far as I can see, all those processes were well within the provisions of section 24(1) – (4) of the County Government Act. Once it was sent to him a second time, then under section 24(5) of the said, he had seven days to assent to it and failure to do so would mean that the Bill would become law under section 24(6) aforesaid. 25 30 35
69. Because the Governor did not assent to the Bill by 25th July 2014 but instead chose to write his letter of 22nd July 2014 in rejection of the Bill, there is no doubt that the Bill became law by that date subject to what I shall say later about its gazettment or lack of thereof. 40

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70. But that is not the end of the matter because fresh budget estimates were submitted to the County Assembly on 24th July 2014 including those of the County Assembly prepared allegedly without the involvement of the Clerk. The said budget estimates were then committed to the Committee on Budget and Appropriations. On 28th July 2014, there was a special sitting of the Assembly whereupon the Committee on Budget and Appropriations presented its report rejecting the estimates as being unlawful. On the same date, a Bill titled Bomet County Appropriation (Amendment) Bill 2014 was tabled before the County Assembly and the Speaker gave his ruling that there was already in place an Appropriation Act and as such there could only be an amendment to that Act through a Supplementary Appropriation Bill.
71. From the facts on record, it is evident that the County Assembly reconvened during the course of the day and the Leader of the Majority moved a motion for revisiting the Budget Estimates which motion was overwhelmingly supported by a majority of the members. The Budget and Appropriation Committee’s report and its recommendations earlier tabled was expunged and the Budget Estimates were approved as submitted and the Bomet County Appropriation (Amendment) Bill, 2014 was purportedly passed.
72. Having found that the Bomet County Appropriation Bill originally passed on 16th July 2014, although not assented to, had become law, can it therefore be said that there are two Appropriations Act for Bomet County”
73. My reading of section 24 of the County Government Act would show that the said law envisaged a situation where the Governor could on two occasions refuse to assent to a Bill becoming law. However, on the second occasion, he has no choice but to assent to a Bill referred to him “without amendment or with amendments which do not accommodate” his concerns and which Bill has been supported by two-thirds of members of the County Assembly. Failure to do so would render the Bill as law by virtue of the provisions of section 24(6) of the County Government Act. The obvious reason for that provision is that there must be an end to the legislative process and more specifically, when it relates to the budget making process which as shown above, has strict timeframes embedded in the law.
74. I should pause here and state that the Governor of Bomet

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- County's objection to the Appropriation was partly because of the failure by the County Assembly to adhere to the ceilings set by the Commission on Revenue Allocation and his insistence that the Assembly ought to pass a vote on account that tallies with the estimates submitted. 1
75. The Court in *Speaker County Assembly of Nakuru & 46 others v The Commission of Revenue Allocation & 2 others* Petition No 368 of 2014 addressed the issue of the CRA ceilings and the Governor's position was vindicated but that is all that can be said of his decision to act as if he had the mandate to superintend, supervise or direct the County Assembly on the exact law to enact. Although a Governor is entitled to disagree with the County Assembly, he must do so within the law as set out in sections 24 and 30 of the County Government Act and that is by a memorandum outlining his reasons for referral of a Bill back to the Assembly. 5
76. Having so said, what options then did the County Assembly have when it received the fresh budget estimates on 24th July 2014" According to the 2nd Respondent, there was no other option available because there was already in place an Appropriation Act and as such there could only be an amendment of that Act through a supplementary appropriation. This argument, as attractive as it may sound, is only partly true. I say so because a reading of section 135 of the PFMA reveals that it provides for supplementary budgets. 10
- For avoidance of doubt, the Section provides thus; 15
- “(1) A County Government may spend money that has not been appropriated if the amount appropriated for any purpose under the County Appropriation Act is insufficient or a need has arisen for expenditure for a purpose for which no amount has been appropriated by that Act, or money has been withdrawn from the County Government Emergency Fund. 30
- (2) A County Government shall submit a supplementary budget in support of the additional expenditure for authority for spending under subsection (1). 35
- (3) In complying with subsection (2), a County Government shall describe how the additional expenditure relates to the fiscal responsibility principles and financial objectives. 40
- (4) Except as provided by subsection (5), the approval of the County Assembly for any spending under this

- section shall be sought within two months after the first withdrawal of the money. 1
- (5) If the County Assembly is not sitting during the time contemplated in subsection (4), or is sitting but adjourns before approval has been sought, approval shall be sought within fourteen days after it next sits. 5
- (6) When the County Assembly has approved spending under subsection (2), a supplementary Appropriation Bill shall be introduced for the appropriation of the money spent. 10
- (7) In any financial year, the County Government may not spend under this Section more than ten percent of the amount appropriated by the County Assembly for that year unless that County Assembly has, in special circumstances, approved a higher percentage.” 15
77. From the facts before me, which in any event are not controverted, it appears that the budgetary process was in fact restarted afresh through submission of fresh budget estimates which were referred to the Committee on Budget and Appropriation which in its report tabled on 28th July 2014 rejected the estimates. However, the County Assembly Hansard proceedings produced in evidence by the 2nd Respondent demonstrate that on the same day, the Leader of the Majority moved a motion for revisiting the Budget Estimates which motion was overwhelmingly supported by a majority of the members. The Budget and Appropriation Committee Report tabled earlier in the House was expunged and the Budget Estimates were approved as submitted and the Bomet County Appropriation (Amendment) Bill, 2014 was passed. 20 25 30
78. It is unmistakable to me that the approach taken to restart the budget process with fresh estimates appeared to have been the most convenient one in the political circumstances obtaining at that time. However, the title of the end product of that process being Bomet County Appropriation (Amendment) Bill was misplaced. I say so because once I have found that the Appropriation Bill had become law, it is inconceivable that before the said Bill had properly become a County Act and monies expended under it, an amendment as envisaged by section 135 of the PFMA could properly be made. 35 40
79. The above finding would then lead me to another issue raised regarding the legality of the Bomet County (Appropriation) Act.

Public Participation

80. It has been alleged that both the Bomet County Appropriation and Appropriation (Amendment) Acts were enacted without public participation. On their part, the 1st, 3rd and 4th Respondents submitted that public participation was unnecessary in the passage of the Amendment Bill since it was merely an amendment to an existing Act and that in any event there was public participation before the passage of the Appropriation Act. 1 5
81. Public participation as a national value under article 10 of the Constitution is an expression of the sovereignty of the people articulated under article 1 of the Constitution. Article 185 vests legislative authority of a County Government in a County Assembly. Article 196(1)(b) obligates a County Assembly to facilitate public participation in its legislative business. Public participation in matters of public finance is also reinforced under article 201 (a) in that it provides that there shall be openness and accountability, including public participation in financial matters. The County Government Act has also set out elaborate parameters on public participation at the County level. 10 15 20
82. The High Court has also held that the mode and the manner of giving effect to public participation will vary from case to case and there must be some clear and reasonable level of participation afforded to the public - See the decisions in *Nairobi Metropolitan PSVs Saccos Union Ltd & 25 others v County of Nairobi Government & 3 others* (2013) eKLR; *Moses Munyendo & 908 others v Attorney General and another* (2013) eKLR; *Richard Dickson Ogendo & 2 others v Attorney General & 5 others* (2014) eKLR; and *Robert Gakuru & others v Governor Kiambu County & 3 others* (2014) eKLR. 25 30
83. The evidence before me is clear that there was public participation in the budget estimates forming the Appropriation Act which became law on 25th July 2014. Indeed, the 5th Respondent in his investigative report confirmed that fact and concluded firstly, that between 22nd April 2014 and 24th April, 2014, the County Treasury conducted public participation forums in Chepalungu sub-County at Sigor Market, Bomet East sub-County at Longisa market, Sotik sub-County at Sotik market, Konion sub-County at Mogogosiek pavilion and Bomet Central sub-County at Silibwet market center on budget estimates and views of the public were collected which were taken into account during the preparation of the Budget 35 40

Estimates tabled before the County Assembly. Similarly, between the 10th and the 12th of June 2014, the Committee on Budget and Appropriation held five public participation forums in the five sub-counties of Bomet County where members of the public gave their views on budget estimates. I have seen the list of attendees in those forums and the newspaper advertisements informing the members of the public about the planned public forums and I have no reason to disbelieve the fact that indeed those meetings were held.

77. However, that does not dispose of the issue in question. There is still the allegation that the Budget Estimates presented on 24th July 2014 and later passed in the Bomet County Appropriation (Amendment) Bill were not subjected to public participation. In that regard, the 1st, 3rd and 4th Respondent maintained that the estimates were mere amendments and as such did not require public participation afresh. To answer address that question, I shall revert to the averments made by Mr Kipngetich at paragraph 63 of his affidavit that;

“The Bomet County Appropriation (Amendment) Bill is indeed similar to the Bomet County Appropriation Bill that was rejected two times save that the figures for the executive were broken down”.

And that therefore public participation was not necessary in the passage of the former Bill.

78. That statement is of no consequence since the Appropriation (Amendment) Act was unlawful in any event but turning back to the concept of public participation, in *Law Society of Kenya v Attorney General Nairobi* Petition No 318 of 2012 [2013] eKLR the Court observed that,

“In order to determine whether there has been public participation, the court is required to interrogate the entire process leading to the enactment of the legislation; from the formulation of the legislation to the process of enactment of the statute.”

79. The words of this Court in the case of *The Institute of Social Accountability and Another v National Assembly* Petition No 71 of 2013 also ring true. The Court stated thus;

“We are aware that during the legislative process, amendments to the Bill may be moved during the Committee Stage and to hold that every amendment moved must undergo the process of public participation would negate and undermine

-
- the legislative process. In this case, we are satisfied that the amendment moved was in substance, within the parameters of what had been subjected to public participation during the review process. We find that the public was involved in the process of enactment of the CDF Act through the Task Force and review panel earlier set up by CDF Board. The amendment was within the parameters of what was in the public domain and in the circumstances we find and hold that the amendment bill did not violate the principle of public participation.” 10
80. I adopt the above findings and in the unique circumstances of this Petition I am unable to find that there was no public participation to the extent alleged by the Petitioners and the 2nd Respondent and specifically with regard to the enactment of the Appropriation Act. 15
81. In conclusion and in returning to the question posed earlier, it is obvious by now that only the Bomet County Appropriation Act, 2014 and not the Appropriation (Amendment) Act, 2014 that was properly passed subject to what I shall later and to that extent, it is erroneous to argue that there were two Appropriation Acts for Bomet County 20
- II. Whether the 5th Respondent had abdicated her constitutional duty by approving withdrawals based on non-existent law. 25
82. It was submitted that the 5th Respondent abdicated her constitutional duty by approving withdrawals from the County Revenue Fund based on non-existent law. The 5th Respondent while not really challenging that position, presented what I would term as mitigating factors against any harsh decision that may be taken against her or the budget of Bomet County. 30
83. The 5th Respondent claimed that there exists a Bomet County Appropriation Act properly placed before me law by operation of law. I have already stated elsewhere above that indeed that is the correct position. I have also found, based on my understanding of the facts before me as applied to the law, that the Bomet County Appropriation (Amendment) Bill was not lawful. 35
84. However, article 199(1) of the Constitution is crystal clear that; “a County Legislation does not take effect unless published in the Gazette”. In addition, section 25(1) and (2) of the County Government Act stipulates that; 40

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- “25(1) A legislation passed by the County Assembly and assented to by the governor shall be published in the County Gazette and Kenya Gazette within seven days after assent. 1
- (2) Subject to subsection (3), the County Assembly legislation shall come into force on the fourteenth day after its publication in the County Gazette and Kenya Gazette whichever comes earlier, unless the legislation stipulates a different date on or time at which it shall come into force.” 5 10
85. The law is therefore clear that a County legislation takes effect upon gazettement. From the evidence before me, the Appropriation Act aforesaid was never gazetted and that strictly means that there was no law that could be used to implement the budget for Bomet County for the 2014/2015 financial year. However, it is true that a budget for the 2014/2015 financial year for Bomet County was uploaded in the Integrated Financial Management System and has subsequently been implemented by the 5th Respondent despite the fact of non-gazettement of the said Appropriation law. 15 20
84. In that regard, under the provisions of article 228(4) of the Constitution, the mandate of the 5th Respondent is to oversee the implementation of the budgets of the National and County Governments by authorizing withdrawals from public funds under articles 204, 206 and 207 of the Constitution. Under article 228(5), the Controller of Budget shall not approve any withdrawal from a public fund unless that withdrawal is authorized by law. Further, under section 109(6) of the PFMA, the County Treasury shall obtain the approval of the Controller of Budget before withdrawing money from the County Revenue Fund under the authority of an Act of the County Assembly appropriating money for a public purpose, an Act of Parliament or county legislation that imposes a charge on that fund or in accordance with the provision of section 134 and 135 of the PFMA. The question in my mind therefore is how could the 5th Respondent approve withdrawals from the County Revenue Fund for Bomet County without a properly gazetted Appropriation Act? I do not have an answer to that question save for what Mr Waweru stated; that he had seen a letter indicating that the Appropriation Act as enacted on 25th July 2014 had been sent to the Government Printer for publication and there was therefore a presumption of gazettement. He failed to produce any Gazette Notice to support 25 30 35 40

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- that presumption. 1
85. It is of course the responsibility of the 5th Respondent to only authorize withdrawals from the County Revenue Fund if the law and the budgetary process as envisaged by the Constitution and the Public Finance Management Act, 2012 have been adhered to. In instances where the 5th Respondent is of the opinion that the budget process leading to the enactment of Appropriation Act has been flawed, it must seek a remedy from the Court as the ultimate guardian of the Constitution and not authorize a withdrawal that is based on an equally flawed legislation. 5 10
86. What then is the effect of non-gazettment of a County legislation? I have stated elsewhere above that under article 199(1) of the Constitution, a County legislation “does not take effect” unless published in the Gazette. What does “take effect” mean? 15
- Black’s Law Dictionary*, Eighth Edition defines “effect”, if taken as a noun, as “a result, outcome or consequence”. If taken as a verb, it means “to bring about; to make happen” and more importantly, “effective” is defined as “(of a statute, order or contract etc) in an operation at a given time”. “Effective date” is also defined as “the date on which a statute, contract ... becomes enforceable or otherwise takes effect, which sometimes differs from the date on which it was enacted or signed”. (Emphasis added) 20 25
87. I need not go beyond the above definitions because article 199(1) envisages both a date of enactment of a law and the date it takes effect. In the present circumstances, there is all evidence that the Appropriation Act was enacted once it became law by the failure of the Governor to assent to it. However, it could only become enforceable once it was gazetted. “Enforcement” means “the act or process of compelling compliance with a law, mandate, command, decree or agreement” – See *Black’s Law Dictionary*. 30
88. Without the Appropriation Act being properly gazetted, it could not be acted upon and in effect no withdrawal of public funds could be properly made under it. It may be argued that gazettment is a mere formality but I disagree; a constitutional obligation cannot be a formality and the 5th Respondent had no lawful reason to act without the Act being gazetted. That fact renders the Appropriation Act unconstitutional to the extent that it was implemented in breach of article 199(1) of the Constitution. 35 40

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89. In concluding this aspect of the Petition, the office of the 5th Respondent is the organ constitutionally created to ensure that the principles of public finance which are stipulated under article 201 of the Constitution are observed and fulfilled. It must therefore be very keen in performing its function as the watchdog of the people on public finance. Had it observed its duties faithfully, this Petition would perhaps have been avoided and saved the taxpayers money that has already been expended in implementing a budget without a properly effective law in support thereof. 1
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90. Having said so, what remedies are therefore available in this Petition?
- III. Reliefs available to the Petitioners
86. I have come to the end of this judgment, but, I am in the very untidy position of having to craft appropriate remedies given the flaws in the Bomet County Budgetary process and the blatant violations of the Constitution and the PFMA as I have shown above. 15
87. I say so because on the one hand I am concerned about the failure to adhere to the Constitution and the law in preparing the Bomet County budget, and on the other hand I am aware that Bomet County has implemented the projects it set out to undertake in the 2014/2015 financial year and the County Government has spent money in that regard. I should also not forget the fact that the financial year is coming to an end in a few weeks’ time. 20
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88. In addition, I also have in mind the submission made by the 5th Respondent in which she urged the Court not to stop funds to the County but allow the County Government to correct the anomalies in the budgetary process in accordance with recommendations made in her report. She also urged the Court in that regard to consider the dire consequences any adverse orders may have on the County Government and the people of Bomet. 30
89. In the above context therefore and granting appropriate remedies, the beginning would be by recourse to the prayers sought in the Petition. 35
90. Prayer (a) was worded as follows;
- a. A declaration that the Budget making process of Bomet County for the financial year 2014-2015 be declared unlawful and unconstitutional. 40

For reasons given above, the prayer must be granted as prayed.

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91. Prayer (b) was worded as follows; 1
 (b) A declaration that the Bomet County Appropriation Act of 2014 and Bomet County Appropriation [Amendment] Act of 2014 are unprocedural, unconstitutional, null and void. 5
 Like prayer (a), this prayer must be granted wholly.
92. Prayer (c) was worded thus; 10
 (c) A declaration that the CEC Finance Bomet County and the Governor of Bomet violated the Constitution by hijacking the budget making process for the year 2014-2015.
93. Whereas I have found fault on the part of the CECF and the Governor, it cannot be said that they hijacked the budget making process because the greater failing in that process is reserved for every player in the chain of events and I have given the reasons why. The prayer is consequently disallowed and is dismissed. 15
94. Prayer (d) was worded as follows; 20
 (d) An order that the Bomet County begins the Budget process afresh in full compliance of the Constitution and the Public Finance Management Act, 2012.
- This prayer, attractive as it sounds, is neither lawful nor feasible taking into account the budgetary process and the relevant statutory timelines. It is therefore disallowed and is consequently dismissed. 25
97. Prayer (e) was worded thus; 30
 (e) An order that the Controller of Budget only release one-half of the amount included in the budget estimates submitted to the County Assembly on the 5th of June 2014 pending the passing of a new Appropriation Act that complies with the Constitution and statutes.
- This prayer was partly the subject of this Court's preliminary consent orders in *Speaker County Assembly of Nakuru & 46 others v The Commission of Revenue Allocation & 2 others* Petition No 368 of 2014. It has also been overtaken by events and I am not inclined to grant it. 35
98. As for costs, I see no benefit that the Petitioners intended to obtain by filing the Petition and so I shall not allow costs to be paid from public coffers for public-spirited litigants. 40

99. Prayer (g) was worded thus; 1
(g) Any other or further relief that the Honourable Court
may deem just and fit to grant.

100. I am unable to grant this prayer as it is unclear what further relief 5
this Court can grant in the circumstances of this Petition.

Conclusion

101. It is now obvious that while the Budgetary process in the Bomet 10
County Government for the financial year 2014-2015 was flawed,
the said Government has continued to expend public money on
the basis of that flawed law. Each player in that process ie the
County Executive Committee Member for Finance, the Clerk to the
County Assembly, the Speaker of the County Assembly, the County
Assembly and the Governor have a load to carry in that regard and 15
none should point a finger at another. Despite efforts to ameliorate
the situation, the Controller of Budget cannot escape blame either.

102. This Court will not tire in reminding all and sundry in Kenya 20
that our nascent Constitution requires warriors of Constitutionalism
whose fire in the belly is to guard it from attack and from vultures
intent on sucking its succulent honey by graft, short cuts and
impunity. It speaks and acts through its guardian, the Courts, and
no matter the culprit, its teeth will bite when violated or threatened
with violation. 25

103. Let the lesson of Bomet County seen in this Petition, be a 30
lesson that devolution was crafted into a living Constitution and
no County should act outside the demands and expectations of
the Constitution and laws enacted under it. The sanctions for such
action may be elsewhere but this judgment may be used by the
Petitioners to obtain those sanctions. I digress.

Final orders

104. The final orders to be made are as follows; 35

1. A declaration is hereby made that the Budget making
process of Bomet County for the financial year 2014-
2015 was unlawful and unconstitutional.
2. A declaration is hereby made that the Bomet County
Appropriation Act of 2014 and the Bomet County
Appropriation [Amendment] Act of 2014 are 40
unprocedural, unconstitutional, null and void.
3. Prayers (c), (d) (e) and (g) of the Petition are dismissed.

4. Let each Party bear its own costs as this matter was in the best interests of the residents of Bomet County and the Public at large	1
105. Orders accordingly.	5
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**County Government of Busia & another v
Manwari & 12 others [2015] KLR – HCK**

High Court, at Busia
F Tuiyot, J

May 29, 2015

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Petition No 2 of 2014

Brief facts

The Respondents were claimants in court cases at various stages against several defunct Local Authorities. Through an application they sought orders to enjoin the Petitioners in the said suits.

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The Petitioners brought a Petition before the High Court challenging the Respondent's application that sought to enjoin it into various suits against the defunct Local Authorities of Busia County.

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The Petitioners *inter-alia* submitted that it would have been premature to enjoin the 1st Petitioner ie County Government of Busia to the suits before the process of verification and transfer of assets and liabilities from the defunct Local Authorities to the National and County Governments that was contemplated by the Transition to Devolved Government Act was complete.

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Issues

- i. Whether the invocation of a Constitutional relief where a parallel remedy existed amounted to an abuse of Court.
- ii. Whether County Governments would take up liabilities of the defunct Local Authorities that were located within their jurisdiction.
- iii. Whether the High Court had jurisdiction to issue an advisory opinion.

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Constitutional law – devolution – Devolved Government – devolution of assets and the assumption of liabilities of the defunct local authorities – whether County Governments would take up liabilities of defunct Local Authorities that were located within their jurisdiction – Transition of Devolved Government Act, (cap 265A).

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Civil Practice and Procedure – parties to a suit – joinder of parties – whether a party that was sought to be wrongly enjoined to civil proceedings could raise an objection to the enjoinder through a petition or Civil proceedings – whether by challenging the application through a petition, that amounted to an abuse of court process.

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Held:

1. In Constitutional proceedings, the High Court determines disputes before it and where merited, grants appropriate reliefs which may include declaration of rights, orders for Judicial Review or damages. The High Court does not render Advisory Opinions. 1
2. A party that was sought to be wrongly enjoined to civil proceedings could raise an objection to the enjoiner. Where enjoiner had been ordered, a party could seek, by application, to be removed from misjoinder. That happens routinely before Kenyan civil courts and that was a course that was open to the Petitioners. Nothing changed merely because the Applicant had to rely, in addition to provisions of legislation, on some Constitutional provisions to argue his/her position. Courts at all levels were often and as a run of the mill called upon to interpret the provisions of the Constitution and Statutes in resolving Civil Disputes or Criminal cases before them. 5
3. Where a parallel remedy existed, then that remedy and not a Constitutional relief should have been sought unless that remedy did not provide adequate relief, otherwise it would amount to an abuse of the court process. 10
4. The Constitutional Petition was an abuse of court process. The adequate relief to the Petitioner's apprehension lay with them challenging their enjoinder in the various Civil Proceedings. 15
5. Section 15(1) of the Sixth Schedule of the Constitution required that legislation be enacted to make provision for the transfer of devolved functions from the National Government to County Governments. The legislation enacted The Transition to Devolved Government Act which provided the legal and constitutional framework for the transfer of assets and liabilities to the devolved units. The provisions of section 33 of the Sixth Schedule should not be interpreted in a manner that diminished the purpose and object of section 15 of the Sixth Schedule of the Constitution. 20
6. It was not in the place of the Court to find that all proceedings against the named defunct local authorities had to naturally continue against the County Government of Busia because there was a Statutory Authority, being the Transition Authority that had the constitutional mandate to carry out the function of identifying who should assume that responsibility. It was expected that the Authority had the expertise and resources to discharge its constitutional function. That Authority, had identified that a criteria for transfer of court cases involving defunct local authorities required to follow the principle that the assets and liabilities accompanying a function 25

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- had to accompany the transferred function. 1
7. The Transition Authority had not completed the activity of auditing and verifying the Court cases for purposes of transfer. That was one of the activities that ought to have been carried out in phase one of the transition period. However, the same requirement provided that any activity that might have been outstanding from Phase one had to be completed in Phase two of the transition period. Phase two meant the period between the date of the first elections and three years after the first elections under the Constitution. The date of the first election was 4th March 2013 and that would mean that Phase two ended on 4th March 2016. The period granted to the Authority by law was yet to expire. 5 10
8. There was nothing that indicated that the phases for transition set out in the Transition to Devolved Government Act was against the spirit of the Constitution or were in any way unconstitutional. There could have been hardship and inconvenience during the period of transition but through Constitutional and Statutory provisions, the People of Kenya agreed that a period of not more than 3 years from the date of the first election under the Constitution was required for an orderly and coordinated transition to the Devolved System of Government. The Respondents would have to live with that negotiated hardship and inconvenience, 15 20
9. The closest law that appeared to address the devolution of assets and the assumption of liabilities of the local authorities prior to their extinction was the Transition of Devolved Government Act, (cap 265A). With the emergence of the County Governments, the assets and pre-existing liabilities of the defunct local authorities were to be shared between those County Governments and the National Government. The body that was established to work out how that distribution was to be done was the Transition Authority which was created under section 4 of the Transition to Devolved Government Act. Among its functions set out in section 7 of the Act, the Transition Authority was required to prepare and validate an inventory of all the existing assets and liabilities of government, other public entities and local authorities. Once that was done it was upon the Transition Authority to come up with the criteria to determine the transfer of previously shared assets, liabilities of the government and local authorities. As at the time the application was argued, there was no evidence and none was brought to the attention of the court that such a criteria was in place as contemplated under the Transition to Devolved Government Act. Without that criterion, 25 30 35 40

it would have been premature to attribute the local authorities' pre-existing liabilities to the County Governments. 1

Petition dismissed.

Cases 5

East Africa

1. *Kumenda, JAS & another v Clerk Municipal Council of Kisii & 6 others* Miscellaneous Civil Application No 3 of 2013 – (Explained)
2. *Republic v County Secretary Murang'a County Government ex parte Thiga Thuita* Judicial Review Application No 1 of 2013 – (Followed) 10
3. *Republic v Town Clerk of Webuye County Council & another* Miscellaneous Civil Application No 448 of 2006 – (Explained)
4. *Sheikh, Abdi Ali v County Secretary County Government of Kakamega* Miscellaneous Application No 10 of 2014 – (Explained) 15

Trinidad and Tobago

1. *Damian Belfonte v Attorney General of Trinidad and Tobago* Civil Appeal No 84 of 2004 – (Followed)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 159(2)(b)(d); 165(3)(d); 185; Sixth Schedule sections 15,33 – (Interpreted) 20
2. County Governments Act, 2012 (Act No 17 of 2012) In general – (Interpreted)
3. Interpretation and General Provisions Act (cap 2) In general – (Interpreted) 25
4. Public Finance Management Act, 2012 (Act No 18 of 2012) In general – (Interpreted)
5. Transition to Devolved Government Act, 2012 (Act No 1 of 2012) sections 2,3,15(1); 33 – (Interpreted) 30

Advocates

1. *Etyang & Makokha* for the Petitioners
2. *Manwari* for the 1st Respondent
3. *Manwari* H/B for Ashioya for the other Respondents 35

May 29, 2015, **F Tuiyot, J** delivered the following Judgment.

Pleadings and Background

1. Once again, the Constitutional and Legal Provisions in relation to the Transition to Devolved Government have been brought to focus. In this Petition the Petitioner seeks the following remedies:- 40
 - 1) A declaration that all pending executions against any of the Petitioners herein individually and or jointly and

particularly those arising out of claims filed against the former Local Authorities of Nambale Town Council, Busia County Council, Teso County Council, Busia Municipal Council, Port Victoria town Council, Malaba Town Council and Bumala Town Council are stayed forthwith, suspended and or declared null and void.

2) A declaration that the enjoinder of the Petitioners herein individually and or jointly in pending suits arising out of claims filed against the former Local Authorities of Nambale Town Council, Busia County Council, Teso County Council, Busia Municipal Council, Port Victoria Town Council, Malaba Town Council and Bumala Town Council the former Local Authorities is malicious and thus null and void.

3) An order directing the Respondents to re-direct/launch their claims through the “Authority” as defined under section 2 of the Transition to the Devolved Government Act cap 265A Laws of Kenya and not through the Petitioners.

4) Any other order the Honourable court may deem it be fit and just to ensure that law and order is maintained.

2. The 2nd Petitioner is the County Government of Busia as duly constituted under the Provisions of the Constitution of Kenya 2010 and the County Governments Act Chapter 265 (Laws of Kenya). The common thread that joins the twelve (12) Respondents is that they are Claimants in court cases, at various stages, against the now defunct Local Authorities of Nambale Town Council, Busia Town Council, Teso County Council, Busia Municipal Council, Port Victoria Town Council, Malaba Town Council and Bumala Town Council.

3. The grievance of the Petitioners is that the Respondents are seeking to enjoin the 1st Petitioner into the various suits against the defunct Local Authorities. The position of the Petitioners is that the proposed injunction is premature and a contravention of the Constitution and Statute. It is the averment of the Petitioner that by virtue of the Constitution of Kenya, 2010, The County Governments Act and The County Governments Public Finance Management Transition Act the budget making process, Approval and Requisite Appropriation and Legislative processes are functions of The County Assembly. Secondly, that the County Government of

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- Busia is independent and autonomous of the National Government which was the Principal to the defunct Local Authorities. 1
4. In addition, the Petitioners are of the view that it would be premature to enjoin the 1st Petitioner to the suits before the process of verification and transfer of assets and liabilities from the defunct Local Authorities to the National and County Governments that is contemplated by the Transition to Devolved Government Act is complete. In this decision The County Governments Act, The County Governments Public Finance Management Transition Act and the Transition to Devolved Governments Act shall jointly be referred to as the Devolution Statutes. 5 10
5. The Respondents are opposed to the Petition. The 1st Respondents reply is dated 18th March 2015. The 1st Respondent states that the entire Petition is a misconstruction of both the Constitution and Statute. The 1st Respondent argues that the Constitution and Devolution Statutes as relates to County Governments were intended to establish mechanisms and facilitate settlement of any existing obligations of the defunct Local Authorities to their creditors. That the intention of the Constitution and of the Statutes could not have been to obstruct the settlement of those obligations. In making those arguments the 1st Respondent cited article 159(2) (b) and (d) of the Constitution which provides:- 15 20
- “2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles- 25
- a)
b) Justice shall not be delayed;
c)
d) Justice shall be administered without undue regards to procedural technicalities; and..” 30
6. In addition this Court was asked to give regard to section 33 of the sixth Schedule of the Constitution, 35
- “An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name.” 40
- That on proper construction of the provision, the County Government of Busia was the Legal Successor of the named Defunct Authorities.

7. The other Respondents took a similar position and in addition opposed the Petition on the ground that it does not raise any Constitutional issues. They took the position that the Petitioners should have sought the orders they seek here in the parent files in which the Petitioners seek to be enjoined.

8. The Petitioners invited the Court to find that section 15 of the 6th Schedule and section 2 of the Transition to Devolved Government Act were relevant to the resolution of the matter at hand. It was emphasized for the Petitioners that the process of identifying the assets and liabilities of County Governments is ongoing and should be completed within three years of the date of the first election under The Constitution 2010. That the date for completion of that exercise is therefore 4th March 2016.

10. In reply, the Respondents argued that on reading section 33 of the 6th schedule to the Constitution, the Legal Successor to the former Local Authorities was the Busia County Government. That the provisions of section 33 are reinforced by the provisions of section 23(3)(e) of the Interpretation and General Provisions Act cap 2 Laws of Kenya which provides;

- e. affect an investigation, legal proceedings or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceedings or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.”

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11. The Respondents submitted that Parliament could not have intended that there be a vacuum in settlement of debts from the Local Authorities. That the spirit of the Devolution Statutes is that there shall be a continuation of a relationship between the County Government and the creditors of the defunct local authorities. The Respondents relied on two recent High Court decisions being Bungoma Misc Application No 10 of 2014 *Abdi Ali Sheikh v The County Secretary County Government of Kakamega* (unreported) and *JAS Kumenda & another v Clerk Municipal Council of Kisii and 6 others* (2013) eKLR. 1
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12. It was further emphasized that the Judgments and Decrees are not under challenge and there was nothing to be identified or verified and that the County Government of Busia should abide by the recommendation of the Transition Authority on settlement of Decrees against defunct Local Authorities. Counsel was referring to a manual prepared and circulated by Transition Authority to all County Government titled "Mechanisms and Criteria of Transfer of Assets and Liabilities of Government and Other Public Entities". Recommendation 6 under article 7.7 of the document reads as follows:- 15
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- "On transfer of cases, it is recommended that a functional approach be adopted, for those cases which are unlikely to be settled within the period of transition. The cases can be categorized to fit within the provision of the fourth schedule and then transferred to the respective Government. There should be vetting of all the cases by the defunct Local Authorities to determine: 25
- i) Cases where judgment have been delivered 30
- a) If the judgment is for or against the defunct Local Authorities, parties should be made to comply with the law and honour the award."
- The Determination 35
13. So as to deserve a determination on merit, the Petition must, first, overcome the criticism that it is an abuse of court process. The opening ground of opposition filed by the 2nd, 3rd, 4th, 6th 9th and 11th Respondents raises the following issue:- 40
- "That the petition is bereft of any constitutional issues, and that it was a misplaced, and mischievous recourse to obtain orders of stay in the High court, in a separate file, form the parent files that gave rise to the orders, judgments, rulings and

awards, that are now being sought to be stayed.”

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In my understanding, the Respondents are raising a fundamental issue that the answer to the Petitioners apprehension is a relief in the separate civil proceedings in which they are sought to be enjoined. The Respondents are making reference to the existence of a parallel remedy. As a corollary, the Respondents do not see any Constitutional issues that deserve a determination through a Constitutional Petition.

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14. Before I decide on this objection by the Respondents, I must observe that, as drawn, the nature and character of the Petition does not reveal itself readily. Are these proceedings for Enforcement of the Petitioners Bill of rights” Perhaps not, because in none of the 45 paragraphs of the Petition do the Petitioners complain of or cite any Right or Fundamental Freedom that is denied, violated, infringed or threatened.

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15. In the title to the Petition, the Petitioners seem to suggest that they are seeking an Advisory opinion of this Court pursuant to article 165(3)(d) of the Constitution of Kenya, 2010. That article provides:-
“Subject to clause (5), the High Court shall have-

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(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 with this Constitution;

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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;

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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; and

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iv) A question relating to conflict of laws under article 191; and”

In Constitutional proceedings, the High Court determines disputes before it and where merited grants appropriate reliefs which may include Declaration of rights, orders for Judicial Review or Damages. The High Court does not render Advisory Opinion. That said, and to be fair, to the Petitioners, they sought certain very specific

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- Declarations at the end of the Petition. 1
16. The difficulties of the nature and character of the Petition aside, I must return to the Respondents argument. The Petitioners did not tell court that they could not, using the same reasons cited in this Petition, resist their enjoinder to various civil proceedings. The arguments made by the Petitioners are substantially on the interpretation of the Devolution Statutes. A party that is sought to be wrongly enjoined to civil proceedings can raise an objection to the enjoinder. Where enjoinder has been ordered a party can seek, by application, to be removed from misjoinder. This happens routinely before our civil courts and this was a course that was open to the Petitioners. And nothing changes merely because the Applicant has to rely, in addition to provisions of legislation, on some Constitutional provisions to argue his/her position. Courts at all levels are often, and as a run of the mill called upon to interpret the provisions of the Constitution and Statutes in resolving Civil Disputes or Criminal cases before them. 5 10 15
17. This Court is swayed by the Respondents argument that there is an alternative remedy to the Petitioners cause. And as a general rule where a parallel remedy exists, then that remedy, and not a Constitutional relief, should be sought unless that remedy does not provide adequate relief. It would otherwise amount to an abuse of court process. The decision in CA No 84 *Damian Belfonte v The Attorney General of Trinidad and Tobago* sets out the approach to be taken in examining whether the invocation of a Constitutional relief, where a parallel remedy exists, amounts to an abuse of Court. The Court Held; 20 25
- “(19) the opinion in *Jaroo* has recently been considered and clarified by the Board in *AG v Ramanoop*. Their lordships laid stress on the need to examine the purpose for which the application is made in order to determine whether it is an abuse of process where there is an available common law remedy. In their lordship’s words: 30 35
- “.....Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course As a general rule, there must be some feature, which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional 40

relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of such a feature would be a case where there has been an arbitrary use of state power “(emphasis added).”

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Do the issues raised by Petitioners herein reveal a feature or features that makes a Constitutional relief rather than the ordinary one more appropriate? None was cited to me and on my own I cannot see any. However, it may be of concern that the Petitioners may be required to make a myriad of applications in the various civil suits and this may not be an efficient way of disposing of a common issue or issues. But that may turn out to be a misplaced concern because the civil process itself contemplates this type of situation and provides procedure for test cases.

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18. It is my finding that an adequate relief to the Petitioners apprehension lies with them challenging their enjoinderment in the various Civil Proceedings. I therefore hold that this Constitutional Petition is an abuse of court process. And with that I would have ordinarily come to the end my decision. I however feel constrained to make some observations on the position taken by the Respondents that, as a matter of course, a County Government takes up the liabilities of the defunct Local Authorities that were located within their jurisdiction.

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19. The Respondents find support for this argument in various High Court Decisions. For instance Okong'o J in *JAS Kumenda & another v Clerk Municipal Council of Kisii & 6 others* (2013) eKLR held as follows-

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“Due to the foregoing, the County Governments are in my view the successors of the local authorities that were constituted under the repealed Local Government Act and should be the ones to proceed with pending legal actions by the defunct local authorities and against whom the pending legal proceedings against the said local authorities should be sustained. I find support in this proposition in the sixth schedule to the Constitution of Kenya.

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Section 33 of the sixth schedule to the Constitution of Kenya, 2010 provides that, an office or institution established under the constitution of Kenya, 2010 is a legal successor of the corresponding office or institution under the former

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- Constitution or under a former Act of parliament in force immediately before the effective date of the Constitution of Kenya, 2010 whether known by the same name or a new name. County Governments under the new constitution took over the powers and functions of the local authorities as they were recognized and defined under the old constitution and the Local Government Act. Pursuant to the provisions of the said section 33 of the sixth schedule to the Constitution of Kenya, 2010 County Governments are therefore the natural and presumptive legal successors of the defunct local authorities. It follows therefore that until the body referred to in section 59 of Urban Areas and Cities Act is established, legal actions that were pending by and against the defunct local authorities can be sustained or pursued against County Governments under whose jurisdiction such local authorities were situated. To hold as argued by the Respondents herein that such legal proceedings should remain suspended until such a time that the said body is set up would result in an absurd and a manifestly unjust situation for the hundreds of litigants who have pending suits against the defunct local authorities. Such holding would also put courts in very awkward position as they would not know what to do with matters involving the defunct local authorities which are pending rulings and judgments before them”
20. Reaching a similar conclusion in *Republic v Town Clerk of Webuye County Council and another* (2014) eKLR Majanja J was of the following view:
- “Despite the statutory lacuna’s in the County Government Act and the Urban Areas and Cities Act, the rights accrued as a result of the litigation are preserved upon repeal of the Local Government Act by the Constitution. Section 33 of the sixth schedule to the Constitution provides for succession of institutions upon promulgation. It states that,
- “An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of parliament in force immediately before the effective date, whether known by the same or a new name.”
- In my view and taking into account the legal provisions I have cited, the County is the legally established body unit

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- contemplated under the law that takes the place of local authorities unless there is a contrary enactment. I therefore find and hold that the proceedings and judgment against Webuye Town Council and its officers must continue against Bungoma County which must now bear the burden of the judgment.” 1 5
21. While Mabeya J, added this angle to the argument in High Court Bungoma Misc Application No 10 of 2014; 10
- “The Respondents contended that the liability of the Lugari County Council did not as a matter of course fall on the Respondent. That the Transition Authority is yet to specify which of the assets and liabilities of the Lugari County Council is to be taken by the Central government and which one will remain with the Respondent. In my view, articles 48 and 159(2)(b) behoves this Court to ensure that justice is attained without undue delay. It was not in contemplation of the drafters of our Constitution as well as the Transition into Devolved Government Act, that settlement of claims, more so, decrees against the defunct local authorities would be suspended indefinitely. If that was the intention, nothing would have been easier than to expressly provide so. To my mind, section 35 of the Transition to Devolved Government act which the Respondent relied on, do not amount to a suspension of settlement of claims by the devolved units, it only bars such units from transferring assets and liabilities to 3rd parties so that no devolved units short changes the Central Government on the shared assets or liabilities which the decree in Bungoma CMCC No 366 of 2005 is not.” 15 20 25 30
22. The Transition to Devolved Government Act is the Statute that provides a framework for the transition to Devolved Government and was enacted pursuant to section 15 of the sixth schedule to the Constitution. The drafters of the Constitution contemplated that the Transition to Devolved Government would be phased and instructed that Parliament shall, by Legislation, make provision for the phased transfers from the National Government to County Government of functions assigned to them under article 185. 35
23. The object and purpose of the Transition to Devolved Government Act is outlined in section 3 of the Act. Its object and purpose is to:- 40
- (a) Provide a legal and institutional framework for a co-

ordinated transition to the devolved system of government while ensuring continued delivery of services to citizens;	1
(b) Provide, pursuant to section 15 of the sixth schedule to the Constitution, for the transfer of powers and functions to the national and county governments;	5
(c) Provide mechanisms to ensure that the Commission for the implementation of the Constitution performs its role in monitoring and overseeing the effective implementation of the devolved system of government effectively;	10
(d) Provide for policy and operational mechanisms during the transition period for audit, verification and transfer to the national and county governments of-	
i) assets and liabilities;	
ii) human resources;	15
iii) pension and other staff benefits of employees of the government and local authorities; and	
iv) any other connected matters;	
(e) provide for closure and transfer of public records; and	
(f) provide for the mechanism for capacity building requirements of the national government and the county governments and make proposals for the gaps to be addressed.	20
24. Under the provisions of the Act, The Transition Authority is mandated with the function of preparing and validating an inventory of all the existing assets and liabilities of Government, other Public entities and Local Authorities. The Act, just like the Constitution, provides for a phased transition. In the interpretation section of the Act, two phases are provided and defined. Phase one is:-	25
“...The period between Commencement of the Act and the date of the first election under the Constitution.”	30
While phase two means;	
“...The period between the date of the first election and three years after the first elections under the Constitution”	35
25. The 4 th Schedule to the Act provides the activities to be undertaken in the two phases. It is important to reproduce the provisions of the entire schedule which is titled “Transition Phases”	
1. During phase one of the transition period, the Authority shall carry out the following activities-	40
a) audit assets and liabilities of the government,	

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to establish the asset, debts and liabilities of the government;	1
b) audit assets and liabilities of local authorities, to establish the asset, debts and liabilities of each Local Authority;	5
c) audit local authority infrastructure in the counties, to establish the number and functionality of plant and equipment in Local Authorities;	
d) audit the government infrastructure in the counties, to establish the number and functionality of plant and equipment for the purpose of vesting them to either level of government;	10
e) audit the government staff in counties, to establish the number of staff in each county by cadre, grades, gender, age and qualification;	15
f) audit the Local Authority staff in the counties, to establish the number of local authority staff in each county by cadre grades, gender, age and qualification;	
g) facilitate civic education, to ensure civic education on devolution is commenced and co-ordinated;	20
h) facilitate the initial preparation of county budgets, to ensure such budgets are agreed upon;	
i) facilitate the preparation of county profiles, to ensure that the profiles of counties are produced, published and publicized;	25
j) carry out an analysis of functions and competency assignment and ensure plan for distribution of functions and competency is published and necessary Acts amended;	30
k) provide mechanism for closure and transfer of public records and information;	
l) facilitate the development of county public finance management system;	
m) provide a mechanism for the transition of government and local authority employees;	35
n) provide for a mechanism for the transfer of government net assets and liabilities to national and county governments;	
o) provide mechanisms for the transfer of assets and liabilities which may include vetting the transfer of assets during the transitional period;	40

p) provide for a mechanism that will secure assets and liabilities held by the Local Authorities; and	1
q) any other activity that may be necessary to carry out its functions.	5
Phase two	
1. During phase two of the transition period the Authority shall carry out the following activities –	
i. complete any activity that may be outstanding from Phase One;	10
ii. oversee the transfer of functions from the national government to the county government;	
iii. facilitate the county governments in the performance of their functions;	
iv. any other activity that maybe necessary to enable county governments carry out their functions.	15
26. To my mind, court cases for or against the defunct local authorities will either be assets and liabilities. What then would the transfer of the Court cases entail” Both sides to these proceedings made reference to a manual prepared by the Transition Authority Titled “Mechanism and criteria for Transfer of Assets and Liabilities of Government and other Public Entities.” That manual has useful insights of the criteria for transfer of the court cases. Parts 7.3 and 7.4 of The Manual provides as follows:	20
7.3 Mechanism for transfer of Court Cases involving the Defunct Local Authorities	25
The mechanism for the transfer of cases involving the defunct local authorities shall follow the procedure and provisions provided under the constitution.	30
The Constitution of Kenya in article 187(2)(a) provides that resources shall follow functions. Once functions are transferred to the County Governments for instance, it is expected that the assets and liabilities accompanying those functions shall accompany the transferred function. Some of the liabilities that follow the assets are the cases that were initiated for or against the defunct Local Authorities. It will be right to argue that the cases will follow the assets as they follow the function transferred either to the National Government or the County Government. In order to determine the mechanism for the transfer of cases	35
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involving the defunct Local Authorities, it is imperative to first determine the nature of the cases involving the defunct Local Authorities. The reports cases include but are not limited to:	1
1. Personal injury claims	5
2. Employment and Labour Relation issues	
3. Cancellation and denial of trade Licences.	
4. Breach of Contractual Obligations	
5. Land matters	
6. Non- Remittance of Statutory Deductions.	10
7.4 Manner of Handling Court Cases involving Defunct Local Authorities	
Section 134 of the County Government Act No 17 of 2012 provides that:	15
1) The Local Government Act is repealed upon the final announcement of all the results of the first elections held under the Constitution.	
2) All issues that may arise as a consequence of the repeal under Subsection (1) shall be dealt with and discharged by the body responsible for Matter relating to transition.	20
3) Transfer of court cases involving the defunct Local Authorities, need to follow the principle that the functions against which the case has been premised, must also be devolved so as to ascertain what cases belong to what function and which organ is the duty bearer for that function.	25
The argument by the Respondents is that a case for or against a defunct Local Authority follows the County Government which has the jurisdiction over the area in which the Local Authority was located. It is an argument that as a matter of course a County Government takes up the liabilities if the defunct Local Authorities that were located within its jurisdiction. Some reliance was placed on section 33 of the sixth schedule to the Constitution which states as follows:	30
“An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name.”	35
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27. I am not certain that this saving provision should apply to matters of succession and transition specifically covered by another part of the Constitution. Section 15(1) of the sixth schedule required that legislation be enacted to make provision for the transfer of devolved functions from the National Government to County Governments. The legislation enacted (The Transition to Devolved Government Act) provides the legal and constitutional framework for the Transfer of Assets and Liabilities to the devolved units. On my reading of the Constitution as an integral whole, I favour the view that the provisions of section 33 of the sixth schedule should not be interpreted in a manner that diminishes the purpose and object of section 15 of the sixth schedule.
28. I do not think that it is in the place of the Court to find that all proceedings against the named defunct local authorities must naturally continue against the County Government of Busia because there is a Statutory Authority, being the Transition Authority, that has the constitutional mandate to carry out the function of identifying who should assume that responsibility. It is expected that the Authority has the expertise and resources to discharge its constitutional function. That Authority, from the manual referred to above, has identified that a criteria for transfer of court cases involving defunct local authorities needs to follow the principle that “the assets and liabilities accompanying function shall accompany the transferred function”.
29. It is agreed by both sides that the Authority has not completed the activity of auditing and verifying the Court cases for purposes of transfer. This is one of the activities that ought to have been carried out in phase one of the transition period (see the provisions of The fourth schedule to The Transition to Devolved Government set out in paragraph 25 of this Decision). However, the same requirement provides that any activity that may be outstanding from Phase one shall be completed in Phase two of the transition period. Phase two means the period between the date for the first elections and three years after the first elections under the Constitution. The date of the first election was 4th March 2013 and that would mean that Phase two ends on 4th March 2016. The period granted to the Authority by law is yet to expire.
30. There is yet the argument by the Respondents that it could never have been the intention of the Constitution that settlement

of claims against defunct Authorities be delayed indefinitely. But
Devolution involved the replacement of one system of Government
with another. The drafters of the Constitution, in section 15 of the
sixth schedule of the Constitution, provided for a Phased transition.
This Court is not told that the phases for transition set out in the
Transition to Devolved Government Act is against the spirit of the
Constitution or are in any way unconstitutional. There could be
hardship and inconvenience during the period of transition but
through Constitutional and Statutory provisions, The People of
Kenya agreed that a period of not more than 3 years from the date of
the first election under the Constitution was required for an orderly
and coordinated transition to the Devolved System of Government.
The Respondents would in my view have to live with this negotiated
hardship and inconvenience, might it not be for greater good” In
the end I agree with position taken by Ngũgĩ J in *Republic v County
Secretary Murang’a County Government ex parte Thiga Thuita* [2014]
eKLR. In holding that it was erroneous to substitute the County
Secretary of the County Government of Murang’a for The Town
Clerk, Municipal Council of Murang’a for purposes of compelling
the former to settle costs against the defunct Municipal Council of
Murang’a, the Judge stated:-

The closest law that appears to address the devolution of assets
and the assumption of liabilities of the local authorities prior
to their extinction is the Transition of Devolved Government
Act, chapter 265A, of the Laws of Kenya. With the emergence
of the County Governments, the assets and pre-existing
liabilities of the now defunct local authorities were to be
shared between those county governments and the national
government. The body that was established to work out how
this distribution was to be done was the Transition Authority
which is created under section 4 of the Transition to Devolved
Government Act. Among its functions set out in section 7 of
the Act, the Transition Authority is required to prepare and
validate an inventory of all the existing assets and liabilities of
government, other public entities and local authorities. Once
this is done it is upon the Transition Authority to come up
with the criteria to determine the transfer of previously shared
assets, liabilities of the government and local authorities. As
at the time this application was argued, there was no evidence
and none was brought to the attention of the court that such
a criteria is now in place as contemplated under the Transition

to Devolved Government Act. Without this criteria, it would be premature to attribute the local authorities' pre-existing liabilities to the County Governments.	1
It follows that even if the Applicant's motion was properly before court, there would still be no basis to hold the county government of Murang'a responsible for liabilities which were hitherto attributed to the Municipal Council of Murang'a.	5
31. But for reasons stated earlier I dismiss the entire Petition with costs.	10
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Kisoi v Commission of Inquiry into the Petition to Suspend Makueni County Government & 8 others [2015] KLR-HCK	5
High Court, at Nairobi M Ngugi, J	May 8, 2015
Petition No 158 of 2015	10
Brief facts	
The Applicant, Member of Parliament for Mbooni Constituency, Makueni County brought a Petition challenging the establishment of the Commission of Inquiry and its members to inquire into the question whether the County Government of Makueni should be suspended. Together with the Petition, he filed an application seeking <i>inter alia</i> interim conservatory orders to restrain the said commission from investigating or inquiring into the situation of Makueni County Government, or from making any recommendation concerning or related to suspension of Makueni County Government.	15
The Petitioners case was that the said petition to the President had never been published or publicized by the County Government of Makueni or any duly recognized constitutional organ to enable the citizens and residents of Makueni County understand its contents, purport and consequences.	20
The Petitioners submitted that the County Government did educate its residents and citizens with regard to the Petition to the President before they signed it and neither did the county set up structures for public participation.	25
Issues	
i. Whether the Petition presented to the President for the suspension of Makueni County Government had met the requirements of article 192(1)(b) of the Constitution and section 123 of the County Governments Act.	30
ii. Whether the County Governments Act imposed on a County Government an obligation to conduct such a referendum or provide such avenues for public participation during the signing of a Petition for its suspension.	35
iii. Whether the High Court could in the circumstances grant conservatory orders under article 23, in respect of a claim under	40

article 22.	1
<i>Constitutional law – County Government – petition to the President to suspend the County Government of Makueni – whether the Petition met the requirements of article 192(1)(b) of the Constitution and section 123 of the County Governments Act during the signing of a petition to suspend the County Government of Makueni– Constitution of Kenya, 2010, articles 192(1)(b) – County Government Act, section 123.</i>	5
<i>Constitutional law – conservatory orders – application for conservatory orders on the grounds that no referendum or provision of public participation was availed during the signing of a petition to suspend the County Government of Makueni – whether the High Court could in the circumstances grant conservatory orders – Constitution of Kenya, 2010, article 23, article 22.</i>	10
Article 192 of the Constitution	15
(1) The President may suspend a county government-	
(a) In an emergency arising out of internal conflict or war; or	
(b) In any other exceptional circumstances.	20
(2) A County government shall not be suspended under clause (1)(b) unless an independent commission of inquiry has investigated allegations against the county government, the President is satisfied that the allegations are justified and the Senate has authorised the suspension.	25
The County Government Act t section 123	
(1) Subject to subsection (2), a person may petition the President to suspend a county government in accordance with article 192(1)(b) of the Constitution if the county government engages in actions that are deemed to be against the common needs and interests of the citizens of a county.	30
(2) A petition under subsection (1) shall be supported by the signatures of not less than ten percent of the registered voters in the county.	35
(3) The President shall, within fourteen days after receiving a petition against a county government under subsection (1), submit a report on the averments made and grounds giving rise to suspension of a county government before the apex intergovernmental body (hereinafter referred to as the apex body) established under the law governing	40

intergovernmental relations for approval. 1

- (4) Upon approval by the apex body, the President shall
nominate members of a Commission to inquire into
and investigate the situation in the county and make
recommendations on the suspension of the county
government and shall, after approval by Senate, appoint
the members of the Commission by notice in the Gazette.
(Emphasis added) 5

Held: 10

1. Conservatory orders should be granted on the inherent merit of a
case, bearing in mind the public interest, the constitutional values
and the proportionate magnitudes, and priority levels attributable
to the relevant causes. Thus, where a conservancy order was sought
against a public agency like a legislative assembly that was mandated
to carry out certain functions in the normal course of its business,
it was only to be granted with due caution. The interruption of the
lawful functions of the legislative body should take into account the
need to allow for their ordered functioning in the public interest. 15
2. The 1st Respondent was appointed by the President and gazetted
vide Gazette Notice Number 1557 dated 10th March, 2015. The
argument that there was no approval by the National and County
Government Coordinating Summit of the decision of the President
to constitute the Commission had no merit 20
3. A petition to the President for suspension of a County Government
was provided for under section 123 of the County Governments
Act. Upon a careful consideration of the provisions of the County
Governments Act and the material before court, such a Petition did
not appear to have been in any way similar to a County Government
petition which was provided for under section 88 of the County
Governments Act. 25
4. The provisions of section 88 as section 88(3) of the County
Government Act seemed to suggest, were specific and limited to
matters that were within the purview of the County Government.
Under section 123 of the Act, the suspension of a County
Government was outside the mandate of the County Government.
Section 123 allowed any person to lodge a petition with the President
for the suspension of a County Government, provided that such
petition was signed by not less than ten per cent of the registered
voters in the County in question. 30
5. The provisions of article 192 of the Constitution and section 123 35

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- of the County Governments Act, placed no obligation on a County Government to conduct a referendum or public education or even publish the contents of a petition for its suspension before the Petition was submitted to the President. 1
6. The Petition was filed a day before the sitting of the Commission was to commence and some five days after the advertisement was placed in the media. The contents of the advertisement were clear with respect to the Commission's mandate, which was an inquiry into allegations that the Makueni County Government was dysfunctional and had failed to act in accordance with its constitutional mandate and the Commission invited interested persons to submit memoranda or statements for consideration, and supplied contact addresses for the submission of statements and memoranda. It was clear therefore that the 1st Respondent had publicized what it intended to do, and invited citizen participation in its inquiry. 5 10
7. The Applicant had not established a *prima facie* case that either his rights or those of the residents of Makueni had in any way been violated or threatened. 15 20
8. The Petition before the President was lodged in accordance with article 192(1)(b) and section 123 of the County Government Act, not under section 88 of the County Governments Act. Secondly, the petition to the President was duly published, as evidenced by the copy produced in court, which was not challenged by the Applicant. Further, the approval of the apex body, the National and County Government Coordinating Summit, was obtained. There was no obligation on the 8th Respondent to facilitate public participation on the Petition either before its presentation to the President, or before the Commission of Inquiry commenced its work, as it was not a petition to the County Government under section 88 of the County Governments Act. Therefore the Petitioner had not presented to the Court an arguable case that would justify the grant of conservatory orders in his favour. More importantly, the balance of convenience and the public interest would militate against the grant of such orders. 25 30 35
9. At no point did the Applicant raise any issue regarding the petition the subject of the inquiry, or any other matter regarding the Constitution of the Commission or the publication of the Petition. To have raised those issues at the last moment, was not in the interests of the public, and to grant the orders sought would be against the public interest in view of the fact that the state had 40

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- expended considerable resources to set up the Commission, which was set to commence its sittings the day after the application was filed. All things considered, the balance of convenience, as well as the public interest, demanded that the Commission ought to proceed with its mandate. 1
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10. While the core of the Petition was the alleged violation of the rights of the Petitioners and the residents of Makueni under articles 27 and 47(1) of the Constitution, nothing had been placed before the Court in the course of the hearing of the Application that even remotely suggested violation of those rights. The crux of the petition was the failure by the 8th Respondent to abide by sections 88-91 of the County Governments Act, which did not apply to the petition in question and the alleged failure by the President to obtain the consent of the National and County Government Coordinating Summit, which was obtained. 10
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11. The issue whether the Petition, the subject of inquiry by the 1st Respondent met the criteria of article 192(1)(b), and whether it was instigated by the Governor and Deputy Governor, were matters which fell squarely within the mandate of the 1st – 7th Respondents. 20

Application dismissed, parties to bear costs.

Cases

East Africa

1. *Adieno, Wycliffe Indalu v Attorney General & 2 others* Petition No 315 of 2014 – (Applied) 25
2. *DT Dobie & Company (Kenya) Ltd v Muchina* [1982] KLR 1 – (Followed)
3. *In re Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General* [2011] 1 KLR 458 – (Explained) 30
4. *Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others* Application No 5 of 2014 – (Applied)
5. *Muslims for Human Rights (MUHURI) & 2 others v Attorney General* [2011] 1 KLR 322 – (Followed)
6. *Sabuni, Samuel & 2 others v Court Martial & 8 others* Petition No 235 of 2014 – (Applied) 35
7. *Wambora, Martin Nyaga v Speaker, County Assembly of Embu & 3 others*, Petition No 7 of 2014 – (Explained)

United Kingdom

1. *Attorney General v Sumair Bansraj* (1985) 38 WIR 286 – (Approved) 40

Statutes

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East Africa

1. Constitution of Kenya, 2010 articles 22, 23(3)(c); 27(1)(4)(5); 47(1); 174; 192(1)(b),(6)
2. County Governments Act, 2012 (Act No 17 of 2012) sections 88-91,90(1)(2); 123(5)(6)(7); 124; 125; 130 – (Interpreted) 5
3. Commissions of Inquiry Act (cap 102) section 3 – (Interpreted)
4. Elections Act, 2011 (Act No 24 of 2011) In general – (Interpreted)
5. Intergovernmental Relations Act, 2012 (Act No 2 of 2012) section 7 – (Interpreted) 10

Advocates

1. *Prof Ojienda and Mr Okoth* for the Applicant
2. *Makori Okello*, State Counsel, for the 2nd and 3rd Respondents
3. *Mr Bitta & Mr Muiruri* for the 1st-7th and 9th Respondents 15
4. *Mr Nyamu* for the 8th Respondent

May 8, 2015, **M Ngugi, J** delivered the following Ruling.

Introduction

1. The Applicant is the Member of Parliament for Mbooni Constituency, Makueni County. He has brought the present petition to challenge the establishment of the 1st Respondent and the appointment of the 2nd – 7th Respondents to inquire into the question whether the County Government of Makueni should be suspended. Together with the petition, the Petitioner filed an application dated 21st April 2015 brought by way of Notice of Motion in which he seeks the following substantive orders:
 - i) ...
 - ii) ...
 - iii) That pending the hearing and determination of the petition herein, interim conservatory order to issue against the Commission of Inquiry into the petition to suspend Makueni County Government, Mohammed Nyaoga, Johnston Kavuludi, Emily Gatuguta, Harrison Maithya (Prof), Alice Wairimu and Taib Ali Taib either by themselves, agents or anyone claiming through them, to restrain them from investigating or further investigating, inquiring or further inquiring into the situation of Makueni County Government, or from making any recommendation concerning or related to suspension of Makueni County Government. 20 25 30 35 40

- iv) That the Respondents herein bear the costs of this Application. 1
2. The Application is supported by his affidavit sworn on the same date, and pursuant to orders of the Court, the Applicant filed submission dated 28th April, 2015. The Respondents oppose the petition and have filed affidavits in reply and submissions which I shall refer to later in the ruling. 5
3. The Applicant's case Mr Kisoi states in his affidavit that he brings the Application in his individual capacity as well as in his official capacity as the duly elected representative of Mbooni Constituency in Makueni County. He avers that on or about 22nd November, 2014, it was reported in the media that a petition was presented to the President to suspend the County of Makueni. He claims, however, that the petition has never been published or publicized by the County Government of Makueni or any duly recognised constitutional organ to enable the citizens and residents of Makueni County understand its contents, purport and consequences. 10
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4. The Applicant argues, further, that the County Government did not undertake any civic education in the County to educate its residents and citizens with regard to the Petition to the President before they signed it; did not facilitate the conduct of a local referendum among the residents of Makueni County before they signed the petition, and neither did the County set up structures for public participation that would enable the residents and citizens in Makueni County present their views on the petition before signing it. 20
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5. It is also Mr Kisoi's deposition that the County Government did not establish or facilitate avenues for the participation of people's representatives, including members of the National Assembly and Senate in Makueni, before the Petition was signed, He further alleges that the petition was never published in the traditional media, public meetings, community stations or television stations to enable the citizens and residents understand its contents, purports and consequences. 30
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6. The Applicant avers that by Gazette Notice Number 1557 dated 10th March, 2015, the President constituted the 1st Respondent, chaired by the 2nd Respondent and with the 3rd to 7th Respondents as its Commissioners, to hear the petition. He contends that there was no approval by the National and County Government 40

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- Co-ordinating Summit, as required by law, of the decision of the President to constitute the 1st Respondent to inquire and investigate into the situation of the 8th Respondent, and that consequently, the Constitution of the commission is void *ab initio*. 1
7. The Applicant further states that in a newspaper advertisement carried in the *Daily Nation* newspaper of 16th April, 2015, the 1st Respondent advertised that it would commence its proceedings on 23rd April, 2015 in Nairobi, to hear the Petition to suspend the Makueni County Government, and invited all persons who so wish, to submit memoranda and statements at their Nairobi office on the Petition. He contends that to date, the 1st Respondent has never published or publicized the actual petition that is the subject of its intended proceedings. 5 10
8. He argues that it is inconceivable how the 1st Respondent expects the residents of Makueni County to submit informed memoranda and statements on the Petition whose contents or purport they have never neither seen nor known. It is also his deposition that the residents of Makueni County are neither sufficiently economically endowed, nor socially empowered, and neither do they have access to mainstream media. It was his contention therefore that it was a travesty of justice for the 1st Respondent to fail to publish the actual petition that is the subject of their intended proceedings in public meetings held in Makueni County or through media accessible to the people of Makueni, before commencing its hearings. 15 20 25
9. The Applicant is also aggrieved by the decision to conduct the hearing of the Petition in Nairobi City County, which he avers is several thousand miles away from Makueni County, and expect the majority of the residents of Makueni County who are poor, to participate in the immensely important proceedings that may lead to the suspension of their county. He therefore seeks orders to stop the 1st to 7th Respondents from commencing their proceedings on 23rd April 2015. 30 35
10. The Applicant has made further depositions with regard to the alleged instigation of the petition to suspend Makueni County by the Governor and Deputy Governor as a result of a motion to impeach them by the County Assembly, but these are matters this court need not go into at this stage. He also avers that there was pending before the High Court Constitutional Petition Nos 500 of 2014 and 489 of 2014 challenging the impeachment of 40

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- the Governor of Makueni County and the County Executive Committee members respectively. It was his contention therefore that the proceedings before the 1st Respondent are sub-judice the pending court petitions. 1
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11. The Applicant further deposes that the petition presented to the President to suspend the County violates his rights under article 47(1) of the Constitution for being unlawful and procedurally unfair as it offends sections 90(1) and (2) of the County Governments Act. He contends that the said sections enjoin the Government of Makueni to facilitate and undertake a local referendum pursuant to the Elections Act No 24 of 2011 before the residents and citizens could sign the Petition. It is also his deposition that the impeachment of the Governor of Makueni is not an exceptional circumstance under article 192(1)(b) of the Constitution and section 122(b) of the County Governments Act to warrant suspension or commencement of a process to suspend the County. 10 15
12. The Applicant similarly argued that the constitution of the 1st Respondent to investigate and inquire into the situation of Makueni County is patently unlawful as it offends sections 123(3) and (4) of the County Governments Act; that the said proceedings by the 1st to 7th Respondents scheduled to commence on 23rd April, 2015 in Nairobi patently breach the provisions of articles 27(1), (4) and (5) of the Constitution; and that they disenfranchise the poor residents of and citizens in Makueni County from undertaking their civic duty to participate in the Petition seeking to suspend the County. 20 25
13. The Applicant's Counsel Prof Ojienda and Mr Okoth made submissions on his behalf. Mr Okoth submitted that in considering whether to grant conservatory orders in an application such as this, the Court is not called upon to make any definite finding either of fact or law, which would be within the province of the court that will ultimately hear the Petition. The Applicant was only required at this stage to establish a *prima facie* case with a likelihood of success, and to demonstrate that unless the conservatory order is granted, there is real danger which may be prejudicial to him. 30 35
14. He relied, among others, on the decisions in *Centre for Rights, Education and Awareness (CREAW) and 7 others v The Hon Attorney General*, Petition No 16 of 2011, *Muslims for Human Rights (MUHURI) and 2 others v The Attorney General* Mombasa High Court Petition No 7 of 2011. Counsel submitted further that under 40

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- article 23(3)(c) of the Constitution, a court had jurisdiction, in any proceedings brought under article 22, to grant appropriate relief, including a conservatory order. 1
15. Mr Okoth submitted that one of the objectives of devolved governments under article 174 of the Constitution is to give powers of governance to the people in making decisions that affect residents of the County. It was his submission that the County Government of Makueni could not be heard to say that it had no role in a Petition instituted to suspend the County Government as it was under an obligation to facilitate public participation. 5 10
16. Counsel further submitted that the Applicant's petition was not frivolous as it was seeking the Court's guidance on the due process of law to be followed in instituting a Petition to suspend a County Government; the threshold to be met; participants to be involved and interventions to be explored in the process leading to the signing and lodgement of a Petition to the President to suspend a County Government; and the statutory obligations to be performed by a Commission formed to inquire into suspension of a County Government. 15 20
17. It was his submission that because of the grave implications of the suspension of the County to the residents of Makueni County on one hand and tax payers generally in the event that the Commission were to recommend suspension, this was the best time and the appropriate forum to inquire into the critical question of what would constitute a valid petition to the President to form a Commission such as the 1st Respondent. 25
18. The Applicant submitted that the statutory consequences that would follow a recommendation for suspension include: proroguing of Makueni County Assembly pursuant to section 124 of the County Governments Act; suspension of the County pursuant to section 125 of the County Governments Act and transfer of the County Executive Authority of Makueni County to the County Management Board, an entity that has no direct mandate from the residents of the County, but is appointed under section 126 of the Act; and fresh elections in Makueni County and the eventual dissolution of the current County Executive and County Assembly in accordance with section 130 of the County Governments Act. 30 35 40
19. It was the Applicant's submission, therefore, in reliance on the

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- decision of the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 others* SC Application No 5 of 2014, that a recommendation of suspension by the 1st Respondent would lead to fresh elections pursuant to article 192(6) of the Constitution and section 130 of the County Government Act, which would utilise enormous, yet scarce public resources. It was his submission that such resources should only be committed to public causes that have received certification by Court to be valid. 1 5
20. Mr Okoth submitted on behalf of the Applicant that the Court was not being asked to descend into the arena of the Commission, but to stay the proceedings of the Commission. He contended that once the Petition before the Commission is published and it is ascertained that the factual basis of the petition to suspend Makueni County is the very substratum of Nairobi Petition Nos 500 of 2014 and 489 of 2014, then the proceedings before the 1st Respondent would be sub judice the said petitions. Counsel submitted that the Applicant had established a *prima facie* case, and asked the Court to dismiss the preliminary objection by the 8th Respondent and grant the conservatory orders sought by the Applicant. 10 15 20
- The Case for the 1st -7th and 9th Respondents
21. In response to the Application, and on behalf of the 1st – 7th and 9th Respondent, the Attorney General filed an affidavit sworn by Mr Morris Kaburu, the Secretary to the Commission, on 23rd April, 2015. He also filed submissions dated 27th April, 2015. The case for the Attorney General was presented by Learned Counsels, Mr Bitta and Mr Muiruri. 25
22. In his affidavit, Mr Kaburu denied the allegation that the Petition to suspend Makueni County was never published. He contended that it is inconceivable that a petition supported by signatories in excess of 50,000 from Makueni County as verified by the Independent Electoral and Boundaries Commission (IEBC) can be said not to have been published. 30 35
23. He further averred that the Petition had been published; that the Applicant, as a member of Parliament, had been made aware of the contents of the petition and invited to participate in the proceedings as a person with an identifiable interest; and that the allegation that the County Government of Makueni has failed to undertake some of its constitutional and statutory obligations are allegations which are the very subject matter of inquiry by the Commission. 40

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24. It was also the AG's averment that, contrary to the contention by the Applicant, the National and County Government Co-ordinating Summit approved the decision to constitute the Commission, and the President acted in accordance with this approval. 1
25. To the Complaint that the Commission was carrying out its proceedings in Nairobi, Mr Kaburu averred that the Commission, which commenced sittings on 23rd April 2015, had scheduled hearings from the 4th of May 2015 and throughout the month of May in various locations in Makueni County. Mr Kaburu contended that, in any event, national organs such as the Senate, the National Assembly and the Supreme Court which legislate on or adjudicate over matters affecting counties, including Makueni County, all sit in Nairobi. It was his deposition therefore that there was no rationale to compel the Commission to set up its offices for the purposes of executing its mandate in Makueni County. 5 10 15
26. The view of the Respondents was that this Petition is premature and presumptive and seeks to second guess what the Commission will or will not do; is premised on alleged infringement of fundamental rights and freedoms but discloses no such infringement, either in the pleadings or in the supporting affidavit, and has therefore no merit. 20
27. In their oral and written submissions, the Respondents observed that the Applicant has waited until the eve of the commencement of the Commission's work before moving to Court to stop the proceedings; that he appeared not to be cognizant of the amount of public resources expended so far to reach the current stage where evidence and public hearings have commenced; and that the granting of the orders that he was seeking would have financial implications arising from on-going contracts for goods and services entered into in relation to the process. 25 30
28. Learned Counsel Mr Bitta submitted that as demonstrated in the averments by Mr Kaburu, the Petition and application is based on false premises in view of the fact that the Petition to the President was published in the Kenya Gazette, which is the official publication, and is therefore deemed to have been in the public domain; that it was signed by 50,000 Makueni residents, and it was therefore not possible for it to receive affirmation of 50,000 voters if it was not published. 35 40
29. The Respondents urged the Court to be guided by the decision

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- in *Gatirau Peter Munya (supra)*, *Samuel Sabuni and 2 others v Court Martial and 8 others* [2014] eKLR, and *Wycliffe Indalu Adieno v Attorney General and others*, Petition No 315 of 2014 with regard to what the Court should consider in granting conservatory orders. It was his submission that such considerations are broader than *prima facie* case and prejudice and in the circumstances; the greater consideration is that of public interest and whether the petitioner has an alternative remedy other than coming to court. 1 5
30. In his submissions, Learned Counsel, Mr Muiruri, urged the Court, in considering the question of proportionate magnitude of the case, should consider whether the petition to the President was adequately publicized; the period within which the Commission is to exercise its mandate, and the process of constituting the Commission. He submitted that the Applicant is not an ordinary citizen and that despite sitting through the proceedings in Parliament when the matter was discussed, he has not told the Court whether he attempted to present his views as to why the Commission should not be formed. On behalf of the 1st Respondent and its members, the AG urged the Court to dismiss the Application with costs. 10 15 20
- The 8th Respondent's Case
31. The 8th Respondent opposes both the Application for conservatory orders and the Petition. It has filed an affidavit in opposition sworn by Ms Rael Mumo Muthoka, its Secretary on 27th April, 2015. It also filed a notice of preliminary objection dated 24th April, 2015 in which it seeks to have the Petition struck out, and written submissions dated 27th April, 2015. Its case was presented by its Learned Counsel, Mr Nyamu. 25 30
32. The 8th Respondent argues that this Application and the Petition are incurably defective for various reasons. It contends, first, that the Petition the subject of the inquiry by the 1st Respondent is not a petition envisaged under section 88 of the County Government Act, and the provisions of sections 88, 90 and 91 of the County Governments Act are not applicable to such a Petition. 35
33. The 8th Respondent argues, further, that the initiation of the Petition pursuant to which the Commission was constituted was not subject to the control and participation of the County Government. it contends that the procedure for petitioning the President for suspension of a County Government under section 123 of the County Governments Act and article 192 of the Constitution is 40

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- different from the procedure for other petitions to the County Government under section 88 of the County Governments Act. It submits therefore that section 90 of the County Governments Act is not applicable to such petitions, and the present petition is speculative, malicious, scandalous and only meant to delay and defeat the exercise of constitutional mandate by the President and the rights of the people of Makueni County. 1 5
34. The 8th Respondent further submits that the Petitioner is asking the Court to enter into the mandate of the 1st Respondent and its commissioners; that the petitioner has an avenue under section 3 of the Commission of Inquiries Act to raise objections on the basis that the matters the subject of the inquiry are sub-judice in the course of the Commission's proceedings, and a further right to approach the Court with regard to the recommendations of the Commission. 10 15
35. In her affidavit, Ms Mumo avers that the Commission was established in the correct manner; that all the procedures in establishing it were followed to the letter; that the petition to suspend Makueni County was presented six months ago and was gazetted as required. The 8th Respondent therefore avers that allegation that the public was not informed is baseless. 20
36. The 8th Respondent further avers that it was not the County Government of Makueni's place to present a petition to the President as envisaged under section 123 of the County Government Act and article 192 of the Constitution, and it is therefore not in way concerned with the establishment of the Commission and had no role to play in publication of its responsibilities or mandate. It was its case that the petitioner was confusing the procedure for petitions to the President under section 123 of the County Government Act and article 192 of the Constitution with the procedure and requirement of a Petition to the County Government under section 88 of the County Government Act; and in addition, that petitions to the President are not made through County Governments, which, under section 123 of the County Governments Act, have no obligation to conduct civic education, publish the petition or proceedings thereof or even call a referendum. 25 30 35
37. The 8th Respondent agrees with the AG that a Petition supported by more than 50,000 signatories from Makueni County as verified by the IEBC cannot be said not to have been published as the persons who appended their signatures in support of the Petition 40

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- are presumed to have read and understood its contents; that the allegation that the Commission will be sitting far from the people of Makueni is false as the advertisement indicated very clearly that the sittings of the Commission will also be in Makueni County on dates to be set and communicated; and further, that the Makueni County had no obligation to set up structures for public participation as the conduct of proceedings by the Commission is the preserve of the 1st to 7th Respondents. 1 5
38. The 8th Respondent further observes that the Applicant, as a Member of Parliament and a State officer, can easily access the Commission Secretariat at the Kenyatta International Conference Centre and be provided with any information, document or material he may require; and it has not been demonstrated that he has made any attempts to raise any matter with the Commission prior to the presentation of this petitions. It prayed that the application be dismissed and the Petition struck out. 10 15
39. In his submissions on behalf of the 8th Respondent, Mr Nyamu acknowledged that the Court has the discretion to issue conservatory orders. He submitted, however, that for such orders to be granted, a party must prove that he has a *prima facie* case with a likelihood of success and that unless the Court grants the said orders, there is real danger that he will suffer prejudice as a result of the violation of the Constitution. He relied on, among others, the decisions in *Hon Martin Nyaga Wambora and others v The Speaker of the County Assembly of Embu and others*, Petition No 7 of 2014 and *Gatirau Peter Munya (supra)*. 20 25
40. Mr Nyamu urged the Court to strike out the Petition, and in doing so, given the manner in which the Petitioner had brought the present petition, to strike it out with costs to the 8th Respondent. 30
41. The 10th Respondent was served with the application and petition but did not file a response or participate in the proceedings. 35
- Analysis and Determination
42. I have considered the pleadings and submissions of the parties in this matter, and in my view, two issues arise for consideration:
- i. Whether the Applicant has met the criteria for the grant of a conservatory order; 40
 - ii. Whether the present petition should be struck out in its entirety.

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43. Before considering the Applicant's case for conservatory orders and the submissions for and against it, I believe it is appropriate to first set out the principles that govern the grant of conservatory orders in constitutional petitions as they emerge from decisions in this and other jurisdictions. 1
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- Principles for Grant of Conservatory Orders
44. Article 23(3) of the Constitution vests in the Court the jurisdiction to grant conservatory orders in petitions brought under article 22 of the Constitution alleging violation or threat of violation of constitutional rights. It states as follows: 10
- (3) In any proceedings brought under article 22, a court may grant appropriate relief, including—
- (a) a declaration of rights;
 - (b) an injunction; 15
 - (c) a conservatory order;
 - (d)
45. In considering whether or not to grant a conservatory order in *Centre For Rights Education and Awareness (CREAW) & 7 others v Attorney General & others* Petition No 16 of 2011, Musinga J (as he then was) stated as follows: 20
- “....It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.” 25
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46. While expressing his agreement with the decision of Musinga J in the CREAW case above, Ibrahim J (as he then was), in *Muslims for Human Rights (MUHURI) & 2 others v Attorney General & 2 others*, Petition No 7 of 2011 stated as follows: 35
- “I would agree with my Brother, that an applicant seeking Conservatory Orders in a Constitutional case must demonstrate that he has a “*prima facie* case with a likelihood of success.” 40

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47. The Court went on to cite with approval the Privy Council decision in *Attorney General v Sumair Bansraj* (1985) 38 WIR 286 in which Braithwaite JA stated as follows:- 1
- “Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by section 14(2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has become to be known as the “Conservatory Order” in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the *status quo* of the subject matter will remain intact. The order would not then be in the nature of an injunction, ... but on the other hand it would be well within the competence and jurisdiction of the High Court to “give such directions as it may consider appropriate for the purpose of securing the enforcement of ... the provisions” of the Constitution. 5 10 15 20
48. In arriving at his decision in the *Muhuri* case, Ibrahim J concluded as follows:
- “What is clear to me from the authorities is that strictly a “Conservatory Order is not an injunction as known in Civil matters or generally in other legal proceedings but is an order that tends to and is intended to preserve the subject-matter or set of circumstance that exist on the ground in such a way that the constitutional proceedings and cause of action is not rendered nugatory. Through a Conservatory Order the court is able to “give such directions as it may consider appropriate for the purpose of securing of ... the provisions of the Constitution (see – *Bansraj* above)”. A Conservatory Order would enable the court to maintain the *status quo* or existing situation or set of facts and circumstances so that it would be still possible that the rights and freedoms of the claimant would still be capable of protection and enforcement upon determination of the Petition and the trial was not a futile academic discourse or exercise. 25 30 35 40
49. It is to be observed that emphasis is placed on balancing the respective rights and interests of parties in a matter, and considering both the public interest and the balance of convenience before

issuing conservatory orders. In the *Bansraj* case (*supra*) which was cited with approval in the *Muhuri* decision, the Court observed as follows:

“On the other hand, however, the state has its rights too... The critical factor in cases of this kind is the exercise of the discretion of the judge who must “hold the scales of justice evenly not only between man and man but also between man and state.”

50. With respect to the balance of convenience, the court in the *Muhuri* case stated as follows:

“Upon consideration of all matters herein including the submissions and principles enunciated in some of the authorities cited, it would be reasonable to state that in certain constitutional interlocutory applications which seek Conservatory Orders then the court may also consider the Balance of Convenience as between the Applicant/Claimant and the Respondent and in particular where it may involve the national and/or public interest.

51. The public interest principle has been re-emphasised in the recent past in the decision of the High Court in *Martin Nyaga Wambora v Speaker of The County Assembly of Embu & 3 others* Petition No 7 of 2014. In that case, the Court set out the principles applicable in the grant of conservatory orders as follows:

[59] In determining whether or not to grant conservancy orders, several principles have been established by the Courts. The first is that: “... [an applicant] must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution”

[60] To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention”.

[61] The second principle, which naturally follows the first, is whether if a conservancy order is not granted, the matter

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- will be rendered nugatory”. 1
52. The Court then went on to cite the decision of the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 others* SCK Petition No 2 of 2013. In that decision, the Supreme Court (Ojwang and Wanjala, JJSC) stated as follows with regard to the public interest consideration with respect to conservatory orders: 5
- “[86] ‘conservancy orders’ bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the suppliant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes” 10
- [63] Thus, where a conservancy order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislative body should take into account the need to allow for their ordered functioning in the public interest.” 15
53. I now turn to weigh the Applicant’s case against the principles enunciated in the cases set out above. 20
- Whether the Applicant has met the Criteria for the Grant of a Conservatory Order
54. The Applicant raises several grounds for the grant of a conservatory order in his favour, and also as forming the basis of his petition. He argues, first, that the petition for the suspension of Makueni County has never been published or publicised; that the 8th Respondent never undertook any civic education in the County; that it did not facilitate the conduct of a local referendum among the residents of Makueni County before the petition was signed, nor did it set up the structures for public participation that would enable the residents 25
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- and citizens in Makueni County present their views on the petition before it was signed; and further, that the County Government of Makueni did not carry out a local referendum in accordance with the provisions of sections 88, 90 and 91 of the County Government Act. 1
55. The Applicant also argues that the Petition was instigated and influenced by the Governor and Deputy Governor of the 8th Respondent through public pronouncements and manipulation of the public psyche following an impeachment motion against them. 5
56. The Applicant also has various grievances against the 1st Respondent. He has argued, first, that its constitution was unlawful as it offends the provisions of sections 123(3) and 123(4) of the County Government Act as there was never a resolution of the National and County Government Co-ordinating Summit to set it up. He is further aggrieved that the Commission has to date not published or publicized the actual petition that is the subject of its intended proceedings. Finally, the Applicant contends that the 1st Respondent intends to carry out proceedings in Nairobi as opposed to Makueni, thus violating his rights as well as the rights of the people of Makueni. 10
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57. It is perhaps useful to start with a brief consideration of the law relating to the suspension of County Governments. Article 192 of the Constitution sets out the conditions under which a County Government may be suspended by providing as follows: 25
- (1) The President may suspend a county government-
 - (a) In an emergency arising out of internal conflict or war; or
 - (b) In any other exceptional circumstances. 30
 - (2) A County government shall not be suspended under clause (1)(b) unless an independent commission of inquiry has investigated allegations against the County Government, the President is satisfied that the allegations are justified and the Senate has authorised the suspension. 35
58. The County Government Act supplements the constitutional provisions by setting out at section 123 thereof the procedure to be followed with regard to suspension:
- (1) Subject to subsection (2), a person may petition the President to suspend a county government in accordance with article 192(1)(b) of the Constitution if the county government engages in actions that are deemed to be 40

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- against the common needs and interests of the citizens of a county. 1
- (2) A petition under subsection (1) shall be supported by the signatures of not less than ten percent of the registered voters in the county. 5
- (3) The President shall, within fourteen days after receiving a petition against a county government under subsection (1), submit a report on the averments made and grounds giving rise to suspension of a county government before the apex intergovernmental body (hereinafter referred to as the apex body) established under the law governing intergovernmental relations for approval. 10
- (4) Upon approval by the apex body, the President shall nominate members of a Commission to inquire into and investigate the situation in the county and make recommendations on the suspension of the county government and shall, after approval by Senate, appoint the members of the Commission by notice in the Gazette. (Emphasis added) 15 20
59. Section 123(5) then sets out the composition of the Commission, which I believe is not under challenge in this petition. Section 123(6) and (7) of the Act then provide that:
- (6) The Commission shall have all or any of the powers vested in a Commission under the Commissions of Inquiry Act (cap 102), and at any inquiry directed under this section, the county government in question and any member thereof shall be entitled to be heard. 25
- (7) The Commission shall inquire into the matters before it expeditiously and report on the facts and make recommendations to the President. 30
60. Section 2 of the County Governments Act defines the “apex body” referred to in section 123(4) of the County Government Act set out above to mean “the body established under the law governing intergovernmental relations.” The apex body, as the Applicant indicates in his affidavit, is the National and County Government Coordinating Summit, established under section 7 of the Intergovernmental Relations Act of 2012. 35 40
61. Did the petition presented to the President for the suspension of Makueni County Government meet the requirements of article

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- 192(1)(b) of the Constitution and section 123 of the County Governments Act? It is not disputed that the petition, which is dated 21st November 2014 and signed by nine petitioners, was supported by more than 50,000 registered voters from Makueni County, whose signatures were verified by the IEBC as required. A copy of the petition was produced in Court at the hearing of this Application. 1
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62. It was also, contrary to the allegations by the Applicant, approved by the “apex body”, The National and County Government Coordinating Summit. The evidence for this is contained in the letter dated 13th January, 2015 from the Cabinet Secretary for Devolution, Ms Ann Waiguru, to Mr Joseph Kinyua, the Chief of Staff and Head of Public Service, Executive Office of the President, which has not been controverted by the Applicant. In the said letter, Ms Waiguru informs Mr Kinyua that the National and County Government Coordination Summit had resolved that a Commission of Inquiry be set up once the signatures appended to the petition for suspension were verified by the IEBC. 10
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63. As a result, pursuant to the verification by IEBC, the 1st Respondent was appointed by the President and gazetted vide Gazette Notice Number 1557 dated 10th March, 2015. The argument that there was no approval by the National and County Government Coordinating Summit of the decision of the President to constitute the Commission therefore has no merit. 20
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64. The Applicant has also argued that the petition to the President was not published and that the County Government of Makueni did not conduct any referendum or facilitate avenues for the participation of the people before they signed the Petition. He relies for these contentions on the provisions of section 88 of the County Governments Act. The question is whether the County Governments Act imposes on a County Government an obligation to conduct such a referendum or provide such avenues for public participation during the signing of a Petition for its suspension. 30
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65. It must be observed that a Petition to the President for suspension of a County Government is provided for, as set out above, under section 123 of the County Governments Act. On the material before me, and upon a careful consideration of the provisions of the County Governments Act, such a Petition does not appear to me to be in any way similar to a County Government petition which is provided for under section 88 of the County Governments Act as follows: 40

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1. Citizens have a right to petition the county government on any matter under the responsibility of the county government. 1
 2. Citizen petitions shall be made in writing to the county government. 5
 3. County legislation shall give further effect to section 88(1).
66. In my view, the provisions of section 88, as section 88(3) seems to suggest, are specific and limited to matters that are within the purview of the County Government. Under section 123 of the Act, the suspension of a County Government is outside the mandate of the County Government. Section 123 allows any person to lodge a petition with the President for the suspension of a County Government, provided that such petition is signed by not less than ten per cent of the registered voters in the County in question. 10 15
67. In my view, and again upon a careful perusal of the provisions of article 192 of the Constitution and section 123 of the County Governments Act, there is no obligation on a County Government to conduct a referendum or public education or even publish the contents of a petition for its suspension before the Petition is submitted to the President. 20
68. The Applicant is also aggrieved that there has been no publication of the subject of the proceedings by the Commission, and that the Commission shall be conducting its sittings in Nairobi. First, I must observe that, from the evidence before me, this is not factually true. From the document annexed to the Applicant's affidavit as annexure "MM2", it is evident that the 1st Respondent has scheduled sittings, not only in Nairobi, but also in Makueni. Secondly, under the Commission of Inquiry Act, the 1st Respondent has power, under section 3 of the Commissions of Inquiry Act, to make provisions pertaining to the issues that it is set up to deal with, and the places where it will sit. It states as follows: 25 30 35
1. The President, whenever he considers it advisable so to do, may issue a commission under this Act appointing a commissioner or commissioners and authorizing him or them, or any specified quorum of them, to inquire into the conduct of any public officer or the conduct or management of any public body, or into any matter into which an inquiry would, in the opinion of the President, 40

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- be in the public interest. 1
2. Every commission shall specify the matter to be inquired into, and shall direct where and when the inquiry shall be made and the report thereof rendered, and, where more commissioners than one are appointed, the commission may designate one such commissioner to be chairman, and, if the President so thinks fit, another such commissioner to be deputy chairman, of the commissioners. (Emphasis added) 5
69. I note that the 1st Respondent placed an advertisement in the *Daily Nation* newspaper of Thursday, April 16th 2015 with respect to its mandate and sittings. The advertisement, which informs the general public of the constitution of a Commission of Inquiry and the scope of its mandate, among other things, is in the following terms: 10
- a. Inquire into the circumstances leading to the allegations in the Petition that the County Government of Makueni has irretrievably broken down with two governments operating parallel to each other; 15
 - b. Inquire into the allegation in the Petition that the County Government of Makueni is completely dysfunctional and cannot discharge its constitutional mandate; 20
 - c. Perform any other task that the Commission may deem necessary in fulfilling the Terms of Reference; 25
 - d. Recommend such legal or administrative measures as the Commission may deem necessary, and report its findings and recommendations within six (6) months; and
 - e. Report on the facts and make recommendations to the President in respect of the matter before it. 30
- In exercising its mandate, the Commission shall be guided by the Constitution of Kenya and all relevant laws.
- The Commission has caused to be gazetted its Rules of Procedure. Hearings will commence on Thursday, 23rd April 2015 at the Aberdare Hall at the KICC. The Commission will also on dates to be notified, schedule meetings in Makueni County in order to encourage public participation as required by law. 35
- In the meantime, all persons who wish to submit memoranda or statements for consideration by the Commission may deliver the same to our office or via our Telephone Numbers 40

020-2217466 or 020-2217467 or 020-2217468, Email address makuenicoi@kenya.go.ke or care of PO Box Number 62345-00200 Nairobi.” 1

70. It is noteworthy that the present petition was filed on 22nd April 2015, a day before the sittings of the Commission were to commence, and some five days after the advertisement was placed in the media. The contents of the advertisement are clear with respect to the Commission’s mandate, which is an inquiry into allegations that the Makueni County Government is dysfunctional and has failed to act in accordance with its constitutional mandate; and the Commission invites interested persons to submit memoranda or statements for consideration, and supplies contact addresses for the submission of statements and memoranda. It is clear therefore that the 1st Respondent had publicised what it intended to do, and invited citizen participation in its inquiry. 5 10 15

71. It is thus evident that on the material before me, and bearing in mind the mandate of the Court at this stage, which is to consider whether or not to grant conservatory orders under article 23, in respect of a claim under article 22, I am unable to find that the Applicant has established a *prima facie* case that either his rights or those of the residents of Makueni have in any way been violated or threatened. 20

72. As I have found above, the Petition before the President was lodged in accordance with article 192(1)(b) and section 123 of the County Government Act, not under section 88 of the Act. Secondly, the Petition to the President was duly published, as evidenced by the copy produced in court, which was not challenged by the applicant. Further, the approval of the apex body, the National and County Government Coordinating Summit, was obtained. There was no obligation on the 8th Respondent to facilitate public participation on the petition either before its presentation to the President, or before the Commission of Inquiry commenced its work, as it is not a Petition to the County Government under section 88 of the County Governments Act. 25 30 35

73. In view of the above, I am constrained to find that the Petitioner has not presented to this Court an arguable case that would justify the grant of conservatory orders in his favour. 40

74. More importantly, I believe that the balance of convenience and

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- the public interest would militate against the grant of such orders. I take several matters into account in this regard. First, the Petitioner is a Member of Parliament, not an ordinary resident of Makueni. The Petition to the President has been in the public domain since November 22, 2014. The Commission of Inquiry was appointed on 6th March 2015 and gazetted on 10th March 2015. Its members were approved by the National Assembly, where the Applicant sits, on 4th March 2015, according to the Hansard, the official record of parliamentary proceedings of that day.
75. As submitted by the AG, at no point throughout this period did the applicant raise any issue regarding the petition the subject of the inquiry, or any other matter regarding the constitution of the Commission or the publication or publicisation of the Petition. To raise these issues now, at the 11th hour, has not been shown to be in the interests of the public, and to grant the orders sought would be against the public interest in view of the fact that the state has expended considerable resources to set up the Commission, which was set to commence its sittings the day after this application was filed. All things considered, the balance of convenience, as well as the public interest, demand that the Commission proceeds with its mandate.
76. In the circumstances, I find that the Application dated 22nd April 2015 has no merit and is hereby dismissed.
- Whether the Present Petition should be struck out in its entirety
77. The 8th Respondent has asked the Court to strike out the Petition in its entirety on the basis, *inter alia*, that it is speculative, malicious, scandalous and only meant to delay and defeat the exercise of the constitutional mandate by the President and the rights of the people of Makueni County; and further, that it is based on the wrong premise that the Petition for the suspension of the County is one brought under section 88 of the County Government Act.
78. I must state that given the nature of the issues raised by the Applicant/Petitioner, this Court has, had to address its mind to the issues that the substantive petition raises, including the Application of section 88, 90 and 91 of the County Government Act. As a result, it has had to make definitive findings of fact and law at this interlocutory stage. The question is whether it should strike out the Petition as prayed by the 8th Respondent.

79. I am cognisant of the words of the Court in the case of *DT Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR with respect to striking out of pleadings, in which the Court of Appeal considered various decisions on the question and stated that the power to strike out pleadings should be exercised in cases which are clear and beyond all doubt, that ".....the Court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments." 1
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80. In the present matter, the 8th Respondent has asked the Court to strike out the Petition on various grounds, which were also at the core of its opposition to the application for conservatory orders. I have considered above the Applicant's case, and the Respondent's response thereto. Having done so, and in light of the conclusions which have led to the decision not to grant the conservatory orders sought, I am doubtful that any useful purpose would be served by maintaining this Petition. 15
81. While the core of the Petition is the alleged violation of the rights of the Petitioners and the residents of Makueni under articles 27 and 47(1) of the Constitution, nothing has been placed before me in the course of the hearing of the Application that even remotely suggests violation of these rights. The crux of the Petition is the failure by the 8th Respondent to abide by sections 88-91 of the County Governments Act, which I have found do not apply to the petition in question; and the alleged failure by the President to obtain the consent of the National and County Government Coordinating Summit, which this Court has found was obtained. 20
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82. With respect to other matters raised by the Applicant such as whether the Petition the subject of inquiry by the 1st Respondent meets the criteria of article 192(1)(b), and whether it was instigated by the Governor and Deputy Governor, I agree with the Respondents that those are matters which fall squarely within the mandate of the 1st – 7th Respondents. 35
83. In the circumstances, I am not satisfied that there is any issue worth canvassing that remains live in this Petition, and I am inclined to agree with the 8th Respondent that it should be struck out. 40
84. Consequently, the Application for conservatory orders is hereby dismissed, and the Petition is also struck out.

85. With regard to costs, which are in the Court’s discretion, I direct each party to bear its own costs. 1

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**County Government of Nyeri & another
v Ndungu [2015] KLR – CAK**

Court of Appeal, at Nyeri

March 18, 2015

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A Visram, M koome, J Otieno-odek, JJ A

Civil Appeal No 2 of 2015

(An appeal from the Industrial Court of Kenya at Nyeri (Byram Ongaya, J) dated 5th December, 2014 in Petition No 1 of 2014)

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Brief facts

The Respondent was the County Executive Secretary in charge of Culture, Gender and Social Development. She was appointed by the Governor of Nyeri County on September 27, 2013, pursuant to article 179(2) of the Constitution of Kenya, 2010. On June 24, 2014, the Governor dismissed her from service and she filed a Petition at the Industrial Court to challenge her dismissal.

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Her Petition entailed a claim that her constitutional rights had been violated and that she had not received fair administrative action. She stated that she had been dismissed in a press conference which was made known to her by members of the public and she was not given reasons for the dismissal. The Industrial Court *via* a judgment declared that the Respondent's dismissal violated her constitutional rights, quashed the dismissal decision and reinstated the Respondent into service at the Nyeri County.

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Against that decision, the Appellants lodged an appeal at the Court of Appeal. The basis of the Appeal was that the pleasure doctrine was applicable and that the Governor had powers under section 31(a) of the County Governments Act, No 17 of 2012, to dismiss a County Executive Committee member at any time if the Governor considered it appropriate or necessary. They explained that those powers were similar to powers of the President of the Republic of Kenya to dismiss a Cabinet Secretary under article 152(5)(b) of the Constitution of Kenya, 2010.

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Issues

- i. What was the prescribed mode of removal of a member of the County Executive Committee.
- ii. Whether the pleasure doctrine was applicable in the dismissal of a member of the County Executive Committee by the Governor and if so, what is the extent of its application.

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iii. Whether the Respondent's termination was subject to the Employment Act.	1
iv. Whether the Respondent's constitutional rights of fair administrative action were violated by the Appellants.	5
County Government – <i>County Executive Committee members – dismissal of County Executive Committee members – procedure in which County Executive Committee members could be dismissed from office – County Governments Act, No 17 of 2012, sections 31(a) & 40.</i>	10
Constitutional Law – <i>pleasure doctrine – applicability of the pleasure doctrine in dismissal of a County Executive Member – limitation and nature of restriction on the applicability of the doctrine of pleasure – whether a governor had discretionary powers to exercise the pleasure doctrine – Constitution of Kenya, 2010, articles 10, 47, 73(2)(d), 174 & 175; County Governments Act, No 17 of 2012, sections 31(a) & 34.</i>	15
County Governments Act, No 17 of 2012, section 31(a)	
31. Powers of the governor	
The governor—	
(a) may, despite section 40, dismiss a county executive committee member at any time, if the governor considers that it is appropriate or necessary to do so;	20
County Governments Act, No 17 of 2012, section 40	
40. Removal of member of executive committee	25
(1) Subject to subsection (2), the Governor may remove a member of the county executive committee from office on any of the following grounds—	
(a) incompetence;	
(b) abuse of office;	30
(c) gross misconduct;	
(d) failure, without reasonable excuse, or written authority of the governor, to attend three consecutive meetings of the county executive committee;	35
(e) physical or mental incapacity rendering the executive committee member incapable of performing the duties of that office; or	
(f) gross violation of the Constitution or any other law.	40
(2) A member of the county assembly, supported by at least one-third of all the members of the county	

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- assembly, may propose a motion requiring the governor to dismiss a county executive committee member on any of the grounds set out in subsection (1). 1
- (3) If a motion under subsection (2) is supported by at least one-third of the members of the county assembly— 5
- (a) the county assembly shall appoint a select committee comprising five of its members to investigate the matter; and 10
- (b) the select committee shall report, within ten days, to the county assembly whether it finds the allegations against the county executive committee member to be substantiated. 15
- (4) The county executive committee member has the right to appear and be represented before the select committee during its investigations. 15
- (5) If the select committee reports that it finds the allegations— 20
- (a) unsubstantiated, no further proceedings shall be taken; or
- (b) substantiated, the county assembly shall vote whether to approve the resolution requiring the county executive committee member to be dismissed. 25
- (6) If a resolution under subsection (5)(b) is supported by a majority of the members of the county assembly—
- (a) the speaker of the county assembly shall promptly deliver the resolution to the governor; and 30
- (b) the governor shall dismiss the county executive committee member.

Held:

1. Under the County Governments Act, No 17 of 2012, there were two separate methods through which a County Executive Committee member could be dismissed from office. Firstly, under section 40, a Governor could dismiss a County Executive Committee member on any specified ground following a resolution by the County Assembly for such dismissal. Secondly under section 31(a), a Governor could dismiss a County Executive Committee member on his own motion at any time if he considered it appropriate and necessary to do 35 40

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- so. It was this second mode that appeared to vest an element of discretion on the part of the Governor and which was the subject of interpretation in this Appeal. 1
3. Comparative jurisprudence on the question of the doctrine of pleasure showed that the doctrine connoted that a public authority had to act reasonably and fairly in exercising power. The extent of reasonableness or fairness was dependent on the express or implied qualification imposed in the exercise of the doctrine by public authority. 5
4. The County Governments Act was enacted to give effect to Chapter 11 of the Constitution which provided for devolution. Therefore, an interpretation of section 31(a) of the Act had to be done in light of the values, purposes and principles of the Constitution. 10
5. Section 31(a) of the County Governments Act, granted power to a Governor to dismiss a member of the County Executive Committee at any time ie at his pleasure. However, given the principles and values of the Constitution, such power was qualified to the extent that the Governor could only exercise that power reasonably and not arbitrarily or capriciously. The Constitution explicitly stated that sovereign power belonged to the people and the exercise of the said power ought to be in accordance with the Constitution. The Constitution took away the notion that sovereign power was vested in individuals or certain offices and could be exercised at the will of an individual or office. 20 25
6. A County Executive Committee member was a Governor's right hand in his/her respective office and the Governor had to have confidence in such a member. Where confidence was lost, the Governor had to have the capability to remove a member without undue delay so as to enable the County Executive Committee to function for the benefit of the County. The preamble to the Constitution provided that in adopting and enacting the Constitution, the people of Kenya recognized the aspirations of all Kenyans for a government based on the essential values of human rights freedom, democracy, social justice and the rule of law. The Kenyan people exercised their sovereign and inalienable right to determine the form of governance of the country. 30 35
7. Section 31(a) provided that a Governor could dismiss a County Executive Committee member at any time if he/she considered it appropriate or necessary to do so. The provisions of section 31(a) placed an obligation on the Governor to exercise that power only when necessary or appropriate. Such a requirement entailed 40

- reasonableness on the part of the Governor when exercising that power. Chapter 6 of the Constitution provided for leadership and integrity and it placed an obligation on leaders to exercise the authority vested in them in a manner that was consistent with the purposes and objects of the Constitution. Article 73(2)(d) of the Constitution had made leaders accountable to the public for their decisions and actions and further, article 174(a) provided that one of the objects of devolution was to promote democratic and accountable exercise of power
8. By dint of article 179(1) of the Constitution and section 34 of the County Governments Act, the executive authority of a County was vested in the County Executive Committee. The County Executive Committee comprised of the Governor, Deputy Governor and members of the County Executive Committee who were appointed by the Governor. The members of the County Executive Committee assisted the Governor to carry out his mandate under the law and it was the Governor who assigned to every member of the County Executive Committee responsibility to ensure the discharge of any function in the County. That was the reason why the County Executive Committee members were individually and collectively accountable to the Governor in the exercise of their powers and performance of their duties and responsibilities.
9. By virtue of the fact that a Governor ought to exercise his powers for the public good he should not act on selfish motives but for the benefit of his/her County. The reasons for exercising the said power ought to be valid and compelling and would depend on the circumstances of each case. Consequently, the power to dismiss a member of the County Executive was qualified to the extent that the same ought to be for the benefit of the County and in accordance to the principles of devolution.
10. The extent to which due process was applicable to a case of dismissal of a County Executive Committee member depended on express or implied statutory limitations and the circumstances of the case. There could be circumstances where the Governor lost confidence in a County Executive Committee member and due to the sensitivity or urgency of the matter at hand, the Governor could dismiss the member without giving notice of his intention to do so.
11. Section 31(a) of the County Government Act, did not require a Governor to hold a disciplinary hearing before issuing a dismissal but he could only dismiss a County Executive Committee member where he considered it appropriate or necessary. Appropriateness

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- or necessity was not arbitrary or whimsical. It imported the requirement that there had to be reasons that made the dismissal appropriate or necessary. It was these reasons that determined whether the discretionary power exercised under section 31(a) of the County Government Act was reasonable or not. 1
12. There were no reasons for the Respondent's dismissal offered in the dismissal letter and the circumstances leading to the termination of the Respondent's services were unclear. It was therefore apparent that the 2nd Appellant's actions were arbitrary and were a violation of the Respondent's right to fair administrative action as provided for in article 47 of the Constitution. 5
13. The Employment Act 2007 did not apply to State Officers as a State Officer's terms and conditions of service were regulated by the Constitution and the applicable statute, the principles of fair administrative action and the rules of natural justice. It therefore followed that a member of the County Executive Committee being a state officer was not subject to the provisions of the Employment Act. 10

Appeal dismissed, with costs to the Respondent. 20

Cases

East Africa

1. *Joho, Hassan Ali & another v Suleiman Said Shahbal* Petition No 10 of 2013 – (Mentioned) 25
2. *Birir, Richard Bwogo v Narok County Government & 2 others* Petition No 1 of 2014 – (Mentioned)
3. *Munyasya, Tom Luusa & another v Governor of Makueni County & another* Cause No 103 of 2014 – (Mentioned)

Australia 30

1. *Amalgamated Society of Engineers v Adelaide Steamship Company Ltd & others* (1920) 28 CLR 129 – (Explained)

Canada

1. *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680 – (Explained) 35
2. *David Dunsmuir v New Brunswick* [2008] 1 SCR 190 – (Explained)
3. *Knight v Indian Head School Division No 19* (1990) 1 SCR 653 – (Mentioned)

India

1. *India v Tulsiram Patel* (1985) 3 SCC 398 – (Explained) 40
2. *Bihar v Abdul Majid* (1954) SCR 786 – (Explained)
3. *BP Singhal v Union of India & another* (2010) INSC 365 –

(Followed)	1
4. <i>PL Dhingra v Union of India</i> AIR 1958 SC 36 – (Explained)	
5. <i>Moti Ram v NE Frontier Railway</i> AIR [1964] SC 600 – (Explained)	
United Kingdom	
1. <i>Cusack v Harrow London Borough Council</i> [2013] 4 All ER 97 – (Explained)	5
2. <i>Ridge v Baldwin & others</i> [1963] 2 All ER 66 – (Mentioned)	
Texts and Journals	
1. Wade, HWR., Forsyth, CF., (Eds) (2004) <i>Administrative Law</i> London: Oxford University Press 9 th Edn pp 354-355	10
2. Garner, BA., (Ed) (2004) <i>Black's Law Dictionary</i> St Paul Minnesota: West Group Publishers West 8th Edition	
3. Hogg, QM., (Lord Hailsham) <i>et al</i> (Eds) (1995) <i>Halsbury's Laws of England</i> London: Butterworths 4th Edn Reissue, Vol 44(1) para 1372	15
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East Africa	
1. Constitution of Kenya, 2010 articles 1(3)(b); 10(1)(2); 22(1); 27(1) (2)(3); 23(3)(f); 28; 41(1); 47; 50; 73(2)(d); 152(5)(b); 174; 175; 179(1),(2)(b),(6); 200(2)(c); 260 – (Interpreted)	20
2. County Governments (Act No 17 of 2012) section 3(b); 3(i)(j); 31(a); 35; 39; 76 – (Interpreted)	
3. Employment Act, 2007 (Act No 11 of 2007) In general – (Interpreted)	25
4. Law Reform Act (cap 26) In general – (Interpreted)	
5. Civil Procedure Rules (cap 21 Sub Leg) order 53 – (Interpreted)	
India	
1. Constitution of India articles 156, 310 – (Interpreted)	
Advocates	30
1. <i>Mr Wahome Gikonyo</i> for the Appellants	
2. <i>Mr JM Ng'ang'a</i> for the Respondent	
March 18, 2015, the following Judgment of the Court was delivered.	
Introduction	35
1. This Appeal raises a fundamental issue under the 2010 Constitution and the County Governments Act: whether a member of the County Executive Committee is appointed at the pleasure of a Governor and can be dismissed at the Governor's pleasure, without due process.	40

Background	1
2. Article 179 (2) of the Constitution stipulates:-	
“The County Executive Committee consists of	
a. the County Governor and the Deputy County Governor; and	5
b. members appointed by the County Governor, with the approval of the assembly, from among persons who are not members of the assembly.	
3. Pursuant to the above article, the Respondent was appointed vide a letter dated 27 th September, 2013 as the County Executive Secretary in charge of Culture, Gender and Social Development by the 2 nd Appellant. Subsequently, on 24 th June, 2014 the Respondent was relieved from her duties by the 2 nd Appellant. Aggrieved with her termination, the Respondent filed a Petition in the Industrial Court seeking:-	10
• A declaration that the act of the 2 nd Respondent (2 nd Appellant herein) in relieving the Petitioner (Respondent herein) of her duties is a breach of the latter’s constitutional rights under article 27(1), (2) & (3), 28, 41 & 50 of the Constitution of Kenya and that the same is null and void for all intent and purposes.	20
• An order of Judicial Review to remove into this Honourable court and quash the decision of the 2 nd Respondent relieving the Petitioner of her duties as County Executive in charge of Culture Gender and Social Development.	25
• An order of Judicial Review of prohibition to remove into this Honourable court and prohibit the Respondents from appointing any fresh nominee for approval by the Nyeri County Assembly for appointment as a member of Nyeri County Executive in charge of Culture Gender and Social Development.	30
• In alternative and without prejudice to prayer (d) above, an order of payment of all dues to the Petitioner in the period she would have served up to the end of her term.	35
4. The Respondent deposed that she had moved the Court pursuant to article 22(1) of the Constitution because the Appellants had violated her inalienable Constitutional right to an efficient, lawful and procedurally fair administrative action. She deposed that she was never given any reasons for her termination; she was informed	40

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of the dismissal by the members of the public after the 2nd Appellant announced the same in a press conference. She maintained that she was relieved from duty in a manner that was illegal, unconstitutional, inhuman and degrading. The Respondent further deposed that the 2nd Appellant violated her constitutional rights in the following ways:- • By dismissing the Respondent with immediate effect, the 2nd Appellant violated her right to a fair hearing and fair labour practices contrary to article 41(1) of the Constitution. • By dismissing the Respondent without giving reasons for her dismissal, the 2nd Appellant acted contrary to article 47 of the Constitution which prescribes fair administrative action. • By announcing the Respondent's dismissal at a press conference without any notice to her exposed her to degrading and inhuman action contrary to article 28 of the Constitution. 5. In his Replying Affidavit the 2nd Appellant opposed the Respondent's Petition, deposing that the said petition was incompetent and an abuse of the Court process because firstly, the Governor, Nyeri County was not a legal person capable of being sued in his own name, and secondly, the Petition was not supported by sufficient material to demonstrate that her fundamental rights had been violated. According to the 2nd Appellant, since the Respondent was appointed under article 179(2)(b) of the Constitution she held her office at his pleasure. Consequently, she could not question her dismissal under section 31(a) of the County Governments Act which is in <i>pari-materia</i> with article 152(5)(b) of the Constitution and which gives the President the power to dismiss a Cabinet Secretary at his own pleasure without giving reasons. The 2nd Appellant further deposed that the Respondent being a state officer under the meaning of article 260 of the Constitution was not subject to the Employment Act. 6. The trial court <i>vide</i> a judgment dated 5th December, 2014 allowed the Respondent's Petition and issued the following orders:- • Declaration that the act of the 2nd Respondent (2nd Appellant herein) in relieving the Petitioner of her duties is a breach of the Petitioner's constitutional rights under articles 27(1), (2) & (3), 28, 41 & 50 of the Constitution	1 5 10 15 20 25 30 35 40

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- and the same is null and void for all intent and purposes. 1
 - An order of judicial review of certiorari is hereby issued to remove into the honourable court for quashing the decision of the 2nd Respondent relieving the Petitioner of her duties as the county executive in charge of culture, gender and social development and as conveyed by each and every letter issued by the 2nd Respondent and addressed to the Petitioner on 24/6/14 including the one erroneously dated 24/6/13. 5
 - The Petitioner is entitled to remain in service of the Respondents and to be allowed by the Respondents to continue in the Respondents' service forthwith as the Nyeri County Executive Member in charge of culture, gender and social development, and to perform the attached duties in accordance with the relevant provisions of the Constitution, statutes or as lawfully assigned, unless the Petitioner otherwise lawfully ceases to hold office. 10 15
 - The Respondents to pay costs of the suit. 20
7. Aggrieved with that decision the Appellants filed this current appeal based on the following grounds:
- The learned Judge erred in law in not holding and finding that the Governor has powers under section 31(a) of the County Governments Act, No 17 of 2012 to dismiss a County Executive Committee Member at any time if the Governor considers it appropriate or necessary to do so just like the President of the Republic of Kenya has powers to dismiss a Cabinet Secretary under article 152(5)(b) of the Constitution. 25 30
 - The learned Judge erred in law in not holding and finding that a County Executive Committee Member holds office at the pleasure of the Governor under section 31(a) of the County Governments Act like a Cabinet Secretary holds office at the pleasure of the President under article 152(5)(b) of the Constitution. 35
 - The learned Judge erred in law in not holding that the pleasure doctrine was applicable in the appointment and dismissal of Members of County Executive Committee under article 179(2)(b) of the Constitution as read together with section 31(a) of the County Governments 40

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Act just as it is applicable to the appointment and dismissal of Cabinet Secretaries under article 152(2) & (5)(b) of the Constitution.	1
• The learned Judge erred in holding that the dismissal of a County Executive Committee Member by a Governor has to involve the due process by serving a County Executive Committee Member with a notice to show cause and giving reasons for such dismissal and giving the County Executive Committee Member a chance to be heard in writing before dismissal.	5
• The learned Judge erred in law in not holding that the appointment and dismissal of a County Executive Committee Member is governed by article 179(2)(b) & 200(2)(c) of the Constitution as read together with section 35 & 31(a) of the County Governments Act and that the Employment Act does not apply to the same just as it does not apply to the appointment and dismissal of Cabinet Secretaries which is governed by article 152(2) & 5(b) of the Constitution.	10
• The learned Judge in view of the provisions of article 179(2) (b) & 200(2)(c) of the Constitution as read with together with section 35 & 31(a) of the County Governments Act erred in holding that relieving the Respondent from her duties was in breach of the Petitioner's rights under article 27(1)(2) & (3), 28, 41 & 50 of the Constitution.	15
• The learned Judge erred in holding that section 76 of the County Governments Act is applicable to County Executive Committee members as it applies to County Public Services while a member of a County Executive Committee is not an employee of the County Public Service Board but an appointee of the Governor under article 179(2)(b) of the Constitution.	20
• The learned Judge erred in not holding and finding that a dismissal of a County Executive Committee Member by the Governor under section 31(a) of the County Government Act just like that of the President of a Cabinet Secretary under article 152(5)(b) of the Constitution does not oblige the two to give reasons but under section 40 of the County Governments Act, the County Assembly just like the National Assembly under	25
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article 152(6) of the Constitution has to give the reasons enumerated therein.	1
• The learned Judge erred in holding that the relieving of duties of the Respondent by the Governor was not in accordance with the Constitution or that section 31(a) of the County Governments Act requires the Governor to give reasons for relieving a County Executive Committee Member.	5
• The learned Judge erred in not finding and holding that if the appointment and dismissal of County Executive Committee members or Cabinet Secretaries is to be subjected to the provisions of the Employment Act whereby they have to be served with a notice to show cause and disciplinary hearings are conducted, both the National and County Governments may ground to a halt to the grave prejudice of the citizenry.	10
• The learned Judge erred in holding that article 179(7) of the Constitution which provides that 'if a vacancy arises in the office of the County Governor, the members of the County Executive Committee appointed under clause 2(b) cease to hold office.' has no relevance to the dispute in question while at the same time holding that for an Executive Committee Member to cease to hold office due process has to be followed.	15
• The learned Judge erred in law in granting orders of judicial review in a Petition when judicial review has its own elaborate procedure under the Law Reform Act and order 53 of the Civil Procedure Rules.	20
Appellants' submissions:	25
8. Mr Wahome Gikonyo, learned counsel for the Appellants, submitted that there are conflicting authorities in the High Court in respect of the applicability of the pleasure doctrine in appointments made by a Governor; whether the Governor has power to terminate the services of a member of the County Executive Committee at his own pleasure without following due process. He submitted that section 31(a) of the County Governments Act was in <i>pari materia</i> with article 152(5)(b) of the Constitution which empowers the President to terminate the services of a Cabinet Secretary at his own pleasure. While placing reliance on the definition of the word 'may' in the <i>Black's Law Dictionary</i> , 8 th Edition, Mr Wahome urged	30
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that the word may in section 31(a) of the County Governments Act permits a Governor to terminate the services of the Respondent without following due process.

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9. He argued that a pleasure appointment such as the one enjoyed by the Respondent could be taken away without notice, and if the legislator had intended otherwise, it would have said so explicitly in the statute. According to Mr Wahome, the loss of confidence in a member of the County Executive Committee was sufficient reason to terminate his/her services. He argued that section 76 of the County Governments Act only applied to County employees and not members of the County Executive Committee. Mr Wahome urged us to allow the Appeal.

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Respondent's submissions:

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10. Mr JM Ng'ang'a, learned counsel for the Respondent, in opposing the appeal, submitted that in jurisdictions where the pleasure doctrine is applicable like in India the same is expressly stated in the Constitution. He submitted that the Constitution of Kenya does not contain the aforementioned provision hence an Act of Parliament which contains the same is contrary to the Constitution and is void. Mr Ng'ang'a argued that by dint of article 179(2)(b) of the Constitution the Governor needs approval of the County Assembly in the appointment of County Executive members hence his power is not absolute. Therefore, Mr Ng'ang'a urged that the Respondent was entitled to a fair administrative action and could not be dismissed unprocedurally.

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11. According to Mr Ng'ang'a, even if the pleasure doctrine was applicable the same does not license a person to act arbitrarily and whimsically. The doctrine does not have an absolute unrestricted application. Mr Ng'ang'a submitted that political questions and exercise of prerogative power in this country are subject to judicial review on principles of legality, rationality or procedural impropriety; the same suggests that this country is moving away from the pleasure doctrine. Mr Ng'ang'a argued that section 31(a) of the County Governments Act is ambiguous and unconstitutional. He maintained that the Respondent's dismissal was based on section 40 of the County Governments Act. Mr Ng'ang'a urged us to dismiss the appeal.

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Analysis:	1
12. Section 17 of the Industrial Court Act provides:-	
“17(1) Appeals from the Court shall lie to the Court of Appeal against any judgment, award, order or decree issued by the Court in accordance with article 164(3) of the Constitution.	5
(2) Any appeal from a judgment, award, decision, decree or order of the Court <u>shall lie only on matters of law</u> ” Emphasis added.	10
By virtue of the foregoing provisions we are restricted to delving into matters of law only. We are of the considered view that the following issues arise for our consideration:-	
• What is the prescribed mode of removal/dismissal of a member of the County Executive Committee from office”	15
• Whether the doctrine of pleasure is applicable in the dismissal of a member of a County Executive Committee by the Governor under section 31(a) of the County Governments Act; if so what is the extent of its application”	20
• Whether the Respondent’s termination was subject to the Employment Act.	
• Whether the Respondent’s constitutional rights were violated by the appellants.	25
• Whether the remedies issued by the Industrial Court were proper.	
Dismissal of a member of a County Executive Committee:	
13. In determining how a member of a County Executive Committee can be removed from office we have to take into consideration the relevant constitutional and statutory provisions. The County Governments Act was enacted pursuant to article 200 of the Constitution to give effect to chapter 11 of the Constitution which provides for a devolved government. In particular article 200 (c) placed an obligation on Parliament to enact legislation which would provide:-	30
“...the manner of election or <u>appointment of persons to, and their removal from, offices in the county governments...</u> ” Emphasis added.	35
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The County Governments Act reiterates the foregoing as one of

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- the objects of the Act in section 3(j)(i). In our view the relevant provisions are sections 31(a) & 40 of the County Governments Act. 1
14. Alive to the fact that we are called upon to interpret the aforementioned provisions, we remind ourselves of the cardinal rule for construction of a statute; that is, a statute should be construed according to the intention expressed in the statute itself. *Halsbury's Laws of England*, 4th Edition (Reissue), Butterworths, 1995, Vol 44(1), para 1372 provides:- 5
- “The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context...” 10
15. The intention of a statute can be identified through a number of factors. In *Cusack v Harrow London Borough Council* (2013) 4 All ER 97, the Supreme Court observed:- 15
- “Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors.” 20 25 30
- Further, in *Halsbury's Laws of England* (*supra*):-
- “It is one of the linguistic canons applicable to construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act...” 35 40
16. Going back to how a member of a County Executive Committee

can be removed from office section 40 provides:-	1
“40(1) Subject to subsection (2), the Governor may remove a member of the county executive committee from office on any of the following grounds:-	
a. Incompetence;	5
b. abuse of office;	
c. gross misconduct;	
d. failure, without reasonable excuse, or written authority of the governor, to attend three consecutive meetings of the county executive committee;	10
e. physical or mental incapacity rendering the executive committee member incapable of performing the duties of that office; or	
f. gross violation of the Constitution or any other law.	15
(2) A member of the county assembly, supported by at least one-third of all the members of the county assembly, may propose a motion requiring the governor to dismiss a county executive committee member on any of the grounds set out in subsection (1).	20
(3) if a motion under subsection (2) is supported by at least one-third of the members of the county assembly-	
a. the county assembly shall appoint a select committee comprising five of its members to investigate the matter; and	25
b. the select committee shall report within ten days, to the county assembly whether it finds the allegations against the county executive committee member to be substantiated.	
(4) the county executive committee member has the right to appear and be represented before the select committee during its investigations.	30
(5) If the select committee reports that it finds the allegations-	
a. unsubstantiated, no further proceedings shall be taken;or	35
b. substantiated, the county assembly shall vote whether to approve the resolution requiring the county executive committee member to be dismissed.	
(6) if a resolution under subsection (5)(b) is supported by a majority of members of the county assembly-	40
a. the speaker of the county assembly shall promptly deliver the resolution to the governor; and	

- b. the governor shall dismiss the county committee executive member.” 1

On the other hand, section 31(a) of the County Governments Act provides:- 5

“31. The governor –

- a. may, despite section 40, dismiss a county executive committee member at any time, if the governor considers that it is appropriate or necessary to do so;...” 10

17. In the persuasive authority of *Amalgamated Society of Engineers v Adelaide Steamship Company Ltd & others* (1920) 28 CLR 129, the Australian High Court while echoing the cardinal rule of statutory interpretation stated herein above expressed itself as follows:- 15

“The fundamental rule of interpretation, to which all others are subordinate, is that statute is to be expounded according to the intent of parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning....” 20

18. From the language adopted by the legislator in enacting sections 40 & 31(a) we discern two methods through which a member of a County Executive Committee can be dismissed. Firstly, under section 40 a Governor can dismiss a County Executive Committee member on any of the aforementioned grounds following a resolution by the County Assembly for such dismissal. In that case the dismissal is initiated by the County Assembly. Secondly, under section 31(a) a Governor can dismiss a County Executive member on his own motion at any time if he considers it appropriate and necessary to do so. It is this second mode that appears to vest an element of discretion on the part of the Governor and which is the subject of interpretation in this appeal. 25
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19. The Respondent was dismissed from office by a letter dated 24th June, 2014 from the 2nd Appellant pursuant to section 40(1) of the County Governments Act. Subsequently, by a letter of even date, the 2nd Appellant corrected the earlier letter by indicating that the Respondent’s dismissal was pursuant section 31(a) of the County Governments Act. It is not lost to us that the amendment was due to the fact that the 2nd Appellant could only dismiss the Respondent 40

on his own motion under section 31(a) and not section 40(1) as
herein above observed. 1

Applicability of the doctrine of pleasure:

20. As noted from the foregoing section 31(a) gives a Governor an
element of discretion when it comes to dismissing a member of 5
a County Executive Committee. The Appellants argue that this
discretion is based on the doctrine of pleasure that is applicable
to appointments by the Governor under article 179(2)(b) of the
Constitution. The Industrial Court in finding that the doctrine had 10
no application in the current constitutional set up of this country
expressed itself as follows:-

“The Court upholds its opinion in *Richard Bwogo Birir v
Narok County Government & 2 others* [2014] eKLR thus, 15
“To answer the 1st issue for determination being whether
the pleasure doctrine applies in Kenya’s public service and
particularly in this case, the Court finds that the pleasure
doctrine and the related doctrine of the servants of the
crown does not apply in public and state service of the 20
new Republic under the Constitution of Kenya, 2010.
The Court further finds that the pleasure doctrine and the
doctrine of servants of the crown did not apply and could
not be legitimately invoked in the dismissal of the Petitioner
(Respondent) by the 2nd Respondent (2nd Appellant) as was 25
purportedly advanced for the Respondents. Finally, the
Court holds that it is the doctrine of servants of the people
and the doctrine of due process that apply to public and
state officers in Kenya. The Court further holds that it is
through the application of the doctrine of servants of the 30
people and the doctrine of due process of law that public
and state officers in Kenya are subdued by the people who
are the holders of sovereign power in the new Republic.”

.....

And again the Court upholds the opinion in *Birir’s* case on the 35
demise of the pleasure doctrine and the doctrine of the servants of
the crown, thus,

“...In the new Republic, the Court holds that public service
by public and state officers is guided by the doctrine of 40
servants of the people and the doctrine of due process and
not by the doctrines of the servants of the crown and the
pleasure doctrine. In the opinion of the Court, the demise

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- of the pleasure doctrine and the demise of the doctrine of servants of the crown in the new Republic's constitutional framework constitute the very foundation of the Republic, namely, Kenya is a sovereign Republic and all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution." 1 5
21. The pleasure doctrine can be traced back to England wherein the tenure of a public servant was deemed to be at the pleasure of the Crown. A public servant used to hold office until the Crown directed his/her dismissal. A pleasure appointment is defined in the *Black's Law Dictionary*, 9th Ed as :- 10
- "The assignment of someone to employment that can be taken away at any time, with no requirement of cause, notice or hearing." 15
- In Union of *India v Tulsiram Patel* (1985) 3 SCC 398, the Supreme Court of India set out the origin of the doctrine of pleasure as follows:-
- "In England, except where otherwise provided by statute, all public officers and servants of the Crown hold their appointments at the pleasure of the Crown or *durante bene placito* ('during good pleasure' or during the pleasure of the appointor') as opposed to an office held *dum bene se gesserit* ('during good conduct'), also called *quadiu se bene gesserit* ('as long as he shall behave himself well'). When a person holds office during the pleasure of the Crown, his appointment can be terminated at any time without assigning cause...." 20 25
- In the case of State of *Bihar v Abdul Majid* (1954) SCR 786, the Supreme Court of India expressed itself as herein under:- 30
- "The Rule that a civil servant holds office at the pleasure of the Crown has its origin in the latin phrase '*durante bene placito*' ('during pleasure') meaning that the tenure of office of a civil servant, except where it is otherwise provided by statute, can be terminated at any time without cause assigned. The true scope and effect of this expression is that even if a special contract has been made with the civil servant the Crown is not bound thereby. In other words, civil servants are liable to dismissal without notice and there is no right of action for wrongful dismissal, that is, they cannot claim damages for premature determination of their services." 35 40

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22. The justification of the said doctrine was set out in *BP Singhal v Union of India & another* (2010) INSC 365 wherein the Supreme Court of India observed:- 1
- “12. In *Shenton v Smith* (1895) AC 229, the Privy Council explained that the pleasure doctrine was a necessity because, the difficulty of dismissing those servants whose continuance in office was detrimental to the State would, if it were necessary to prove some offence to the satisfaction of a jury (or court) be such, as to seriously impede the working of the public service.” 5 10
23. Originally the doctrine of pleasure was a prerogative power which was unfettered. A holder of an office under pleasure could be removed at any time, without notice, without assigning cause, and without there being a need for any cause. However, with the passage of time and evolution of democracy this doctrine has undergone a series of modification. In *BP Singhal v Union of India & another* (*supra*) the Supreme Court of India observed:- 15
- “13. There is a distinction between the doctrine of pleasure as it existed in a feudal set-up and the doctrine of pleasure in a democracy governed by rule of law. In the nineteenth century feudal set-up unfettered power and discretion of the Crown was not an alien concept. However, in a democracy governed by Rule of Law, where arbitrariness in any form is eschewed, no Government or Authority has the right to do what it pleases. The doctrine of pleasure does not mean a license to act arbitrarily, capriciously or whimsically. It is presumed that discretionary powers conferred in absolute and unfettered terms on any public authority will necessarily and obviously be exercised reasonably and for public good.” 20 25 30
- In *Administrative Law*, HWR Wade & CF Forsyth, 9th Ed pg-354-355, the learned authors stated:- 35
- “The common theme of all authorities as far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely- that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown’s lawyers have argued in numerous cases that unrestricted permissive language confers unfettered 40

discretion, the truth is that, in a system based on the rule of law, unfettered government discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act.	1
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The whole concept of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good. There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed."	5
The evolution of the doctrine of pleasure has been on the basis of firstly, putting to an end arbitrary action by a public authority and secondly, ensuring that such a power is exercised reasonably and for the public good.	10
24. The application of the doctrine has been subjected to qualifications expressly through legislation or by implication. In India certain pleasure appointments have been subjected to restrictions by the Constitution. Article 310 of the Constitution of India provides:-	15
"310. Tenure of office of persons serving the Union or a State-	
1. Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State.	20
Article 311 provides in part:-	
"311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or State;-	25
(1)	
(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity to being heard in respect of those charges."	30
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25. The Supreme Court of India while referring to the qualifications on the pleasure doctrine under article 310 of the Constitution in *PL Dhingra v Union of India AIR* (1958) SC 36, held, 1
- “Subject to these exceptions our Constitution, by article 310(1), has adopted the English Common Law rule that public servants hold office during the pleasure of the President or Governor, as the case may be and has, by article 311 imposed two qualifications on the exercise of such pleasure. 5
- Though the two qualifications are set out in separate articles they quite clearly restrict the operation of the rule embodied in article 310(1). In other words the provisions of article 311 operate as a proviso to article 310(1) 10
- Further, in *Moti Ram v NE Frontier Railway AIR* (1964) SC 600 the Supreme Court stated:- 15
- “The Rule of English Law pithily expressed in the latin phrase ‘*durante bene placito*’ (‘during pleasure’) has not been fully adopted either by section 240 of the Government of India Act, 1935 or by article 310(1) of the Constitution. The pleasure of the President is clearly controlled by the provisions of article 311, and so, the field that is covered by article 311 on a fair and reasonable construction of the relevant words used in that article would be excluded from the operation of the absolute doctrine of pleasure. The pleasure of the President would still be there, but it has to be exercised in accordance with the requirements of article 311.” 20 25
26. In *BP Singhal v Union of India & another (supra)*, the Supreme Court of India found that in the absence of an express limitation on the application of the doctrine of pleasure there exists an implied limitation that the power would not be exercised arbitrarily, whimsically or capriciously; the power would be subject to the fundamentals of constitutionalism. In the aforementioned case, the Supreme Court of India while noting that by virtue of article 156 of the Constitution a Governor held his office at the pleasure of the President and the exercise of said power was not subject to any limitation or restriction by legislation held, 30
- “42. When a Governor holds office during the pleasure of the Government and the power to remove at pleasure of the President is not circumscribed by any conditions or restrictions, it follows that the power is exercisable at any time, without assigning any cause. However, 35 40

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- there is a distinction between the need for cause for the removal, and the need to disclose the cause for removal. While the President need not disclose or inform the cause for his removal to the Governor, it is imperative that a cause must exist. If we do not proceed on that premise, it would mean that the President on the advice of the Council of Ministers, may make any order which may be manifestly arbitrary or whimsical or mala fide. Therefore, while no cause or reason be disclosed or assigned for removal by exercise of such prerogative power, some valid cause should exist for the removal.
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49. ...What article 156(1) dispenses with is the need to assign reasons or the need to give notice but the need to act fairly and reasonably cannot be dispensed with by article 156(1). The President in exercising power under article 156(1) should act in a manner which is not arbitrary, capricious or unreasonable.”
27. Comparative jurisprudence shows that the evolution of the doctrine of pleasure connotes that a public authority ought to act reasonably and/or fairly in exercising the said power. The extent of reasonableness or fairness is dependent on the express or implied qualification imposed in the exercise of the said doctrine by a public authority. In *David Dunsmuir v New Brunswick* (2008) 1 SCR 190 the Supreme Court of Canada observed:-
- “79. Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however easy to apply. As has been noted many times, ‘the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case.’”
28. In *Ridge v Baldwin & others* (1963) 2 All ER 66, the House of Lords held that a public employee’s right to procedural fairness/ due process was dependent on his/her status as an office holder. In doing so, Lord Reid classified the dismissal of a public employee into three, that is, firstly, dismissal of a servant by his master wherein the relationship is purely governed by the contractual terms. Secondly,

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- dismissal from an office held during pleasure wherein it was held that procedural fairness was not applicable. Thirdly, dismissal from an office where there must be something against a man to warrant his dismissal. It was held that procedural fairness was only applicable to the third distinction. Subsequently, the Supreme Court of Canada in *Knight v Indian Head School Division No 19* (1990) 1 SCR 653 the applicability of procedural fairness was extended to offices held at pleasure. 1 5
29. However, the Supreme Court of Canada in *David Dunsmuir v New Brunswick (supra)* held that in determining the applicability of due process:- 10
- “113. The starting point, therefore, in any analysis, should be to determine the nature of the employment relationship with the public authority. 15
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115. The dismissal of a public employee should therefore generally be viewed as a typical employment law dispute. However, there may be occasions where a public law duty of fairness will still apply. We can envision two such situations at present. The first occurs where a public employee is not, in fact, protected by a contract of employment. This will be the case with judges, ministers of the Crown and others who ‘fulfill constitutionally defined state roles’. It may also be that the terms of appointment of some public office holders expressly provide for summary dismissal or, at the very least, are silent on the matter, in which case the office holders may be deemed to hold office ‘at pleasure’. 20 25
- Because an employee in this situation is truly subject to the will of the Crown, procedural fairness is required to ensure that public power is not exercised capriciously. 30
- Emphasis ours.
30. Turning back to the applicability of the doctrine of pleasure in this country we note that there are conflicting decisions in the Industrial Court on the issue. In *Richard Bwogo Birir v Narok County Government & 2 others* – Petition No 1 of 2014 and in this case, the Industrial Court held that the doctrine has no application in this country while in *Tom Luusa Munyasya & another v Governor of Makueni County & another* Industrial Cause No 103 of 2014 it was held that the doctrine applied without any limitation. The 35 40

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- Appellants herein maintain that the Respondent's appointment was at the pleasure of the 2nd Appellant; the doctrine of pleasure applied in the circumstances without any limitations. 1
31. In *David Dunsmuir v New Brunswick (supra)* the Supreme Court of Canada expressed itself as follows:- 5
- “28. By virtue of the Rule of Law principle, all exercises of public authority must find their source in law. All decision making powers have legal limits derived from the enabling statute itself, the common law or civil law or the Constitution.” 10
32. In order to determine whether the doctrine of pleasure is applicable and the extent of its application in Kenya we are guided by the following dicta in *David Dunsmuir v New Brunswick (supra)*, 15
- “The interpretation of the law is always contextual. The law does not operate in a vacuum. The adjudicator was required to take into account the legal context in which he was to apply the law.”
33. The County Governments Act was enacted to give effect to chapter 11 of the Constitution which provides for devolution. Therefore, interpretation of section 3(a) of the said Act ought to be in light of the values, purposes and principles of the Constitution. The Supreme Court of Kenya in *Hassan Ali Joho & another v Suleiman Said Shahbal* Petition No 10 of 2013 held that whenever a court is called upon to interpret an Act of Parliament it should ensure that the Act conforms to the Constitution. The current Constitution explicitly states that sovereign power belongs to the people and the exercise of the said power ought to be in accordance with the Constitution. The Constitution took away the notion that sovereign power was vested in individuals or certain offices and could be exercised at the will of the said individual or office. The preamble to the Constitution provides that in adopting and enacting the Constitution the people of Kenya recognize the aspirations of all Kenyans for a government based on the essential values of human rights freedom, democracy, social justice and the rule of law. The Kenyan people exercised their sovereign and inalienable right to determine the form of governance of the country. 20
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34. Article 1(3)(b) of the Constitution provides that the sovereign power is delegated to the national executive and the executive structures in the county governments. Article 10(1) of the Constitution binds all 40

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- state organs, state officers, public officers and all persons to observe the national values and principles of governance when applying or interpreting the Constitution; enacting, applying or interpreting any law; or implementing public policy decisions. Article 10(2) sets out the national values and principles of governance as follows:-
- a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of people;
 - b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
 - c. good governance, integrity, transparency and accountability; and
 - d. sustainable development.” [Emphasis added].
35. Chapter 6 of the Constitution provides for leadership and integrity. It places an obligation on leaders to exercise the authority vested in them in a manner that is consistent with the purposes and objects of the Constitution. Article 73(2)(d) of the Constitution has made leaders accountable to the public for their decisions and actions. Further, article 174(a) provides that one of the objects of devolution is to promote democratic and accountable exercise of power. We note that section 3(b) of the County Governments Act indicates one of the objective of the Act is to give effect to the objects an principles of devolution as set out in articles 174 & 175 of the Constitution
36. Therefore in interpreting the nature of the power of a Governor under section 31(a) of the County Governments Act we have to take into account the foregoing.
37. We are of the considered view that the section 31(a) grants power to a Governor to dismiss a member of the County Executive Committee at any time, that is, at his pleasure. However, we find that the said power is qualified to the extent that he can only exercise the same reasonably and not arbitrarily or capriciously. Why do we say so?
38. Firstly, By dint of article 179(1) of the Constitution and section 34 of the County Governments Act the executive authority of a County is vested in the County Executive Committee. The County Executive Committee comprises of the Governor, Deputy Governor, members of the County Executive Committee who are appointed by the Governor. The members of the County Executive

Committee assist the Governor to carry out his mandate under the law. It is the Governor who assigns to every member of the County Executive Committee responsibility to ensure the discharge of any function in the County. This is the reason why the County Executive Committee members are individually and collectively accountable to the Governor in the exercise of their powers and performance of their duties and responsibilities. (See article 179(6) of the Constitution and section 39 of the County Governments Act.) A County Executive Committee member is the Governor's right hand in his/her respective office. Hence the Governor has to have confidence in the County Executive Committee member. Where such confidence is lost the Governor ought to have the capability of removing such a member without undue delay so as to enable the County Executive Committee to function for the benefit of the County.

39. Secondly, section 31(a) provides that a Governor may dismiss a County Executive Committee member at any time, if he/she considers that it is appropriate or necessary to do so. We find that the provision places an obligation on the Governor to exercise the said power only when necessary or appropriate. In our view this entails reasonableness on the part of the Governor in exercising this power. In *Dunsmuir v New Brunswick (supra)* the Supreme Court while discussing reasonableness observed:-

“47. Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness; certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

Further, by virtue of the fact that a Governor ought to exercise his

powers for the public good he should not act on selfish motives but for the benefit of his/her county. We find that the reasons for exercising the said power ought to be valid and compelling and will depend on the circumstances of each case. Consequently, the power to dismiss a member of the County Executive is qualified to the extent that the same ought to be for the benefit of the County and in accordance to the principles of devolution as set out herein above. In *BP Singhal v Union of India & another (supra)*

“50(i)

- (ii) Though no reason need be assigned for discontinuance of the pleasure resulting in removal, the power under article 156(1) cannot be exercised in an arbitrary, capricious or unreasonable manner. The power will have to be exercised in rare and exceptional circumstances for valid and compelling reasons. The compelling reasons are not restricted to those enumerated by the Petitioner (that is physical/mental disability, corruption and behaviour unbecoming of a Governor) but are of a wider amplitude. What would be compelling reasons would depend upon the facts and circumstances of each case.”

Was the Respondent’s right to a fair administrative action violated”

40. From the foregoing it is clear that a Governor ought to exercise his power to dismiss a member of a County Executive Committee under section 31(a) of the County Governments Act reasonably and for the public good. In this case, the Respondent contended that her right to a fair administrative action was violated by the Appellants. This is because the 2nd Appellant neither informed her of the allegations against her nor gave her an opportunity to defend herself before the dismissal.

41. In *BP Singhal v Union of India & another (supra)* the Supreme Court of India held,

“The President in exercising power under article 156(1) should act in a manner which is not arbitrary, capricious or unreasonable. In the event of challenge of withdrawal of the pleasure, the court will necessarily assume that it is for compelling reasons. Consequently, where the aggrieved person is not able to establish a *prima facie* instance of arbitrariness or *mala fides*, in his removal the court will refuse to interfere.”

The burden lay with the Respondent to establish that her dismissal was arbitrary and capricious and that her rights were violated. 1

42. As demonstrated herein above the extent to which due process is applicable in a case such as this depends on the express and implied limitations by statute and the circumstances of the case. 5
 There are certain circumstances a Governor may lose confidence in a member of a County Executive Committee and due to the sensitivity and/or urgency of the matter at hand the Governor may dismiss the member without giving notice of his intention to do so. Further, section 31(a) of the County Governments Act does not require the Governor to hold a disciplinary hearing in respect of the said member before dismissal; he can only dismiss if he considers it appropriate or necessary. Appropriateness or necessity is not arbitrariness or whimsical. Appropriateness or necessity imports the requirement that there must be reasons that make the dismissal appropriate or necessary. It is these reasons that determine whether the discretionary power exercised under section 31(a) of the County Governments Act is reasonable or not. In *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1947) 2 All ER 680, Lord Green expressed himself as herein under: - 10 15 20

“It is true the discretion must be exercised reasonably. What does that mean” Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word ‘unreasonableness’ in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey these rules he may truly be said, and often is said, to be acting ‘unreasonably’. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head.” 25 30 35 40

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43. Article 47 of the Constitution provides in part:- 1
- “47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.” 5
- In the instant case the Respondent was dismissed vide a letter dated 24th June, 2014 with immediate effect. From the said letter it is not clear under what circumstances the Respondent's services were terminated. We also note that no evidence was tendered by the Appellants as to the reason(s) for the Respondent's dismissal. In fact the Appellants maintained that 2nd Appellant had the power to dismiss the Respondent at his pleasure without giving reasons. We find that in the circumstances that the Respondent proved that the 2nd Appellant's actions were arbitrary. This is because there was no evidence that the 2nd Appellant acted reasonably in dismissing the Respondent. Consequently, we concur with the trial court that the Respondent's right to a fair administrative action was violated by the Appellants. 10 15 20
- Applicability of the Employment Act:
44. The Employment Act was enacted to govern the relationship of an employer and employee under a contract of employment. Part VI provides an elaborate due process to be followed in the case of termination/dismissal of employees. It provides for the right to be notified of the intention to dismiss and a fair hearing. 25 30
45. Article 260 of the Constitution defines a State Officer as a person holding a State Office. The said Article sets out the following offices as State offices: -
- a. President;
 - b. Deputy President; 35
 - c. Cabinet Secretary;
 - d. Member of Parliament
 - e. Judges and Magistrates;
 - f. Member of a commission to which Chapter fifteen applies; 40
 - g. Holder of an independent office to which Chapter fifteen applies;
 - h. Member of a County Assembly, Governor, or Deputy

Governor of a County, or other member of the Executive Committee of a County Government;	1
i. Attorney General;	
j. Director of Public Prosecutions;	
k. Secretary to the Cabinet;	5
l. Principal Secretary;	
m. Chief of the Kenya Defence Forces;	
n. Commander of a service of the Kenya Defence Forces;	
o. Director-General of the National Intelligence Service;	
p. Inspector General, and the Deputy Inspectors-General, of the National Police Service; or	10
q. An office established and designate as a State Office by national legislation. Emphasis added.	
46. We are of the considered view that the Employment Act does not apply to State Officers. A State Officer's terms and conditions of service are regulated by the Constitution or the relevant Statute, principles of fair administrative action and rules of natural justice. It therefore follows that a member of the County Executive Committee being a State Officer is not subject to the provisions of the Employment Act	15 20
Appropriateness of the remedies issued:	
47. The Appellants took issue with the orders that were issued by the trial court. They argued that the orders were judicial review orders yet what was before the Court was not judicial review proceedings. The Respondent filed the Petition in the Industrial Court pursuant to article 22 of the Constitution. On this issue we can do no better than reproduce article 23(3)(f) of the Constitution: -	25
“Article 22(3) In any proceedings brought under article 22, a Court may grant appropriate relief including-	30
(a)	
.....	
(f) an order of judicial review.”	35
Conclusion:	
48. The upshot of the foregoing is that we find that the Appeal herein has no merit and is hereby dismissed with costs to the Respondent.	40

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Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 others [2015] KLR - HCK	5
High Court, at Nairobi I Lenaola, J	February 20, 2015
Petition No 368 of 2014	10
Brief facts	
On July 23, 2014, the Petitioners filed a Petition challenging the legality of the circular Reference No CRA/CGM/Vol III/99 addressed to all County Governments, by the Commission on Revenue Allocation (1 st respondent) recommending a ceiling on allocation for all county Assemblies and all County Executives in County budgets for the financial year 2014/2015. Thereafter, the Controller of budget (2 nd Respondent) on diverse dates vide various circulars addressed to the County Governments demanded that the County Assemblies' budget allocations comply with the aforesaid Circular failure to which the 2 nd Respondent would not approve withdrawals from the County Revenue Fund or any other fund by County Governments.	15
It was the Petitioner's contention that the said Circular was void on two fronts. Firstly, that it was issued without authority and in breach of the legislative authority of County Assemblies under articles 185(1) and (2) of the Constitution. Secondly, that in issuing and acting on the said Circular, the 1 st Respondent violated article 189(1) of the Constitution as it failed to consult County Assemblies on a matter that fell within their mandate and would in effect affect them.	20
Issues	
1. Whether the impugned circular was issued in breach of the law and the legislative authority of County Assemblies	25
2. Whether the Commission on Revenue Allocation had powers to issue the Circular and if so, whether the recommended ceilings were within the law.	30
3. Whether recommendations made by the Commission on Revenue Allocation were binding on all the organs to which they were made.	35
4. Whether the Petitioners' fundamental rights under articles 27 (freedom from discrimination) and 47 (fair administrative action) of the Constitution were violated by the Respondents, jointly or	40

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- severally 1
5. Whether County Assemblies were persons capable of having their fundamental rights protected and enforced under the Constitution.
6. What was the mandate of County Assemblies, Commission on Revenue Allocation and the Controller of budget in the budgetary making process. 5
- Constitutional Law** – public finance – principles of public finance – the budgetary and related processes in County Governments – the powers of the Commission on Revenue Allocation & the Controller of budget in revenue allocation, budgetary processes and budget implementation – Constitution of Kenya, 2010, articles 10,216,217,218, Public Finance Management Act, sections 104, 107; County Allocation of Revenue Act; Division of Revenue Act. 10
- Constitutional Law** – public finance – budgetary making process – Commission on Revenue allocation – the role of the Commission in the budget making process – where the commission had issued a circular recommending a ceiling on allocation for all county Assemblies and all County Executives in County budgets for the financial year 2014/2015 – whether the 1st Respondent had powers to issue the Circular and if so, whether the recommended ceilings were within the law – whether recommendations made by the Commission on Revenue Allocation were binding on all the organs to which they were made. 15
- Statutes** – Interpretation of Statutes – National Revenue Allocation Laws – Public Finance Management Act, sections 104, 107; County Allocation of Revenue Act; Division of Revenue Act. 20
- Held:** 25
1. Article 218(1)(a) of the Constitution directed that at least two months before the end of each financial year, Division of Revenue Bill should be introduced to parliament to facilitate division of revenue raised by the National Government among the two levels of Governments. The National Treasury prepared the 2014 Budget Policy Statement and presented it to Parliament and it was adopted by Parliament on March 20, 2014 in accordance with article 218(1) (a) of the Constitution. 30
2. Under article 216(1) and (2) of the Constitution, the 1st Respondent was the body charged with the responsibility of making recommendations *inter-alia* to the Senate, the National Assembly, the National Executive, County Assemblies and County Executives on the basis upon which revenue would be shared equitably between 35 40

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- the National and County Governments. It also recommended how the revenue allocated to the County Government level would be shared among the County Governments and also made recommendations on matters concerning the financing and financial management by the County Governments. 1
3. Taken in its ordinary English meaning, ‘recommendations’ do not have a binding effect on the person or body to whom they are made and are not the same as ‘directives’ or ‘directions’ which were binding on those to whom they were addressed. However, in the context of the Petition and in order to interpret ‘recommendations’, the Constitution had to be read as a whole in order to ascertain its aim and object so as to establish the aim of the drafters of the Constitution. Heed had to be paid to the language used and the context of the specific provision under consideration. Article 217(7) of the Constitution showed that the bonding nature of the resolution was quite different from a mere recommendation. 5
4. Articles 216, 217 and 218 of the Constitution as well as the Commission on Revenue Allocation Act, (Cap 5E) distilled a number of facts: 10
- a. The principle function of the 1st Respondent was to make recommendations to the senate, the National Assembly, the National Executive, County Assembly and County Executive 15
 - b. By the very nature of recommendations, they were persuasive but not binding on the person or body to which they were directed 20
 - c. Its principal functions in article 216(1) and (2) of the Constitution were to be supplemented by legislation and hence section 10(1) of the Commission on Revenue Allocation Act. 25
 - d. The impugned Circular if looked at in the context of article 216(1)(2) and (5) of the Constitution and section 10(1) of the Commission on Revenue Allocation Act could not be said to be unlawful or unconstitutional as argued by the Petitioners because it was made well within the mandate of the 1st Respondent. 30
5. Whether the Petitioners acted on the circular was a non-issue because in fact it was not binding on them or Parliament. That issue was moot because once the recommendations made were found not to be binding, then it followed that any complaint by the Petitioners 35
- 40

- ought to be directed at the State Organs with the final say on the budgets i.e. Parliament.
6. The principles under section 107 of the Public Finance Management Act, (cap 142) as read together with section 12 were crucial in the management of funds allocated to County Governments and there was no reason in the circumstances to delve into them because there was no issue raised with regard to them. Without section 12 or section 107 being declared unlawful, there was no value of any case made out of a non-binding Circular while the law that came subsequent to it remained intact.
7. The 1st Respondent ought to perform its functions as provided for under the four corners of the Constitution and the law. Further, in meeting its objectives it was bound by article 10, 216(3) and 249(1), of the Constitution and section 10(2) of the Commission on Revenue Allocation Act. Section 10(2) created no obligation although the information required could be useful to the 1st Respondent but it was a matter wholly of discretion on its part. The 1st Respondent was not bound by the Constitution and the Act to seek information and representations from the County Government before making its recommendations on budget ceilings though the principles in article 189 of the Constitution encourage consultation between the two levels of Government. The same principles would apply to relations between the levels of Government and Independent Commissions and Offices
8. In the entire budgetary process, the views of County Governments and Assemblies were important and ought to be considered and taken seriously in making the Budget Policy Statement which would be used in preparing the National Annual Budget but the court could not hold that it was a mandatory obligation on the part of the 1st Respondent. While it was a good practice to consult and in terms set out in article 189 of the Constitution, failure to do so could not amount to a violation of any law or the Constitution itself. The point was that out of respect for each other's roles and expertise, each organ should not off-handedly dismiss any suggestions or information obtained from the other but failure to do so could not attract the Court's sanctions.
9. Under section 104(1)(a)(b) of the Public Finance Management Act, it was the responsibility of the County Treasury to prepare the Annual Budget for a County and co-ordinate the preparation of Estimates of Revenue and Expenditure of a County Government. The procedure for the budgetary process under section 117 of

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- the Public Finance Management Act therefore started with the preparation of a County Fiscal Strategy Paper which was then submitted for approval by the County Assembly by 28th February of each financial year. 1
10. In preparing the County Fiscal Strategy Paper, the County Treasury was obligated to specify the broad strategic priorities and policy goals that would guide the County Government in preparing its budget for the coming financial year. Thereafter, under section 118 of the Act, the County Treasury prepared a County Budget Review and Outlook Paper in respect of the County for each financial year and submitted the paper to the County Executive Committee by 30th September of that year. The County Executive Committee then was obligated to discuss that Outlook Paper and after approval it was laid before the County Assembly before it was published and publicized. 5 10
11. It was within the mandate of the Treasury, County Executive and County Assembly to prepare and approve budgets for a County. However, that process could not be read in isolation of other processes because it was within the mandate of the 1st Respondent to recommend to the Senate, the National Assembly, the County Assembly and the County Government on equitable sharing of revenue between the two levels of Government and as between County Governments. By so recommending, the 1st Respondent would in essence be performing its obligations under article 216 of the Constitution and even if the 1st Respondent had recommended budgetary ceilings in the County Budgets for 2014/2015 financial year, that action did not violate the Constitution. However it had to do so in the framework and in accordance with the Constitution and the law. 15 20 25
12. The 1st Respondent was an independent Constitutional Commission and as such article 249(2) of the Constitution which provided for the objects of the commissions and the independent offices, were required to function free of subjection to “direction or control by person or authority”, but rather operate within the terms of the Constitution and the law. The independent clause did not accord them *carte blanche* to act or conduct themselves on whom; their independence was by design, configured to the execution of their mandate and performance of their functions as prescribed by the Constitution and the law. 30 35
13. Under section 117 of the Public Finance Management Act, the County Fiscal Paper ought to be prepared by 28th of February in each financial year, hence for Counties to comply with the 40

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- Circular as issued by the 1st Respondent, they had to restart the budgetary process with the preparation and adoption of the Fiscal paper. However the issue was moot considering that the Allocation of Revenue Act, 2014 was in operation and it was the one that created the offending ceilings even if it was based on non-binding recommendations from the 1st Respondent. 1
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14. Article 228(4) of the Constitution mandated the 2nd Respondent to oversee the implementation of the budgets of the National and County Governments by authorizing withdrawals from public funds under articles 204, 206 and 207 of the Constitution and under article 228(5), the Controller of Budget could not approve any withdrawal from a public fund unless that withdrawal was authorized by law. 10
15. Section 102 of the public Finance Management Act read together with Chapter twelve of the Constitution set out the principles that a County Government had to adhere to in respect of Public Finance. 15
16. Nowhere under the Public Finance Management Act provided for the 2nd Respondent to review budgets of County Governments before they were enacted. Fiscal reporting mechanisms were clear at the National level and so were they in the County level with the County Executive, County Treasury and County Assemblies each charged with the responsibility of ensuring accountability and transparency in utilization of County resources and specifically, the mandate of approving County Budgets was the responsibility of a County Assembly. The 2nd Respondent encroached on their mandate when it sought to get involved in their budgetary processes. 20
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17. Article 228 was clear that the 2nd Respondent only oversaw the implementation of budgets. In that regard, the importance of the Appropriation Act was obvious and could not be understated. The argument that the 2nd Respondent would only authorize withdrawals from the County Revenue if the law and the budgetary process as envisaged by the Constitution and the Public Finance Management Act, 2012 was adhered to was a matter of interpretation of the Constitution and Statute based on a specific set of contested facts. 30
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18. The Petitioners were not private individuals but officers serving in a public office as defined in article 260 of the Constitution. The Respondents were also officers and offices in the same public office and it was inconceivable how one could violate the other's rights in the context of the Bill of rights. In the circumstances of the Petition any differences regarding the fiscal and budgetary processes between affected State Organs should not be such as to attract the Court's 40

trips are said to be in their millions. Granted, no doubt devolution is working and indeed it must work but wastage will only drain an already drained populace” 1

Petitions dismissed 5

Cases

East Africa

1. *County Government of Meru v Ethics and Anti-Corruption Commission* Petition No 177 of 2014 – (Explained)
2. *Kenya Bus Service Ltd & 2 others v Attorney General & 2 others* Miscellaneous Civil Suit No 413 of 2005 – (Explained) 10
3. *Kigula & others v Attorney General* [2005] AHRLR 197 4. *Okoiti, Okiya Omtatah & 3 others v Attorney General & 5 others* Petition No 227 of 2013 – (Explained)
2. *In re the Matter of the Interim Independent Electoral Commission* [2011] 2 KLR 32 – (Followed) 15

Canada

1. *Republic v MacFarlane* [1923] 32 CLR 518 – (Mentioned)
2. *Thomson v Canada (Deputy Minister of Agriculture)* (1992) 1 SCR 385 – (Mentioned) 20

South Africa

1. *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1; [1999] ZACC 11 – (Mentioned) 25

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 1,2,3,6,10,19,20(1)(2); 22;23(1) (3); 25(4)(c)(5)(a)(7)(8)(9) ; 27(1)(4)(5); 27(4); 27; 43; 47 (1); 73(1)(a)(2)(b)(c); 156(1)(4)(b); 159; 160; 165; 174; 175; 176; 178(1)(2); 179(1); 185(1)(2); 186; 189(1)(3)(4); 190; 191(2) (b); 194; 201(b)(ii); 202(1); 203(1); 204; 205; 206; 207(2)(3); 209; 210; 215; 216(2)(3)(a); 218(1)(a)(b); 224; 225; 228(4)(5); 248; 249(2); 259; 260; First Schedule – (Interpreted) 30
- 2 Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya, 2010 Sub Leg) rules 23, 24 – (Interpreted) 35
3. Commission on Revenue Allocation Act, 2011 (Act No 16 of 2011) section 10(c) – (Interpreted)
4. County Allocation of Revenue Act, 2013 (Act No 34 of 2013) section 12 – (Interpreted) 40
5. Appropriation Act, 2008 (Act No 7 of 2008) – In general

-
6. Division of Revenue Act, 2014 (Act No 10 of 2014) [SA] section 3 – (Interpreted)	1
7. Interpretation and General Provisions Act (cap 2) section 2 – (Interpreted)	
8. Public Finance Management Act, 2012 (Act No 18 of 2012) sections 102, 104(1)(a)(b); 107(1); 109 (6); 117(1)(2)(5)(6); 118; 125(5) (a); 126; 129; 131; 133; 134; 135 – (Interpreted)	5

Advocates

1. <i>Mr Nyamodi</i> for 1 st Respondent	
2. <i>Mr Arwa</i> for 2 nd Respondent	10
3. <i>Mr Moimbo</i> for 3 rd Respondent	
4. <i>Mr Wanyama</i> for Interested Party	
5. <i>Mr Okoth</i> for Petitioner	

February 20, 2015, **I Lenaola, J** delivered the following Judgment. 15
Introduction

1. This Petition concerns the budgetary and related processes in County Governments. All the Petitioners are State Organs established under the provisions of article 178(1) of the Constitution with their mandate set out under article 178(2) of the Constitution and include <i>inter-alia</i> to preside over the sittings of their respective County Assemblies. They have brought this Petition pursuant to the provisions of articles 1,2,3,6,10,19,20,22,23(1) & (3), 27(1), 27(4), 27, 43, 47, 73, 159, 160, 165, 174, 175, 176, 179(1), 185, 186, 189, 190, 194, 201, 205, 207, 209, 210, 216, 224, 225, 228, 259 & 260 of the Constitution of Kenya and rules 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and sections 117, 125, 129, 131, 133 and 134 of the Public Finance Management Act, Cap 412C, Laws of Kenya on their own behalf and on behalf of all the Forty Seven Counties created under article 6(1) of the Constitution as read together with the First Schedule to the Constitution.	20
2. On or about 22 nd April, 2014 <i>vide</i> a circular Reference No CRA/CGM/Vol III/99 addressed to all County Governments, the 1 st Respondent recommended a ceiling on allocation for all County Assemblies and all County Executives in County budgets for the financial year 2014/2015. Thereafter, the 2 nd Respondent on diverse dates <i>vide</i> various circulars addressed to the County Governments allegedly reinforced the 1 st Respondent's circular	35
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- aforesaid and demanded that the County Assemblies' budget allocations should comply with the aforesaid Circular failure to which the 2nd Respondent would not approve withdrawals from the County Revenue Fund or any other fund by County Governments. That at the date of the impugned Circulars, none of the County Governments had passed its County Finance Act for the financial year 2014/2015 to enable implementation of its budget. The Petitioners therefore claim that the 2nd Respondent acted ultra vires its mandate in issuing the said circulars to the Counties.
3. The Petitioners have also filed this Petition claiming a violation of articles 73, 185, 189, 207, 216 and 228 of the Constitution by the Respondents and are further seeking to enforce their fundamental rights and freedoms under articles 27 and 47 of the Constitution. In their Petition dated 23rd July 2014, they therefore seek the following orders;
- “(a) A declaration that the Circulars that the 1st and 2nd Respondents, jointly and severally, and either by themselves, assigns or any person claiming through them, issued to any County Government in the Republic of Kenya on various dates between the 22nd day of April, 2014 to the 16th day of July 2014, or any other date, to prescribe and or put mandatory ceilings to financial allocation to any County Assembly in a County Budget for the Financial year 2014/2015 breached the Petitioners' constitutional rights under articles 27(1), 27(4), 27(5), 43 and 47(1) of the Constitution of Kenya, and were null and void for all intents and purposes.
 - (b) Judicial Review order of *Certiorari* to remove into this Honourable Court and quash the Circulars that the 1st and 2nd Respondents, jointly and severally, and either by themselves, assigns or any person claiming through them, issued to any County Government in the Republic of Kenya on various dates between the 22nd day of April, 2014 to the 16th day of July 2014, or any other date, to prescribe and or put mandatory ceilings to financial allocations to any County Assembly in a County Budget for the Financial Year 2014/2015.
 - (c) Judicial Review orders of *Mandamus* to remove into this Honourable Court and compel the 2nd Respondent to oversee the implementation of the budgets of County

Governments in Kenya for the financial year 2014/2015 in terms of article 228(4) of the Constitution of Kenya once County Governments pass their respective budgets for the Financial Year 2014/2015.	1
(d) Judicial Review orders of <i>Mandamus</i> to remove into this Honourable Court and compel the Respondents, jointly and severally, and either by themselves, assigns or any person claiming through them, to approve and disburse Funds as provided for in every County Government's budgetary allocations as set out in the County's Budgets estimates of Revenue and Expenditure for the Financial year 2014/2015, County's appropriation Acts for the Financial year 2014/2015 and or County's Finance Acts for the Financial year 2014/2015.	5 10
(e) Costs of and incidental to this Petition and;	15
(f) Any other order that this Honourable Court deems fit and just to grant in the circumstances."	
The Petitioners' case	
4. Prof Ojienda, Senior Counsel, presented the Petitioners' case and the gist of their case was that the impugned Circulars were issued without authority and are in breach of the legislative authority of County Assemblies under the provisions of articles 185(1) and (2) of the Constitution. That in issuing the said Circulars the 1 st and 2 nd Respondents also violated article 189(1) of the Constitution as they failed to consult the County Assemblies on the matter while the same fell within the latter's mandate. They further claimed that in doing so, the 1 st and 2 nd Respondents violated the fundamental right of County Assemblies under article 47 of the Constitution to administrative action that is lawful, reasonable and procedurally fair.	20 25 30
5. It was also the Petitioners' contention that the impugned Circulars targeted only votes on account of County Assemblies and County Executives for the financial year 2014/2015 by creating budgetary ceilings while the Respondents wholly protected budgets for the National Executive, the National Assembly, the Senate, the Judiciary and the twelve Commissions and Independent offices listed in article 248 of the Constitution. As such they claimed that the impugned Circulars breached the fundamental rights of County Assemblies to the fundamental and inalienable right to equal protection and equal benefit of the law and not to be discriminated against, directly or indirectly, as provided for under article 27(1), (4) and (5) of the	35 40

- Constitution. 1
6. On the latter issue, Prof Ojienda submitted that the term ‘administrative action’ refers to broad areas of governmental activity in which the repositories of power are exercised by statutory bodies, including the adoption of policy making and issuance of a specific direction and application of a general rule to a particular case in accordance with requirements of policy, expediency or administrative practice. He relied on the South African case of *President of the Republic of South Africa and others v South African Rugby Football Union and others* (CCT 16/98) 2000 (1) SA1 which discussed the normative content of the right to administrative action. It was therefore Prof Ojienda’s submission that since the 1st and 2nd Respondents purported to direct County Assemblies on how to legislate, their actions amounted to unlawful and unfair administrative action and thus violated article 47 of the Constitution on three fronts; 5 10 15
7. Firstly, that the notices are *ultra vires* the mandate of the 1st and 2nd Respondents as set out under articles 216(2) and 228(4) of the Constitution. 20
8. Secondly, that the legislative authority of Counties vests in County Assemblies by dint of the provisions of article 185(1) and(2) of the Constitution. In that regard, that County budgets are estimates of revenue and expenditure by Counties in a given financial year and constitute plans for management of County resources and that approval of County budgets is an express constitutional mandate of County Assemblies under the provisions of article 184(4)(a). Further, that the Constitution has not apportioned the legislative authority of County Assemblies to approve County budgets as a shared mandate between County Assemblies and the 1st and 2nd Respondents nor does legislative authority to determine votes on accounts in County budgets vest in the 1st and 2nd Respondents, jointly or severally. It was therefore his submission that the Circulars are unconstitutional, unlawful and a manifest of anarchy in the operationalization of the principle of devolution. 25 30 35
9. Thirdly, that the impugned Circulars breach the procedures, time-lines and systems of checks and balances required to be observed by County Assemblies in enacting county budgets as is envisaged under article 201 of the Constitution and under sections 117, 125, 129 and 131 of the Public Finance Management Act 2012. He claimed 40

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- in that regard that in their budgetary processes, each of the County Assemblies must enact and pass certain instruments before passing its County budget. 1
10. In addition, that each of the instruments is progressive of and dependent on the previous instruments and it would be illegal to adopt a County Budget Estimates of Revenue and Expenditure that is not consistent with the financial outlook of a County as determined by each of the aforementioned instruments. That at the time of filing this Petition, all Counties had complied with the requirements of the Constitution and the Public Finance Management Act and had enacted County budgets for the financial year 2014/2015 and had adopted their respective County Fiscal Strategy Papers, approved their County Budget Estimates of Revenue and Expenditure by the 30th June 2014 and enacted their Appropriations Acts for the financial year 2014/2015. It was therefore Prof. Ojienda's contention that for the Counties to comply with the Circulars as issued, they had to restart the entire process of reviewing and adopting the Fiscal Strategy Paper, Budget Estimates of Revenue and Expenditure, Appropriations Bills and Acts as well as Finance Bills and Acts which actions would have gone beyond the mandatory statutory timelines set out under the Public Finance Management Act and hence create the risk of invalidating the consequent budgets that they would pass. 5 10 15 20
11. The Petitioners further contended that the mandate of the 1st Respondent is circumscribed in article 216 of the Constitution that mandate is to recommend on matters concerning financing and financial management by the Counties. That the Constitution does not allow it to decide on matters concerning financial management by the Counties and while relying on the Canadian cases of *R v Mac Farlane* (1923) HCA 36 and *Thomson v Canada (Deputy Minister of Agriculture)* (1992) 1 SCR 385, the Petitioners distinguished a "recommendation" from a "decision" and stated that a recommendation does not have any binding force and does not impose obligations and therefore a "recommendation" connotes advice which the recipient may be at liberty to accept or disregard. 25 30 35
12. It was also the Petitioners' submission that the mandate of the 2nd Respondent under article 228 of the Constitution is to oversee the implementation of the budgets of the National and County Governments through its authorization to withdraw from the Equalization, Consolidated and Revenue Funds and Prof Ojienda 40

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- further submitted that the said mandate in relation to Counties is limited to ascertaining that withdrawals from Revenue Funds under article 207 of the Constitution is done only in accordance with the legislation enacted by County Assemblies or an Act of Parliament. 1
13. It was Prof Ojienda's further submission that there is no law in Kenya that mandates any of the Respondents to approve budgets or determine votes on account of budgets and to do so would amount to usurpation of powers of the County Assemblies. While relying on the case of *Okiya Omtatah Okioti & 3 others v Attorney General & 5 others* Petition No 227 of 2013 [2014] eKLR and the Supreme Court decision in *Re Matter of the Interim Independent Electoral Commission*, Constitutional Application No 2 of 2011 [2011] eKLR, he submitted that all constitutional organs are obliged to stick to their mandates as stipulated in the Constitution and do no more. 5 10 15
14. It was also the Petitioners' contention that the impugned Circulars violated their right not to be discriminated against as provided for under article 27(1), (2) (4) and (5) because they only targeted votes on account of County Assemblies in County budgets for 2014/2015 and that they were therefore a premeditated and decided target. That while the 2nd Respondent oversees the implementation of the budgetary allocations to other State Organs such as the County Executive, National Executive, the National Assembly, the Senate, the Judiciary and the twelve Commissions and Independent Offices, they have not seen a single circular to these other organs faulting their votes for the financial year 2014/2015. In fact they claimed that the Respondents are all deliberately protecting those budgetary allocations in a conspiratorial manner. 20 25 30
15. It was the Petitioners' further contention that the Division of Revenue Act 2014 and the County Allocation of Revenue Act, 2014 contains block figures of revenue that goes to each County Government and that none of these statutes have any provision for the budgetary ceilings set by the 1st and 2nd Respondents vide the impugned circulars. 35
16. Further, that Parliament did not set a law sanctioning the impugned budgetary ceilings and the Senate in its oversight role dismissed the intended ceilings as is evident in the Hansard of 5th August 2014 and 2nd September 2014. It was therefore Prof Ojienda's submission that the Respondent breached article 73(1)(a) and (2) (b) and (c) of the Constitution which enjoins all State Officers, 40

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- including the Respondents, to exercise public authority as a public trust in a manner that brings honour to the office and promotes public confidence in the integrity of the office. He claimed in that regard that the acts of the 1st and 2nd Respondents in colluding with, obtaining and acting upon directions of the National Executive and purporting to set votes on account of County Assemblies offends article 249(2) of the Constitution. 1
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17. Lastly, Prof Ojienda urged the Court to find that the impugned Circulars violate the Constitution and grant the Prayers in the Petition as set out above. 10
- The 1st Respondent's case
18. The 1st Respondent, the Commission on Revenue Allocation, is a constitutional commission established under article 215 of the Constitution and whose functions are set out under article 216 of the Constitution, the Commission for Revenue Allocation Act and the Public Finance Management Act. Those functions include making recommendations concerning the basis for the equitable sharing of revenue raised by the National Government between the National and County Governments and among County Governments. The Commission is also mandated to make recommendations on other matters concerning the financing of, and financial management by County Governments and fiscal prudence as required by the Constitution and national legislation. 15
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19. It opposed the Petition through the Affidavit of George Ooko, the Commission Secretary, sworn on 28th August 2014. In his Affidavit, he deponed that the 1st Respondent had not violated the Constitution in any way or as alleged by the Petitioners. 30
20. In the said Affidavit, Mr Ooko stated that County Governments and Assemblies must comply with the law in their budgetary processes and any County budget that does not do so is illegal and unconstitutional. 35
21. He claimed that the 1st Respondent's Circular Reference No CRA/CGM/Vol III/99 dated 22nd April 2014 did not recommend new budget ceilings for County Assemblies and County Executives. It merely restated the advice that the 1st Respondent had rendered to Parliament as provided by article 205 of the Constitution and Parliament, while taking into consideration the recommendation, made by the 1st Respondent as provided for by article 218(1)(a) 40

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- and (b) of the Constitution, enacted the Division of Revenue Act and the County Allocation of Revenue Bill. That therefore the budgetary ceilings are as a result of existing legislation and not the 1st Respondent's Circular as alleged. Further, that the 1st Respondent did not seek to micro-manage the County budgetary process in issuing the Circular neither did it seek to legislate on allocations to the County Assemblies and County Executives as alleged by the Petitioners because the legislative role in the County budgetary process is purely a function of Parliament and County Assemblies and that the total amount of revenue available to each County Government was done by Parliament through the Division of Revenue Act pursuant to article 218(1)(a) of the Constitution. 1
22. It was his further deposition that no County had submitted copies of the County development plans, debt management strategies or any other information to the 1st Respondent as required by law. Further, that no County Treasury had sought the recommendation of the 1st Respondent, as mandatorily required by section 117(5) of the Public Finance Management Act, in preparing the County Fiscal Strategy Paper. 5
23. It was also his contention that there was no discrimination meted out to County Assemblies because budget ceilings are lawfully set by Parliament for all arms of Government, all levels of Government and independent bodies and Commissions and that all the other Government agencies had complied with their set budget ceilings except County Assemblies which deliberately made budgets over and above those ceilings. 10
24. Mr Oraro, appearing for the 1st Respondent, also submitted that the provisions of the Division of Revenue Act, 2014 and the County Allocation of Revenue Act, 2014 are in conformity with the Constitution and that Parliament sets ceilings for County budgets via these two legislations as required by article 218 of the Constitution while under article 216, thereof, the 1st Respondent is granted the constitutional mandate of ensuring that County budgets are in compliance with the Division of Revenue Act and the County Allocation of Revenue Act. 15
25. It was his position therefore that the impugned Circulars are constitutional and lawful and the 1st Respondent acted within its mandate under the Constitution and the Public Finance Management Act, and related legislation. 20
26. It was his position that the impugned Circulars are constitutional and lawful and the 1st Respondent acted within its mandate under the Constitution and the Public Finance Management Act, and related legislation. 25
27. It was his position that the impugned Circulars are constitutional and lawful and the 1st Respondent acted within its mandate under the Constitution and the Public Finance Management Act, and related legislation. 30
28. It was his position that the impugned Circulars are constitutional and lawful and the 1st Respondent acted within its mandate under the Constitution and the Public Finance Management Act, and related legislation. 35
29. It was his position that the impugned Circulars are constitutional and lawful and the 1st Respondent acted within its mandate under the Constitution and the Public Finance Management Act, and related legislation. 40

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26. He went on to submit that the various County Appropriation Acts were unconstitutional as they are in conflict with the Division of Revenue Act, 2014 and County Allocation of Revenue Act, 2014 and as such, under article 191(2) of the Constitution, these two legislations prevail over the County Appropriations Acts. He thus urged the Court to find the County Appropriations Acts as unconstitutional and on the reliefs sought by the Petitioners, Mr Oraro submitted that they are moot as the recommendations made by the 1st Respondent to County Governments have already been taken into account by Parliament while passing the Division of Revenue Act, 2014 and County Allocation of Revenue Act, 2014. 1
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27. Lastly, it was Mr Oraro's submission that the Petitioners are State Organs as created under article 178(1) of the Constitution and the Counties are also State Organs and further that the Petitioners in their official capacity and the forty seven Counties are not persons within the meaning of the Constitution and therefore they are incapable of enjoying/enforcing any right under the Bill of Rights. In that regard, he relied on the case of County Government of *County Government Meru v Ethics and Anti-Corruption Commission* (2014) e KLR where it was held that a County Government was not a person capable of enforcing fundamental rights and freedoms and for the above reasons, he urged the Court to find that the Petition lacked merit and ought to be dismissed in its entirety. 15
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- The 2nd Respondent's case
28. The 2nd Respondent, the Controller of Budget, is an office established under article 228 of the Constitution and its mandate is to oversee the implementation of the budgets of the National and County Governments by authorizing withdrawals from public funds and also to bar any withdrawal from a public fund unless he is satisfied that the withdrawal is authorized by law. 30
29. It opposed the Petition through the Affidavit of Mr Waweru Tuti, its Legal Officer, sworn on 12th September 2014. Mr Arwa appeared for the 2nd Respondent and argued its case. 35
30. In his affidavit Mr. Waweru deponed that for any withdrawals to be authorized by law, the budgetary process as envisaged by the Constitution and the Public Finance Management Act, must be adhered to. 40
31. That the 2nd Respondent, before approving any withdrawal from

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- the County Revenue Fund, interrogates the budgetary process to establish whether the requirements of the law have been met and that in the financial year 2013/2014, County Assemblies approved flawed budgets and thereafter their Appropriation Acts were based on the said flawed budgets and consequently, requests for withdrawals from the County Revenue Fund was not approved and the same were referred back to the County Assemblies for rectification and/or incorporation of details and or information that had been omitted thus resulting in the delay of withdrawals of any money from the Fund which in turn stalled the operations of County Governments. That to avoid similar situations, the 2nd Respondent advised County Assemblies to present their proposed budgets ahead of time for advise on what additional information ought to have been incorporated in them before presentation of the budget estimates to the 2nd Respondent. The 2nd Respondent upon being presented with the proposed budgets by each of the County Assemblies for comments prior to enactment of the Appropriation Act, wrote letters to the 47 Counties on diverse dates between 5th June 2014 and 16th June 2014 briefly indicating what requirements of law their budgets had to satisfy before any withdrawal from the County Revenue Fund would be allowed. That the County Assemblies disregarded the recommendations and circulars sent to them and prepared budgets without due consideration to the recommendations made and therefore the Budgets presented to the 2nd Respondent were not prepared in line with the Programme Based Budget Approach as required by the Public Finance Management Act, and the Transition Authority Circular dated 12th, March 2014 which required all County Governments to implement Programme Based Budgets with effect from the financial year 2014/2015.
32. Further, that the Budget prioritization documents presented by each of the Petitioners were inconsistent with the devolved functions as stipulated under the Fourth Schedule to the Constitution and that the budgets presented did not show the allocation of development projects in the County. In particular, that the geographical distribution of the projects could not be ascertained by examining the particular budget estimates and that the budgets presented did not disclose the comparative data for the development expenditure of the prior year, thus limiting the ability to assess whether enough money had been allocated to complete those projects. Further, that the sub-items in the budget had no codes according to the

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- Government Financial Statistics coding that provides that every item must have a code and lastly, that the Counties had allocated monies that exceeded the monies in the County Revenue Fund and the County Assemblies ignored the recommendations of the 2nd Respondent in the whole budget process. 1
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33. Mr Waweru thus concluded that there was need to observe the principles of Public Finance as enshrined in article 201 of the Constitution and ensure prudent and responsible use of money and avoid wastage as was clear in the financial year 2013/2014 where members of County Assemblies made several foreign trips which were unnecessary and a waste of public funds. That the reason why the Petitioner's budgets were therefore not approved was because they had not satisfied the requirements of law in their enactment and that is why they could not be approved as submitted and not because they had exceeded the ceilings set by the 1st Respondent as contended by the Petitioners. 10
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34. Mr Arwa added that the Petitioners had not been discriminated against as alleged and that the ceilings were made based on an existing legal framework which had to be followed by all agencies including the Petitioners. He thus urged the Court to dismiss the Petition with costs. 20
- The 3rd Respondent's case 25
35. The 3rd Respondent, the Attorney General, is established under the provisions of article 156(1) of the Constitution with its mandate set out under article 156(4)(b) of the Constitution including to represent the National Government in Court or in any other legal proceedings to which the National Government is a party. 30
36. The Attorney General opposed the Petition and Mr Moimbo presented his case and while associating himself with the submissions of the 1st and 2nd Respondent, he added as follows;
37. That the generation of budgets at the National and County levels is a process that is strictly guided by both the Constitution and the Public Finance Management Act and as such, any budget based on budget estimates outside the provisions of the Constitution and Public Finance Management Act is unconstitutional and untenable in law. 35
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38. On the issue of the alleged recommendations by the 1st Respondent, he submitted that under sections 25(5)(a) and 117(5) of the Public

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- Finance Management Act, the National Treasury and the County Treasuries are enjoined to seek and take into account the views of the 1st Respondent while preparing the Budget Policy Statement and the County Fiscal Strategy Paper. He thus submitted that the recommendations made by the 1st Respondent are binding on the Petitioners and that they have the force of law because article 216(3) (a) of the Constitution removes the basis of such recommendations from the wisdom of the 1st Respondent and places it on the mandatory criteria of equity under article 203 of the Constitution. That a finding by this Court that the recommendations made by the 1st Respondent are not binding would render the 1st Respondent functionally ineffective and would render article 203(1) and 216(3) (a) inoperative and useless. 1 5 10
39. As regards the 2nd Respondent, Mr Moimbo submitted that it can only oversee the implementation of budgets of the National and County Governments, by authorizing withdrawals from public funds under articles 204, 206 and 207 and that under article 228(5) such withdrawals can only be made within the law and it is within the mandate of 2nd Respondent to stop a withdrawal that is not legal. 15 20
40. Mr Moimbo thus urged the Court to dismiss the Petition.
- The Interested Party's Case
41. The Interested Party, the Council of Governors, opposed the Petition. Mr Wanyama presented its case and his submissions were that County Assemblies were not persons capable of enjoying rights under the Bill of Rights. That while the provisions of article 20(1) of the Constitution recognize both horizontal and vertical application of the Bill of Rights, the Constitution has not given State Organs, such as the Petitioners, the power to petition this Court over a violation enshrined in the Bill of Rights. He relied on the case of *Kenya Bus Service Ltd and another v Minister for Transport and 2 others* (2012) eKLR where it was held that state organs are not entitled to the protection of the Bill of Rights and cannot therefore claim a violation of fundamental rights and freedoms. 25 30 35
42. It was his further submission that the impugned Circulars are binding on the Petitioners and that under the provisions of section 2 of the Interpretation and General Provisions Act (Cap 2) Laws of Kenya, the Circular is a form of subsidiary legislation since the 1st Respondent was acting within its powers under article 216 of the Constitution and section 10(c) of the Commission on Revenue 40

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- Allocation Act. 1
43. He submitted further that in any event, if there was conflict between County legislation and National legislation, National legislation prevails as provided for under article 191(2) of the Constitution. That because the Commission on Revenue Allocation Act is also a National legislation that has donated powers to the 1st Respondent to make recommendations on how funds should be spent at the County Government, the recommendations made thereunder amount to subsidiary legislation and therefore prevails over County legislation. He claimed further that the fact that County Appropriation Bills as passed exceeded the ceilings imposed by the recommendations of the 1st Respondent shows that they are contrary to the law and in any event, under article 191(2)(b) of the Constitution, the suspended County Assemblies budgets prejudice the National economic policy and as such are void. 5 10 15
44. He therefore urged the Court to find that the 1st and 2nd Respondent have not violated the Constitution in any way and have instead acted in accordance with the law by issuing the impugned Circulars to the Petitioners. He urged the Court to dismiss the Petition for the above reasons. 20
- Determination
45. Having set out the Parties' submissions as above and looking at the pleadings and submissions before me, I am of the view that there are two main issues for determination in this Petition. Firstly, whether the impugned Circulars were issued in breach of the law and the legislative authority of County Assemblies. To answer that issue I must also consider the budgetary making process and the mandates of County Assemblies as well as that of the 1st Respondent and 2nd Respondent in the said budgetary making process. Secondly, whether the Petitioners' fundamental rights under article 27 and 47 of the Constitution have been violated by the Respondents, jointly or severally. Lastly, I will consider what remedies are available to the Petitioners, if any. 25 30 35
- Whether the impugned circulars were issued in breach of the law and the legislative authority of County Assemblies
46. As already stated, in order to determine the dispute before me, it is important to analyse and confirm the budget making process as outlined in the Constitution and in the Public Finance Management Act *vis-à-vis* the mandate of the County Assemblies as well as the 1st 40

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- and 2nd Respondent in that process. If I understood Prof Ojienda well, his submission was that the Constitution does not allow the 1st Respondent to decide on matters concerning financing and fiscal management by Counties and that its mandate is limited to making recommendations on the basis of equitable sharing of finances while that of the 2nd Respondent is to ascertain the lawfulness of withdrawals from Revenue Funds created under article 207 of the Constitution. It was therefore his submission that there is no known law presently that mandates any of the Respondents to approve budgets or determine votes on account of budgets of County Assemblies and to do so would amount to usurping the powers of the County Assemblies and therefore the ceilings recommended by the 1st Respondent through Reference No CRA/CGM/Vol III/99 are illegal.
47. It is important to state from the outset that the budgetary process in Kenya is undertaken both at the National Level and at the County level. At the National level, the process is managed by the National Treasury while at the County level it is managed by the County Treasury. That being so, the first principle in the budgetary process is to be found in articles 201(b)(ii) and 202(1) of the Constitution which provide that revenue collected nationally shall be shared equitably between the National and County Governments. As to how and the manner in which that revenue is to be shared, article 218(1)(a) of the Constitution is important as it directs that at least two months before the end of each financial year, there shall be introduced into Parliament, a Division of Revenue Bill which shall divide revenue raised by the National Government among the two levels of Government.
48. The National budgetary process proper then starts with the preparation of a Budget Policy Statement by the National Treasury as is provided for in section 25(1) of the Public Finance Management Act. Section 25(4)(c) of the same Act requires that the Budget Policy Statement must include the amount of indicative transfers of funds from the National Government to the County Governments. Section 25(5)(a) of the same Act enjoins the National Treasury in its preparation of the Budget Policy Statement to seek and take into account the views of the 1st Respondent, County Governments, Controller of Budget, the Parliamentary Service Commission, the Judicial Service Commission, the public and any other interested persons or groups. Section 25(7) of the Act then provides that

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- Parliament, within fourteen days of submission to it of the Budget Policy Statement, shall table and discuss its recommendations and pass a resolution to adopt it with or without amendments. Thereafter, under the provision of section 25(8) of the Act, the Cabinet Secretary for Finance shall take into account the resolutions passed by Parliament and finalize the budget for that financial year. Lastly, under section 25(9) of the Act, the National Treasury shall publish and publicize the Budget Policy Statement not later than fifteen days after submission of the said Statement to Parliament.
49. Of importance in this Petition is that the National Treasury indeed prepared the 2014 Budget Policy Statement and presented the same to Parliament and that it was adopted by Parliament on 20th March 2014. In accordance with article 218(1)(a) of the Constitution which directs that at least two months before the end of each financial year there shall be introduced in Parliament a Division of Revenue Bill which shall divide revenue raised by the National Government among the National and County levels of Government, Parliament enacted the Division of Revenue Act, 2014 which was assented to by the President on 30th July, 2014 and which came into effect on 4th August 2014. Section 3 of that Act provides as follows;
- “The object and purpose of this Act is to provide for the equitable division of revenue raised nationally between the national and county levels of government for the financial year 2014/2015 in accordance with article 203(2) of the Constitution”.
- Further and in the above context, article 218(1)(b) provides for the enactment of the County Allocation of Revenue Act which provides for the equitable allocation of revenue raised by the National Government among the 47 Counties. In that regard, the County Allocation of Revenue Act, 2014 in section 3 states it objects as follows;
- “(a) provide, pursuant to article 218(1)(b) of the Constitution, for the allocation of the equitable share of revenue raised by the National Government among the County Governments in accordance with the resolution approved by Parliament under article 217 of the Constitution for the financial year 2014/2015;
- (b) provide, pursuant to articles 187(2) and 201(2) of the Constitution, for conditional additional allocations for the financial year 2014/2015; and

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- (c) facilitate the transfer of allocations made to the County Governments under this Act from the Consolidated Fund to the respective County Revenue Funds.” 1
50. The National Budgetary process effectively ends when transfers are made to the respective County Revenue Funds and before I start on the budgetary process at the County Level, I am aware that the Petitioners’ case is pegged on the import to be attached to Circular Reference as CRA/CGM/VOL III/ 99 issued by the 1st Respondent to all the Governors and County Executive Committee Members of Finance in all the 47 Counties. In that regard, it was Prof. Ojienda’s submission that the said Circular is void on two fronts. Firstly, that it was issued without authority and in breach of the legislative authority of County Assemblies under the provisions of articles 185(1) and (2) of the Constitution. Secondly, that in issuing and acting on the said Circular, the 1st Respondent violated article 189(1) of the Constitution as it failed to consult County Assemblies on a matter that fell within their mandate and would in effect affect them. 5 10 15
51. For avoidance of doubt that impugned Circular reads as follows; 20
 “Commission on Revenue Allocation
 Our Ref: CRA/CGM/VOL III/99 22nd April, 2014
 I All governors
 I County Executive Committee members – Finance 25
 Re: Recommended Budget Ceilings for County Assembly and County Executive based on Recommended Budget on Costs of New County Structures of Kshs 30,232 Million
 Attached please find CRA recommended ceilings for County Assembly and County Executive with accompanying notes. 30
 Please note that where budget exceeds the recommended ceilings, it would be at the expense of the costed devolved services which will consequently affect service delivery. 35
 Yours sincerely,
 SIGNED
 George Ooko 40
COMMISSION SECRETARY
 cc - Controller of Budget

I Clerk of the Senate	1
I Ag. CEO, Council of Governors.” (Emphasis added)	
Three facts can be clearly discerned from a plain reading of the Circular. Firstly, it was issued by the 1 st Respondent. Secondly, it was directed at Governors and County Executive Committee members in all the 47 Counties and lastly, it recommended budget ceilings for County Assemblies and County Executives and in that regard a question arises whether the 1 st Respondent had powers to issue the Circular and lastly, if so, whether the recommended ceilings were within the law.	5
52. The 1 st Respondent is an Independent Commission established under article 248(2) of the Constitution. Its functions are stipulated under article 216(1) and (2) of the Constitution as follows;	10
“(1) The principal function of the Commission on Revenue Allocation is to <u>make recommendations</u> concerning the basis for the equitable sharing of revenue raised by the National Government-	15
(a) between the National and County Governments’ and	20
(b) among the County Governments’.	
(2) The Commission shall also <u>make recommendations</u> on other matters concerning the financing of, and financial management by, County Governments’ as required by this Constitution and National legislation.” (Emphasis added)	25
In addition to the above provisions, section 10(1) of the Commission on Revenue Allocation Act, Cap 5E provides as follows;	
“(1) In addition to its principal function under article 216(1) of the Constitution, the commission shall, in accordance with clause (2) of that Article –	30
(a) <u>Make recommendations</u> for consideration by Parliament prior to any Bill appropriating money out of the Equalization fund is passed in parliament.	35
(b) Upon request from the Senate, <u>make recommendations</u> on the basis for allocating among the counties the share of National revenue that is annually allocated to the County levels of Government.	40
(c) <u>Submit recommendations</u> to the Senate, National Assembly, National Executive, County Assembly and County executive on the proposals made for equitable	

distribution of revenue between the National and County Governments and amongst the County Governments taking into account the criteria set out in article 203 of the Constitution, including <u>recommendations</u> on the amounts earmarked for specific purposes such as the constituency development fund, among others; and	1
(d) Perform such other functions as are provided for by the Constitution or any other written law.” (Emphasis added)	5
53. Looking at the above provisions and all of them read together, the 1 st Respondent is the body charged with the responsibility of making recommendations <i>inter-alia</i> to the Senate, the National Assembly, the National Executive, County Assemblies and County Executives on the basis upon which revenue would be shared equitably between the National and County Governments. It also recommends how the revenue allocated to the County Government level would be shared among the County Governments. It also makes recommendations on matters concerning the financing and financial management by the County Governments. None of the Parties disputed these facts but the point of disagreement is whether those recommendations are binding on all the organs to which they are made. Mr Moimbo for example warned this Court against any interpretation that would mean that the recommendations aforesaid are not binding. What is the law on the subject”	10
54. The <i>Concise Oxford English Dictionary</i> defines “recommend” as;	15
“(i) put forward with approval as being suitable for a purpose or role	20
(ii) Advise as a course of action”.	25
Taken in its ordinary English meaning, it would therefore mean that ‘recommendations’ do not have a binding effect on the person or body to whom they are made. Recommendation are not the same as ‘directives’ or ‘directions’ which are certainly binding on those to whom they are addressed, - See <i>Re Thomson (supra)</i> . However, in the context of the Petition before me and in order to interpret ‘recommendations’, the Constitution must be read as a whole in order to ascertain its aim and object so as to establish the aim of the drafters of the Constitution - See <i>Kigula and others v The Attorney General</i> (2005) AHGRLR 197 (Ug CC 2005). Heed must therefore	35
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be paid to the language used and the context of the specific provision under consideration. 1

55. In that regard and further to what I have stated above, article 217 of the Constitution states that; 5
- “(1) Once every five years, the Senate shall, by resolution, determine the basis for allocating among the Counties the share of National revenue that is annually allocated to the County level of Government.
- (2) In determining the basis of revenue sharing under clause (1), the Senate shall— 10
- (a) take the criteria in article 203(1) into account;
- (b) request and consider recommendations from the Commission on Revenue Allocation;
- (c) consult the County Governors, the Cabinet Secretary responsible for finance and any organisation of County Governments; and 15
- (d) invite the public, including professional bodies, to make submissions to it on the matter.
- (3) Within ten days after the Senate adopts a resolution under clause (1), the Speaker of the Senate shall refer the resolution to the Speaker of the National Assembly. 20
- (4) Within sixty days after the Senate’s resolution is referred under clause (3), the National Assembly may consider the resolution, and vote to approve it, with or without amendments, or to reject it. 25
- (5) If the National Assembly—
- (a) does not vote on the resolution within sixty days, the resolution shall be regarded as having been approved by the National Assembly without amendment; or 30
- (b) votes on the resolution, the resolution shall have been—
- (i) amended only if at least two-thirds of the members of the Assembly vote in support of an amendment; 35
- (ii) rejected only if at least two-thirds of the members of the Assembly vote against it, irrespective whether it has first been amended by the Assembly; or
- (iii) approved, in any other case. 40
- (6) If the National Assembly approves an amended version of the resolution, or rejects the resolution, the Senate, at

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- its option, may either— 1
- (a) adopt a new resolution under clause (1), in which case the provisions of this clause and clause (4) and (5) apply afresh; or
 - (b) request that the matter be referred to a joint committee of the two Houses of Parliament for mediation under article 113, applied with the necessary modifications. 5
- (7) A resolution under this Article that is approved under clause (5) shall be binding until a subsequent resolution has been approved. 10
- (8) Despite clause (1), the Senate may, by resolution supported by at least two-thirds of its members, amend a resolution at any time after it has been approved.
- (9) Clauses (2) to (8), with the necessary modifications, apply to a resolution under clause (8).” (Emphasis added) 15
57. The bonding of nature of a resolution above is quite different, obviously, from a mere recommendation. Important is also article 218 (2) of the Constitution which provides as follows; 20
- “(1) ...
- (2) Each Bill required by clause (1) shall be accompanied by a memorandum setting out—
 - (a) an explanation of revenue allocation as proposed by the Bill;
 - (b) an evaluation of the Bill in relation to the criteria mentioned in article 203(1); and 25
 - (c) a summary of any significant deviation from the Commission on Revenue Allocation’s recommendations, with an explanation for each such deviation.” (Emphasis added) 30
- The import of the above provisions is that a recommendation made by the 1st Respondent to the Senate is not binding but for good order, reasons for a deviation must be given. 35
58. As to who the recommendations are generally made to, article 218(5) proves as follows; 35
- 216
- “(1) ...
 - (2) ... 40
 - (3) ...
 - (4) ...

(5) The Commission shall submit its recommendations to the Senate, the National Assembly, the National Executive, County Assemblies and County Executives."	1
Reading articles 216, 217 and 218 of the Constitution as well as section 10(1) of the Commission on Revenue Allocation Act, Cap 5E, a number of facts can be distilled a <i>viz</i> ;	5
(i) The principle function of the 1 st Respondent is to make recommendations to the Senate, the National Assembly, the National Executive, County Assemblies and County Executives.	10
(ii) By the very nature of recommendations, they are persuasive but not binding on the person or body to which they are directed.	
(iii) Its principal functions in article 216(1) and (2) of the Constitution are to be supplemented by legislation and hence section 10(1) of the Commission on Revenue Allocation Act, which has been reproduced elsewhere above.	15
(iv) The impugned Circular if looked at in the context of article 216(1),(2) and (5) of the Constitution and section 10(1) aforesaid cannot be said to be unlawful or unconstitutional as argued by the Petitioners because it was made well within the mandate of the 1 st Respondent.	20
But that is not the end of the matter because it has been argued that the Circular has breached the legislative authority of the County Assemblies. How has that been done" The Petitioners have stated that the Circular had the effect of invalidating their County Fiscal Strategy Papers, County Budget Estimates of Revenue and Expenditure, Appropriation Bills and Finance Acts but I am at pains to understand that argument because while the circular was issued on 22 nd April 2014, the law providing for budgetary ceilings, being section 12 of the County Allocation of Revenue Act, 2014 came into force on 5 th September 2014 while this Petition was filed on 23 rd July 2014.	25
Section 12 aforesaid provides as follows;	
"Section 107 of the Public Finance Management Act is amended by inserting the following new Subsection immediately after subsection (2) –	30
(2A) pursuant to articles 201 and 216 of the Constitution	35
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and notwithstanding Subsection (2), the Commission on Revenue Allocation shall recommend to the Senate the budgetary ceilings on the recurrent expenditures of each County Government.” (Emphasis mine) 1

Prof Ojienda in the above context, submitted that neither the Division of Revenue Act, 2014 nor the County Allocation of Revenue Act, 2014 contained block figures of revenue that goes to each County government as budgetary ceilings set by the 1st Respondent vide the impugned Circulars. I have again looked at the impugned Circular and the accompanying notes which provide for budget ceilings in block figures to each County. Where then is the dispute” Whether the Petitioners acted on the circular is a non-issue because in fact it was not binding on them or Parliament. That issue is moot because once I have found that the recommendations made are not binding, then it follows that any complaint by the Petitioners ought to be directed at the State Organs with the final say on the budgets i.e. Parliament. There is no argument before me that the County Allocation of Revenue Act, 2014 is unconstitutional or that section 12 which introduced budgetary ceilings is unconstitutional. I have also not seen any argument that section 107 of the Public Finance Management Act, Cap 142 is unconstitutional. That section for avoidance of doubt proves as follows; 5

“(1) A County Treasury shall manage its public finances in accordance with the principles of fiscal responsibility set out in subsection (2) and shall not exceed the limits stated in the regulations. 25

(2) In managing the county Government’s public finances, the County Treasury shall enforce the following fiscal responsibility principles- 30

(a) the county Government’s recurrent expenditure shall not exceed the County Government’s total revenue; 35

(b) over the medium term a minimum of thirty percent of the County Government’s budget shall be allocated to the development expenditures; 40

(c) the County Government’s expenditure on wages and benefits for its public officers shall not exceed a percentage of the County Government’s total revenue as prescribed by the County Executive member for finance in regulations and approved

by the County Assembly;	1
(d) over the medium term, the Government's borrowings shall be used only for the purpose of financing development expenditure and not for recurrent expenditure;	5
(e) the County debt shall be maintained at a sustainable level as approved by County Assembly.	
(f) the fiscal risks shall be managed prudently; and	
(g) a reasonable degree of predictability with respect to the level of tax rates and tax bases shall be maintained, taking into account any tax reforms that may be made in the future.	10
(3) For the purposes of subsection (2)(d), short term borrowing shall be restricted to management of cash flows and shall not exceed five percent of the most recent audited County Government revenue.	15
(4) Every County Government shall ensure that its level of debt at any particular time does not exceed a percentage of its annual revenue specified in respect of each financial year by a resolution of the County Assembly.	20
(5) The regulations may add to the list of fiscal responsibility principles set out in subsection (2)."	
Read together with section 12 aforesaid, the above principles are crucial in the management of funds allocated to County Governments and I see no reason in the circumstances to delve into them in the circumstances of the Petition before me because there is no issue raised with regard to them.	25
Without section 12 or section 107 above being declared unlawful, I do not see the value of any case made out of a non-binding Circular while the law that came subsequent to it remains intact.	30
59. Notwithstanding my findings above, I also understood one of the Petitioners' complaints to be that the 1 st Respondent issued the impugned Circular without having involved and consulted them. I shall now turn to consider this submission.	35
60. The 1 st Respondent is an Independent Constitution Commission and as such under, article 249(2), it is not subject to the direction or control of any person or authority. The Supreme Court in <i>Re Matter of the Interim Independent Electoral Commission (supra)</i> expressed itself in the following terms as regards independent commissions;	40

“While bearing in mind that the various commissions and independent offices are required to function free of subjection to “direction or control by any person or authority”, we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. These Commissions or independent offices must, however, operate within the terms of the Constitution and the law; the “independence clause” does not accord them *carte blanche* to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law.”

The Court went further to state that;

For due operation in the matrix, “independence” does not mean “detachment”, “isolation” or “disengagement” from other players in public governance. Indeed, for practical purposes, an independent commission will often find it necessary to co-ordinate and harmonise its activities with those of other institutions of Government, or other Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of Government, or other commissions, so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of Government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the Constitution has instituted the safeguards in question.

It then concluded as follows;

The moral of this recognition is that commissions and independent offices are not to plead “independence” as an end in itself; for public-governance tasks are apt to be severely strained by possible “clashes of independences.”

61. I am duly guided on the interpretation of the law as above and it is clear to me that the 1st Respondent ought to perform its functions as provided for under the four corners of the Constitution and the law. Further, in meeting its objectives it is bound by the provisions

of article 249(1) which are as follows,	1
“(1) The objects of the commissions and the independent offices are to—	
(a) protect the sovereignty of the people;	
(b) secure the observance by all State organs of democratic values and principles; and	5
(c) promote constitutionalism”.	
Some of the democratic values and principles which also bind the 1 st Respondent are those stated at article 10 of the Constitution are as follows;	10
“(1) ...	
(2) The National values and principles of governance include—	
(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;	15
(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;	20
(c) good governance, integrity, transparency and accountability; and State and religion. National symbols and national days. National values and principles of governance.	
(d) sustainable development.”	25
62. Further, under article 216(3) of the Constitution;	
“(3) In formulating recommendations, the Commission shall seek—	
(b) to promote and give effect to the criteria mentioned in Article 203 (1);	30
(c) when appropriate, to define and enhance the revenue sources of the national and county governments; and	
(c) to encourage fiscal responsibility.”	35
63. In addition to the above, section 10(2) of the Commission on Revenue Allocation Act provides that;	
“In making recommendations under this section, the Commission shall take into consideration such facts or information as may be given to it by a County Government”.	40
64. Having rendered the law as I have done above, did the 1 st Respondent seek any information from County Governments	

before making the recommendation for budgetary ceilings and was it obligated to do so” I do not think so and I say so because I have no evidence to the contrary. Section 10(2) above creates no obligation in the manner suggested by the Petitioner although the information required may be useful to the 1st Respondent. It is a matter wholly of discretion on its part.

65. I reiterate that the 1st Respondent was not bound by the Constitution and the Act to seek information and representations from the County Government before making its recommendations on budget ceilings. I say so well aware that the principles in article 189 of the Constitution encourage consultation between the two levels of Government and I dare add that the same principles would apply to relations between the levels of Government and Independent Commissions and Offices. That article provides as follows;

“(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;
 - (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 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 mean of procedures provided under national legislation.
- (4) National legislation shall provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.”

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66. In addition to the above, I am aware of the provisions of section 25(5) of the Public Finance Management Act which provides that; 1
- “ (1) ...
- (2) ...
- (3) ... 5
- (4) ...
- (5) In preparing the Budget Policy Statement, the National Treasury shall seek and take into account the views of –
- (a) the Commission on Revenue Allocation;
- (b) County Governments; 10
- (c) Controller of Budget;
- (d) The Parliamentary Service Commission;
- (e) The judicial Service Commission;
- (f) The public; and 15
- (g) Any other interested persons or groups;”
67. All the above provisions read together would point to the fact that in the entire budgetary process, the views of County Governments and Assemblies are important and ought to be considered and taken seriously in making the Budget Policy Statement which would be used in preparing the National Annual Budget but I am not prepared to hold that it is a mandatory obligation to do so on the part of the 1st Respondent. I say so because while it is a good practice to consult and in terms set out in article 189 above, failure to do so cannot amount to a violation of any law or the Constitution itself. The point is that out of respect for each other’s roles and expertise, each organ should not off-handedly dismiss any suggestions or information obtained from the other but failure to do so cannot attract this Court’s sanctions. 20 25 30
68. Having found as I have, I must now consider the other interrelated issue on whether the 1st and 2nd Respondents usurped the legislative mandate of the County Government in the County budgetary process. Prof Ojienda strenuously submitted on this point and argued that the Circular is unconstitutional, unlawful and manifests anarchy because approval of County budgets is within the mandate of County Assemblies and it is not within the 1st and 2nd Respondents’ mandate to determine particular votes on County Budgets. 35 40
69. In that regard, under the provisions of section 104(1)(a)(b) of the Public Finance Management Act, it is the responsibility of the

County Treasury to prepare the Annual Budget for a County and co-ordinate the preparation of Estimates of Revenue and Expenditure of a County Government. The procedure for the budgetary process under section 117 of the Public Finance Management Act therefore starts with the preparation of a County Fiscal Strategy Paper which is then submitted for approval by the County Assembly by 28 th February of each financial year. In preparing the County Fiscal Strategy Paper, the County Treasury is obligated to specify the broad strategic priorities and policy goals that will guide the County Government in preparing its budget for the coming financial year. Thereafter, under section 118 of the Act, the County Treasury prepares a County Budget Review and Outlook Paper in respect of the County for each financial year and submits the paper to the County Executive Committee by 30 th September of that year. The County Executive Committee then is obligated to discuss that Outlook Paper and after approval it is laid before the County Assembly before it is published and publicised.	1
70. The County Government budget process therefore consists of the following stages as stipulated under section 125(1) of the Public Finance Management Act;	20
“(1) ...	
(a) Integrated development planning process which shall include both long term and medium term planning;	25
(b) Planning and establishing financial and economic priorities for the County over the medium term;	
(c) Making an overall estimation of the County Government’s revenues and expenditures;	
(d) Adoption of County Fiscal Strategy Paper;	30
(e) Preparing budget estimates for the County Government and submitting estimates to the County Assembly;	
(f) Approving of the estimates by the County Assembly;	
(g) Enacting an appropriation law and any other laws required to implement the County Government’s budget;	35
(h) Implementing the County Government’s budget; and	
(i) Accounting for, and evaluating, the County Government’s budget revenues and expenditures.	40
(2) The County Executive Committee member for Finance	

-
- shall ensure that there is public participation in the budget process.” 1
71. As can be seen and above, one can only but agree with Prof Ojienda for the Petitioners that it is within the mandate of the Treasury, County Executive and County Assembly to prepare and approve budgets for a County. However, that process cannot be read in isolation of other processes because I have already found that it is within the mandate of the 1st Respondent to recommend to the Senate, the National Assembly, the County Assembly and the County Government on equitable sharing of revenue between the two levels of Government and as between County Governments. By so recommending, the 1st Respondent would in essence be performing its obligations under article 216 of the Constitution and I therefore reiterate that even if the 1st Respondent had recommended budgetary ceilings in the County Budgets for 2014/2015 financial year, that action does not violate the Constitution. I further reiterate that it is actually the core responsibility of the 1st Respondent to recommend the manner in which the National Revenue is to be shared between the two levels of Government and among the Counties and such recommendation may include prescribing ceilings. However it must do so in the framework and in accordance with the Constitution and the law as I have found elsewhere above. 5 10 15 20 25
72. Before I conclude on this issue, I recall that by Prof Ojienda submitted that there are strict timelines and systems of checks and balances required to be observed by County Assemblies in enacting County budgets. In that regard, under the provisions of sections 117, 125, 129 and 133 of the Public Finance Management Act, the following instruments must be passed during the budgetary process in each financial year; 30
- (i) A County Fiscal Strategy Paper, which, pursuant to the provisions of sections 117(1) and (6) of the Public Finance Management Act must be submitted to a County Assembly by the County Treasury by 28th February each year, and adopted by the County Assembly by 14th March each year. It is the County Fiscal Strategy Paper that presents the financial outlook of a County with respect to County Government revenues, expenditures and borrowing for the coming financial year and over the medium term; 35 40

- (ii) A County Budget Estimates of Revenue and Expenditure, which, pursuant to the provisions of sections 125(2)(a), 129(6) and 131(1) of the Public Finance Management Act, must be presented to a County Assembly by the County Executive Committee Member for Finance by 30th April each year and approved by the County Assembly promptly and in any event before 30th June each year;
- (iii) A County Appropriations Act which the County Assembly must consider and enact by 30th June each year; and
- (iv) A County Finance Act, which pursuant to the provisions of section 133 of the Public Finance Management Act, a County Assembly must consider and enact by 30th September each year.
73. In the above context, I note that the impugned Circular is dated 22nd April 2014. As can be seen from the provisions of section 117 of the Public Finance Management Act, the County Fiscal Paper ought to be prepared by 28th of February in each financial year. I must therefore agree with Prof Ojienda that for Counties to comply with the Circular as issued by the 1st Respondent, they had to restart the budgetary process with the preparation and adoption of the Fiscal paper. But to my mind the issue is moot considering that the Allocation of Revenue Act, 2014 is in operation and it is the one that creates the offending ceilings even if it is based on non-binding recommendations from the 1st Respondent. I will say no more on the subject because that Act is not the subject of challenge in this Petition.
74. The last issue I will deal with on this question regards the submission made by the Petitioners that it is the constitutional duty of the County Assemblies to approve budgets for County Assemblies and as such the 2nd Respondent acted *ultra vires* its mandate by purporting to approve the said County Budgets.
75. In that regard, under article 228(4) of the Constitution, the mandate of the 2nd Respondent is to oversee the implementation of the budgets of the National and County Governments by authorizing withdrawals from public funds under articles 204, 206 and 207 of the Constitution. Under article 228(5), the Controller of Budget shall not approve any withdrawal from a public fund

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- unless that withdrawal is authorized by law. 1
76. If I understood Mr Arwa properly, his submission was that the 2nd Respondent had failed to authorize withdrawals from the County Revenue Fund mainly because the County Assemblies had disregarded the recommendations made in the respective Circulars issued to them on diverse dates between 5th June 2014 and 16th June 2014. The question I must therefore answer is whether the 2nd Respondent acted *ultra vires* its mandate by so doing. 5
77. In that context, I recall Mr Waweru, the Legal Officer for the 2nd Respondent stated in his Affidavit that in the financial year 2013/2014, the County Assemblies approved flawed budgets and thereafter their Appropriation Acts were rendered on rendered equally flawed and as such withdrawals from the Revenue Fund were not approved. That in order to avoid a similar situation for the financial year 2014/2015, the 2nd Respondent advised County Assemblies to present budget estimates to the 2nd Respondent for comments prior to the enactment of the Appropriation Acts and that the budget estimates were thereafter submitted and the Controller of Budget wrote letters on diverse dates between 5th June and 16th July 2014 advising the County Governments on what items their budgets ought to have included before their finalization and ultimately enactment of the Appropriation Acts; Was that a lawful action on the part of the 2nd Respondent? I think not. 10
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78. I say so because the law on the subject is very clear. Section 102 of the Public Finance Management Act sets out the principles that County Governments must adhere to in respect of public finances. They are as follows; 30
- “(1) Each County Government shall ensure adherence to—
- (a) the principles of public finance set out in Chapter Twelve of the
 - (b) the fiscal responsibility principles provided in section 107 under this Act; 35
 - (c) national values set out in the Constitution; and
 - (d) any other requirements of this Act.
- (2) The County Executive Committee shall observe principles of collective responsibility in exercising their functions under this Act. 40
- (3) In making decisions a county assembly shall take cognisance of article 216(2) of the Constitution.”

79. As regards the responsibility of a County Treasury with respect to County public funds, article 207(1) of the Constitution as well as section 109 of the Public Finance Management Act establishes a County Revenue Fund for each County Government and the fund is to be administered by the County Treasury. Under section 109(4) of that Act, the County Treasury shall arrange for the fund to be kept in the Central Bank or an account approved by the County Executive Committee member responsible for finance. Under article 207(2)(3) as well as section 109(6) of the Public Finance Management, the County Treasury shall obtain the approval of the Controller of Budget before withdrawing money from the County Revenue Fund under the authority of an Act of the County Assembly appropriating money for a public purpose, an Act of Parliament or county legislation that imposes a charge on that fund or in accordance with the provision of section 134 and 135 of the Public Finance Management Act.

80. Prior to the above processes and as stated earlier, the budget process in a County starts with the preparation of the County Fiscal Strategy Paper by the County Treasury. Under section 117(2) of the Public Finance Management Act, the County Treasury ought to align its County Fiscal Strategy Paper with the national objectives in the Budget Policy Statement. The County Treasury shall in that regard, include in its County Fiscal Strategy Paper the financial outlook with respect to county government revenues, expenditures and borrowing for the coming financial year and over the medium term. Under section 117(5) of that Act, in preparing the County Fiscal Strategy Paper, the County Treasury shall seek and take into account the views of the Commission on Revenue Allocation, the public, any interested persons or groups and any other forum that is established by legislation. Under section 126 of that Act, in developing the County Fiscal Strategy paper, the County Treasury consults with and takes into account the recommendations of the 1st Respondent and not the 2nd Respondent. Similarly, in developing the County Development Plan, the County Treasury sends the approved copy by the County Assembly.

In addition, section 131(1) of the Public Finance Management Act provides that;

“the County Assembly shall consider the County Government budget estimates with a view to approving them, with or without amendments, in time for the relevant appropriation

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- law and any other laws required to implement the budget to be passed by the 30th June in each year.” 1
81. I have deliberately reproduced the above sections of the Public Finance Management Act to demonstrate that nowhere in the law is any role created for the 2nd Respondent and specifically for it to review budgets of County Governments before they are enacted. Fiscal reporting mechanisms are clear at the National level and so are they in the County level with the County Executive, County Treasury and County Assemblies each charged with the responsibility of ensuring accountability and transparency in utilization of County resources and specifically, the mandate of approving County Budgets is the responsibility of a County Assembly. I must therefore agree with the Petitioners that the 2nd Respondent obviously encroached on their mandate when it sought to get involved in their budgetary processes. I have read the Affidavits of Mr Waweru Tuti and Mr George Ooko and whereas I note their concerns about the alleged untidy spending habits of County Governments and alleged claims of misuse of public funds as well as the need to ensure prudent utilization of public funds, good faith and meaningful intentions are worthless if those objects and designs are constitutionally and statutorily objectionable. 5 10 15 20
82. Before I conclude on this issue, I also recall the submission made by Mr Oraro that the various County Appropriation Acts are invalid as they are in conflict with the Constitution and as such are not enforceable. 25
83. It is indeed true that under article 191(2) of the Constitution, National legislation prevails over County legislation. However, in terms of the Petition before me, and as I have found elsewhere above, I have not seen any law authorizing the 2nd Respondent to undertake the function of approving County Budgets. Article 228 is very clear that the 2nd Respondent only oversees the implementation of budgets. In that regard, the importance of the Appropriation Act is obvious and cannot be understated. The argument made by the Respondents that the 2nd Respondent would only authorize withdrawals from the County Revenue if the law and the budgetary process as envisaged by the Constitution and the Public Finance Management Act, 2012 was adhered to is a matter of interpretation of the Constitution and Statute based on a specific set of contested facts. Who should ultimately determine alleged violations of the 30 35 40

Constitution and the Public Finance Management Act” Who determines whether the County Appropriation Acts are in line with the Constitution and Public Finance Management Act.	1
84. The provisions of article 165 of the Constitution are clear in that regard. For avoidance of doubt it states thus;	5
165(3)	
“(1)	
(a)	
(b)	10
(2)	
(3) Subject to clause (5), the High Court shall have—	
(a)	
(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;	15
(c)	
(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—	20
(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;	25
(e)”	
The dispute before me does not concern itself with the legality or otherwise of the Counties Appropriation Acts but it regards the mandate of the 1 st and 2 nd Respondent in the budgetary process and in overseeing the implementation of County budgets. The allegation that Counties had not submitted copies of County developments plans, debt management strategies as required by the law was not proved and given my findings as above, that issue is moot. That being the case, this Court cannot enter into such a vague dispute. It would only intervene had it been shown that the Appropriation Acts as enacted by the Counties violated the existing national legislation or that the Petitioners acted in contravention of the law, which is not the case before me.	30
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85. In conclusion, the 2 nd Respondent’s role is limited to overseeing	

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- the implementation of budgets including withdrawals from public funds. But having said so, as will be seen shortly, in fact this issue was not one in which any specific order was sought against the 2nd Respondent. 1
- Whether the fundamental rights and freedoms of the Petitioners were violated 5
86. I now turn to consider the last issue I set out to determine which is the alleged violation of the Petitioners' rights under articles 27 and 47 of the Constitution. In this regard, Prof Ojienda submitted that in issuing the impugned Circular, the 1st Respondent failed to consult the Petitioners thus violating their right to fair administrative action as provided for under article 47 of the Constitution. He also claimed that the fact that the impugned Circular on budget ceilings targeted only votes on account for County Assemblies and County Executive for the financial year 2014/2015 and did not affect budgets of other State Organs such as the National Executive, National Assembly, Senate, Judiciary and the twelve Commissions and Independent Offices, was discriminatory and therefore a violation of article 27 of the Constitution. 10 15 20
87. The 2nd Respondent on the other hand argued that there was no discrimination as alleged because budget ceilings were set for all arms of Governments and independent bodies and that all these other Government agencies had complied with their budget ceilings requirements save the Petitioners. On his part, Mr Oraro submitted therefore that the Petitioners are State Organs under article 178(1) of the Constitution and as such they are not persons capable of enforcing any of the fundamental rights and freedoms under the Bill of Rights. 25 30
88. I will start by determining this preliminary issue and if I find that County Governments are not persons for purposes of enforcing fundamental rights and freedoms, the matter ends there. If not, I will proceed and determine the merits of the claims aforesaid. 35
89. It is not in doubt that the Petitioners have invoked the provisions of article 22 of the Constitution to allegedly enforce their right to protection against discrimination and right to fair administrative action as provided for under the provisions of article 27 and 47 of the Constitution respectively. 40
90. Article 20(2) of the Constitution is on the Application of the Bill

of Rights and it provides that;	1
“Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedoms’.	
Under article 260 of the Constitution a ‘person’ includes	5
“a company, association or other body of persons whether incorporated or unincorporated’.	
The issue therefore is whether County Assemblies are persons capable of having their fundamental rights protected and enforced.	10
In answering that question, Majanja J in <i>County Government of Meru v Ethics and Anti-Corruption Commission (supra)</i> stated as follows;	
“A County Government is recognized as part of the State organs that exercise the sovereign power of the people under articles 1(4), 6 and 176 of the Constitution. Under article	15
260 of the Constitution. “State”, when used as a noun, means the collectivity of offices, organs and other entities comprising the Government of the Republic under this Constitution” while the term person, “includes a company,	
association or other body of persons whether incorporated or unincorporated.” Under article 21 of the Constitution, the obligations, regarding the implementation of fundamental	20
rights and freedoms are cast on the on the State and every State organ. Article 22 of the Constitution, which has been invoked by the Petitioner, grants every “persons” the right	
to Institute Court proceedings claiming that a right or fundamental freedom in the bill of Rights has been denied, violated or infringes or is threatened.”	25
The learned judge continued thus;	30
“The provisions I have cited above show that there is a clear distinction between a person and a County Government which is a State organ <i>vis-vis</i> the rights and obligations under the Bill of Rights. I am doubtful, that the County Government qua County government can lodge a claim under	
article 22 of the Constitution against another State organ to enforce fundamental rights and freedoms as the County Governments is not a person for purposes of the Constitution	35
ad more particularly the Bill of Rights. I therefore find and hold that the Petitioner cannot agitate a claim for violation of	
fundamental rights and freedoms against the Commission. I therefore decline to grant prayer (b) of the Amended Petition.”	40

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91. I am in agreement with the learned judge and I adopt his reasoning in the instant Petition. I do so because the Petitioners are not private individuals but officers serving in a public office as defined in article 260 of the Constitution. The Respondents are also officers and offices in the same public office and it is inconceivable how one can violate the other's rights in the context of the Bill of rights. In any event, in the circumstances of the Petition before me, any differences regarding the fiscal and budgetary processes between affected State Organs should not be such as to attract this Court's intervention under the Bill of Rights. Those differences are to be settled in the manner envisaged by article 189(4) of the Constitution and not by litigation predicated on the Bill of Rights. In addition, the dispute at hand concerns the powers of the 1st and 2nd Respondent in revenue allocation, budgetary processes and budget implementation. Article 10 of the Constitution sets out the principles of rule of law, transparency, accountability and good governance as some of the national values to guide such processes. Rule of law dictates that every state organ, independent offices and Commission must apply the Constitution and the law in its affairs and it is the duty of this Court to determine the legality of their actions and that is how far the Court should go.
92. In a nutshell, I see no reason to make any finding that any rights as under articles 27 and 47 of the Constitution have been breached as far as the Petitioners are concerned and I so hold and find. All their complaints in that regard and which have been set out elsewhere above are dismissed.
- Whether the orders sought can be granted
93. From what I have stated above and noting the prayers in the Petition, once I have held that the impugned Circulars were not binding yet were lawfully issued, it follows that Prayers (a) and (b) in the Petition cannot be granted and are instead dismissed.
94. As regards prayers (c) and (d), it is the duty of the 2nd Respondent to oversee the implantation of the budget in accordance with the law subject to what I have stated above. It is also not bound to follow the respective County Budgets which are themselves subject to National Revenue Allocation Laws to wit the Public Finance Management Act, the Division of Revenue Act and the County Allocation of Revenue Act. No challenge has been made to those laws and the powers donated to the 1st and 2nd Respondents in that regard. The

- prayers as crafted cannot be granted and are instead dismissed. 1
95. As for costs, I see no reason to award costs as this was litigation between State Organs and offices.
- Conclusion 5
96. This case brings to the fore the need for prudence in the use of public funds and the need to follow the lawful processes set by the Constitution and relevant Statutes. It also makes urgent the need for a clear across-the-board understanding of Chapter 12 of the Constitution. Although one of the most important Chapters in the Constitution, seldom has it been subjected to an interrogation at the practical level. The result is that each of the Organs and institutions charged with its implementation invariably find relevance in areas reserved for others. The Chapter creates distinct roles for the National Executive, Parliament, County Executives and County Assemblies, Independent Commissions and offices and in this judgment, I have attempted to demarcate those roles. Should any of them for whatever reason become rogue, and should any wrangles arise, the law has created sufficient dispute resolution mechanisms to quickly address such situations including alternative dispute resolution mechanisms as is provided for in article 189(3) and (4) of the Constitution. 10
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97. In the course of the hearing of this Petition, on more than one occasion, I directed parties to attempt a resolution of the issues raised but the little progress made only related to certain payments made to enable obligations towards salaries and sundries to be met. I encourage more and more attempt at meetings to resolve these issues and the Attorney-General ought to take a lead and not a backseat in such situations. 25
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98. Lastly, it is time that County Executives and County Assemblies learnt that funds allocated to Counties are meant to serve legitimate and lawfully progressive purposes. It is distressing, as was said by one party to this Petition, to learn that Kenyans elected to serve in Counties may have been banned from travel for being a nuisance in certain foreign Countries. The funds used for such trips are said to be in their millions. Granted, no doubt devolution is working and indeed it must work but wastage will only drain an already drained populace. I digress and will now proceed to make the final orders based on all the findings I have made above. 35
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Final orders	1
99. It follows from the above findings that I see no merit in the Petition and the same is dismissed. Having so ordered, it follows that this Judgment is binding on Petitions Numbers 417 of 2014 and 242 of 2014. Both are determined in the same terms and a copy of this Judgment shall be placed in each of those files for record purposes.	5
100. I shall make no orders as to costs	
101. Orders accordingly.	10
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**Institute of Social Accountability & another
v National Assembly & 4 others [2015] KLR-HCK**

High Court, at Nairobi

February 20, 2015

I Lenaola, M Ngugi & D Majanja, JJ

Petition No 71 of 2013

Brief facts

The Petitioners brought a Petition before the High Court seeking declarations that the Constituencies Development Fund Act No 30 of 2013 (CDF Act) violated the Constitution.

The Petitioners' case was that the CDF Act contravened the constitutional principles of the Rule of law, good governance, transparency, accountability, separation of powers and the division of powers between the National and County Government and the public finance management and administration.

Issues

- i. Whether the process leading to the enactment of the CDF Act was Constitutional.
- ii. Whether the CDF Act offended the principles of public finance and division of revenue provided under the Constitution.
- iii. Whether the CDF Act violated the division of functions between the National and County Governments.
- iv. Whether the CDF Act offends the principle of separation of powers.

Constitutional Law – national revenue – division of national revenue – where funds are sent to the constituencies in compliance with the CDF Act – whether sending revenue to the constituencies as required by the CDF was in itself a contravention of articles 202 and 203 to the Constitution.

Constitutional Law – public participation – degree of participation in the law-making process – whether the public was accorded reasonable opportunity in the law making process – what amounted to a reasonable opportunity – whether the process leading to the enactment of the CDF Act was Constitutional.

Constitutional Law – enactment of laws – enactment of laws to align with the Constitution of Kenya – whether the CDF Act was one of the contemplated laws under section 2(3)(b) of the Sixth Schedule to the Constitution relating to devolved government that were required to be enacted by the Sixth Schedule and Chapters Eleven and Twelve of the Constitution within the period stipulated in the Fifth Schedule –

Constitution of Kenya, 2010, Sixth Schedule of the Constitution, section 2(3)(b). 1

Constitutional Law – devolution – Constituency Development Fund – whether it had been contemplated in the statutes that a constituency had to be one of the beneficiaries of the national revenue before it was divided between the National and County Governments – Constitution of Kenya 2010, articles 93, 96(1), 110, 165, 202, 203, 259. 5

Statutes – interpretation of statutes – interpretation of the CDF Act – whether the CDF Act duplicates and overlaps the County Governments' functions under the Fourth Schedule of the Constitution. 10

Held:

1. The High Court was enjoined under article 259 of the Constitution to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, the High Court was obliged under article 159(2)(e) of the Constitution to protect and promote the purpose and principles of the Constitution. 15
2. The general presumption was that every Act of Parliament was constitutional and the burden of proof lay on any person who alleged otherwise. 20
3. In determining whether a statute was constitutional, the Court had to determine the object and purpose of the impugned statute, for it was important to discern the intention expressed in the Act itself. Further, the Court had to consider not only the purpose of the Act but also its effect. 25
4. While interpreting the impugned legislation alongside the Constitution, the Court had to bear in mind Kenya's peculiar circumstances. The Court had to adopt a liberal approach that promoted the Rule of Law and that had jurisprudential value that reflected the spirit of the Constitution, since the matter concerned devolution. 30
5. Article 93 established Parliament comprising the National Assembly and the Senate. Each of the Houses was enjoined to perform their respective functions in accordance with the Constitution and where the Constitution prescribed a procedure that ought to have been followed in enacting a law, that procedure had to be followed. Therefore while Parliament might legislate on any matter concerning the Republic, the legislation had to conform to the Constitution both procedurally and in its substance. 35
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6. The issue of whether the matter was one for County Government was of constitutional importance and the decision of the Speakers of the National Assembly and the Senate, could not be conclusive and binding on the Court, whose jurisdiction was to interpret the Constitution.
7. Participation of the Senate in the legislative process was not just a matter of procedure. It was significant to the role of the Senate in Kenya's constitutional scheme, as the Senate's legislative role was limited to matters concerning County Governments. Through its participation in the legislative process, the Senate was seized of the opportunity to discharge its primary mandate which was to protect the interests of the counties and County Governments as mandated under article 96(1) of the Constitution. It was a means of ensuring that the county's voice was heard and considered at the national forum and the interests of counties and their governments secured. That way, the sovereign power of the people was duly exercised through their democratically elected representatives.
8. While concurrence of the Speakers of the National Assembly and the Senate was significant in terms of satisfaction of the requirements of article 110(3) of the Constitution, it did not by itself oust the power of the Court vested under article 165(3)(d) where a question was raised regarding the true nature of legislation in respect to article 110(1). The Court had to interrogate the legislation as a whole and determine whether in fact the legislation met the constitutional test of a matter concerning County Governments.
9. The laws contemplated under section 2(3)(b) of the Sixth Schedule to the Constitution were the laws relating to devolved government that were required to be enacted by the Sixth Schedule and Chapters Eleven and Twelve of the Constitution within the period stipulated in the fifth schedule. The CDF (Amendment) Bill was not one of the laws contemplated under section 14 of the Sixth Schedule as it was an amendment to an existing legislation.
10. The forms of facilitating an appropriate degree of participation in the law-making process were capable of infinite variation. What mattered was that at the end of the day a reasonable opportunity was offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounted to a reasonable opportunity would depend on the circumstances of each case.
11. In order to determine whether there had been public participation, the Court was required to interrogate the entire process leading

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- to the enactment of the legislation from the formulation of the legislation to the process of enactment of the statute. 1
12. During the legislative process, amendments to the Bill might have been moved during the Committee Stage and to have held that every amendment moved had to undergo the process of public participation would negate and undermine the legislative process. 5
- The amendment moved was in substance, within the parameters of what had been subjected to public participation during the review process. The public was involved in the process of enactment of the CDF Act through the Task Force and Review Panel initially set up by CDF Board. The amendment was within the parameters of what was in the public domain and in the circumstances the amendment bill did not violate the principle of public participation. 10
13. County Governments' share of revenue had to be at least fifteen per cent of all revenue collected by the National Government in accordance with article 203(2) of the Constitution. The import of that provision was that any amount that reduced the amount of shareable revenue or revenue collected by the National Government effectively affected the amount available to the counties hence an infringement on the requirements of the provision. The Constitution did not envisage any other organ, body or fund to have a share of all the revenue collected by the National Government before it was shared between the two levels of government established under article 1(4) of the Constitution. 20
14. It was not contemplated anywhere that a constituency had to be one of the beneficiaries of the national revenue before it was divided between the national and County Governments. Article 206(1)(a) and (b) of the Constitution excluded from the Consolidated Fund such monies excluded by an Act of Parliament and was payable into another fund established for a specific purpose. 25
15. For purposes of equitable sharing of revenue the phrase 'revenue raised nationally' as used in articles 201(b)(ii), 202(1) and 203(2) was to be equivalent to 'revenue raised by the National Government' within the wording of article 218 of the Constitution. The implication of the wording of the provisions was that the revenue shared between the National and County Governments and amongst the counties was not received from anywhere else but from the revenue collected by the National Government. In other words all revenue collected by the National Government had to be pooled in a common pot before it was shared by the levels of government. It was in that light that the wording of the impugned section ought 30
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to be scrutinized.	1
16. The use of the phrase, ‘all the National Government’s ordinary revenue’ in the CDF Act introduced ambiguity. However, as case law had established, not all ambiguity necessarily rendered a statute unconstitutional, as such ambiguities could be solved by applying rules of interpretation.	5
17. CDF was not a conditional grant to County Governments envisaged under article 202(2) of the Constitution, as it was not even expressed to be such.	10
18. Section 22 of the CDF Act demonstrated that the Act was not clear in terms of what projects the CDF was supposed to fund and implement. The section broadly referred to unspecified projects which the court was unable to determine to which level of Government they belonged into as per the Fourth Schedule to the Constitution. Nevertheless, the drafters of the Constitution did not envisage that there would be a three tier system (National Government, County Government and Constituency) that would be charged with infrastructural development at the county level.	15
19. From a plain and literal reading of the provisions of article 186 and the Fourth Schedule to the Constitution, it could not be said that for instance, infrastructural development and wealth creation at the Constituency level was solely a function of the National Government. Infrastructural development was such a fluid term that might include county transport and development of county health facilities which would fall within the functions of the County Government enumerated in Part 2 of the Fourth Schedule.	20
20. Article 186(1) of the Constitution had set out that National and County Governments were to share certain functions within the County and those functions were clearly stipulated in the Fourth Schedule of the Constitution. The creation and assignment of roles to an entity outside the structures of governance established under the Constitution was antithetical to the principles of the Constitution as it threatened to violate the functional competencies of County Government within which CDF operated.	25
21. The National Government might impose conditions on grants issued under article 202(2) of the Constitution. Those conditions might include naming the specific projects to which such grants were channeled. However, the conditions attaching to those grants, including the manner of implementation had to by themselves be in line with the devolution principles and constitutional values. Such conditions must not be such that they undermined the County	30
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- Government autonomy envisaged under the Constitution. 1
22. The National Government, while free to infiltrate its policies at the county levels, it could only do so through the structures recognised under the Constitution and not run parallel to them. If it so desired, the National Government could channel grants, whether conditional or unconditional to the County Governments as additional revenue within the meaning of article 202 and not any other entity which performed the functions allocated to the county by the Constitution. The National Government could not purport to channel grants to an entity whose intended projects effectively undermined the role of the Government at the County level unless the projects were specifically defined to exclude them from the ambit of Part 2 of the Fourth Schedule of the Constitution. 5 10
23. The CDF appeared to be a third entity grafted from the National Government that operated within the County Governments but outside their structures. The involvement of the members of the National Assembly and Senators in the implementation and administration of CDF, infringed the Constitution in two ways. First, it threatened to violate the division of functions between the National and County Governments. Secondly, the purpose of the Act, coupled with the target projects under section 22 were vaguely worded and lacked a specific cause, it was premature to categorically class the enumerated projects as falling either under the National or County Governments. It was nevertheless a safe inference to make that the reference to 'community based projects' within the wording of section 22 would at the very least cause a functional overlap with those of County Governments. 15 20 25
24. The Constitution required that the County Governments decentralize their functions and services to the extent that it was efficient and practicable to do so under article 176(2). That principle was fortified by Part VI of the County Governments Act, 2012 which sets out the decentralisation units in a county. The Constitution envisaged that although power was shared between the National and County Governments the decentralized units within the County would facilitate the achievement of the objects of devolution through to the grassroots. 30 35
25. Under article 1 of the Constitution, the County Government did not derive its power from the National Government but directly from the people of Kenya and under the Constitution. Those two levels of governments were in theory, equal and none was subordinate to the other. MPs and cabinet secretaries involved in 40

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- the management or implementation of the CDF constituted the executive and legislative organs of the National Government, their involvement in development activities at the county level not only threatened to undermine the functions of the government at the county level but also blurred the executive and legislative divide that underlies the principle of separation of powers. Therefore it was unconstitutional for the National Government to extend its mandate in the Counties beyond its mandate under the Constitution through the artifice of the CDF. 1 5
26. At the national level, under article 93(1) of the Constitution, there was established a Parliament consisting of the National Assembly and the Senate. In the same breath at the county level, there is the County Assembly and the County Executive headed by the Governor. Therefore, the arrangement introduced by the CDF of having Members of Parliament getting involved in the implementation of the development agenda of a county undermined the County Government and especially the role of the county executive. At the County level the Governor and the County Executive Committees were the executives in the county and in charge of development policies. 10 15 20
27. The involvement of the Members of Parliament in the CDF implementation violated the core principle of separation of powers and to that extent, the CDF Act was unconstitutional. Further, to the extent that the Act conflated the executive and legislative functions, it complicated accountability mechanism envisaged under the Constitution underpinned by the doctrine of separation of powers. In that respect, the Act violated key national values and principles enunciated under article 10 of the Constitution, to wit, good governance and accountability. 25 30
28. Members of Parliament had a specific and clearly defined role under the Constitution. That role did not include involvement bodies whose functions entailed coordinating, project approvals or actual implementation of projects as those functions were executive in nature. It was also untenable to permit Senators, who were charged with the constitutional role of oversight over county resources from the National Government to the County Government, to convene and chair County Project Committee as established under Part VII of the CDF Act. 35 40
29. Parliament was constitutionally bound to enact legislation that assists and strengthens the County Governments in the discharge of their roles rather than one that undermined them, as the CDF

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- Act effectively did. The organs of the National Government must trust and utilize the machinery that the Constitution now ordains. Even with the noblest of intentions, any Act of Parliament had to meet the threshold of constitutionality for it to withstand the test of validity. 1
30. The purpose of the CDF (Amendment) Act was to amend a law that violated the division of functions between the national and County Governments. Therefore an amendment to the Act would have necessitated the input of the Senate. The purpose of involving the Senate was to ensure that counties as far as possible get to effectively participate in the legislative business at the national level in matters substantially affecting interests of County Governments. That calls for the court to look beyond the substance or purpose of the statute expressed in the text. 5
31. The Court had to unbundle the specific provisions of the proposed legislation to see if and to what extent they satisfied the criteria set out under article 110(1) of the Constitution. An amendment to the Act affecting the manner in which money was allocated to the CDF was the core part of the Act. As the availability of money affects the financing and implementation of projects that fall within the competence of the County Government, the provision could not be severed without undermining the entire Act. The CDF (Amendment) Bill was not an insubstantial amendment. Therefore the CDF (Amendment) Bill was unconstitutional for want of involvement by the Senate. 10
32. Devolution was a panacea to addressing the developmental and equity gaps that existed in the communities. That is not however to say that the National Government could not conceptualize and fund development initiatives at the local level, what was critical was that such initiatives in both design and implementation, had to respect the system of governance in existence and the spirit and letter of the Constitution. 15
33. Constitutional cases could not be decided on the basis that Parliament or the President acted in good faith or on the basis that there was no objection to action taken at the time that it was carried out. It was of crucial importance at an early stage of the development of the new constitutional order, to establish respect for the principle that the Constitution was supreme. The Court's duty was to declare legislative and executive action which was inconsistent with the Constitution to be invalid, and then to deal with the consequences of the invalidity in accordance with the provisions of the Constitution. 20
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34. In order to protect the Constitution, the Court would have to be creative in fashioning appropriate relief that was tailored to the facts of the case and that was consistent with the values of the Constitution. Suspension of the declaration of invalidity would be appropriate in the circumstances as it would allow the Legislature time to correct the defective legislation while avoiding chaos and disarray in a system that had been established for over a decade. Such a move would support good governance, a core national value under article 10 of the Constitution. 1
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35. In determining the period of suspension various factors must be taken into account including, the government's previous conduct, whether there was any legislation in the pipeline and the nature and severity of the continuing infringement. In order to allow for transitional and corrective mechanisms, suspension of the invalidity of the CDF Act for a period of twelve months from the date of the judgment was a reasonable period. The National Government was entitled to remedy the defects in the period either in form of new legislation or other means within the Constitution. For avoidance of doubt, the Act could be repealed earlier by an Act of Parliament or await the expiry of the suspension, whichever came first. 10
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36. (Obiter) "The Court must patrol Kenya's constitutional boundaries with vigor, and affirm new institutions, as they exercise their constitutional mandates, being conscious that their very infancy exposes them not only to the vagaries and fragilities inherent in all transitions, but also to the proclivities of the old order." 25

Orders

Constituencies Development Funds Act, 2013 declared unconstitutional and therefore invalid. 30

The order of invalidity above was suspended for a period of twelve (12) months from the date of judgment.

The National Government could remedy the defect within that period and the Constituencies Development Fund Act would stand invalidated at the expiry of the twelve (12) months or could be earlier repealed whichever came first. 35

Each party was to bear its own costs.

Cases

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East Africa

1. *Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others* Petition No 454 of 2012 – (Applied) 5
2. *Consumer Federation of Kenya (COFEK) v Public Service Commission & another* Petition No 263 of 2013 – (Mentioned)
3. *In re the Matter of the Interim Independent Electoral Commission* [2011] 2 KLR 32 – (Applied)
4. *Republic v Cabinet Secretary for Transport & Infrastructure & 5 others ex parte Kenya Country Bus Owners Association & 11 others* Judicial Review Case No 124 of 2014– (Mentioned) 10
5. *Kenya Small Scale Farmers Forum and 6 others v Republic and 2 others* [2013] 3 KLR – (Mentioned)
6. *Law Society of Kenya v Attorney General & 2 others* Petition No 318 of 2012 – (Explained) 15
7. *Mati & another v Attorney General & another* [2011] 2 KLR 1 – (Mentioned)
8. *Momanyi v Attorney General & another* [2012] 1 KLR 661 – (Mentioned)
9. *Munyendo & 908 others v Attorney General & another* [2013] 1 KLR – (Explained) 20
10. *Muthama v Minister for Justice and Constitutional Affairs & another* [2012] 1 KLR 832 – (Mentioned)
11. *Murang'a Bar Operators & another v Minister of State for Provincial Administration and Internal Security & 2 others* [2011] 1 KLR 543 – (Mentioned) 25
12. *Ndyanabo v Attorney General* [2001] 2 EA 485 – (Mentioned)
13. *Ruturi & 2 others v Ministry of Finance & another (No 2)* [2002] 1 KLR 54; [2001] EA 253 – (Explained) 30
14. *Shahbal, Suleiman v Independent Electoral and Boundaries Commission & 3 others* Petition No 3 of 2014 – (Explained)
15. *Speaker of the Senate & another v Attorney General & 4 others* Advisory Opinion No 2 of 2013 – (Explained)
16. *Tinyefuza v Attorney General* [1997] UGCC 3 – (Mentioned) 35
17. *Trusted Society of Human Rights Alliance v Attorney General & 2 others* Petition No 243 of 2011 – (Explained)

Namibia

1. *S v Acheson* 1991(2) SA 805 – (Explained) 40

South Africa

1. *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 – (Mentioned)

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2. <i>Doctors for Life International v Speaker of the National Assembly & others</i> [2006] ZACC 11; 2006 (12) BCLR 1399 – (Explained)	1
3. <i>Executive Council of the Western Cape Legislature and others v President of the Republic of South Africa & others</i> [1995] ZACC 8 – (Explained)	
4. <i>Minister of Health and others v Treatment Action Campaign and others</i> (2002) 5 LRC 216; 2002 (5) SA 721 – (Mentioned)	5
5. <i>Matiso and others v Commanding Officer, Port Elizabeth Prison, & others</i> [1995] ZACC 7; 1995(4) SA 631 – (Mentioned)	
6. <i>Minister of Health and another v New Clicks South Africa (Pty) Ltd and others</i> 2006 (2) SA 311; [2005] ZACC 14 – (Explained)	10
7. <i>Premier: Limpopo Province v Speaker of the Limpopo Provincial Legislature and others</i> [2012] ZACC 3; 2012 (4) SA 58 – (Explained)	
Canada	
1. <i>R v Big M Drug Mart Ltd</i> [1985] 1 SCR 295 – (Explained)	15
India	
1. <i>Minerva Hills Ltd & others v Union of India and others</i> [1980] 3 SCC 625 – (Explained)	
Philippines	
1. <i>Greco Antonius Beba Belgica and 3 others v Executive Secretary Raquito n Ochoa JR Secretary of Budget and Management Florencio B Abad and another</i> GR No 208566 – (Explained)	20
Statutes	
East Africa	
1. Constituencies Development Fund Act, 2013 (Act No 30 of 2013) sections 1(4); 3; 4(1)(c)(d),(2); 5; 10(1); 18; 20; 22; 24(3)(a)(b)(c); (7); 28; 30; 31(3); 36; 37; 47; 95; 104; 126 – (Interpreted)	25
2. Constitution of Kenya, 2010 articles 1(2); 6; 10(2); 23; 93; 95(1)(4)(b); 96(1); 97(1); 109(3)(4); 110(1)(3); 114(2); 118; 156; 159(2)(e); 165(3)(d)(4); 174; 175(b); 176(2); 179; 183; 185(3); 186(1); 189(1)(a); 190(3); 201(b)(ii); 202(1)(2); 203(2); 204; 206(1)(a)(b); 209(3); 217; 218; 219; 258; 259; Fourth Schedule; Sixth Schedule sections 2(3)(b); 14 – (Interpreted)	30
3. Constituencies Development Fund (Amendment) Act, 2013 (Act No 36 of 2013) In general – (Interpreted)	35
4. Constituencies Development Fund Act, 2003 (Act No 10 of 2003) (Repealed) In general – (Interpreted)	
5. County Governments Act, 2012 (Act No 17 of 2012) sections 37, 48(1)(b) – (Interpreted)	
6. Elections Act, 2011 (Act No 24 of 2011) In general – (Interpreted)	40
7. Public Finance Management Act, 2012 (Act No 18 of 2012) In general – (Interpreted)	

Advocates

1. <i>Mr Waikwa Wanyoike</i> for the Petitioners	1
2. <i>Mr Anthony Njoroge</i> for the 1 st Respondent	
3. <i>Ms S Munyi & Mr Kaumba</i> for the Attorney General	
4. <i>Mr W Gatonye & Mr Naikuni</i> for the 3 rd Respondent	5
5. <i>Mr Nderitu</i> for the Interested Party	

February 20, 2015, the following Judgment of the Court was delivered.

Introduction

1. The Petitioners seek declarations that Constituencies Development Fund Act, Act No 30 of 2013 ('CDF Act') violates the Constitution. The legislation establishes a fund known as the Constituencies Development Fund (CDF) which has for the past decade disbursed money to the constituencies to finance and implement development projects.	10
2. The Petitioners challenge the constitutionality of the CDF Act on two fronts; the process leading to its enactment and the substance of the legislation including the nature, administration and management of the CDF. The Petitioners contend that the CDF Act contravenes the constitutional principles of the rule of law, good governance, transparency, accountability, separation of powers and the division of powers between the national and County Government and the public finance management and administration.	20
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Parties to the Petition

3. The 1 st Petitioner, the Institute of Social Accountability, a registered trust whose objective is to promote good governance, transparency and accountability mechanisms in local governance and in utilization of financial resources filed Nairobi Petition No 71 of 2013. The 2 nd Petitioner, the Centre for Enhancing Democracy and Good Governance, is a civil society organization working to enhance democracy and good governance. It filed Nakuru Petition No 16 of 2013.	30
4. The 1 st and 2 nd Respondents, the National Assembly and the Senate respectively, are State Organs established under Chapter 8 of the Constitution. They collectively form Parliament which is the legislative arm of the National Government. The 3 rd Respondent, the Attorney General is an office established under article 156 of the Constitution and is the principal legal advisor to the government.	35
5. The Constituencies Development Fund Board ("CDF Board"), the	40

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Assembly to provide reasonable opportunity for the members of the public to provide their views on the CDF (Amendment) Act, 2013 and failure by the National Assembly to facilitate public participation in the passage of CDF (Amendment) Act, 2013 is unconstitutional and therefore renders the CDF (Amendment) Act 2013 invalid.	1
f. That an order issue striking down the Act for being unconstitutional and so as to pave way for the enactment of a valid legislation to administer conditional grants allocated to counties by the National Government.	5
g. That the costs of, and incidental; to, this petition be awarded to the Petitioner against the Respondents.	10
h. That this Honourable Court be pleased to grant such further order or orders as may be just and appropriate.	15
Factual Background	
8. The factual background to this petition is uncontested. The Petitioners' case revolves around the interpretation of the CDF Act in light of the Constitution.	20
9. The CDF was originally established by the now repealed Constituencies Development Fund Act, 2003 ("CDF Act, 2003"). The Act set aside a specific portion of the annual government budget for financing of grassroots infrastructure within the Constituencies. The objective of the CDF Act as set out in the preamble was, "to provide for the establishment of the Constituencies Development Fund and for connected purposes". The intendment of the Act was to ensure that the government set aside at least 2.5% of its ordinary revenue and channel it to the CDF to be utilized at the constituency level. For purposes of administration of the CDF fund, a national CDF Board was established and at the constituency level CDF committees were established with the respective Member of Parliament being the Committee Patron.	25
10. The CDF Act, 2003 underwent major amendments in 2007. These changes included the formation of a fully-fledged state corporation known as the CDF Board to replace the National Committee. This Board was given the mandate to manage the Fund including the approval of projects.	30
11. On 22 nd June 2009, the Minister of State for Planning, National Development and Vision 2030 through, Gazette Notice No 6392,	35
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appointed the CDF Review Task Force to review all aspects of CDF with a view to amending the laws governing it and giving recommendations on how to improve its institutional framework. The Task Force handed over its report on 1st June 2010.	1
12. In January, 2013 Parliament passed the CDF Act, No 30 of 2013 which effectively repealed the CDF Act, 2003. On 2nd August 2013, the CDF (Amendment) Bill was published. The Amendment Bill was introduced for the first time in Parliament on 6th August 2013. It went through the processes of deliberation and was passed on the same day. The notification that the Amendment Bill had been published was made in the Kenya Gazette of 8th August 2013 and the Bill assented to by the President on 13th September 2013.	5 10
13. In the Amended Petition, the Petitioners are therefore impugning some of the provisions of the CDF Act, 2013 and the CDF (Amendment) Act, 2013 and the process leading to its enactment. For purposes of convenience, reference to the CDF Act in this judgment means the Act as amended by the impugned amendment.	15
The Petitioners' Case	20
14. The Petitioners' case is contained in the Amended Petition of 29th January 2013, the affidavits of Wanjiru Gikonyo sworn on 4th September 2013 and 4th February 2014 and the written submissions dated 22nd July 2013.	25
15. The Petitioners found their case on the principle of supremacy of the Constitution which means that this Court is obliged to invalidate an Act of Parliament, omission or any law that contravenes the Constitution. They cite several cases among them, <i>Jayne Mati & another v Attorney General and another</i> Nairobi Petition No 108 of 2010 [2011] eKLR, <i>Samuel Momanyi v Attorney General and another</i> Petition No 341 of 2011 [2012]eKLR, <i>Johnson Muthama v Minister for Justice and Constitutional Affairs and Another</i> Petition No 198 of 2011 [2012]eKLR and the South African Constitutional Court case of <i>Minister of Health and others v Treatment Action Campaign and others</i> (2002) 5 LRC 216.	30 35
16. The Petitioners submit that article 202 of the Constitution has established a detailed formula for the equitable sharing of revenue between the National Government and the County Government. That article 203 of the Constitution provides the criteria for the equitable share of the funds and that the County Governments'	40

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- share of the budget shall not be less than 15% of the total budget. 1
 The petitioners take issue with section 4(1)(a) of the CDF Act
 which establishes the CDF as a national fund consisting of moneys
 of an amount not less than 2.5% “of all the National Government 5
 ordinary revenue collected in every financial year”. This phrase, the
 Petitioners contend, bears the same meaning as the phrase ‘revenue
 raised nationally’ or ‘of all the revenue collected by the National
 Government’ as contained in articles 202(2) and 203(2) respectively,
 which means that the CDF is created prior to the allocation of the 10
 national revenues between the national and County Governments.
 It was therefore their case that the CDF Act has introduced new
 criteria for equitable sharing from that which is provided for under
 articles 201, 202 and 203 of the Constitution.
17. The Petitioners also challenge the manner in which the CDF 15
 is administered. It is their case that the CDF Act has created the
 fund to be administered by individual MPs rather than through
 the machinery of either the National Government or the County
 Government, thus in effect creating a third party which can share in
 the equitable allocation of the national revenue. It is their case that 20
 section 24 of the CDF Act is unconstitutional as it allocates certain
 administrative responsibilities to Members of National Assembly
 who perform certain implementation and administrative roles as
 well as an oversight role through the National Assembly Committee
 on CDF. This, they claim makes the MP both an executor of the 25
 CDF projects as well as a legislator. They submit that arming the
 Members of the National Assembly with the ability to play both
 of these roles violates the principle of separation of powers which
 is an integral part of the Constitution as stated by the Supreme
 Court in the decision in *In the Matter of the Interim Independent* 30
Electoral Commission Constitutional Application No 2 of 2011
 [2011] eKLR. The Petitioners further submit that the administration
 and implementation of projects for which the National Assembly
 has determined the allocation of funds is not a function assigned 35
 to the National Assembly and in any event such an arrangement
 undermines the principle of accountability under article 10 of the
 Constitution.
18. The Petitioners contend that sections 4(1)(c), (1)(d) and 4(2) of the 40
 CDF Act characterizes the money given to the CDF as a conditional
 grant, and even so the money is not remitted to the counties, instead,
 the National Assembly has set its own structures to receive the money

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- and implement projects. This is without the involvement of the
counties since there is no representation of County Governments
in the CDF Board and CDFC. The petitioners further contend
that it is irregular within the meaning of article 202(2) of the
Constitution to describe the CDF as a conditional grant because
counties are not even involved in its implementation and therefore
there is no need to impose conditions on the counties in relation
to CDF. They thus claim that the effect of sections 4(1)(c), (1)(d)
and 4 (2) as read together with section 3 of the CDF Act is to allow
the National Government to overstep its restricted constitutional
functional mandate by purporting to establish CDF as a conditional
grant to the counties yet the counties neither receive any monies nor
have any role in the selection and implementation of the projects
funded through CDF.
19. The Petitioners also take issue with the purpose of the CDF fund in
terms of the development projects to be financed through the CDF.
They contend that the CDF Act has not identified the specific types
of projects that should be undertaken but has instead used broad
terminology to describe the projects which are allowed. They point
to the language used in Schedule Four to the Constitution dealing
with division of functions between the two levels of government
stating that it is instructive that the functions assigned to Counties
are localized and whatever functions undertaken by the counties
are limited to the geographic scope of the county. The petitioners
maintain that that any projects undertaken through CDF are local
and are county projects and not a project of national function. The
sum of their argument is that the CDF Board, being a national
organ, has unconstitutionally encroached on the functions of the
County Government and as such, sections 3 and 22 of the CDF
Act are invalid.
20. The Petitioners further argue that the CDF Act is unconstitutional
as its design is such that it locates the CDF projects outside the
County Government planning processes. They contend that whereas
the National Government may provide money to execute such
projects, the only organ with the powers to plan and execute the
project is the County Government. That therefore, the National
Government had violated the Constitution by establishing a parallel
development scheme in the form of CDF which usurps the powers
of the County Governments.

21. Apart from the substantive provisions, the Petitioners have also challenged the constitutionality of the CDF Act on the ground that due process was not followed in its enactment. It is the petitioners' case that the National Assembly failed to facilitate meaningful participation in the enactment of the CDF (Amendment) Act rendering it unconstitutional. The petitioners rely on the South African Constitutional Court case of *Doctors for Life International v Speaker of the National Assembly and others* (CCT12/2005) 2006 ZACC 11 where the Court held that Parliament was under a public duty to genuinely consider public views in the enactment of legislation.

The 1st Respondent's Case

22. The 1st Respondent, the National Assembly, opposes the Petition through the affidavits sworn on 23rd July 2013 and 3rd April 2014 by Hon Moses K Lessonet, the Chairperson of the National Assembly Committee on the CDF established under section 28 of the CDF Act, 2013. It also filed written submissions dated 14th May 2014 and further submissions dated 25th August 2014.

23. The position of the National Assembly is that the CDF Act has set out a clear demarcation of roles for a Member of Parliament as an *ex-officio* member of the CDF Committee and also as a link between the Committee and the people in the constituency. Counsel for the 1st Respondent relied on the decision by the Philippines Supreme Court in *Greco Antonius Beba Belgica and 3 others v Honourable Executive Secretary Raquito n Ochoa JR Secretary of Budget and Management Florencio B Abad and another* (GR No 208566) where it was held that the involvement of individual legislators in post enactment measures such as project identification, release of funds and funds realignment of the Priority Development Assistance Fund are not within the functions of congressional oversight but belong to the execution of the budget. Counsel further submitted that the MPs assist the CDF Committees with views and opinions and that it is the Committee which is the body mandated to disburse the CDF and oversee the implementation of projects in the constituency.

24. On the question of separation of powers, the National Assembly submitted that a pure separation of powers does not exist in any country nor is it desirable. In that regard, counsel relied on the Indian Supreme Court case of *Minerva Hills Ltd & others v Union of India and others* [1980] 3 SCC 625 where the Court had held

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that there is no rigid separation of powers but there is a broad demarcation and at times, each of the arm of government may perform the functions of the other. Counsel also pointed to the situations in Tanzania and Germany to illustrate that separation of powers is not pure and that one arm of government normally interferes with the functions of another arm of government.	1 5
25. The 1st Respondent contends that there was public participation in the process of enactment of the CDF (Amendment) Bill, 2013. Counsel submitted that the National Assembly has a broad measure of discretion in how it achieves the object of public participation dependent on the circumstances of the case. The case of <i>Commission for the Implementation of the Constitution v The Parliament of Kenya & others</i> Petition No 454 of 2012 [2013] eKLR was cited in support of this proposition.	10 15
26. Furthermore, National Assembly argued that the impugned Amendment Bill did not require extensive public participation upon publication because the Bill was short and precise as it dealt with the deletion of section 4(2) of the CDF Act. That at the committee stage, an amendment was introduced to amend section 20 of the Act so as to provide for the manner of equitable sharing of the fund among constituencies and entrench the constitutional principles of equalization as set out under article 204 of the Constitution. The National Assembly submitted that the CDF Committee had received considerable public opinion and as such, there was in effect public participation in passing the legislation. It was urged that the CDF Committee had received overwhelming representations from the public that the fund was not additional revenue to the County Governments as the funds did not go to the county but to the constituencies.	20 25 30
The 2nd Respondent's Case	
27. The 2nd Respondent, the Senate, did not participate in these proceedings despite being served.	35
3rd Respondent's Case	
28. The 3rd Respondent, the Hon. Attorney General did not file any response to the Petition but filed written submissions on points of law.	40
29. The Attorney General submitted that section 3 of the CDF Act providing for the object of the Act resonates well with the	

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- Constitution especially with regard to development, equity and devolution of resources and as such, the CDF Act and the Fund cannot be declared unconstitutional. 1
30. The Attorney General submits that under article 1 (2) of the Constitution, the people's participation, which is a form of exercising their sovereign power may either be direct or through their democratically elected representatives, and that the enactment of the CDF Act was done through the Members of Parliament who are people's democratically elected representatives. In that regard counsel representing the Attorney General cited *Consumer Federation of Kenya (COFEK) v The Public Service Commission and the Attorney General* Petition No 263 of 2013 [2013] eKLR. 5 10
31. The Attorney General further submits that the various committees established under the CDF Act are meant to ensure competitiveness and a people centered approach in the appointment of the members. Counsel cited the provisions of section 24 of the Act, which provide for an elaborate procedure for the appointment of the CDF Committees through a transparent and people centered process in line with the constitutional principles of inclusiveness in decision making processes. 15 20
32. The Attorney General denies that there is a violation of the separation of powers principle as the administration of the Fund is left to the Board and the Constituency Committees, whose membership excludes Members of Parliament. The Attorney General submits that Members of Parliament can exercise oversight over the fund and make their contributions in terms of the development of their constituencies. 25 30
33. Regarding the division of powers and functions under the Constitution, the Attorney General submits that the constituency is a unit of representation for the purpose of elections of the Members of the National Assembly but nonetheless, it is taken as a sub-unit of the county and as such, for administration and development purposes, it is under the County and therefore under the administration of the County. In this respect, counsel for the Attorney General submitted that while the Constitution provides for the distribution of functions between the national and County Government, such function must be performed in a manner the respects the functional and institutional integrity that respects each level of government as provided in article 189(1)(a) of the 35 40

- Constitution. 1
34. The Attorney General contends that the principles of public finance management under article 201 of the Constitution such as accountability, transparency and public participation are inbuilt in the CDF Act. That the Act has provided for clear accountability and transparent measures on the management of the CDF Fund. 5
35. The Attorney General, in the written submissions, submitted that if the constituency is a unit of the sub-county then it is squarely under the administration of the County and in that respect, administrative roles that are imposed on National Government officials are clearly unconstitutional. It is the position of the Attorney General that the Act is not unconstitutional though the management and administration of the CDF should be under the direction and control of the County Government. 10
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- The 4th Respondent's Case
36. The 4th Respondent, the CDF Board, in response to the petition filed affidavits sworn by Yusuf Mbuno, its Chief Executive Officer on 24th May 2013 and 5th May 2014 and also an affidavit sworn by Clarah Kimeli, its Legal Officer on 13th February 2013. 20
37. Mr Mbuno deponed that the CDF Act, 2013 was enacted to repeal and replace the CDF Act, 2003 in order to align it with the devolved government structure. He denied that the Act in any way interferes with the functions of County Governments. 25
38. The CDF Board submits that under section 36 of the Act, the function of the County Committee is to coordinate implementation of projects funded under the Act and ensure there is no duplicity in implementation of projects funded within the County. The CDF Board distanced the National Assembly members from project implementation financed by the CDF stating that this is done by a project management committee established under section 31 of the Act and not Members of the National Assembly as alleged by the petitioners. Further, that it is the CDF Board that administered the Fund and not Members of Parliament as alleged by the petitioners. The Board points out that members of the CDF Committee are elected by the constituents of the particular constituency. That the constituents nominate five individuals from each ward to be forwarded to the Officer of the Board in the Constituency, and then the National Assembly member of the area in consultation 30
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- with the officer of the Board and sub-county administrator appoints eight members from the nominated list. The CDF Board notes that membership of the County Project Committee is representative and includes elected leaders at the county such as the governors, senators in addition to the National Assembly member. The CDF Board contends that the function of the National Assembly Select Committee is that of oversight like any other committee of the National Assembly and as such, the role of the Member of the National Assembly must be viewed in the context of the role of the National Assembly envisaged under article 95 of the Constitution. 1
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39. As regards allocation of revenue to the constituencies, the position of the CDF Board is that funds are allocated to the Fund based on the formula established by the Commission on Revenue Allocation and the National Assembly and that the Board does not have any role to play in the allocation process. 15
40. It is also the Board's position that the CDF Act is complimentary to any development and it should therefore be interpreted in the context of section 47 of the Act. That section 4(2) of the CDF Act does not violate article 202(1) of the Constitution because the characterization of the moneys from CDF fund as revenue to County Governments under article 202(1) is meant to make it clear funds are allocated from the National Government share of revenue after taking into consideration the allocation formula set out under article 203 of the Constitution. In any event, it was his assertion that the CDF Act does not violate the principle on division of functions of the national and County Governments as provided for under the Constitution but has instead created structures to align itself to the devolved governing structures and organs under the Constitution. The Board also avers that it has used prudent financial management as provided for under article 201 of the Constitution. 20
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41. As regards public participation, the Board submits that the CDF Act, 2013 was enacted as a result of the Taskforce on CDF which recommended amendments to CDF Act, 2003 after having engaged various stakeholders, through public hearings and other measures to collect public views. That following the promulgation of the Constitution, a panel of six members from the previous Task Force and three members of CDF Board was constituted to carry out a review of the CDF Act, 2003 and ensure it was in line with the Constitution. Thereafter, a Special Committee was established to 35
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- revise the recommendations made by the Panel and to align them with the Constitution and other legislation on devolved government. The Board maintains that throughout this process, the Committee engaged various stakeholders including the Petitioners in that task. It is the Board's contention that there was public participation that led to the enactment of the Act.
42. The Board further submits that the CDF (Amendment) Bill, 2013 was enacted to amend the primary Act so as to correct an error and align it with the spirit of the Act and as such did not require public participation. That in any event, it would be cumbersome, difficult and impossible that every time Parliament intended to amend legislation to correct errors there would be public participation. Counsel for the Board cited the case of *Moses Munyendo & 908 others v The Attorney General and Minister for Agriculture* Petition No 16 of 2013 [2013]eKLR, where the court held that there is presumption of public participation where legislation has been enacted in accordance with National Assembly Standing Orders. It was therefore the Board's position that the Bill was not hurriedly passed and was indeed published in the Kenya Gazette of 8th August 2014.
43. The CDF Board refuted the claim that section 4(2) of the Act violates the Constitution because the monies are allocated to constituencies from the National Government's share of revenue as a charge to the consolidated fund. According to the CDF Board, section 4(2) was amended to appreciate that CDF is not concerned with County Governments and that money allocated under CDF Act, 2013 is not additional revenue to County Governments but funds allocated to constituencies. The Board therefore submits that it was not necessary to have the CDF (Amendment) Bill, 2013 forwarded to the Senate for debate and passage and consequently the Bill and the Act does not contravene articles 110(3) and 114(2) of the Constitution as claimed. The Board also discounted the argument that the CDF does interfere with devolved governance and division of functions between the national and County Government urging that the amendment of section 4(2) brought the Act into conformity with the spirit of the Act as anchored under section 4(1)(c) of the Act.
44. The Board submits that the CDF (Amendment) Bill does not affect the functions and powers of the County Governments as stipulated

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- under the provisions of article 110 of the Constitution. Citing *Re Matter of the Interim Independent Electoral Commission (supra)*, the Board contended that the petitioners had not demonstrated how the CDF Act or CDF (Amendment) Act bears significant impact on the conduct of the County Government. 1
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45. According to the Board, the CDF Committees and the Board are responsible for the monitoring of the implementation of projects in terms of sections 24(7), 31(3) and 18 of the CDF Act and that allocation of funds to the project is the responsibility of the Committee and that therefore, there is no duplication of duties in the implementation of the CDF projects and each of the parties plays a distinct role. Further that the National Assembly Select Committee on CDF plays an oversight role as provided for under section 5 of the Act. 10
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46. As regards the petitioners' contention that the CDF Act allowed the National Government to encroach on the functions of the County Governments, the Board responds that article 95(1) of the Constitution sets out the key function of the National Assembly as a representative of the people at the constituency level and that the language of article 95 was wide and encompassing in so far as constituencies are concerned. That the parliamentary committee's role under section 10(1) of the Act should be viewed in the context of the National Assembly's primary function as representatives of the people and its oversight on national revenue. Additionally, that Parliament has powers to appropriate funds as anchored under the provisions of article 95(4)(b) and 206 of the Constitution and it has in fact set up other funds such as the Uwezo Fund, Youth Enterprise Fund without enacting an Act of Parliament. The Board also submits that the CDF finances activities not supported by County Governments such as education through bursaries to needy students and security. 20
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- The Interested Party's Case 35
47. The case for the Interested Party, the Commission on the Implementation of the Constitution (hereinafter "CIC") is as contained in the written submissions dated 27th May 2013.
48. CIC submits that despite the intended objective to align the CDF Act with the Constitution, the Act as enacted was fundamentally flawed and was unconstitutional in many respects. First, the Act violated the provisions of section 14 of the Sixth Schedule as read 40

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- financed through the Fund. That under section 37, the membership to such committees includes officers who are not part of County Governments. As such, CIC submits that the role of the county project committee is in conflict with the constitutional and statutory roles of County Governments. 1
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52. CIC also submits that the involvement of the members of the National Assembly in the management of the CDF is a violation of the Constitution. That by giving them a role in the implementation of the CDF directly conflicts with their oversight role as provided for under article 95(4) of the Constitution. 10
53. Lastly, CIC submits that the Public Finance Management Act, 2012 has created elaborate mechanisms for planning and funding of the county development projects as provided for under section 126 of the Act. That the planning process provided for under the CDF Act, 2013 is diametrically opposed to that process and would in essence lead to duplication of projects and consequent misuse and misapplication of public resources. 15
- Determination 20
54. Looking at the parties' pleadings and submissions, the core issue presented to us for determination is whether the CDF Act as amended is constitutional. We have identified four key issues for our consideration: 25
- a. Whether the process leading to the enactment of the CDF Act is Constitutional; 25
 - b. Whether the CDF Act offends the principles of public finance and division of revenue provided under the Constitution; 30
 - c. Whether the CDF Act violates the division of functions between the National and County Government; and
 - d. Whether the CDF Act offends the principle of separation of powers.
55. The parties do not dispute this Court's jurisdiction to entertain this petition. article 258 of the Constitution grants every person the right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention and such is the dispute before us. This task demands that we deal with the issues involving the interpretation of the various provisions of the Constitution as well as the impugned statute. In that regard, it is important to set out the relevant principles that will guide us in 35
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- the task ahead. 1
56. First, this Court is enjoined under article 259 of the Constitution to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, this Court is obliged under article 159(2)(e) of the Constitution to protect and promote the purpose and principles of the Constitution. 5
57. Second, there is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on any person who alleges otherwise (see *Ndyanabo v Attorney General of Tanzania* [2001] EA 495). We therefore reiterate that this Court will start by assuming that the CDF Act 2013 is constitutional and valid unless the contrary is established by the petitioners. 10 15
58. Third, in determining whether a Statute is constitutional, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see *Murang'a Bar Operators and another v Minister of State for Provincial Administration and Internal Security and others* Nairobi Petition No 3 of 2011 [2011] eKLR, *Samuel Momanyi v Attorney General and another (supra)*). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. The Canadian Supreme Court in the *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 enunciated this principle as follows; 20 25
- Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity. 30 35
59. Fourth, the Constitution should be given a purposive, liberal interpretation. The Supreme Court in *Re The Matter of the Interim Independent Electoral Commission Constitutional Application (supra)* at para 51 adopted the words of Mohamed AJ in the Namibian 40

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- case of *State v Acheson* 1991(20 SA 805, 813) where he stated that; 1
 The Constitution of a nation is not simply a statute which
 mechanically defines the structures of government and the
 relationship government and the governed. It is a mirror 5
 reflecting the “national soul” the identification of ideas and
 aspirations of a nation, the articulation of the values
 bonding its people and disciplining its government. The spirit
 and tenor of the Constitution must, therefore preside and
 permeate the process of judicial interpretation and judicial 10
 discretion.
60. Lastly and fundamentally, it is the principle that the provisions of
 the Constitution must be read as an integrated whole, without any
 one particular provision destroying the other but each sustaining
 the other (see *Tinyefuza v Attorney General of Uganda* Constitutional 15
 Petition No 1 of 1997 (1997 UGCC 3)).
61. We are duly guided by the principles we have outlined and we
 accept that while interpreting the impugned legislation alongside
 the Constitution, we must bear in mind our peculiar circumstances. 20
 Ours must be a liberal approach that promotes the rule of law and
 has jurisprudential value that must take into account the spirit of
 the Constitution. As this is a matter that concerns devolution, we
 recall what the Supreme Court stated in *The Speaker of the Senate &
 another v Attorney-General & another & 3 others* Advisory Reference 25
 No 2 of 2013 [2013] eKLR;
- [136] The Kenyan people, by the Constitution of Kenya,
 2010 chose to de-concentrate State power, rights, duties,
 competences – shifting substantial aspects to the County
 Government, to be exercised in the county units, for 30
 better and more equitable delivery of the goods of the
 political order. The dominant perception at the time of
 constitution-making was that such a deconcentration of
 powers would not only give greater access to the social
 goods previously regulated centrally, but would also 35
 open up the scope for political self-fulfilment, through
 an enlarged scheme of actual participation in governance
 mechanisms by the people – thus giving more fulfillment
 to the concept of democracy. 40
- Whether due process adhered to in the enactment of the CDF Act
 62. Where both the process and the substance of legislation are

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challenged, it is prudent to begin by first examining the impugned process before proceeding to the substance. This is because if the process leading to the enactment of an Act is constitutionally flawed, then the resulting legislation is also flawed and that would be the end of the matter.	1 5
63. Article 93 establishes Parliament comprising the National Assembly and the Senate. Each of these Houses is enjoined to, “perform their respective functions in accordance with [the] Constitution” and where the Constitution prescribes a procedure that ought to be followed in enacting a law, that procedure must be followed. Thus, while Parliament may legislate on any matter concerning the Republic (article 186(4)), the legislation must conform to the Constitution both procedurally and in its substance. As was observed in the <i>Doctors for Life Case (supra)</i>;	10 15
[208] It is trite that legislation must conform to the Constitution in terms of both its content and the manner in which it was adopted. Failure to comply with manner and form requirements in enacting legislation renders the legislation invalid. And courts have the power to declare such legislation invalid ... this Court not only has a right but also has a duty to ensure that the law-making process prescribed by the Constitution is observed. And if the conditions for law-making processes have not been complied with, it has the duty to say so and declare the resulting statute invalid.	20 25
64. The Petitioners challenge the constitutionality of the CDF (Amendment) Act on the basis that the Senate was not involved in its passing yet it was a Bill concerning the County Government. In response to that submission, the National Assembly took the position that the CDF (Amendment) Act was not considered by the Senate because it was resolved by the Speakers of the two Houses of Parliament that the Act did not concern counties. It was contended that the CDF (Amendment) Bill concerned money and not counties. Article 109(3) and (4) of the Constitution provides:	30 35
(3) A Bill not concerning County Government is considered only in the National Assembly, and passed in accordance with Article 122 and the Standing Orders of the Assembly.	40
(4) A Bill concerning County Government may originate in the National Assembly or the Senate, and is passed in accordance with articles 110 to 113, articles 122 and 123	

and the Standing Orders of the Houses.	1
Under article 110(1) of the Constitution, 'a Bill concerning County Government' means;	
a. A Bill containing provisions affecting the functions and powers of the County Governments set out in the Fourth Schedule	5
b. A Bill relating to the election of members of a county assembly or a county executive; and	
c. A Bill referred to in Chapter Twelve affecting the finances of County Governments.	10
Article 110(3) of the Constitution then provides for the procedure for enacting a legislation concerning counties in the following terms;	
Before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a Special or an ordinary Bill.	15
As to whether a Bill is one that concerns county or not, the Supreme Court in <i>The Speaker of the Senate Case (supra)</i> at para 102 cited the Final Report of the <i>Task Force on Devolved Government</i> Vol 1: A Report on the Implementation of Devolved Government in Kenya [page 18] which stated as follows;	20
The extent of the legislative role of the Senate can only be fully appreciated if the meaning of the phrase 'concerning counties' is examined. Article 110 of the Constitution defines bills concerning counties as being bills which contain provisions that affect the functions and powers of the County Governments as set out in the Fourth Schedule; bills which relate to the election of members of the county assembly or county executive; and bills referred to in Chapter Twelve as affecting finances of the County Governments. This is a very broad definition which creates room for the Senate to participate in the passing of bills in the exclusive functional areas of the National Government, for as long as it can be shown that such bills have provisions affecting the functional areas of the County Governments.	25
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65. In this matter we recall that the respondents submitted that the Speakers of the two houses had resolved that the CDF (Amendment) Bill was not a Bill concerning counties and as such, was not supposed	40

to be considered by the Senate. The Supreme Court in *The Speaker of the Senate Case (supra)* stated as follows in respect to classification of Bills by the Speakers of the Houses;

Where the Speakers determine that a Bill is not one “concerning County Government”, such a Bill is then rightly considered and passed exclusively by the National Assembly, and then transmitted to the President for assent. The emerging, broader principle is that both Chambers have been entrusted with the people’s public task, and the Senate, even when it has not deliberated upon a Bill at all the relevant stages, has spoken through its Speaker at the beginning, and recorded its perception that a particular Bill rightly falls in one category, rather than the other. In such a case, the Senate’s initial filtering role, in our opinion, falls well within the design and purpose of the Constitution, and expresses the sovereign intent of the people, this cannot be taken away by either Chamber or either Speaker thereof.

66. Accordingly it is clear that if the Speaker of the Senate signifies concurrence with a Bill that it falls within one category or another, it may well be said that would be the end of the matter. However, the issue whether the matter is one for County Government is of constitutional importance and the decision of the respective speakers, while respected, cannot be conclusive and binding on the court whose jurisdiction it is to interpret the Constitution and as the final authority on what the Constitution means. Participation of the Senate in the legislative process is not just a matter of procedure, it is significant to the role of the Senate in our constitutional scheme as the Senate’s legislative role is limited to matters concerning County Governments. Through its participation in the legislative process, the Senate is seized of the opportunity to discharge its primary mandate which is, to protect the interests of the counties and County Governments as mandated under article 96(1) of the Constitution. It is a means of ensuring that the county voice is heard and considered at the national forum and the interests of counties and their governments secured. This way, the sovereign power of the people is duly exercised through their democratically elected representatives. Therefore, when the speakers of both chambers classify bills under article 110, they are essentially resolving on the question as to whether and to what extent provisions of a particular Bill affect the interests of County Governments, and consequently

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- whether county input ought to be invited. 1
67. Under article 165(3)(d) of the Constitution, the High Court has jurisdiction to hear any question regarding the interpretation of the Constitution. The Court must therefore interrogate any legislation and decide whether, on the principle laid out in *The Speaker of the Senate* Case (*supra*), it is a bill that falls within the provisions of article 110 of the Constitution. 5
68. On the issue of consultation between the Speakers of both Houses of Parliament, Hon Moses Lessonet deponed at paragraph 4 and 5 of his affidavit as follows; 10
- [4] That I was the sponsor of the CDF (Amendment) Bill 2013 in the National Assembly. I moved the Bill following receipt by the Committee on the CDF of various representations from members of the public and various bodies, including the Petitioners herein in their submissions to court, that the CDF is not additional revenue to County Governments'. My Committee agreed with this position particularly taking into account the fact that the funds are not disbursed to County Governments' but directly to the constituencies under the mechanisms set out in the Act. 15 20
- [5] That on the issue of whether the Bill should have been considered by the Senate, that is question for determination by the Speakers of the two Houses of Parliament as provided for under article 110(3) of the Constitution. I verily believe that this issue was resolved by the two Speakers of Parliament and it was resolved that the Bill was not a Bill concerning counties and therefore did not require to be considered by the Senate. 25 30
69. In our view and we so hold, the fact that the legislation was passed without involving the Senate and by concurrence of the Speakers of both House of Parliament, is neither conclusive nor decisive as to whether the legislation affects County Government. In other words, while concurrence of the Speakers is significant in terms of satisfaction of the requirements of article 110(3) of the Constitution, it does not by itself oust the power of this Court vested under article 165(3)(d) where a question is raised regarding the true nature of legislation in respect to article 110(1). The court must interrogate the legislation as a whole and determine whether 35 40

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- in fact the legislation meets the constitutional test of a matter,
“concerning County Government.” We shall revert to this issue
when we review the substance of the CDF Act and the subsequent
amendment to determine whether in fact the legislation is a matter
concerning County Government.
70. The next procedural challenge was raised by the CIC which
submitted that the CDF (Amendment) *Act* violated the provisions
of section 14 of the Sixth Schedule as read together with section
2(3)(b) of that Schedule which requires that before any laws
relating to Chapters Eleven and Twelve are enacted, the CIC and
the Commission on Revenue Allocation (CRA) must be consulted
and given at least 30 days to consider the proposed legislation. The
two chapters deal with devolved government and public finance
respectively. Section 14 of the Sixth Schedule to the Constitution
provides as follows;
- 14(1) The laws contemplated in section 2(3)(b) and section
15 may be enacted only after the Commission on the
Implementation of the Constitution and, if it has been
established, the Commission on Revenue Allocation,
have been consulted and any recommendations of the
Commissions have been considered by Parliament.
- (2) The Commissions shall be given at least thirty days to
consider legislation under subsection (1).
- (3) Subsections (1) and (2) lapse when the Commission on
the Implementation of the Constitution is dissolved.
71. The laws contemplated under section 2(3)(b) of the Sixth Schedule
to the Constitution are the laws relating to devolved government
required to be enacted by the Sixth Schedule and Chapters Eleven
and Twelve of the Constitution within the period stipulated in the
Fifth Schedule. In our view the CDF (Amendment) Bill was not one
of the laws contemplated under section 14 of the Sixth Schedule as
it was an amendment to existing legislation.
72. The third and last limb of argument challenges the process of the
enactment of the CDF (Amendment) Act on the ground of lack of
public participation in the enactment process.
73. The Petitioners contend that the CDF (Amendment) Act is
unconstitutional because the National Assembly failed to facilitate
meaningful participation and genuinely consider public views in its
enactment. In response to that submission, the National Assembly

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- submitted that it has a broad measure of discretion on how it achieves the object of public participation and that the same varies from case to case. That the Amendment to CDF did not require extensive public participation because the Bill was short and precise dealing with deletion of only section 4(2) of the CDF Act and that the CDF Committee had received considerable public opinion and as such, there was in effect public participation in passing the legislation. On their part, the CDF Board submitted that the CDF (Amendment) Act did not require public participation as it was enacted primarily to amend the CDF Act in order to align it with the Constitution.
74. Public participation is anchored in article 10(2) of the Constitution which establishes the founding values of the State which include, among others, transparency, accountability and participation of the people. The Constitution contemplates a participatory democracy that is accountable and transparent and makes provisions for public involvement in legislative affairs hence article 118 of the Constitution provides thus;
- 118(1) Parliament shall-
- a. Conduct its business in an open manner and its sittings and those of its committees shall be open to the public, and
 - b. Facilitate public participation and involvement in the legislative and other business of Parliament and its Committees.
75. As to the nature and form of public participation, the South African Constitutional Court in *Doctors for Life International Case (supra)* held that;
- [105] The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.

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- (See also *Kenya Small Scale Farmers and others v Republic and others* Nairobi Petition No 1174 of 2007 [2013] eKLR) 1
76. How public participation is given effect will vary from case to case but it must be clear, upon examination of the legislative process, that a reasonable level of participation has been afforded to the public. In *Minister of Health and another NO v New Clicks South Africa (Pty) Ltd and others* 2006 (2) SA 311 (CC) at para. 630, Sachs J., noted that; 5
- The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. 10 15
77. We are in agreement with the exposition of the law as stated above. Applying the same principles in the instant case we find that the CDF (Amendment) Bill is dated 2nd August 2013. It was then first introduced in the National Assembly on 6th August 2013. It was debated on the same day and passed. It was then published in the Kenya Gazette Vol CXV No 114 dated 8th August 2013 and assented to by the President on 13th September 2013. *Prima facie*, the short time within which the legislation was passed would seem, did not afford an opportunity for public participation. 20 25
78. In response to the argument that there was no public participation, Hon Lessonet depones as follows; 30
- [6] In this regard the CDF (Amendment) Bill 2013, did not require extensive public participation upon publication for the following reasons:
- a. The Bill was short and precise, dealing with deletion of only section 4(2) of the CDF Act, being Section 4(2) thereof. A minor committee stage amendment was introduced to amend Section 20 of the Act to provide for the manner of equitable sharing of the fund among constituencies and to entrench the constitutional principle of equalization as set out at article 204 of the Constitution. This is also a matter on which the Committee on the CDF has received 35 40

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- considerable public fund. 1
- b. The committee on the CDF had received overwhelming representations from the public that the Fund is not additional revenue to County Governments' as the funds did not go to County Governments' but to the constituencies. Funds allocated to County Governments from the national revenue is dealt with by the Division of Revenue Bill and Revenue Allocation Bill as set out at articles 215, 216, 217, 218 and 219 of the Constitution of Kenya 2010. The Repealed section 4(2) of the CDF Act, 2013, was therefore misplaced in law and required to be deleted. This is clear even from the report of the CDF Review Task Force on the CDF Act made on 1st July 2010. 5 10
- c. The object of public participation is to enable the public make known their views to Parliament so as to guide and inform deliberations and legislation. The views of the public were already known with respect to the repealed Section 4(2) and therefore there was no need for further public participation. Indeed, it is instructive that the Petitioners herein have not given any contrary view to section 4(2) of the principle Act. 15 20
- d. A house of Parliament is solely responsible for making its own procedure for enactment of laws as set out at article 124 of the Constitution. There was nothing unconstitutional for the National Assembly to shorten time for consideration and passing of the CDF (Amendment) Bill 2013. 25 30
77. The issue as to whether there was public participation is not merely a matter of form but one of substance. The court must look at the process to determine whether it meets constitutional muster. In *Law Society of Kenya v Attorney General* Nairobi Petition No 318 of 2012 [2013] eKLR the Court observed that, 35
- [51] In order to determine whether there has been public participation, the court is required to interrogate the entire process leading to the enactment of the legislation; from the formulation of the legislation to the process of enactment of the statute. 40
78. There is no dispute that the process of amendment of the CDF Act commenced through a task force that engaged stakeholders. After

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- the Task Force presented its report, the CDF Board undertook a further review of the Act where stakeholders were engaged. There are instances that before legislation is proposed, it is preceded by intensive public consultation. These consultation and other pre-legislation activities ought to be taken into account in assessing whether there has been a modicum of public participation. We therefore find that there was public participation in formulation of the law. In the actual Committee Stage, the impugned amendment was moved and accepted. In light of the process of formulation of the CDF legislation, we do not accept that there was no public participation to the extent that the CDF Act was rendered invalid. 1 5 10
79. We are aware that during the legislative process, amendments to the Bill may be moved during the Committee Stage and to hold that every amendment moved must undergo the process of public participation would negate and undermine the legislative process. In this case, we are satisfied that the amendment moved was in substance, within the parameters of what had been subjected to public participation during the review process. We find that the public was involved in the process of enactment of the CDF Act through the Task Force and review panel earlier set up by CDF Board. The amendment was within the parameters of what was in the public domain and in the circumstances we find and hold that the amendment bill did not violate the principle of public participation. 15 20 25
- Whether section 4 of the CDF (Amendment) Act offends the principles of public finance and division of revenue
80. The principal question here concerns the nature of the CDF and whether it upsets the formula for equitable sharing of national revenue provided under the Constitution. Is the CDF a conditional grant to the counties? 30
81. That County Governments, just like the National Government, require money to perform the functions allocated to them under the Constitution is unassailable. It is no wonder then that there are several provisions in the Constitution governing how revenue is to be shared between the two levels of government. Indeed, a key principle of devolved government is that County Governments must have reliable sources of revenue to enable them to govern and deliver services effectively in terms of article 175(b) of the Constitution. Furthermore, an important principle of public finance as enshrined under article 201(b)(ii) is that revenue raised nationally is to be 35 40

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- shared equitably among the national and County Governments. Similar provisions are echoed by article 202(1) which lays emphasis on equitable sharing of national revenue. County Governments' share of revenue must be at least fifteen per cent of 'all revenue collected by the National Government' in accordance with article 203(2) of the Constitution. The import of this provision is that any amount that reduces the amount of shareable revenue or revenue collected by the National Government effectively affects the amount available to the counties hence an infringement on the requirements of this provision. We must therefore agree with the petitioners that the Constitution does not envisage any other organ, body or fund to have a share of all the revenue collected by the National Government before it is shared as between the two levels of government established under article 1(4) of the Constitution.
82. There are two levels of revenue sharing under the Constitution, vertical sharing between the National Government on the one part and the 47 County Governments collectively on the other. This is done annually through the Division of Revenue Bill. There is also the horizontal sharing of the county's shareable revenue among the 47 County Governments under article 217 of the Constitution in accordance with the criteria set in article 203 of the Constitution. This sharing amongst the 47 County Governments is done in form of an annual County Allocation of Revenue Act. A County Government's share of revenue must then be promptly transferred to the county 'without undue delay and without deduction' in terms of article 219 of the Constitution. The Constitution also provides for the Equalisation Fund established under article 204 to which is paid one half per cent of all revenue collected by the National Government. This amount may be used by the government directly or indirectly through conditional grants to County Governments in areas where there are marginalized communities.
83. The Constitution permits National Government to allocate monies in form of grants whether conditional or unconditional to the County Government. The germane issue here is whether the CDF qualifies as a National Government grant to County Governments within the meaning of article 202(2) and whether it disturbs the equitable sharing of revenue between the two levels of government as envisaged under the Constitution.
84. According to the petitioners, national revenue is only shareable

between the national and County Governments and that the CDF Act ushers in a third party, the CDF, to the table of revenue sharing unknown under the Constitution. The petitioners condemn the wording of section 4 of the CDF Act as it demands that the CDF receives money prior to division of the national revenue between the two levels of government. On their part the respondents contend that the CDF Act has not introduced new criteria for sharing of national revenue.

85. Section 4 of the CDF Act provides thus;

4(1) There is established a fund to be known as the Constituencies Development Fund which shall—

(a) be a national fund consisting of moneys of an amount of not less than 2.5% (two and half per centum) of all the National Government ordinary revenue collected in every financial year;

(b) comprise of any moneys accruing to or received by the Board from any other source;

(c) disbursed by the National Government through the Board to constituencies as a grant to be channelled to constituencies in the manner provided for by this Act;

(d) be administered by the Board.

In order to determine the constitutionality or otherwise of section 4, the same must be examined through the prism of the principles of public finance as set out under article 201 of the Constitution as follows;

201. The following principles shall guide all aspects of public finance in the Republic—

(a) there shall be openness and accountability, including public participation in financial matters;

(b) the public finance system shall promote an equitable society, and in particular—

(i) the burden of taxation shall be shared fairly;

(ii) revenue raised nationally shall be shared equitably among National and County Governments; and

(iii) expenditure shall promote the equitable development of the Country, including by making special provision for marginalised groups and areas;

(c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;	1
(d) public money shall be used in a prudent and responsible way; and	5
(e) financial management shall be responsible, and fiscal reporting shall be clear.	
Article 202 of the Constitution has then established for the equitable sharing of national revenue as follows;	10
202(1) Revenue raised nationally shall be shared equitable among the national and County Governments.	
(2) County Governments may be given additional allocations from the National Government's share of the revenue, either conditionally or unconditionally.	15
86. As can be seen from the provisions we have outlined above, the equitable sharing of revenue among the national and County Governments is one of the principles established under article 201 as part of the principles and framework governing public finance in Kenya. This objective is achieved in accordance with the criteria set out in article 203(1) as follows;	20
203(1) The following criteria shall be taken into account in determining the equitable shares provided for under Article 202 and in all national legislation concerning County Government enacted in terms of this Chapter—	25
(a) the national interest;	
(b) any provision that must be made in respect of the public debt and other national obligations;	30
(c) the needs of the National Government, determined by objective criteria;	
(d) the need to ensure that County Governments are able to perform the functions allocated to them;	
(e) the fiscal capacity and efficiency of County Governments;	35
(f) developmental and other needs of counties;	
(g) economic disparities within and among counties and the need to remedy them;	
(h) the need for affirmative action in respect of disadvantaged areas and groups;	40
(i) the need for economic optimisation of each	

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county and to provide incentives for each county to optimise its capacity to raise revenue;	1
(j) the desirability of stable and predictable allocations of revenue; and	
(k) the need for flexibility in responding to emergencies and other temporary needs, based on similar objective criteria.	5
(2) For every financial year, the equitable share of the revenue raised nationally that is allocated to County Governments shall be not less than fifteen per cent of all revenue collected by the National Government.	10
(3) The amount referred to in clause (2) shall be calculated on the basis of the most recent audited accounts of revenue received, as approved by the National Assembly.	15
87. We have already reproduced the provisions of section 4(1)(a) of the CDF Act which provides that there shall, “be a national fund consisting of moneys of an amount of not less than 2.5% (two and half per centum) of all the National Government ordinary revenue collected in every financial year” [Emphasis ours]. A plain and literal reading of this section establishes that the monies forming part the CDF shall be 2.5% of all the National Government ordinary revenue collected in every financial year. The issue therefore is what happens after the sharing of national revenue between the two levels of government. From a plain reading of articles 202 and 206 of the Constitution, it is clear that the National Government has various ways in which it can deal with the revenue allocated to it. The starting point would be the provisions of article 202(2) of the Constitution which empowers the National Government to give additional revenue out of its share either conditionally or unconditionally to the County Government.
88. National Government money shall be dealt with in accordance with the provisions of article 206 of the Constitution as follows;
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| 206(1) There is established the Consolidated Fund into which shall be paid all money raised or received by or on behalf of the National Government, except money that— | 35 |
| (a) is reasonably excluded from the Fund by an Act of Parliament and payable into another public fund established for a specific purpose; or | 40 |
| (b) may, under an Act of Parliament, be retained by | |

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- the State organ that received it for the purpose of defraying the expenses of the State organ. 1
89. We have combed through the provisions of Chapter Twelve of the Constitution which deals with public finance and we must agree with the petitioners that nowhere is it contemplated that a constituency shall be one of the beneficiaries of the national revenue before it is divided between the national and County Government. Article 206(1)(a) and (b) of the Constitution excludes from the Consolidated Fund such monies excluded by an Act of Parliament and is payable into another fund established for a specific purpose. Counsel for the National Assembly emphasized the fact that the CDF was such a fund established by an Act of Parliament. 5 10
90. We wish to emphasize once again that section 4(1)(a) of the CDF Act provides that the CDF shall be a national fund consisting of moneys of an amount of not less than 2.5% (two and half per centum) of all the National Government ordinary revenue collected in every financial year. It is therefore clear to us that the money paid into the CDF is 2.5% of all the National Government ordinary revenue. 15 20
91. We recall that our system of governance like many other decentralised systems is such that it is the National Government that primarily finances the devolved units. Although counties have limited revenue raising powers provided under article 209(3) of the Constitution, the primary source of funding remains the equitable share emanating from revenue collected by the National Government. The money raised or received by or on behalf of a County Government is paid into a Revenue Fund for the respective County Government established under article 207 of the Constitution. 25 30
92. Article 218(1)(a) of the Constitution which provides for the Annual Division and Allocation of Revenue Bills talks of a Division of Revenue Bill which is to divide, 'revenue raised by the National Government' between the national and county levels of government. It is thus clear that it is the National Government's revenue that is to be shared between the national and County Governments. We therefore find, for purposes of equitable sharing of revenue that the phrase 'revenue raised nationally' as used in articles 201(b) (ii), 202(1) and 203(2) to be equivalent to 'revenue raised by the National Government' within the wording of article 218 of the 35 40

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- Constitution. The implication of the wording of the provisions we have cited is that the revenue shared between the national and County Government and amongst the counties is not received from anywhere else but from the revenue collected by the National Government. In other words all revenue collected by the National Government must be pooled in a common pot before it is shared by the level of government. It is in this light the wording of the impugned section ought to be scrutinised. 1 5
93. We are in agreement with the CIC that the use of the phrase, ‘all the National Government ordinary revenue’ in the CDF Act introduces ambiguity. However, as case law has established, not all ambiguity necessarily renders a statute unconstitutional, as such ambiguities can be solved by applying rules of interpretation. In *Ruturi & Kenya Bankers Association v Minister for Finance* [2002] 1 KLR 84 [2001] EA 253 it was held that a statute or enactment worded in a language which is difficult to follow, ambiguous, contradictory or impossible to apply, is not necessarily rendered unconstitutional since it only gives rise to questions of interpretation by the Court. 10 15
94. We are aware that the amendment to section 4(2) of the Act which made the CDF a charge on the Consolidated Fund to which is paid, ‘.. not less than 2.5% of all the National Government ordinary revenue collected.’ Again, it is not clear whether the money is after deduction of the equitable share or not. The principle that must come out clearly is that the ‘revenue raised nationally’ within the wording of article 202 is the revenue raised by the National Government and that the same is only shareable between the two levels of government recognised under the Constitution which are the National and County Governments. The question as to whether the CDF violates the formula of equitable sharing can only be properly assessed after establishing whether or not CDF is a conditional grant as envisaged under Clause (2) of article 202. 20 25 30
95. It was argued on behalf of the petitioners that since the National Government does not remit CDF moneys to County Governments and that the implementing agencies are all creatures of National Government, the CDF is not a grant contemplated under article 202(2) of Constitution and it would be irregular to describe it as such as the Counties are not even involved in its implementation. In this respect we are in agreement with the Petitioners that the National Assembly that the CDF money is not additional revenue 35 40

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- to the County Government within the meaning of article 202(2) of the Constitution, the reason that necessitated, we are told, the amendment to the CDF Act at section 4 by deleting subsection (2) of the section which read, “(2) All moneys allocated under this Act is additional revenue to the County Governments under article 202(2) of the Constitution to be administered according to section 5.” The subsection was replaced by one that reads, “(2) All monies allocated under this Act shall be considered as funds allocated to constituencies pursuant to article 206(2)(c) of the Constitution.”
96. Conditional grants are a feature of most fiscally decentralized countries. Through conditional grants, the National Government is able to achieve certain National Governmental objectives within the decentralized units. What is paramount though is that the nature and design of such grants must respect the constitutional architecture. It is our finding that CDF is not a conditional grant to County Governments envisaged under article 202(2) of the Constitution as it is not even expressed to be such.
97. Section 4(1)(c) of the CDF Act provides that the CDF money is to be, ‘disbursed by the National Government through the Board to constituencies as a grant to be channelled to constituencies in the manner provided for by this Act.’ The section describes the CDF as a grant to the constituencies. This is problematic as we shall see shortly. The constitutionality or otherwise of this subsection can only be appreciated by examining the manner of implementation of the fund under the CDF Act. This leads us to the next core question, whether the effect of the CDF is such that it interferes with the functional and power sharing between the national and County Government.
- Whether the CDF Act, 2013 violates the division of functions
98. It was the Petitioners’ case that the design and manner of implementation of the CDF infringes on the Constitution. The Petitioners contended that provisions of sections 3 and 22 of the CDF Act have encroached on the functions of County Governments. The impugned section 3 is one dealing with the object and purpose of the Act and reads thus;
- The provisions of this Act shall apply, as more specifically provided for in the Act, and shall ensure that a specific portion of the national annual budget is devoted to the constituencies for purposes of infrastructural development, wealth creation

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- and in the fight against poverty at the constituency level. 1
99. The petitioners take issue with section 22 of the CDF Act which they claim has not specifically identified the projects that should be undertaken but has instead used broad terminology to describe the allowable projects. The section is one that provides for the nature of community based projects that the CDF may be channeled to and reads as follows: 5
- 22(1) Projects under this Act shall be community based in order to ensure that the prospective benefits are available to a widespread cross-section of the inhabitants of a particular area. 10
- (2) Any funding under this Act shall be for a complete project or a defined phase, of a project and may include the acquisition of land and buildings. 15
- (3) All projects shall be projects as defined under this Act and may include costs related to studies, planning and design or other technical input for the project but shall not include recurrent costs of a facility. 20
- (4) Funds provided under this Act shall not be used for the purpose of supporting political bodies or political activities or for supporting religious bodies or religious activities. 25
- (5) Notwithstanding the provisions of subsection (4), the Constituency Development Fund Committee may identify a religious body or organization as an appropriate specialized agency for purposes of section 12 with regard to emergency support. 30
- (6) A Constituency Development Fund Committee office project shall be considered as a development project for purposes of the Act and may include appropriate furniture and equipment for the office. 35
- (7) Notwithstanding the provision of subsection (3), up to a maximum of six per centum of the total annual allocation by the constituency may be used for administration, recurrent expenses of vehicles, equipment and machinery and such use shall be listed in the First Schedule as a project. 40
- (8) Projects may include the acquisition of vehicles, machinery and other equipment for the constituency
- (9) Sports activities shall be considered as development

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- projects for purposes of this Act but shall 'exclude cash awards provided that the allocation to such activities does not exceed two per centum of the total allocation of the constituency in that financial year. 1
- (10) Monitoring and evaluation of ongoing projects and capacity building of various operatives may be considered as a development project provided that not more than three per centum shall be allocated for this pulse. 5
- (11) Environmental activities may be considered as 'development projects for purposes of this Act provided that the allocation to such activities does not exceed two per centum of the total allocation of the constituency in that financial year. 10
- (12) Each of the projects shall be listed on the First Schedule including the emergency item under section 11 and, where applicable, the activities under subsections (6), (7); (8), (9), (10) and (11) of this section. 15
100. On its part, the National Assembly submitted that Parliament has power to appropriate funds for specific purposes through Funds such as Uwezo Fund and the Youth Enterprise Fund anchored in the provisions of article 95(4)(b) and 206 of the Constitution. It is therefore argued that through the CDF Act, Parliament has created an oversight role over the funds allocated under CDF and that CDF finances activities not supported by County Governments such as education bursaries to needy students and security. 20
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101. Article 186 of the Constitution establishes the respective functions and powers of national and County Government as follows;
- 186(1) Except as otherwise provided by this Constitution, the function and powers of the National Government and the County Governments', respectively, are as set out in the Fourth Schedule. 30
- (2) A function or power that is conferred on more than one level of government of a function or power within the concurrent jurisdiction of each of those levels of government. 35
- (3) A function or power not assigned by this Constitution or national legislation to a county is a function or power of the National Government. 40

The Fourth Schedule to the Constitution has then specifically dealt

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- with distribution of functions between the national and County Governments'. With those provisions in mind and looking at the provisions of section 3 of the CDF Act, it is without a doubt that the CDF seeks to address issues involving infrastructural development, wealth creation and fight against poverty at the constituency level. Are these broadly enumerated functions within the purview of functions of county or National Government?
102. We recall the submission made by the Attorney General that a constituency is a unit of representation for purposes of election of National Assembly members and it is taken as a sub-unit of a county and that its administration and development agendas are under the administration of the Governors and the County Government. We have deliberately discussed here the submission by the Attorney General because he has, in our view answered and clarified the question at hand. We are in agreement with the Attorney General that a constituency is a unit of representation of the people in the National Assembly and in that context several constituencies form a county. How then is the CDF, which is funded by the National Government supposed to undertake projects within a constituency which is under the administration of the County Government and not interfere with the County Government functions?
103. Section 22 of the Act set out above demonstrates that the Act is not clear what projects the CDF is supposed to fund and implement. The section broadly refers to unspecified projects which we are unable at this point to determine to which level of government they belong into as per the Fourth Schedule to the Constitution. Nevertheless, we take the position that the drafters of the Constitution did not envisage that there would be a three tier system (National Government, County Government and constituency) that would be charged with infrastructural development at the county level.
104. We do not think that from a plain and literal reading of the provisions of article 186 and the Fourth Schedule to the Constitution, it can be said that for instance, infrastructural development and wealth creation at the Constituency level is solely a function of the National Government. Infrastructural development in our view is such a fluid term that may include county transport and development of county health facilities which fall within the functions County Government enumerated in Part 2 of the Fourth Schedule.

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- Whether the CDF Act 2013 violates the principle of separation of powers 1
111. The Petitioners urged that the CDF Act violates the principle of separation of powers by involving MPs in the implementation of projects funded by the CDF. The respondents on the other hand refuted this argument, claiming that the Fund is run by committees and not the individual MPs. Further, that their involvement reinforces their role under article 95 of the Constitution including that of oversight. 5
112. The Petitioners contended that section 24 of the CDF Act is unconstitutional on two fronts. First, it allocates certain administrative responsibilities to Members of Parliament who play an oversight role through the National Assembly Committee on CDF therefore making the MP both an executor of CDF as well as a legislator. In that regard therefore, they claimed that arming the MP with the ability to play the dual roles has directly violated the principle of separation of powers. Second, that the administration and implementation of projects for which the National Assembly has determined the allocation of funds is not a function assigned to the National Assembly and such an arrangement offends the principle of accountability under article 10 of the Constitution. 10 15 20
113. While submitting that there was no absolute separation of powers, the Respondents contended that section 24 of the Act has clearly demarcated the role for the Member of Parliament as an *ex-officio* member of CDF Committee and as a link between the Committee and the people in the Constituency. That the MP's role was limited to issuing opinions and the Committee was the body mandated to disburse CDF and oversee the implementation of projects in the Constituency. The Attorney General submitted that section 24 of the Act provides for an elaborate procedure in the appointment of CDF Committees and as such the process is transparent, people centered and representative. On the separation of powers, he submitted that the management of the fund is left to the Board and the Committee to which MPs are not members thus does not violate the principle of separation of powers. Similarly, the CDF Board submitted that under sections 24, 31 and 18 of the Act, the CDF Committees and the Board are responsible for the monitoring of the projects and allocation of funds to the projects was the responsibility of the Committee. Thus, the Board stated, there is no duplication of the CDF projects within the counties. 25 30 35 40

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114. Section 24 of the Act deals with the composition of the CDF Committee and the section as subsequently amended provides in part as follows; 1
- 24(1) There shall be a Constituency Development Fund Committee for every constituency. 5
- (2) Each Constituency Development Fund Committee shall comprise-
- (a) the National Government official at the constituency as may be designated by the Cabinet Secretary or an alternate; 10
- (b) three men nominated by the ward development committees and one of whom shall be a youth at the date of appointment;
- (c) three women nominated by the ward development committees and one of whom is a youth shall be a youth at the date of appointment; 15
- (d) one person with disability nominated by the ward development committees;
- (e) one person nominated from among the active Non-Governmental Organisations in the constituency; 20
- (f) an officer of the Board seconded to the Constituency Development Fund Committee by the Board who shall be *ex-officio*. 25
115. In our understanding, section 24 of the Act has been challenged as being unconstitutional because of the role the National Assembly member is considered to play in the CDF administration under section 24(3) of the Act which provides thus; 25
- 24(3) The eight persons referred to in subsection (2) (b), (c), (d) and (e) shall be nominated through the following procedure- 30
- (a) within forty-five days of being sworn in, each Member of Parliament for a particular constituency shall convene open public meetings of registered voters in each of the elective wards in the constituency; 35
- (b) each ward shall then elect five persons whose names shall be forwarded to the officer of the Board in the constituency;
- (c) upon receiving the names from all the wards in the constituency, the Member of Parliament in consultation with the officer of the Board and the 40

Section 28(5) sets out the functions of the National Assembly Select Committee as follows;	1
28(5) The functions of the National Assembly Select Committee shall be —	
(a) to consider and recommend to the National Assembly any matter requiring action by the National Assembly pursuant to the provisions of this Act;	5
(b) to oversee the implementation of this Act and in this respect, shall after every two years submit a report to the National Assembly and where necessary, propose any amendments to this Act, in particular, with respect to the quantum of funds repayable into the Fund in accordance with section 4 of the Act;	10
(c) to oversee the policy framework and legislative matters that may arise in relation to the Fund;	15
(d) to continually review the framework set out for the efficient delivery of development programmes financed through the Fund;	
(e) to consider and report to Parliament with recommendations, names of persons required to be approved by Parliament under this Act; and	20
(f) to carry out any other functions relevant to the work of the Fund.	
118. In addition to the above functions, the Committee may make reports other than the statutory report stated in sub section 5(b) in order to appraise the National Assembly on various matters relating to the Fund and to seek various approvals as required by the Act. Under section 29, the CDF Board is required to submit a quarterly report to the National Assembly Select Committee on CDF on a monthly basis, detailing the following;	25
(a) a summary of the project proposals received from the constituencies in the preceding month and indicating the approval status of such projects;	30
(b) a summary of the status of disbursements of funds to the constituencies for that preceding month	35
(c) a summary of the status of disbursements from the Treasury to the National Account; and	
(d) any restriction imposed on a constituency account in accordance with the Act.	40

Lastly, under section 30 of the Act, it is the duty of the Board to

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- participate in the governance and decision making. A key underlying principle in this being that of subsidiarity, that recognizes that ideally the local needs and communities are better appreciated, prioritised and localized problems solved at the lowest level capable of dealing. The Constitution requires that the County Governments decentralize their functions and services “to the extent that it is efficient and practicable to do so” under article 176(2). This principle is fortified by Part VI of the County Governments Act, 2012 which sets out the decentralisation units in a county. We find that with this cascading mechanism of governance, the Constitution envisaged that although power is shared between the national and County Government, the decentralized units within the county would facilitate the achievement of the objects of devolution through to the grassroots. We do not read the Constitution to authorize other competing governance structures outside the national structure, county and sub units of the County Government, driving development concerns at the county level.
122. Article 1(4) of the Constitution recognises two levels of government, the national and County Governments. Each of these levels exercises power derived from the Constitution itself. Under article 1 of the Constitution, the County Government does not derive its power from the National Government but directly from the People of Kenya and under the Constitution. These two levels of governments are therefore, in theory, equal and none is subordinate to the other. MPs and cabinet secretaries involved in the management or implementation of the CDF constitute the executive and legislative organs of the National Government. Their involvement in development activities at the county level not only threatens to undermine the functions of the government at the county level but also blurs the executive and legislative divide that underlies the principle of separation of powers. We therefore find that it is unconstitutional for the National Government to extend its mandate in the counties beyond its mandate under the Constitution through the artifice of the CDF.
123. There are available means through which the National Government can permeate its agenda into counties within the purview of the Constitution. For instance, through conditional grants to County Governments. The National Government could also assign or transfer its functions to the County Governments if it so desires within the terms set out under articles 186(3) and 187

Parliament and the executive function is not one of those roles. The various roles of State organs are implicated in the doctrine of separation of powers.	1
126. The Constitution creates various institutions and vests them with State power dispersed both vertically and horizontally. In <i>Trusted Society of Human Rights Alliance v The Attorney General and others</i> Nairobi Petition No 243 of 2011 [2012] eKLR the Court observed as follows;	5
The Constitution consciously delegates the sovereign power under it to the three branches of government and expects that each will carry out those functions assigned to it without interference from the other two....this must mean that the Courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislative intent. Yet...the courts have an interpretive role-including the last word in determining the constitutionality of all governmental actions. That, too, is an incidence of the doctrine of separation of powers.	10 15 20
127. The principle of separation of powers is at the heart of the structure of our government; each organ is independent of each other but acting as a check and balance to the other and also working in concert to ensure that the machinery of the state works for the good of Kenyans. The Apex Court in the <i>In the Matter of the Interim Independent Electoral Commission (supra)</i> expressed itself as follows;	25
The effect of the Constitution's detailed provision for the rule of law in processes of governance, is the legality of executive or administrative actions to be determined by the Courts, which are independent of the Executive branch. The essence of separation of powers, in this context, is that the totality of governance powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set up, it is to be recognized that none of the several government organs functions in splendid isolation.	30 35
128. The Respondents argued that there can never be complete separation of powers and it is an accepted fact in major constitutional democracies that the principle is not perfect. This state of affairs	40

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- was exemplified in the former Constitution where, for example, members of the executive were also members of the legislature. 1
129. Under the current dispensation, the first port of call must be the Constitution and what it says about the role of each State organ. In *Speaker of the Senate Case (supra)*, the Supreme Court observed that; 5
- [135] By a Constitution achieved after many false starts, the people have declared that “All sovereign power belongs to the people of Kenya” [Article 1(1)]; and they have established institutions of governance committed to named functions: the Executive; the National Assembly; the Senate; and numbers of others. 10
130. Article 94 of the Constitution vests legislative authority of the people of Kenya in Parliament. The roles of the National Assembly and the Senate are specifically delineated in articles 95 and 96 of the Constitution. Article 95(4) of the Constitution provides as follows; 15
- 95(4) The National Assembly—
- (a) determines the allocation of national revenue between the levels of government, as provided in Part 4 of Chapter Twelve; 20
 - (b) appropriates funds for expenditure by the National Government and other national State organs; and
 - (c) exercises oversight over national revenue and its expenditure. 25
- As regards the Senate, article 96(1), (2) and (3) of the Constitution provides as follows;
- 96(1) The Senate represents the counties, and serves to protect the interests of the counties and their governments. 30
 - (2) The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in articles 109 to 113. 35
 - (3) The Senate determines the allocation of national revenue among counties, as provided in article 217, and exercises oversight over national revenue allocated to the County Governments.
131. The respective roles of the Houses of Parliament are clearly stated. 40
- The oversight role of the National Assembly and the role of the Senate in regulation of County Government under the umbrella of

legislative authority do not permit the National Assembly and the Senate to get involved in the administration and implementation of development projects in the counties. Members of Parliament cannot legislate on county laws, play oversight role over the county funds in the case of the senators, set policies on the counties and undertake and implement development projects at the constituency level without impinging on the County Government function and the all-important principle of checks and balances.

132. In light of the specific grant and definition of legislative powers under the provisions of articles 95 and 96 of the Constitution, we find that the involvement of the Members of Parliament in the CDF implementation violates the core principle of separation of powers and to this extent, the CDF Act is unconstitutional. We will also add here that, to the extent that the Act conflates the executive and legislative functions, it obfuscates accountability mechanism envisaged under the Constitution underpinned by the doctrine of separation of powers. In that respect, the Act violates key national values and principles enunciated under article 10 of the Constitution, to wit, good governance and accountability and we so find.

133. Besides, the Constitution has set up mechanisms of ensuring that the county executive performs their constitutional functions. At the county level, under article 185(3) of the Constitution, the County Assembly exercises oversight over the County Executive committee and any other executive organs of the county. At the national level, under the provisions of article 96(1) of the Constitution, the Senate represents the counties at the national level and serves to protect the interests of the counties and their governments. The Senate also has an oversight role over the county resources allocated to the counties from the National Government. Articles 190(3) of the Constitution provides for intervention by the National Government in a County Government if the latter is unable to perform its functions or does not comply with a system of financial management set under the Constitution.

134. The history and role of the CDF has been noble and was a direct response to the concentration of resources in the central government and development exclusion. In other words, the CDF was a precursor to the devolution ushered in by the Constitution. While there may have been a rationale for the existence of the CDF

of the Constitution, the CDF (Amendment) Bill as legislation affecting the functions and powers of the County Governments qualifies as, ‘a Bill concerning County Government’ within the meaning of article 110(1) and ought to have passed by the Senate. The purpose of the CDF (Amendment) Act was to amend a law that as we have found violates the division of functions between the national and County Governments. Thus, an amendment to the Act would have necessitated the input of the Senate. The purpose of involving the Senate is to ensure that counties, as far as possible, get to effectively participate in the legislative business at the national level in matters substantially affecting interests of County Governments. This calls for the court to look beyond the substance or purpose of the statute expressed in the text. The court must unbundle the specific provisions of the proposed legislation to see if and to what extent they satisfy the criteria set out under article 110(1) of the Constitution. An amendment to the Act affecting the manner in which money is allocated to the CDF is the core part of the Act. As the availability of money affects the financing and implementation of projects that fall within the competence of the County Government, the provision cannot be severed without undermining the entire Act. The CDF (Amendment) Bill is not an insubstantial amendment. We therefore find and declare that the CDF (Amendment) Bill unconstitutional for want of involvement by the Senate and we so declare.

Conclusion

139. From the many arguments and submissions made before this Court, we distilled four broad issues that called for this Courts determination and we conclude by a summary of our key findings as follows;
- a. Whether the process leading to the enactment of the CDF was constitutional.
 - i. The CDF (Amendment) Bill concerns County Government and consequently we find and hold that it is unconstitutional on the ground that the Senate was not involved in the enactment of the Bill.
 - ii. We find that there was sufficient public participation in the process leading up to the enactment of the CDF (Amendment) Act.
 - iii. With regard to consultation of the CIC and the Commission on Revenue Allocation, we find that

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there was no violation of section 14 of the Sixth Schedule to the Constitution.	1
b. The nature of the CDF and whether it violates principles of public finance and division of revenue.	
i. We have established that CDF is not a conditional grant to the County Governments within the meaning of article 202(2) of the Constitution.	5
ii. That article 202 envisages equitable sharing of the National Government revenue between the national and County Governments. Nevertheless, if National Government so desired, it could at its discretion grant additional revenue, whether conditionally or unconditionally through the County Governments.	10
iii. Further, that such grants by National Government must respect the structures established under the Constitution. In other words, the National Government must tap into the existing structures of the County Government.	15
c. Whether the CDF Act violates the division of powers and functions	20
i. The Court finds that power and functions are distributed at only two levels of government, the national and county levels.	
ii. That the purpose and design of the CDF Act is constitutionally flawed in a number of aspects: First, the Act establishes CDF as a mechanism that runs parallel the constitutionally recognised governance structures. By charging it with local projects under section 22 of the CDF Act threatens to upset the division of functions between the national and county levels of governments and interfere with the County Government autonomy.	25 30
d. Whether the CDF Act 2003 offends the principle of separation of powers	35
By involving Members of Parliament in the planning, approval and implementation of the CDF projects, the CDF Act violates the doctrine of separation of powers between the executive and legislative functions. It also undermines some key national values and principles of governance including devolution of power, accountability and good governance.	40

140. In making our findings, we are conscious of the fact that CDF has been important in addressing development at the grass root level and has in the past been one of the most significant steps to alleviate poverty and ensure community empowerment. The CDF Review Task Force states in its report that that one of the main purposes of the enactment of the CDF Act and the subsequent establishment of the CDF Fund was to devolve funds from the central government to the local communities. As noble as the intention of the CDF was in 2003 when it was first established, the principle of devolution is now one of the pillars of the Constitution anchored through the County Governments. The Constitution has made it clear at article 1(4) that sovereign power is exercised between the two levels of government. Indeed, some of the objectives of devolution under article 174 of the Constitution include the promotion of social economic development, protection of the rights of marginalised communities and equitable sharing of national and local resources.
141. The Constitution has also set up other mechanisms of ensuring equitable development and sharing of resources such as the Equalization Fund under article 204 and the criteria for equitable sharing set out under article 203 of the Constitution. Devolution was a *panacea* to addressing the developmental and equity gaps that exist in our communities. This is not however to say that the National Government cannot conceptualise and fund development initiatives at the local level; what is critical is that such initiatives in both design and implementation, must respect the system of governance in existence and the spirit and letter of the Constitution.
142. Good faith and well-meaning intentions are meaningless if the object and design are constitutionally objectionable. As was stated in *Executive Council of the Western Cape Legislature and others v President of the Republic of South Africa and others* (CCT27/95) [1995] ZACC 8 at para 100,
- Constitutional cases cannot be decided on the basis that Parliament or the President acted in good faith or on the basis that there was no objection to action taken at the time that it was carried out. It is of crucial importance at this early stage of the development of our new constitutional order, to establish respect for the principle that the Constitution is supreme. ...
- Our duty is to declare legislative and executive action which is inconsistent with the Constitution to be invalid, and then to deal with the consequences of the invalidity in accordance

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- with the provisions of the Constitution.” [Emphasis ours] 1
143. In coming to the conclusions we have, we draw inspiration from the words of Mutunga CJ, in the *Speaker of the Senate* case (*supra*) where he stated as follows; 5
- [161] The Court must patrol Kenya’s constitutional boundaries with vigor, and affirm new institutions, as they exercise their constitutional mandates, being conscious that their very infancy exposes them not only to the vagaries and fragilities inherent in all transitions, but also to the proclivities of the old order. 10
- Remedies
144. Having reached the above findings, the next crucial action is what is the appropriate relief to grant? Article 258 of the Constitution which entitles any person to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention does not provide for specific relief to be granted to the Applicant or give the Court any guidance on how its jurisdiction should be exercised unlike a similar provision in article 23 of the Constitution respecting the enforcement of fundamental rights and freedoms which empowers the Court to frame or grant, “appropriate relief.” 15
145. It is our view that in order to give effect to the right to enforce the Constitution, the power of the court to award an appropriate remedy must be implied. We hold that the Court has the power to issue any remedy as is necessary to ensure that the Constitution is not threatened or violated. Such relief may include conservatory orders and a declaration of invalidity of any law that is inconsistent with the Constitution. 20
146. We are also cognisant of our obligation under article 2 of the Constitution to declare any law that is inconsistent with the Constitution null and void. However, the court is empowered to deal with the consequences of such invalidity bearing in mind its duty to interpret and apply the Constitution in a manner that, *inter alia*, promotes good governance. Article 258 of the Constitution does not limit the court’s jurisdiction to fashion an appropriate remedy to deal with the invalidity of the law. It is accepted that the court may suspend the declaration of invalidity in order to deal with the consequences of such invalidity. In *Suleiman Shahbal v Independent Electoral and Boundaries Commission and 3 others* 25
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- Petition No 3 of 2014 [2014]eKLR, the Supreme Court expressed the following position; 1
- [42] The lesson of comparative jurisprudence is that, while a declaration of nullity for inconsistency with the Constitution annuls statute law, it does not necessarily entail that all acts previously done are invalidated. In general, laws have a prospective outlook; and prior to annulling-declarations, situations otherwise entirely legitimate may have come to pass, and differing rights may have accrued that have acquired entrenched foundations. This gives justification for a case-by-case approach to time-span effect, in relation to nullification of statute law. In this regard, the Court has a scope for discretion, including: the suspension of invalidity; and the application of “prospective annulment”. Such recourses, however, are for sparing, and most judicious application – in view of the overriding principle of the supremacy of the Constitution, as it stands. 5 10 15
147. While in that case, the court declined to hold that the annulment of a specific provision of the Elections Act, 2011 prospective, the court noted that; 20
- [53] In the case of Kenya, the High Court bears the primary responsibility for determining whether any law is inconsistent with or in contravention of the Constitution. This discretion also vests in the Court of Appeal as well as the Supreme Court. In the *Joho* and *Mary Wambui* cases, this Court considered the impugned statutory provision in light of the entire scheme of the Constitution, before making the declaration of invalidity and, further in the *Mary Wambui* case, before deciding upon the retrospective application of that declaration. This is the appropriate approach, in our view, as regards the instant case. 25 30
148. We are convinced that in order to protect the Constitution, the court must be creative in fashioning appropriate relief that is tailored to the facts of the case and is consistent with the values of the Constitution. Suspension of the declaration of invalidity would be appropriate in these circumstances as it would allow the Legislature time to correct the defective legislation while avoiding chaos and disarray in a system that has been established for over a decade. Such a move supports good governance, a core national 35 40

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- value under article 10 of the Constitution. 1
149. We have found the CDF Act is defective in many respects, from the manner it was enacted, its objective, design and implementation. Are the defective parts severable? The test for severance has been established elsewhere thus; 5
- [I]f the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and second, if so, is what remains giving effect to the purpose of the legislative scheme? (*Coetzee v Government of the Republic of South Africa; Matiso and others v Commanding Officer, Port Elizabeth Prison, and others* [1995] ZACC 7; 1995(4) SA 631(CC) at para 16). 10 15
- In *Premier: Limpopo Province v Speaker of the Limpopo Provincial Legislature and others* (CCT 94/10) [2012] ZACC 3 it was observed at para 24, “It cannot be over-emphasised that severance should be reserved for cases where it is clear from the outset exactly which parts of the statute need to be excised to cure the constitutional deficiency.” 20
150. We are satisfied that since the defect in the CDF Act, 2013 related to the Fund and the manner of its administration and application, its substratum is lost. It is not possible to separate the wheat from the chuff, the good from the bad in order to salvage the Act. The only option is to render the CDF Act, 2013 invalid in its entirety. 25
151. The next question is what are the consequences of the declaration of invalidity? Ordinarily, orders of invalidity take immediate effect but the court in framing appropriate relief must be mindful of the circumstances of the case and in particular the need to avoid undue hardship. As the Supreme Court demands, such a consideration must be judicious and dependent on the case. In discussing the issue of suspension orders under South Africa law, Sachs J in *Coetzee* as cited in *Premier: Limpopo Province v Speaker of the Limpopo Provincial Legislature and others* (*supra*) had this to say; 30 35
- [36] The words ‘in the interests of justice and good government’ are widely phrased and, in my view, it would not be appropriate, particularly at this early stage, to attempt a precise definition of their ambit. They clearly indicate the existence of something substantially more than the mere 40

inconvenience which will almost invariably accompany
any declaration of invalidity, but do not go so far as to
require the threat of total breakdown of government.
Within these wide parameters the Court will have to make
an assessment on a case-by-case basis as to whether more
injustice would flow from the legal vacuum created by
rendering the statute invalid with immediate effect than
would be the case if the measure were kept functional
pending rectification. No hard-and-fast rules can be
applied.

152. The CDF is a system that has been running over the years and at
the moment, the funds for the financial year 2014/2015 have been
disbursed and the budgetary process for the next financial year is in
progress. Obviously the Fund has entered into legal obligations that
need to be dealt with. We must accord leverage to public interest
and good order while conscious of our country's political realities.
We are of the view that a temporary suspension of the invalidity of
the Act is the appropriate relief in the circumstances.

153. How long should the order of invalidity be suspended? It has
been held that, "[v]arious factors must be taken into account in
determining the period of suspension, including: the government's
previous conduct; whether there is any legislation in the pipeline;
and the nature and severity of the continuing infringement" ought
to be taken into account (See *Premier: Limpopo Province v Speaker
of the Limpopo Provincial Legislature and others (supra)* at para 46).
In reflecting on this issue, the court has to consider the fact and the
circumstances of the case. In *Kenya Country Bus Owners' Association
(Through Paul G Muthumbi – Chairman, Samuel Njuguna –
Secretary, Joseph Kimiri – Treasurer) & 8 others v Cabinet Secretary for
Transport & Infrastructure & 5 others* NRB JR No 2 of 2014 [2014]
eKLR, the court made an order suspending invalidity of traffic
regulations on the ground that the breaches were minor and could
be remedied while protecting the lives of road users which would
be at risk without the regulation in place pending re-enactment of
the impugned regulations. In this case, we take judicial notice of
the government budget cycle and the fact that the financial year
ends in June of every year. We are also alive that there are ongoing
projects that require completion. In order to allow for transitional
and corrective mechanisms, we are of the view that suspension of
the invalidity of the CDF Act for a period of twelve months from

the date of this judgment is a reasonable period. The National Government is entitled to remedy the defects in the period either in form of new legislation or other means within the Constitution taking into account the findings we have made. For avoidance of doubt, the Act may be repealed earlier by an Act of Parliament or await the expiry of the suspension, whichever comes first.

Costs

154. As this matter involves matters of public interest and concerns the manner in which the Constitution is being implemented, we shall order that each party bears its own costs.

Disposition

155. Before we make the final orders, we must apologise for the delay in delivering this judgment which was caused partly by the heavy workload and other reasons beyond our control. We are also grateful to all the counsel in this petition for their lucidity in submissions.

156. We find that that the CDF Act 2013 is unconstitutional for reasons stated above and as a result, we make the following ;

- a. A declaration is hereby issued that the Constituencies Development Funds Act, 2013 is unconstitutional and therefore invalid.
- b. The order of invalidity above is suspended for a period of twelve (12) months from the date of judgment.
- c. The National Government may remedy the defect within that period and the Constituencies Development Fund Act shall stand invalidated at the expiry of the twelve (12) months or may be earlier repealed whichever comes first.
- d. Each party shall bear its own costs.

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**Wambora & 32 others v County Assembly
of Embu & 3 others [2015] KLR-HCK**

High Court, at Nairobi

February 12, 2015

R Mwongo, WK Korir J & GV Odunga, JJ

Petition Nos 7 & 8 of 2014 (Consolidated)

Brief facts

The first impeachment proceedings against the Petitioner had occurred pursuant to a resolution for his removal in the Embu County Assembly passed on January 29, 2014. That was swiftly followed by proceedings in the Senate, resulting in a resolution of impeachment published in Gazette Notice Number 1052 of February 17, 2014.

By a judgment dated April 16, 2014, in Consolidated Petition No 3 of 2014, the High Court of Kerugoya invalidated, in entirety, the first impeachment proceedings against the Governor and was consequently restored to office. Immediately following the judgment of the Court, a second impeachment motion against the Governor, was commenced in the County Assembly of Embu on April 16, 2014. That was followed by a confirmatory resolution in the Senate.

The consolidated petitions were instituted in reaction to the second impeachment motion against the Governor. It was asserted by the Petitioners that section 33 of the County Governments Act was in violation of the Constitution for failing to allow public participation and involvement in the removal of a county Governor.

Issues

- i. Whether a Petition which incorporatds the issues as to:
 - a. Non-Joinder of the Attorney General;
 - b. The role of the Parliamentary Service Commission in the Petition; and
 - c. Whether the Petition was brought in good faith; was competent.
- ii. Whether the proceedings to impeach the Governor in both the County Assembly and the Senate were sub-judice.
- iii. Whether section 33 of the County Governments Act, 2012 was unconstitutional for failing to allow public participation and involvement in the removal of a County Governor hence in contravention of articles 1, 2(1) and (2), 10, 118(1)(b), 174(a) and (c) and article 196(1)(b).

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- iv. What was the process and procedure for removal of a Governor? 1
 - v. Whether the Rules of Natural Justice were complied with in the removal of the Governor.
 - vi. Whether the removal of the Governor required public participation, and if so; whether there was public participation; and whether article 35 of the Constitution on access to information was complied with. 5
 - vii. To what extent, if any, could the Court intervene in the removal process?

Constitutional Law – Devolved Government – County Governments – impeachment of a County Governor – process for the removal of a County Governor from office – impeachment for gross violation of the Constitution – definition of gross violation – standard of proof of gross violation – the constitutional threshold amounting to gross violation – whether the Court had a constitutional duty to substantively analyze a charge of gross violation of the Constitution made against a Governor – Constitution of Kenya, 2010, article 181; County Governments Act, 2012 section 33. 10

Constitutional Law – Devolved Government – County Governments – impeachment of a County Governor – exclusive power of the County Assembly and Senate to determine an impeachment motion – whether the High Court had a role to play in the process of impeachment of a Governor. 15

Constitutional Law – separation of powers – balance of power in a democratic government – distribution of power to the Legislature, Executive and Judiciary – independence of branches of democratic government in performing functions. 20

Statutes – Interpretation of the County Governments Act – constitutionality of section 33 of the County Governments Act – whether section 33 of the County Governments Act, was unconstitutional for failing to allow public participation and involvement in the removal of a County Governor hence in contravention of articles 1, 2(1) and (2); 10, 118(1)(b), 174(a) and (c) and 196(1)(b) of the Constitution – County Governments Act, 2012, section 33; Constitution of Kenya, 2010, articles 1, 2(1) and (2), 10, 118(1)(b), 174(a) and (c) and 196 (1)(b). 25

Words and Phrases – impeachment – the word ‘impeachment’ derives from Latin roots expressing the idea of being caught or entrapped, and is analogous to the modern French verb empêcher (to prevent) and the modern English word ‘impede’. Impeachment also means prosecution, indictment or arraignment. 30

County Governments Act, 2012, section 33 40

- “(1) A member of the County Assembly may by notice to the speaker, supported by at least a third of all the members,

- move a motion for the removal of the governor under article 181 of the Constitution. 1
- (2) If a motion under subsection (1) is supported by at least two-thirds of all the members of the county assembly—
- (a) the speaker of the county assembly shall inform the Speaker of the Senate of that resolution within two days; and 5
- (b) the governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section. 10
- (3) Within seven days after receiving notice of a resolution from the speaker of the county assembly—
- (a) the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor; and 15
- (b) the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.
- (4) A special committee appointed under subsection (3)(b) shall— 20
- (a) investigate the matter; and
- (b) report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated.
- (5) The governor shall have the right to appear and be represented before the special committee during its investigations. 25
- (6) If the special committee reports that the particulars of any allegation against the governor—
- (a) have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or 30
- (b) have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the impeachment charges. 35
- (7) If a majority of all the members of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.
- (8) If a vote in the Senate fails to result in the removal of the governor, the Speaker of the Senate shall notify the speaker of the concerned county assembly accordingly and the motion by the assembly for the removal of the 40

governor on the same charges may only be re-introduced to the Senate on the expiry of three months from the date of such vote.	1
(9) The procedure for the removal of the President on grounds of incapacity under article 144 of the Constitution shall apply, with necessary modifications, to the removal of a governor.	5
(10) A vacancy in the office of the governor or deputy governor arising under this section shall be filled in the manner provided for by article 182 of the Constitution.”	10
Article 196(1)(b) provides as follows:	
“196(1) A county assembly shall—	
(a)	
(b) facilitate public participation and involvement in the legislative and other business of the assembly and its committees.”	15
Article 181(1) provision is made for the removal from office of a county governor on any of the following grounds:	
“(a) gross violation of this Constitution or any other law;	20
(b) where there are serious reasons for believing that the county governor has committed a crime under national or international law;	
(c) abuse of office or gross misconduct; or	25
(d) physical or mental incapacity to perform the functions of office of county governor.”	
Part 8 of the County Assembly of Embu Standing Orders which under Standing Order No 61 makes provision for removal of a governor by impeachment as follows:	
“(1) Before giving notice of Motion under, section 33 of the County Governments Act, No. 17 of 2012 the member shall deliver to the Clerk a copy of the proposed Motion in writing stating the grounds and particulars upon which the proposal is made, for the impeachment of the Governor on the ground of gross violation of a provision of the Constitution or of any other law; where there are serious reasons for believing that the Governor has committed a crime under national or international law; or for gross misconduct or abuse of office. The notice of Motion shall be signed by the Member who affirms that	30
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- the particulars of allegations contained in the motion are true to his or her own knowledge and the same verified by each of the members constituting at least a third of all the members and that the allegations therein are true of their own knowledge and belief on the basis of their reading and appreciation of information pertinent thereto and each of them sign a verification form provided by the Clerk for that purpose. 1
- (2) The Clerk shall submit the proposed Motion to the Speaker for approval. 5
- (3) A member who has obtained the approval of the Speaker to move a Motion under paragraph (1) shall give a seven (7) days notice calling for impeachment of the Governor. 10
- (4) Upon the expiry of seven (7) days, after notice given, the Motion shall be placed on the Order Paper and shall be disposed of within three days; Provided that if the County Assembly is not then sitting, the Speaker shall summon the Assembly to meet on and cause the Motion to be considered at that meeting after notice has been given. 15
- (5) When the Order for the Motion is read, the Speaker shall refuse to allow the member to move the motion, unless the Speaker is satisfied that the member is supported by at least a third of all Members of the County Assembly to move the motion; Provided that within the seven days' notice, the Clerk shall cause to be prepared and deposited in his office a list of all Members of the County Assembly with an open space against each name for purposes of appending signatures, which list shall be entitled "SIGNATURES IN SUPPORT OF A MOTION FOR REMOVAL OF GOVERNOR BY IMPEACHMENT" 20
- (6) Any signature appended to the list as provided under paragraph (5) shall not be withdrawn. 25
- (7) When the Motion has been passed by two-thirds of all members of the County Assembly, the Speaker shall inform the Speaker of the Senate of that resolution within two days." 30
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- Section 91 of the **County Governments Act** establishes the modalities and platforms for citizen participation. It provides that the county government shall facilitate the establishment of structures for citizen participation including—
- a. information communication technology based platforms;
 - b. town hall meetings;
 - c. budget preparation and validation fora;
 - d. notice boards: announcing jobs, appointments, procurement, awards and other important announcements of public interest;
 - e. development project sites;
 - f. avenues for the participation of peoples' representatives including but not limited to members of the National Assembly and Senate; or
 - g. establishment of citizen fora at county and decentralized units."

Held:

1. The Government Proceedings Act only applied to civil proceedings by and against the Government and it did not apply to proceedings which were not of a civil nature such as criminal proceedings. Matters relating to the interpretation of the Constitution were not civil matters as contemplated under the Government Proceedings Act but were proceedings *sui generis*.
2. Article 156(4)(b) of the Constitution only dealt with legal representation of the National Government in court or in any other legal proceedings to which the National Government was a party. It neither dealt with criminal proceedings nor did it require that the Attorney General be a party to the proceedings.
3. Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, otherwise known as the *Mutunga* Rules, defined "*respondent*" as meaning "*a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom.*" It followed that the said Rules contemplated that a person other than the Attorney General could be cited as a Respondent. The failure to bring the proceedings against the Attorney General was therefore not fatal to the proceedings.
4. Nothing turned on the objection that the Parliamentary Service Commission (PSC) ought not to have been a party to the proceedings as the said Commission was joined to the proceedings

- by an order of the Court which order had not been challenged either by review or on appeal and had not been set aside. In addition, it was not contended that the presence of the PSC had caused any prejudice to any party. 1
5. With respect to the immunities of the Senate and the Speaker of the Senate, section 4 of the National Assembly (Powers and Privileges) Act was clear that it applied only to criminal and civil proceedings and matters relating to interpretation and application of the Constitution were neither criminal nor civil. To hold otherwise would amount to elevating the Senate and the Speaker above the Constitution as under articles 1 and 2 of the Constitution; 5
- a. all sovereign power belonged to the people of Kenya and was to be exercised only in accordance with the Constitution 10
- b. the Constitution is the supreme law of the Republic and binds all persons and all State organs; 15
- a. no person may claim or exercise State authority except as authorized under the Constitution;
- b. any act or omission in contravention of the Constitution is invalid. 20
2. The institution constitutionally mandated to hear and determine any question respecting the interpretation of the Constitution including the question whether anything said to be done under the authority of the Constitution or if any law was inconsistent with, or in contravention of, the Constitution was the High Court under article 165 of the Constitution. It followed that no State Organ could hold itself to be immune to proceedings challenging the constitutionality of its actions and that included Parliament and its speakers. In other words immunity only applied to situations where the particular entity was acting constitutionally. 25
3. Article 3(1) of the Constitution enjoined every person to respect, uphold and defend the Constitution. Article 258 entitled any person to institute court proceedings, claiming that the Constitution had been contravened, or was threatened with contravention and such actions could be instituted by a person acting as a member of, or in the interest of, a group or class of persons or by a person acting in the public interest. It had not been contended that the Petitioners were not entitled to bring the proceedings. The mere fact that the success of the proceedings could result in safeguarding and securing the 1st Petitioner's position as the Governor, Embu County, did not disentitle them from instituting the proceedings. 30
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4. In the current constitutional dispensation, the Courts had to resist the temptation to try and contain constitutional challenges in a straight-jacket and had to resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them. The Petitioners could not be faulted for bringing the proceedings simply because they were perceived supporters of the 1st Petitioner. 1 5
5. For proceedings to be said to be *sub judice*, the same ought to be pending before the Court or a judge for determination. The *sub judice* doctrine applied to situations where there were pending proceedings in a Court of law. A person could not institute proceedings in a Court of law with a view to stalling an ongoing legal process by relying on the *sub judice* principle. For *sub judice* to apply, the proceedings sought to be stayed ought to have been the ones subsequently commenced and not *vice versa*. In the instant case, Embu Petition Nos 5 and 6 of 2014 were filed on the April 28, 2014, whereas the motion before the County Assembly was filed on the April 16, 2014 and notice given on April 22, 2014. Therefore when the motion was instituted there was no pending matter in court in relation to the issues herein. The two petitions filed in court were withdrawn and discontinued immediately after the motion was passed on the April 29, 2014. The *sub judice* rule could not in the circumstances of the case be successfully invoked. 10 15 20
6. In interrogating the constitutionality of a provision of a statute, the starting point was statutory interpretation. There were several principles which had been developed over the years that had to be taken into account. 25
- a. A statute is presumed to be constitutional unless the contrary is proved. 30
 - b. The Courts were concerned only with the power to enact statutes not with their wisdom. Therefore, the primary role of the Court was to interpret the law, as enacted by Parliament, and that entailed giving effect to the legislative intent of Parliament. Thus, the Court was not concerned with 'what ought to be' but with 'what is', 35
 - c. The purpose and effect of the statute or provision impugned must be considered in determining the constitutionality or otherwise of a statute. 40
 - d. The Court must look at the character of the legislation as a whole.
 - e. The provision or statute alleged to contravene the

- Constitution must be juxtaposed against the provision(s) of the Constitution alleged to be impugned to determine the variance. That is to say, a comparative enquiry must be done to determine whether the statutory provision squared out with the constitutional provision.
- f. Finally, within that exercise of seeking to determine the constitutionality of any statutory provision, there was the overarching constitutional obligation to interpret the Constitution itself, in accordance with the constitutional construction imperatives stated in article 259.
7. The obligation on Parliament to enact law to operationalize the removal procedures of governors was stringent and a constitutional necessity. The County Government's Act and, in particular, section 33 thereof were intended to operationalize Chapter 11 of the Constitution on Devolution, and article 181 of the Constitution, respectively. The purpose of both the Act and of section 33 therefore had a sound constitutional underpinning, under stringent time demands.
8. The purpose of section 33 of the County Governments' Act was to give effect to article 181 of the Constitution whose purpose was to foster accountable exercise of power through, *inter alia*, the removal of unfit public officials who had been elected by the people to govern at the county level. The power of self-governance and participation of the people provided for by article 174 (c) of the Constitution had to be read together with article 1 to the effect that people could also indirectly exercise sovereignty and they did that through electing their representatives at the county level who make decisions on their behalf. To that extent the mandate of impeachment had been placed on the peoples' representatives. Thus, to the textual approach of interpreting the Constitution, the power of impeachment lay with the County Assembly and the Senate.
9. The effect of section 33 of the County Governments Act was to ensure that the objectives of article 181 were met in accordance with the Constitution, and to that extent section 33 was *intra vires* the Constitution.
10. Article 1(2) of the Constitution was to the effect that sovereign power belonged to the people and could be exercised either directly or indirectly. Article 1(3)(a) provided that the peoples' sovereign power was delegated to, among other state organs, the "legislative assemblies in the county governments". Further, under article 38 of the Constitution the people exercised their sovereignty directly

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- through the political right to vote by electing their representatives through a secret ballot. Reading these provisions together, there could be no doubt that the elected representatives exercised sovereignty on behalf of the people, through the principle of delegation of power to state organs. In that case, the delegation was to the legislative assembly in the County Government. There was no requirement for a popular exercise of political right to vote in respect of the removal of a governor. 1 5
11. Section 33 was not in any way inconsistent with article 1 of the Constitution. When the county assembly chose to invoke section 33 and to debate the motion on the impeachment of the Governor, and when the Senate followed suit, neither the Embu County Assembly members nor the Senate were acting in contravention of the Constitution, as section 33 was not unconstitutional to that extent. 10 15
12. In interpreting article 10 in light of article 259(4)(b) of the Constitution, it was implied that the list contained in article 10 was an example from an unexhausted generic categorization of the components of values and principles of good governance. Therefore, it could not be construed that every aspect provided for under section 33 would, or should, be expected to contain all the unexhausted components listed as national values and principles. What was required was that for a statute or provision to be compliant with article 10, it had to contain a majority of, or fundamentally similar, components of the listed values and principles within the subject matter under consideration in the provision. In addition, it must not contain provisions with components contradictory to those within the generic ambit of those in the national values and principles list. 20 25 30
13. Whether section 33 of the County Governments Act squared with article 196(1)(b) of the Constitution in respect of the process of removal of a governor; section 33 provided for participation of members of county assemblies and senators. At the Senate there was scope for investigations on the charges levelled against the governor, which could reasonably include inviting witnesses or any other person to appear before it pursuant to the Senate's powers under article 125 to call for evidence. 35
14. Article 196(1)(a), and (2) of the Constitution provided that public participation included: holding of county assembly business in an open manner; holding sittings in public and not excluding the public or media from any sitting except in exceptional circumstances. 40

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Article 196(3) required Parliament to enact legislation, and such legislation on public participation under the Act was contained in Part VIII, sections 87-92 on Citizen Participation in the Act.	1
15. Section 87(d) of the County Governments Act required citizen participation to be based on, <i>inter alia</i> , the principle of affording legal standing to interested or affected persons to appeal from, or review decisions or redress grievances. Section 88(1) thereof provided citizens with the right to petition the county government as follows: “Citizens have the right to petition the county government on any matter under the responsibility of the county government.” Those provisions of the Act would both apply to the situation of a governor facing removal where he, or the citizens, desired to participate in the process.	5 10
16. A consideration to the nature of public participation constitutionally required in respect of recalling of a member of Parliament and member of County Assembly, as compared to that constitutionally provided for removal of a governor showed that, whereas the Constitution of Kenya provided for removal by recall of a member of Parliament through involving the electorate, the County Governments Act did not provide a similar requirement for removal of a governor.	15 20
17. Article 259 of the Constitution provided that the Constitution shall be interpreted in a manner that promoted its purposes values and principles. As such it had to be read as an integral document. In light of the forgoing, section 33 of the Act was not contrary to article 196 of the Constitution, as alleged.	25
18. Looking at what took place prior to the ejection of the Governor, the laid down procedure was followed in his removal. The law provided several opportunities for a governor to be heard before being removed from office. Under section 33 of the Act, where the Senate opted for the formation of a special committee, as was done in the case of the 1 st Petitioner, the governor would have an opportunity to be heard by the special committee and another opportunity to be heard by the full House, where removal had been recommended by the special committee.	30 35
19. The overriding consideration of the principles of natural justice was that the rules were applicable on a case by case basis. The underlying foundation of the principles was that in so far as the <i>audi alteram partem</i> rule was concerned, before a decision was taken, the person to be affected by the decision had to be informed of the impending decision or action, notice of the matters to be taken into account	40

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- against the person should be given, and that person had to be given an opportunity to be heard. In a serious matter like the one before the Court, those rules had to be applied without exception. 1
20. There was no evidence on record to show that the Speaker manifested bias or that a bystander would have formed the opinion that he was biased. By accepting the motion, he was only doing that which the law required him to do. The role of the Speaker in the process was therefore statutory. 5
21. As for the mover of the motion, it was indeed true that he was the one who had moved the initial motion. There was, however, no law barring him from moving a similar motion the second time. Since the earlier removal had been declared null and void, section 33(8) of the Act which barred reintroduction of a removal motion on the same grounds within three months was inapplicable. The motion was therefore properly before the floor of the Assembly and the 2nd Respondent was mandated by the law to preside over the debate of the motion. 10 15
22. Under article 177 of the Constitution, the Speaker of the County Assembly was an *ex officio* member of the Assembly. No nexus had been made between the contempt proceedings which were facing the Speaker and the subsequent motion to impeach the 1st Petitioner. Further the tabling of the motion could not come to the aid of the 2nd Respondent as the matter was already in the hands of the Court and the motion could not have in any way influenced the direction of the contempt of Court proceedings. 20 25
23. The issue that all the members of the initial Special Committee were picked to serve in the second Special Committee that was to investigate the allegations against the Governor was debated at length by the Senate and it was decided that there was nothing wrong in allowing the same members to sit in the new Committee. Although there was nothing untoward in the filling of the Special Committee with members who had dealt with the first removal, the decision by the Senate did not give the impression that justice would be seen to have been done. Such course of action in future was not recommended. Human beings were prone to prejudices and biases and any independent observer could easily reach the conclusion that the 1st Petitioner was not treated fairly by being subjected to the same people who had dealt with him before over the same matter. 30 35
24. In the circumstances, there ought to have been no difficulty in appointing different members of the Senate to the second Special Committee. In any case, a special committee was formed as and 40

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- when the need arose. Under section 33(6)(a) of the County Governments Act a special committee could report that particulars of any allegation against the governor had not been substantiated and that would be the end of the matter. The special committee therefore had a critical role to play in the removal proceedings. The fate of a governor could well depend on the report of the special committee. 1
25. No prejudice was occasioned to the 1st Petitioner as the report of the Special Committee was adopted by an overwhelming majority of the whole House. The Senate had a fixed membership, save for any vacancies, during its lifetime, and where a matter was supposed to be handled by the House then nobody could be heard to say that the matter ought to have been handled by different people for there could only be one Senate at a time. Nothing however, turned on that issue. 5
26. Violation of the law and the Constitution by a governor could be remedied, *inter alia*, through removal or institution of criminal charges. The people of Kenya had to embrace the doctrine of political responsibility. Those voted into public offices should not be heard to say that theirs was only about policy formulation. They were in charge of the institutions they oversaw and when those institutions fail they could be called upon to explain their role in such failures. Although removal from office was still at its infancy, it was a useful tool for ensuring that governors and public officers in general were accountable to the electorate and the public. Waiting for five years to remove an inept, incompetent, corrupt or unaccountable leader could be disastrous and that was why removal could sometimes be a useful tool in appropriate cases. 10
27. The right to public participation was based on the democratic idea of popular sovereignty and political equality as enshrined in article 1 of the Constitution. Because the government was derived from the people, all citizens had the right to influence governmental decisions; and the government had to respond to them. Therefore, participation must certainly entail citizens' direct involvement in the affairs of their community as the people must take part in political affairs. 20
28. Article 196(1)(b) of the Constitution enjoined a County Assembly to facilitate public participation and involvement in the legislative and other business of the assembly and its committees. Whereas the Constitution did not expressly task the County Assembly with the role of removal of a Governor, article 181(2) of the Constitution empowered Parliament to enact legislation providing 25
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- for the procedure of removal of a county governor on the grounds specified under the said article. Pursuant to the said provision Parliament enacted the County Governments Act and in section 33 the procedure for removal of a Governor was to be initiated in the County Assembly. Accordingly, the removal of a governor was one of the businesses statutorily assigned to the County Assembly. 1 5
29. The question was not whether the public ought to participate in the process of the removal of a governor but to what extent should that participation go. Some level of public participation had to be injected into the process in order to appreciate the fact that a governor was elected by the County, and in order to avoid situations where an otherwise popular governor was removed from office due to malice, ill will and vendetta on the part of the Members of the County Assemblies. 10 15
30. An opportunity had to be availed to the voters in a County to air their views on the process of the removal of their Governor before a decision was arrived at either way. To completely lock out the voters from being heard on such important matter as the removal of their Governor would be contrary to the spirit of article 1(2) of the Constitution. Whereas it was not possible that each and every person in the County be heard on the issue, those who wished to put across their views on the impeachment ought to be allowed to do so though the ultimate decision rested with the County Assembly. 20 25
31. Public participation ought to commence from the time of the notification of the motion to remove the Governor by a member to the Clerk which notification was the mandate of the Assembly. That was when the removal process crystallized. However, it was clear that the period provided between the notification and the time for debating and the determination of the motion by the Assembly in the Standing Orders was very limited. It was therefore not plausible to expect that the mode of public participation in such circumstances would be commensurate with that of the enactment of legislation. 30 35
32. In making a determination whether the County Assembly complied with its duty to facilitate public participation, the Court would consider whether what the County Assembly had done was reasonable in all the circumstances. The factors that would determine reasonableness would include the nature of the business conducted by the County Assembly and whether there were timelines to be met as set by the law. That would be the ultimate determination on the method of facilitating public participation. 40
33. For purposes of the impeachment proceedings, public participation

- ought to relate to the impeachment proceedings themselves. It could not be justified on the basis of events that took place before the said proceedings were formally commenced by notice to the Clerk of the Assembly. Therefore the prior processes of investigations of the alleged complaints by the farmers could not constitute public participation for the purposes of the impeachment process. 1 5
34. From the averments by the parties which were before the Court, the allegation made by the Petitioners that they were not afforded an opportunity to participate in the removal proceedings had not been proved. The Court could not stretch the averments in the supporting affidavit set out to mean that the respondent's infrastructure stated in paragraph 32 of the replying affidavit was not adhered to in the case. In matters such as the one before the Court, evidence was contained in the affidavit rather than in submissions. 10 15
35. Although the Standing Orders of the County Assembly of Embu provided for the removal by impeachment, the Constitution and the Act did not mention impeachment in reference to governors. The two documents only referred to removal from office. A closer look at the Constitution explained why the drafters of the Constitution stuck with the words 'removal from office' in the case of governors. 20
36. There were two provisions in the Constitution for the removal of the President. Under article 144, the President could be removed from office on grounds of incapacity whilst under article 145; he could be removed by impeachment. However, in the case of a Governor, the grounds of removal were lumped together under article 181. 25
37. A person could not be blamed, accused or prosecuted for being physically or mentally unable to discharge the duties of office hence the avoidance of the word 'impeach' in respect of the removal of county governors from office. That also explained why Parliament provided under section 33(9) of the Act that removal of a governor from office on the grounds of physical or mental incapacity would be done in accordance with article 144 of the Constitution with necessary modifications. It would hence not be wrong to say that a governor had been removed by impeachment if the removal was not on the ground of physical or mental incapacity to perform the duties of office. 30 35
38. The threshold for removal from office of a governor was provided under the Constitution and the County Governments Act. The Senate Standing Orders and the standing orders of various county assemblies made further provision on the issue. Section 33(1) of the 40

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- Act provided that to move a motion, it had to be supported by at least a third of all the members of the County Assembly. Thereafter, during the vote, the motion had to be supported by at least two-thirds of all the members of the County Assembly. At the Senate, section 33(7) of the Act provided that for removal of a governor to succeed it must be supported by a majority of all members of the Senate. 1 5
39. Looking at the applicable laws in various jurisdictions it was clear that other jurisdictions had provided for a more stringent procedure for impeachment. For example the inclusion of the Chief Justice in the Philippines in the impeachment panel; and the Constitution by the Chief Judge of an independent impeachment panel in Nigeria. Ideally, that should be the case as removal from office had the potential to ruin a person's career and reputation spanning many years. The Kenyan laws appeared to have left that issue entirely in the hands of the politicians – the County Assembly and the Senate. It was judgment by peers. On account of that, it was imperative that the judiciary exercised greater vigilance in its supervisory role. 10 15
40. *Black's Law Dictionary*, 9th Edition at page 1619 defined threshold in respect to parliamentary law as "the number or proportion of votes needed for election". Hence the numbers constituting the threshold for the removal counted for something. 20
41. Gross violation of the Constitution or any other law was a ground for removal from office as provided under article 181(1)(a). An interpretation of article 181 of the Constitution as read with section 33 of the County Governments Act showed that removal of a Governor was a constitutional and political process; it was a *sui generis* process that was quasi-judicial in nature and the rules of natural justice and fair administrative action ought to be observed. The impeachment architecture in article 181 of the Constitution revealed that removal of a Governor was not about criminality or culpability but was about accountability, political governance as well as policy and political responsibility. 25 30
42. The Court had a supervisory role to play in the process of the removal of a governor. So long as the Constitution remained as it was, the Court had a duty to check the constitutionality and legality of anything done by Parliament (National Assembly and Senate) and the county assemblies. The Court had to zealously and firmly guard that power for to do otherwise would amount to subverting the Constitution by abdicating a clear constitutional responsibility. In the same breath, the Courts could not take over the roles clearly 35 40

- reposed in the other arms of government by the Constitution as that would amount to an overthrow of the Constitution in the pretext of exercising supervisory powers. A delicate balance had to be struck in order to attain harmonious and smooth operation of the engine of governance. The Court must not severely restrict the constitutional mandates of the other state organs to the extent that those organs could not execute their work. Such restrictions could result in the Constitution looking like a green and beautiful tree that bore no fruit. 1 5
43. The powers exercisable by the Court were powers of review and such powers could only check compliance with the Constitution, the law, the Rules of natural justice and the rationality of impugned decisions. Where the decision of the impeaching organs was contrary to common logic, then the Court could quash such a decision for being unreasonable. 10 15
44. The conduct of the County Assemblies and the Senate should only raise the antenna of the Court if they did something perverse to normal conduct to the extent of perplexing and agitating the mind of the ordinary man. 20
45. There were clear steps provided in the process leading to the removal of a governor. That process begun at the county level then proceeded to the Senate. Where the motion for removal had succeeded in the County Assembly, it did not necessarily mean the Senate would automatically approve the removal. In fact a careful reading of the relevant laws showed that the actual trial was by the Senate. Under article 96(1) of the Constitution the role of the Senate was to represent the counties, and protect the interests of the counties and their governments. In the removal of a governor, the County Assembly and the Senate were performing their functions under the Constitution and the County Governments Act. 25 30
46. The Courts had to be very careful before they intervened in matters that were properly in the domain of other state organs. The Courts could only intervene where constitutional issues were raised. 35
47. The Court had to interrogate the facts in order to determine whether there was nexus between the Governor and the alleged gross violations which would call for a substantive interrogation of the charges and evidence leading to the removal in order for the Court to make any meaningful and legitimate intervention. However, the Court was not supplied with material which would enable it to conduct interrogation, and there was the danger of the Court speculating as to whether what led to removal of the Governor met 40

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- the threshold. For example, the evidence which was tabled before the investigations committees was not availed to the Court. In addition, evidence such as was availed to the Senate and which was referred to in the Hansard was not availed before the Court. That was the nature of evidence which might have enabled the Court to deal with the issues of nexus and threshold. 1
48. A perusal of the report showed that the Senate analyzed the evidence put forward in support of each allegation. The Senate also considered the 1st Petitioner's written answer to the charges before making its determination. 5
49. As had been held by the Court of Appeal, the standard of proof required for removal of Governor was above a balance of probability but below reasonable doubt noting that the threshold for removal of a governor involved "gross violation of the Constitution". If that was so, then the Senate had attained that standard. 10
50. It was apparent that the Senate understood the constitutional threshold that had to be met hence there was no reason to fault the Senate in its conclusion. A scrutiny of the Report of the Special Committee on the removal of the 1st Petitioner found the same to be satisfactory. 15
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Petition dismissed each party to bear its costs

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- 25
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 2. *Center for Rights Education and Awareness (CREW) & another v John Harun Mwau & 6 others* Civil Appeal No 74 of 2012 – (Followed)
 3. *Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others* Petition No 454 of 2012 – (Explained) 30
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2. <i>Inakoju & 17 others v Adeleke & 3 others</i> (2007) 4 NWLR (Pt1025) 423 – (Explained)	
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1. Garner, BA., (Ed) (2009) <i>Blacks Law Dictionary</i> St Paul Minnesota: West End Publishers 9 th Edn pp 820, 1562, 1619	
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4. Constitution of Kenya, 2010 articles 1(2)(3)(a); 2(1)(2)(5); 3(1)(2); 4(2); 10(1); 35; 38(1); 47; 59(4); 73(1)(a)(iv) -78; 93(1); 96(1); 98(1)(e); 117; 118(1)(b); 127(6)(d)(e); 145; 156(4)(b); 165(2)(d)(ii)(3)(6)(i); 117; 144; 145; 174(a)(c); 176(1); 177; 178; 179(4); 180; 181(2); 182; 192(1)(b); 196(1)(b); 200(2)(c)(d); 201; 226; 227; 232; 238; 258; 259(ii); 261(7) – (Interpreted)	25
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3. Universal Declaration of Human Rights (UDHR), 1948 article 21	
Advocates	
1. <i>Mr Paul Muite</i> , Senior Counsel, <i>Mr Nyamu</i> , <i>Mr Ndegwa</i> and <i>Mr Njoroge</i> for the Petitioners	15
2. <i>Mr Nyamu</i> with <i>Mr Njoroge</i> for the Petitioners in Petition No 7 of 2014	
2. <i>Mr Ndegwa</i> for the Petitioners in Petition No 8 of 2014	
3. <i>Prof T Ojienda</i> , Senior Counsel, <i>Mr Njenga</i> and <i>Ms Jane Mugambi</i> for the 1 st and 2 nd Respondents	20
4. <i>Mr Njoroge</i> and <i>Miss Thanji</i> for the Interested Party (PSC)	
5. <i>Mr Chahale</i> and <i>Miss Tallam</i> for the <i>Amicus</i> (CAJ)	
February 12, 2015, the following Judgment of the Court was delivered	25
Introduction	
1. The historic impeachment of the Embu County Governor, Hon Martin Nyaga Wambora (“The Governor”), has been fraught with litigation at every turn. The first impeachment proceedings against the Governor occurred pursuant to a resolution for his removal in the Embu County Assembly passed on 29 th January, 2014. This was swiftly followed by proceedings in the Senate, resulting in a resolution of impeachment published in Gazette Notice number 1052 of 17 th February, 2014.	30
2. By a judgment dated 16 th April, 2014, in Consolidated Petition No 3 of 2014 (formerly Embu Petition No 1 of 2014), Petition No 4 of 2014 (formerly Pet No 51 of 2014 (Nairobi), Judicial Review No 6 of 2014 (formerly Nairobi JR Misc Applic No 17 of 2014) and Misc Applic No 4 of 2014, this Court (Ong’udi, Githua and Olao, JJs) invalidated, in entirety, the first impeachment proceedings against the Governor. He was consequently restored to office as	35
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- Governor. Immediately following the judgment of the Court, a second impeachment motion against the Governor, was commenced in the County Assembly of Embu on 16th April, 2014. This was followed by a confirmatory resolution in the Senate. 1
3. The Consolidated Petitions herein were instituted in reaction to the second impeachment motion against the Governor. Both Petition Nos 7 and 8 of 2014, herein, were filed together with Notices of Motion on 30th April 2014, at Embu under Certificate of Urgency. At the hearing of the certificates, Ong'udi J, recused herself and forwarded both matters to the Principal Judge. Following interlocutory hearings of the motions, Mwongo, PJ, declined to issue any orders in Petition No 7, but issued a conservatory order in Petition No 8. It is by virtue of that order that Hon Martin Nyaga Wambora, the 1st Petitioner herein, still holds office as the Governor of Embu today. Subsequently, the two Petitions were consolidated and the Chief Justice empanelled this bench to hear them on merit. It is these Consolidated Petitions that are for determination by this Court. 5 10 15
4. The basis of the impeachment presently complained about, is a replication of the first impeachment process. The substance of the facts giving rise to the Complaints allegedly occurred in 2013. The County Government of Embu had advertised tenders for the supply of maize, and had procured services to face-lift Embu stadium. According to the complaint in the County Assembly, the maize was allegedly below quality and did not germinate. Where it did grow, such growth did not exceed more than 20 percent. As for Embu Stadium, it was alleged that the amount spent on it far exceeded what had been budgeted for, and the refurbishment was unsatisfactory. The Members of the County Assembly found this inexplicable, as the project had been taken over from the Ministry of Works, which had done some of the works. 20 25 30
5. The County Assembly had on the 3rd January 2014, summoned the County Secretary to appear on 6th January 2014, before the joint committees on Agriculture, Livestock, Fisheries and Co-operatives; Infrastructure; and Youth and Sports. She was to answer queries over seeds supplied to farmers, together with clarifying issues concerning the stadium renovations. Thereafter, the County Assembly recommended her suspension to the Governor pending investigations by the Ethics and Anti-Corruption Commission. The 35 40

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- Governor declined to act as recommended. 1
6. Triggered, *inter alia*, by the Governor's refusal to act on the County Assembly recommendation, an impeachment motion was tabled in the County Assembly on 16th January, 2014. It was premised on the grounds that the Governor's conduct amounted to gross violation of the Constitution and an abuse of office. This started off the first impeachment process, which was concluded by the Kerugoya High Court's decision, mentioned above, invalidating the impeachment, and reinstating the Governor into office. 5 10
7. Hot on the heels of the delivery of the said judgment at Kerugoya, a Notice of Motion dated 16th April, 2014 – the same date the judgment was delivered – was filed in the County Assembly of Embu. The Motion was for the removal of the Governor, and was approved by the Speaker on the same day. A notice thereof was given on 22nd April 2014. The Governor was served with a notice requiring him to attend the Assembly on 29th April, 2014, to defend himself. He, however, failed to appear when the motion was due to be discussed in the County Assembly. On 29th April, 2014, an impeachment resolution was passed by the County Assembly. Communication thereof was forwarded the next day to the Senate, which went ahead with the next phase of the impeachment proceedings under its own procedures. 15 20
8. In the meantime, the Petitioners filed Petition Nos 5 and 6 of 2014 in the Embu High Court, seeking to stop discussion of the motion. They withdrew these soon after the County Assembly passed the resolution to impeach the Governor in the second impeachment proceedings. The details of these Petitions have not been indicated. 25 30
9. After grant of leave to amend the Petition, and allowing for responses, it was mutually agreed that all parties do file written submissions together with lists and copies of authorities. The oral hearing was held on 6th November, 2014. 35
- The Parties
10. The 1st Petitioner is the Governor of Embu elected pursuant to article 180 of the Constitution. He will hereinafter be referred to variously as the "1st Petitioner" or "Mr Wambora" or "the Governor". The 2nd-33rd Petitioners are male and female citizens, registered as voters in Embu County. They will hereinafter be referred to as "the Petitioners". The Petitioners were represented by Mr Paul 40

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- Muite, Senior Counsel, Mr Nyamu, Mr Ndegwa and Mr Njoroge advocates. 1
11. The 1st Respondent is the County Assembly of Embu established pursuant to article 176(1) of the Constitution and is referred to herein as ‘the County Assembly’. 5
12. The 2nd Respondent is the Speaker of the County Assembly of Embu (“the Speaker”) established pursuant to article 178 of the Constitution. The 1st and 2nd Respondents were represented by Prof T Ojienda, Senior Counsel, Mr Njenga and Ms Jane Mugambi, advocates. 10
13. The 3rd and 4th Respondents are the Speaker of the Senate and the Senate, established under article 93(1) and article 98(1)(e) of the Constitution respectively. They neither filed any pleadings nor did they appear in these proceedings at any stage. They were unrepresented. 15
14. The Parliamentary Service Commission (hereinafter the ‘PSC’) was admitted as an Interested Party. It is established pursuant to article 127 of the Constitution. It was represented by Mr Njoroge and Ms Thanji, advocates. 20
15. The Commission on Administrative Justice was admitted as a friend of the Court and shall hereafter be referred to as the ‘Amicus’. It is established under article 59(4) of the Constitution and the Commission on Administrative Justice Act, 2011. Its counsel on record was Mr Chahale, advocate, who did not appear at the oral hearing. 25
- The Amended Petition 30
16. In the Amended Petition dated 23rd May, 2014 and supported by the affidavit of Aloise Victor Njagi sworn on the same date, the Petitioners sought the following reliefs from this Court:
- “a) A declaration that the Petitioners and Members of the Public are entitled the right to participate in the process of removing the Governor of Embu County from office and the same has been violated. 35
 - b) That the Court be pleased to establish the required threshold of the members of public who should participate under article 118(1)(b), article 174(a) and (c) and article 196(1)(b). 40
 - c) That the honorable Court do make a declaration that Public

Participation is a Pre-condition to proceedings for removal of a governor under article 181 of the Constitution.	1
d) A declaration that the act of removing a County Governor is not an exclusive affair of the county assembly and the Senate.	5
e) Declaration that the resolution passed by the County Assembly on 29 th April, 2014 is null and void for having been passed by the County Assembly in contravention of County Assembly of Embu Standing Order No 86 and the Senate <i>in toto</i> contravention of Standing Order No 92 of the Senate Standing orders.	10
f) Declaration that the impeachment passed by the Senate pursuant to a resolution passed by the County assembly of Embu on 29 th April, 2014 is null and void.	15
g) Declaration that section 33 of the County Government Act is unconstitutional for being in conflict with and flying over the face of article 1, article 2(1) and (2), article 10, article 118(1)(b), article 174(a) and (c) and article 196(1)(b) for failing to allow public participation and involvement in the removal of a county Governor.	20
h) That the Honorable Court be pleased to issue an order of <i>certiorari</i> to remove to the High Court and quash the resolution passed by the County Assembly of Embu dated 29 th April, 2014 and the Senate on the 13 th May 2014 to remove (the) 1 st Respondent (sic) as the Governor of Embu County.	25
i) That the Honorable Court be pleased to issue an order of <i>certiorari</i> to remove to the High Court and quash the resolution passed by the Senate dated 13 th May, 2014 to impeach the Governor of Embu County.	30
j) A declaration that the threshold of the impeachment of a Governor as envisaged (<i>sic</i>) under article 181 of the Constitution were read together with other provisions (<i>sic</i>).	35
k) A declaration that the Petitioners herein are entitled to the full protection of their right to information and the same right has been violated.	
l) Costs of the suit.”	
17. To assist the Court, the Petitioners set out at Paragraph 92 of the Amended Petition, what they styled as the “Questions for interpretation” to be answered by the Court as the main, or part of	40

the key issues for determination. These were set out in the Amended Petition as follows: 1

- “92. The Petitioners proposes for a (*sic*) Constitutional interpretation of the following questions. 5
- a. Whether the action of removing and impeaching the Embu County Governor without involving the Petitioners violates the Petitioners’ rights” If so what is the expected threshold of the number of members of public who should participate in the removal process and what criteria would be applied in facilitating the public participation” 10
 - b. Whether the action of removing and impeaching the Embu County Governor without involving the members of the public and the Petitioners violated their sovereign power to directly participate in the removal and impeachment process” 15
 - c. Whether the act of removing a County Governor ought to be an exclusive affair of the county assembly and the Senate” 20
 - d. Whether the resolution passed by the County assembly on 29th April, 2014 in toto disregard of the Embu County Assembly Standing Order No 86 Order and Senate Standing Order No 92 is valid and capable of initiating the removal of the Governor” 25
 - e. Whether if the answer to the question (d) above is in affirmative, whether the said motion can form the subject of debate in the Senate and its committee under section 33(3) of the County Government Act No 17 of 2012” 30
 - f. Whether section 33 of the County Government Act is unconstitutional for being in conflict with and flying over the face of article 1, article 2(1)(2), article 10, article 118(1)(b), article 174(a) and (c) and article 196(1)(b) for failing to allow public participation and involvement in the removal of a County Governor” 35
 - g. Whether the petitioners’ right to information under article 35 has been violated”
 - h. Whether principles of natural justice have been violated by both the County Assembly and the Senate” 40
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The Petitioners' Case	1
18. It was the Petitioners' case that the removal and impeachment of Mr Wambora by the Respondents is inconsistent with the provisions of articles 1, 2(1)(2)(5); 3(1)(2); 4(2); 10; 118(1)(b); 174(a) and (c) and 196(1)(b) of the Constitution and those rights as enshrined under the Bill of Rights; in particular articles 38(1) and 35.	5
19. In opening their submissions, the Petitioners questioned the propriety of the appearance of the PSC in the suit as it had not been sued. They argued that in the circumstances, there were limits to its participation in the proceedings.	10
20. The Petitioners' opposition to the inclusion of the PSC in these proceedings was also based on the fact that the Senate had not entered appearance in the proceedings. It was their submission that the Constitution establishes the PSC with responsibility for matters under article 127(6) of the Constitution. As such, the actual legislative functions of the Senate are not part of the work of the PSC. Thus, the Senate should have been the proper party appearing and not the PSC.	15 20
21. The Petitioners also argued that the petition was necessitated by the injustices meted on the Governor. Counsel stated that the impeachment proceeded despite there being no nexus between the alleged violations complained of and the Governor's specific actions or conduct. It was the Petitioners' submission that the Governor is not the accounting officer for the County under either article 226 of the Constitution or section 149 of the Public Finance and Management Act, 2012 or the Public Procurement and Disposal Act, 2005.	25 30
22. Counsel pointed out that the High Court in <i>Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others</i> , [2014] eKLR (Kerugoya, Petition No 3 of 2014) (hereinafter "Wambora 1"), made a finding that in order to remove the Governor from office, there has to be a nexus between the Governor and the conduct complained of. The Petitioners noted that the Court also found that there has to be gross violation of the Constitution or other written law by the Governor. It was their submission that the Court held that it was for this Court to make the decision on whether the alleged conduct was a gross violation of the Constitution.	35 40
23. The Petitioners submitted that the basis for the charges against	

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- the Governor was tenders issued by officers of the County; that the Governor had no role in procurement and tendering issues; that there were specific officers of the County who are vested with the responsibility and legal obligation to handle procurement and related matters as accounting officers; that there was no basis in law for his removal since in any event investigations into the procurements had not found him liable; and consequently, that the threshold required for his impeachment had not been achieved. 1 5
24. With regard to the criteria and threshold for removal of the Governor, the Petitioners invited the Court to consider the Court of Appeal decision in *Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others* [2014] eKLR (Nyeri, Civil Appeal No 21 of 2014) (hereinafter the “Wambora 1 Appeal”). The Court there held, Counsel submitted, that there must be proof of personal wrongdoing by the Governor. It was counsel’s further submission that the seriousness with which impeachment is treated in law is exemplified by the fact that grounds for removal of a Governor under article 181 of the Constitution is in *pari materia* with the criteria for the removal by impeachment of the President under article 145 of the Constitution. The allegations with which the Governor was charged were not serious in those terms. 10 15 20
25. It was submitted for the Petitioners that what is ‘gross violation’ amounts to a serious crime against the law, and is an issue of law for determination by the Court. Such serious crime must be clearly demonstrated. It was counsel’s submission that the Court of Appeal in the *Wambora 1 Appeal* defined ‘gross violation’ to include proof of the personal involvement of the Governor in the subject matter of the charge. 25 30
26. Counsel faulted the High Court in *Wambora 1* for not making a determination on the question whether there was a nexus in the acts alleged to have been committed and the involvement of the Governor. The 1st Petitioner’s case was that he was not involved in the tendering and procurement process, as there are specific officers who deal with such aspects as provided under section 149 of the Public Finance and Management Act. It was contended that the person who should have been summoned and charged was the accounting officer or the County Secretary, who are the responsible officers. The Court was also told that investigations pertaining to the issue of the seedlings and the stadium were carried out, and he 35 40

- was not found culpable. 1
27. The Petitioners asserted the High Court’s jurisdiction to interfere with the actions of the County Assembly and Senate. They submitted that although the Court of Appeal in *Wambora I* Appeal held, under the core function test, that no organ should interfere with the functions of the other, the High Court as regards supervisory jurisdiction, derives its mandate from article 165(3) and article 165(6). Thus, it was submitted that the removal of a Governor is a political as well as a quasi-judicial process. Accordingly, the petitioners argued, where the High Court exercises its supervisory jurisdiction, it cannot be said to be interfering with other organs under the separation of powers prism. It was contended that supervisory jurisdiction is exclusive to the High Court and when exercised, it does not amount to interference with other state organs. 5 10 15
28. On public participation, it was the Petitioners’ contention that they were entitled to fully participate in the removal and subsequent impeachment of the Governor by virtue of articles 1(2) and 10 of the Constitution. In particular, it was contended that the removal and impeachment of the Governor amounts to “any other business” of the county assembly as envisaged under article 196(1)(b) of the Constitution. Further, that under article 174(a) and (c), of the Constitution, in terms of the promotion of the objects of devolution, accountable exercise of power and enhancing self-governance and participation of the people in the exercise of state power, the Petitioners were entitled to directly participate in the respondents’ business, whatever the nature of such business. 20 25
29. It was submitted that the right to public participation consists of at least two elements: First, a general right to participate in public affairs, including engaging in public debates and dialogue with elected representatives at public hearings, which necessarily demands that citizens have the essential information and effective opportunity to exercise the right to public participation. Secondly, it involves the more specific right to vote or to be elected. 30 35
30. It was argued that the level of public participation expected is that set out in the case of *Robert N Gakuru & others v The Governor Kiambu County* Petition No 532 of 2013. In that case, Odunga, J stated that county assemblies are obliged in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively, and ought to take all reasonable 40

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- measures to ensure that as many of their constituents are aware of the intention to pass legislation. 1
31. It was also submitted that the evidence submitted by the 1st Respondent showing that a committee had previously gone round talking to farmers, amounted to no more than a mere investigation. At that point, the impeachment process had not commenced, and the committee's actions did not amount to public participation in the impeachment process itself. 5
32. The Petitioners submitted that as no affidavit had been filed to show that there was public participation of the people of Embu County, the exercise fell afoul of the principles of good governance. Counsel cited the case of *Doctors for Life International v The Speaker of the National Assembly & others* (CCT 12/05) [2006] ZACC 11; 2006 (12) BCLR 1399(CC); 2006 (6) SA 416(CC) (17 August 2006) in support of the necessity of public participation. 10 15
33. It was also averred that lack of public participation infringed the Petitioners' civil and political rights under articles 1, 3 and 25(a) of the International Convention on Civil and Political Rights and Article 20 of the African [Banjul] Charter on Human and Peoples' Rights. 20
34. Additionally, the Petitioners submitted that section 33 of the County Governments Acts, 2012, (hereinafter referred to as the Act) which sets out the procedure for the removal of a governor by the Senate and County Assembly, was unconstitutional. It was argued that the provision is in conflict with article 1, article 2(1) (2), article 10, article 118(1)(b), article 174(a) and (c) and article 196(1)(b) of the Constitution. 25 30
35. The Petitioners asserted that section 33 of the Act:
 "...lacks an integral part of the letter and spirit of the Constitution";
and that the cited Articles of the Constitution create: 35
 "...an obligation and duty on the part of the senate and the county assembly to facilitate public participation and involvement in the legislative and other business that fundamentally affect their socio, economic or political affairs". 40
36. It was the Petitioners' case the said section 33, as enacted, denies them the right to participate in matters pertaining to the removal

- of the Governor. As such the Petitioners' sought a declaration that section 33 of the Act is unconstitutional. 1
37. On the right to information, it was the Petitioners' case that according to article 35 of the Constitution, they are entitled to access information relating to the running of the affairs of the 1st Respondent and held by the state regarding the impeachment, which information should have been widely published. This right was violated by the County Assembly, which did not avail such access. It was counsel's submission that the state must publish and publicize any information affecting the nation. This, it was submitted, must be done through a recognized instrument such as the Kenya Gazette. The Petitioners' contention was that the mere fixing of notices on the notice board was insufficient and did not amount to publication. 5 10
38. The Petitioners contended that during the second impeachment process, there was bias. This was argued to be based on two facts: The first was that the Speaker of the County Assembly was facing contempt proceedings at the time of approving the motion for removal of the Governor and was thus biased. The second was that during that impeachment process before the Senate, the Special Committee constituted comprised of the same members as had sat in the first impeachment process. This, it was argued, was unfair and unreasonable since those very members had in the earlier impeachment proceedings found the Governor liable. It was urged that this contravened article 47 of the Constitution. Further, that the principle of *nemo iudex in causa sua* is applicable where there is a real likelihood of bias. The Petitioners contended that, bias was clearly manifested in the Senate report which was not distinct from the one made in the earlier impeachment proceedings. Counsel cited *Halsbury's laws of England* 4th Edition pages 86 to 90 on the issue of bias. 15 20 25 30
39. For all these reasons the Court was urged to nullify all the proceedings for removal of Mr Wambora from office as Governor of Embu County. 35
40. It was contended that the proceedings before the County Assembly were conducted in contravention of the *sub judice* rule since there were court proceedings relating to the issue before the said Assembly. 40
- The Respondents' Case
41. Counsel, for the 1st and 2nd Respondents, relied on the affidavit

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- of Hon. Justus Kariuki Mate, the Speaker of the County Assembly of Embu, who is also the 2nd Respondent herein. Deposed on 3rd June, 2014, on his own behalf and on behalf of the 1st Respondent, the affidavit outlined the constitutional and statutory foundation of the County Assembly of Embu, and how its membership is constituted. He pointed out that the Speaker is an *ex officio* member of the County Assembly. 1 5
42. The deponent further averred that the role of the County Assembly included exercising an oversight role over the County Executive and any other County executive organs. The object was to ensure there was accountability and transparency in the execution of the functions of the County executive and in the application of the resources of the County Government. He outlined the functions of the Speaker of the County Assembly under article 178 of the Constitution as essentially to preside over the sitting of the County Assembly and to facilitate the orderly and effective sitting of the County Assembly of Embu. 10 15
43. The Respondents noted that the roles of the members of a County Assembly are set out under the provisions of the Act, which include the following:- 20
- “a) Maintain close contact with the electorate and consult them on issues before or under discussion in the County Assembly. 25
 - b) Present views, opinions and proposals of the electorate to the County Assembly.
 - c) Provide a linkage between the County Assembly and the electorate on public service delivery.” 30
44. The Speaker highlighted provisions that enjoin the County Assembly to consider matters of accountability and transparency of the County Government; the proper application of County resources for the better welfare and provision of the electorate at the grass roots level; and to take appropriate action to ensure that the resources available to the people were applied optimally and transparently. In realising these provisions, he stated, the County Assembly is provided with various powers in law through which it exercises its oversight authority over the County executive and the various organs and offices in the County Government structure which included:- 35 40
- “i. Approval of nominees for appointment to County public

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offices as may be provided in the County Government Act.	1
ii. Approval of the budget and the expenditure of the County Government as provided under the provisions of section 8(c) of the County Government Act.	
iii. Approval of borrowing by the County Government as provided under section 8(d) of the County Government Act.	5
iv. Approval of County development planning	
v. Approve the establishment or abolition of the offices in the County public services as provided under section 62(2) of the Act	10
vi. Approving County Executive members.”	
45. In his affidavit, the Speaker averred that the County Assembly, in its oversight role, is given power in law to remove various officers within the County government structure. These included powers for:	15
“a) Removal of speaker under section 11 of the County Government Act	
b) Removal of members of the executive committee under section 40 of the Act	20
c) Removal of the governor and Deputy Governor under Article 181 of the Constitution as read together with section 33 of the Act.”	
46. According to him, the County Assembly is mandated in law to establish committees for such general or special purposes as it considers fit and necessary for the efficient execution of its constitutional mandate. In so doing, the County Assembly of Embu has constituted, among others, a Committee for Agriculture, Fisheries, Livestock and Co-operatives as provided for under Standing Order 191(5) of the Embu County Assembly for the following purposes:-	25
“a) To investigate, inquire into and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the departments.	30
b). To study and review all the County legislations referred to it.	35
c). To study the program and policy objectives of the departments and the effectiveness of the implementation.	
d). To investigate and inquire into all matters relating to the departments as it may deem necessary and may be referred to them by the County Assembly	40

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- e). To vet and report on all the appointments where the Constitution or any law requires the County Assembly to approve. 1
- f). To make reports and recommendations to the County Assembly as often as possible including the recommendation of proposed legislation.” 5
47. The Speaker averred that a first motion of impeachment was filed on 16th January, 2014, which process had proceeded through the Senate, and an impeachment decision was passed. However, the impeachment had subsequently been nullified by the High Court. 10
48. Consequently, the process of removal of the Governor was again commenced on 16th April 2014, when he received a new Notice of Motion for the removal of the Governor from office. After confirming that there was no pending suit on the matter and that there was no order issued by the Court restraining the County Assembly from being seized of the motion, he approved the motion. Notice of the Motion, he said, was presented to the Assembly by the mover, Hon Ibrahim Swaleh, on the 22nd April 2014. 15
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49. He averred that, applying the guidance of this Court in its judgment in *Wambora 1 (supra)*, he directed that a notice of the motion be served on the Governor for his attendance on the 29th April, 2014, when the motion was to be moved. However, when the motion was served on him, the Governor made efforts to have the matter amicably settled, and there was extensive discussion of it in public fora and the media. Despite the 1st Petitioner’s efforts to settle the impeachment amicably, the motion was moved on 29th April 2014 before the Assembly where the 1st Petitioner was called upon to respond to the allegations levelled against him. 25
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50. According to the deposition, the Governor failed to appear before the Assembly and instead filed Embu High Court Petition No 5 of 2014 *Hon Martin Nyaga Wambora v The County Assembly of Embu & others* seeking interim orders to stop the County Assembly from deliberating on the Motion. This time the Court did not grant any conservatory orders and consequently, the suit together with Embu High Court Petition No 6 of 2014, which had been filed by the 2nd Petitioner and others, were withdrawn. 35
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51. The deponent further asserted that Petitions Nos 5 and 6 were filed with the sole intention of pre-empting and frustrating the

- debate on the removal motion before the County Assembly, and that when they did not yield any conservatory orders as intended, the petitioners withdrew the Petitions. The Motion at the County Assembly was passed and the decision communicated to the Senate. Subsequently, the Senate constituted a special committee to hear the charges against the 1st Petitioner; that a hearing was conducted on 11th May 2014; that parties appeared in the company of their advocates; and that after the hearing, the Senate found that three of the charges against the 1st Petitioner had been substantiated and on 13th May 2014, by a near unanimous vote, the Senate proceeded to remove him from office by way of impeachment. 1 5 10
52. With regard to the complaint that the Governor was not procedurally removed, the Respondents contended that this petition should be dismissed as unmeritorious for the reason that the Petitioners failed to demonstrate that there was any breach of the procedure in respect of the removal of the Governor by way of impeachment. The Petition, they argued, had been brought by way of collateral attack to the findings against the Senate. They asserted that the Governor was twice afforded the opportunity to raise issues in his defence against the charges at the County Assembly of Embu on 29th April 2014, and before the select committee of the Senate on 11th May, 2014. On both occasions, however, he failed to appear either by himself or to lead witnesses to refute the allegations made against him. The County Assembly of Embu and the Senate were both guided by the decision of this Court in *Wambora 1* with regard to the applicable procedure and the role of the Assembly and the Senate in their mandates. 15 20 25
53. The Respondents asserted that this Petition was effectively an appeal from the decision of the County Assembly of Embu and the Senate, which this Court had no jurisdiction to determine. He added that the threshold required for removal of a Governor was expressed by the number of votes required to pass such a resolution, which included a two-thirds majority at the Assembly and a majority at the Senate. 30 35
54. The Respondents submitted that the threshold required in the removal of the Governor under article 181 of the Constitution was realised since the charges were based on well documented evidence that was availed to both to the County Assembly and the Senate; that the Governor's written responses to the charges were found to 40

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- be inadequate; and that there was no jurisdiction for appeal to this Court against a finding of the County Assembly and Senate under the doctrine of separation of powers; that the findings of the County Assembly and Senate were final and binding upon all parties herein; and that there was no basis for the Court to interfere. 1
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55. On this submission, the Respondents relied on the case of *Doctors For Life (supra)* which discusses the law on separation of powers, where it was held, *inter alia*, that:
- “...what the Court should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligations that parliament is required to fulfil in respect of the passage of laws, on one hand and respect which they are required to accord to other branches required by the principle of separation of powers.” 10
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56. It was the Respondents’ submission that the County Assembly and the Senate by virtue of their composition and political orientation are the best-placed persons to make a proper decision or judgment with regard to the applicable standard and threshold for the removal of a governor. They argued that impeachment by its nature is a quasi-judicial and political question. This explained the rationale as to why the mandate to exercise that jurisdiction was properly vested in the County Assembly and Senate. As such, the Court has no jurisdiction to take out a merit review on such a process by seeking to replace the opinion of those two organs with its own. 20
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57. The Respondents further argued that the Governor had failed to demonstrate any breach of his constitutional rights in the process aforesaid, having been given notice to defend himself; that he failed to offer any substantive defence to the charges levelled against him; and that the rights pleaded by the petitioners in the present petition were not absolute rights since they were limited by the very Constitution that provides for them – including providing for the removal of a governor. 30
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58. It was urged that article 181 of the Constitution sat on the premise that even where a County Governor is validly elected under the provisions of article 180 and is seized of a bona fide right under article 38 to hold a political office to which he has been elected, he could be validly removed from office for such reasons as are set out under article 181. As such, the operation of article 181 of the 40

- Constitution and statute could not by itself without proof of a breach of due process, constitute an affront to the constitutional rights of the 1st Petitioner. 1
59. The Respondents stated that the finding of the special committee of the Senate was that the Governor had clearly failed in the discharge of his functions and in the role of the office of the Governor, resulting to the loss of public funds. This loss occasioned disenfranchisement, disadvantage, inconvenience, injustice and inequity upon the people of the Embu County. 5
60. On the Petitioners' allegations that the Senate select committee was tainted with bias, the Respondents argued that this was an unfounded and baseless claim. They noted that the Court in *Wambora 1* did not make a finding that the select committee had misconducted itself in any way in the hearing of the matter; and that the Senate is established under article 93 of the Constitution with a fixed membership set out under article 98 for a fixed five year term. Thus, in the absence of concrete evidence on bias in the present case, there would be no basis to impute bias on the part of the Senate merely on the ground that the Governor was required to attend before the same members as those of the earlier select committee. 10
61. Further, the Respondents pointed out that the mandate of a select committee appointed under section 33(3)(b) of the Act is purely investigative, and does not make the decision as to whether or not a governor should be removed from office. That is a reserve of the Senate in plenary under section 33(7). The Senate is enjoined under section 33(6)(b) to hear a governor even where a select committee finds that the charges have been substantiated. It is from this hearing that the Senate makes the determination by a vote on whether such a governor should cease to hold office. 15
62. On public participation, the Respondents argued that the complaints giving rise to the investigations and subsequent charges against the Governor were made by the public to their elected representatives. In turn, the representatives raised complaints in the County Assembly, prompting investigations against the Governor in respect of mis-procurements by his office. For example, with regard to the bad maize seed, extensive field research had been carried out with input from the farmers who were affected, and findings were made and considered. Consequently, findings were made by both 20
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- the Assembly and the Senate that the seeds were unlawfully procured to the detriment of the farmers. 1
63. It was contended that the petitioners were not an objective public, but a diehard group of ardent supporters of the Governor who expressed clear bias against the Assembly and its officials in their petition. This explained why they constantly alleged that there was no public participation in the removal process. The Respondents further argued that the County Assembly, in fulfilment of the statutory requirement to involve the public in its business, developed infrastructure for public participation in July 2013. This included the establishment of public contact offices in each of the County Assembly wards and the recruitment of ward staff to facilitate public participation. Thus the County Assembly, through the office of the Clerk, disseminated notices of all its business to the public through public notice boards, religious institutions and the ward office infrastructure developed for that purpose. 5 10 15
64. The Respondents argued that the requirement for public participation under article 196 of the Constitution does not create an obligation for establishment of a referendum of all citizens on all business of the Assembly. All that is necessary is that there is appropriate notice and a forum in which the public could participate in the business of the Assembly. Given that the notices by the Assembly had from time to time received various responses and input from the public – which information was maintained by the office of the Clerk – that amounted to public participation. 20 25
65. It was submitted that this Court, in examining whether or not there was public participation, has to consider the nature of the business and the context under which a specific undertaking is done. The Respondents cited the case of *Commission for implementation of the Constitution v Parliament of Kenya and another* [2013] eKLR where the Court held that: 30
- “The National Assembly has a broad measure of discretion in how to achieve the object of public participation. How this is effected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public”. 35
66. They also cited the case of *Doctors for Life International v The speaker of the National Assembly & others*, applied with approval in *Robert N Gakuru & Others v Governor, Kiambu County* [2014] 40

- eKLR where the Court held that: 1
- “Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement. This discretion will apply both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes”. 5
67. The Respondents contended that there was reasonable public participation sufficient to satisfy the requirement of article 10 as read together with article 196 of the Constitution, adding that the process of removal of a governor was a quasi-judicial and political process; that when an Assembly sits as a quasi-judicial body it exercises its Constitutional and Statutory mandate donated by article 181 of the Constitution and section 33 of the Act; and that it acts like a court receiving a complaint, examining facts, considering the defence offered by the person against whom the charges are brought and making a determination on whether or not the charges had been established. 10
68. It was also argued that the nature and extent of public participation in legislation and in removal of a governor would differ for the reason that the impact of promulgated legislation is long-term and affects everyone subject to it; in respect of a governor’s removal the impact is less felt and concerns mostly the governance aspect. It was further submitted that in its legislative function the Assembly is enjoined to be more of a consultative forum receiving proposals and facilitating public participation. When it is performing a quasi-judicial and political function such as removal which concerns examining and investigating a complaint or charges and making a determination thereon, it acts more like a court. 15
69. It was submitted by the Respondents that section 33 of the Act provides the procedural framework within which a removal charge under article 181 of the Constitution is predicated. Accordingly, in considering the question whether or not there was public participation in the process, one must consider how such participation would find expression within the framework of this law. In the context of a charge against a governor under section 33 of the Act the nature and form of public participation required is specific to the various processes set out under the law that provide for the hearing, investigation and determination of the charges in 20
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- issue. It was further submitted that on 29th April 2014, the County Assembly did in fact hold the debate in public as there was a public gallery register maintained by the Clerk of the Assembly and Senate as enjoined by article 196 of the Constitution. 1
70. On the issue of *sub-judice*, the Respondents faulted the Petitioners in their claim that the motion to impeach the governor was passed when Embu Petition Nos 5 and 6 of 2014 had not been determined by the Court. They referred to section 6 of the Civil Procedure Act and Standing Order No 86 of the Embu County Assembly which is *pari materia* standing order 92 of the Senate Standing Orders that provide for the principle of *sub judice*. They argued that Section 6 of the Civil Procedure Act provided that for a matter to be *sub judice* it had to be considered against a previously instituted suit between the same parties on the same issues. In this case, however, the Motion before the Assembly was filed on the 16th April 2014 and notice given on 22nd April 2014, whereas Embu Petition Nos 5 and 6 of 2014 were filed on the 28th April 2014. Accordingly, when the motion before the Assembly was instituted there was no pending matter in Court in relation to the issues covered by the Motion. 5 10 15 20
71. In this case, the petitioners had not demonstrated that Embu Petition Nos 5 and 6 of 2014, were active, or had been set down for trial, as no notice or proceedings had been exhibited to show that the matters were under active prosecution. Further, no orders of the Court had been produced. 25
72. The Respondents also pointed out that under Standing Order 86(2) of the County Assembly of Embu Standing Orders it is for a member alleging *sub judice* to demonstrate that the discussion of such a matter in the Assembly would prejudice its fair determination. Indeed, it is for a member, under standing Order 86(4), to adduce evidence to show that the matter before the house was *sub judice*. The argument as to *sub-judice* was available only to a member of the Assembly in the specific sitting and not to third parties who are not subject to the standing orders. 30 35
73. The respondents submitted that the petitioners had not established any basis for their claim that section 33 of the Act is unconstitutional. Instead, they argued that section 33 draws its life from article 181 of the Constitution, the substantive basis for impeachment, and noted that section 33 contains the procedural basis for operationalization of article 181. Thus, the provision is not unconstitutional. 40

74. The Respondents relied on the case of *Walter Barasa v The Cabinet Secretary Ministry of Interior & others* Pet No 488 of 2013 where the Court considered the principles applicable to the question of whether or not a statute ought to be declared unconstitutional. Key among the requirements is that the impugned section should be juxtaposed to the relevant Article, and a case made out as to how the section fails to square out with the Article. This had not been done. They therefore prayed that the petition be dismissed. 1
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- The Interested Party's Case 10
75. The Interested party filed its replying affidavit through Jeremiah M Nyegenye, the Clerk of the Senate. He stated that the orders sought by the 1st petitioner were a ploy to prevent the Senate from discussing matters arising from the decision of the County Assembly of Embu to remove him as the Governor of Embu County. He added that the orders sought infringed on the powers, privileges and immunities of Parliament as set out under article 117 of the Constitution and sections 4 and 29 of the National Assembly (Powers and Privileges) Act Cap 6, Laws of Kenya. 15
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76. On the issue of public participation, the Interested Party submitted that a quasi-judicial body having the role of determining gross violation of the Constitution need not take views from the public, as this was a matter of fact and law. 25
77. The Interested Party concurred that articles 118(1)(b) and 119(1)(b) require Parliament and the County Assemblies to "facilitate public participation and involvement in the legislative and other business" of the houses, and their committees. This provision, they submitted, must be read in the light of article 259, which requires that the Constitution "shall be interpreted in a manner that promotes good governance". It was argued that the interpretation that would achieve this, is that the sort of public participation envisaged in proceedings for removal of a governor would be such as are open to the public so that they are aware of the charges that have been levelled against him. 30
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78. It was also submitted that the Constitution and the Act have given a special quasi-judicial role of impeachment to the County Assemblies and the Senate comprising people who, under article 1(2), exercise the sovereign power of the people as democratically elected representatives. This was strengthened by the case of *Inakoji* 40

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- 17 others v Adeleke & 3 others* (2007) 4 NwLR (PT1025)423 SC.which upheld *Akintola v Aderemi* All NLR 442 (1962) 2 SCNLR 139 where it was stated that the proceedings leading to removal of a governor should be available to any willing eyes, and the public can see watching from the gallery. 1 5
79. With regard to the alleged unconstitutionality of section 33 of the Act , the Interested Party relied on the decision of the Supreme Court of the Phillipines in *Andres Sarmiento et al v The Treasurer of the Phillipines* (GR No 125680 & 126313, September 4, 2001) where the Court stated: 10
- “...In fine, jurisprudence is replete with cases that every law has in its favour the presumption of constitutionality, and to justify its nullification, there must be a clear and unequivocal breach of the Constitution, not a doubtful and argumentative one. 15
- A statute or part thereof, will be sustained unless it is plainly, obviously, palpably and manifestly in conflict with some provisions of the fundamental law” 20
80. The Interested Party submitted that the petitioners had not discharged the burden of proof to establish the unconstitutionality of section 33 CGA. 20
81. The Interested Party submitted that the proceedings taken out by the petitioners should be struck out on the ground of incompetence. 25
- It was submitted that non-joinder of the Attorney General, was a fatal breach of section 12 of the Government Proceedings Act, which requires that any proceedings by or against the Government should be instituted against by or against the Attorney General. 30
- Amicus Curiae's Case*
82. The *amicus curiae*, through counsel, submitted that they are statutorily mandated to investigate any conduct in state affairs in both the national and county governments, dealing largely with issues of administrative justice. 35
83. The *Amicus* submitted that the process of impeachment of a governor is as much a parliamentary process as it is a quasi-judicial one. As such, Parliament cannot claim exclusive jurisdiction particularly where there are allegations of violation of the Constitution or fundamental rights. It added, however, that the Court can only interfere after the parliamentary process had been 40

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- proceed with the process. This would provide the basis for proper investigations thereby allaying fears of unfairness or administrative injustice. 1
87. It was further submitted that in light of articles 35 of the Constitution the objective of public participation in matters of governance was a principle adopted by the Kenyan people under article 10 of the Constitution. The object was to enable the people to be involved in the decision making process. In this regard, it was argued, the state is obliged to facilitate the involvement of the people and in this instance the County Assembly was required to facilitate public involvement in the legislative and other business of the Assembly and its committees. It was further submitted that article 181 provided for grounds for the removal of a governor and section 33 set out the removal procedure. It was submitted that where the law or the Constitution places a particular responsibility on a certain body, person or authority to perform that function, then it is the exclusive duty of that person, body or authority to perform that function. 5 10 15 20
88. Amicus was in agreement with the Interested Party that law places the function of the actual removal of a governor under the relevant County Assembly and the Senate. In instances where committees comprising members of the County Assembly have been formed and have inquired into certain conduct of a governor by inviting those privy to the allegations against the governor, that amounts to involving the public in the process. When the stage of conducting the actual removal proceedings is reached, it cannot be argued that members of the public ought to be involved as this is a jurisdiction that is exclusively granted by the Constitution and the law to the County Assembly and the Senate. 25 30
89. The *Amicus* argued that a provision of general application such as article 196(1) of the Constitution cannot be invoked to defeat a jurisdiction granted by dint of the Constitution to a certain person, body or authority. If it were to be construed that the general public must be involved in the actual removal proceedings then the impeachment process would be converted from a quasi-legal process to a purely political process. In such case it could not be said that good governance would be promoted. The Amicus asserted that the principle of public participation cannot be construed to mean that there must be a direct physical involvement in all instances of 35 40

parliamentary and county assembly business, and each case must be construed on its own facts.

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90. It was submitted that a proper interpretation of article 35 on the right to access information held by the state, would suggest that the state was under an obligation to provide information it held to any citizen who had sought it. This would presuppose that the individual in need of certain information would have to prompt the state to provide the same. Article 35(3) then provides that the state should publish and publicize any important information affecting the nation. Counsel added that as it was not in contention that the removal of a governor is one piece of information that the state ought to publish and publicize, the Court should be careful to pronounce at what stage the state is obliged to publish such information.

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91. The *Amicus* further submitted that its view was that the information should be published at the end of the process so that the end result is communicated to the public. Counsel pointed out that the other reason for the duty to publicize information for the public was to ensure that the public are duly informed, and not so that the public may participate in those particular proceedings. One of the objectives of article 35(3), it was contended, was to keep the public informed of happenings that affect the nation, so as to avoid a situation where decisions that affect the nation are made without such information being relayed to the public.

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92. Finally, it was submitted that the removal of the 1st Petitioner was in the public domain through all forms of media as well as publication in public places. It therefore cannot be said that the matter had not come to the attention of the public. However, Counsel was clear that the duty of the state to publish and publicize information was neither diminished nor ousted, and that such failure in the situation such as the present case where the matter is actually in the public domain, could not alone invalidate the impeachment process unless for other reasons.

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Issues for Determination

93. Having carefully listened to the parties and having considered the pleadings, we think that the issues which this Court is required to determine are as follows:

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1. Whether the Petition is competent; which incorporates the issues as to:

a) Non-Joinder of the Attorney General.	1
b) The role of the Parliamentary Service Commission in the Petition.	
c) Whether the Petition was brought in good faith.	
2. Whether the proceedings to impeach the Governor in both the County Assembly and the Senate were <i>sub-judice</i> .	5
3. Whether Section 33 of the County Governments Act, 2012 is unconstitutional for being in contravention of article 1, article 2(1) and (2), article 10, article 118(1)(b); article 174(a) and (c) and article 196(1)(b).	10
4. What is the process and procedure for removal of a Governor”	
5. Whether the Rules of Natural Justice were complied with in the removal of the Governor.	
6. Whether the removal of the Governor requires public participation, and if so; whether there was public participation; and whether article 35 of the Constitution on access to information was complied with.	15
7. To what extent, if any, can the Court intervene in the removal process”	20
8. Who should bear the costs of the petition”	
Analysis and Determination	
94. We now deal with each of the issues identified for determination.	25
Whether the Petition is Competent	
95. The first issue raised in these proceedings touching on the competency of the consolidated petition is the failure to join the Attorney General to these proceedings.	
96. The Petitioners also took issue with the participation of the PSC in these proceedings. According to them, article 127 of the Constitution establishes the said Commission and at clause (6) thereof provides that it is responsible for the efficient functioning of Parliament. However the actual legislative work is not part of the functions of the Commission. It was therefore submitted that if the Senate and the Speaker intend to urge a particular point they ought to appear before the Court and ought not to do so through a proxy or through the backdoor. According to the Petitioners the issues in this petition are not issues for the Commission.	30
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97. On the part of the PSC, it was argued that article 127(6)(d) and (e) of the Constitution provides that the PSC promotes parliamentary	

democracy and that the Court had already ordered the joinder of the Commission which was rightly assisting the Court. It was submitted that in parliamentary democracy the 1st and 2nd Respondents enjoy the powers, privileges and immunities under article 117 and 195 of the Constitution as read with the National Assembly (Powers and Privileges) Act Cap 6 the Laws of Kenya which apply by virtue of section 7 of the Sixth Schedule to the Constitution. It was therefore submitted that pursuant to sections 4 and 29 of the National Assembly (Powers and Privileges) Act, since the Speaker of the Senate and the Senate enjoy immunities from legal proceedings, they ought not to have been parties to these proceedings. Instead, the proceedings ought to have been served on the Attorney General by virtue of section 12 of the Government Proceedings Act since impeachment is a quasi-judicial process.

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98. In rejoinder, the Petitioners submitted that no body, including Parliament, is immune from judicial scrutiny and that immunity and privilege only apply to lawful actions since it is the Constitution, which is supreme. It was contended that article 117 has nothing to do with the issues, which fall for determination. Since the replying affidavit was sworn on behalf of the Interested Party the Court was urged to find that the complaints raised by the petitioners had not been defended by the Speaker and the Senate hence they had no answer thereto.

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Non joinder of the Attorney General

99. Article 156(4)(b) of the Constitution provides that the Attorney-General shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings. Section 12(1) of the Government Proceedings Act, Cap 40 Laws of Kenya on the other hand provides that “subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be”.

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100. However the preamble to the Government Proceedings Act, provides that it is:

“An Act of Parliament to state the law relating to the civil liabilities and rights of the Government and to civil proceedings by and against the Government; to state the law relating to the civil liabilities of persons other than the Government in certain cases involving the affairs or property

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- of the Government; and for purposes incidental to and connected with those matters”. (Emphasis added) 1
101. It follows that Government Proceedings Act only applies to civil proceedings by and against the Government. It does not apply to proceedings which are not of a civil nature such as criminal proceedings. In our view matters relating to the interpretation of the Constitution are not civil matters as contemplated under the Government Proceedings Act but fall under their own class. In other words they are proceedings *sui generis*. To illustrate this it was held in *Masefield Trading (K) Limited v Rushmore Company Limited and another* [2007] 2 EA 288, that: 5 10
- “The rights and duties of individuals are regulated by private law. The Constitution on the other hand is an instrument of government, which contains rules about the Government of the country... The Constitution is the supreme law of the land and the Constitution and the rules made there under do not provide for serving the notices that are required to be issued to the Attorney General prior to filing suits or applications in which there are allegations of breach of constitutional provisions. Once a party alleges violation of their fundamental rights, the Court will hear them and the requirement of notices to the Attorney General like in civil cases does not arise.” 15 20 25
102. Similarly, in *Mureithi & 2 others (For Mbari Ya Murathimi Clan) v Attorney General & 5 others Nairobi HCMCA No 158 of 2005* [2006] 1 KLR 443 it was held: 30
- “The respondents have contended that this matter is time barred under the Limitation of Actions Act Cap 22. However the Act does not apply to judicial review, which is *sui generis*. “Suit” as defined in s 2 of the Civil Procedure Act means “all civil proceedings commenced in any manner, prescribed” “Action” under the Interpretation and General Provisions Act Cap 2 means “all civil proceedings in a Court and includes any suit as defined in s 2 of the Civil Procedure Act.” Since the actions set out in Part II of the Limitation of Actions Act Cap 22 of the Laws of Kenya must have the same meaning as set out above, the Act has no application to judicial review matters and constitutional matters.” 35 40

See also *Kibunja v Attorney General & 12 Others (No 2)* [2002] 2

- KLR 6. 1
103. Article 156(4)(b) of the Constitution on the other hand, in our view, only deals with legal representation of the national government in Court or in any other legal proceedings to which the national government is a party. It neither deals with criminal proceedings nor does it require that the Attorney General be a party to the proceedings. 5
104. Rule 2 of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, otherwise known as the Mutunga Rules, defines “respondent” as meaning “a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom.” It follows that the said Rules contemplate that a person other than the Attorney General may be cited as a Respondent. 10
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105. It is therefore our view that the failure to bring these proceedings against the Attorney General is not fatal to these proceedings. 20
- The Role of the PSC
106. Another argument by the Petitioners was that the PSC ought not to have been a party to these proceedings. In our view nothing turns on this objection as the said Commission was joined to these proceedings by an order of the Court which order has not been challenged either by review or on appeal and has not been set aside. In addition, it was not contended that the presence of the PSC had caused any prejudice to any party. 25
107. With respect to the immunities of the Senate and the Speaker of the Senate, section 4 of the National Assembly (Powers and Privileges) Act is clear that it applies only to criminal and civil proceedings, and as we have held hereinabove, matters relating to interpretation and application of the Constitution are neither criminal nor civil. To hold otherwise would amount to elevating the Senate and the Speaker above the Constitution. It must always be remembered that under articles 1 and 2 of the Constitution all sovereign power belongs to the people of Kenya and is to be exercised only in accordance with the Constitution; that the Constitution is the supreme law of the Republic and binds all persons and all State organs; that no person may claim or exercise State authority except as authorized under the Constitution; and that any act or omission 30
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- in contravention of the Constitution is invalid. 1
108. The institution constitutionally mandated to hear and determine any question respecting the interpretation of the Constitution including the question whether anything said to be done under the authority of the Constitution or if any law is inconsistent with, or in contravention of, the Constitution is the High Court under article 165 of the Constitution. It therefore follows that no State Organ can hold itself to be immune to proceedings challenging the constitutionality of its actions and that includes Parliament and its speakers. In other words immunity only applies to situations where the particular entity is acting constitutionally. The position was restated by the Supreme Court of India in *State of Rajasthan v Union of India* [(1977) 3 SCC 592] where it was observed that: 5 10
- “This Court has never abandoned its constitutional function as the final Judge of constitutionality of all acts purported to be done under the authority of the Constitution. It has not refused to determine questions either of fact or of law so long as it has found itself possessed of power to do it and the cause of justice to be capable of being vindicated by its actions. But, it cannot assume unto itself powers the Constitution lodges elsewhere or undertake tasks entrusted by the Constitution to other departments of State which may be better equipped to perform them. The scrupulously discharged duties of all guardians of the Constitution include the duty not to transgress the limitations of their own constitutionally circumscribed powers by trespassing into what is properly the domain of other constitutional organs. Questions of political wisdom or executive policy only could not be subjected to judicial control. No doubt executive policy must also be subordinated to constitutionally sanctioned purposes. It has its sphere and limitations. But, so long as it operates within that sphere, its operations are immune from judicial interference. This is also a part of the doctrine of a rough separation of powers under the Supremacy of the Constitution repeatedly propounded by this Court and to which the Court unswervingly adheres even when its views differ or change on the correct interpretation of a particular constitutional provision.” 15 20 25 30 35 40
109. It was argued that this petition was brought in bad faith based on the fact that the petitioners failed to give particulars of and

demonstrate any breach of their constitutional rights, and the petition is largely speculative and intended to achieve a political end being to safeguard and secure the 1st Petitioner's position as the Governor, Embu County. According to the Respondents, the petitioners before the Court are not litigating *bona fide*, but are urging for a position that will secure and safeguard the position of the 1st Petitioner as governor of Embu County. The 2nd Petitioner, it was contended, was actively involved in meetings held to urge the respondents not to proceed with the motion and when that failed they collected signatures petitioning the President for the suspension of the county under article 192 of the Constitution. The 2nd - 33rd Petitioners, it was contended are therefore not persons claiming that they were not involved in the process but political supporters of the 1st Petitioner who have taken the position that if he cannot be governor, then the County should be suspended. The respondents relied on *Mumo Matemu v Trusted Society of Human Rights* [2013] eKLR, where it was held:

“However, we must hasten to add that the person who moves the Court for judicial redress in cases of this kind must be acting *bona fide* with a view to vindicating the cause of justice. Where a person acts for personal gain or private profit or out of political motivation or other oblique consideration, the Court should not allow itself to be seized at the instance of such person and must reject their application at the threshold.”

110. Even if it were correct that the action of the other petitioners apart from the 1st Petitioner are *mala fides*, that would not necessarily dispose of this Petition since the 1st Petitioner's petition would remain intact. Article 3(1) of the Constitution enjoins every person to respect, uphold and defend the Constitution. Article 258 entitles any person to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention and such actions may be instituted by a person acting as a member of, or in the interest of, a group or class of persons or by a person acting in the public interest. It has not been contended that the Petitioners are not entitled to bring these proceedings. The mere fact that the success of these proceedings may result in safeguarding and securing the 1st Petitioner's position as the Governor, Embu County, does not disentitle them from instituting these proceedings. In our view, in the current constitutional dispensation, the Courts

must resist the temptation to try and contain constitutional challenges in a straight-jacket and must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them. In our view the petitioners cannot be faulted for bringing these proceedings simply because they are perceived supporters of the 1st Petitioner. Whereas we agree with the decision in *Mumo Matemu* Case (*supra*), we are of the view that the mere fact that attempts were made at resolving the impasse through alternative avenues does not necessarily connote bad faith.

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Whether the Impeachment Proceedings were *Sub-Judice*.

111. It was claimed that the proceedings to impeach the 1st Petitioner were *sub judice*. *Sub judice* is defined in *Blacks Law Dictionary* 9th Edn page 1562 as “under a judge; Before the Court or judge for determination.” For proceedings to be said to be *sub judice*, the same must be pending before the Court or a judge for determination. The *sub judice* doctrine applies to situations where there are pending proceedings in a court of law. A person cannot institute proceedings in a Court of law with a view to stalling an ongoing legal process by relying on the sub judice principle. For *sub judice* to apply, the proceedings sought to be stayed ought to have been the ones subsequently commenced and not vice versa. In this case, Embu Petition Nos 5 and 6 of 2014 were filed on the 28th April 2014, whereas the Motion before the County Assembly was filed on the 16th April 2014 and notice given on 22nd April 2014. Therefore when the motion was instituted there was no pending matter in court in relation to the issues herein. The two petitions filed in court were withdrawn and discontinued immediately after the motion was passed on the 29th April 2014. In our view the *sub judice* rule cannot in the circumstances of this case be successfully invoked.

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Whether section 33 of the County Governments Act, 2012, is unconstitutional

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112. It was asserted by the petitioners that section 33 of the Act is in violation of the Constitution. Specifically, it was alleged that the section contravened article 181, upon which it derives its existence, and articles 1; 2(1),(2); 10; 118(1)(b); 174(a) and (c) and article 196(1)(b).

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113. In the petitioners’ pleadings, the question raised for determination at paragraph 92(f) and also the declaration sought in that regard in

- prayer (g), both assert the unconstitutionality of section 33 of the Act in the following limited and narrow manner, namely, that it is unconstitutional: 1
- “...for failing to allow public participation and involvement in the removal of a county Governor” 5
114. This narrow approach in respect of the scope of unconstitutionality of the section notwithstanding, we have taken the view that the section should be interrogated in a broad sense as to whether it is unconstitutional in any event, as against the cited provisions of the Constitution. 10
115. There was no contest as to whether this Court has jurisdiction to determine the constitutionality of a provision of a statute. For good measure, we will state such jurisdiction at the outset. It is contained in article 165(3)(d)(i) of the Constitution which provides that the High Court has: 15
- “(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of— 20
- (i) the question whether any law is inconsistent with or in contravention of this Constitution;”
116. It is now accepted that in interrogating the constitutionality of a provision of a statute or a statute, the starting point is statutory interpretation. There are several principles, which have been developed over the years that must be taken into account. 25
117. The first guiding principle is that a statute is presumed to be constitutional unless the contrary is proved. This was reiterated in the case of *Wyclife Gisebe Nyakina & another v Institute of Human Resource Management & another* {Petition No 450 of 2013} [2014] eKLR where Mumbi Ngugi, J, quoting *Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers v Kenya Revenue Authority & others* High Court Petition No 544 of 2013 stated as follows: 30
- “[25] The principles upon which the Court determines the constitutionality of statutes are now well settled. It is well established that every statute enjoys a presumption of constitutionality and the Court is entitled to presume that the legislature acted in a constitutional and fair manner unless the contrary is proved by the petitioner. 35
- In considering whether an enactment is unconstitutional, 40

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- the Court must look at the character of the legislation as a whole, its purpose and objects and effect of its provisions (see *Ndyanabo v Attorney General of Tanzania* (2001) 2 EA 485, *Joseph Kimani and Others v Attorney General and Others* Mombasa Petition No 669 of 2009 [2010] eKLR, *Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security & others* Nairobi Petition No 3 of 2011 (Unreported)), *Samuel G Momanyi v Attorney General & another* Nairobi Petition No 341 of 2011 (Unreported)". (Emphasis added)
118. The second guiding principle is that the Courts are concerned only with the power to enact statutes not with their wisdom. This was well stated in the dissenting decision in *US v Butler*, 297 US 1 [1936], in the U.S Supreme Court where it was observed that:
- "The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our sense of self-restraint. For the removal of unwise laws from the statute books appeal lies, not to the Courts, but to the ballot and to the processes of democratic government." [Emphasis supplied]
119. Clearly therefore, the primary role of the Court is to interpret the law, as enacted by Parliament, and that entails giving effect to the legislative intent of Parliament. Thus, the Court is not concerned with 'what ought to be' but with 'what is', as exemplified in the Indian Case of *Re Application by Bahadur* [1986] LRC 545 (Const.), where it was stated:
- "I would only emphasize that one should not start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown..."
120. In this regard, the Court in *Republic v The Council of Legal Education* [2007] e KLR, cited with approval the Indian Case of *Maharashtra State Board of Secondary and Higher Secondary Education & another v Kurmarsteth* [1985] LRC where it had been

found as follows:

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“...It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act. It is not for the Court to examine the merits or demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation...”

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121. The third guiding principle is that the purpose and effect of the statute or provision impugned must be considered in determining the constitutionality or otherwise of a statute. This test was well stated by the Supreme Court of Canada in the case of *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, in the following words:

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“I cannot agree. In my view, both purpose and effect are relevant in determining constitutionality; either unconstitutional purpose or unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realised through the impact produced with the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation’s objects and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation’s object and thus, its validity.” (Emphasis added)

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122. The fourth guiding principle is that the Court must look at the character of the legislation as a whole.

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123. The fifth guiding principle is that the provision or statute alleged to contravene the constitution must be juxtaposed against the provision(s) of the constitution alleged to be impugned to determine the variance. That is to say, a comparative enquiry must be done to determine whether the statutory provision squares out with the constitutional provision. In the majority decision of the US Supreme Court in *US v Butler*, 297 US 1 [1936], it was held that:

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“When an Act of Congress is appropriately challenged in the Courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay

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- the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the Court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.” [Emphasis added]
124. Finally, within that exercise of seeking to determine the constitutionality of any statutory provision, there is the overarching constitutional obligation to interpret the constitution itself, in accordance with the constitutional construction imperatives stated in article 259 as follows:
- “259(1) This Constitution shall be interpreted in a manner that—
- (a) promotes its purposes, values and principles;
 - (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
 - (c) permits the development of the law; and
 - (d) contributes to good governance
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- (3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking....”
125. The constitutional basis and rationale for the promulgation of the Act can be found embedded in the provisions of the Constitution. Article 200 commands Parliament to enact legislation to provide for all matters relating to Chapter 8 on Devolution. Specifically, Parliament is mandated to make provision as follows at article 200(2)(c) and (d):
- “(2) In particular, provision may be made with respect to —
- (a) ...
 - (b) ...
 - (c) the manner of election or appointment of persons to, and their removal from, offices in county governments, including the qualifications of voters and candidates;
 - (d) the procedure of assemblies and executive committees including the chairing and frequency of meetings,

- quorums and voting...” 1
126. With regard to the removal of a governor, article 181(1) sets out the grounds for his or her removal, and article 181(2), requires Parliament to make legislation for removal procedures of a governor in the following terms: 5
- “(2) Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds specified in clause (1). 10
127. Article 261, the Sixth Schedule section 3(b) and the Fifth Schedule to the Constitution all stipulate the time frame within which Parliament must enact legislation on various aspects of devolved government. With regard to legislation on removal of a governor under Chapter Eleven, the constitutionally specified time frame is indicated as eighteen months from the effective date of the Constitution. 15
128. The constitutional mandate and time frame for enacting the said legislation is exceedingly stringent. So stringent, indeed, that article 261 of the Constitution provides for extension of the time frame only once by Parliament – pursuant to a two thirds majority – and the extension cannot be for a period of more than one year. Further, a failure to enact such legislation within the stipulated time frame may result in issuance of a declaratory order of the High Court specifying the period within which Parliament must enact the legislation and provide a progress report to the Chief Justice. Under article 261(7), should Parliament fail to comply with such an order of the Court, the Chief Justice shall advise the President to dissolve Parliament, and on such advice the President shall so dissolve Parliament. 20 25 30
129. Pursuant to the constitutional mandate, the objects and purposes of the Act are set out in section 3(a), where the relevant object is stated as follows : 35
- “Provide for matters necessary or convenient to give effect to Chapter Eleven of the Constitution pursuant to article 200 of the Constitution”
130. In *Doctor’s for Life International v The Speaker National Assembly and others* 9 CCT12/05) [2006] ZACC II the Constitutional Court of South Africa noted as follows regarding the Court’s role in maintaining the delicate balance between its role as the guardian and enforcer of constitutional values and principles on the one hand, 40

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- and deference to legislative and executive functions, on the other: 1
“What courts should strive to achieve is the appropriate
balance between their role as the ultimate guardians of the
Constitution and the rule of law including any obligation 5
that Parliament is required to fulfill in respect of the passage
of laws, on the one hand, and the respect which they are
required to accord to other branches of government as
required by the principle of separation of powers, on the
other hand.”(at Para 70) 10
131. The obligation on Parliament to enact law to operationalise the
removal procedures of governors was stringent and a constitutional
necessity. As may be clearly seen from the above discussion, the Act
and, in particular, section 33 thereof are intended to operationalise
Chapter 11 of the Constitution on Devolution, and article 181 of 15
the constitution, respectively. The purpose of both the Act and of
section 33 therefore have a sound constitutional underpinning,
under stringent time demands.
132. The purpose of section 33 of the Act is to give effect to article 20
181 of the Constitution whose purpose is to foster accountable
exercise of power through, *inter alia*, the removal of unfit public
officials who have been elected by the people to govern at the
county level. The power of self governance and participation of
the people provided for by article 174(c) of the Constitution must 25
be read together with article 1 to the effect that people may also
indirectly exercise sovereignty. This they do through electing their
representatives at the county level who make decisions on their
behalf. To this extent the mandate of impeachment has been placed
on the peoples’ representatives. Thus, to the textual approach of 30
interpreting the Constitution which asks the question: where does
the power of impeachment lie” The answer is that it lies with the
County Assembly and the Senate.
133. As far as the effect of section 33 is concerned, therefore, its effect 35
is to ensure that the objectives of article 181 are met in accordance
with the Constitution, and to this extent we find that section 33 is
intra vires the Constitution.
134. What now remains is to answer the question whether section 40
33 of the Act contravenes the various constitutional provisions
cited by the petitioners. For this, we must employ the principle of
juxtaposing the section against each constitutional provision alleged

- to be contravened, and determine whether they ‘square’ out. 1
135. Section 33 of the County Governments Act, 2012 provides as follows:
- “(1) A member of the county assembly may by notice to the speaker, supported by at least a third of all the members, move a motion for the removal of the governor under article 181 of the Constitution. 5
 - (2) If a motion under subsection (1) is supported by at least two-thirds of all the members of the county assembly— 10
 - (a) the speaker of the county assembly shall inform the Speaker of the Senate of that resolution within two days; and
 - (b) the governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section. 15
 - (3) Within seven days after receiving notice of a resolution from the speaker of the county assembly—
 - (a) the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor; and 20
 - (b) the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter. 25
 - (4) A special committee appointed under subsection (3)(b) shall— 25
 - (a) investigate the matter; and
 - (b) report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated. 30
 - (5) The governor shall have the right to appear and be represented before the special committee during its investigations.
 - (6) If the special committee reports that the particulars of any allegation against the governor— 35
 - (a) have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or
 - (b) have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the impeachment charges. 40

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(7) If a majority of all the members of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.	1
(8) If a vote in the Senate fails to result in the removal of the governor, the Speaker of the Senate shall notify the speaker of the concerned county assembly accordingly and the motion by the assembly for the removal of the governor on the same charges may only be re-introduced to the Senate on the expiry of three months from the date of such vote.	5 10
(9) The procedure for the removal of the President on grounds of incapacity under article 144 of the Constitution shall apply, with necessary modifications, to the removal of a governor.	15
(10) A vacancy in the office of the governor or deputy governor arising under this section shall be filled in the manner provided for by article 182 of the Constitution.”	15
136. This is then juxtaposed against article 1 which provides:	
(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.	20
(2) The people may exercise their sovereign power either directly or through their democratically elected representatives.	25
(3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—	25
(a) Parliament and the legislative assemblies in the county governments;	30
(b) the national executive and the executive structures in the county governments; and	30
(c) the Judiciary and independent tribunals.	30
(4) The sovereign power of the people is exercised at—	35
(a) the national level; and	35
(b) the county level.	35
137. The general complaint of the petitioners on this score was that the sovereign power of the people to participate in the removal of their popularly elected governor was denied. Article 1(2) is to the effect that sovereign power belongs to the people and may be exercised either directly or indirectly. Article 1(3)(a) is to the effect that the peoples’ sovereign power is delegated to, among other state organs,	
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- the “legislative assemblies in the county governments”. Further, under article 38 of the Constitution the people exercise their sovereignty directly through the political right to vote by electing their representatives through a secret ballot. 1
138. Reading these provisions together, there can be no doubt that the elected representatives exercise sovereignty on behalf of the people, through the principle of delegation of power to state organs. In this case, the delegation is to the legislative assembly in the county government. There is nowhere any requirement for a popular exercise of political right to vote in respect of the removal of a governor. 5 10
139. We therefore find that section 33 is not in any way inconsistent with article 1 of the Constitution. When they chose to invoke section 33 and to debate the motion on the impeachment of the Governor, and when the Senate followed suit, neither the Embu County Assembly members nor the Senate were acting in contravention of the Constitution, as section 33 is not unconstitutional to that extent. 15
140. We now juxtapose section 33 against article 2(1) and (2) of the Constitution. The latter provide: 20
- “(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
- (2) No person may claim or exercise State authority except as authorised under this Constitution” 25
141. We have carefully considered section 33 of the Act against the above Article, and we can find nothing either in the petitioners’ arguments or in the content of the said provisions that suggests any sense of inconsistency between the two. We need say no more on this. 30
142. Article 10 which is also alleged to be contravened by section 33 provides as follows:
- “10(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them— 35
- (a) applies or interprets this Constitution;
- (b) enacts, applies or interprets any law; or
- (c) makes or implements public policy decisions. 40
- (2) The national values and principles of governance include
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(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;	1
(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;	5
(c) good governance, integrity, transparency and accountability; and	
(d) sustainable development” (emphasis added)	10
143. Section 33 has provisions for the removal of the governor, and the question is whether those provisions have the content that meets the standards required under the national values and principles of governance in article 10. Two essential points that arise concern: first, the distinction between the question whether section 33 contains all, or only some, of the ingredients comprising the national values and principles of governance and thus whether the absence of any one or more particular components in the list in article 10 would thereby render the Section unconstitutional; and the second is a question of fact as to whether in the actual impeachment process, the County Assembly and the Senate complied with article 10. The latter issue is not a subject of contention in this case. In article 10(2) the distinctive word used in identifying the national values and principles is the word “include”. Article 259(4)(b) of the Constitution provides the following interpretive assistance when that word is used:	15
“the word ‘includes’ means ‘includes but is not limited to’ ”	20
144. Thus, in interpreting article 10 in light of article 259(4)(b), it is implied that the list contained in article 10 is an example from an unexhausted generic categorization of the components of values and principles of good governance. Naturally, therefore, it cannot be construed that every aspect provided for under section 33 would, or should, be expected to contain all the unexhausted components listed as national values and principles. What is required in our view, is that for a statute or provision to be compliant with article 10, it must contain a majority of, or fundamentally similar, components of the listed values and principles within the subject matter under consideration in the provision. In addition, it must not contain provisions with components contradictory to those within the generic ambit of those in the national values and principles list.	25
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145. We now assess the subsections of section 33 in light of the
above interpretation for compliance with article 10. Section 33
Subsection 1 concerns issuance of notice, and support of a motion
by one third of the members. These comply with the rule of law
and fair administrative action principles. Subsection 2 concerns the
requirement for two-thirds support of a motion, and information to
the Speaker of the Senate, and the right of a governor against whom
an impeachment motion is passed to continue in office pending
completion of proceedings. These comply with the rule of law and
notice principles, and the principle of fair administrative action and
non-prejudice to a governor's rights until found culpable. Subsection
3 concerns convening of the Senate by notice, hearing of charges,
and establishment of an investigation committee. These comply
with due process rights and the right to be heard by an investigating
body. These comply with principles of good governance, human
dignity and rule of law.

146. Subsections 4, 5 and 6 concern investigations into the complaint,
reporting back to the Senate on the substantiation or otherwise of the
particulars of charges; the right of the governor to be represented and
defend himself prior to a vote. These comply with due process rights,
the right to be heard and be represented, fair administrative justice
and good governance. Subsections 7 and 8 concern a majority vote
by members of the Senate. These comply with representative rights,
good governance, rule of law and transparency and accountability
principles.

Having carefully considered section 33 against article 10, we see
nothing in section 33 that does not square with article 10. In light
thereof, we are unable to find anything unconstitutional about
section 33.

147. We now consider articles 118(1)(b), and 196(1)(b) of
the Constitution which relate to the requirement for public
participation in legislative and other business. The Petitioners made
heavy weather of these provisions, particularly article 196(1)(b)
relating to county assemblies. Their contention was that removal
of a governor amounted to other business, and it was incumbent
on the County Assembly to ensure that the petitioners, and other
interested members of the public generally, were facilitated to be
involved in the removal of the Governor.

148. Article 196(1)(b) provides as follows:

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- “196(1) A county assembly shall—
 (a)
 (b) facilitate public participation and involvement in the legislative and other business of the assembly and its committees.” 1
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149. What amounts to public participation is dealt with elsewhere in this decision where the question whether there was public participation has been considered. Here, the only question is whether section 33 squares with article 196(1)(b) in respect of the process of removal of a governor. Section 33 provides for participation of members of county assemblies and senators. At the Senate there is scope for investigations on the charges levelled against the governor, which could reasonably include inviting witnesses or any other person to appear before it pursuant to the Senate’s powers under article 125 to call for evidence. 10
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150. Article 196(1)(a), and (2) provide that public participation includes: holding of county assembly business in an open manner; holding sittings in public and not excluding the public or media from any sitting except in exceptional circumstances. Article 196(3) requires Parliament to enact legislation, and such legislation on public participation under the Act is contained in Part VIII, Sections 87-92 on Citizen Participation in the Act. We highlight two relevant provisions on “citizen participation” that may relate to public participation in the removal process: Sections 87(d) and 88 of the Act. 20
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151. Section 87(d) requires citizen participation to be based on, inter alia, the principle of affording legal standing to interested or affected persons to appeal from, or review decisions or redress grievances. Section 88(1) provides citizens with the right to petition the county government as follows: 30
 “Citizens have the right to petition the county government on any matter under the responsibility of the county government.” 35
- These provisions of the Act would both apply to the situation of a governor facing removal where he, or the citizens, desire to participate in the process. 40
152. We must also take into account and consider the nature of public participation constitutionally required in respect of recall

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- of a member of Parliament and member of County Assembly, as compared to that constitutionally provided for removal of a governor. All are elective political offices. However, whereas the people of Kenya provided for removal by recall of a member of Parliament through involving the electorate, the people did not provide a similar requirement for removal of a governor. 1 5
153. Article 259 of the Constitution provides that the constitution shall be interpreted in a manner that promotes its purposes values and principles. As such it has to be read as an integral document. In the case of *Tinyefuza v AG*, Constitutional Appeal No 1 of 1997, [1997] UGCC 3: 10
- “...the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.” 15
154. The Court of Appeal in the case of the *Center for Rights Education and Awareness & another v John Harun Mwau & 6 others* Civil Appeal No 74 of 2012 [2012] eKLR reaffirmed and set out the principles of interpreting the constitution and stated thus: 20
- “These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statutes which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a Court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest – meaning that the Court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as 25 30 35 40

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- the High Court correctly appreciated, has minimal role to play. The Court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution.” 1
155. In light of the forgoing, we do not find section 33 of the Act to be contrary to article 196 of the Constitution, as alleged. 5
- What is the Process and Procedure for the removal of a Governor” was it Complied with in respect to the 1st Petitioner”
156. The devolved system of government under the Constitution, vests in the County government various powers. The Constitution under Chapter Eleven makes provision for Devolved Government. It, *inter alia*, makes provision for removal of a county governor. Through article 181(1) provision is made for the removal from office of a county governor on any of the following grounds: 10
- “(a) gross violation of this Constitution or any other law;
 - (b) where there are serious reasons for believing that the county governor has committed a crime under national or international law; 15
 - (c) abuse of office or gross misconduct; or
 - (d) physical or mental incapacity to perform the functions of office of county governor.” 20
157. Through art 181(2) the Constitution empowered Parliament to enact legislation providing for the procedure for the removal of a county governor on any of the grounds mentioned in clause (1). In compliance with article 181(2) of the Constitution, Parliament provided through section 33 of the Act the procedure for the removal of a county governor. We have reproduced elsewhere in this judgement section 33 of the Act. 25
158. Specific to the 1st Petitioner is Part 8 of the County Assembly of Embu Standing Orders which under Standing Order No 61 makes provision for removal of a governor by impeachment as follows: 30
- “(1) Before giving notice of Motion under, section 33 of the County Governments Act, No 17 of 2012 the member shall deliver to the Clerk a copy of the proposed Motion in writing stating the grounds and particulars upon which the proposal is made, for the impeachment of the Governor on the ground of gross violation of a provision of the Constitution or of any other law; where there are serious reasons for believing that the Governor has committed 35
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- a crime under national or international law; or for gross misconduct or abuse of office. The notice of Motion shall be signed by the Member who affirms that the particulars of allegations contained in the motion are true to his or her own knowledge and the same verified by each of the members constituting at least a third of all the members and that the allegations therein are true of their own knowledge and belief on the basis of their reading and appreciation of information pertinent thereto and each of them sign a verification form provided by the Clerk for that purpose. 1
- (2) The Clerk shall submit the proposed Motion to the Speaker for approval. 5
- (3) A member who has obtained the approval of the Speaker to move a Motion under paragraph (1) shall give a seven (7) days notice calling for impeachment of the Governor. 15
- (4) Upon the expiry of seven (7) days, after notice given, the Motion shall be placed on the Order Paper and shall be disposed of within three days; Provided that if the County Assembly is not then sitting, the Speaker shall summon the Assembly to meet on and cause the Motion to be considered at that meeting after notice has been given. 20
- (5) When the Order for the Motion is read, the Speaker shall refuse to allow the member to move the motion, unless the Speaker is satisfied that the member is supported by at least a third of all Members of the County Assembly to move the motion; Provided that within the seven days' notice, the Clerk shall cause to be prepared and deposited in his office a list of all Members of the County Assembly with an open space against each name for purposes of appending signatures, which list shall be entitled "Signatures In Support of a Motion For Removal of Governor By Impeachment" 25
- (6) Any signature appended to the list as provided under paragraph (5) shall not be withdrawn. 30
- (7) When the Motion has been passed by two-thirds of all members of the County Assembly, the Speaker shall inform the Speaker of the Senate of that resolution within two days." 35
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- the procedure for the removal of a Governor is stated as follows: 1
- “(1) Within seven days after receiving notice of a resolution 1
from the speaker of a County Assembly supporting the
removal of a governor of the county pursuant to article 5
181 of the Constitution—
- (a) the Speaker of the Senate shall convene a meeting of
the Senate to hear charges against the governor; and
(b) the Senate, by resolution, may appoint a special
committee comprising eleven of its members to 10
investigate the matter.
- (2) A Special Committee appointed under subsection (2)
shall—
- (a) investigate the matter; and
(b) report to the Senate within ten days on whether it finds 15
the particulars of the allegations against the governor
to have been substantiated.
- (3) The governor shall have the right to appear and be
represented before the Special Committee during its 20
investigations.
- (4) If the special committee reports that the particulars of any
allegation against the governor—
- (a) have not been substantiated, further proceedings
shall not be taken under this section in respect of that 25
allegation; or
- (b) have been substantiated, the Senate shall, after
according the governor an opportunity to be heard,
vote on the charges.
- (5) If a majority of all the county delegations of the Senate
vote to uphold any impeachment charge, the governor 30
shall cease to hold office.
- (6) If a vote in the Senate fails to result in the removal of the
governor, the Speaker of the Senate shall notify the Speaker
of the concerned County Assembly accordingly and the 35
motion by the assembly for the removal of the governor
on the same charges may only be re-introduced to the
Senate after the expiry of three months from the date of
such vote.”
160. Further, Standing Order 69 on the right to be heard provides that: 40
“Whenever the Constitution or any written law requires the
Senate to consider a petition or a proposal for the removal

- of a person from office, the person shall be entitled to appear before the relevant Committee of the Senate considering the matter and shall be entitled to legal representation.” 1
161. The Court of Appeal aptly summarised the procedure for the removal of a county governor when it stated at paragraph 31 in *Wambora I* Appeal that: 5
- “...Section 33 of the County Governments Act provides for the procedure of removal of an erring Governor. The organ vested with the mandate at first instance to move a motion for the removal of a County Governor is the County Assembly. Neither the Courts nor the Senate have the constitutional mandate to move a motion for the removal of a County Governor. The Senate’s constitutional mandate to hear charges against a Governor is activated upon receipt of a resolution of the County Assembly to remove a Governor. Upon receipt of such a resolution, the Senate shall convene a meeting to hear the charges against the Governor and may appoint a Special Committee to investigate the matter. It is our considered view that the jurisdiction and process of removal of a Governor from office is hierarchical and sequential in nature. There are three sequential steps to be followed: first is initiation of a motion to remove the Governor by a member of the County Assembly; second there is consideration of the motion and a resolution by two thirds of all members of the County Assembly and third, the Speaker of the County Assembly is to forward the County Assembly’s resolution to the Senate for hearing of the charges against the Governor.” 10 15 20 25
162. The procedure for the removal of the 1st Petitioner is found in the Act and the standing orders of both the County Assembly of Embu and the Senate. The County Assembly and the Senate ought to strictly adhere to the procedure lest the removal is declared illegal for failing to comply with the law. 30 35
163. We have already set out the law governing the removal of a governor. We will now proceed to set out the events leading to the process of the removal of Mr Wambora as Governor of Embu County. The 2nd Respondent avers that on 16th April, 2014 he received a notice of motion proposing the removal of the 1st Petitioner from office, which he approved after confirming that there was neither pending suit nor court order on the matter. It was 40

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- supported by one third of the members of the County Assembly, and thus met the statutory threshold. On 22nd April, 2014 the said motion was presented to the Assembly by Hon. Ibrahim Swaleh. By a letter dated 23rd April, 2014, the 1st Petitioner was informed of the notice of motion for his removal from office by impeachment, and in the same letter he was invited to appear in person or to be represented by an advocate before the County Assembly during its plenary, on 29th April, 2014. 1 5
164. We find it important to reproduce the said letter, which read as follows: 10
- “Re: Notice of Motion for Removal of Governor from Office by Impeachment.
- I write to notify you that Members of the County Assembly gave a Notice of Motion on 22nd April 2014 seeking for removal of the Governor of Embu County by impeachment pursuant to article 181 of the Constitution of Kenya, 2010 and Section 33 of the County Government Act, 2012. The particulars of the allegations made against you are hereon attached. 15 20
- The principles of natural justice and procedural fairness dictate that a person, who may be adversely affected by a decision, should be accorded an opportunity to be heard. In fulfillment of this principle, the House Business Committee in its sitting of 22nd April 2014 resolved the following; 25
- (a) That, you be duly notified in writing of the notice of motion as tabled in the Assembly.
- (b) That, you be invited in writing, which I hereby do, to appear in person or be represented by an advocate or yourself and advocate at the County Assembly of Embu Plenary on 29th April 2014 at 2.30p.m. 30
- (c) That, you be allocated one (1) hour for your oral defense, which time you may share with your advocates on 29th April 2014. 35
- (d) That, should you elect to make any written submissions to the Assembly as part of your defense, the same should be received on or before Monday 28th April 2014 at 9.00a.m. You are kindly requested to provide the Assembly with at least 35 copies of such written submissions.” 40

The letter was signed by the Clerk of the County Assembly.

165. We were told, and this has not been controverted by the Petitioners, that the 1st Petitioner neither appeared at the plenary nor filed any submissions. The Embu County Assembly Hansard that has been availed to this Court shows that the 2nd Respondent dispatched the Sergeant-at-Arms to locate the 1st Petitioner within the precincts of the Assembly but the search was futile. 1 5
166. On 29th April, 2014, the County Assembly debated the motion and 23 out of 33 members supported it. The statutory threshold of two-thirds was thus met. Following the resolution of the County Assembly, and by a letter dated 29th April, 2014, the Speaker of the County Assembly of Embu informed the Speaker of the Senate of the approval of the motion by the County Assembly pursuant to section 33(2) of the Act. 10
167. Pursuant to section 33(3)(b) of the Act, the Senate then constituted a Special Committee to hear the charges against the 1st Petitioner. He appeared through counsel during the hearing on 11th May, 2014, and raised objection to the proceedings but he was overruled. Counsel indicated to the Committee that he had no instructions to proceed beyond that point. Prior to that, the 1st Petitioner had on 10th May, 2014 responded in writing to the allegations made against him. 15 20
168. The Committee later tabled its report with a finding that the allegations had been substantiated. The majority of the members of the Senate voted in support of the report of the Special Committee on the proposed removal from office of Martin Nyaga Wambora, the Governor of Embu County' dated 13th May, 2014 (hereinafter referred to as "the Report") thus leading to the removal of the 1st Petitioner. 25 30
169. It is the 1st and 2nd Respondents' case that the Governor was twice afforded a forum; before the County Assembly on 29th April, 2014, and subsequently before the Special Committee of the Senate on 11th May, 2014, to raise his defence. However, he opted not to take advantage of these opportunities. 35
170. Looking at what took place prior to the ejection of the Governor, we are satisfied that the laid down procedure was followed in his removal. In fact, the petitioners have, correctly, not impugned the process and procedure followed by the Senate and the County Assembly. We have also looked at the law and we are satisfied that 40

it provides several opportunities for a governor to be heard before being removed from office. As can be seen from section 33 of the Act, where the Senate opts for the formation of a special committee, as was done in the case of the 1st Petitioner, the governor will have an opportunity to be heard by the special committee and another opportunity to be heard by the full House, where removal has been recommended by the special committee.

Whether the Rules of Natural Justice were complied with in the removal of the Governor.

171. Related to the issue of the removal process is that of adherence to the rules of natural justice. It was argued by the petitioners that the principles of natural justice were not only available to the Governor but were also available to the other petitioners. The petitioners contended that their rights as enshrined in articles 1, 2(4), 10, 19, 33(1), 35(1), 47, 118(1)(b) and 196(1)(b) of the Constitution were violated as they were denied the opportunity of participating in the removal of the Governor. They submit that failure to effectively facilitate an inclusive and participatory process violated the rules of natural justice.

172. The petitioners argued that the fact that all members of the Special Committee that had participated in the initial removal proceedings, had also been nominated to the Special Committee that recommended the ouster of the 1st Petitioner, was in breach of the rules of natural justice. According to the petitioners, this was equivalent to allowing judges to sit on appeal over their own decision. It is their case that since the initial removal had been quashed, the members of the Special Committee were naturally offended hence the likelihood of bias. The petitioners contended that there was no way that the members of the Committee would have arrived at a different conclusion considering that they were dealing with the same charges and facts.

173. On a related issue, the Petitioners asserted that the removal proceedings were tainted with bad faith on the part of the 1st and 2nd respondents. Their argument was that the motion that led to the removal of the 1st Petitioner was moved by the same member of the 1st Respondent who had moved the removal motion resulting in the initial impeachment of the Governor, which had been declared illegal by the High Court at Kerugoya. In support of their allegation of bad faith they pointed to the fact that the motion was moved on

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- the same date the Court declared the initial removal null and void. Further, that the 2nd Respondent and the Clerk of the 1st Respondent were facing contempt of court proceedings in respect of the initial removal, and their prompt commencement of the current removal proceedings could only have been driven by bad faith. 1
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174. The petitioners were also perturbed that the respondents did not resort to the other constitutional processes for dealing with the issue, considering that the alleged violations had even been even referred to the Ethics and Anti-Corruption Commission for investigations which were indeed on-going. To them, the 1st and 2nd respondents abused their powers by resorting to the severe remedy of removal of the Governor. From the submissions of the petitioners, we conclude that their argument is that the twin pillars of the rules of natural justice were not adhered to. 10
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175. What then are these two pillars of the rules of natural justice” They were succinctly summarised by the learned authors of *Halisbury’s Laws of England* at page 218 (paragraph 95), Vol 1(1) as: 20
“Natural justice comprises two basic rules; first that no man is to be a judge in his own cause (*nemo judex in causa sua*), and second that no man is to be condemned unheard (*audi alteram partem*). These rules are concerned with the manner in which the decision is taken rather than with whether or not the decision is correct.” 25
176. Scholars have debated about the import and extent of these principles but the Courts have had no problem with understanding what these rules mean. The overriding consideration is that the rules are applicable on a case by case basis. The underlying foundation of these principles is that in so far as the *audi alteram partem* rule is concerned, before a decision is taken, the person to be affected by the decision must be informed of the impending decision or action, notice of the matters to be taken into account against the person should be given, and that person must be given an opportunity to be heard. In a serious matter like the one before us, those rules must be applied without exception. 30
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177. As for the *nemo judex in causa sua* rule, the first requirement is that no man should sit as an adjudicator in a case in which he has an interest. This is a rule that should be followed strictly, for one cannot be expected to be fair where the outcome of his decision will affect his interests. Secondly, no biased person should be allowed 40

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- to sit in judgement over the fate of another. The bias could be real or perceived. What amounts to actual bias or perceived bias will be deduced from the facts of the case and the general observations on the behaviour and actions of the umpire. 1
178. The case of *R v London Rent Assessment Panel Committee, ex p. Metropolitan Properties Co (FGC) Ltd*, [1969] 1 QB 577, is a case that arose from the decision of a rent assessment committee. The chairman of the committee was a solicitor who lived with his father in a flat whose landlord was an associate company of the landlord involved in the case before the committee. The solicitor had also acted in the past for tenants against his father's landlord on matters similar to those in question in the case before the committee. 5
179. Setting the test for establishing whether there was bias Lord Denning, MR stated that; 10
- “In considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was impartial as he could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit.” 20 25
180. In Kenya, administrative action that is “expeditious, efficient, lawful, reasonable and procedurally fair” is entrenched in article 47 of the Bill of Rights. The petitioners have cited several reasons to demonstrate that the removal of the 1st Petitioner was not fair. 30
181. The procedure for the removal of a governor has already been outlined. It is clear that the process starts with the issuance of a notice of motion by a member of the county assembly. Once the Speaker is satisfied that the motion is in order, the same is debated and a vote taken on it. Where two-thirds of the members of the county assembly approve the motion, the matter is escalated to the Senate for investigation of the allegations. 35
182. We will now examine what happened at the County Assembly in this case. There is no evidence on record to show that the Speaker manifested bias or that a bystander would have formed the opinion 40

- that he was biased. By accepting the motion, he was only doing that which the law required him to do. The role of the Speaker in the process is therefore statutory. 1
183. As for the mover of the motion, it is indeed true that he is the one who had moved the initial motion. There was, however, no law pointed out to us barring him from moving a similar motion the second time. Since the earlier removal had been declared null and void, section 33(8) of the Act which bars reintroduction of a removal motion on the same grounds within three months was inapplicable. The motion was therefore properly before the floor of the Assembly and the 2nd Respondent was mandated by the law to preside over the debate of the motion. 5 10
184. The petitioners claimed that the tabling of the motion on the day the Court declared the earlier proceedings null and void was influenced by the fact that the 2nd Respondent and the Clerk were facing contempt of Court proceedings in Wambora 1. That indeed could be one of the reasons why the motion was moved at lightning speed. 15 20
185. This allegation calls for examination of the role of the Speaker of a County Assembly. Under article 177 of the Constitution, the Speaker of the County Assembly is an *ex officio* member of the Assembly. It is not alleged that the motion to remove the 1st Petitioner was engineered by the Speaker of the County Assembly. To the contrary, the evidence before us is that the motion was in fact initiated by Hon Ibrahim Swaleh a member of the Embu County Assembly representing Kirimari Ward. In our view no nexus has been made between the contempt proceedings which were facing the Speaker and the subsequent motion to impeach the 1st Petitioner. Further the tabling of the motion could not come to the aid of the 2nd Respondent as the matter was already in the hands of the Court and the motion could not have in any way influenced the direction of the contempt of Court proceedings. 25 30 35
186. Moving to the question of bias on the part of the Special Committee appointed by the Senate to conduct investigations into the allegations against the Governor, we note that it is indeed true that all the members of the initial Special Committee were picked to serve in the second Special Committee that was to investigate the allegations against the Governor. This issue was debated at length by the Senate and it was decided that there was nothing wrong in 40

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- allowing the same members to sit in the new Committee. 1
187. Although we do not find anything untoward in the filling of the Special Committee with members who had dealt with the first removal, we share the petitioners' concerns that the decision by the Senate did not give the impression that justice would be seen to have been done. We would therefore strongly advice against such course of action in future. The Court in *Wambora 1* did indeed declare the first removal null and void, but that order did not disabuse the minds of the members of the Special Committee of the information gathered during the first hearing. Human beings are prone to prejudices and biases and any independent observer may easily reach the conclusion that the 1st Petitioner was not treated fairly by being subjected to the same people who had dealt with him before over the same matter. 5 10 15
188. In the circumstances, there ought to have been no difficulty in appointing different members of the Senate to the second Special Committee. In any case, a special committee is formed as and when the need arises. It should be remembered that under section 33(6) (a) of the Act a special committee can report that particulars of any allegation against the governor have not been substantiated and that would be the end of the matter. The special committee therefore has a critical role to play in the removal proceedings. The fate of a governor may well depend on the report of the special committee. 20 25
189. Having said so, we find that no prejudice was occasioned to the 1st Petitioner as the report of the Special Committee was adopted by an overwhelming majority of the whole House. We, however, agree with those opposed to this petition that the Senate has a fixed membership, save for any vacancies, during its lifetime, and where a matter is supposed to be handled by the House then nobody should be heard to say that the matter ought to have been handled by different people for there can only be one Senate at a time. Nothing however, turns on this issue. 30 35
190. The petitioners posed the question as to why the County Assembly did not go for more palatable options, rather than removal, in dealing with the allegations against the Governor. We do not wish to speculate on answers to that question. Our view, however, is that violation of the law and the Constitution by a governor can be remedied, *inter alia*, through removal or institution of criminal charges. The people of Kenya must embrace the doctrine of political 40

responsibility. Those voted into public offices should not be heard to say that theirs is only about policy formulation. They should know that they are in charge of the institutions they oversee and when those institutions fail they may be called upon to explain their role in such failures. Although removal from office is still at its infancy on our shores, we think it is a useful tool for ensuring that governors and public officers in general are accountable to the electorate and the public. Waiting for five years to remove an inept, incompetent, corrupt or unaccountable leader may be disastrous and that is why removal may sometimes be a useful tool in appropriate cases.

Whether the removal of the Governor requires public participation, and if so; whether there was public participation; and whether article 35 of the Constitution on access to information was complied with.

191. The Petitioners submitted that they were constitutionally entitled to participate in the impeachment process of the Embu County Governor as provided under article 10(1) of the Constitution. This article provides for the national values and principles of governance which bind all state organs, state officers and public officers whenever any of them applies or interprets the Constitution including peoples' participation.

192. Public participation in governance is an internationally recognized concept. This concept is reflected in international human rights instruments. The Universal Declaration of Human Rights of 1948 proclaims in article 21 that everyone has the right to take part in the government of his country, directly or through freely chosen representatives. The International Covenant on Civil and Political Rights (ICCPR) affirms at article 25, that:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions;

- a. To take part in the conduct of public affairs, directly or through freely chosen representatives;
- b. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- c. To have access, on general terms of equality, to public service in his country.”

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193. The right to public participation is based on the democratic idea of popular sovereignty and political equality as enshrined in article 1 of the Constitution. Because the government is derived from the people, all citizens have the right to influence governmental decisions; and the government should respond to them. Therefore, participation must certainly entail citizens' direct involvement in the affairs of their community as the people must take part in political affairs. 1 5
194. Article 196(1)(b) of the Constitution enjoins a County Assembly to facilitate public participation and involvement in the legislative and other business of the assembly and its committees. Whereas the Constitution does not expressly task the County Assembly with the role of removal of a Governor, article 181(2) of the Constitution empowers Parliament to enact legislation providing for the procedure of removal of a county governor on the grounds specified under the said article. Pursuant to the said provision Parliament enacted the County Governments Act and in section 33 the procedure for removal of a Governor is to be initiated in the County Assembly. Accordingly, the removal of a governor is one of the businesses statutorily assigned to the County Assembly. In our view the question is not whether the public ought to participate in the process of the removal of a governor but to what extent should that participation go. In our view, some level of public participation must be injected into the process in order to appreciate the fact that a governor is elected by the County, and in order to avoid situations where an otherwise popular governor is removed from office due to malice, ill will and vendetta on the part of the Members of the County Assemblies. 10 15 20 25 30
195. Our view is reinforced by the decision in *Matatiele Municipality and Others v President of the Republic of South Africa & others (2)*, (*supra*) where Ngcobo, J expressed himself *inter alia* as follows: 35
- “Our constitutional democracy has essential elements which constitute its foundation; it is partly representative and partly participative. These two elements reflect the basic and fundamental objective of our constitutional democracy. The provisions of the Constitution must be construed in a manner that is compatible with these principles of our democracy. Our system of government requires that the people elect representatives who make laws on their behalf and contemplates that people will be given the opportunity to 40

participate in the law-making process in certain circumstances. 1
The law-making process will then produce a dialogue between
the elected representatives of the people and the people
themselves. The representative and participative elements of
our democracy should not be seen as being in tension with 5
each other.....What our constitutional scheme requires
is “the achievement of a balanced relationship between
representative and participatory elements in our democracy.”
The public involvement provisions of the Constitution 10
address this symbolic relationship, and they lie at the heart of
the legislative function. The Constitution contemplates that
the people will have a voice in the legislative organs of the State
not only through elected representatives but also through
participation in the law-making process.....To uphold 15
the government’s submission would therefore be contrary
to the conception of our democracy, which contemplates
an additional and more direct role for the people of the
provinces in the functioning of their provincial legislatures
than simply through the electoral process. The government’s 20
argument that the provisions of section 118(1)(a) are met
by having a proposed constitutional amendment considered
only by elected representatives must therefore be rejected.....
Before leaving this topic, it is necessary to stress two points.
First, the preamble of the Constitution sets as a goal the 25
establishment of “a society based on democratic values [and]
social justice” and declares that the Constitution lays down
“the foundations for a democratic and open society in which
government is based on the will of the people.” The founding 30
values of our constitutional democracy include human
dignity and “a multi-party system of democratic government
to ensure accountability, responsiveness and openness.”
And it is apparent from the provisions of the Constitution
that the democratic government that is contemplated is 35
partly representative and partly participatory, accountable,
transparent and makes provision for public participation
in the making of laws by legislative bodies. Consistent with
our constitutional commitment to human dignity and self-
respect, section 118(1)(a) contemplates that members of the 40
public will often be given an opportunity to participate in
the making of laws that affect them. As has been observed,
a “commitment to a right to . . . public participation in

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- governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self respect.” 1
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196. In our view an opportunity must be availed to the voters in a County to air their views on the process of the removal of their Governor before a decision is arrived at either way. To completely lock out the voters from being heard on such important matter as the removal of their Governor would be contrary to the spirit of article 1(2) of the Constitution. Whereas it may not be possible that each and every person in the County be heard on the issue, those who wish to put across their views on the impeachment ought to be allowed to do so though the ultimate decision rests with the County Assembly. 10
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197. The essence of public participation was captured in the case of *Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 others*, CCT86/08 [2010] ZACC 5, in the following terms: 20
- “...engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision. As this Court observed in *Doctors for Life*, both the duty to facilitate public involvement and the positive right to political participation “seek to ensure that citizens have the necessary information and the effective opportunity to exercise the right to political participation.” This can be achieved not only through elected representatives, but also by enabling citizens to participate directly in public affairs, “through public debate and dialogue with elected representatives, referendums and popular initiatives or through self-organization”. 25
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198. This was reaffirmed in *Doctors for Life International vs Speaker of the National Assembly & others* (CCT 12/05) 2006 ZACC 11, where it was held: 40
- “The right to political participation is a fundamental

human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements; a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected. ... Significantly, the ICCPR guarantees not only the “right” but also the “opportunity” to take part in the conduct of public affairs, This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation....The right to political participation includes but is not limited to the right to vote in an election. That right, which is specified in article 25(b) of the ICCPR, represents one institutionalization of the right to take part in the conduct of public affairs. The broader right, which is provided for in Article 25(a), envisages forms of political participation which are not limited to participation in the electoral process. It is now generally accepted that modes of participation may include not only indirect participation through elected representatives but also forms of direct participation.....”

199. As already outlined hereinabove, Standing Order 61 which we have reproduced, of the County Assembly of Embu makes provision for the removal of a governor.

200. In our view public participation ought to commence from the time of the notification of the motion to remove the Governor by a member to the Clerk which notification in our view is the mandate of the Assembly. This is when the removal process crystallises. However, it is clear that the period provided between the notification and the time for debating and the determination of the motion by the Assembly in the Standing Orders is very limited. It is therefore not plausible to expect that the mode of public participation in such circumstances would be commensurate with that of the enactment of a legislation. As was appreciated by Sachs J in the South African case of the *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC:

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue

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- and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”
[Emphasis supplied] 1
201. A similar position was adopted in *Doctors for Life International v The speaker of the National Assembly & others* (*supra*) cited with the approval in *Robert N Gakuru & others v Governor, Kiambu County* (*supra*) that: 5
- “Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement. This discretion will apply both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes”. 10
202. A word of caution was, however, given in the *Gakuru* Case when the Court stated that: 15
- “In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively.” 20
203. In making a determination whether the County Assembly complied with its duty to facilitate public participation, the Court will consider what the County Assembly has done and in this case the question will be whether what the County Assembly has done is reasonable in all the circumstances. The factors that would determine reasonableness would include the nature of the business conducted by the County Assembly and whether there are timelines to be met as set by the law. This will be the ultimate determination on the method of facilitating public participation 25 30
204. The parameters of consultation was the subject of the holding in the South African case of *Maqoma v Sebe & another* 1987 (1) SA 483, where the Court held: 35
- “It seems that ‘consultation’ in its normal sense without reference to the context in which it is used, denotes a deliberate getting together of more than one person or party... in a situation of conferring with each other where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate. The word consultation in itself 40

- does not presuppose or suggest a particular forum, procedure or duration for such discussion or debate. Nor does it imply that any particular formalities should be complied with. Nor does it draw any distinction between communications conveyed orally or in writing. What it does suggest is a communication of ideas on a reciprocal basis.” 1 5
205. It is however our view that for the purposes of the impeachment proceedings public participation should relate to the impeachment proceedings themselves. It cannot be justified on the basis of events that took place before the said proceedings were formally commenced by notice to the Clerk of the Assembly. Therefore the prior processes of investigations of the alleged complaints by the farmers cannot in our view constitute public participation for the purposes of the impeachment process. 10 15
206. The Respondents contended that the County Assembly in fulfillment of the statutory requirement to involve the public in its business developed infrastructure for public participation by July, 2013. This included the establishment of public contact offices in each of the County Assembly Wards, and the recruitment of Ward staff to facilitate public participation. It was further contended that the Assembly through the office of the Clerk disseminates notices of its business to the public through public notice boards, religious institutions and the ward office infrastructure developed for that purpose. In support of these averments copies of notices were exhibited. From the annextures availed, the notices that fell within the period between 16th April, 2014 when the notification was received and 29th April 2014 when the motion was debated, were three. The same bore the stamps for Kyeni North Ward, Mbeti South Ward and Supreme Council of Muslims and were all dated 24th April, 2014 and received on 25th April, 2014. Was this sufficient notification” 20 25 30
207. In the *Gakuru* Case, it was stated as follows: 35
“...It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is 40

even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.” 1 5

208. In that decision the Court relied on the holding in *Doctors for Life International vs. Speaker of the National Assembly & others (supra)* to the effect that: 10

“The phrase “facilitate public involvement” is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are “facilitate” and “involvement”. To “facilitate” means to “make easy or easier”, “promote” or “help forward”. The phrase “public involvement” is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of “involve” includes to “bring a person into a matter” while participation is defined as “[a] taking part with others (in an action or matter); . . . the active involvement of members of a community or organization in decisions which affect them”. According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participates in the legislative process. That is the plain meaning of section 72(1)(a). This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in *New Clicks*, “[t]he Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies.” The democratic government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process.” 15 20 25 30 35 40

209. Section 91 of the County Governments Act establishes the

modalities and platforms for citizen participation. It provides that the county government shall facilitate the establishment of structures for citizen participation including—

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“a. information communication technology based platforms;

b. town hall meetings;

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c. budget preparation and validation *fora*;

d. notice boards: announcing jobs, appointments, procurement, awards and other important announcements of public interest;

e. development project sites;

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f. avenues for the participation of peoples’ representatives including but not limited to members of the National Assembly and Senate; or

g. establishment of citizen *fora* at county and decentralized units.”

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210. At this juncture, it is important to set out the parties’ evidence with respect to public participation.

211. According to the affidavit sworn by Aloise Victor Njage on behalf of the petitioners on 23rd May, 2014 at paragraphs 6 and 7:

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“6. That by virtue of article 10, article 118(1) (b), article 174 (a) and (c) article 196 (1) (b) of the Constitution, your Petitioners avers that they are entitled to directly participate in all businesses of the Respondents of whatever nature and form and most especially an activity that touches or relates to good governance and/or establishment of the Embu County Government and that the removal and impeachment of their 1st Petitioner constitutes or amounts to any other business contemplated in the fore mentioned Article, and that the said right has been infringed by the Respondents when they moved to remove and impeach the 1st Petitioner in exclusion of the Petitioners herein, and as such your Petitioners are therefore entitled to Petition this Honourable Court for protection and restoration of the said right.

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7. That the Petitioners contend that have a right to information as enshrined under article 35(1)(a) and (3) of the Constitution to enable comprehensive participation based on accurate information that pertains to them and affairs of the County Assembly.”

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212. For the Respondents, the affidavit sworn by Justus Kariuki Mate on 3rd June, 2014 at paragraph 32 deposed as follows: 1
- “That the County Assembly of Embu is consultative Assembly that has always involved the public in its business. Accordingly, I verily believe that the allegations made by the Petitioners that the 1st Respondent failed in its obligations under Article 196 with regard to public participation are not true for reasons that; 5
- i. The complaints giving rise to the investigations and subsequent charges against the 1st Petitioner were made by the public to their elected representatives and who raised them in the County Assembly and thereby precipitating investigations against the 1st Respondent (*sic*). 10
- ii. In investigations made and in receiving evidence on the allegations made against the 1st Petitioner and which have now been substantiated, the County Assembly received data and information from the public. In the matter of the procurement of bad maize seeds by the office of the 1st Petitioner, an extensive field research was carried out with input from the farmers and thereby leading to the findings of the assembly and the senate that the said maize seeds had been unlawfully procured to the detriment and loss of farmers. 15 20 25
- iii. All the committee and plenary proceedings of the assembly are open to the public for their input and contribution.
- iv. The only reason why the Petitioners herein allege that there was no public participation in the process herein is because they are not an objective public but a group of the 1st Petitioner’s supporters who have even in their petition expressed clear bias against the Assembly and its officials and would therefore not be an objective guide on the question of whether or not there was public participation. 30 35
- v. The motive of the collection of signatures by the Petitioners is clear from the depositions of Aloise Victor Njagi in the affidavit sworn on 7th May 2014 where at paragraph 8 thereof he confirms that the signatures presented to this court vide their annexures1 to that affidavit, are not of persons alleging that the County 40

- Assembly did not involve the public in the process herein but signatures in support of a Petition to have the County suspended by the President under the provisions of article 192(1)(b). 1
- vi. The said signatures are now introduced to these proceedings to mislead the Court that the public is not involved in the business of the Assembly. 5
- vii. The county Assembly in fulfilment of the statutory requirement to involve the public in its business developed infrastructure for public participation by July 2013, which included establishment of Public contact offices in each of the County Assembly Wards, and the recruitment of Ward staff to facilitate public participation. 10
- viii. The County Assembly of Embu Through The office of the clerk disseminates notices of its businesses to the public through public notice boards, religious institutions and the ward office infrastructure developed for that purpose. 15
- ix. I verily believe that the requirement for public participation under article 196 does not require a referendum of all citizens on all business of the Assembly as long as there is provided notice and forum for the public to participate in the business of the Assembly. 20
- x. From the notices, the Assembly has from time to time received various responses and input from the public and which information is maintained by the office of the clerk.” 25
213. The averments above made by the Respondents were not rebutted by a further affidavit of the Petitioners. 30
214. We have taken into account the period provided within which public participation may be conducted and the statutory structures for citizens participation, as well as the mode of notification formulated by the County Assembly. According to the respondents these included establishment of public contact offices in each of the County Assembly Wards, and the recruitment of Ward staff to facilitate public participation. They also contended that the County Assembly through the office of the Clerk disseminates notices of its business to the public through public notice boards, religious institutions and the ward office infrastructure developed for that purpose. 35
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215. From the averments by the parties which are before the Court, we are not satisfied that the allegation made by the Petitioners that they were not afforded an opportunity to participate in the removal proceedings has been proved. We are unable to stretch the averments in the supporting affidavit set out hereinabove to mean that the respondent's infrastructure stated in paragraph 32 of the replying affidavit was not adhered to in this case. It must be emphasized that in matters such as this evidence is contained in the affidavit rather than in submissions. 1
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- To what extent, if any, can the Court intervene in the removal process" 10
216. Having decided that the formal procedure as provided by the law was followed in the removal of the 1st Petitioner, we will now look at the issue of threshold. Impeachment of governors came with the introduction of counties by the 2010 Constitution. Although the Constitution replaced in 2010 had provision for impeachment of the President, such power was never exercised by Parliament and we need to look at decisions of other jurisdictions to have a clear understanding of how this power should be exercised. 15
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217. *Black's Law Dictionary*, 9th Edition at page 820 defines impeachment as: 20
- "The Act (by a legislature) of calling for the removal from office of a public official, accompanied by presenting a written charge of the official's alleged misconduct; esp., the initiation of a proceeding in the US House of Representatives against a federal official, such as the President or a judge.... 25
- In the United Kingdom, impeachment is by the House of Commons and trial by the House of Lords." 30
218. The word 'impeachment' derives from Latin roots expressing the idea of being caught or entrapped, and is analogous to the modern French verb *empêcher* (to prevent) and the modern English word 'impede'. Impeachment also means prosecution, indictment or arraignment. 35
219. We note that although the Standing Orders of the County Assembly of Embu provide for the removal by impeachment, the Constitution and the Act do not mention impeachment in reference to governors. The two documents only refer to removal from office. A closer look at the Constitution explains why the drafters of the Constitution stuck with the words 'removal from office' in the case 40

- of governors. 1
220. There are two provisions in the Constitution for the removal of the President. Under article 144, the President can be removed from office on grounds of incapacity whilst under article 145, he may be removed by impeachment. However, in the case of a governor, the grounds of removal are lumped together under article 181. 5
221. One of the grounds for removal of a governor from office is ‘physical or mental incapacity to perform the functions of office’. A person cannot be blamed, accused or prosecuted for being physically or mentally unable to discharge the duties of office hence the avoidance of the word ‘impeach’ in respect of the removal of county governors from office. That also explains why Parliament provided under section 33(9) of the Act that removal of a governor from office on the grounds of physical or mental incapacity will be done in accordance with article 144 of the Constitution with necessary modifications. Owing to our explanation, we think that it would not be wrong to say that a governor has been removed by impeachment if the removal is not on the ground of physical or mental incapacity to perform the duties of office. 10
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222. In the United States of America, the Constitution under article 1, section 3, Clause 6 provides that the “Senate shall have the sole Power to try all Impeachments.” To better understand why the framers of the Constitution of the United States of America vest impeachment solely on the House of Representatives, Michael J Gerhardt in his article, ‘*The Special Constitutional Structure of the Federal Impeachment Process*’, Law and Contemporary Problems, Vol 63: Nos 1 & 2, pages 245-256, at page 246 states that; 25
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- “By vesting the impeachment authority in the politically accountable authorities of the House and the Senate, the framers of the Constitution deliberately chose to leave the difficult questions of impeachment and removal in the hands of officials well versed in pragmatic decision-making. Members of Congress are pragmatists who can be expected to decide or resolve issues, including the appropriate tests, by recourse to practical, rather than formalist, calculations. In fact, members of Congress decide almost everything pragmatically, and decisions about impeachment and removal are no exception. The vesting of impeachment authority in political branches necessarily implies the discretion to

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- take various factors, including possible consequences, into consideration in the course of exercising such authority.” 1
223. Therefore, under the Constitution of the United States of America, the impeachment process is the preserve of the House of Representatives and the Senate. Accordingly, there is no provision for intervention by any other organ or arm of the government. 5
224. Article XI, section 6 of the 1987 Constitution of the Republic of the Philippines provides that: 10
- “The Senate shall have the sole power to try and decide cases of impeachment. When sitting for that purpose, the Senators shall be on oath or affirmation. When the President of the Philippines is on trial, the Chief Justice of the Supreme Court shall preside, but shall not vote. No person shall be convicted without the concurrence of two-thirds of all the Members of the Senate.” 15
225. Closer home, the Constitution of the Federal Republic of Nigeria 1999 under section 188 provides for the removal of a Governor or deputy governor. This provision was set out by the Supreme Court in the case of *Hon Muyiwa Inakoju (supra)*. It provides that: 20
- “188(1) The Governor or Deputy-Governor of a State may be removed from office in accordance with the provisions of this section.
- (2) Whenever a notice of any allegation in writing signed by not less than one-third of the members of the House of Assembly - 25
- (a) is presented to the Speaker of the House of Assembly of the State; 30
- (b) stating that the holder of such office is guilty of gross misconduct in the performance of the functions of his office, detailed particulars of which shall be specified, the Speaker of the House of Assembly shall, within seven days of the receipt of the notice, cause a copy of the notice to be served on the holder of the office and on each member of the House of Assembly, and shall also cause any statement made in reply to the allegation by the holder of the office, to be served on each member of the House of Assembly. 35
- (3) Within fourteen days of the presentation of the notice to the Speaker of the House of Assembly (whether or not 40

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- any statement was made by the holder of the office in reply to the allegation contained in the notice), the House of Assembly shall resolve by motion, without any debate whether or not the allegation should be investigated. 1
- (4) A motion of the House of Assembly that the allegation be investigated shall not be declared as having been, passed unless it is supported by the votes of not less than two-thirds majority of all the members of the House of Assembly. 5
- (5) Within seven days of the passing of a motion under the foregoing provisions of this section, the Chief Judge of the State shall at the request of the Speaker of the House of Assembly, appoint a Panel of seven persons who in his opinion are of unquestionable integrity, not being members of any public service, legislative house or political party, to investigate the allegation as provided in this section. 10
- (6) The holder of an office whose conduct is being investigated under this section shall have the right to defend himself in person or be represented before the Panel by a legal practitioner of his own choice. 20
- (7) A Panel appointed under this section shall -
- (a) have such powers and exercise its functions in accordance with such procedure as may be prescribed by the House of Assembly; and within three months of its report its findings to Assembly (*sic*). 25
- (b) within three months of its appointment, report its findings to the House of assembly.
- (8) Where the Panel reports to the House of Assembly that the allegation has not been proved, no further proceedings shall be taken in respect of the matter. 30
- (9) Where the report of the Panel is that the allegation against the holder of the office has been proved, then within fourteen days of the receipt of the report, the House of Assembly shall consider the report, and if by a resolution of the House of Assembly supported by not less than two-thirds of all its members, the report of the Panel is adopted, then the holder of the office shall stand removed from office as from the date of the adoption of the report. 35
- (10) No proceedings or determination of the Panel or of 40

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- the House of Assembly or any matter relating to such proceedings or determination shall be entertained or questioned in any court. 1
- (11) In this section -
 “gross misconduct” means a grave violation or breach of the provisions of this Constitution or a misconduct of such nature as amounts in the opinion of the House of Assembly to gross misconduct.” [Emphasis supplied] 5
226. In Kenya, the threshold for removal from office of a governor is provided under the Constitution and the Act. The Senate Standing Orders and the standing orders of various county assemblies make further provision on the issue. 10
227. Section 33(1) of the Act provides that to move a motion, it has to be supported by at least a third of all the members of the County Assembly. Thereafter, during the vote, the motion has to be supported by at least two-thirds of all the members of the County Assembly. At the Senate, section 33(7) of the Act provides that for removal of a governor to succeed it must be supported by a majority of all members of the Senate. 15
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228. Looking at the applicable laws in the various jurisdictions it is clear that other jurisdictions have provided for a more stringent procedure for impeachment. For example the inclusion of the Chief Justice in the Philippines in the impeachment panel; and the constitution by the Chief Judge of an independent impeachment panel in Nigeria. Ideally, that should be the case as removal from office has the potential to ruin a person’s career and reputation spanning many years. The Kenyan laws appear to have left this issue entirely in the hands of the politicians – the County Assembly and the Senate. It is judgement by peers. On account of this, it is imperative that the judiciary exercise greater vigilance in its supervisory role. 25
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229. However, unlike in the United States where the power of impeachment is expressly reposed in the legislature and Nigeria where the jurisdiction of the judiciary is ousted, the Kenyan Constitution leaves room for the judiciary to ensure that whatever is done by the County Assembly and the Senate is in consonance with the Constitution-see article 165(2)(d)(ii). 35
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230. Do the numbers amount to threshold “*Black’s Law Dictionary*, 9th Edition at page 1619 defines threshold in respect to parliamentary

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- law as “the number or proportion of votes needed for election”. We do think that numbers constituting the threshold for the removal count for something. 1
231. With regard to the case presented before this Court, it was the petitioners’ case that the allegations made by the 1st and 2nd respondents can be narrowed down to gross violations of the Public Procurement and Disposal Act and Public Finance and Management Act. Of the four grounds listed in article 181, it appears that the Governor’s removal from office was narrowed to gross violation of the Constitution and other laws. We will therefore deal with this ground of removal only. 5 10
232. It has been argued that the gross violation attributed to Mr Wambora had not been demonstrated. Gross violation of the Constitution or any other law is a ground for removal from office as provided under article 181(1)(a). The question that then arises is how you qualify gross violation. Who is the one to assess that the allegations amount to gross violation” 15
233. In stating what amounts to gross violation, the Supreme Court of Nigeria in Hon Muiwa Inakoju (*supra*) held that: 20
- “(i) The word “gross” in the subsection does not bear its meaning of aggregate income. It rather means generally in the context atrocious, colossal, deplorable, disgusting, dreadful, enormous, gigantic, grave, heinous, outrageous, odious and shocking. All these words express some extreme negative conduct. Therefore a misconduct which is the opposite of the above cannot constitute gross misconduct. Whether a conduct is gross or not will depend on the matter as exposed by the facts. It cannot be determined in vacuo or in a vacuum but in relation to the facts of the case and the law policing the facts. 25 30
- (ii) Gross misconduct is defined as (a) a grave violation or breach of the provisions of the Constitution and (b) a misconduct of such nature as amounts in the opinion of the House of Assembly to gross misconduct. 35
- (iii) By the definition, it is not every violation or breach of the Constitution that can lead to the removal of a Governor or Deputy Governor. Only a grave violation or breach of the Constitution can lead to the removal of a Governor or Deputy Governor. Grave in the context does not mean an 40

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- saying the obvious that a Governor or Deputy Governor who involves in certificate forgery and racketeering during his tenure has committed gross misconduct.” 1
234. With regard to what amounts to gross violation the Court in Wambora 1 observed at paragraph 253; 5
- “...whatever is alleged against a Governor must:
- (a) Be serious, substantial and weighty.
 - (b) There must a nexus between the Governor and the alleged gross violations of the Constitution or any other written law. 10
 - (c) The charges framed against the Governor and the particulars thereof must disclose a gross violation of the Constitution or any other written law.
 - (d) The charges as framed must state with degree of precision the Article(s) or even sub-Article (s) of the Constitution or the provisions of any other written law that have been alleged to be grossly violated.” 15
235. On appeal, the Court of Appeal at Nyeri as regards what amounts to gross violation, held at paragraph 46 in Wambora 1 Appeal that: 20
- “We reiterate that what constitutes gross violation of the Constitution is to be determined on a case by case basis. Gross violation of the Constitution includes violation of the values and principles enshrined under article 10 of the Constitution and violation of Chapter six (Leadership & Integrity) of the Constitution; or intentional and/or persistent violation of any article of the Constitution; or intentional and blatant or persistent violation of the provisions of any other law. The rationale for this definition is that the values and principles embodied in the Constitution provide the bedrock and foundation of Kenya’s constitutional system and under article 10(1) these values bind all state organs, state officers, public officers and all persons. We hasten to state that the facts that prove gross violation as defined above must be proved before the relevant constitutional organ. Examples of the constitutional Articles whose violation amounts to gross violation include: 25
- i. Chapter 1 on the Sovereignty of the People and Supremacy of the Constitution more specifically articles 1, 2, and 3(2) of the Constitution. 30
 - ii. Chapter 2- Article 4 that establishes Kenya as a sovereign 35
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multi-party Republic & Article 6 that establishes devolution and access to services.	1
iii. Article 10 on national values and principles of good governance.	
iv. Chapter 4 on the Bill of Rights.	5
v. Chapter 6- Articles 73 to 78 on Leadership and Integrity.	
vi. Chapter 12 - Article 201 on principles of public finance.	
vii. Chapter 13- Article 232 on values and principles of public service.	
viii. Chapter 14 - Article 238 on principles of national security.	10
ix. Article 259 (11) on advice and recommendation.	
x. Any conduct that comes within the definition of the offence of treason in the Penal Code (Cap 63 of the Laws of Kenya)."	15
236. A body exercising its quasi-judicial function should be very careful in deciding what amounts to gross violation or misconduct. The Supreme Court of Nigeria in Hon Muiyiwa Inakoju (*supra*) warned that:
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| "It is not a lawful or legitimate exercise of the constitutional function in section 188 for a House of Assembly to remove a Governor or a Deputy Governor to achieve a political purpose or one of organised vendetta clearly outside gross misconduct under the section. Section 188 cannot be invoked merely because the House does not like the face or look of the Governor or Deputy Governor in a particular moment or the Governor or Deputy Governor refused to respond with a generous smile to the Legislature qua House on a parliamentary or courtesy visit to the holder of the office. The point I am struggling to make out of this light statement on a playful side is that section 188 is a very strong political weapon at the disposal of the House which must be used only in appropriate cases of serious wrong doing on the part of the Governor or Deputy Governor, which is tantamount to gross misconduct within the meaning of subsection (11). Section 188 is not a weapon available to the Legislature to police a Governor or Deputy Governor in every wrong doing. A Governor or Deputy Governor, as a human being, cannot always be right and he cannot claim to be right always. That explains why section 188 talks about gross misconduct. | 20 |
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- Accordingly, where a misconduct is not gross, the section 188
weapon of removal is not available to the House of Assembly.” 1
237. The Court of Appeal in Wambora 1 Appeal did accept that the
process had a political element when it held at paragraph 31 that: 5
“Our reading and interpretation of article 181 of the
Constitution as read with section 33 of the County
Governments Acts shows that removal of a Governor is a
constitutional and political process; it is a *sui generis* process
that is quasi-judicial in nature and the rules of natural 10
justice and fair administrative action must be observed. The
impeachment architecture in article 181 of the Constitution
reveals that removal of a Governor is not about criminality or
culpability but is about accountability, political governance
as well as policy and political responsibility.” 15
238. On the doctrine of separation of powers, the Court of Appeal
in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5
others* [2013] e KLR held that:
“It is not in doubt that the doctrine of separation of powers is 20
a feature of our constitutional design and a pre-commitment
in our constitutional edifice. However, separation of
powers does not only proscribe organs of government
from interfering with the other’s functions. It also entails
empowering each organ of government with countervailing 25
powers which provide checks and balances on actions taken
by other organs of government. Such powers are, however,
not a license to take over functions vested elsewhere. There
must be judicial, legislative and executive deference to the
repository of the function. We therefore agree with the High 30
Court’s *dicta* in the petition the subject of this appeal that:
“[Separation of powers] must mean that the Courts must
show deference to the independence of the Legislature
as an important institution in the maintenance of our
constitutional democracy as well as accord the executive 35
sufficient latitude to implement legislative intent. Yet,
as the Respondents also concede, the Courts have an
interpretive role - including the last word in determining
the constitutionality of all governmental actions...” 40
239. We have no doubt in our minds that this Court has a supervisory
role to play in the process of the removal of a governor. Time and

again it has been said and will continue being said, that so long as the Constitution remains as it is, this Court has a duty to check the constitutionality and legality of anything done by Parliament (National Assembly and Senate) and the county assemblies. The Court must zealously and firmly guard this power for to do otherwise would amount to subverting the Constitution by abdicating a clear constitutional responsibility. In the same breath it must be stated that the Courts cannot take over the roles clearly reposed in the other arms of government by the Constitution. Again, that would amount to an overthrow of the Constitution in the pretext of exercising supervisory powers. Of course this is within the context of exercise by such state organ of its mandate within the Constitution and the law. A delicate balance must indeed be struck in order to attain harmonious and smooth operation of the engine of governance. The Court must not severely restrict the constitutional mandates of the other state organs to the extent that those organs cannot execute their work. Such restrictions may result in the Constitution looking like a green and beautiful tree that bears no fruit.

240. The Court of Appeal in Wambora 1 Appeal at paragraph 53 of the judgement delineated the role of the Court in removal proceedings as follows:

“It is incumbent upon the High Court to determine if the facts in support of the charges against a Governor meet and prove threshold in article 181 of the Constitution. For example, was the 4th Appellant an employee of the 1st Appellant or of the County Government” Is a Governor to bear personal vicarious liability for the acts and omissions of officers of the County Government” We are of the view that article 181 and section 33 of the County Governments Act are not ouster clauses that limit or oust the jurisdiction of the High Court as conferred by article 165(3)(d) (ii) and(iii) of the Constitution. Though the process of removal of a governor from office is both a constitutional and a political process, the political question doctrine cannot operate to oust the jurisdiction vested on the High Court to interpret the Constitution or to determine the question if anything said to be done under the authority of the Constitution or of any law is consistent with or in contravention of the Constitution.”

241. We hold the view that the powers exercisable by this Court are powers of review and such powers can only check compliance

- with the Constitution, the law, the rules of natural justice and the rationality of impugned decisions. Where the decision of the impeaching organs is contrary to common logic, then this Court can quash such a decision for being unreasonable. 1
242. We associate ourselves with the dicta of Souter, J in his concurring opinion in *Nixon v United States*, 506 US 224 (1993) where he observes that although removal proceedings should be left to the Senate: 5
- “One can, nevertheless, envision different and unusual circumstances that might justify a more searching review of impeachment proceedings. If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply “ ‘a bad guy’ ” ...judicial interference might well be appropriate. In such circumstances, the Senate’s action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence.” 10 15 20
243. In our view, the conduct of the county assemblies and the Senate should only raise the antenna of this Court if they do something perverse to normal conduct to the extent of perplexing and agitating the mind of the ordinary man going about his business in Gikomba market in Nairobi. 25
244. In our case there are clear steps provided in the process leading to the removal of a governor. That process begins at the county level then proceeds to the Senate. Where the motion for removal has succeeded in the County Assembly, it does not necessarily mean the Senate will automatically approve the removal. In fact a careful reading of the relevant laws shows that the actual trial is by the Senate. Under article 96(1) of the Constitution the role of the Senate is to represent the counties, and protect the interests of the counties and their governments. In the removal of a governor, the County Assembly and the Senate are performing their functions under the Constitution and the Act. 30 35
- Can the Courts Intervene” 40
245. It is our considered opinion that the Courts have to be very careful before they intervene in matters that are properly in the

domain of other state organs. We opine that the Courts can only intervene where constitutional issues are raised. As was observed by the Supreme Court of India in the case *State of Rajasthan (supra)*:

‘...it is true that if a question brought before the Court is purely a political question not involving determination of any legal or constitutional right or obligation, the Court would not entertain it, since the Court is concerned only with adjudication of legal rights and liabilities. But merely because a question has a political complexion that by itself is no ground why the Court should shrink from performing its duty under the Constitution if it raises an issue of constitutional determination. Every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political. A constitution is a matter of purest politics, a structure of power and as pointed out by Charles Black in *Perspectives in Constitutional law* ‘constitutional law’ symbolizes an intersection of law and politics, wherein issues of political power are acted on by persons trained in the legal tradition, working in judicial institutions, following the procedures of law....”

246. We agree with the Court of Appeal in *Mumo Matemu (supra)* where it was stated that:

“We [also] reiterate that a court reviewing the procedure of a legislature is not a super-legislature, sitting on appeal on the wisdom, correctness or desirability of the opinion of the impugned decision-making organ. It has neither the mandate nor the institutional equipment for that purpose in our constitutional design. Moreover, the process cannot be wrong simply because another institution, for example the Courts, would have conducted it differently. It must be accepted that the institutional environment is controlling on the manner in which an organ disposes of its issues.”

247. In *Wambora 1 Appeal (supra)* the Court of Appeal was of the opinion that this Court has to interrogate the facts in order to determine whether there was nexus between the Governor and the alleged gross violations. That would call for a substantive interrogation of the charges and evidence leading to the removal in order for the Court to make any meaningful and legitimate intervention.

248. However in this case we were not supplied with material which would enable us to conduct interrogation, and there is the danger of the Court speculating as to whether what led to removal of the Governor met the threshold. For example, the evidence which was tabled before the investigations committees was not availed to this Court. In addition, evidence such as was availed to the Senate and which is referred to in the Hansard was not availed before the Court. This is the nature of evidence which might have enabled the Court to deal with the issues of nexus and threshold. 1
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249. We now consider whether there was a nexus between the 1st Petitioner and the alleged gross violation of the Constitution and the relevant laws. The summary of the findings of the Special Committee of the Senate is found at page 68 of the Report where it is stated that: 15
- “Conclusion
153. The Special Committee, having executed its mandate under section 33 of the County Governments Act and standing order 68 of the Senate Standing Orders has found as follows- 20
- (1) On the Charge of Gross Violation of the Public Procurement and Disposal Act, Chapter 412A of the Laws of Kenya, pursuant to section 33(6) of the County Governments Act, 2012 and standing order 68(4) of the Senate Standing Orders, the Committee finds this Charge to be substantiated; 25
- (2) On the Charge of Gross Violation of the Public Finance Management Act, Chapter 412C of the Laws of Kenya, pursuant to section 33(6) of the County Governments Act, 2012 and standing order 68(4) of the Senate Standing Orders, the Committee finds this Charge to be substantiated; and 30
- (3) On the Charge of Gross Violation of the Constitution of Kenya, 2010 pursuant to section 33(6) of the County Governments Act, 2012 and standing order 68(4) of the Senate Standing Orders, the Committee finds this Charge to be substantiated.” 35
250. A perusal of the report clearly shows that the Senate analysed the evidence put forward in support of each allegation. The Senate also considered the 1st Petitioner’s written answer to the charges before making its determination. The allegation of gross violation 40

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- of the Public Procurement and Disposal Act was premised on the purchase and distribution of maize seed that did not germinate or whose germination did not surpass 20%, and the procurement of works for the face-lifting of Embu Stadium. 1
251. After considering the evidence availed to it concerning the purchase of maize seeds, the Special Committee at pages 46-49 of the Report observed and concluded that; 5
- “99. The Governor, in his response, seems to have taken the approach of denying liability and assigning blame to other officials within the County, specially the procurement officials, arguing that procurement was not undertaken by the Governor but by these officials. On the lack of germination of seeds, the Governor, in his response, blamed “lack of adequate rainfall or other non-procurement reasons”. This, however, is not corroborated by the documentation from the experts - KEPHIS and the County Executive Committee Member for Agriculture – which make no mention of lack of adequate rainfall as a factor that may have contributed to the non-germination or poor germination of the DK 8031 maize seeds. 10 15 20
100. Article 179(4) of the Constitution provides that the Governor is the “chief executive” of the County. Where the entire County is virtually at a stand-still due to a failed crop, and the County Executive is virtually on trial by the residents of Embu County, it is unthinkable that the chief executive of the County would do nothing except to shift blame to junior officers in the County and to blame, without any proof, lack of adequate rainfall as the cause of the failed crop. As chief executive, the Governor retains an overall oversight responsibility over the affairs of his County, including matters of procurement, and he cannot therefore be heard to say, on a matter so important to the County as the distribution of failed maize seeds that “it was not me”. 25 30 35
101. Article 227 of the Constitution provides for “procurement of goods and services” and requires, at sub-article (1) that “when a State organ or any other public entity contracts for goods and services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective”. In this matter, the Special Committee observes that there is no evidence that the procurement of the maize seeds was conducted in a fair, equitable, 40

- transparent, competitive and cost-effective manner. The evidence of the County Assembly and that of the County Executive Committee for Agriculture points to procurement of DK 8031 maize seed which was authorized by the Office of the Governor but that fell below the threshold under article 227 of the Constitution. The County Assembly in making its case stated that the entire procurement of the maize seeds demonstrated “complacency, incompetence and manipulation of the procurement system to aid fraud”. This position was not rebutted by the response of the Governor, which merely sought to place blame on the procurement officials. 1
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102. Section 27 of the Public Procurement and Disposal Act, 2005, further requires at sub-section (3) that “each employee of a public entity and each member of a board or committee of the public entity shall ensure, within the areas of responsibility of the employee or member that this Act, the regulations and the directions of the Authority are complied with”. No evidence was presented by the Governor to demonstrate that, as the chief executive of the County Executive, he had ensured compliance with the Public Procurement and Disposal Act, 2005 before taking the steps of launching the DK 8031 maize seeds and extensively distributing the maize seeds within the County. There was also no evidence that the Governor had directed the County Secretary or the officials serving in his office to adhere to the procurement laws. Had the Governor done so, he would probably have forestalled the massive losses occasioned to the farmers. 15
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103. The Committee further observed, as had been submitted by the County Assembly, that the annual procurement plan of the Director of Agriculture prepared in accordance with section 26(3) of the Public Procurement and Disposal Act, provided for the purchase of two varieties of maize: KDV 1 and KDV 6. The County Executive, with the authorization and full knowledge of the Office of the Governor, proceeded to instead purchase maize of variety DK 8031 without the authority of the Tender Committee as required under section 26(4) of the Public Procurement and Disposal Act and in accordance with the procurement procedure detailed under section 34 of the Act.” 30
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252. The Special Committee made almost similar findings on the procurement of works for the face-lifting of Embu Stadium. It observed that the tender was floated at a time that a Tender 40

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- Committee did not exist within the County. 1
253. As for the allegation of gross violation of the Public Finance Management Act, 2012, the Special Committee concluded at page 62 that: 5
- “143. As the chief executive of the County, the Governor had a responsibility to ensure that he discharged the obligation under section 162 of the Public Finance Management Act, 2012 with respect to the management and utilization of County resources. The response of the Governor to the allegations set out by the County Assembly does not demonstrate to the Committee that the Governor has indeed discharged his mandate under section 162 of the Public Procurement and Disposal Act, 2012.” 10
254. The allegation of gross violation of the Constitution was considered by the special Committee which made several observations one of them being at pages 66-67 as follows: 15
- “150. The Special Committee further observed that the standard response by the Governor to all the allegations set out by the County Assembly has been “it was not me”. This response by the Governor does little to “promote public confidence” in the office of the Governor as required under article 73(1)(a)(iv) of the Constitution. The Governor seems to have abdicated from taking any responsibility for the goings on in his office and in his County, despite being the elected chief executive of the County. This is in violation of section (*sic*) 73(2)(d) of the Constitution which requires that State officers be guided by the principle of “accountability to the public for decisions and actions”. 20 25 30
255. In *Wambora I* Appeal the Court stated that the standard of proof in such proceedings is; 35
- “....neither beyond reasonable doubt nor on a balance of probability. Noting that the threshold for removal of a governor involves “gross violation of the Constitution”, we hold that the standard of proof required for removal of Governor is above a balance of probability but below reasonable doubt.” 40
- If that be so, then we do not hesitate to hold that the Senate attained this standard.

256. As a matter of observation, we note that the decision of the Senate came before the decision of the Court of Appeal. In its Report the Special Committee had grappled with the issue of the standard of proof required in removal proceedings and although it did not make any specific conclusion, it appears to have left the standard of proof, which was deemed to be above a balance of probabilities and rising up to beyond reasonable doubt, to the discretion of individual senators. Depending on the individual senators, their standard of proof was higher than that set by the Court of Appeal.

257. After citing article 73 of the Constitution on the responsibility of leadership, the Senate concluded at page 37 that;

“75. These are therefore the standards by which the Governor should be judged when considering the allegations against him and the evidence produced in support of the allegations. The violations must be gross, that is, a glaring error, flagrant and extreme. The violation must be such that it brings dishonour and lowers the dignity of the office of the governor. A minor infraction of the law cannot attract the sanction of impeachment.”

258. From the foregoing it is apparent that the Senate understood the constitutional threshold that had to be met. We have no reason to fault the Senate in its conclusion.

259. In line with our power to consider the reasonableness of the decision of the Senate, we have looked at the Report and find nothing in it that would invite the review powers of this Court.

260. In summary, our view is that this Court can only review proceedings relating to the removal of a governor. We have nevertheless subjected to scrutiny the Report of the Special Committee on the removal of the 1st Petitioner and we have found the same to be satisfactory. We find no reason for disturbing the decision of the Senate. Whether or not we agree with it is another thing altogether.

Appreciation

261. Before we conclude we must express our gratitude to counsel for thorough research and very eloquent submissions made in the prosecution of and in opposition to this petition. If we have not referred to all the authorities referred to us by counsel, it is not due to disrespect or out of lack of the appreciation for counsels’ industry.

Disposition	1
262. Having considered this petition it is our view and we hold as follows on each of the issues vented for determination:	
1. This Petition is not incompetent.	
2. The proceedings to impeach the Governor of Embu County Hon Martin Nyaga Wambora were not sub judice.	5
3. Section 33 of the County Governments Act, 2012 is not unconstitutional.	
4. The due process for the removal of a governor was followed in the removal of the Governor of Embu County Hon Martin Nyaga Wambora.	10
5. The removal process of the Governor requires that an opportunity be afforded to the public to participate therein which opportunity was afforded in the instant case.	
6. The Courts can intervene where constitutional issues are raised.	15
7. That in the result this Petition fails and is dismissed.	
Costs	
262. On the issue of costs we find that this litigation has been useful in advancing the law concerning the removal of governors from office. Although the petition has been lost, we do not think that the litigation has been in vain. Therefore, the appropriate order on costs is to direct each party to meet own costs and we so order.	20
Orders Accordingly.	25

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Kenya County Government Workers Union
v Kisumu County Government & 95 others
[2015] KLR-ICK

Industrial Court, of Kenya January 12, 2015
HS Wasilwa, J

Petition No 270 of 2014

Brief facts

The Petitioner (Kenya County Government Workers Union) was a body representing the workers and staff of all the County Governments (respondents) in Kenya, and claimed to have exclusive right in handling of staff issues serving under the respective County Governments and not the National Government. Following the commencement of the Capacity Assessment and Rationalization of the Public Service (CARPS) programme by the Respondents, the Petitioners filed a Petition contending that the actions of the Respondents would breach or threaten to breach the rights of the Petitioners and its members. The Petition sought, *inter alia*, conservatory orders of injunction against the Respondents jointly and severally through any committees established under the CARPS programme from dealing with deployment, redeployment, termination or promotion or in any manner dealing with staff issues that were members of petitioner and workers of the County Government who were respondents, and that pending the hearing and determination of the Petition, the Respondents be prohibited jointly and severally through any committees from carrying out any duties of biometric data capturing of members of the Petitioner who were workers of the County Governments until the law was complied with.

Issues

- i. Whether the Capacity Assessment and Rationalization of the Public Service (CARPS) programme was being implemented by the National Government without consideration and support of the County Governments.
- ii. Whether the implementation of the CARPS programme infringed on the rights to fair labour practices of the Petitioners.
- iii. Whether the CARPS programme had usurped the powers of the County Public Service Boards.
- iv. Whether the non-inclusion of the Petitioner to the membership of the various committees established under the CARPS programme

was discriminatory.

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- v. Whether the CARPS programme discriminated upon certain members of the Petitioner.

Constitutional Law – fundamental rights and freedoms – right to fair labour practices and right to equal protection and benefit of the law to all persons – whether the implementation of the Capacity Assessment and Rationalization of the Public Service (CARPS) programme infringed on the rights of the petitioner and some of its members – where the Petitioner was a representative of all staff and workers of the respective County Governments – whether the non-inclusion of the Petitioner to the various committees established under the CARPS programme was discriminatory – Constitution of Kenya, 2010, articles 27, 41, 232(1), 235(1) & 236.

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Constitutional Law – devolution – implementation of the Capacity Assessment and Rationalization of the Public Service (CARPS) programme at National and County Governments level – whether the CARPS programme had usurped the powers of the County Public Service Boards – Constitution of Kenya, 2010, article 6(2); County Governments Act, 2012, section 57; Inter-Governmental Relation Act, 2012, sections 7, 8 & 23.

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Held:

1. The nobility of the Capacity Assessment and Rationalization of the Public Service (CARPS) programme could not be underestimated. The Respondents submitted that they were part and parcel of the programme and supported it fully as being complementary to their role and function. It was therefore not true that the CARPS programme was being implemented by the National Government exclusive to the County Government.
2. Article 41 of the Constitution envisaged 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 chose to join a trade union then it was that union that was expected to represent them in any decision the employer chose to effect against or for the employee.
3. The CARPS Manual at Annex 1 stated the membership to its various committees. A representative from the County Government Workers Union was among the members. If however the Petitioner had been excluded in the actual formation of the committee, then the rights of the petitioner's members would have either been infringed upon or threatened with infringement and that situation should of necessity be corrected.
4. The County Public Service Boards formed part of the membership of

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the CARPS programme and hence had <i>locus</i> to complain about such an omission from the membership, if any. Therefore the functions of the County Public Service Boards had not been usurped by the CARPS programme.	1
5. If at all the Petitioners had been excluded from membership of the technical committees established under the CARPS programme, that would amount to discrimination as the manual envisaged that they should be members. The assertion that the Petitioners could not be members because they had no Collective Bargaining Agreement (CBA) with the various respondents could not stand as that was still and could have been the position when the manual was put in place and that was coming in the transition period before structures were fully established.	5 10
6. The Constitution under article 27 provided for equal protection and benefit of the law to all persons. Therefore, there should be no discrimination against any employee whether on suspension or whether facing any disciplinary proceedings or on leave.	15

Orders

i) <i>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.</i>	20
ii) <i>The tools for data capture to include all workers, the petitioner's members whether on suspension or facing any disciplinary proceedings or whether on leave.</i>	25
iii) <i>The order granted stopping the whole CARPS programme against the Respondents be lifted forthwith on conditions granted under (i) and (ii) above.</i>	
iv) <i>Each party to bear own costs as the matter was of great public interest.</i>	30

Cases

None referred to

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 6(2); 27; 41(1)(2)(4)(5); 174; 175; 201; 232(1); 235(1); 236(b); Sixth Schedule section 15 – (Interpreted)	35
2. County Governments Act, 2012 (Act No 17 of 2012) sections 57, 60, 74 – (Interpreted)	
3. Employment Act, 2007 (Act No 11 of 2007) sections 10(5); 40; 41 – (Interpreted)	40
4. Intergovernmental Relations Act, 2012 (Act No 2 of 2012) sections	

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- 7, 8(j)(k); 19; 23 – (Interpreted) 1
5. Transition to Devolved Government Act, 2012 (Act No 1 of 2012)
sections 4, 7(2)(m) – (Interpreted)

Advocates

1. *Yogo & Mr Brian Otieno* for the Petitioner 5
2. *Rodi* for the 1st and 2nd Respondents
3. *Nabutola* for the 3rd and 4th Respondents
4. *Miss Langat* for the 13th and 14th Respondents
5. *Kirui* for the 65th and 66th Respondents 10

January 12, 2015, **HS Wasilwa, J** delivered the following 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:- 15

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. 20
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. 25
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. 30
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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 40

capturing of members of the Petitioner who are workers of the County Governments named as respondents herein until the law is complied with.	1
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.	5
6. The Court to give direction as to the hearing and disposal of the Petition.	10
On 1.10.2014, the Court granted orders in terms of prayers 1 and 3. The Application was to be heard <i>inter partes</i> on 6.10.2014. When the Application came up for <i>inter partes</i> 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.	15
The Petition	25
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.	30
It is the Petitioner's contention that article 232(1) of the Constitution provides for values and principles of public service <i>inter alia</i> :-	35
a) Involvement of the people in the process of policy making.	
b) Accountability	40
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 section 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 section 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:- 1

- i. Cabinet secretaries responsible for; - Devolution & Planning - The National Treasury - Labour, Social Security & Services 5
- ii. Chairperson, Council of Governors
- iii. Chairperson - Human Resource & Labour Sub-Committee, Council of Governors iv. Chairperson, Public Service Commission 10
- v. Chairperson - Transition Authority
- vi. Chairperson of Salaries & Remuneration Commission
- vii. Chairperson - Commission on implementation of the Constitution. 15
- viii. Chairperson - Commission on Revenue Allocation
- ix. The AG.

The Petitioner contends that the Committee has no representation by the Petitioner as the workers union contrary to article (1) & (2) of the Constitution. 20

The Petitioner also submits that the manual also establishes the “County Rationalization Technical Team” whose membership include:- 25

- 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 30
- 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 section 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. 35
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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:- 1

- 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. 5
- 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. 10
- d) It has persons not authorized by law to deal with county workers' issues such as;
 - (1) County Commission
 - (2) Lead Consultants. 15
- 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:- 20

- (1) Failed to seek public participation
- (2) Failed to seek public comments on the programme before its' implementation. 25

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. 30
- c) Are out of the Country on study leave or other official engagements. 35

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 40

‘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

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petitioner's members under their respective jurisdiction.	1
(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.	5
(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.	10
(i) Costs of this petition be borne by the respondents jointly and severally.	15
(j) Interest on (i) above.	

Respondents Case:-

Various respondents entered their appearances and filed responses to the Petition. The Hon AG filed his appearance on 2nd October 2014.	20
The AG 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:-	25
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,	30
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.	35
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.	40

- 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”. 1

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 section 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. 5 10 15

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 section 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. 20 25

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. 30 35

The 3rd and 4th Respondents filed their submissions on 15.12.2014 through the firm of Luswet & 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 40

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- functions and powers of the County Public Service Boards. They content that infact 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. 1 5
- 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 threaten 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. 10 15
- 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 collaborative programme and its' membership includes the secretary of County Public Service Boards. 20 25
- For the 61st and 62nd respondents and interested parties, Irene Kapchebai Mbito 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. 30
- The 93rd and 94th Respondents filed their submissions through Esther Asati Advocate.The submitted that by the time the case was filed the exercise had been overtaken by events as the 93rd respondent had already finalized it. 35
- 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 programe. It is their position 40

that they have not infringed on any rights of the petitioners and they asked court to dismiss this Petition. 1

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 standito 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. The asked the court to dismiss this petition. 5
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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. 15

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 forced project of the National Government without consideration of the needs of the County Government. 20
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. 25
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. 30
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 35
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section 7 of Inter Governmental Relation Act 2012. Section 7 of Inter Governmental Relation Act provides as follows:-	1
1. There is established a National and County Government co-ordinating summit which shall be the apex body for inter governmental relations.	5
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.	10
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;	15
a) Consultation and Co-operation between the National and County Governments.	
b) Promotion of National values and principles of governance.	20
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.	25
f) Evaluating the performance of national and County Governments and recommending appropriate action.	
g) Receiving progress reports and providing advise as appropriate.	30
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.	35
j) Co-ordinating and harmonizing the development of County & National Governments Policies.	40
k) Facilitating and co-ordinating the transfer of functions, powers or competences from and to other	

level of government and	1
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 section 7 and 8, the import is that the AG may be referring to section 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:-	5 10
“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.”	15
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.	20 25
(b) assist, support and consult and, as appropriate, implement the legislation of the other level of government; and	30
(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 co-operate in the performance of functions and exercise of powers and, for that purpose may set up joint committees and joint authorities ---”	35
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.	40
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:- 1

“(i) Carry out an audit of the existing human resource of the government and the local authorities. 5

(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. 10

(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. 15

Section 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 section 7(2)(m) of the TDGA 2012. 25

(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, 30

(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, 35

(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. 40

(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.”	1
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.	5 10
It is therefore not true that the CARPS programme is being implemented by the national government exclusive to the County Government.	15
(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 section 23 of IGRA 2012;	20
“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;	25
(a) the objectives and principles of devolution provided in article 174 and 175 of the Constitution and	25
(b) the objectives and purposes of this Act.”	25
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:-	30
i. Provide for well organized structures, at the national and county levels, that are based on given mandates and functions.	35
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.	35
iii. Facilitate deployment and transfer of staff within and across the government. iv. Examine and analyze the existing human resource profiles and inventories to	40

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inform the rationalization programme.	1
v. Recommend modalities for undertaking the rationalization exercise in accordance with relevant laws, statutes and conventions and implement the recommendations.”	5

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.	10
(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.	15
(iv) Every Ministry and County Government to produce it’s rationalization plan (with costs and budget) for implementation.	20
(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,	25
(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.”	30

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:-	35

“Where any matter stipulated in subsection (1) changes, the employer shall in consultation with the employee revise the	40

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, section 40 of Employment Act 2007 must come into play in case of redundancy and section 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

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- 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. 1 5
- (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. 10
- The Constitution is clear under article 27:- 15
 “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. 20 25
- (F) After analyzing as above, the Court makes the following orders:- 25
- 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. 30
 - 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. 35
 - 4) As this matter is of great public interest, each party to bear it’s own costs. 40

Meru Bar, Wines & Spirits Owners Self Help
Group (Suing thro' its Secretary) Ibrahim
Mwika v County Government of Meru
[2014] KLR - HCK

High Court, at Meru
JA Makau, J

December 4, 2014

Petition No 32 of 2014

Brief facts

The Petitioner, Meru Bar, Wines and Spirit Owners Self Help Group, a group representing operators and dealers in alcoholic drinks, were challenging the procedure and manner in which the Meru County Alcoholic Drinks Control Act No 3 of 2014 was formulated, passed and assented to. They contended that there was no public participation as envisaged under article 10 and 196 of the Constitution and section 3(f), 87 and 115 of the County Government Act. In addition they asserted that the Act contravened national legislation in the following respects: Section 27, which barred the recovery of a debt arising from the illegal sale of alcoholic drinks was inconsistent with the Law of Contract Act; that section 34(2)(a) and (b) which proscribed PET bottles (Bottles made of polyethylene terephthalate) was inconsistent with section 37 2(b) of the Alcoholics Drinks Control Act No 4 of 2010, and section 91A of the Customs and Excise Act.

The Petitioners hence averred that the Meru Alcoholic Drinks Control Act was unconstitutional, inconsistent with National Legislation, unfair, unreasonable, and was passed contrary to a fair procedure as enshrined in the Constitution and in the County Government Act.

Issues

- i. Whether the regulation of liquor licensing was a national or county function.
- ii. Whether County legislation could be termed as Subsidiary Legislation.
- iii. Whether a conflict of laws could arise in circumstances where National and County functions were clearly provided for.
- iv. Whether County legislation superseded National legislation in matters that were exclusively provided for County Governments
- v. What considerations were to be taken into account before declaring a statute to be unconstitutional

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- vi. What form of public participation was required for development and passage of legislation? 1

Constitutional Law – Devolved Government – County Governments – legislative authority of the county assembly – distribution of functions between the National Government and the County Governments – where the legislative authority of the County Assembly was derived from the Constitution – whether the Meru County Alcoholic Drinks Control Act No 3 of 2014 could be termed as Subsidiary legislation. 5

Constitutional Law – Devolved Government – County Governments – legislative authority of the county assembly – mandate to legislate on licensing or dealing in liquor within Counties – whether that mandate could be exercised through legislation by the County Assembly of the respective County – Constitution of Kenya, 2010, article 185(1) and (2). 10

Constitutional Law – Devolved Government – County Governments – legislative authority of the County Assembly – liquor licensing – conflict of laws – whether liquor licensing fell within concurrent jurisdiction of the National and County Governments – whether a conflict of laws between the National Legislation and County legislation on liquor licensing could arise where liquor licensing was an exclusive mandate of the County Government – whether the County Legislation would prevail over the National Legislation where there was a conflict – Constitution of Kenya, 2010, article 191(1). 15

Constitutional Law – right to health – obligation of the Government to enact legislation to protect its citizen's health – where the Meru County Alcoholic Drinks Control Act was intended to address the problems manifested by experience in Meru County – where the Act set out the problems sought to be addressed by the enactment of the Act in the object and purpose section of the Act – whether it was illegal for the County Government to carry out the objects of the Act – Meru County Alcoholic Drinks Control Act No 3 of 2014, section 3. 20

Statutes – constitutionality of statutes – factors to be considered in determining the constitutionality of a statute in view of conflict of laws – contention that County Legislation contravened National Legislation – Burden of proof when challenging constitutionality of a legislation – whether the Meru County Alcoholic Drinks Control Act and the regulations made thereunder were unconstitutional for differing from National Legislation – Meru County Alcoholic Drinks Control Act No 3 of 2014. 25

Constitutional Law – legislature – parliament's general procedures and rules – public access and participation – what amounted to public 30

participation – whether the Meru County Alcoholic Drinks Control Act was enacted without public participation contrary to the Constitution. 1

Held:

1. In view of article 185 of the Constitution of Kenya, 2010 the legislative power of an Assembly was not derived from an Act of Parliament for the time being in force or from an applied law or from an Act of legislation of another County but from express and specific provision of the Constitution. The Meru County Alcoholic Drinks Control Act (the Act) was passed in exercise of legislative authority of Meru County Assembly as enshrined in the Constitution, under article 185(1) and (2). The said Act could not hence be taken as a subsidiary legislation as the Petitioner contended. 5 10
2. It was clear that under article 185(2) of the Constitution, Meru County Assembly had authority to make legislation to regulate the mandate of the Respondent under part 2 of the Fourth Schedule of the Constitution of Kenya, at paragraph 4(c) to regulate cultural activities, public entertainment and public amenities including liquor licensing which function the Respondent did not share with the National Government and as such the primary legislation for regulating liquor licensing in Meru County was not a National Legislation but a County legislation. 15 20
3. The mandate to impose such conditions as may be desirable for licensing or dealing in liquor within Meru County including sale, production, consumption, and advertising of liquor vested with the Meru County Government. That mandate could be exercised through legislation by the County Assembly of the respective County under article 185(1) and (2) of the Constitution. 25
4. There was nowhere under part 1 of the Fourth Schedule of the Constitution which set functions of the National Government under the devolved system of Government to regulate liquor licensing. 30
5. Liquor licensing did not fall within concurrent jurisdiction of the National and County Government but was an exclusive mandate of the County Government. In that case there was no conflict of laws as envisaged in article 191(1) of the Constitution. 35
6. Section 34(2),(a) and (b) of the Meru County Alcoholic Drinks Control Act No 3 of 2013 did not in any way attempt to oust the application of National Legislation referred to by the Petitioner namely Alcoholic Drinks Control Act and the Customs and Excise Act (cap 472) in Meru County. The Act imported National legislation as alternative legislation for proscribing the type and 40

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- capacity of the container to be used in packaging, distribution or selling alcoholic drinks in Meru County. 1
7. Even if there was conflict between section 34(2),(a) and (b) of the Meru County Alcoholic Drinks Control Act (which the Petitioner had not demonstrated existed) with the provisions of 31(2), (b), of the National Alcoholic Drinks Control Act and section 91A of the Customs and Excise Act (cap 472), the County Legislation would prevail over the National Legislation as liquor licensing function was an exclusive mandate of the County Government and was not a shared function between the National Government and the County Government. 5 10
8. There was always the general presumption that legislation was constitutional and the burden of rebutting the presumption was always with he who alleged to the contrary. It had to always be assumed that the legislative body understood the needs and aspirations of the people and legislation enacted was intended to address problems manifested in the society. 15
9. The enacted Meru County Alcoholic Drinks Control Act was intended to address the problems manifested by experience in Meru County. Section 3 of the subject Act set out the problems sought to be addressed by the enactment of the subject Act in the object and purpose of the Act. 20
10. It was important for the court to interrogate the background upon which legislations, such as the subject Act, was enacted. The background was a matter of public notoriety which a court ought to take Judicial notice of such as that many people in Meru County and the neighboring counties` had lost lives and eyesight or vision because of uncontrolled sale and consumption of illicit alcoholic drinks, thus public interest had to be considered in the matter of that nature. 25 30
11. The objectives of the Act in educating County residents on harmful effects, economic and social concerns of consumption of alcoholic drinks, and how to reduce and mitigate such adverse effects showed that the Respondent understood the needs of the Meru County residents. There was nothing wrong or illegal in the County carrying out such noble tasks. There were constitutional, rational and reasonable grounds in setting out such objectives of the Act. 35
12. A careful consideration of section 47 and 48 of the impugned Act showed the Petitioner's contention to be unjustified and misleading. The said sections protected promotion of alcoholic drinks by way of outdoor advertisement in a manner that was false, misleading 40

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or deceptive or advertising of alcoholic drinks on residential areas or within three hundred meters from a learning institution or advertising of alcoholic drinks at the event associated with children. A quick perusal of sections, 44, 45, 46, 47, 48 and 49 of the Alcoholic Drinks Control Act revealed that sections 47 and 48 of the Meru County Alcoholic Drinks Control Act had no differences. 13. Though the consumers of alcohol had the right to take as much alcohol as their pockets and stomachs could accommodate, that right was not absolute and it had to be regulated as far as it was possible to protect the rights of other members of the society who did not indulge in such liabilities and whose rights could be affected by the unfettered, production, sale, consumption, advertisement and deception. The government had also an obligation to protect the unenlightened or unsuspecting or innocent alcoholic consumers from the destructive effects of alcohol bearing in mind that it was not only necessary but was an obligation of a responsible government to enact legislation to protect its citizen's health. 14. It would be an abdication of duty on the part of the government, whether national or county, if it failed to act as expected by leaving the manufacturers, sellers, distributors and providers of alcoholic drinks to operate as they deemed fit to the detriment of the entire society. It was the duty of the government to exercise due diligence in carrying out its responsibility through its legislative arm to legislate and provide rules and ensure that the society under them enjoy their rights without interference with their health and with the rights of others. 15. The prohibition of the promotion of alcoholic drinks in a manner that was false, misleading or deceptive advertising in residential buildings or places demarcated under any written law as residential areas or within a distance of three hundred meters from a nursery school or primary school to secondary school or other institutions of learning for persons under the age of eighteen years or a place of worship, or health facility, or a public playground or any other public land or property or public service vehicle as envisaged under section 47 and 48 of the Meru County Alcoholic Drinks Control Act was therefore necessary. 16. Section 23 of the Alcoholic Drinks Control Act was similar to section 27 of the subject Act word for word; there was hence no basis for the Petitioner to have prayed for the subject Act to be deemed inconsistent with the National laws or the Constitution. After all where such inconsistency existed the County legislation prevailed.	1 5 10 15 20 25 30 35 40

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- The Act was not inconsistent with the Constitution of Kenya and it did not hinder economic development but provided proximate and assessable services to the Meru Society. 1
17. Under the new constitutional dispensation, public participation was a requirement in the formulation or legislation. The participation of the people was one of the National values and principles of governance under article 10(2),(a) of the Constitution. 5
18. The common denominator in all the decisions on public participation was that what mattered in the ultimate was that a reasonable opportunity was given to the public and all interested parties with timely access to the information relevant to the process of legislation so as to know about the issue at hand and have opportunity to give their response. There was a caveat however, that it could not be expected of the legislature that every person who claimed to be affected by the laws or regulation that were being made to have a hearing or a say but a representative could do. However it was prudent as concerned different sectors of the public that they should be able to communicate their views to the law maker either in advance through any possible means including through memorandum, text messages or in person or even by circular letters or notice in any form so as to be taken into account. 10 15 20
19. The steps taken by the Respondent by publishing the Meru County Alcoholic Drinks Control Bill, 2014, advertising for public meetings in the Daily Nation Newspaper, 4 to 5 days before public meetings and stating the purpose of the meetings and setting out the venues, date and time in advance gave the members of public a reasonable opportunity including the Petitioners as individuals to prepare to give their views. The fact that the Respondent produced evidence that published public consultative meeting between Respondent's Assembly and public took place over the subject Bill was enough proof that public participation took place. 25 30
20. The Petitioner did not assert that members of public who attended the meeting were denied participation in the public meeting. It was the duty of the Petitioner but not of the Respondent to give the names of members of public (if any) who attended the meetings but were excluded from taking part in the meeting. The burden of proof lay with the person who asserted, and that was the Petitioner. The burden of proof could not shift at all. 35 40
21. The Respondent effectively and extensively notified, involved and took into account, views of the public in the process of enacting the Act as required under article 10 and 196 of the Constitution and

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- section 3(f), 87 and 91 of the County Government Act. 1
22. In order to determine whether there had been public participation the Court was required to interrogate the entire process leading to the enactment of the legislation. The Court was entitled to take into account judicial notice of County Assembly standing orders that required before enactment, that any legislation had to be published as a bill and go through various stages in the County Assembly. The Court was entitled to take into account that the standing orders provided for public participation, in some sense. The Bill had to be advertised and go through various committees of the County Assembly which admit public participation and take views and recommendations of the public when such committee makes its report to the County Assembly. 5 10
23. On the issue regarding the County Assembly legislation stage, the Petitioner had not proved to the required standard that the process was faulty and flawed, in the absence of evidence to the contrary the process of enactment was in accordance with County Assembly standing orders which provided for public participation as it had not been demonstrated that the process was devoid of public participation. 15 20
24. The Petitioner failed to prove that the Petitioner's fundamental rights and freedom had been violated, that the impugned Act was inconsistent with the Constitution of Kenya; the Alcoholic Drinks Control Act, the Customs and Excise Act and the Law of Control Act. 25

Petition dismissed, each party to bear its own cost

Cases

East Africa

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1. *Gakuru, Robert & another v Governor Kiambu County & 3 others* Petition No 532 of 2013 – (Explained)
 2. *Law Society of Kenya v Attorney General & 2 others* Petition No 318 of 2012 – (Mentioned)
 3. *Munyaka, John Kinyua & 11 others v County Government of Kiambu & 3 others* Petition No 3 of 2014 – (Followed) 35
 4. *Munyendo & 908 others v Attorney General & another* [2013] 1 KLR – (Mentioned)
 5. *Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County Government of Nairobi & 3 others* Civil Application No 16 of 2014 – (Followed) 40
 6. *Speaker of the Senate & another v Speaker of National Assembly & 2*

<i>others</i> Advisory Opinion Reference No 2 of 2013 – (Mentioned)	1
Statutes	
<i>East Africa</i>	
1. Alcoholics Drinks Control Act, 2010 (Act No 4 of 2010) sections 4,23,31(2)(b); 37(2)(b); 44-49 – (Interpreted)	5
2. Constitution of Kenya, 2010 articles 6(1)(2); 10; 10(2)(a); 22; 23; 27, 47(1); 165; 174(f); 176(1)(2); 185(1)(2); 191(1)(2)(a)(b),(3) (4)(6); 196,(1)(b); Fourth Schedule Part 2 – (Interpreted)	
3. Customs and Exercise Act (cap 472) section 91A – (Interpreted)	10
4. County Governments Act, 2012 (Act No 17 of 2012) sections 3,3(f); 87; 115 – (Interpreted)	
5. Interpretation and General Provisions Act (cap 2) section 3 – (Interpreted)	
6. Law of Contract Act (cap 23) In general – (Interpreted)	15
7. Penal Code (cap 63) sections 47,48 – (Interpreted)	
8. Transition to Devolved Government Act, 2012 (Act No 1 of 2012) In general – (Interpreted)	
Advocates	
1. <i>Mr Mwangi</i> for the Petitioner	20
2. <i>Prof Ojienda</i> for the Respondent	
December 4, 2014, JA Makau, J delivered the following Judgment.	
1. The Petitioner, Meru Bar, Wines and Spirit Owners Self Help Group suing through Ibrahim Mwika, pursuant to articles 10,22,23, 165, 191 and 196 of the Constitution of Kenya and on an alleged contravention of article 47(1) and 27 of the Constitution, the County Alcoholic Drinks Control Act, 2014, the Alcoholic Drinks Control Act Chapter 121A and the Customs and Exercise Act Chapter 472 of the Laws of Kenya sought a declaration that the Petitioner's fundamental rights and freedom have been violated; that the Meru Alcoholic Drinks Control Act is inconsistent with the Constitution of Kenya, the Alcoholic Drinks Control Act, the Customs and Exercise Act and the Law of Contract; an order do issue quashing the Meru Alcoholic Drinks Control Act in its entirety in the alternate and without prejudice to the above mentioned prayer, an order do issue quashing the <i>ultra vires</i> provisions of the Meru Alcoholic Drinks Control Act, costs of the Petition and any other relief that this Honourable Court may deem just to grant.	25 30 35 40
2. The Petitioner is an Association registered as a Self Help Group; under the Ministry of Labour, Social Security and Services composed	

- of operators and dealers in Alcoholic Drinks in various capacities including bar owners; proprietors of wines and spirits, outlets, suppliers, distributors and retailers of Alcoholic Drinks. The Self Help group as per annexure “IMI” certificate of Registration No 3556445 was registered on 19th September, 2014 and has 129 members as per attached signed list of member’s annexure “IM2”. The Petitioner’s Petition is based on several grounds on the face of the Petition *inter alia*; that the Respondent, County Government of Meru, on 8th May, 2014, the 2nd Respondent (there is only one Respondent herein and the Petitioner I believe meant the Respondent herein) held a seating with its assembly where it conducted both a 2nd and 3rd reading of the Meru Alcoholic Drinks Control Bill and passed it albeit with a number of amendments; that the Meru Alcoholic Drinks Control Act was apparently assented to by the Governor on 25th June, 2014 and is indicated to have commenced on 18th July, 2014; that the Petitioners and other stakeholders are aggrieved by the entire procedure and manner that was adopted in formulating and passing the Meru Alcoholic Drinks Control Act; that in formulating such public regulations and subsidiary legislation the Respondent is required to abide by the provisions of article 10 of the Constitution which demands *inter alia*; the rule of law, democracy and participation of the people as well as article 196 of the Constitution requiring public participation and involvement of the public in its legislative functions and committees and finally section 3(f) of the County Government Act.
3. The Petitioners aver that being stakeholders in the Alcoholic Drinks Industry they were not at all involved in the formulation of the Act and neither were they invited to make contributions to it before it was tabled in the County Assembly. The Petitioners urge their lack of knowledge of the Bill was not out of ignorance or lack of interest but because of the deliberate acts and omissions by the Respondent in failing to publicize the Bill or entertain participation of the interested persons. The Petitioners allege further there was no effort or attempt made by the Respondent to advertise the proposed Bill in Newspapers, radio, public notices or even in its website- www.assembly.meru.go.ke and neither was there a circulation of the proposed Bill to the residents prior to its tabling before the house. That in addition the Bill was hurriedly passed not only without taking into account the interest of the stakeholders but also contrary to the Standing Orders of the Respondent’s Assembly which require

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- publication of a Memorandum of Objects, Public Participation, and which proscribe the conducting of 2 readings on a single day. That the Respondent hurriedly conducted the 2nd and 3rd reading of the subject Act together and then thereafter constituted a committee of the whole house which passed the Bill into an Act. 1
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4. The Petitioners contend that they believe the Act as passed is inconsistent with the provisions of not only the Constitution of Kenya but also the National Legislation namely the Alcoholic Drinks Control Act as well as other statutes and consequently in accordance with article 191 of the Constitution, where there is conflict between County legislation and National legislation in matters where there is concurrent jurisdiction National legislation prevails. The Petitioner urges the Meru Drinks Control Act is inconsistent with the provision of the Constitution under section 3(e), and (h) which they allude is inconsistent with article 174(f) of the Constitution, section 4 on composition of Alcoholic Drinks Control Boards in excluding participation of stakeholders contrary to section 10 of the Constitution on inclusiveness in governance, section 9 on composition of the sub-county Alcoholic Drinks Regulation Committee excludes the inclusion of Stakeholders contrary to principles or article 10 and 27 of the Constitution; section 15(1),(b) in so far as it excludes anyone convicted of criminal offence from holding a license rather than anyone convicted under the of rehabilitation under the Penal Code and section 47 and 48 that prescribe promotion are inconsistent with article 174(f) of the Constitution. 10
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5. That the Act is inconsistent with the National Legislation on the following; section 27 of the Act is inconsistent with the Law of Contract Act, section 3, 87 and 115 of the County Government Act for lack of public participation, section 34 (2) (a) and (b) so far as it proscribes PET bottles is inconsistent with section 37(2)(b) of the National Alcoholic Drinks Control Act and section 91A of the Customs and Exercise Act. 30
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6. The Petitioners averred that based on the objects of the Act as espoused by section 3 the Respondent must have proceeded on an unreasonable, erroneous presumption and error of fact to the effect that simple alcoholic drinks consumption without being in excess is itself evil, bad and unhealthy and that it was unreasonable to exclude stakeholders such as bar owners and distributors from the Alcoholic 40

Drinks Control Board and Sub-County Committees resulting for lack of articulation of the Petitioners' interest as stakeholders during licensing, renewals and refusals. The Petitioner further referred to section 14(1),(a) of the Act on one of the grounds of refusal of license in a residential area if it is considered that the area has adequate facilities to be unreasonable and skewed thinking and termed it as contrary to the laws of demand and supply, free trade and a liberal economy. The Petitioners further raised the issue with section 14(2) and (b) which prohibits sale of Alcoholic Drinks in a Petrol Station terming it as having no justifiable reason in view of the fact that petrol stations have shops, supermarkets and even restaurants with counters and can have requisite controls. The Petitioner further urged the provisions of section 39 proscribing sale of alcohol drinks to "authorized officers" so absurd considering that such officers unless on duty can per take of the entertainment. That section 42 they urged in so far as it prescribes mixing of drinks to be unreasonable and unfair in that cocktails and other lawful mixes have been unjustifiable been proscribed. It was in the light of the foregoing that the Petitioners aver that the Meru Alcoholic Drinks Control Act is unconstitutional, inconsistent with National Legislation, unfair, unreasonable, and was passed contrary to a fair procedure as enshrined in the Constitution and in the County Government Act. The Petitioners averred that it would be just if the Meru Alcoholic Drinks Control Act is quashed to enable all interested parties to come up with an Act that is lawful, inclusive and clothed with public participation. Further the Petitioner, urged that there is already National Legislation on the matter, that the Act passed is superfluous and its movers would have justice by only legislating either on what was provided for or limited to the operations of the County Board and Committees. The Petitioners further seek the Act to be quashed and there be a declaration that their fundamental rights have been violated.	1 5 10 15 20 25 30
7. The Respondent on the other hand is opposed to the Petition. The Respondent filed a Replying Affidavit dated 13 th October, 2014 in opposition to the Petition through its Chief Officer Mercy Mwendwa Ndiira. The Respondent countered the Petitioner's Petition by averring that the regulations of licensing, production, sale, distribution, and consumption and as well as outdoor advertising of alcoholic is an exclusive Constitutional function of the County Government and the National Government has no role	35 40

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- to play. The Respondent further avers that whenever the National legislation is inconsistent with the County Government legislation on a subject then the County Government legislation prevails. The Respondent in their reply at any rate asserts that the subject County legislation conforms to the National legislation. 1
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8. On the issue of public participation the Respondent contends that the Petitioner has no basis in this Petition as it was not in existence at the time of the enactment of the Meru County Alcoholic Drinks Control Act as the Petitioner was not registered as at 18th July, 2014 when the subject Act was enacted. That the Petitioner's certificate of registration evidently shows that the Petitioner was registered on 19th September, 2014 two months after the subject Act had been enacted. Therefore the Petitioner's contention that the Petitioner was not consulted in the enactment of the subject Act are spurious as no amount of effort by the Respondent would cause a non-existent petitioner as of 18th July, 2014 to participate in the process leading to the enactment of Meru County Alcoholic Drinks Control Act 2014 on 12th July, 2014. 10
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9. The Respondent alleges that it has demonstrated as per annexure "MMN12" produced in Replying Affidavit of Mercy Mwendwa Ndiira that the Respondent effectively notified, involved and took into account, the views of the public in the process of enacting Meru County Alcoholic Drinks Control Act No 3 of 2014 through public advertisement carried in the Daily Nation Newspaper dated 21/4/2014 at page 8, on the website of Meru County Assembly and that the Respondent's County Assembly notifying the public that the Assembly would hold eight (8) public participation forums to consult the public on the Meru Alcoholic Drinks Control Bill 2014 to wit:- 25
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- a. At North Imenti sub-county Meru Town Kamunde Hall on the morning of 25th April, 2014
 - b. At Tigania East sub-county, Muriri Social Hall on the morning of 25th April, 2014. 35
 - c. At Buuri sub-County, Timau Social Hall, on the afternoon of 25th April, 2014.
 - d. At Tigania West sub-county Uuru sub-county on the afternoon of 25th April, 2014.
 - e. At Imenti South Sub-county Nkubu Social Hall on the morning of 26th April, 2014. 40
 - f. At Igembe South and Igembe Central Sub-county on the

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morning of 26th April, 2014. g. At Imenti Central sub-county, Gatimbi Deputy Commissioner's office in the afternoon of 26th April, 2014. h. At Igembe North sub-county Laare Social Hall on the afternoon of 26th April, 2014. 10. The Respondent contends that the published public consultative meetings between the Respondents County Assembly and the public over the Meru County Alcoholic Drinks Control Bill, 2014 took place as evidenced by the sample copies of the official receipts annexed to the Affidavit of Mercy Mwendwa Ndiira which were issued to the Respondent's County Assembly for public meetings as enumerated herein above. In addition to the aforesaid the Respondent contends that on 22/4/2014, 23.4.2014 and 24/4/2014 the Respondent's County Assembly advertised through local vernacular FM stations namely MERU FM and Muuga FM and that there was going to be public consultative meetings between the public and Meru County Assembly at the specified venues and dates over Meru Alcoholic Drinks Control Bill, 2014. 11. It is further the contention of the Respondent that prior to the public consultative meetings held on 25th and 26th April, 2014 the Respondent had published the Meru County Alcoholic Drinks Control Bill, 2014 way back on 28th February, 2014 under Meru County Gazette Supplement No 1 of 2014 so as to give the public sufficient time to interrogate the contents of the bill and raise any concern they might have over the contents of the Bill. The Meru County Alcoholic Drinks Control Bill, 2014 is marked annexure "MMN13" in the affidavit of Mercy Mwendwa Ndiira. The Respondent further averred that the subject law is in the public interest and should be allowed to rather satisfy the purely commercial interest of the Petitioner. 12. This matter was on 30/9/2014 mentioned before Hon Mr Justice PM Njoroge, who upon hearing the Petitioner <i>ex parte</i> granted conservatory orders staying the Application and enforcement of Meru County Alcoholic Drinks Control Act, 2014 upto 16th October, 2014 and directed the parties to appear before me on 16th October, 2014. On 16th October, 2014 upon hearing Mr Thuita, learned Advocate for the Petitioner and Mr Okoth learned advocate for the Respondent the Court in the interest of the parties extended	1 5 10 15 20 25 30 35 40

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- the justice and balancing the interests of the parties extended the interim orders issued by Hon Mr Justice PM Njoroge and directed that the parties do attend court on 3/11/2014 for hearing of the Petitioner itself. The Counsel were directed to file and exchange their respective submissions before then and were to attend court on 3/11/2014 for highlighting on the same, if need be. 1
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13. The Respondent's counsel M/S Prof Tom Ojienda and Associates advocates filed their submissions together with a list of authorities on 30th October, 2014 whereas the Petitioner's submissions were filed by M/s Mwangi & Quandaru Advocates on 3rd November, 2014 together with authorities. The Counsel filed different issues for determination by court. I have carefully considered the Petition, Affidavit in support and annextures thereto as well as the Replying Affidavit and annextures thereto. I have also considered the parties Counsel rival issues for determination, the nature of the claim before this Court and pleadings in support and opposition, the issues for consideration can be condensed or summarized as follows in the court's view. 10
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- i. Whether Meru County Alcoholic Drinks Control Act No 3 of 2014 is inconsistent with the Natural Law and further whether it is subsidiary legislation and whether section 34(2) and (b) of Meru county Alcoholic Drinks Control Act No 3 of 2014(1 is in breach of the Provisions of section 31(2)(b), of the National Alcoholic Act No 4 of 2010 and section 91A of the Customs & Excise Act (Cap 472) Laws of Kenya" 20
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 - ii. Whether Meru County Alcoholic Drinks Control Act is inconsistent with the Constitution of Kenya and to what extent if so and further whether it hinders economic development within the meaning of article 174(f) of the Constitution " 30
 - iii. Whether the Meru County Alcoholic Drinks Control Act No 3 of 2014 was enacted without public participation in breach of articles 10 and 196 of the constitution of Kenya and section 3(f) of the County Government Act No17 of 2013 35
14. The Court has very carefully considered the submissions by Mr Mwangi learned Counsel for the Petitioner and submissions by Prof Tom Ojienda, learned Professor for the Respondent. The Court has equally considered the respective learned Counsel highlighting on 40

Whether Meru County Alcoholic Drinks Control Act, No 3 of 2014 is inconsistent with the National Law and further whether it is subsidiary legislation and whether section 34(2)(a) and (b) of Meru County Alcoholic Act No 3 of 2014 breach the provisions of Section 31(2) (h), of the National Alcoholic Drinks Control Act No. of 2010 and Section 91A of the Customs and Exercise Act (Cap 472 Laws of Kenya.

“191(1) This article applies to conflicts between national and county legislation in respect of matters falling within the concurrent jurisdiction of both levels of government.”

(b) The national legislation is aimed at preventing unreasonable action by a county that—

(ii) impedes the implementation of national economic policy. 30

(a) the national legislation provides for a matter that cannot be regulated effectively by legislation enacted by the individual counties;

(i) norms and standards; or

(ii) national policies; or

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(c) the national legislation is necessary for—	1
(i) the maintenance of national security;	
(ii) the maintenance of economic unity;	
(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;	5
(iv) the promotion of economic activities across county boundaries;	
(v) the promotion of equal opportunity or equal access to government services; or	10
(vi) the protection of the environment.	
(4) County legislation prevails over national legislation if neither of the circumstances contemplated in clause (2) apply.	15
(5) In considering an apparent conflict between legislation of different levels of government, a court shall prefer a reasonable interpretation of the legislation that avoids a conflict to an alternative interpretation that results in conflict	20
(6) A decision by a court that a provision of legislation of one level of government prevails over a provision of legislation of another level of government does not invalidate the other provision, but the other provision is inoperative to the extent of the inconsistency.”	25
16. The Petitioner’s position is that in view of article 191 of the Constitution of Kenya, 2010, where there is a conflict between National Legislation and County Legislation in areas where both have concurrent jurisdiction the National Legislation prevails.	30
17. The Respondent on the other hand takes a different view urging that the mandate of governance established by the people is defined by particular concepts, principles and values one of which of these concepts being devolution and devolved units which the Constitution of Kenya expressly recognizes. Article 6 thereof has a distinct and independent level of government from the National Government. Article 6(1) and (2) of the Constitution of Kenya provides:-	35
“6(1) The territory of Kenya is divided into the counties specified in the First Schedule.	40
(2) The governments at the national and county levels are distinct and inter-dependent and shall conduct	

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- their mutual relations on the basis of consultation and cooperation.” 1
18. The Respondent in articulating on the said article and the importance and independence of devolved units referred to the case of *Speaker of Senate & another v Speaker of National Assembly & 2 others* advisory opinion preference No 2 of 2013 (2013) eKLR where it was held:- 5
- “The Kenyan people, by the Constitution of Kenya, 2010 chose to de-concentrate State power, rights, and duties, competences – shifting substantial aspects to County Government, to be exercised in the county units, for better and more equitable delivery of the goods of the political order. The dominant perception at the time of constitution-making was that such a deconcentration of powers would not only give greater access to the social goods previously regulated centrally, but would also open up the scope for political self-fulfillment, through an enlarged scheme of actual participation in governance mechanisms by the people – thus giving more fulfillment to the concept of democracy. 10 15
- [137] By article 1 of the Constitution, the people’s sovereign power is delegated to Parliament and the legislative assemblies in the county units, the national and county executives, and the judiciary and independent tribunals. 20 25
- [138] Devolution as a required constitutional practice runs in parallel with an attendant set of values, declared in article 10 of the Constitution: the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, the protection of the marginalized.” 30
19. In our Constitution it is clear that the fundamental organ of devolved government is the County Assembly as expressly created under article 176(1) and (2) of the Constitution_which provides:- 35
- “176(1) There shall be a County Government for each county, consisting of a county assembly and a county executive. 40
- (2) Every County Government shall decentralize its functions and the provision of its services to the extent that it is efficient and practicable to do so.”

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20. On the issue of legislative authority of County article 185(1) and (2) of the Constitution of Kenya, clearly points out that the same vests within the County Assemblies. The said articles 185(1) and (2) provides:- 1
- “185(1) The legislative authority of a county is vested in, and exercised by, its county assembly. 5
- (2) A county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the County Government under the Fourth Schedule.” 10
21. In the case of *Nairobi Metropolitan PSV Saccos Union Limited & 25 others Civil Appeal No 42 of 2014* (Nairobi), Court of Appeal, stated:- 15
- “The Constitution created functions and legislative authority to make laws for effective performance of those functions...”
22. The County Assembly in exercise of a Constitutional mandate under article 185(1) and (2) of the Constitution of Kenya 2010 can make laws but could such laws be termed as “subsidiary legislation” as the Petitioner contends in his submissions” section 3 of the interpretation and General provisions Act (cap 2) defines “subsidiary legislation” that it means any legislative provision including a transfer of delegation of powers or duties) made in exercise of a power in that behalf conferred by a written law, by way of by-law, notice, order, proclamation, regulation, rule, rule of court or other instrument. A “written Law” conferring a mode to enact a subsidiary legislation is described by the said section to mean:- 20
- “a. An Act of parliament for the time being in force 30
- b. An applied law
- c. Any subsidiary legislation for the time being in force, or
- d. Any County legislation as defined in article 260 of the Constitution article 260 of the Constitution of Kenya, 2010 provides:- 25
- “County legislation” means a law made by a County Government or under authority conferred by a County Assembly.” 35
23. In view of article 185 of the Constitution of Kenya, 2010 the legislative Assembly is not derived form an Act of Parliament for the time being in force or from an applied law or from an Act of 40

- legislation of another County but from express and specific provision of the Constitution. The Meru County Alcoholic Drinks Control Act No 3 of 2014 was passed in exercise of legislative authority of Meru County Assembly as enshrined in the Constitution of Kenya, under article 185(1) and (2) of the Constitution of Kenya, 2010. The said Act I find is not and cannot be taken as a “subsidiary legislation” as the Petitioner contended. 1 5
24. The Petitioner contends that the Respondent aver that the National Government has a role in regulating the liquor industry referring to paragraph 4(c) of Part 2 of the schedule 4 to the Constitution of Kenya he; admits that indeed the County Government is vested with the duty to manage liquor licensing however, the licensing is the only function directed to the County Government and entails only permitting the use of something or to allow an action to take place. It is further contended for the Petitioner that a license may be issued by authorities, to allow an activity that would otherwise be forbidden and may require payment of fees and/or providing capability or keep authority informed on a type of activity and give them the opportunity to set conditions and limitations. The Petitioner concede that it is no longer the duty of NACADA to issue licenses but the County Government, however, according to the Petitioner, all other policies and standards concerning alcoholic drinks are a preserve of the National Government. The Petitioner therefore submitted that it is not the case that the National Government has no role in the alcoholic drinks industry. 10 15 20 25
25. The Petitioner therefore contends that any conflict between National legislation and the Meru Alcoholic Drinks Control Act would render the latter Act null and void to that extent of the inconsistency. The Petitioner outlined numerous provisions. That according to them are in conflict with the National Law but mainly underlined the conflict regarding section 34(2),(a) and (b) of the Meru Alcoholic Drinks Control Act in so far as it proscribes PET bottles as well as containers of between 200-249 milliliters is inconsistent with section 31,(2), (b) of the National Alcoholic Drinks Control Act and section 91A of the Customs and excise Act which provides:- 30 35
- “91A(1) No person shall pack or sell an alcoholic beverage in a container the capacity of which is less than the two hundreds milliliters.” 40

- entertainment and public amenities including liquor licensing which function the Respondent does not share with the National Government and as such I find that primary legislation for regulating liquor licensing in Meru County is not a National Legislation but a County legislation. 1
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30. The Petitioner in this Petition has contended that section 34(2),(a) and (b) of the Meru County Alcoholic Drinks Control Act No 3 of 2014 is in breach of the provisions of section 31(2),(b) of the National Alcoholic Drinks Control Act No 4 of 2010 and section 91A of the Customs and Excise Act (cap 472 Laws of Kenya). The impugned Meru County Alcoholic Drinks Control Act No 3 of 2014 was enacted by the Respondent in exercise of its Constitutional mandate as per article 185(1) and (2) of the Constitution of Kenya for the purpose of regulating a function conferred in part 2 of the further schedule to constitution under paragraph 4(c). That as per Legal Notice 177 of 9th August, 2013 the Transition to devolved Government Act, 2012 Transition authority lies with the counties to regulate “cultural activities, public entertainment and public amenities including – liquor licensing. 10
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31. In view of the foregoing I find that the mandate to impose such conditions as may be desirable for licensing or dealing in liquor within Meru County including sale, production, consumption, and advertising of liquor vests with the Meru County Government. That mandate can be exercised through legislation by the County Assembly of the respective County under article 185(1) and (2) of the Constitution of Kenya, 2010. 25
32. I further find and hold that there is nowhere under part 1 of the fourth schedule of the Constitution of Kenya, 2010 which sets functions of the National Government under the devolved system of Government to regulate liquor licensing. I find the Petitioner did not quote any article or provision of the Constitution to the effect that National Government or any of its agency regulates liquor licensing function. 30
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33. Having come to the conclusion that National Government does not regulate liquor licensing but country legislation, I find that conflict of laws between National legislation and County legislation does not arise as alluded to by the Petitioner at all. The primary legislation regulating a mandate exclusively and legally vest in a County Government through the legislation by the County 40

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- Assembly. The conflict of laws between the National Government and County Government can arise in a situation envisaged under article 191(1) of the Constitution of Kenya, 2010 provides:- 1
- “191(1) This article applies to conflicts between national and county legislation in respect of matters falling within the concurrent jurisdiction of both levels of government. 5
- (a) the national legislation applies uniformly throughout Kenya and any of the conditions specified in clause (3) is satisfied; or 10
- (b) the national legislation is aimed at preventing unreasonable action by a county that—
- (i) is prejudicial to the economic, health or security interests of Kenya or another county; or 15
- (ii) impedes the implementation of national economic policy.”
34. The liquor licensing I find and hold does not fall within concurrent jurisdiction of the National and County Government but is an exclusive mandate of the County Government. I therefore find that article 191(1) of the Constitution of Kenya, 2010 is not applicable in the instant petition. 20
35. The Respondent in support of their proposition that liquor licensing is a mandate of the County Governments referred to the case of *Nairobi Metropolitan PSV Saccos Union Limited and 25 others v County of Nairobi Government & 3 others*, Nairobi Civil Appeal No 42 of 2014 (*Supra*) where it was held:- 25
- “In so far as the Constitution created County Governments and gave them certain functions and legislative authority to make laws for effective performance of those functions, we find that the Judge was right in declining to declare Paragraph 6: I of the Finance Act unconstitutional. We do not agree with Mr Kinyanjui’s contention that although section 18 (a) of the 4th schedule of the Constitution gives the functions of transport and communication to the National Government, the County Government is an organ of the Constitution, the one that is vested with the function of determining matters of traffic and parking fees. If it was the intention of the drafters of the Constitution to give the function of parking to the National Government, they should have expressly said so. 30 35 40

Instead the Constitution states clearly that the functions of regulating traffic and parking are vested in the County Governments. In addition, the Traffic Act gives room to a local authority (read County Government) to use any other method in calculating the parking fees other than what is provided for under section 72(B).

As stated, we find no conflict between the Finance Act, the Traffic Act. Even if there was, the Finance Act would prevail as the Constitution that created the County Governments and gave them legislative powers and functions of regulating traffic and parking.”

I find the authority relevant and binding on this Court.

36. It is contended by the Petitioner that section 34(2),(a) and (b) is in breach of the Meru County Alcoholic Drinks Control Act No 3 of 2014 breach provisions of section 31(2), (b) of section 37(1), (b) of the National Alcoholic Drinks Control Act No 4 of 2010 and section 91A of the Customs and Excise Act (cap 472) Laws of Kenya. Sections 34(1) and 2(a) and (b) of the Meru County Alcoholic Drinks Control Act No 3 of 2014 provides:-

“34(1) No person shall sell, manufacture, pack or distribute an alcoholic drink in sachets or such other form except as may be prescribed under this Act or any other relevant written law. (2) Without prejudice to the provisions of subsection (1): -

(a) no person shall manufacture, pack, distribute or sell in the county an alcoholic drink in a container having a capacity of less than 250 milliliters;

(b) any other distilled or fortified alcoholic drink shall only be manufactured, packed, sold or distributed in glass bottles of the kind specified in paragraph (a) or as may be prescribed in national legislation relating to control of alcoholic drinks.”

36. The Court has very carefully compared the contested sections of the impugned Act with the provisions of the National Acts. Section 34(2),(a) and (b) of the Meru County Alcoholic Drinks Control Act No 3 of 2013 does not in any way attempt nor oust the Application of National Legislation referred to by the Petitioner namely Alcoholic Drinks Control Act No 4 of 2010 and the

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- Customs and Excise Act (cap 472) in Meru County. The Act herein imports National legislation as alternative legislation for proscribing the type and capacity of the container to be used in packages, distribution or selling alcoholic drinks in Meru County contrary to assertion by the Petitioner S34 of Meru County Alcoholic Drinks Control Act do not bar drinks from other counties or out of Meru County but is only intended to balance public interest and is also for good of the County. Further as earlier on held by this Court even if there were conflict between section 34(2),(a) and (b) of the Meru County Alcoholic Drinks Control Act No 3 of 2014(which the Petitioner has not demonstrated exists) with the provisions of 31(2), (b), of the National Alcoholic Drinks Control Act No 4 of 2010 and section 91A of the Customs and Excise Act (Cap 472) the County Legislation would prevail over the National Legislation as liquor licensing function is an exclusive mandate of the County Government and is not shared function between the National Government and the County Government.
37. The other issue for consideration is. The other issue is Whether Meru County Alcoholic Drinks Control Act is inconsistent with the Constitution of Kenya and to what extent if so and further whether it hinders economic development within the meaning of article 174(f) of the Constitution”
38. The Petitioner under paragraph 29 of his Supporting Affidavit outlined the manner in which he contends the Subject Act is inconsistent with the Constitution being *inter alia*; that section 3(e) and (h) thereby so far as they unjustifiably outlaw excessive consumption.
39. The Petitioner stated they only wished to reiterate the said paragraph 29 and only sought to highlight on the issue of composition of Alcoholic Drinks Control Board as set out in section A and the Sub County Alcoholic Drinks Regulation Committees as set out under section 9 of the Meru County Alcoholic Drinks Control Act section 4 & 9 of the Meru County Alcoholic Drinks Control Act.
40. The Petitioner urges that sections 4 and 9 of the impugned Act goes against the principle of inclusiveness as enshrined under article 10 of the Constitution of Kenya, 2010. The Petitioner further urge the two sections are tantamount to discrimination on the grounds of occupation as in the said boards and committee,

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Alcoholic Drinks Control Act No 3 of 2014 states the object and purpose of the Act to Include:-	1
“3. The object and purpose of this Act is to provide for licensing of alcoholic drinks by the County Government pursuant to Part II of the Fourth Schedule to the Constitution so as to control the production, sale, distribution, promotion and use of alcoholic drinks and the promotion of research, treatment and rehabilitation of persons dependent on alcoholic drinks in order to: –	5
(a) protect the health of the individual in the county from the dangers of excessive consumption of alcoholic drinks;	10
(b) protect persons under the age of eighteen years from the negative impact on health and social development arising from exposure to advertisements of alcoholic drinks;	15
(c) protect consumers of alcoholic drinks from misleading or deceptive inducements and inform them of the risks of excessive consumption of alcoholic drinks;	20
(d) protect the health of persons under the age of eighteen years by preventing their access to alcoholic drinks;	
(e) inform and educate the residents in the county on the harmful health, economic and social consequences of the consumption of alcoholic drinks;	25
(f) adopt and implement effective measures to eliminate illicit trade in alcohol including smuggling, unlawful manufacturing and counterfeiting;	30
(g) ensure fair and ethical business practices related to production, distribution, promotion and sale of alcoholic drinks;	
(h) reduce and mitigate the negative health, social and economic impact on communities resulting from production, sale and consumption of alcoholic drinks.”	35
43. Legislations such as the subject Act is important for the Court to interrogate at the background upon which an Act was enacted. The background is a matter of public notoriety which a court ought to	40

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associated with a manufacturer of an alcoholic drink or any other related form; and	1
(c) in places demarcated under any written law as residential areas or within a distance of three hundred metres from a nursery, primary or secondary school, or other institution of learning for persons under the age of eighteen years, or a place of worship, health facility or a public playground or any other public land or property or in a public service vehicle.	5
(2) A person who contravenes the provisions of this section commits an offence and shall be liable to a fine of not less than one hundred thousand shillings and not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding three years, or to both such fine and imprisonment.	10
(3) Pursuant to article 24(2) of the Constitution, the right to freedom of expression set out in Article 33 of the Constitution is limited to the extent specified in this section for the purpose of: –	15
(a) protecting consumers of alcoholic drinks from misleading or deceptive inducements to use alcoholic drinks; and	
(b) protecting persons under the age of eighteen years from the negative impact on health and social development arising from exposure to advertisements of alcoholic drinks. Promotion at underage events	20
48(1) No person shall promote an alcoholic drink:-	25
(a) at any event or activity associated with persons under the age of eighteen years;	
(b) using such things or materials that are associated with persons under the age of eighteen years.	30
(2) Any person who contravenes the provisions of this section commits an offence and shall be liable to a fine of not less than one hundred thousand shillings and not exceeding five hundred thousand shillings or imprisonment for a term not exceeding three years or to both such fine and imprisonment.	35
(3) Pursuant to article 24(2) of the Constitution, the right to freedom of expression set out in article 33 of the	40

I have very carefully considered section 47 and 48 of the impugned Act and I find the Petitioner's contention to be unjustified and misleading. The said sections protects promotion of alcoholic drinks by way of outdoor advertisement in a manner that is false, misleading or deceptive or advertising of alcoholic drinks on residential areas or within three hundred metres from a learning institution or advertising of alcoholic drinks at the event associated with children. A quick perusal of sections, 44, 45, 46, 47, 48 and 49 of the Alcoholic Drinks Control Act No 4 of 2010 reveal that sections 47 and 48 of the Meru County Alcoholic Drinks Control Act have no differences.

45. The section challenged by the Petitioner are intended as per the subject Act to meet the object and purpose of the Meru County Alcoholic Drinks Control Act. The product whose consumption, production, sale and distribution the impugned Act is required to regulated is not a basic need for human beings to survive, it is a luxury as opposed to any other consumable goods available for general public consumption. Those who take the substance do it for different purposes and some even do it without knowing whether it has side effects or not. Some take it to feel high though it has no medicinal value. The consumption of alcohol may result into harmful effects on its consumer. It may have negative impact on the health and social development on its consumers and even break family, besides making consumers unproductive. That though the consumers of alcohol may have the right to take as much alcohol as their pockets and stomachs may be able to accommodate, that right is not absolute as it ought to be regulated as far as it is possible to protect the rights of other members of the society who do not indulge in such liabilities and whose rights may be affected by the unfettered, production, sale, consumption, advertisement and deception. The government has also an obligation to protect the unenlightened or unsuspecting or innocent alcoholic consumers from the destructive effects of alcohol bearing in mind that it is not only necessary but is an obligation of a responsible government to enact legislation to protect its citizen's health and persons under

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- the age of 18 years from negative impact on health and social development, from misleading and deceptive inducement and give useful information and beneficial information of the risks of excessive consumption of alcohol drinks, educate citizens on the harmful, health, economic and social consequences associated with consumption of alcoholic drinks, control manufacturing and counterfeiting and should government fail to act as expected it would be an abdication of duty on the part of the government, whether national or county, to leave the manufacturers, sellers, distribution and providers of alcoholic drinks to operate as they deem fit to the detriment of the entire society. It is the duty of the government to exercise due diligence in carrying out its responsibility through its legislative arm to legislate and provide rules and ensure that the society under them enjoy their rights without interference with their health and with the rights of others.
46. I therefore find and hold that prohibition of the promotion of alcoholic drinks in a manner that is false, misleading, or deceptive advertising in residential buildings or places demarcated under any written law as residential areas or within a distance of three hundred metres from a nursery school or primary school to Secondary School or other institutions of learning for persons under the age of eighteen years or a place of worship, or health facility, or a public playground or any other public land or property or public service vehicle as envisaged under section 47 and 48 of the Meru County Alcoholic Drinks Control Act No 3 of 2014 is necessary as such promotion alcoholic drinks may influence negatively on the children underage who reside and live in the residential areas and/or attend social events within such areas and as such I find there is necessity of protecting the general society from harmful effects of alcoholic drinks arising out of concealment of harmful effects by dealers in alcoholic drinks in their advertisements of alcoholic drinks.
47. The provision of section 27 of the Meru County Alcoholic Drinks Control Act No 3 of 2014 provides:-
- “27. No suit shall be maintainable to recover any debt alleged to be due in respect of the sale of any alcoholic drink which was delivered for consumption in the premises where it was sold unless it was sold for consumption with a meal supplied at the time of sale or unless the person to whom it was sold or supplied was at the time of the sale a lodger on such premises.”

Section 23 of the Alcoholic Drinks Control Act No 4 of 2010 is similar to section 27 of the subject Act. The Meru County Alcoholic Drinks, Control Act No 3 of 2014 and Alcoholic Drinks Control Act No 4 of 2010, being later in time of enactment as compared with the Law of Contract Act (Cap 23) take precedence over the Law of Contract Act (Cap 23). In the case of *John Kinyua Munyaka & 11 others v County Government of Kiambu & 3 others, Muranga & 3 others*, Muranga HC Petition No 3 of 2014 (*Supra*) Hon Justice J Ngaah observed:-

“This provision is similar, word for word, with section 23 of the Alcoholic Drinks Act, 2010 and nullifying it while the national legislation remains intact would be an exercise in futility, assuming there was a genuine case for its nullification.”

I agree entirely with the learned Judge that since the two provisions are similar word for word, there is no basis for the Petitioner to have prayed for subject Act to be deemed inconsistent with the National laws or the Constitution. That after all where such inconsistency exists the County legislation prevails. I therefore find and hold that the Meru County Alcoholic Drinks Control Act No 3 of 2014 is not inconsistent with the Constitution of Kenya and further it does not hinder economic development but provides proximate, easily and assessable services to the Meru Society.

The last issue for consideration is whether the Meru County Alcoholic Drinks Control Act No 3 of 2014 was enacted without public participation in breach of articles 10 and 196 of the Constitution of Kenya and section 3(f) of the County Government Act No 17 of 2012.

48. Under the new Constitutional dispensation, public participation is a requirement in the formulation or legislation. The participation of people is one of the National values and principles of governance under article 10(2),(a) of the Constitution of Kenya, 2010. Section 10(2),(a), of the Constitution provides:-

“(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.....”

Under article 196(1), (b) of the Constitution provides for public

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- participation and County Assembly is obligated to facilitate public participation and involvement in the legislation and other business of the assembly and committee. Such requirement is mandatory. Section 196(1),(b) of the Constitution provides:- 1
- “196(1) A county assembly shall— 5
- (b) facilitate public participation and involvement in the legislative and other business of the assembly and its committees.”
- The same mandatory requirement is reiterated under section 3(f) of the County Government Act No 17 of 2012 which provides:- 10
- “the object and purpose of this Act is to..... provide for public participation in the conduct of activities of the County Assembly as required under article 196 of the Constitution.” 15
49. Further to the above section 87 of the County Government Provides for principles of citizen participation in counties. Section 87(a) of the County Government Act (Cap 265) provides:-
- “Citizen participation in County Governments shall be based upon the following principles:- 20
- (a) timely access to information, data, documents, and other information relevant or related to policy formulation and implementation.
- (b) reasonable access to the process of formulating and implementing policies, law and regulations, including the approval of developments, proposals, projects and budges, the granting of permits and establishment of specific performance standards.” 25
50. The Petitioner submitted that the main case touching on public participation in Kenya was the case of *Robert N Gakuru & 2 others v Government of Kiambu County & 3 others* (2014) eKLR in which case Hon Justice Odunga while delivering judgment in the case cited extensively with approval the Sought African Case of *Doctors for Life International v Speaker of the National Assembly* Cct 12/05(2006) Zacc11 in which case it was held right to political participation is a fundamental Human Right. The learned Judge also cited the case of *Glenister v President of the Republic of South Africa* Cct 48/10(2011) Zacc 6 in which it was held that the invitation to the public to participate must give the public sufficient time to prepare, study a Bill and formulate representation to be made. 30 35 40

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51. The learned Judge under paragraph 84 of his judgment held that no public participation as contemplated under the Constitution and the County Government Act, 2012 took place and found the Kiambu Finance Act 2013 was null and void. 1
52. The Petitioner in the instant petition asserts that there was no participation of public in the legislation of the subject Act and in particular no participation of the owners, distributors, and manufacturers of Alcoholic drinks were sought. The Petitioner pointed out that though the Respondent under paragraph 24 of the Replying Affidavit states that an advertisement was carried out in the Daily Nation on 21st April, 2014 and through other advertisement in the local vernacular station and attached hotel booking for the forums, the Respondent has deliberately failed to attach a list of those who attended the forums, if any, and further that it is not indicated whether the participants were supplied with the Bill or not. The Petitioner referred to the case of *Robert N Gakuru & 2 others v Governor Kiambu County & 3 others (supra)* at paragraph 76 of judgment of Hon Justice Odunga where he observed as follows:- 5
- “In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfillment of the Constitutional dictates. It is my view that it behaves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may for as possible such as churches, mosques, temples, public barazas, national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. Article 196(1)(b) just like the South African position requires just that. Dealing with the issue I wish to 10 15 20 25 30 35 40

reiterate what was held in *Doctors for Life International v Speaker of the National Assembly and others (supra)* to the effect that:" 1

The Petitioner therefore urged the Court to find and hold that the Respondent has not bothered to show how many people attended the forums and what their participation entailed and further there is nothing to show that the major stakeholders were consulted. 5

53. The Petitioner has further taken issue with the Respondent's assembly in passing the Meru County Alcoholic Drinks Control Act, terming the procedure taken in passing the Act as a rushy in manner and that it flouted its own procedures under the standing orders. The Respondent is accused of having adopted the standing orders of Transitional Authority pursuant to the provisions of section 14(1),(a),(7) and (8) of the County Government Act (No 17 of 2012) which provides that:- 10 15

"14(1) A county assembly—

(a) may make standing orders consistent with the Constitution and this Act regulating the procedure of the county assembly including, in particular, orders for the proper conduct of proceedings; and 20

(7) Until a county assembly makes its standing orders under subsection (1), the standing orders of the National Assembly shall, with the necessary modifications, apply to that county assembly." 25

54. The Petitioner submits that the Respondent flouted the said standing orders in a number of ways in that there was no Memorandum of objects that accompanied the bill and even a look at the Bill on the Respondent's website www.assembly.meru.go.ke reveals that position and urged that it is contrary to the provision of the standing Order 117 which stipulate that:- 30

"No bill shall be introduced unless such Bill together with the Memorandum referred to in Standing Order 114 (Memorandum of objects and reasons), has been published in the County Gazette and the Kenya Gazette (as a Bill to be originated in the County Assembly), and unless, in the case of a County Revenue Fund Bill, an Appropriation Bill or a Supplementary Appropriation bill, a period of seven days, and in the case of any other Bill a period of fourteen days, 35 40

- beginning in each case from the day of such publication, or such shorter period as the County Assembly may resolve with respect to Bill, has ended.” 1
55. The Petitioner further urge in addition the standing order 118 states (1) except with the leave of the County Assembly, not more than one stage of a Bill might be taken at any one sitting urging that the 2nd and 3rd reading were conducted on the same day but did not indicate whether leave of county assembly was not obtained. 5
56. The Petitioner further added a further flaunting of the Standing Order occurred due to lack of public participation by the required sectoral committee contrary to standing order 121(3) which provides:- 10
- “The Sectorial Committee to which a Bill is committed shall facilitate public participation and shall take into account the views and recommendations of the public when the committee makes its report to the County Assembly.” 15
- The Petitioner concluded by urging that due to the procedural lapse, the Subject Act was not validly passed and should be declared null and void. 20
57. The Respondent’s response to the Petitioner’s contention that there was no public participation, on part of the Petitioner is that to begin with the Petitioner herein was not in existence and it wasn’t registered as of 18th July, 2014 when the impugned Act was enacted as shown in their Certificate of Registration annexed to the Petitioner’s supportive affidavit sworn on 29th September, 2014, which shows that the Petitioner was registered on the 19th day of September, 2014, two months after Meru County Alcoholic Drinks Control Act, 2014 had been enacted. The Respondent therefore contended the Petitioner’s assertion that it was not consulted is as per Respondent spurious as no amount of effort by the Respondent could have caused a non-existent petitioner to participate before the enactment as of 18th July, 2014 in a process leading to enactment of Meru County Alcoholic Drinks Control Act 2014 on 18th July, 2014. 25 30 35
58. In the instant case there is no dispute that the Petitioner was not in existence as of the time of passing the bill however the Petitioner’s members were in existence as individuals and before the court can decide on the issue as to whether the subject Act was enacted without 40

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- the public participation the court will examine whether the guiding principles in determining whether public were effectively involved in a legislative enactment of the subject Act, were complied with. 1
59. The Counsel for both the Petitioner and the Respondent have at great detail submitted on the concept of public participation and referred to several Acts as well as several decisions. These are *Robert N Gakuru & others v Kiambu County HCCP* No 532 of 2013 (Nairobi) (*Supra*) *Doctors for Life International v Speaker of the Value Assesors* Cct 12/05(2006) Zacc Ii, (*Supra*) *Glenister v President of Republic of South Africa* Cct 48/10 (2011) Zacc 6 (*Supra*) and *John Kinyua Munyaki & 11 others v County Government of Kiambu & 3 others*, Murangi HCCP No 3 of 2014 (*Supra*). *The Law Society of Kenya v The Attorney General & 2 others* HCP No 318/2012, *Moses Munyendo & 918 others v The Attorney General & another* HCP No 16/2013. 5 10 15
60. The common denominator in all these decisions is that what Matters in the ultimate is that a reasonable opportunity has been given to the public and all interested parties with timely access to the information relevant to the process of legislation so as to know about the issue at hand and have opportunity to give their response. There is a caveat however, that it can't be expected of the legislature that every person who claims to be affected by the laws or regulation that are being made to have a hearing or a say but a representative can do. However it is prudent as concerns different sectors of the public that they should be able to communicate their views to the law maker either in advance through any possible means including through memorandum, text messages or in person or even by circular letters or notice in any form so as to be taken into account. In formulating the final regulations the Respondent annexed annexure 'MMN12' through an Affidavit of Mercy Mwendwa Ndiira sworn on 13th October, 2014 on behalf of the Respondent. It is deponed on behalf of the Respondent that the Respondent effectively and extensively notified, involved and took into account, views of public in the process of enacting Meru County Alcoholic Drinks Act No 3 of 2014. The Respondent has asserted that it caused public advertisement in the Daily Newspaper dated 21/04/2014 at page 8 and on the website of Meru County Assembly and the Respondent County Assembly notified the public that the Assembly would hold eight public participation forums to consult the public on the Meru County Alcoholic Drinks Control Bill 2014. 20 25 30 35 40

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61. The Respondent averred that the published public consultative meetings as alluded to took place between the Respondent's County Assembly and public over Meru County Alcoholic Drinks Control Bill 2014 as evidenced by sample receipts issued to the Respondent. That on 22/04/2014, 23/04/2014 and 24/04/2014 the Respondent's County Assembly advertised through local vernacular FM stations, being Meru FM and Muuga FM of the Public Consultative meetings between the Public and Meru County Assembly at the specified venues and dates over Meru County Alcoholic Drinks Control Bill, 2014, further prior to the Public Consultative meetings held between 25th and 26th April 2014, the Respondent had published the Meru County Alcoholic Drinks Control Bill 2014 way back on 28th February, 2014 under Meru County Gazette Supplement No 1 of 2014 to give public sufficient time to interrogate the contents of the Bill and raise any concerns they might have over the Bill.
62. I have carefully perused the Affidavit of Mercy Mwendwa Ndiira and annextures marked "MMN12" and "MMN13". The Petitioner has not contested the annextures "MMN12" and "MMN13" nor has the Petitioner controverted the contents of the affidavit of Mercy Mwendwa Ndiira. The public advertisement carried in the Daily Nation Newspaper were headed as follows:-
- "Meru County Alcoholic Drinks Control Bill 2014 Public Participation Schedule Meru County Government office of the Clerk Meru County Assembly Public Notice".
63. The advertisement proceeded to set out dates, times, sub-county and venue of the meeting. The attached Hall hiring receipts from various groups clearly indicated the purpose of the hire was for public participation on Alcoholic Bill 2014. The Annexure "MMN13" is a special issue, Meru County Gazette Supplement No 1 (Bill No 1) being the Meru County Alcoholic Drink Control Bill, 2014 issued on 28th February, 2014.
64. In my view and in view of the steps taken by the Respondent by publishing the Meru County Alcoholic Drinks Control Bill, 2014 on 28th February, 2014, advertising for public meetings in the Daily Nation Newspaper of 21/04/2014, 4 to 5 days before public meetings and stating the purpose of the meetings and setting out the venues, date and time in advance that gave the members of public a reasonable opportunity including the Petitioners as individuals to prepare to give their views but not as a group as by then the group

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- was not in existence and all interested parties to know about the matter in issue and all had sufficient time to prepare and have a say or communicate their response. The Petitioner's contention that the Respondent is obliged to show how many people attended those forums and what that participation entailed is untenable in view of the fact that the Petitioner never alleged that no one attended those forum and that the subject was not the one in issue. The fact that the Respondent produced evidence that published public consultative meeting between Respondent's Assembly and public took place over the subject Bill 2014 is enough proof that public participation took place. The contents of Respondent's Affidavit through Mercy Mwendwa Ndiira remain uncontested by the Petitioner. The Petitioner did not assert that members of public who attended the meeting were denied participation in the public meeting. It is the duty of the Petitioner but not of the Respondent to give the names of members of public (if any) who attended the meetings but were excluded from taking part in the meeting. The burden of proof lies with the person who asserts, that is the Petitioner. The burden of proof does not shift at all. I am satisfied that the Respondent effectively and extensively notified, involved and took into account, views of the public in the process of enacting the Meru County Alcoholic Control Drinks Act No 3 of 2013 as required under article 10 and 196 of the Constitution of Kenya 2010 and section 3(f), 87 and 91 of County Government Act No 17 of 2013.
65. All Statutes come with a presumption of constitutionality and it is for the Petitioners to discharge the burden of proving that a statute is unconstitutional. (See *Law Society of Kenya v Attorney General*, Nairobi HCCP 312/2012 (*Supra*) and *Moses Munyendo & 908 others v Attorney General* Nairobi HCP 16 of 2013)
66. In order to determine whether there has been public participation the Court is required to interrogate the entire process leading to the enactment of the legislation. The Court is entitled to take into account of judicial notice of County Assembly standing orders that require before enactment, any legislation must be published as a bill and to go through various stages in the County Assembly. The Court is entitled to take into account that the standing orders provide for public participation, in some sense. The bill must also be advertised and go through various committees of the County Assembly which admit public participation and take views and recommendations of the public when such committee makes its

report to the County Assembly.

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67. Whether or not there was public participation after the bill was read as published in the instant case is a question of fact and that it is for the Petitioner to have pleaded that in the Petition and to prove that in fact the Constitution was violated to an extent that the resulting law is null and void. The Respondent has given evidence through the Replying Affidavit that there was public participation. The Petitioner's organization was not consulted as it was not in existence by then. The public in my view and as per Affidavit of Mercy Mwendwa Ndiira and annexures thereto were consulted and gave their views and in my view those who attended public meetings were representatives of the public. Further the law do not require that each individual and organization to present their views so long as their views are represented by others who attend the public participation.

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68. On the issue as regarding the County Assembly legislation stage the Petitioner has not proved to the required standard that the process was faulty and flawed, in absence of evidence to the contrary the Court would take that the process of enactment was in accordance with County Assembly standing orders which provides for public participation as it has not been demonstrated that the process was devoid of public participation.

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69. The upshot is that the Petitioner has failed to prove that the Petitioner's fundamental rights and freedom have been violated, that the Meru Alcoholic Drinks Control Act is inconsistent with the Constitution of Kenya; the Alcoholic Drinks Control Act, the Customs and Excise Act and the Law of Control Act, consequently the Petitioner's Petition dated 29th September, 2014 is hereby dismissed but as the matter is of public interest I order that each party to bear its own costs.

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**Okoiti & 3 others v Nairobi City County
& 4 others [2014] KLR – HCK**

High Court, at Nairobi (Constitutional
& Human Rights Division)
M Ngugi, J

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November 26, 2014

Petition Nos 143 & 142 of 2014; Judicial Review No 140 of 2014
(Consolidated)

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Brief facts

The Petition challenged the appointment of new members to the Board of Directors and a new Chairperson for the Nairobi City Water and Sewerage Company Limited. It was claimed that there was a failure to comply with procedural requirements in making the appointments. Similarly, it was also contended that the dismissal of the former Chairman and over two-thirds of the former members of the Board of Directors was done without compliance with procedural requirements and administrative fairness.

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The Nairobi City Water and Sewerage Company Limited was a public corporation wholly owned by the County Government of Nairobi, whose predecessor was the Nairobi City Council. It was claimed that the challenged appointments were done in accordance with the Articles of Association of the Nairobi City Water and Sewerage Company Limited. However, the Petition raised questions as to whether other legal requirements and stakeholders, such as the provisions of the Water Act, No 8 of 2002 and the National Government's role in water services as provided for in the Constitution of Kenya 2010, were applicable to the appointments.

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Issues

- i. Whether the regulation and management of Water Sanitation Services and Water Services Providers (WSPS) was an exclusive function of County Governments or it was a shared function between the National Government and County Governments.
- ii. Whether the provisions of the Water Act prevail over those of the Companies Act and those of the 5th Respondent's articles of Association as pertains to the appointment and/or selection of directors.
- iii. Whether the conflict of laws as contemplated by article 191 of the Constitution arise regarding management of water services providers

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- such as the Athi Water Services Board. 1
- iv. Whether the provisions of appointment of directors in the Companies Act and the Nairobi City Water and Sewerage Services Limited's Articles of Association conform to the requirements of the Constitution. 5
- v. Whether the Board of Directors appointed on 26th March 2014 was appointed in accordance with the Constitution, the Water Act, the Companies Act and the Nairobi City Water and Sewerage Services Limited's Articles of Association. 10
- Constitutional Law** – appointments – appointment of the Chairman and the Board of Directors to a public corporation – appointment of the Chairman and the Board of Directors of the Nairobi Water and Sewerage Co Ltd – nature of applicable laws – Constitution of Kenya 2010, articles 10, 73 & 232; Companies Act (cap 486), section 184; Water Act, Corporate Governance Guidelines (Gazette Notice No 7045 of 2010). 15
- Constitutional Law** – Devolved Government – distribution of functions between the National Government and the County Governments – water and sanitation services – whether both the National Government and the County Governments had a role in water and sanitation services – Constitution of Kenya 2010, Fourth Schedule to the Constitution. 20
- Held:**
1. Water and sanitation were crucial to the citizenry's health and well-being and impacted on their standard of living. The Constitution of Kenya, 2010, recognized the right to clean and safe water under article 43(1)(d) and it entailed a positive obligation for the State to ensure the progressive realization of that right. It was doubtless why the right to water and sanitation was expressly recognized in the Constitution. 25
 2. International conventions to which Kenya was a party also underscored the importance of the right to water and sanitation, and its critical role in the enjoyment of other rights such as health. These conventions, by dint of article 2(6) of the Constitution, imposed a constitutional obligation on the Government to ensure the progressive realization of those rights. 30
 3. The provisions under article 11 of the International Covenant on Economic, Social and Cultural Rights 1996 and article 28 of the 2006 UN Convention on the Rights of Persons with Disabilities to the effect that state parties recognized the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous 35
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- the right to water was guaranteed. The achievement of the right was dependent on the proper regulation and management of water and sanitation services, and of the entities that had the duty of service provision. 1
9. The provision and management of water services was a shared function, distributed between the two levels of government. Article 6(2) of the Constitution recognized the fact that the governments at the national and county levels were distinct and inter-dependent. It enjoined them to conduct their mutual relations on the basis of consultation and cooperation. With regard to water provision, they ought to perform their respective functions in the spirit of consultation and co-operation, and in accordance with the legislation, policies and standards set by the state, bearing in mind the provisions of section 7 of the Transitional Provisions which required such adaptations as would ensure accord with the Constitution. 5 10 15
10. For the past decade or so, the water sector in Kenya had been regulated under the provisions of the Water Act, 2002. As it was now a shared function between the National and County Governments, it was expected that legislation at the national and county level would be enacted to provide for its regulation. The Water Act was enacted to, among other things, provide for the management, conservation, use and control of water resources and for the acquisition and regulation of rights to use water, and to provide for the regulation and management of water supply and sewerage services. 20 25
11. The Articles of Association of a company constituted the constitution of any company and played a vital role in defining and distributing powers and functions, and regulating the functioning of the company. It may thus be argued that the Articles of Association of the 5th Respondent prevailed over the provisions of the Water Act in relation to the appointment of directors of the 5th Respondent. However, the 5th Respondent was an agent of the 4th Respondent (Athi Water Services Board). That was in accordance with the provisions of section 51(1) of the Water Act which empowered the Minister to establish Water Services Boards, and pursuant to which the Athi Water Service Board was established. Subsequently, in exercise of its powers under section 55(1) of the Water Act, the Athi Water Service Board appointed the 5th Respondent as its agent. 30 35 40
12. As a public corporation providing a service that was, in the absence of county legislation, governed by the Water Act, for it could not be that such an essential sector could be left in a vacuum with regard

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- to regulation, the appointment of directors of the 5th Respondent ought to be governed both by the provisions of the Companies Act and its Articles of Association, as well as the Corporate Governance Guidelines under the Water Act. 1
13. The 5th Respondent was incorporated by the Nairobi City Council, the predecessor of the 1st Respondent. The 1st Respondent had retained the 5th Respondent pursuant to section 6(5) of the County Government Act. The 5th Respondent was therefore a County Corporation by dint of section 2(1) of the Public Finance Management Act cap 412C, which defined a county corporation as a public corporation within a county established by an Act of Parliament or county legislation. Having been retained as a county corporation by the 1st Respondent, it could not exist in a vacuum. It was an agent of the 4th Respondent in the absence of county legislation, in accordance with the provisions of section 55 of the Water Act. 5 10 15
16. There was no legislation enacted by the 1st Respondent, the County Government of Nairobi, for the regulation of water services provision. Further, all the parties conceded that there was no conflict of laws as contemplated under article 191 of the Constitution with regard to the management of water services providers such as the 5th Respondent. 20
17. The provisions of the Act and the Articles of Association required that the appointment of directors of the 5th Respondent ought to be done at a general meeting and that it ought to be preceded by a resolution for such appointment. Further, that the shareholders should have elected directors by way of voting and the person elected ought to have garnered a majority of the votes. These provisions provided for participation and transparency in the appointment of the directors of the company. They did not therefore violate the provisions of the Constitution. 25 30
18. The meeting at which the directors of the 5th Respondent were appointed was called by way of a notice scheduling the 8th Annual General Meeting. The agenda of the meeting included the election of Directors, and notification of the right of the members, in accordance with the provisions of section 136(2) of the Companies Act, to attend and vote at the meeting or appoint a proxy to attend and vote on his or her behalf. Therefore, in so far as pertains to the summoning of the 5th Respondent's Annual General Meeting, there was compliance with the requirements of the Companies Act and the 5th Respondent's Articles of Association. 35 40

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19. It was evident from the contents of the letter, and from subsequent correspondence contained in the pleadings, particularly the Supplementary Affidavit of the 1st Petitioner, that there was no involvement or participation of various stakeholders in the selection or nomination of the candidates for directors of the 5th Respondent and that the process undertaken for the selection/nomination and subsequent appointment of the directors was not reached through a transparent and competitive process as required by among others, the Corporate Governance Guidelines to which the 5th Respondent vowed to adhere to in its Service Provision Agreement. 1
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20. The 1st Respondent overlooked the standards for public appointments imposed on it by the Constitution. Even if the Water Act and Corporate Governance Guidelines had not imposed on it the requirement for stakeholder engagement and an open, transparent process, the Constitution did. 10
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21. The 1st Respondent could not purport to select the directors of the 5th Respondent, a company which, though wholly owned by the 1st Respondent, existed for the purpose of providing water services to the residents of the County. Its directors could not be pre-selected and imposed on the residents. They ought to have been appointed in a manner that took into account stakeholder interests, that was open and transparent and that gave an opportunity to anyone interested to seek appointment. 20
22. Even the Articles of Association of the 5th Respondent properly applied, could not be said to countenance a situation where one person pre-determined the persons to be elected as directors. It would be to abuse the provisions of the Articles of Association and the Companies Act and a travesty of the concept of elections. Therefore, the appointments made to the 5th Respondent's Board of Directors were not made in accordance with the Constitution, the Water Act, the Companies Act or the 5th Respondent's Articles of Association. 25
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24. The gist of the 4th Petitioner's case was that he was removed from the position of Chairman without being given notice of the meeting or resolution for his removal. He conceded however, that his term in office had come to an end. In the circumstances, there was no unconstitutionality, unfairness, or any gross breach of natural justice with regard to his removal. He was entitled to offer himself in an open process for appointment as a director, and should he have been appointed and elected thereafter as Chairman, serve in that capacity. 35
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Petition allowed. (The appointment of the directors of the Nairobi Water and Sewerage Company Limited was to be carried out afresh in accordance with the law.) 1

Cases

East Africa

1. *Kilifi Lands Disputes Tribunal v Resident Magistrate Kaloleni & 2 others* Miscellaneous Application No 117 of 2004 – (Mentioned)
2. *Mureithi, Benson Riitho v JW Wakhungu, Cabinet Secretary Ministry of Environment & 2 others* Petition No19 of 2014 – (Mentioned) 10
3. *Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County Government of Nairobi & 3 others* Petition No 486 of 2013 – (Mentioned)
4. *Republic v City Council of Nairobi & 2 others ex parte KAKA Travellers Cooperative Savings and Credit Society Limited* Judicial Review Application No 323 of 2010 – (Mentioned) 15
5. *Speaker of the Senate & another v Attorney General & 4 others* Advisory Opinion No 2 of 2013 – (Mentioned)

South Africa

1. *Speaker of the National Assembly & others v De Lille MP & another* [1999] ZASCA 50; [1999] 4 All SA 241 – (Mentioned) 20

Philippines

1. *City of Manila v Teotico*, GR No L-23052 – (Mentioned)
2. *Bagatsing v Ramirez*, GR No L-41631 – (Mentioned) 25

United Kingdom

1. *Southend on Sea Corporation v Hodson (Wickford) Ltd* [1961] 2 All ER 46; [1962] 1 QB 416 – (Explained)
2. *Wood v Odessa Waterworks Co* (1889) 42 Ch D 636 – (Explained)

Texts and Journals

1. Dignam, A., (Ed) (2011) *Hicks and Goo's Cases and Materials on Company Law* London: Oxford University Press 7th Edn p 179 30
2. Gower, LC., Davies, LP., (Eds) (2003) *Gower and Davies' Principles of Modern Company Law* London: Sweet & Maxwell 7th Edn

Statutes

East Africa

1. Companies Act (cap 486) sections 136(2); 181; 184; 186 – (Interpreted)
2. Constitution of Kenya, 2010 articles 2,2(6); 6(2); 10,(2); 21,(2); 27; 35; 43(1)(b),(d); 47; 66; 70; 73,(2); 75; 185(2); 186(1)(2); 187(2); 189; 191; 204(2); 232; 235; 236; 259; First Schedule section 2; Fourth Schedule Part 1 section 22(c); Part 2 section 10,11,(c); Sixth 40

Schedule Part 2 section 7(1) – (Interpreted)	1
3. County Governments Act, 2012 (Act No 17 of 2012) sections 6(5) (6) – (Interpreted)	
4. Public Finance Management Act, 2012 (Act No 18 of 2012) sections 149(2)(j); 164(5); 166(5); 184; 185 – (Interpreted)	5
5. Transition to Devolved Government Act, 2012 (Act No 1 of 2012) section 7 – (Interpreted)	
6. Water (Services Regulatory) Rules, 2012 (cap 372 Sub Leg) rule 18(8) – (Interpreted)	
7. Water Act (cap 372) sections 47(1); 51,(1); 53; 55	10
International Instruments	
1. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979 article 14.2(h)	
2. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1996 article 11	15
3. Convention on the Rights of Persons with Disabilities (CRPD), 2006 article 28	
Advocates	
1. <i>Mr Ojienda</i> instructed by the firm of Tom Ojienda & Associates Advocates for the 1st Respondent	20
2. <i>Ms Mwangi</i> instructed by the State Law Office for the 2nd Respondents	
3. <i>Mr Muruka</i> instructed by the firm of John H Muruka & Co Advocates for 3 rd Respondent	25
4. <i>Ms Omotto</i> instructed by the firm of Nyachae & Ashitiva & Co Advocates for the 5th Respondent	
November 26, 2014, M Ngugi, J delivered the following Judgment.	
Introduction	30
1. This Judgment pertains to High Court Petition Nos 142 and 143 of 2014, which were consolidated with Judicial Review Application No 140 of 2014. In their respective suits, the Petitioners challenge the appointments of new members of the Board of Directors and the Chairperson of the Nairobi City Water and Sewerage Company Ltd by the 1st Respondent.	35
2. Petition No 142 of 2014 was filed on 28 th March 2014 under a Certificate of Urgency to challenge the appointment of one George Aladwa as the Chairman of Nairobi City Water and Sewerage Company. The Petitioner alleged that the appointment had been done without any consideration of constitutional requirements with	40

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- regard to such appointments. 1
3. Petition No 143 of 2014 was also filed under Certificate of Urgency on 31st March 2014 on the grounds that the Respondent had dismissed over two-thirds of the members of the Board of Directors of the Nairobi City Water and Sewerage Company and appointed new members without any regard to constitutional requirements. 5
4. The third matter, Judicial Review Application No 140 of 2014 was filed under Certificate of Urgency on 8th April 2014 challenging the removal of the Applicant, Mr Peter Kuguru, from his position as Chairman and appointing the said George Aladwa as Chairman. By an order made on 5th May 2014, these three matters were consolidated in view of the fact that they all deal with the appointment of the Board of Directors responsible for the management of the Nairobi City Water and Sewerage Company Ltd. 10
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5. Upon consolidation, the parties to the Petition were to be Okiya Omtatah Okoiti as the 1st Petitioner, Balkrishna Ramji Devani as the 2nd Petitioner, Pelican Signs Limited as the 3rd Petitioner, and Mr Peter Kiguru as the 4th Petitioner. The Respondents in the Consolidated Petition are the Nairobi County (1st Respondent), the Ministry of Environment, Water and natural Resources (2nd Respondent), the Water Services Regulatory Board (3rd Respondent), the Athi Water Services Board (4th Respondent) the Nairobi Water and Sewerage Company Limited (5th Respondent) and Mr George Aladwa (6th Respondent). 20
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6. The 2nd and 3rd Petitioners did not participate in the proceedings subsequent to the consolidation. Their interest in the matter appears to have been specifically directed at the appointment of Mr George Aladwa who was later dropped from appointment as the Chairman of the 5th Respondent. The said George Aladwa did not participate in the hearing of the Petitions, either. 30
- The 1st Petitioner's Case 35
7. The 1st Petitioner appeared in person. His case is contained in his Petition dated 31st March 2014 which is supported by his Affidavit sworn on 31st March 2014 and two Further Affidavits sworn on 2nd and 19th May 2014. He also filed submissions dated 29th May 2014 and supplementary submissions dated 28th July 2014. 40
8. The 1st Petitioner submits that water is a strategic national resource and cannot be owned or managed by individuals or institutions,

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- and that the governance of water is a national strategic function vested in the 3rd Respondent but delegated to the 4th Respondent, who in turn delegates part of it downwards to the 5th Respondent in a delegated structure-function framework. 1
9. He submits that the residents of Nairobi City County have a constitutional right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, including to a water service provider (the 5th Respondent) led and managed according to the law, so as to ensure the efficient supply of good quality, affordable, reliable, and sustainable water and sewerage services. 5 10
10. The Petitioner submits that the Notice for the 5th Respondent's Annual General Meeting (AGM) of 26th March, 2014, listed the institutions of the purportedly retiring directors represented but the 1st and its Governor who had been sued as the 2nd Respondent by the 1st Petitioner replaced them with names of handpicked individuals whose curriculum vitae have not been disclosed, and whose representation of stakeholders was not revealed, and for whom no vetting process was undertaken by the 1st Respondent. It is his contention that if allowed to stand, the irregular appointment of strangers will eliminate the representation of known and approved institutional stakeholders on the Board of Directors of the 5th Respondent, yet the 5th Respondent is expected to actualize the all-important right to water of the residents of Nairobi City County; and that it will also reverse and erode the major governance gains so far realized since the Water Act, 2002 came into operation in 2003. 15 20 25
11. The Petitioner contends that from precedents, the 5th Respondent always publishes a notice in at least two newspapers of national circulation asking defined key stakeholders to express interest to serve on its Board of Directors in a competitive process. The shortlisted candidates would then be subjected to the predecessor of the current Nairobi City County Assembly before being appointed at the Annual General Meeting of the 5th Respondent specifically convened for that purpose. 30 35
12. The Petitioner avers that the 1st Respondent's recruitment process for the directors of the 5th Respondent was fatally flawed, irresponsible and an affront to the Bill of Rights, the principle of public participation, and is contrary to the other provisions of the Constitution and the Water Act, 2002 as the Respondent is 40

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- under a legal duty to recruit directors of the 5th Respondent in a competitive, transparent, fair and open manner that conforms to all other required procedures; and that the 1st Respondent has a constitutional duty to uphold the rule of law, the provisions and the spirit of the Constitution. He submits that anything done or omitted to be done contrary to the Constitution is null and void, and that therefore the decision of the 1st Respondent with regard to the appointment of directors and Chairman of the 5th Respondent is, among other things, unlawful, unjustified, capricious, and against core values, tantamount to discrimination, and is therefore amenable to judicial intervention. 1 5 10
13. The Petitioner further contends that other than the questionable technical credentials and competence of the handpicked directors of the 5th Respondent, they are likely to be compromised, subservient acolytes of the 1st Respondent and unable to assert their desired operational autonomy. 15
14. The Petitioner submits further that the recruitment violated the national values and principles of governance including rule of law, democracy and participation of the people set out in article 10, and it is also, in contravention of article 27, discriminatory against those who are not in the good books of the 1st Respondent or are unknown to it. 20
15. It is also the 1st Petitioner's contention that the recruitment process contravenes article 35 of the Constitution on the right of people to access important information affecting the nation; article 47 on the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; and article 73 on the authority assigned to a State officer and the guiding principles of leadership and integrity. 25 30
16. The Petitioner further contends that the appointments violate articles 6(2), 186(2), 189, the fourth schedule and other constitutional provisions and principles on devolution in locking out one level of government from a shared function like water and article 232 on the values and principles of public service. 35
17. The Petitioner has made extensive submissions with regard to the relationship between a general and specific law. He has relied on a number of decisions, among them *City of Manila v Teotico*, GR No L-23052 January 29, 1968, *Bagatsing v Ramirez*, GR No L-41631 40

December 17, 1976 to support his case for the supremacy of specific laws over general laws. However, as this Petition does not, in my view, turn on this point or on whether or not there has been an implied repeal of the Water Act, I need not go into an analysis of his submissions on these two points.

18. He asks the Court to grant the following orders:
- a. A Declaration be and is hereby issued that the 1st and 2nd Respondents' decision to unilaterally appoint strangers to the Board of Directors of 6th Respondent was irregular and fatally flawed for not following the procedures laid down in both the Constitution and the Water Act, 2002.
 - b. A Declaration be and is hereby issued that to ensure that there is no disruption of the services provided by the 6th Respondent, all the directors currently in office continue serving until they are replaced through the process provided in law.
 - c. A Declaration be and is hereby issued that the law requires and empowers the 4th and 5th Respondents to play a critical role in the appointment of the directors of the 6th Respondent.
 - d. A Declaration be and is hereby issued that the directors of the 6th Respondent representing known stakeholders approved by the 4th and 5th Respondents cannot be replaced by strangers to those institutions.
 - e. A Declaration be and is hereby issued that the 1st and/or the 2nd Respondent cannot appoint the Chairperson of the Board of Directors of the 6th Respondent.
 - f. A Declaration be and is hereby issued that the Articles and Memorandum of Association of the 6th Respondent envisages a seamless transition from one Board to another.
 - g. A Declaration be and is hereby issued that the 1st and 2nd Respondents can manage water and sanitation services exclusively without involving the 4th and 5th Respondents.
 - h. A Declaration be and is hereby issued that the Water Act 2002 is still in force in Kenya and must be obeyed.
 - i. That the Honourable Court do issue hereby issues an order quashing the decision by the 1st and 2nd Respondents' decision to appoint strangers to the Board of the 6th Respondent.

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- Application No 140 of 2014. The Application is supported by his Affidavit of the same date. His case was presented by his Learned Counsel, Ms Munyaka. 1
20. The 4th Petitioner was the Chairman of the 5th Respondent until the 1st Respondent removed him in March 2014. It is his case that the 1st Respondent acted *ultra vires* by replacing him as Chairman of the Board of Directors without giving him notice of the intention to remove him. He terms the acts of the 1st Respondent unfair, unjust and unprocedural, and contends that the Respondent has acted unreasonably and irrationally by ostracizing him from the affairs of the 5th Respondent and consequently throwing the affairs of the 5th Respondent into disarray; that the decision to suspend him was made without due regard to the law and/or policies governing the Respondents and in particular the salient grounds upon which such a measure can be taken; that it was made in flagrant disregard of the rules of natural justice as he was neither given an opportunity to be heard nor reasons for the said decision. He contends further that the 1st Respondent acted arbitrarily, *ultra vires* and unlawfully in suspending him as the Memorandum and Articles of Association of the 5th Respondent specifically provide for arbitration in cases of disputes within the Board. 5
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21. It is his case further that the 1st Respondent considered irrelevant considerations in arriving at the decision to suspend him; that it disregarded relevant considerations; that its conduct in its entirety and in particular the impugned decision of 3rd April 2014 smacks of impropriety, is absurd, capricious, unlawful, unjust, Wednesbury unreasonable and irrational and further *ultra vires* both the Memo and articles and sections 6(6) of the County Governments Act and section 47(1) of the Water Act. 25
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22. It is his contention that Clause 83 of the Articles of Association of the 5th Respondent provides for the stay in office of the Chairman for a period of 3 years and as such it is obnoxious for the Respondents to purport to circumvent this provision; and that in any event, Clause 131 of the Articles of Association is clear that in the event of a dispute between Directors, it should be referred to arbitration for expeditious resolution. It was his case therefore that the Board erred fundamentally by arbitrarily ousting him from office. 35
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23. The 4th Petitioner agrees with the submission by the 1st Petitioner that the stake holders of the 5th Respondent were not involved in the

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- decision. He contends that he has never been given a chance to be heard, and the reasons for his ouster have never been communicated to him. 1
24. The 4th Petitioner submits that the Water Act provides the measures for the appointment of directors; that such measures include competitive bidding for directors and inclusions of stakeholders under Gazette Notice No 7045 of 18/6/2006, and the actions of the 1st Respondent were in breach of the law, the Constitution and the powers of the Governor. 5
25. The 4th Petitioner submits that there is no conflict of laws; that the Water Act has not been repealed, and that the Constitution provides for a transition period so that services shall not be disrupted by giving legislative roles to the County when it has no effective mechanism to enforce the same. It is however, his submission that even if the Water Act was not applicable, the Memo random and Articles of the 5th Respondent provide for voting and natural justice at general meetings. It is his case further that the Memo random and Articles do conform to the Constitution but were not followed. 10
26. The 4th Petitioner further submits that the 1st Respondent acted in excess of its jurisdiction and therefore, there is need for orders prohibiting its actions. He relies on the decision in *Applicant v The Resident Magistrate Kaloleni* Misc Application No 117 of 2004 and *R v City Council of Nairobi and others*, Judicial Review Appl No 323 of 2010 in support of his case. 15
27. The 4th Petitioner asks the Court to grant an order of *certiorari* to quash the decision of the 1st Respondent removing him from his position as the Chairman of the Board of Directors of the 5th Respondent; an order of *mandamus* to compel the 1st, and 5th Respondents to reinstate him as the Chairman of the Board of Directors of the 5th Respondent; and an order prohibiting the Respondents or any person acting in their behest from removing or purporting to remove him from office as the Chairman of the Board of Directors of the 5th Respondent. He also prays for the costs of the Application. 20
- The 1st Respondent's Case
28. The 1st Respondent's case is contained in the Replying Affidavit of one Lilian W Ndegwa sworn on 8th May 2014 and its written submissions dated 23rd May 2014. Learned Council, Prof Ojienda, 25
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- presented its case. 1
29. It is useful to point out that the 1st Petitioner had initially sued both the Nairobi City County and the Governor of the County, and that the acts under attack had been acts of the Governor. 5
30. According to the 1st Respondent, the mandate of the 5th Respondent is set out at sections 51, 53 and 55 of the Water Act. It is, under the said Act, an agent of the 4th Respondent and exercises the mandate of the 4th Respondent. Its mandate includes the provision of water services or any service of or incidental to the supply of water or sewerage. 10
31. The 1st Respondent further submits that the legal framework under which the 5th Respondent supplies water and provides sewerage services fundamentally changed with the enactment of the Constitution of Kenya 2010. It contends that the function of the National Government in relation to water is that set out in section 22(c) of Part 1 of the fourth Schedule to the Constitution. Consequently, the mandate of the 2nd, 3rd and 4th respondents, as agencies of the National Government, is limited to water protection, securing sufficient residual water, hydraulic engineering and safety of dams nationally and not supply of water and the provision of sewerage in Nairobi County. 15 20
32. It is also the 1st Respondent's case that in accordance with the Constitution, the supply of water and the provision of sewerage, collectively known as "water and sanitation services" is an exclusive function of County Governments. It is therefore its contention that in the present case, the provision of water and sanitation is, within its area of jurisdiction, its exclusive mandate, and that the said services are undertaken by the 5th Respondent on its behalf. 25 30
33. The 1st Respondent contends that by dint of article 185(2) of the Constitution, regulation of water and sanitation services, including water service providers, is the mandate of the County Government done through laws passed by its County Assembly; that the Water Act must be read in accordance with section 7 of the Transitional and Consequential Provision in the Constitution; and that the Constitution does not support the continued exercise of the regulatory mandate of water and sanitation services by the 3rd Respondent. 35 40
34. The 1st Respondent further argues that the regulation of water

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- and sanitation services, being a County Government function, is not through national legislation such as the Water Act, Corporate Governance Principles published by either the 2nd and 3rd Respondent, or licensing terms set by the 3rd Respondent; and it is misconceived for the Petitioners to contend that the 3rd Respondent, the Water Act and the Corporate Governance Guidelines are the relevant institution and legislation to regulate the provision of water and sanitation services in Nairobi County or any other County. 1
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35. The 1st Respondent relies on the decision in *Nairobi Metropolitan PSV Saccos Union Ltd and 25 others v County of Nairobi and 3 others* in support of its contention that County legislation is the relevant legislation regulating the function of the County Government; that state organs must exercise only such power as the Constitution sanctions, relying in this regard on the decision in *Speaker of the National Assembly and others v De Lille MP and another* (297/98) [1999] ZASCA 50 and *Speaker of the Senate and another v Hon Attorney General*, Nairobi SC Advisory Opinion Reference No 2 of 2013 eKLR. 10
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36. The 1st Respondent agrees with the 1st and 4th Petitioners that there is no conflict of laws as contemplated under article 191 of the Constitution regarding the management of water and sanitation providers such as the 5th Respondent; that the provisions of the Water Act do not prevail over those of the Companies Act and those of the 5th Respondent's Articles of Association pertaining to the appointment and/or selection of directors; and that the Guidelines on Corporate Governance do not prevail over the provisions of the Companies Act or the 5th Respondent's Articles of Association with regard to appointments. It was its case that only legislation enacted by the County Government under article 185(2) of the Constitution would prevail over the Companies Act and the 5th Respondent's Articles of Association. 20
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37. The 1st Respondent further submits that it exercises its Constitutional function to provide water and sanitation services indirectly through the 5th Respondent; that it is empowered in that regard by section 6(5) of the County Governments Act No 17 of 2012; that the 5th Respondent, being wholly owned by the 1st Respondent, is a public corporation pursuant to Section 2 (1) of the Public Finance Management Act; that once incorporated as a limited liability company, the 5th Respondent became a separate 35
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legal entity distinct from its members. It is its case that it cannot therefore be held responsible or accountable for actions of the 5th Respondent.	1
38. The 1st Respondent further contends that the Public Finance Management Act has put in place a robust legal framework to ensure transparency and accountability of County corporations such as the 5th Respondent. It cites in particular the provisions of sections 149(2)(j), 164(5), 166(5), 184 and 185. It is also its case that the manner of appointment of the 5th Respondent's directors is regulated by section 184 of the Companies Act and article 66 of the Articles of Association. It contends that the relevant requirements are that the appointment should be done at a general meeting of the company; there must be a resolution for the appointment of directors; and that shareholders should vote to elect the directors. It is its case that the acts of a director or manager shall, by virtue of section 181 of the Companies Act, be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.	5 10 15 20
39. The 1st Respondent submits therefore that the 5th Respondent duly convened an Annual General Meeting held on 26th March 2014, chaired by the 4th Petitioner and appointed directors to the Board of Directors.	25
40. The 1st Respondent concedes that it is the sole shareholder of the 5th Respondent; that on 25th February 2014, the Governor of Nairobi County, nominated persons who would be elected at the Annual General Meeting of the 5th Respondent and notified the Chief Executive Officer of the 5th Respondent; but maintains that it was undertaking its mandate in the nomination of persons into the Board of Directors, not as a County Government, but as a shareholder in the 5th Respondent.	30
41. It is its case that there has been no appointment of the Chairman of the Board of Directors of the 5th Respondent to replace the outgoing Chairman, the 4th Petitioner, whose three year tenure had already expired; that the purported representation of certain institutions in the Board of Directors, including the Kenya National Chamber of Commerce and Industry and Jomo Kenyatta University as a representative of the Institute of Higher Learning, both of which are government institutions, negates the independence of County Government from National Government as envisaged in article	35 40

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- 6(2) of the Constitution. 1
42. With regard to the 4th Petitioner, it is the 1st Respondent's case that as he does not dispute that his tenure as Chairman of the Board had expired, he cannot seek to chair the Board of which he is no longer a member. It is its submission that there is therefore nothing untoward, unlawful or unconstitutional in the procedure for appointing directors to the Board of the 5th Respondent; and that therefore the provisions of the Companies Act and the Articles of Association of the 5th Respondent conform to the requirements of the Constitution. It therefore prays that the Petition be dismissed with costs. 5 10
- The 2nd Respondent's Case
43. On behalf of the Ministry of Environment Water and Natural Resources, the 2nd Respondent, the Attorney General relied on submission dated 2nd May 2014 presented to the Court by Learned Counsel, Ms Mwangi. The case of the 2nd Respondent is that the water function is shared between the National and County Government as provided under section 22(c) of Part 1, and section 11 of Part 2 of the fourth Schedule of the Constitution; and that the fourth Schedule envisages cooperation between the two levels of government in line with articles 6(2), 186(2) and 189 of the Constitution. 15 20
44. Ms Mwangi submitted that the Water Act 2002 specifies the roles of the different entities in terms of ownership and operations and puts the entire water sector under the regulation of the Water Services Regulatory Board. She submitted that the court should give directions that will enable the water sector run with minimal or no conflict. 25 30
- The 3rd Respondent's Case
45. The Water Services Regulatory Board, 3rd Respondent sets out its case in a Replying Affidavit sworn by one Eng Robert Gakubia on 2nd May 2013 and its submissions dated 15th July 2014. Learned Counsel, Mr Muruka, submitted that in determining the issue whether the provision and management of water services is a shared function or exclusive to County Governments, articles 185(2), 186(1) and 187(2) should be read with articles 259(1), 21, and 191 of the Constitution. He submitted that whereas section 11(b) of Part 2 of the fourth Schedule of the Constitution provides that it is a function of County Governments to undertake "water and 35 40

sanitation services” section 22(c) of Part 1 of the fourth Schedule to the Constitution provides the function of the National Government to be inter alia: water protection, securing sufficient residual water, hydraulic engineering and safety of dams. He submitted therefore that the water services function is shared between the national and County Governments in terms of regulation and management respectively.

46. Counsel further argued that Kenya is also a signatory to the International Covenant on Economic Social and Cultural Rights and by dint of article 2(6) of the Constitution, the state is under an obligation to enact legislation to fulfill international obligations; that it is also under an obligation to pursue a human rights based framework at both national and county level for progressive realization of the right to water and sanitation services and consequently, it is the obligation of the National Government to establish a legal framework and uniform regulatory standards on minimum core obligations for both the national and County Governments.

47. It is the 3rd Respondent's case further that under the Water Act 2002, it has generated appropriate national norms, standards and rules to ensure efficient and effective service provision in line with the human right to water and sanitation; and that the said standards are in conformity with the recommendations in the Report of the UN Special Rapporteur on human rights to safe drinking water and sanitation which underscores sustainability and non-retrogression in the realization of the human right to water and sanitation.

48. It submits therefore that whereas the 1st Respondent has the Constitutional mandate to manage water and sanitation services, the exercise of this constitutional obligation has to be in consonance with the national policy and legislative framework governing the water sector as contemplated by article 21 of the Constitution; and that a number of County Governments have made positive progress in synchrony with this framework, citing the example of Kiambu County Government vide Gazette Notice No 3686.

49. It is its case therefore that national regulation in both the water resources and services sector is inevitable in light of article 21 of the Constitution. It contends that such regulation is imperative as a tool to set national uniform standards in resource management and service provision standards; that it is necessary for national

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- role of the National Government with regard to setting of standards is clear in view of article 21 of the Constitution; and further, that the 1st Respondent has the constitutional mandate to provide water services in line with the national standard provided for in a national legislation which is currently the water Act 2002. 1
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53. It is also the 3rd Respondent's contention that the 5th Respondent was and is still a licensed water services provider and the provisions for appointment of directors set out in its Articles of Association must be read together with the water sector regulations; and further, that the Constitution at articles 10(2), 73(2) and 232 has codified the corporate governance principles envisaged under the guidelines published by the 3rd Respondent vide Legal Notice No 7045 of 18th June 2010. 10
54. It submits that the appointment of the 5th Respondent's directors did not follow a competitive process as envisaged by the Constitution and the sectoral laws; that there was no advertisement of the vacancies and the legal framework governing the process was overtly violated in that the appointment of the board of directors by the 1st Respondent was not done in accordance with the Constitution of Kenya and the Water Act 2002 and it blatantly violated articles 10(2), 73(2) and 232 of the Constitution and the Corporate Governance Guidelines published under section 47 of the Water Act 2002. The 3rd Respondent relies on the decision in Petition Number 19 of 2014; *Benson Riitho Mureithi 9 v JW Wakhungu, Cabinet Secretary Ministry of Environment and 2 others* for the proposition that appointments such as is in contestation in this case must follow the principles of good governance. 15
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- The Case for the 4th Respondent 30
55. Athi Water Services Board, the 4th respondent, filed an Affidavit in reply sworn by its Legal Manager, one Clement Mugambi, on 29th May, 2014 and submissions dated 18th July 2014. In submissions on its behalf, Learned Counsel, Mr Sifuna, agreed with the submissions made on behalf of the other parties except the 1st Respondent that provision of water services is the obligation of both the National and County Government under article 43(d) of the Constitution. It was his submission that water is an inalienable right and its provision must be made in a manner that promotes the progressive realization of the right. The 4th Respondent takes the position that the Water Act was saved by virtue of section 7(1) of Part 2 of the sixth Schedule 35
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- of the Constitution of Kenya, 2010, which saves all law in force immediately before the effective date, such law to be construed with such alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. 1
56. The 4th Respondent contends further that by Legal Notice No 177 of 9th August, 2013 made pursuant to the Transition to Devolved Governments Act, 2012, the Transition Authority approved the transfer of the functions specified in the schedule to that Notice to the County Government of Nairobi City with effect from 9th August, 2013, but that the Legal Notice does not provide for any transitional rules and modalities on how this transfer of especially 'urban water and sanitation services with formal service provision including water, sanitation and sewerage companies' is to be effected; nor does it state the mode of transfer of the responsibilities bestowed upon the 4th Respondent under the Service Provision Agreement. It contends therefore that it is in recognition of this *lacunae* in the law that the Cabinet Secretary for Environment, Water and Natural Resources, in consultation with the Governor of the Nairobi City County, constituted a Task Force to advise on the re-organisation of water services in the County; that in her letter dated 8th July, 2013 to the Governor, the Cabinet Secretary advised on the general policy in the water sector under the devolved system of Government. 5 10 15 20
57. With regard to the other issues raised in this petition, the 4th Respondent takes the position that regard should be had to the Service Provision Agreement aforesaid, as well as the Corporate Governance Guidelines for the Water Service Sector issued by the 3rd Respondent under the Water Act, 2002. It is its case that the provisions of the Service Provision Agreement, relevant to the present Petition are article 2.3(a) which stipulates that the guidelines and standards (the Corporate Governance Guidelines for the Water Service Sector) of the 3rd Respondent are based on the provisions of the Water Act, 2002 and are binding on the 4th and 5th Respondents; and that therefore the Service Provision Agreement is to be interpreted in such a way as to be consistent with such guidelines. 25 30 35
58. The 4th Respondent refers also to Paragraph 3 of the Special Conditions to the said Agreement which adds several articles to the Service Provision Agreement. These include article 1.1(e) under which the 5th Respondent warranted to at all times adhere to the 40

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- Corporate Governance Guidelines issued by the 3rd Respondent in constituting the 5th Respondent's Board of Directors; article 1.1(h) in which the 5th Respondent warranted not to alter, amend, interpret, or implement its Memorandum and Articles of Association in a manner which would cause it to be in breach of its obligations under the Service Provision Agreement, the Water Act, 2002, or any applicable regulations, procedure or guidelines that may or may be perceived to affect the interests of the 4th respondent as licensee or frustrate the terms of that Agreement; article 1.1(i) in which the 5th Respondent warranted to invite the 4th Respondent in all the 5th Respondent's Annual General Meetings, as well as Special General Meetings as an observer. 1 5 10
59. It is its further contention that in recognition that the 5th Respondent's Memorandum and Articles of Association did not comply with the 3rd Respondent's Water Sector regulations, Paragraph 4 of the Special Conditions included an undertaking to article 2.3(b) of the Agreement to the effect that the 5th Respondent would amend its Memorandum and Articles of Association within one year after execution of the Agreement so as to comply with the 3rd Respondent's water sector guidelines. Such amendment was to be to the effect that the directors of the 5th Respondent shall retire on a rotation basis; appointment of the directors of the 5th Respondent shall be through a transparent and competitive process; and the representation of various stakeholders in the Board of the 5th Respondent shall comply with sector guidelines so that no single stakeholder is able to dominate the said Board. 15 20 25
60. The 4th Respondent contended further that paragraph 16 of the Special Conditions added a provision to article 20 of the Agreement to the effect that the 5th Respondent is, by virtue of being incorporated by a public entity to provide functions that would otherwise be provided by a public entity, considered a public entity and shall at all times abide by the applicable guidelines and regulations governing public entities. 30 35
61. The 5th Respondent submits therefore that a careful reading of the foregoing provisions of the Service Provision Agreement between the 4th and 5th Respondents, the Special Conditions thereto, the Corporate Governance Guidelines for the Water Services Sector, the Water Act, 2002, as well as the 3rd Respondent's Conditions for Approval, points at promotion of public participation, good 40

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- governance, transparency and accountability. It is its contention that the 1st Respondent, which is a State organ, and the 5th Respondent, a public entity, are bound by the provisions of article 10 of the Constitution which require that the principles of public participation, good governance, transparency and accountability are adhered to. 1
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62. It is its contention further that the Articles of Association of the 5th Respondent must be interpreted as being subject to the Service Provision Agreement between the 4th and 5th Respondents, which Agreement was further subject to and largely informed by the 3rd Respondent's Corporate Governance Guidelines for the Water Service Sector. The said Guidelines are, in turn, a creature of the Water Act, 2002. It is that Service Provision Agreement that informed the objects of the 5th Respondent. Without the said Agreement, the 5th Respondent would be an empty shell with no business to transact; and therefore any deliberation on the question of appointment of members of the 5th Respondent's Board of Directors must be approached with this special relationship between the 4th and the 5th Respondents. 10
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63. Consequently, it is its view that in view of this special relationship, the provisions of the Water Act, 2002 are superior over the provisions of the Companies Act and the 5th Respondent's Memorandum and Articles of Association with regard to the appointment of the members of the 5th Respondent's Board of Directors. 25
- The 5th Respondent's case
64. The 5th Respondent's case is that it is a public body wholly owned by the 1st Respondent and did not actively participate in the election of its directors, for that is within the mandate of the shareholders. It is its case that the 1st and 2nd Respondents have the constitutional mandate to appoint its directors as provided under article 235 of the Constitution; and that article 191 of the Constitution provides for the mechanism of dealing with a situation where county legislation conflicts with national legislation. Its case is contained in the Replying Affidavit sworn on 5th May 2014 by Ms Ivy Nyarango, the Company Secretary to the 5th Respondent, and submissions dated 30th June 2014. 30
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65. In the said Affidavit, Ms Nyarango avers that the Chairman of the 6th Respondent's Board of Directors must be appointed pursuant to the provisions of article 83 of the 1st Respondent's

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- Article of Association and that it is the Board that meets and elects its Chairman. According to Ms Nyarango, the Board of Directors of the 5th Respondent had not met, and she had not conducted any elections for its Chair. She averred further that the term of the Board had expired on or about 24th March 2014; that article 66(b) of the 5th Respondent's memorandum and articles provided that the directors shall serve for a term of 3 years after which the shareholders would have the option of re-electing the directors for a further term of three years or electing new directors; and that an AGM was held on 26th March 2014 at which the shareholders nominated a new Board of Directors. 1
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66. The 5th Respondent concedes that by its letter date 28th March 2014, the 4th Respondent questioned the manner in which the 2nd Respondent had nominated the 5th Respondent's Board of Directors; that the 5th Respondent's management did not have any role in appointing directors and that the matter should be taken up with the 2nd Respondent. It is its submission that article 186(1) of the Constitution provides for the respective functions and powers of the National and County Governments; and that Part 2 of Clause 11(b) of the fourth Schedule gives the County Government jurisdiction to provide public works and services which includes water and sanitation services. 15
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67. The 5th Respondent has relied on the decision in *Southend on Sea Corporation vs Hodson (Wickford) Ltd* (1961) 2 All ER for the proposition that a public authority cannot by contract fetter the exercise of its discretion and that an estoppel cannot be raised to prevent or hinder the exercise of discretion. It is also its contention that the exercise of the 1st and 2nd Respondents' authority and statutory discretion to appoint the directors of the 5th Respondent is an expression of the will of the people and this Court should not allow the National Government through various bodies to depart from the constitutionally set principles. It prayed that the Petition be dismissed with costs. 25
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- The Case for the 6th Respondent
68. As noted above, the 2nd and 3rd Petitioners, who had challenged the appointment of the 6th Respondent, Mr George Aladwa, as the Chairman of the 5th Respondent, did not participate in the proceedings. However, submissions dated 15th July 2014 seeking dismissal of the Petition were filed on behalf of the 6th Respondent, 40

the gist of which was to question the competence of the Petitions given that they were based on newspaper reports regarding the appointment of the 6 th Respondent.	1
Analysis and Determination	5
69. Having set out the respective submissions of the parties above, I now turn to consider the issues which arise for determination in the matter. At the outset, following the consolidation of the matters and with the agreement of all the parties, the following six issues were identified, and have been addressed in the submissions of the parties, as arising for determination in the matter:	10
a. Whether the regulation and management of Water Sanitation Services and Water Services Providers (WSPS) is a matter exclusively within the jurisdiction of County Governments, in view of the provisions of articles 185(2), 186(1) and 187(2) of the Constitution or whether it is a shared mandate with the National Government.	15
b. Whether the provisions of the Water Act prevail over those of the Companies Act and those of the 5 th Respondent's articles of Association as pertains to the appointment and/or selection of directors.	20
c. Whether the conflict of laws as contemplated by article 191 of the Constitution arise regarding management of water services providers such as the Athi Water Services Board.	25
d. Whether the provisions of appointment of directors in the Companies Act and the Nairobi City Water and Sewerage Services Limited's Articles of Association conform to the requirements of the Constitution.	30
e. Whether the Board of Directors appointed on 26 th March 2014 appointed in accordance with the Constitution, the Water Act, the Companies Act and the Nairobi City Water and Sewerage Services Limited's Articles of Association and;	35
f. Whether the Petitioners are entitled to the orders sought.	
70. These issues arise in consequences of the allegations by the Petitioners that in appointing directors of the 5 th Respondent, the 1 st and 2 nd Respondent have violated various articles of the Constitution, to wit articles 2, 70, 73, 75, 235 and 236 of the Constitution. In addressing my mind to these issues, I bear in mind	40

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- the provisions of the Constitution, particularly article 10 which contains the national values and principles of governance, and article 259 on the construction of the Constitution. 1
- Whether the regulation and management of Water Sanitation Services and Water Services Providers (WSPS) is exclusively within the jurisdiction of County Governments, or is a shared mandate with the National Government. 5
71. With the exception of the 1st Respondent, the parties agree that the regulation and management of Water Sanitation Services and Water Services Providers is a shared mandate between the county and National Governments in view of the provisions of articles 185(2), 186(1) and 187(2) of the constitution. 10
72. In considering this issue, it is important to do so while bearing in mind the important place of water and sanitation in the lives of citizens. It is, I believe, indisputable that the provision of adequate water and sanitation is critical to the health and wellbeing, indeed to the life, of citizens. This is doubtless why the right to water and sanitation is expressly recognized in the Constitution. Article 43(1) (b) and (d) provide that: 15
- (b) "Every person has the right to accessible and adequate housing, and to reasonable standards of sanitation.
- (d) Every person has the right to clean and safe water in adequate quantities." 20
73. Further, international conventions to which Kenya is a party also underscore the importance of the right to water and sanitation, and its critical role in the enjoyment of other rights such as health. These conventions, by dint of article 2(6) of the Constitution, impose a constitutional obligation on the Government of Kenya to ensure the progressive realization of these rights. 25
74. Article 14.2(h) of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women guarantees the right to water. It provides that: 30
- "States Parties shall undertake all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right ... (h) to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply..." 35
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- (Emphasis added) 1
75. The provisions of article 11 of the International Covenant on Economic, Social and Cultural Rights 1996 and article 28 of the 2006 UN Convention on the Rights of Persons with Disabilities to the effect that state parties recognize the right of everyone to an “adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions” have been interpreted to include the provision of adequate water and sanitation, with General Comment No 15 of the Committee on Economic, Social and Cultural Rights noting that “The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.” 5 10
76. Within the devolved structure of government under the Constitution, article 186(1) provides that the distribution of functions between the national and County Government is as set out in the fourth Schedule to the Constitution. With regard to water and sanitation, section 2 of Part 1 of the fourth Schedule provides that the functions of the National Government include “the use of international waters and water resources” and at section 22, “Protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular – 15 20 25
- a. Water protection, securing sufficient residual water, hydraulic engineering and the safety of dams...”
77. The functions and powers of the County Governments on the other hand are listed under section 10 and 11 of Part 2 of the fourth Schedule. Section 10 provides that such functions include: 30
- “Implementation of specific National Government policies on natural resources and environmental conservation, including (a) soil and water conservation...” while section 11 provides that they include “County public works and services, including- 35
- a. Storm water management systems in built-up areas; and
- b. Water and sanitation services.” 40
78. Article 185(2) provides that county assemblies may make any laws necessary for, or incidental to, the effective performance of the

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- functions and exercise of the powers of the County Government under the fourth Schedule. At article 187(2), the Constitution deals with the transfer of functions between the two levels of government. It provides that: 1
- “If a function or power is transferred from a government at one level to a government at the other level – 5
- b. Arrangements shall be put in place to ensure that the resources necessary for the performance of the function or exercise of the power are transferred; and
 - c. Constitutional responsibility for the performance of the function or exercise of the power shall remain with the government to which it is assigned by the Fourth Schedule.” 10
79. It is also worth observing that under article 204(2) of the Constitution, the National Government is under an obligation to use the Equalization Fund to provide basic services including water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible. (Emphasis added) 15 20
80. Prior to the promulgation of the Constitution, there were already in force statutory provisions governing the water sector. These are contained in the Water Act, 2002. Section 3 of the Act provides that: “Every water resource is hereby vested in the State, subject to any right of user granted by or under this Act or any other written law.” At section 49, the Act provides that: 25
- “1. Following public consultation, the National Water Minister shall formulate, and publish in the Gazette, a national water services strategy 30
 - 2. ...
 - 3. The national water services strategy shall have the following objects: 35
 - a. To institute arrangements to ensure that at all times there is in every area of Kenya a person capable of providing water supply and
 - b. To design a programme to bring about the progressive extension of sewerage to every centre of population in Kenya.” 40
81. Section 7(1) of the sixth schedule of the Constitution is to the effect

of the Companies and Water Acts, and the Articles of Association of the 5th respondent, the Nairobi Water and Sewerage Company Limited. In considering this issue, it is worth bearing in mind the composition of the 5th Respondent and its function within the water sector in the 2nd Respondent.

86. The 5th Respondent was incorporated in December 2003 as a company limited by shares. The subscribers to the Memorandum and Articles of Association were the predecessor to the 1st Respondent, the City Council of Nairobi, with four thousand, nine hundred and ninety eight shares, the then Mayor of Nairobi and the Town Clerk with one share each respectively, which they held in trust for the City Council of Nairobi. For all intents and purposes therefore, the 5th Respondent is owned wholly by the 1st Respondent, the successor to the City Council of Nairobi.

The Water Act No 8 of 2002

87. For the past decade or so, the water sector in Kenya has been regulated under the provisions of the Water Act, 2002. As it is now a shared function between the national and County Governments, it is expected that legislation at the national and county level will be enacted to provide for its regulation. The Water Act was enacted to, among other things, provide for the management, conservation, use and control of water resources and for the acquisition and regulation of rights to use water, and to provide for the regulation and management of water supply and sewerage services. The Act, which came into force in 2002, established the Water Services Regulatory Board.

88. It is the Water Act that sets up the mechanism for the regulation of water services, including the formation of water services providers such as the 5th Respondent which are, under the Act, under an obligation to adhere to guidelines issued by the regulator, the 3rd Respondent.

89. The Companies Act, Cap 486 of the Laws of Kenya, provides for the incorporation, regulation and winding up of companies and other associations. The 5th Respondent has, as is required under the Act, Articles of Association which are intended to govern its internal management. What is the place of a company's Articles of Association? The Articles of Association of a company constitute the constitution of any company and play a vital role in defining and distributing powers and functions, and regulate the functioning of

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- the company. It may thus be argued that the articles of association of the 5th Respondent prevail over the provisions of the Water Act in relation to the appointment of directors of the 5th Respondent. This is borne out by various authoritative texts and decisions. Alan Dignam, Hicks *and Goo's Cases and Materials on Company Law*, 7th Edition (Oxford University Press, Clarendon Street, 2011) [pg 179] states that; 1
- “The Articles of Association are the key internal rules that govern the allocation of power between the members and the company. They are a default set of articles that apply in the absence of those forming the company providing their own set of articles.” 5 10
90. In Paul L Davies, *Gower and Davies' Principles of Modern Company Law*, 7th Edition (London Sweet and Maxwell, London, 2003), it is observed that: 15
- “A remarkable feature of the British Company law is the extent to which it leaves regulation of the internal affairs of a company to the company itself through rules laid down in its Constitution and, in particular, in its Articles of association. [pg 54] However, the crucial point is not the formal relationship between the Articles and the other sources of company law, especially the Act, but the extent to which substantive matters, central to the company's operation, are left to be regulated by the Articles.” 20 25
91. In the case of *Wood v Odessa Waterworks Co* (1889) 42 Ch D 636 Stirling J pointed out that: 30
- “... [642] the Articles of association constitute a contract not merely between the shareholders and the company, but between each individual shareholder and every other.” 35
92. However, the 5th Respondent is an agent of the 4th Respondent (Athi Water Services Board). This is in accordance with the provisions of section 51(1) of the Water Act which empowered the Minister to establish Water Services Boards, and pursuant to which the Athi Water Service Board was established. Subsequently, in exercise of its powers under section 55(1) of the Water Act, the Athi Water Service Board appointed the 5th Respondent herein as its agent. 40
93. The 1st Respondent submits that the provisions of the Water Act 2002 do not prevail over those of the Companies Act or

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- the 5th Respondent's Articles of Association with regard to the appointment or selection of directors. It argues, in particular, that the Corporate Governance Guidelines published as Legal Notice No 7045 of 2010 do not prevail over the Companies Act and the 5th Respondent's Articles with respect to appointment of directors. It does however, make a significant concession when it submits as follows at paragraph 25 of its written submissions:
- "The relevant legislation that would prevail over the Companies Act and those (*sic*) of the 5th Respondent's Articles of Association as pertains to the appointment and/or selection of directors would be the legislation enacted by the 1st Respondent's County Assembly under article 185(2) of the Constitution of Kenya 2010 to regulate provision of "Water and Sanitation" services in Nairobi City County..."
94. As a public corporation providing a service that is, in the absence of county legislation, governed by the Water Act, for it cannot be that such an essential sector can be left in a vacuum with regard to regulation, the appointment of directors of the 5th Respondent ought, in my view, to be governed both by the provisions of the Companies Act and its Articles of Association, as well as the Corporate Governance Guidelines under the Water Act.
95. I take this view for two reasons. First, the 5th Respondent was incorporated by the Nairobi City Council, the predecessor of the 1st Respondent. The 1st Respondent has retained the 5th Respondent pursuant to section 6(5) of the County Governments Act No 17 of 2012 which states that:
- "To ensure efficiency in the delivery of service or carrying out of a function for which the County Government is responsible, the County Government may—
- a. establish a company, firm or other body for the delivery of a particular service or carrying on of a particular function; or
 - (b) contract any person, company, firm or other body for the delivery of a particular service or carrying on a particular function."
96. The 5th Respondent is therefore a County Corporation by dint of section 2(1) of the Public Finance Management Act cap 412C, which defines a "county corporation" as "a public corporation within a county established by an Act of Parliament or county legislation."

a. Applies or interprets this Constitution	1
b. Enacts, applies or interprets any law; or	
c. Makes or implements public policy decisions.”	
103. The national values and principles are set out at article 10(2) as including:	5
“a. Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people	
b. Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;	10
c. Good governance, integrity, transparency and accountability; and	
d. Sustainable development.”	15
104. Article 73 sets out the constitutional principles on leadership and integrity. It provides at article 73(2), which is relevant for present purposes, that:	
“The guiding principles of leadership and integrity include—	20
(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;	
(b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;	25
(c) selfless service based solely on the public interest, demonstrated by—	
(i) honesty in the execution of public duties; and	
(ii) the declaration of any personal interest that may conflict with public duties;	30
(d) accountability to the public for decisions and actions; and	
(e) discipline and commitment in service to the people.”	
105. Article 232 provides that:	35
1. The values and principles of public service include-	
a. high standards of professional ethics;	
b. efficient, effective and economic use of resources;	
c. respective, prompt, effective, impartial and equitable provision of services;	40
d. involvement of the people in the process of policy making;	

e. accountability for administrative acts;	1
f. Transparency and provision to the public of timely, accurate information;	
g. subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;	5
h. representation of Kenya's diverse communities; and	
i. affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of-	
i. men and women	10
ii. the members of all ethnic groups; and	
iii. Persons with disabilities	
2. The values and principles of public service apply to public service in	15
a. All state organs in both levels of government	
b. All state corporations."	
106. This constitutional standard is what would be required to be met in the statutory provisions regulating the appointment of directors of the 5th Respondent, which is indisputably a county corporation or state organ at the county level.	20
107. The appointment of directors is provided for in section 184 of the Companies Act in the following terms:	
"1. At a general meeting of a company other than a private company, a motion for the appointment of two or more persons as directors of the company by a single resolution shall not be made, unless a resolution that it shall be so made has first been agreed to by the meeting without any vote being given against it.	25
(2) A resolution moved in contravention of this section shall be void, whether or not its being so moved was objected to at the time: provided that –	30
i. This subsection shall not be taken as excluding the operation of Section 181, and;	35
ii. Where a resolution so moved is passed, no provision for the automatic reappointment of retiring directors in default of another appointment shall apply.	
(3) For the purposes of this section, a motion for approving a person's appointment or for nominating a person for appointment shall be treated as a motion for his appointment."	40

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108. At section 186, the Act provides that: 1
- “1. Subject to the provisions of this section, no person shall
be capable of being appointed a director of a company
which is subject to this section if at the time of his
appointment he has not attained the age of -one, twenty 5
or he has attained the age of seventy
2. ...
3. ...
4. ...
5. Nothing in the foregoing provisions of this section shall 10
prevent the appointment of a director at any age, or
require a director to retire at any time, if his appointment
is or was made or approved by the company in a general
meeting, but special notice shall be required of any 15
resolution appointing or approving the appointment
of a director for it to have effect for the purposes of this
subsection and the notice thereof given to the company
and by the company to its members must state or must
have stated the age of the person to whom it relates.” 20
109. Article 66 of the Articles of Association of the 5th Respondent
provides as follows:
- “The number of Directors shall be 11. The names of the first
Directors shall be determined in writing by the subscribers 25
of the Memorandum of association or by a majority of them
from an approved list by the Council.”
110. With regard to the Chairman of the Board, the article 83 provides
that:
- “The Directors shall in their first meeting elect a chairman 30
and vice-chairman to preside over their meetings for a period
of 3 years, provided that directors representing the Council
and the Government shall not be eligible for election as
Chairman or Vice-Chairman If at any meeting neither the
chairman nor the vice-chairman is present within fifteen 35
minutes after the time appointed for holding the same, the
Directors present may choose one of their number to chair
the meeting. The initial elections of the Chairman of the
Board shall be presided over by the Company Secretary.” 40
111. The provisions of the Act and the Articles thus require that the
appointment of directors of the 5th Respondent must be done at a

general meeting; that it must be preceded by a resolution for such appointment; that the shareholders should elect directors by way of voting; and the person elected must have garnered a majority of the votes. These provisions, in my view, do provide for participation and transparency in the appointment of the directors of the company. They do not therefore violate the provisions of the Constitution.

Whether the Board of Directors appointed on 26th March 2014 was appointed in accordance with the Constitution, the Water Act, the Companies Act and the Nairobi City Water and Sewerage Services Limited's Articles of Association.

112. I will begin with a consideration of whether there was compliance with the requirements of the Companies Act and the 5th Respondent's Articles of Association, some of which I have already set out above. With regard to the procedure for calling of meetings of the Board, article 43 of the 5th Respondent's Articles of association states as follows:

"An Annual General Meeting and a meeting called for the passing of a special resolution shall be called by twenty-one days' notice in writing at the least, and a meeting for the passing of a special resolution shall be called by seven days' notice in writing at the least. The notice shall be exclusive of the day on which it is given, and shall specify the place, the day and the hour of meeting and, in case of special business, the general nature of that business, and shall be given, in manner hereinafter mentioned or in such other manner, if any, as may be prescribed by the company in general meeting, to such persons as are, under the Articles of the company, entitled to receive such notices from the company; Provided that a meeting of the company shall, notwithstanding that it is called by shorter notice than that specified in this article, be deemed to have been duly called if it is so agreed:

- a. in the case of a meeting called at the Annual general meeting, by all the members entitled to attend and vote thereat; and
- b. in the case of any other meeting, by a majority in number of the members having a right to attend and vote at the meeting, being a majority together holding not less than 95% in nominal value of the shares giving that right."

113. The meeting at which the directors of the 5th Respondent were appointed was called by way of a notice dated 5th March 2014

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- scheduling the 8th Annual General Meeting for the 26th March 2014 at 10:00. The agenda of the meeting included the election of Directors, and it also included notification of the right of members, in accordance with the provisions of section 136(2) of the Companies Act, to attend and vote at the meeting or appoint a proxy to attend and vote on his or her behalf. In so far, therefore, as pertains to the summoning of the 5th Respondent's Annual General Meeting, there was compliance with the requirements of the Companies Act and the 5th Respondent's Articles of Association.
114. With regard to the requirements of the Water Act, section 2 of the First Schedule thereto provides that:
- “In making an appointment to a board or committee, the person making the appointment shall have regard to –
- a. The educational qualifications, expertise, character, and integrity of potential candidates for membership.
 - b. The degree to which water users, or water users of particular kinds, are represented on the board or Committee at the time the appointment is made under this Act or any other written law.”
115. Article 1.1 of the Service Provision Agreement between Athi Water and Nairobi City Water and Sewerage Company for Nairobi City Cluster provides as follows:
- “(e) the Provider warrants that it shall at all times adhere to the Corporate Governance Guidelines issued by WASREB in constituting its Board of Directors and in particular, comply with the condition subsequent in paragraph 4 of the Special Conditions.
 - (f) The Provider warrants that it shall adhere to good corporate governance in its management and operations. In this regard the Provider undertakes to develop specific Terms of Reference for all its organs as provided in the Corporate Governance Guidelines and warrants that it will strictly adhere to the responsibilities and duties contained in them.
 - (i) The Provider warrants that it shall invite the Licensee in all its Annual General Meetings and Special General Meetings as an observer.”
116. Further, section 4.2.1 of the Corporate Governance Guidelines provides as follows with regard to the composition of the Boards of

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- water service providers such as the 5th Respondent: 1
- “The Boards of the Water Service Providers shall have a minimum of seven (7) and a maximum of eleven members with a professional mix of directors appointed from the local authority and directors appointed from the stakeholders through a competitive stakeholder participation procedure such that no individual or group of individuals or interests can dominate its decision making. No more than one director shall be appointed from each of the local authorities covered by the WSP (in a cluster system). A director representing a Local Authority shall be a professional member of staff of the respective local authority. The respective WSB shall oversee the nomination/appointment process for the stakeholder representatives in the startup phases of the WSP. 5
117. I have considered the minutes of the Annual General Meeting of the 5th Respondent held on 26th March 2014 at the Laico Regency Hotel. They are annexed to the 1st Respondent’s Replying Affidavit sworn by the County Secretary, Ms Lilian Ndegwa, together with the notice of the meeting, as annexure LW N 12. The minutes indicate that one Gregory S Mwakanongo, present in the meeting as the proxy for the Nairobi City County, proposed a list of persons to be elected directors of the company. His proposal was seconded by the Deputy Governor, Jonathan Mueke, who was representing the Governor of Nairobi. 10
118. What, however, remains unclear is how the selection/nomination of the said names was done, who were involved in the selection/nomination, the criteria used in the short listing of the names and whether there was a procedure or advertisement calling for persons to apply for selection/nomination. I have noted from the documents contained in the parties’ pleadings various correspondence indicating that a decision that the persons said to have been elected at the annual general meeting had already been pre-determined. 15
119. Of particular note is the letter from the Governor of Nairobi dated 25th February 2014 addressed to Eng. Philip Gichuki, the Chief Executive Officer of the 5th Respondent, and copied to the Registrar of Companies. In the said letter, which pre-dated the Annual General Meeting by a month, the Governor states as follows: 20
- Dear Gichuki 25
- Change of Particulars of the Nairobi Water Directors 30
- 35 40

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- The Nairobi City County as sole shareholder of Nairobi Water and Sewerage Company has nominated the following directors to serve on the Board of Nairobi Water and Sewerage Company Limited and the same should be elected by the Annual General Meeting to be held on the 26th March 2014. 1
5
120. The Governor then set out the names of the persons nominated, who are the same persons who were proposed and seconded at the Annual General Meeting held on 26th March 2014. 10
121. It is evident from the contents of this letter, and from subsequent correspondence contained in the pleadings, particularly the Supplementary Affidavit of the 1st Petitioner, that there was no involvement or participation of various stakeholders in the selection or nomination of the candidates for directors of the 5th Respondent; that the process undertaken for the selection/nomination and subsequent appointment of the directors was not reached through a transparent and competitive process as required by among others, the Corporate Governance Guidelines to which the 5th Respondent vowed to adhere to in its Service Provision Agreement; that the 1st and 2nd Respondent took the position that as the 5th Respondent was the sole shareholder in the 5th Respondent, its word was law, and it was not answerable to any person with regard to the 'selection' of directors for the 5th Respondent, for the purported 'elections' were just a matter of form. 15
20
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122. More importantly, in my view, the 1st Respondent overlooked the standards for public appointments imposed on it by the Constitution. Even had the Water Act and Corporate Governance Guidelines not imposed on it the requirement for stakeholder engagement and an open, transparent process, the Constitution does. I need not repeat the provisions of Article 10, 73 and 232 which I have already set out above. 30
123. In the case of *Benson Riitho Mureithi v JW Wakhungu and 2 others* Petition No 19 of 2014, this Court, after setting out the constitutional provisions at article 73, observed as follows: 35
- [84] "It may seem that the Constitution has imposed an irksome and onerous burden on those responsible for making public appointments by requiring that they make the appointments on the basis of clear constitutional criteria; that they allow for public participation; and that those they appoint meet certain 40

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- integrity and competence standards. This burden, however, is justified by our history and experience, which led the people of Kenya to include an entire chapter on leadership and integrity in the Constitution.” 1
124. It is my view that this position applies with equal force in the circumstances of the present case. The 1st Respondent cannot purport to select the directors of the 5th Respondent, a company which, though wholly owned by the 1st Respondent, exists for the purpose of providing water services to the residents of the County. Its directors cannot be pre-selected and imposed on the residents. They must be appointed in a manner that takes into account stakeholder interests, that is open and transparent, and that gives an opportunity to anyone interested to seek appointment. 5
125. Further, even the Articles of Association of the 5th Respondent, properly applied, cannot be said to countenance a situation where one person pre-determines the persons to be ‘elected’ as directors. It would be to abuse the provisions of the articles of Association and the Companies Act, and a travesty of the concept of elections. 10
126. For the above reasons, I find and hold that the appointments made to the 5th Respondent’s Board of Directors on 26th March 2014 were not made in accordance with the Constitution, the Water Act, the Companies Act or the 5th Respondent’s Articles of Association. 15
- Whether the Petitioners are entitled to the orders Sought
127. I have already set out above the respective cases of the parties, and the responses to the core issues that this petition raises. The final issue to consider is whether the 1st and 4th Petitioners are entitled to the reliefs they seek, the 2nd and 3rd Petitioners not having participated in the proceedings. 20
128. The gist of the 4th Petitioner’s case is that he was removed from the position of Chairman without being given notice of the meeting or resolution for his removal. He concedes, however, that his term in office had come to an end. In the circumstances, I can find no unconstitutionality, unfairness, or any gross breach of natural justice with regard to his removal. He is entitled, in my view, to offer himself in an open process for appointment as a director, and should he be appointed and elected thereafter as Chairman, serve in that capacity. 35
129. With respect to the orders sought by the 1st Petitioner, I believe 40

that they have been addressed in the analysis above, with the upshot being that they are merited, but with some variations.	1
Disposition	
130. The Court has jurisdiction to grant appropriate relief in matters brought before it regarding violation of the Constitution or the Bill of Rights. In the present case, taking into account the findings in the above analysis, the orders that commend themselves to me, and which I hereby grant, are as follows:	5
1. I declare that the purported appointment of directors of the Nairobi Water and Sewerage Company pursuant to the purported elections at the Annual General Meeting of the Company held on 26 th March 2014 is unlawful, unconstitutional and null and void for being carried out in violation of the provisions of the Constitution, the Water Act, the Companies Act and the 5th Respondent's Articles of Association;	10
2. I hereby issue an order quashing the appointment of the directors of the Nairobi Water and Sewerage Company in contravention of the Constitution, the Water Act, the Companies Act and the 5th Respondent's Articles of Association.	15
3. I direct that the appointment of the directors of the Nairobi Water and Sewerage Company be carried out afresh in accordance with the law.	20
131. This matter dealt with important issues relating to the governance of the water sector in Kenya. I therefore direct that each party bears its own costs of the Petition.	25
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**Nendela v County Assembly of Bungoma
& 4 others [2014] KLR - HCK**

High Court, at Bungoma
A Mabeya, J

October 7, 2014

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Constitutional Petition No 4 of 2012

Brief facts

In 2013, the Petitioner was appointed by the Governor of Bungoma to serve as the County Executive Committee member in charge of Roads and Public Works for the County of Bungoma. 10

The Petitioner submitted that his problems began during a tender process for the execution of road works for the year 2013/2014. He explained that he received telephone calls from members of the County Assembly requesting that the execution of road works in their respective areas of representation be placed under their control and that companies associated with their respective associates be given preferential treatment in the award of the said tenders. 15 20

He refused to comply with the requests. He was of the opinion that the division of the sum of Kshs 712,000,000 meant for roads in the County among the 45 representative units within the County would mean that each unit would be given Kshs 15,822,222 a sum which would be too minimal for any meaningful impact. 25

The Petitioner's claim was that as a result of his refusal to accede to those requests, a motion for his removal from office was tabled and the motion was passed on April 14, 2014. He was thus served with a letter to appear before a Select Committee of the Assembly the following morning and to receive presentations for or against his removal from office. 30

The Petitioner contended that the inquiry was unconstitutional and it violated the rules of natural justice. He also complained that he was not given adequate notice to prepare his defence, that he was not given sufficient details of the allegations made against him and that he had not been accorded representation by an advocate of his choice. 35

Issues

- 40
- i. Whether the Petition was premature given that it was anchored on the activities of an adhoc committee whose report had not yet been submitted to the County Assembly.

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- ii. Whether the Court had jurisdiction to hear and determine the Petition. 1
 - iii. The admissibility of the electronic records produced as evidence.
 - iv. Whether the process of removal of a County Executive Committee member under article 40(3) of County Governments Act was unconstitutional 5
 - v. Whether there was a violation of the Petitioner's right to a fair hearing and protection from victimization for carrying out official functions in accordance with the law and the Constitution under article 236 of the Constitution of Kenya 2010. 10
 - vi. Whether the Court could issue the remedy of *certiorari* under the circumstances.

Constitutional Law – fundamental rights and freedoms – enforcement of fundamental rights and freedoms – right to a fair hearing – provision of information on allegations made against a person & provision of an adequate notice period to enable a person facing allegations to prepare a defence – Constitution of Kenya 2010, article 50. 15

Evidence – electronic evidence – admissibility – electronic records – required form of electronic records – admissibility of electronic evidence – admissibility of a transcript and DVD relating to a programme from a radio station as evidence – Evidence Act (Cap 80) section 106B. 20

Judicial Review – prerogative orders – *certiorari* – circumstances in which the remedy of *certiorari* would be issued. 25

Jurisdiction – jurisdiction of the High Court – jurisdiction of the High Court with respect to claims on the violation of constitutional provisions and fundamental rights and freedoms by a County Assembly – Constitution of Kenya, 2010, articles 22(1), 165(3)(b) & 165(3)(d); County Governments Act, No 17 of 2012, section 17; National Assembly (Powers and Privileges) Act (Cap 6), section 29. 30

County Governments Act, No 17 of 2012, section 17;

- 17. The national law regulating the powers and privileges of Parliament shall, with the necessary modifications, apply to a county assembly. 35

County Governments Act, No 17 of 2012, sections 40(2) & 40(3);

- (2) A member of the county assembly, supported by at least one-third of all the members of the county assembly, may propose a motion requiring the governor to dismiss a county executive committee member on any of the grounds set out in subsection (1). 40

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- (3) If a motion under subsection (2) is supported by at least one-third of the members of the county assembly— 1
- (a) the county assembly shall appoint a select committee comprising five of its members to (b) the select committee shall report, within ten days, to the county assembly whether it finds the allegations against the county executive committee member to be substantiated. 5

Held:

1. The Constitution allowed a party to approach the Court through a Constitutional Petition either once rights had been violated or when there was a threat of their violation. Therefore, a Petition could be filed to prevent the infringement of a fundamental right or freedom and one needed not wait until a right had been violated or infringed before he could come to court. 10 15
2. The Petitioner contended that his rights under articles 47, 50 and 236 of the Constitution had either been breached or were about to be violated. Whichever the case, the Petition was perfectly within article 22(1) of the Constitution. There was a clear claim that fundamental rights had either been violated or were threatened to be violated. The Petition was not premature as contended by the Respondents. 20
3. If any law, be it section 17 of the County Governments Act as read with section 29 of the National Assembly (Powers and Privileges) Act or any other law, purported to oust the jurisdiction given to the High Court under article 22(1) and 165(3)(b) and (d) of the Constitution, where there was an allegation of the violation of the Constitution or infringement or threat to violation of fundamental rights and freedoms, that law would be inconsistent to the Constitution and would be null and void to that extent. There was nothing that was produced to show that the high Court was precluded from inquiring on the allegations of the breach of the Petitioner's fundamental rights in the instant case. Accordingly, the High Court had the jurisdiction to hear and determine the Petition as amended. 25 30 35
4. Whilst the evidence relating to the proceedings of the Select Committee was satisfactory and admissible, the evidence relating to the West FM Radio was not. In the latter case, the DVD produced was not in the form set out in sub-section (2) of section 106B of the Evidence Act. The transcript relating to the programme in the West FM Radio Station was therefore not acceptable. 40
5. As regards the evidence relating to the proceedings before the Select

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- Committee, it satisfactorily met the criteria set out in section 106B of the Evidence Act. It was contended by the Respondents in their Replying Affidavit that the transcript was different from the official Hansard of the 1st Respondent. The 1st Respondent however did not produce that Hansard to discredit the petitioner's evidence. In this regard, the Petitioner's evidence as to the proceedings before the Select Committee being the best evidence available was admissible whilst that on the West FM radio station was not. 1 5
6. Although article 50(2) of the Constitution used the term an accused person, an accused person in the instant case did not denote or refer to a person accused in a criminal trial only, but also to any person accused of any allegation which if proved against him, the consequences would be prejudicial to him. Accordingly, the Petitioner stood in the position of an accused person in sub article (2) of article 50, since his position as a Member of County Executive Committee for Bungoma County was at stake. Any adverse decision would have led to his removal as such member. Accordingly, the rights set out thereunder applied to the Petitioner as well. 10 15
7. The Petitioner was a Public Officer for Bungoma County. He was facing a disciplinary process for his removal under section 40 of the County Government Act in view of the allegations he faced. In that regard article 236 of the Constitution decreed that the Petitioner was entitled to due process. 20
8. An elementary, basic and fundamental requirement of due process in any investigation, inquiry or proceeding whose consequences would impact on the private rights of a person was a notice reasonably calculated, under all the circumstances, to appraise the concerned person or persons of the existence of the proceeding or inquiry and afford such person or persons a reasonable opportunity to present his/their objections or defence. Such notice ought to have been of a nature as to reasonably inform the concerned party sufficient information on the inquiry. 25 30
10. The notice given to the Petitioner to adduce and challenge the evidence was approximately 16 hours. The Petitioner requested for one extra day (24 hours) but the request was turned down. He had indicated that the time requested was meant to enable him instruct his lawyers and prepare his defence. His request to cross-examine the witnesses who were giving testimony against him was likewise turned down. The notice of 16 hours given to the Petitioner to appear before the Select Committee was too short and the explanation given by the Respondents was not plausible. 35 40

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- The Respondents knew the statutory requirement for completion of the investigations and reporting to the Assembly to be ten (10) days. It was also within their knowledge that as they passed the motion to investigate the Petitioner and appoint the Select Committee, that the Assembly would be proceeding for the Easter Vacation which was likely to interfere with the aforesaid statutory 10 days period. A Constitutional Court in the circumstances could not permit the Respondents to act at their convenience to the extreme prejudice of an individual. Public bodies were expected to act reasonably in the exercise or discharge of their duties and in that regard, try as much as practically possible to promote and safeguard the rights of the individual as set out in the Constitution. 1
11. From the evidence on record, the Select Committee was in breach of and violated the provisions of articles 236(b) and 50(2), (c), (g) and (k) of the Constitution. The notice given to the Petitioner was too short and the Petitioner was denied a chance to engage an advocate of his choice and he was denied a chance to test the evidence produced against him through cross-examination. The deliberations of the Select Committee infringed the Petitioner's Constitutional rights thereunder and those deliberations could not be allowed to stand. 5 10 15 20
12. Where proceedings were merely preliminary and of an investigative nature, whose conclusions were subject to further examination and testing where the rules of natural justice would be safe guarded, *certiorari* would not issue. However, if the preliminary investigation had some finality which would lead to imposition of any sanctions or damages one's reputation or, by their very nature require the rules of natural justice to be observed, *certiorari* would issue if the investigator breaches those rules. 25 30
13. The High Court could not review the merits of the deliberations of the County Assembly or its Select Committee. It was argued that the Courts could not interfere with ongoing deliberations in the Assembly in reverence to the principle of separation of powers. However, if such deliberations violated or threatened to violate or were in breach of the Constitution, the High Court had jurisdiction under article 165(3) and (b) and (d) and sub-article (6) as read with article 22(1) of the Constitution to intervene. 35
14. Kenyans in their wisdom mandated the High Court to intervene immediately there was a claim that the Constitution or a constitutional right was about to be violated. The High Court only exercised the power of the people of Kenya under article 159 of the 40

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allegations were substantiated, the county assembly would vote to approve whether or not to dismiss the executive committee member and if the vote was in favour of removal, the executive committee member would be dismissed by the Governor.	1
20. Under section 40 of the County Government Act, the County Assembly had the power to pass a motion introduced by one of its members to remove a County Executive Committee Member, investigate allegations leveled against such a member, receive a report of whether the allegations against such member have been substantiated or not and finally vote for the removal of such an Executive Committee Member.	5 10
21. The Article on oversight was akin to article 95(5)(a) of the Constitution that gave the National Assembly oversight functions over state organs. Such oversight ought not only to be exercised in accordance with the law but also strictly in accordance with the Constitution.	15
22. Since the process under section 40 of the County Government Act was of a disciplinary nature whose possible consequences were loss of office, there had to be due process which included and/or connoted fair hearing which Kenyans in their wisdom decided to enshrine in their supreme law vide article 50 of the Constitution.	20
23. Fair hearing connoted impartiality, just, equitable disinterested judicial session held for the purpose of deciding issues of fact or determining a controversy or a setting in which an affected person presented arguments to a decision. Article 50 of the Constitution was very specific that a dispute had to be decided in a fair manner and by an independent and impartial body.	25
24. An independent body is one that is unbiased and disinterested and therefore it followed that, in any process undertaken where rights of a person were likely to be adversely affected, it is a requirement that there be due process and a fair hearing before a decision is arrived at. In that regard, the strict application of the principle that no man should be a judge in his own cause is but mandatory.	30
25. The process set out in section 40 of the County Government Act was a disciplinary process. Its likely result was loss of office for the concerned member of the County Executive Committee. A member of the County Executive Committee was in the public service of the respective County Government. His employment into public service not only enabled him to serve public interest but also benefitted him individually through compensation for services rendered. Therefore, such a member acquired an interest	35 40

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- in the position of employment he occupied which evolved into a legal right capable of being protected under the law. Any decision that might have affected that position ought to have been pinned on the objective criteria set by the Constitution. 1
26. Article 50(1) of the Constitution underpinned the principle of fair hearing whereby disputes, and therefore decisions affecting one's fundamental rights, were to be determined objectively by an impartial and independent tribunal or body. It should be noted that, while article 181 of the Constitution allowed for removal of a Governor by the County Assembly, section 33 of the County Government Act which was the enabling provision, maintained the Constitutional safeguards of fair hearing by subjecting the decision of the County Assembly to scrutiny by the Senate. The Senate became a second tier of investigation and review before Governor was finally removed. That was not the case with section 40(3) as related to the Members of the County Executive Committee. A question of double standards by provisions within the same Act could arise. 5 10 15
27. The Constitutional practice of separating the bodies that were charged with removal of public servants was not restricted to the gubernatorial positions in Kenya alone. 20
28. The procedure for removal of a County Executive Committee commenced with the County Assembly, by way of an allegation being laid before it in the form of a motion, if passed, a Select Committee whose membership was drawn from the assembly was then formed to carry out investigations. That Committee then reported back to the County Assembly which voted on the report. That was a perfect example of the Complainant or accuser being both the investigator, the prosecutor and the Judge. All the members of the assembly were interested in the outcome of the proceedings in that, having passed the motion to investigate the County Executive Committee Member, it was difficult to disabuse their minds when carrying out their investigations as to the intention of the assembly. 25 30
29. The Select Committee could not be the independent and impartial body or tribunal envisaged by article 50(1) of the Constitution. It was not only part of the assembly that sanctioned the motion for investigation, but its members were part of the assembly that would vote for or against the recommendations for removal of the County Executive Committee Member. 35 40
30. Kenyans did not envisage a situation where their Parliament would enact a law that violated the principle of fair hearing as a

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- fundamental right of every person. They expected Parliament to enact laws that protected that Constitutional principle. Further, in donating the oversight function over County Executive Committees and other executive organs to the County Assemblies, vide article 181 of the Constitution, it was not in the contemplation of Kenyans that the County Assemblies would exercise that power as to the accusers, investigators, prosecutors and judges of the County Executive Committee Members. 1
31. To the extent that section 40(3) of the County Government Act as read with sub-section (5)(b) and (6) thereof, provided for the investigations to be carried out by a Select Committee of the Assembly and for the Assembly to vote for the removal of a County Executive Committee Member, the provision ran foul of the Constitutional principle of fair hearing. It was in violation of article 50(1) of the Constitution and was null and void to that extent. 5
32. Under article 259 of the Constitution, the purposeful interpretation required that no article of the Constitution violated the other. Article 185 was not meant to override article 50(1). The law to be enacted under article 200 was intended to comply with the provisions of article 50(1) of the Constitution safeguarding fair hearing and not one that would concentrate the powers of accusation, investigation, prosecution and passing of judgment over Members of County Executive Committee in one body. Such a scenario had a likelihood of abuse of power. 10
33. Constitutionally, no County Assembly could purport to remove a County Executive Committee member pursuant to section 40(3) of the County Governments Act. That provision negated the principal of independence and impartiality stipulated by article 50(1) of the Constitution and was null and void to that extent. 15
34. (**Obiter**) “Parliament should enact a law that provides for a separate, independent impartial and unbiased body that would be charged with the jurisdiction of carrying out investigations once a motion is passed by a County Assembly under section 40(2) of the County Government. It is that separate and independent body that should carry out investigations and report to the Assembly on its findings for the latter to vote on. To the extent that no such independent and impartial body exists, County Assemblies cannot purport to remove a member of the County Executive Committee under section 40 of the CGA. That will be unconstitutional.” 20

Petition allowed.

Cases

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East Africa

1. *Birir, Richard Bwogo v Narok County Government & 2 others* Petition No 9 of 2014 – (Followed)
2. *Judicial Service Commission v Speaker of the National Assembly & another* Petition No 518 of 2013 – (Followed) 5
3. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal No 290 of 2012 – (Explained)
4. *Republic v Edward Kirui* Criminal Case No 9 of 2008 – (Mentioned)
5. *Republic v Stojananovic Milan alias Allan & another* Criminal Case No 153 of 2004 – (Mentioned) 10
6. *Temoi, John Mining & another v Governor of Bungoma County & 17 others* Constitutional Petition No 2 & 2 “A” of 2014 of 2014 (Consolidated) – (Followed) 15

Philippines

1. *Bautista v Court of Appeals* GR No143375 – (Mentioned)

United Kingdom

1. *Evan Rees & others v Richard Alfred Crane* [1994] 2 WLR; [1994] 2 AC 173 – (Mentioned) 20

Texts & Journals

1. Garner, BA., (Ed) (2009) *Black's Law Dictionary* St Paul Minnesota: West End Publishers 9th Edn, pp 694, 788
2. Hogg, QM., (Lord Hailsham) *et al* (Eds) (1987) *Halsbury's Laws of England* London: Butterworths 4th Edn Vol 1 para 67 25

Statutes**East Africa**

1. Constitution of Kenya, 2010 articles 2(4); 22(1); 23; 47; 50(1) (a), (c), (g)(k); 95(5)(a); 159(1)(2)(d); 165(3)(b)(d)(6); 176; 181; 183(1); 185(3); 200; 227(1); 236(b); 259 – (Interpreted) 30
2. Constitution of Kenya, 2010 article 40(3) – Unconstitutional
3. County Governments Act, 2012 (Act No 17 of 2012) sections 9(2) (a)(b); 17; 31(a); 40(2)(4); 5(6)(b) – (Interpreted)
4. Evidence Act (cap 80) section 106B(2) – (Interpreted)
5. National Assembly (Powers and Privileges) Act (cap 6) section 29 – (Interpreted) 35

Nigeria

1. Constitution of the Federal Republic of Nigeria, 2004 section 188 40

Advocates

1. *Mr Wasilwa* for the Petitioner

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2. <i>Mr Situma</i> for the Respondent	1
3. <i>Mr Kituyi</i> for Interested Parties	

October 7, 2014, **A Mabeya, J** delivered the following Judgment.

1. Chapter Eleven of the Constitution of Kenya (hereinafter “COK”) provides for devolution whereby article 176 provides for County Governments through out the Republic. Pursuant to article 200, the National Assembly enacted the County Government Act, 2012 (hereinafter “CGA”) to give effect to the said devolution.	5
2. Section 40 of the CGA provides, <i>inter alia</i> , that:-	10
“(1) Subject to subsection (2), the Governor may remove a member of the County Executive Committee from office on any of the following grounds:-	
a. incompetence;	15
b. abuse of office;	
c. gross misconduct;	
d.	
e.	
f.	20
(2) A member of the County Assembly, supported by at least one third of all the members of the County Assembly, may propose a motion requiring the Governor to dismiss a County Executive Committee Member on any of the grounds set out in subsection (1).”	25
3. Subsections 3 and 4 of that section provides the procedure to be followed by the County Assembly on how to exercise that oversight power and ultimately have a member of the County Executive Committee removed from office. Therefore section 40 may be said to be one of the means by which the County Assembly exercises its oversight over the performance of the County Executive Committee.	30
4. In or about 2013, Stephen Peter Nendela (hereinafter “the Petitioner”) was appointed by the Governor of Bungoma to serve as the County Executive in charge of Roads and Public Works for the County of Bungoma. Before such appointment, he had been vetted by the Public Service Board and the appointment procedurally debated and approved by the County Assembly of Bungoma (hereinafter “the 1 st Respondent”). Upon such appointment, the Petitioner took office and started to discharge his duties as required.	35
5. By a Petition amended on 28 th April 2014, the Petitioner contended	40

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- that in the discharge of his duties, he is bound by article 227(1) of the Constitution to ensure that the procurement of goods and services is characterized by a system of fair, equitable, transparent, competitive and cost effective; that the Chief Officers in-charge of Roads and Public Works for Bungoma County were appointed in or about a month before the filing of the Petition; that due to the late appointment of the said Chief Officers, there was delayed preparation and publication of several operational documents by the County Executive Committee. He set out these documents in the Amended Petition. According to him, all these documents were work in progress. 1 5 10
6. He contended that, in accordance with the Constitutional and Statutory Provisions, on an unspecified date, the County Government of Bungoma invited tenders for the execution of Civil Works in Bungoma County and in particular road works for the year 2013/2014 whereupon, several service providers were pre-qualified as determined by the Tender Committee. That marked the beginning for his troubles. He contended that he was promptly inundated by telephone calls, personal entreaties by several members of the County Assembly (hereinafter “the MCA’S”) and persons associated with them requesting, *inter alia*, that the execution of road works in their respective areas of representation be placed under their control and that companies associated with their respective associates be given preferential treatment in the award of the said tenders. Sadly, he declined these requests. In his view, a division of the sum of Kshs 712,000,000, meant for roads in the County among the 45 representative units within the County would mean that each unit would be given only Kshs 15,822,222 which sum, according to him, would be too minimal for any meaningful impact. He also opined that, that would violate the constitutional and statutory principle of equity, cost effectiveness and value for money. 15 20 25 30
7. The Petitioner contended that as a result of the foregoing, on 25th March, 2014 a motion was table before the County Assembly of Bungoma seeking his removal from office. That motion was passed and on 14th April, 2014, the Petitioner was served with a letter to appear before a Select Committee of the Assembly the following morning to receive presentations for or against his removal from office. 35 40
8. By his Amended Petition, the Petitioner has contested that

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- the process and content of the said inquiry is unconstitutional, capricious arbitrary, pre-determined, injudicious and contaminated by and actuated by malice, self-interest and improper motive on some of the members of the Assembly and it violates the Rules of Natural Justice. He set out in his Amended Petition thereasons for his contention as; failure to be given adequate notice for his defence; failure to give sufficient detail of allegations against him; failure to accord him representation by an Advocate of his choice and violation of articles 47 and 50 of the Constitution as to fair hearing and the unconstitutionality of section 40 of the CGA. He therefore sought various declarations. 1
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9. The 1st, 2nd and 3rd Respondents filed a Response to the Amended Petition. They contended that while respecting the principle of separation of powers, the County Assembly may exercise oversight over the County Executive Committee including the removal of the latter's members under section 40 of the CGA; that the Petitioner had been in office since June 2013 and had not laid before the County Assembly any strategic work plan. The Respondents denied that any member of the County Assembly made any calls to the Petitioner to seek favours; that the Petitioner had failed to produce any work plan for the budgetary allocation under his docket and that this is what had led to the passing of the motion for his removal by the County Assembly. 15
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10. The Respondents further contended that while investigating the Petitioner, the County Assembly was aware of the provisions of section 9(2) of the CGA; that the Petitioner was allowed time to present his case and interrogate evidence against him on 16/4/2014 from 2:30 pm to 4:30 pm; the Respondents denied breaching the rules of natural justice or there being any malice or self interest on the part of the MCA'S. They contended that due to the constitutional timeline of reporting to the assembly within 10 days, the notice given to the Petitioner was adequate as the exercise could not go past the 16th April, 2014 due to Easter Vacation; that the Petitioner participated in the proceedings of 15th April, 2014 but refused to do so on 16/4/2014; that section 40 of the CGA is not unconstitutional and that no Order of *Certiorari* could issue as no decision has been made by the Respondents. They urged that any such Order would be inhibiting the functions of the County Assembly and they denied the transcripts of the proceedings produced by the Petitioner for 16th and 17th April, 2014 and termed them as strange. They therefore 30
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- urged that the Petition be dismissed. 1
11. In the Replying Affidavit sworn on 13/5/14, Edward Simiyu Barasa the Chairman of the Select Committee swore that a five (5) Member Select Committee was constituted to investigate the Petitioner after due passage of a motion to that effect; that on 15/4/2014, the Petitioner appeared before the Select Committee and made an application through his Advocate for deferral which was declined; that on 16/4/2014 the Petitioner and his Advocate stormed out of the proceedings terming the Select Committee a 'Kangaroo Court'. Mr Barasa swore that the Select Committee took time to study the evidence gathered and compiled a report to be tabled before the Assembly as per the law provided. He challenged the admissibility of the transcripts relied on by the Petitioner. In the Affidavit of John Ongwae Mosongo, the Clerk of the County Assembly, sworn on 13/5/2014, it was contended that the transcripts produced by one Noellah Musundi on behalf of the Petitioner did not agree with the Official Hansard which he held. He stated that the said proceedings contained in the official Hansard were confidential. 5 10 15 20
12. I have considered the various Affidavits on record, the written submissions and oral hi-lights of Learned Counsel. I have also considered the testimony of Noellah Namulanda Musundi who appeared before me and was cross-examined at length on the issue of the transcripts she had produced in her Supplementary Affidavit in support of the Petition. 25
13. In his submissions, Mr Wasilwa, Learned Counsel for the Petitioner set out a total of nine (9) issues for determination which Mr Situma, Learned Counsel for the Respondents fully addressed and raised two others. On his part, Mr Kituyi, Learned Counsel for the Interested Parties did not make any submissions but left the matter to the Court. After considering the pleadings, and Affidavits on record, the written submissions and oral hi-lights of Learned Counsel, the Court considers that the issues that arise for determination are six (6). These are as follows:- 30 35
- a) Whether the Petition is premature.
 - b) Whether this Court has jurisdiction to hear this matter.
 - c) Whether the evidence of Noellah Musundi is admissible.
 - d) Whether the Select Committee violated article 50(1)(a), (c), (g) and (k) of the COK. 40
 - e) Whether *Certiorari* can issue in this matter.

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- f) Whether section 40(3) of the CGA is inconsistent with article 50 of the COK. 1
- g) Is the Petition premature”
14. It was submitted on behalf of the Respondents that the Petition was anchored on activities of an ad hoc Select Committee constituted by the County Assembly; that this Select Committee has no legal character to be capable of being sued and that since its report had not been presented to the County Assembly, the Petition was premature as it could not be argued that the Select Committee had infringed any of the Petitioner’s rights. On the part of the Petitioner, it was argued that the Petition was not premature as it was in accordance with article 22 of the COK and that it was meant to preserve the Petitioner’s rights under articles 47, 50 and 236. 5 10
15. Article 22 (1) of the Constitution of Kenya provides:- 15
- “22(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of Rights has been denied, violated or infringed, or is threatened.” (underlining supplied) 20
- From this Article, it is clear that the Constitution allows a party to approach the Court through a Constitutional Petition either once rights have been violated or when there is a threat of their violation. In this regard, a Petition can be filed to prevent the infringement of a fundamental right or freedom. One need not wait until a right has been violated or infringed before he can come to court. 25
16. From the record, the Petitioner contended that the County Assembly had passed a motion to discuss his removal as a public servant for the County of Bungoma; that he had been served with an inadequate notice for the proceedings of 15th April, 2014 before the Select Committee of the 1st Respondent; that on 16th April, 2014, the said Select Committee denied him the right to an Advocate of his choice and for him to test evidence tendered against him through cross-examination. The Petitioner contended that his rights under articles 47, 50 and 236 of the Constitution had either been breached or were about to be violated. Whichever the case, the Petition was perfectly within article 22(1) of the Constitution. There was clearly a claim that fundamental rights had either been violated or were threatened to be violated. The Petition was not premature as contended by the Respondents. 30 35 40

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- b) Whether the Court has jurisdiction to hear and determine the Petition 1
17. On the jurisdiction of this Court, I reiterate what was held in BGM Petition Nos 2 & 2A of 2014 *John Mining Temoi & another v The Governor of Bungoma County* (UR) that:- 5
- “However, for the avoidance of doubt, this Court reiterates that no person, state officer or state organ is above the Constitution or the law. All organs created by the Constitution are subordinate to it. Further, article 10(1) binds all state organs, state officers, public officers and all persons while applying, interpreting, the Constitution or the law or public policy. Therefore when any of these organs, including the County Executive, County Assembly and Speakers of either Parliament or County Assemblies Act in breach of the Constitution or outside their areas of operation, this Court will not hesitate to intervene and reverse those actions. The Constitution is supreme and its dictates are to be jealously protected by this Court. That is what article 165 of the constitution decrees.” 10 15 20
18. To that extent therefore, if any law, be it section 17 of the CGA as read with section 29 of the National Assembly (Powers and Privileges) Act or any other law, purports to oust the jurisdiction given to this court under article 22(1) and 165(3)(b) and (d) of the COK where there is an allegation of the violation of the Constitution or infringement or threat to violation of fundamental rights and freedoms, that law will be inconsistent to the constitution and will be null and void to that extent. There is nothing that was produced to show that this Court is precluded from inquiring on the allegations of the breach of the Petitioner’s fundamental rights in this case. Accordingly, this Court has the jurisdiction to hear and determine the Petition as amended. 25 30
- c) Is the evidence of Noellah Musundi admissible” 35
19. Noellah Musundi swore a Supplementary Affidavit in support of the Petition and therein produced transcripts of content of recording of a programme carried out by a radio station known as West FM and the proceedings of the Select Committee. She attended court and was cross-examined on those transcripts. She produced as Pexh1 an external disc store jet serial number B-306682288 in respect of the proceedings of the Select Committee of the county assembly and a DVD in respect of the transcript for the West FM 40

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- radio station programme. 1
20. It was submitted on behalf of the Respondents that Noellah's evidence did not meet the evidential thresh-hold set out in section 106B of the Evidence Act; that the transcripts were not produced digitally as required by law. The Cases of *Republic v Stojananovic Milan alias Allan & another* [2008] eKLR and *Republic v PC Edward Kirui* [2010] eKLR were relied on. 5
21. Section 106B of the Evidence Act provides how documents' containing electronic evidence is to be produced. Sub-section (2) thereof provides the conditions that must be met before electronic evidence is to be admitted as evidence. In the instance case, apart from Ms Noellah deponing on what she heard in the West FM Radio Station and witnessed during the proceedings of the Select Committee, she produced the original devise she used to record and transcribe the proceedings of the Select Committee as Pexh1. She also produced a certificate as required under sub-section (4) of section 106 B of the Evidence Act. 10
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22. To my mind, whilst the evidence relating to the proceedings of the Select Committee was satisfactory and admissible, that relating to the West FM Radio was not. In the latter case, the DVD produced was not in the form set out in sub-section (2) of section 106 B of the Evidence Act. I will agree with Mr Situma that the transcript relating to the programme in the West FM Radio Station is not acceptable. 20
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23. However, as regards the evidence relating to the proceedings before the select committee, I am satisfied that it met the criteria set out in section 106B of the Evidence Act. It was contended by the Respondents in their Replying Affidavit that the transcript was different from the official Hansard of the 1st Respondent. The 1st Respondent however did not produce that Hansard to discredit Noellah's evidence. In this regard, Noellah's evidence as to the proceedings before the Select Committee being the best evidence available is admissible whilst that on the West FM radio station is not. 30
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- d) Did the Select Committee Violate articles 50(1)(2)(a)(c)(g) and (k) and 236 of the COK"
24. The evidence on record shows that, on the 14th day of April, 2014, the Clerk of the 1st Respondent issued a notice to the Petitioner in the following terms:- 40

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- “In accordance with section 40(1) of the County Government Act and the County Assembly Standing Orders section (*sic*) 62(1) and 63(1), the County Assembly of Bungoma has initiated the process to have you removed from office. A Select Committee on the same will be sitting on the 15th and 16th April, 2014 at the Kenya Industrial Estates Boardroom to receive presentations for and/or against your removal from the said office. This is therefore to notify you to avail yourself before the committee in order to answer the allegations to the charges levelled against yourself as herein below: 10
- Incompetence
1. Failure to submit quarterly reports to the County Assembly;
 2. Failure to submit sectoral work plans to the requisite committee; 15
 3. Failure to develop and submit for approval an infrastructural development policy.
- Gross Misconduct
1. Placement of illegal advertisements and withdrawal of the same causing loss of public funds. 20
 2. Misrepresentation of KERRA roads to belong to the County Government of Bungoma.
 3. Harassment of County Employees. the sessions will run from 9 00 am to 12 30 pm and 2 15 pm to 4 30 pm on both days.” 25
- That notice was shown to have been received by the Petitioner at 4:12 pm of 14/04/2014.
25. Faced with that notice, on 14/4/14 the Petitioner wrote to the Clerk of the 1st Respondent, *inter alia*, as follows:- 30
- “Ref: Deferral of Summons
- Reference is made to your letter dated 14th April, 2014 which was received in my office at 4:12 pm. In accordance to the rules of natural justice and fair hearing enshrined in the Constitution under article 50, I request that the summons be deferred for one day to enable me collect evidence, information, prepare my defence and consult my legal counsel. I hope that one day is reasonable in the circumstances. Kindly consider my request.” 35 40
26. That letter was delivered and received at the offices of the Clerk

- of the Assembly at 8:00 am on 15th April, 2014. The Petitioner swore that, what prompted the request for deferral was that when he contacted his Advocates Mr Wasilwa and Peter Wanyama of Nairobi, they indicated that they needed time to take detailed instructions and collect evidence from the Petitioner's Secretariat at Bungoma. The Petitioner's request was promptly rejected on the 15th April, 2014 at 8:30 am by the Select committee. Further, when one of his Advocates appeared before the Select Committee that afternoon at 2 30 pm, he made two applications. He sought that the matter be adjourned to the following day and for an opportunity to cross-examine witnesses. Both of these requests were declined by the Select Committee promptly whereby, the Petitioner rushed to this court for temporary relief.
27. All these matters as set out above were not denied by the Respondents. What the Respondents contended was that the law (section 40 of the CGA) requires that the Select Committee carry out its investigations and make recommendations to the Assembly within 10 days of being constituted; that the Assembly was proceeding or breaking for Easter Vacation between the 17th until 21st April, 2014 which would have really affected the statutory timelines on the investigation and the reporting to the whole Assembly. Finally, the Respondents contended that the Petitioner came with his Advocate on 16th April, 2014 on the morning and requested the Select Committee to listen to a tape; that when the Select Committee advised that they wait until their time reached at 2:30 pm, they stormed out terming the Select Committee a "*Kangaroo court*".
28. Article 50(1) of the COK provides for fair hearing of disputes by an impartial body. Sub-Article (2) provides:-
- "Every accused person has the right to a fair trial, which includes the rights:
- a) to be presumed innocent until the contrary is proved;
 - b)
 - c) to have adequate time and facilities to prepare a defence;
 - d)
 - e)
 - f)
 - g) to choose and be represented by, an advocate, and to be informed of this right promptly;
 - h)

i)	1
j)	
k) to adduce and challenge evidence;	
l)"	5
29. Although article 50(2) uses the term an “accused person”, I am of the view and so hold that, an accused person in this case does not denote or refer to a person accused in a criminal trial only, but also to any person accused of any allegation which if proved against him, the consequences would be prejudicial to him. Accordingly, I hold that the Petitioner in this case stood in the position of an accused person in sub-article (2) of article 50, since his position as a Member of County Executive Committee for Bungoma County was at stake. Any adverse decision would lead to his removal as such member. Accordingly, the rights set out thereunder applied to the Petitioner as well.	10 15
30. Article 236 of the Constitution provides:- “236. A Public Officer shall not be	
a)	20
b) dismissed, removed, from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.”	
The Petitioner in this case is a Public Officer for Bungoma County. To my mind, he was facing a disciplinary process for his removal under section 40 of the CGA in view of the allegations he faced. In this regard article 236 decrees that the Petitioner is entitled to due process. Due process has been defined in <i>Blacks Law Dictionary (supra)</i> at pg 575 as:-	25
“The conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights including notice and the right to a fair hearing before a tribunal with the power to decide the case.....”	30
31. In view of the foregoing, I am of the view and hold that an elementary, basic and fundamental requirement of due process in any investigation, inquiry or proceeding whose consequences would impact on the private rights of a person is a notice reasonably calculated, under all the circumstances, to appraise the concerned person or persons the existence of the proceeding or inquiry and afford such person or persons a reasonable opportunity to present his/their objections or defence. Such notice in my view must be	35 40

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of a nature as to reasonably inform the concerned party sufficient information on the inquiry.	1
32. In the present case, although the notice of the allegations which the Petitioner faced seems to have been too insufficient as no particulars of the allegations were supplied, I will not fault the same since at the earliest opportunity the Petitioner had, when he responded to the notice, he never complained of its insufficiency. He complained of other matters. Therefore reject the Petitioner's contention that the notice did not have sufficient detail of the allegations facing him.	5 10
33. As regards article 50(2)(a) as to the Petitioner being presumed innocent until the contrary is proved, the Petitioner did not adduce any sufficient material to show that the Respondents had breached this right. I also reject his contention.	15
34. As regards sub-article (2)(c)(g) and (k) of the Constitution, these concerns the rights of giving of adequate time, to choose and be represented by an advocate and to adduce and challenge evidence. The notice given to the Petitioner was between 4.12 pm of 14/4/2014 to 9:00 am the following day. That was approximately 16 hours. The Petitioner requested for one day extra (24 hours) but the request was turned down. He had indicated that the time requested was meant to enable him instruct his lawyers and prepare his defence. His request to cross-examine the witnesses who were giving testimony against was likewise turned down. This Court finds the notice of 16 hours given to the Petitioner to appear before the Select Committee to have been too short. The explanation given by the Respondents is not plausible. The Respondents knew the statutory requirement for completion of the investigations and reporting to the Assembly to be ten (10) days. It was also within their knowledge that as they passed the motion to investigate the Petitioner and appoint the Select Committee, that the Assembly would be proceeding for the Easter Vacation on 17 th April, 2014 which was likely to interfere with the aforesaid statutory 10 days period. Can a Constitutional Court in the circumstances, permit the Respondents to act at their convenience to the extreme prejudice of an individual? I do not think so. Public bodies are expected to act reasonably in the exercise or discharge of their duties and in that regard, try as much as practically possible to promote and safeguard the rights of the individual as set out in the Constitution.	20 25 30 35 40
35. It is on record that the Petitioner's request for time to engage	

Advocates of his choice was turned down. Further, the request to cross-examine the witnesses and test the veracity of their testimonies was likewise shot down by the Select Committee. In this regard, I am satisfied that from the evidence on record, the Select Committee was in breach of and violated the provisions of articles 236(b) and 50(2), (c), (g) and (k) of the Constitution. The notice given to the Petitioner was too short, the Petitioner was denied a chance to engage an advocate of his choice and he was denied a chance to test the evidence produced against him through cross-examination. The deliberations of the Select Committee infringed the Petitioner's Constitutional rights thereunder and those deliberations cannot be allowed to stand.

e) Can *Certiorari* Issue?

36. It was contended by the Respondents that since the Select Committee has no legal personality, its deliberations were only a preliminary investigation and not of a quasi-judicial nature. It was further argued that such a function being merely inquisitorial and a means of establishing facts to be tabled before the assembly, and since no decision had been made *Certiorari* cannot issue. The Case of *Bautista v Court of Appeals* GR No143375 was relied on. It was also argued that, on the authority of *Mumo Matemu v Trusted Society of Human rights Alliance & 5 others* [2013] eKLR this Court has no jurisdiction to review the merits of the deliberations of the Select Committee or the County Assembly for that matter.

37. I am in agreement with Mr Situma that where proceedings are merely preliminary and of an investigative nature, whose conclusions are subject to further examination and testing where the rules of natural justice would be safe guarded, *Certiorari* will not issue (See *Evan Rees and others v Richard Alfred Crane* [1994] 2 WLR.) However, if the preliminary investigation has some finality which will lead to imposition of any sanctions or damages ones reputation or, by their very nature require the rules of natural justice to be observed, *Certiorari* will issue if the investigator breaches those rules.

38. Further, I am in agreement that this Court cannot review the merits of the deliberations of the County Assembly or its Select Committee. It was argued that the Courts cannot interfere with ongoing deliberations in the Assembly in reverence to the principle of separation of powers. This may be so. However, if such deliberations violate or threaten to violate or are in breach of

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- the Constitution, this Court has jurisdiction under article 165(3) and (b) and (d) and sub-article (6) as read with article 22(1) of the Constitution to intervene. Kenyans in their wisdom mandated the High Court to intervene immediately there is a claim that the Constitution or a constitutional right is about to be violated. The High Court only exercises the power of the people of Kenya under article 159 of the COK. It is only Kenyans, through the Constitution, that can soundly tell the Courts to stop from making any inquiry on a threatened infringement of the Constitution or the rights given therein through an amendment to articles 22(1) and article 165(3)(b) of the Constitution. So long as those Articles are still alive, this Court will not hesitate to move with haste to uphold the Constitution. There is no amount of argument that can change that reality. Kenyans having spoken through articles 159(1), 22(1) and 165(3)(b) and (d) of the COK, this Court will strenuously uphold the Supremacy of the Constitution through those Articles!
39. In the present case, the investigative proceedings in the Select committee were not preliminary in nature. By dint of section 40(4) of the CGA, its deliberations are required to be in accordance with the rules of natural justice. This is so because that sub-section requires that the person being investigated be given a hearing. Further, the Petitioner has contended in his Petition that the deliberations of the Select Committee had infringed or was about to infringe his Constitutional rights under articles 50(1)(2)(c)(g) and (k) and 236 of the Constitution. In this regard, if those allegations are proved and for the reason that sub-section (4) of section 40 of the CGA requires the observance of the rules of natural justice, *Certiorari* will issue as a relief which is provided for under article 23 of the Constitution.
40. In his Petition, the Petitioner contended that the investigations against him were prompted by his refusal to allow the MCA's take control and manage roads in their respective units of representation. He swore that the MCA's requested that funds meant for road infrastructure for the County be disbursed to them to oversee the implementation of the civil works on roads in their wards. These allegations were denied by the Respondents. The Petitioner did not give the particulars of the concerned MCA's. The only named person is one Bethwel Mwambu. He was named in respect of the utterances he is alleged to have made during some programme in West FM radio station. Since the Court rejected the transcript relating to that

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- fact, I will not consider the same as proved. 1
41. This Court's view is that it is not necessary to examine the issue of whether there was bias or not on the part of the Select Committee in view of the findings that have been made above. Since the cCurt has found that the deliberations and proceedings of the Select Committee were in violation of articles 50(1), (2), (c)(g), (k) and 236(b) of the COK, *Certiorari* as a remedy will issue. Further, for reasons that the Petitioner complained that the County Assembly or its members (MCAS) were keen to infringe and violate the principle of separation of powers, a declaration to preserve that principle as set out in article 185(3) of the COK and section 9 of the CGA will issue. On the issue of whether the Select Committee was a body capable of being sued, I agree with the submissions of Mr Situma that a Select committee of the Assembly cannot be sued as an entity. I also have doubts about the Clerk of the Assembly. The correct Officer to be sued is the Speaker of the Assembly who is both the Constitutional and titular head of the Assembly. However since the County Assembly is a party to the proceedings, the mistake is curable under the article 159(2)(d) of COK. No prejudice was suffered by any of the parties to these proceedings by that mistake. 5 10 15 20
- f) Is section 40(3) of the County Governments Act, 2012 Unconstitutional"
42. It was argued by the Petitioner that there was inconsistency in sections 31(a), 40(3) as read with section 40(6)(b) with article 50(1), (2)(k) and 236(a) and (b) of the Constitution. Mr Wasilwa Learned Counsel for the Petitioner submitted that, in allowing partisan members of the County Assembly to form a Committee for removal or even vote in plenary for removal of a Member of Executive Branch introduces caprice, personal and subjective standards that are incompatible with fairness, impartiality and absence of bias. He further submitted that the provisions of article 50 of the COK pre-supposes the position obtaining in the Commonwealth where an independent body is the one to recommend removal. He gave section 188 of the Nigerian Constitution as an example. 25 30 35
43. On their part, the Respondents submitted that no case had been made by the Petitioner how the Constitution of the Select Committee under section 40(3)(a) of the CGA violates article 50 (2) of the Constitution. In Mr Situma's view, the Select Committee was properly and procedurally constituted in accordance with the 40

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law and it had adhered to article 50 of the COK and the rules of natural justice since it had accorded the Petitioner an opportunity to be heard which he declined.	1
44. From the outset, it should be noted that, the principle of devolution and separation of power among state organs are enshrined in our Constitution. The County Governments Act, 2012 was enacted by the the National Assembly pursuant to article 200 of the COK. The legislation contemplated under that Article, was one to give effect to matters provided for under Chapter 11 of the Constitution on devolution. Further, article 185(3) of the Constitution gives the County Assembly oversight functions over the County Government and its organs. The sub article provides:-	5
“185(3) A County Assembly, while respecting the principle of separation of powers, may exercise oversight over the County Executive Committee and any other County executive Organ.”	10
“185(3) A County Assembly, while respecting the principle of separation of powers, may exercise oversight over the County Executive Committee and any other County executive Organ.”	15
45. The provision of CGA complained of as being unconstitutional is section 40(3) which provides:-	20
“40(3) If a motion under sub-section (2) is supported by at least one-third of the Members of the County Assembly-	25
a) the county assembly shall appoint a select committee comprising five of its members to investigate the matter;	30
b) the select committee shall report within ten days to the county assembly whether it finds the allegations against the county executive committee member to be substantiated.”	35
46. A reading of sub-sections (5)(b) and (6) of section 40 shows that, if the report of the Select Committee is to the effect that the allegations are substantiated, the county assembly will vote to approve whether or not to dismiss the executive committee member and if the vote is in favour of removal, the executive committee member shall be dismissed by the governor.	40
47. It is clear that under section 40 of the CGA, the County Assembly has the power to pass a motion introduced by one of its members to remove a County Executive Committee Member, investigate allegations leveled against such a member, receive a report of whether the allegations against such member have been substantiated or not	

and finally vote for the removal of such an Executive Committee Member.	1
48. According to the Respondents, this is in the exercise of the oversight power given to the County Assembly under article 185 of the COK. This article on oversight is akin to article 95(5)(a) of the Constitution that gives the National Assembly oversight functions over state organs. When dealing with the issue on how this oversight power is to be exercised by the National Assembly in the Case of <i>The Judicial Service Commission v Speaker of the National Assembly and others</i> Petition No 518 of 2013 (UR) the Court delivered itself as follows:-	5
“185: In considering Parliamentary oversight, it is useful to also consider the purpose and scope of such oversight, as this further helps in understanding the meaning and implications of the concept.....Parliamentary oversight is intended to be people centered: the people must be the beneficiaries or intended beneficiaries of Parliamentary Oversight. Thus Parliamentary Oversight is not an end in and of itself or a mandate to be exercised in a whimsical or capricious manner..... As an integral process for the enhancement of the rule of law, Parliamentary Oversight is bound within established contours hence must be exercised in accordance with the law.”	10 15 20 25
I will add here that such oversight must not only be exercised in accordance with the law but also strictly in accordance with the Constitution.	
49. In the Case of <i>Richard Bwogo Birir v Narok County Government & 2 others</i> [2014] eKLR when considering the application and effect of sections 31 and 40 of the CGA, the Court delivered itself thus:-	30
“The Court has considered the provisions of the two sections and is of the opinion that both sections prescribe a disciplinary action in a due process that may conclude into an imposition of the punishment of dismissal..... Under section 40, the process is initiated by a member of the County Assembly. In the opinion of the court, the mischief is obvious, there may be instances of adverse circumstances against a given County Executive Committee Member and the Governor fails to invoke the executive disciplinary process under section 31(a)	35 40

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- and in which event a County Assembly Member may invoke the oversight jurisdiction of the County Assembly under section 40 to deal with the mischief.” 1
- I am in agreement with that decision to the effect that, since the process under section 40 is of a disciplinary nature whose possible consequences are loss of office, there has to be due process. To my mind, due process includes and/or connotes fair hearing which Kenyans in their wisdom decided to enshrine in their supreme law *vide* article 50. 5 10
50. Article 50(1) of the Constitution provides for fair hearing. It reads:-
“50(1) Every person has the right to have any dispute that can be resolved by the Application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body” 15
- In my view, fair hearing connotes impartiality, just, equitable disinterested judicial session held for the purpose of deciding issues of fact or determining a controversy or a setting in which an affected person presents arguments to a decision maker (see *Blacks Law Dictionary* 9th Edn, West pgs 694 and 788). Article 50 of the Constitution is very specific that a dispute has to be decided in a fair manner and by an independent and impartial body. 20
51. According to *Blacks Law Dictionary (Supra)*, an independent body is one that is unbiased and disinterested. It follows that, in any process undertaken where rights of a person are likely to be adversely affected, it is a requirement that there be due process and a fair hearing before a decision is arrived at. In this regard, the strict application of the principle that no man should be a judge in his own cause is but mandatory. 25 30
52. In *Halbury’s Laws of England* Vol 1 4th Edn, para 67, it is stated that:-
“It is a fundamental principle that, in the absence of statutory authority or consensual agreement or the operation of necessity, no man can be a judge in his own cause. Hence, where persons having a direct interest in the subject matter of an inquiry before an interior tribunal take part in adjudicating upon it, the tribunal is improperly constituted.” 35 40
53. As it was found in the *Richard Bwogo Birir v Narok County Council* Case (*supra*), the process set out in section 40 of the CGA

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- is a disciplinary process. Its likely result is loss of office for the concerned member of the county executive committee. A member of the County Executive Committee is in the public service of the respective County Government. His employment into public service not only enables him to serve public interest but also benefits him individually through compensation for services rendered. To my mind therefore, such a member acquires an interest in the position of employment he occupies which evolves into a legal right capable of being protected under the law. In this regard, any decision that might affect that position must be pinned on the objective criteria set by the Constitution. 1
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54. In this regard, is the set criteria in section 40(3) objective and in accordance with the Constitution” Article 50(1) of the Constitution underpins the principle of fair hearing whereby disputes, and therefore decisions affecting one’s fundamental rights, are to be determined objectively by an impartial and independent tribunal or body. It should be noted that, while article 181 of the COK allows for removal of a Governor by the County Assembly, section 33 of the CGA which is the enabling provision, maintains the Constitutional safeguards of fair hearing by subjecting the decision of the County Assembly to scrutiny by the Senate. The Senate becomes a second tier of investigation and review before Governor is finally removed. This does not seem to be the case with section 40(3) as relates Members of the County Executive Committee. A question of double standards by provisions within the same Act may arise. 15
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55. The Constitutional practice of separating the bodies that are charged with removal of public servants is not restricted to the gubernatorial positions in Kenya alone. Section 188 of the Constitution of the Federal Republic of Nigeria, 2004 provides, *inter alia*, that:- 30
- “188(5) within seven days of the passing of a motion under the foregoing provisions of this section, the Chief Judge of the State shall at the request of the Speaker of the House of Assembly, appoint a panel of seven persons who in his opinion are of unquestionable integrity, not being members of any public service, legislative house or political party to investigate the allegation as provided in this section.” 35
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56. It is clear from the Nigerian set up that it is only after an

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- independent panel has made a report to the assembly to the effect that the allegations leveled against the governor have been proved, that the House of Assembly votes for the removal of the Governor or his deputy as the case may be. It is also clear that the procedure in the Nigerian experience for removal of Governors as well as that of Kenya, the principle of due process and fair hearing is maintained in that there is clear separation between the body that investigates the allegations against the concerned officer and the body that finally sanctions the removal.
57. In the case of section 40(3) of the CGA, the procedure for removal of a County Executive Committee commences with the County Assembly, by way of an allegation being laid before it in the form of a motion, if passed, a Select Committee, whose membership is drawn from the assembly, is formed to carry out investigations. That Committee then reports back to the County Assembly which votes on the report. In my view, this is a perfect example of the Complainant or accuser being both the investigator, the prosecutor and the Judge. All the members of the assembly are interested in the outcome of the proceedings in that, having passed the motion to investigate the County Executive Committee Member, it is difficult to disabuse their minds when carrying out their investigations as to the intention of the assembly. To my mind, the Select Committee can not be the independent and impartial body or tribunal envisaged by article 50(1) of the Constitution. The Select Committee is not only part of the assembly that sanctions the motion for investigation, but its members are part of the assembly that will vote for or against the recommendations for removal of the County Executive Committee Member.
58. To my mind, in giving themselves a Constitution wherein they entrenched the principle of fair hearing as a fundamental right of every person, Kenyans did not envisage a situation where their Parliament will enact a law that violates that very principle. They expect Parliament to enact laws that protect that Constitutional principle. Further, in donating the oversight function over County Executive Committees and other Executive Organs to the County Assemblies, *vide* article 181 of the Constitution, it was not in the contemplation of Kenyans that the County Assemblies will exercise that power as to the Accusers, investigators, prosecutors and judges of the County Executive Committee Members. To the extent that section 40(3) of the CGA as read with Sub-section (5)(b) and

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- (6) thereof, provides for the investigations to be carried out by a Select Committee of the Assembly and for the Assembly to vote for the removal of a County Executive Committee Member, the provision runs foul of the Constitutional principle of fair hearing. It is in violation of article 50(1) of the Constitution and is null and void to that extent. Under article 259 of the COK, the purposeful interpretation requires that no article of the Constitution violates the other. Article 185 was not meant to override article 50(1). The law to be enacted under article 200 was intended to comply with the provisions of article 50(1) of the Constitution safeguarding fair hearing and not one that will concentrate the powers of accusation, investigation, prosecution and passing of judgment over Members of County Executive Committee in one body. Such a scenario has a likelihood of abuse of power.
59. Accordingly, this Court holds that Constitutionally, no County Assembly can purport to remove a county executive committee member pursuant to section 40(3) of the CGA. That provision negates the principal of independence and impartiality stipulated by article 50(1) of the Constitution and is null and void to that extent. Parliament should enact a law that provides for a separate, independent impartial and unbiased body that will be charged with the jurisdiction of carrying out investigations once a motion is passed by a County Assembly under section 40(2). It is that separate and independent body that should carry out investigations and report to the Assembly on its findings for the latter to vote on. To the extent that no such independent and impartial body exists, County Assemblies cannot purport to remove a member of the County Executive Committee under section 40 of the CGA. That will be unconstitutional.
60. Accordingly, I will allow the Petition and make the following declarations:-
- a) Section 40(3) of the County Governments Act, 2012 is inconsistent with article 50(1) of the Constitution of Kenya and *vide* article 2 (4) of the Constitution, section 40(3) of the County Government Act is void to the extent of such inconsistency.
 - b) The Select Committee of Bungoma County Assembly as constituted under section 40(3)(a) of the County Governments Act, 2012 to investigate Stephen Peter Nendela violates and is inconsistent with the imperative

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of article 50(1) and (2) of the Constitution and its actions, decisions and outcome reports are null and void.	1
c) An order of <i>Certiorari</i> is hereby issued to bring forth into this Court for quashing and quashes the decision of the 1 st , 2 nd and 3 rd Respondents and each of them from proceeding to hear or determine or continue to hear, investigate or make or receive a report in respect of the Petitioner Stephen Peter Nendela, pursuant to the notice referenced BGM/ASS/10/1/18 Vol 1 (29) and dated 14/4/2014 or any other letter or summons or document by or from the County Assembly of Bungoma for contravening articles 47, 50(1) and (2) and 236 of the Constitution of Kenya.	5 10
d) A declaration is hereby issued that the County Assembly of Bungoma cannot purport to or claim to control, manage, possess, implement, conduct or execute any County Policy Work Plan, or Executive roles vested in the Executive Committee of the County of Bungoma under article 183(1) of the Constitution and section 9(2)(a) and (b) of the County Government Act.	15 20
e) Since this was a Constitutional matter raising novel issues of public interest and concerns public bodies and a public servant, I will order that each party do bear his or its own costs.	25

It is so ordered.

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**Wambora & 3 others v Speaker of the Senate
& 6 others [2014] KLR - CAK**

Court of Appeal, at Nyeri

September 30, 2014

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A Visram, MK Koome, J Otieno-Odek, JJ A

Civil Appeal No 21 of 2014

(An appeal from the judgment of the High Court of Kenya at Kerugoya (Ong’udi, Githua & Olao, JJ) dated 16th April, 2014 in Petition No 3 of 2014 consolidated with Petition No 4 of 2014, Judicial Review No 6 of 2014 & Miscellaneous Application No 4 of 2014)

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Brief facts

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In 2013, the County Government of Embu (2nd Appellant) procured services of contractors to face lift the Embu County Stadium and advertised for tenders for supply and distribution of maize seeds to the farmers in the County. The County Assembly of Embu (6th Respondent), was dissatisfied with the refurbishment and the type and quality of maize seeds supplied to farmers. Consequently the County Assembly summoned the then County Secretary (4th Appellant), to appear before the Joint Committee on Infrastructure, Youth and Sports and the Joint Committee on Agriculture, Livestock, Fisheries and Co-operatives to answer queries over the stadium and the maize seeds supplied to farmers. The 6th Respondent made a recommendation to the Governor (1st Appellant) to suspend the 4th Appellant pending investigations by the Ethics and Anti-Corruption Commission (EACC). A motion to impeach the 1st Appellant from office was tabled before the 6th Respondent on the grounds that the 1st Appellant had neglected to act on the recommendation of the 6th Respondent which amounted to gross violation of the Constitution and abuse of office. The matter was forwarded to the Senate, which heard the matter and affirmed the 1st Appellant’s impeachment.

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Several petitions and judicial review proceedings based on those facts were consolidated into Petition No 3 of 2014. The High Court issued declarations that the County Assembly and the Senate were best placed to determine whether a motion for the removal of a Governor was in accordance with the Constitution. However the proceedings conducted by the County Assembly and the Senate with regard to removal of the 1st Appellant were held in violation and in disregard of court orders

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and were therefore null and void. An order of *certiorari* was issued quashing the impeachment proceedings against the 1st Appellant, who appealed against that decision. 1

Issues

1. Whether the County Assembly and the Senate were best placed to determine whether a motion for removal of a Governor was in accordance with the Constitution. 5
2. Whether the High Court failed to exercise its constitutional mandate to determine whether the grounds for removal of the 1st Appellant met the constitutional threshold. 10
3. Whether there had to be a nexus between the alleged gross violation and the conduct of the 1st Appellant for impeachment process to succeed.
4. Whether the impeachment and removal of the 1st Appellant as Governor was in accordance with the Constitution and the County Governments Act. 15
5. Whether concept of equal protection under the law of constitutional offices was enforced in the impeachment process. 20

Constitutional Law – Devolved Government – County Government – impeachment of a County Governor – process for the removal of a County Governor from office – circumstances when a Governor could be impeached – impeachment for gross violation of the Constitution – definition of gross violation – standard of proof of gross violation – the constitutional threshold amounting to gross violation – whether the Court has a constitutional duty to substantively analyse a charge of gross violation of the Constitution made against a Governor – Constitution of Kenya, 2010, article 181; County Governments Act, 2012 section 33. 25

Constitutional Law – Devolved Government – County Governments – impeachment of a County Governor – exclusive power of the County Assembly and Senate to determine an impeachment motion – whether the High Court had a role to play in the process of impeachment of a Governor. 30

Jurisdiction – jurisdiction of the High Court – supervisory jurisdiction of the High Court – constitutional jurisdiction of the High Court – quasi-judicial nature of County Assemblies during impeachment proceedings – whether the High Court has jurisdiction to hear a substantive matter regarding the impeachment of a County Governor – Constitution of Kenya, 2010, article 165(6). 35

Held:

1. The terms separation of powers and balance of power meant that 40

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Governor was activated upon receipt of a resolution of the County Assembly to remove a Governor. The Senate could then convene a meeting to hear the charges against the Governor and could appoint a Special Committee to investigate the matter.	1
8. The Courts had neither been vested with jurisdiction to initiate a motion, consider a resolution nor to hear the charges levied against a Governor. The province of the court in the process of the removal of a Governor from office was solely to decide on the rights of individuals and not to enquire how the County Assembly and Senate performed the duties in which they had discretion.	5 10
9. The Constitution exhaustively provided for the jurisdiction of a Court of Law, within which it had to operate. The High Court had four distinct constitutional jurisdictional mandates relevant to the question of removal of a Governor from office founded on article 165. These were :	15
1. Supervisory jurisdiction over any authority exercising judicial or quasi-judicial functions.	
2. Jurisdiction to hear any question on actions performed under the authority of Constitution or any law that was inconsistent with or in contravention of the Constitution.	20
3. Jurisdiction to hear and determine any matter relating to constitutional powers of State Organs in respect of county governments.	
4. Jurisdiction to interpret the Constitution.	25
10. The supervisory role of the High Court in removal of a Governor ensured the procedure and threshold provided in the Constitution and the County Governments Act were followed. If the process for removal of a Governor was unconstitutional, wrong, un-procedural or illegal, it could not be said that the court had no jurisdiction to address the grievance arising therefrom. In its supervisory role, the jurisdiction of the High Court was dependent on the process and the constitutionality of the action taken.	30
11. Article 181 of the Constitution and section 33 of the County Governments Act could not be interpreted as clauses that ousted the supervisory jurisdiction of the High Court nor construed as provisions that prohibited the right of a citizen to access a court of law where there was an allegation of infringement of a constitutional right to hold public office under article 38(3) of the Constitution. The right of access to courts could only be taken away by clear and unambiguous words of the Parliament of Kenya.	35 40
12. In the exercise of its supervisory role, the High Court could not	

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- replace the decision of the competent organ with its own decision; it could only find fault with it. The court had to determine if the action taken was constitutional, rational and examine if there had been any procedural impropriety. 1
13. The process of impeachment of a Governor was neither a civil nor criminal trial; it was a *sui generis* political and quasi-judicial process that had to adhere to the Constitution. The process involved policy and political responsibility and was a tool for ensuring good governance. When a court examined the constitutionality of any action, it was not seated in appeal over the opinion of the relevant organ but would only examine whether relevant material and vital aspects having a nexus to the constitutional and legislative purposes were taken into account in the actual process. 5 10
14. Kenya's legal system was premised on the concept of individual and personal liability or responsibility. The Act or omission complained of had to have been done or undertaken with the knowledge, consent or connivance of the person charged. The Senate in impeaching the 1st Appellant adopted the concept of collective responsibility in article 226(5) of the Constitution. A holder of a public office who directed or approved the use of public funds contrary to law or instruction was liable for any ensuing loss. However collective responsibility is a policy, governance and accountability concept and not a principle of personal liability or individual culpability. 15 20
15. Collective responsibility does not mean that the leader/head is individually responsible and politically liable for all acts or omissions of subordinates. If collective responsibility were to be a principle of culpability and liability, it would follow that all persons who were collectively bound must individually be held answerable, blameworthy and accountable. 25 30
16. The High Court was correct in stating that there had to be a nexus between the alleged gross violation and the conduct of a Governor. An element of personal knowledge that included intentional, brazen or wilful gross violation of the Constitution or other written law had to be established. However the High Court erred by not making a determination as to whether on the facts before it, nexus was established between the Appellant and the alleged gross violation. 35
17. There was need to maintain a high threshold for removal of the Governor and to ensure that the law was strictly followed. The standard of proof was neither beyond reasonable doubt nor on a balance of probability. Noting that the threshold for removal of a Governor involved gross violation of the Constitution, the standard 40

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- of proof required for removal of Governor was above a balance of probability but below reasonable doubt. 1
18. The Constitution did not define gross violation. What amounted to gross violation had to be considered on a case by case basis taking into account the peculiar facts and circumstances of each case. 5
Grave violation or breach of the Constitution constituted, *inter alia*, interference with the constitutional functions of the Legislature and the Judiciary by an exhibition of over constitutional executive power; abuse of the fiscal provisions of the Constitution; abuse of the Code of Conduct for public officers; disregard and breach of the provisions on fundamental rights; interference with local government funds and stealing from the funds, pilfering of the funds for personal gains; instigation of military rule and military government and any other subversive conduct which was directly inimical to the implementation of some other major sectors of the Constitution. 15
19. The standard to be used to determine if the constitutional threshold for removal of a Governor had been met had to take into account the intendment of article 181(1) of the Constitution. Whatever was alleged against a Governor; 20
1. Had to be serious, substantial and weighty.
 2. There had to be a nexus between the Governor and the alleged gross violations of the Constitution or any other written law. 25
 3. The charges framed against the Governor and the particulars thereof had to disclose a gross violation of the Constitution or any other written law.
 4. The charges as framed had to state with degree of precision the article(s) or even sub-article(s) of the Constitution or the provisions of any other written law that had allegedly been grossly violated. 30
20. The motion to remove a Governor from office and particulars of the charge had to expressly state that the alleged violation was gross and indicate particulars of the alleged gross violation. An analogy could be drawn from criminal cases involving robbery with violence. Where the charge against the accused person involved an allegation that the weapon used was offensive and dangerous; the charge sheet had to expressly contain the words offensive and dangerous. 40
If violation of the Constitution was alleged to be gross, the motion and charges against the Governor had to be expressly indicated with the words “*gross violation*” in the charge and the specific particulars

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- of the alleged gross violation had to be given. 1
21. Where the violation was not gross, then the removal process under article 181 of the Constitution was not available. The word “gross” had been omitted from the charges levelled against the 1st Appellant. A Governor was entitled to notice and particulars of the charges facing him and notice as to whether the allegation was merely an allegation of violation of the Constitution or other law or gross violation of the Constitution and other law. 5
22. Gross violation of the Constitution included violation of the values and principles embodied in it that provided the bedrock and foundation of Kenya’s constitutional system. The facts that proved gross violation had to be proved before the relevant constitutional organ. The High Court was duty bound to determine if the facts in support of the charges against a Governor met and proved the threshold in article 181 of the Constitution. 10 15
23. Though the process of removal of a Governor from office was both a constitutional and a political process, the political question doctrine could not operate to oust the jurisdiction vested on the High Court to interpret the Constitution or to determine the question if anything said to be done under the authority of the Constitution or of any law was consistent with or in contravention of the Constitution. 20
24. The grounds for removal of a Governor stipulated in article 181 of the Constitution were substantively similar with some of the criteria in article 145 of the Constitution for impeachment of the President. In both articles, one of the criteria for removal of the President or Governor was gross violation of the Constitution or any other law or where there were serious reasons for believing that the office bearer had committed a crime under national or international law or if there was gross misconduct on the part of the office bearer. It was a principle of interpretation that provisions in *pari materia* (of the same matter; on the same subject) were construed to have the same meaning. The facts that gave rise to invocation of the provisions of the respective articles would differ but the meaning and import of the terms remained the same. 25 30 35
25. The office of the Governor was different from the office of Member of County Assembly although both were subject to a competitive electoral process. The Rule of differentiation was inherent in the doctrine of equality; different treatment of different offices was equality of treatment. Parliament through the County Government Act had prescribed a different procedure and threshold for removal 40

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of Governors and Members of the County Assembly. In relation to members of the County Assembly, the High Court had to confirm the grounds for removal.	1
26. Whereas that was not the case with Governors, the supervisory jurisdiction of the High Court as well as the High Court's jurisdiction to interpret the Constitution ensured that a Governor could not be removed from office if the constitutional procedure had not been followed and the constitutional threshold established and proved.	5
27. The difference in procedure and grounds for removal of the President, Governor or Member of the County Assembly did not vitiate the constitutional process and threshold that had to be fulfilled for each of the distinctive offices.	10
28. A Court of law could not act in vain. The proceedings before the Embu County Assembly and the Senate that led to the removal of the 1 st Appellant as Governor were declared null and void and quashed by the judgment of the High Court, and no appeal was lodged to challenge the decision.	15

<i>Appeal partly allowed. The 5th and 6th Respondents was to bear half the costs of this Appeal.</i>	20

Cases

East Africa

1. <i>Barasa, Nancy v Judicial Service Commission & 9 others</i> Petition No 23 of 2012 – (Explained)	25
2. <i>Davies & another v Mistry</i> [1973] EA 463 – (Followed)	
3. <i>Ephantus Mwangi v Duncan Mwangi Wambugu</i> [1982-88] 1 KAR 278 – (Mentioned)	
4. <i>Jabane v Olenja</i> [1986] KLR 661 – (Mentioned)	
5. <i>In re the Matter of the Interim Independent Electoral Commission</i> [2011] 2 KLR 32 – (Mentioned)	30
6. <i>Matemu, Mumo v Trusted Society of Human Rights & 5 others</i> Civil Appeal 290 of 2012 – (Explained)	
7. <i>Mwanasokoni v Kenya Bus Services</i> [1982-88] 1 KAR 870 – (Mentioned)	35
8. <i>Omanga, Charles & another v Independent Electoral & Boundaries Commission & 2 others</i> Petition No 2 of 2012 – (Followed)	
9. <i>Omondi, George v Republic</i> Criminal Appeal No 5 of 2005 – (Followed)	
10. <i>Ssemogerere, Paul K & others v Attorney General</i> [2004] 2 EA 276 – (Followed)	40
11. <i>Selle & another v Associated Motor Boat Co Ltd</i> [1968] EA 123 –	

(Mentioned)	1
12. <i>Tononoka Steels Limited v Eastern and Southern Africa Trade Development Bank</i> Civil Appeal No 255 of 1998 – (Followed)	
South Africa	
1. <i>In the Matter between the Speaker of the National Assembly and Patricia De Lille (MP) & another</i> [1999] ZASCA 50; [1999] 4 All SA 241 – (Followed)	5
Nigeria	
1. <i>Muyiwa Inakoju & 17 others v Abraham Adeolu Adeleke & 3 others</i> (2007) 4 NWLR Pt 1025; (2007)1 NILR 121 – (Followed)	10
United States of America	
1. <i>Marbury v Madison</i> , 5 US 137 (1803) – (Followed)	
Statutes	
East Africa	
1. Constitution of Kenya, 2010 articles 1, 2,3(2);4; 6; 10(1); 27; 30; 38(3)(c); 73-78; 125; 145(1)(a)(c); 159;160; 165(3)(d)(iii)(iv)(6); 174(a); 181(1)(a)(c); 182(2) ; 201; 226 (5); 232 ; 238 ; 259(11) – (Interpreted)	15
2. County Governments Act,2012 (Act No 17 of 2012) sections 27(3); 33(1), (2)(3)(b) (9) – (Interpreted)	20
3. Penal Code (cap 63) – In general	
4. Public Procurement and Disposal Act, 2005 (Act No 3 of 2005) – In general	
5. Public Procurement and Disposal (County Governments) Regulations, 2013 (Act No 3 of 2005) – In general	25
6. Public Finance Management Act, 2012 (Act No 18 of 2012) – (Interpreted)	
Advocates	
1. <i>Mr Paul Muite, Mr Ahmednasir Abdullahi , Mr David Njoroge</i> for the Appellant	30
2. <i>Mr Ndegwa</i> for the 5 th & 6 th Respondents	
3. There was no appearance for the 1 st , 2 nd & 4 th Respondents	
September 30, 2014, the following Judgment of the Court was delivered.	35
1. The issue in this case revolves around the concepts of separation and balance of power. The terms ‘separation of power’ and ‘balance of power’ mean that the power of the three branches of a democratic government– the Legislative, Executive and Judiciary – should not be concentrated in one branch, but should be distributed such that each branch can independently carry out its own respective	40

functions. The separation and balance of power rests on two main principles. First, the competencies of the three branches of governmental power must be clearly delimited and defined. Second, all branches of government are bound by the rule of law.	1
2. In this judgment, we adopt the dicta by the Supreme Court of South Africa <i>In the matter between The Speaker of the National Assembly and Patricia De Lille (MP) & another</i> , Case No 297/98 wherein it was stated: “...No Parliament, no official and no institution is immune from judicial scrutiny...”	5 10
We further adopt and concur with the dicta expressed by Justice Karqkqra of the Uganda Supreme Court in the case of <i>Paul K Semogerere & 2 others v The Attorney General</i> , Constitutional Appeal No 1 of 2002 where he opined that, “‘It is the Constitution, not Parliament nor the executive nor judiciary which is supreme’”.	15
Background:	
3. This is an appeal against part of the judgment of the High Court dated 16 th April, 2014. The Memorandum of Appeal raises the following grounds:-	20
• The learned Judges erred in law in holding that the County Assembly and the Senate were best placed to determine whether a motion for the removal of a Governor was in accordance with the Constitution which is a jurisdiction exclusively vested in the High Court by article 165(3)(d)(iii) of the Constitution.	25
• The learned Judges erred in law by failing to exercise their constitutional mandate under article 165(3)(d)(iii) and (iv) of the Constitution to determine whether the grounds for removal of the 1st appellant met the constitutional threshold under article 181 of the Constitution.	30 35
• The learned Judges erred in law by failing to determine whether there was any nexus between the allegations in the motion tabled in the County Assembly and the 1st Appellant.	
• The learned Judges erred in law in failing to determine whether the impeachment and removal of the 1st Appellant as governor was in accord with the Constitution	40

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- and the County Governments Act. 1
4. In the year 2013, the County Government of Embu, the 2nd Appellant herein, procured services of contractors to face lift the Embu County Stadium and advertised for tenders for supply and distribution of maize seeds to the farmers in the County. Unfortunately, the County Assembly of Embu, the 6th Respondent herein, was dissatisfied with the manner in which the stadium was refurbished and the type and quality of maize seeds supplied to farmers. Consequently, on 3rd January, 2014, the 6th Respondent summoned the 4th Appellant, the then County Secretary, to appear on 6th January, 2014, before the joint committee on infrastructure, youth and sports and the joint committee on agriculture, livestock, fisheries and cooperatives to answer queries over the stadium and the maize seeds supplied to farmers. 5 10 15
5. According to the 4th Appellant, the summons were delivered to her office on Friday the 3rd January, 2014, after working hours and she only received the same on Monday, 6th January, 2014, at 8:30 am. when she went to office. She wrote to the 6th Respondent seeking an extension of 21 days to prepare comprehensively to answer the queries over the aforementioned issues. The 6th Respondent did not respond and proceeded to make a recommendation to the Governor, the 1st Appellant, to suspend the 4th Appellant pending investigations by the Ethics and Anti- Corruption Commission (EACC). 20 25
6. On 16th January, 2014, a motion to impeach the 1st Appellant from office was tabled before the 6th Respondent on the grounds that the Appellant had refused and/or neglected to act on the recommendation of the 6th Respondent which amounted to gross violation of the Constitution and abuse of office. On even date, the 4th Appellant filed Judicial Review proceedings being JR No 17 of 2014, seeking an order of *certiorari* to quash the decision of the 6th Respondent to have her investigated by EACC and to impeach the 1st Appellant. Pursuant to the said proceedings the High Court (Odunga, J) issued orders maintaining status quo pending the determination of the Application for stay therein. The orders were served upon the 6th Respondent. However, the 6th Respondent continued with the impeachment proceedings. 30 35
7. The 1st Appellant filed HC Petition No 1 of 2014, seeking *inter alia* an order restraining the Speaker of the County Assembly of Embu, the 5th Respondent herein and the 6th Respondent from 40

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- continuing with the impeachment proceedings. On 23rd January, 2014 Githua, J in the said Petition issued conservatory orders restraining the Respondents from continuing with the impeachment proceedings. Despite the said orders, the 6th Respondent convened, debated and passed the motion of impeachment on 28th January, 2014. Thereafter, the 5th Respondent forwarded the resolution to impeach the 1st Appellant to the Speaker of the Senate, the 1st Respondent herein. 1
8. The 1st Respondent caused a notice to be published in the Kenya Gazette calling for a special meeting by the Senate to hear the charges against the 1st Appellant. On 3rd February, 2014, the 1st and 2nd Appellants filed another Constitutional Petition wherein a conservatory order was issued restraining the 1st Respondent from introducing, discussing or otherwise deliberating the impeachment of the 1st Appellant. Despite being served with the said orders, the 1st and 2nd Respondents tabled the resolution to impeach the 1st Appellant before the Senate. The Senate debated on the issue and unanimously agreed to remove the 1st Appellant from office. 5 10 15 20
9. According to the Appellants, the impeachment proceedings were contrary to the Constitution and the rules of natural justice; the proceedings were conducted in blatant and willful disobedience of court orders; that the impeachment proceedings were null and void. Pursuant to the actions of the Senate, the Appellants filed Petition No 3 of 2014 wherein they sought *inter alia*:- 25
- A declaration that the proceedings of impeachment of a Governor under Article 181 of the Constitution are quasi-judicial in nature and are therefore subject to the jurisdiction of the High Court under article 165(3)(d) & (6) of the Constitution. 30
 - A declaration that the proceedings and resolution for removal of the 1st Appellant before the Embu County Assembly that were held in violation and disregard of a court order were null and void. 35
 - A declaration that the proceedings before the Embu County Assembly for removal of the 1st Appellant as Governor violated the provisions of sections 33(1), (2) & (3)(b) of the County Governments Act No 12 of 2012 and was therefore null and void. 40
10. The aforementioned Petitions and Judicial Review proceedings

were consolidated and Petition No 3 of 2014, became the lead file. 1
In the said Petition, the Appellants averred that the charges which
were the basis of the 1st Appellant's impeachment were as follows:-

- a. Violation of the Public Procurement & Disposal Act, 2005 & Regulations 2013. 5
- b. Violation of Public & Finance Management Act 2012.
- c. Violation of the Constitution of Kenya.

The Appellants argued that the 1st Appellant was not the accounting officer nor was he the procuring entity and could therefore not be held liable under the principles of collective responsibility; that there was no nexus or personal conduct or wrongdoing on the part of the 1st Appellant that linked him to the acts and omissions contained in the charges leveled against him. 10

11. The Appellants in their Petition set out the following issues for determination by the trial court:- 15

- Whether the 1st, 2nd, 5th and 6th Respondents acted in willful disobedience and disregard of court orders and therefore contravened the principles of good governance, integrity, rule of law, transparency and accountability under article 10 of the Constitution; 20
- Whether by purporting to pass a resolution to impeach the 1st appellant in disobedience of court orders the 1st, 2nd, 5th & 6th Respondents violated the Constitution; 25
- Whether the Senate could receive a resolution that had been discussed and passed by a County Assembly in defiance and in willful disobedience of court orders;
- Whether the 1st and 2nd Respondents' decision to impeach the 1st Appellant despite being served with a court order undermines the authority of the honourable court as provided under article 159 & 160 of the Constitution; 30
- Whether the impeachment of the 1st Appellant by the 1st Respondent met the constitutional threshold required under article 181 of the Constitution and the County Government Act, 2012; 35
- Whether the accounting officer of a County Government is answerable to the Senate or County Assembly in the financial management of county funds; 40
- What is the meaning, extent and scope of power to call for evidence as provided for under article 125 of the Constitution and does the Article confer the Senate

with oversight authority over County Governments and Governors”	1
• Whether a Deputy Governor can assume office under article 182 (2) of the Constitution through a process of impeachment that was in violation of the Constitution. • With the exception of the 1st and 2nd Respondents, the other respondents entered appearance and filed their respective responses.	5
12. After considering the matter on its merits, the trial court <i>vide</i> a judgment dated 16 th April, 2014, issued declarations that the County Assembly and the Senate were best placed to determine whether a motion for the removal of a Governor was in accordance with the Constitution. The trial court held that the proceedings conducted by the County Assembly and the Senate and the resolutions, consequential Gazette notices, actions and any communications with regard to removal of the 1 st Appellant were held in violation and in disregard of court orders and were therefore null and void. The trial court issued an order of <i>certiorari</i> and quashed the impeachment proceedings against the 1 st Appellant. It is that decision that has instigated this appeal based on the aforementioned grounds of appeal.	10
13. The Appeal proceeded before us by way of both written and oral submissions. The Appellants were represented by senior counsel, Mr Paul Muite and Mr Ahmednasir Abdullahi and Mr David Njoroge. There was no appearance for the 1 st , 2 nd & 4 th Respondents. The 5 th and 6 th Respondents were represented by Mr Ndegwa.	15
Appellants’ submissions	20
14. It was the Appellants’ submission that pursuant to article 165(3)(d) (ii) & (iii) of the Constitution the High Court had the jurisdiction to determine the constitutionality of the impeachment process of the 1 st Appellant and to make a finding whether the process was in accordance with article 181 of the Constitution. According to the Appellants, the learned Judges of the High Court erred in the interpretation of the Constitution by holding that the County Assembly and the Senate were best placed to determine the constitutionality of the impeachment process; that as a result of the said misinterpretation, the learned Judges abdicated their judicial duty by failing to determine whether the grounds for impeachment of the 1 st Appellant met the constitutional threshold.	25
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15. Mr Muite argued that courts ought to take care not to be intimidated when an issue with political dimension is raised; that courts must jealously execute the sacred responsibility and mandate entrusted to the judiciary by the people; that courts should not allow the political question doctrine to stop inquiry into the conduct of the executive or legislature; that courts should be robust in interpreting the Constitution. 1
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16. It was the Appellants' contention that the learned Judges rightly held that the standard to be used to measure what constitutes gross violation does not involve a mathematical formula but a consideration of the intention of article 181(1) of the Constitution. It was submitted that the learned Judges correctly held that there ought to be a nexus between the Governor and the alleged gross violation of the Constitution or any other law. Counsel submitted that despite the foregoing, the learned Judges failed to subject the impeachment process and the charges leveled against the 1st Appellant to the law that they had correctly espoused. According to Mr Muite, it was upon the High Court to establish the threshold of what amounts to gross violation. He urged this Court to set out the guidelines on the applicable threshold of gross violation under article 181 of the Constitution. 10
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17. The Appellants argued that had the learned Judges subjected the impeachment process to the law, they would have found that there was no nexus between the 1st Appellant and the charges leveled against him. This is because the County Assembly's intention was to probe the 4th Appellant on the refurbishment of the stadium and on the maize seeds supplied to the farmers. It was submitted that the 1st Appellant was not involved in the procurement process and there was no nexus between the allegations leveled against the 4th Appellant and the 1st Appellant. According to the Appellants, the 1st Appellant's woes begun when he did not implement the 6th Respondent's recommendation to suspend the 4th Appellant. Mr Muite argued that there was no gross violation of the Constitution by the 1st Appellant. According to him, gross violation has to have an element of *mens rea* or wrongful conduct analogous to *mens rea*. 25
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18. The Appellants further submitted that the Constitution intended the removal process of a person elected to the office of Governor be at par with the removal of Member of County Assembly as provided under section 33(9) of the County Governments Act. Counsel 40

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- submitted that the threshold for removal of a Governor under article 181 of the Constitution should be the same threshold for removal of the President under article 145 of the Constitution. It was submitted that pursuant to article 27 of the Constitution which guarantees equal protection and equal benefit of the law and article 38(3)(c) of the Constitution which guarantees every citizen the right, if elected to hold office, the removal of a Governor under the Constitution could not be subjected to a process that is discriminatory to other elected offices and to a member of a County Assembly or member of Parliament. The Appellants urged this Court to allow the appeal. 1
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- 5th & 6th Respondents' submissions:
19. It was submitted on behalf of the Respondents that the County Assembly and the Senate were best placed to determine whether a motion for removal of a Governor was in accordance with the Constitution. Counsel for the Respondents submitted that the High Court by virtue of article 165 of the Constitution could not assume jurisdiction it did not have; that where the Constitution has granted a specific organ a mandate, the Courts cannot interfere. To the Respondents, the instant appeal has no merit and is aimed at shielding the 1st Appellant from scrutiny and accountability by the organs of the Government that are mandated to have oversight over a public office. 15
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20. Mr Njenga argued that the present appeal had been overtaken by events and was purely academic; that the issue before the High Court was the question of validity of the impeachment of the 1st Appellant by a decision made in February, 2014. Since then the 1st Appellant was impeached by a second process and a decision made on 15th May, 2014. Counsel submitted that the second impeachment decision cannot be affected by this Appeal. He submitted that the judgment of this Court could not apply retroactively to the second impeachment. 25
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21. The Respondents submitted that article 174 of the Constitution provides for the objects and principles of devolution. Of paramount consideration is article 174(a) which make the following provisions "to promote democratic and accountable exercise of power". The intention of the said provision is to place a Governor subject to the oversight role of the County Assembly and the Senate. This ensures that in the context of a County, a Governor executes his functions and mandate as provided under section 30 of the County 35
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- Governments Act in a manner that promotes the welfare and general interest of the people. It was the respondents' case that the removal of a Governor under article 181 of the Constitution and section 33 of the County Governments Act is a right provided to the people exercisable through their elected representatives. This right becomes exercisable when a presumption arises that the continued tenure of a Governor would not be in the best interest of the County due to gross violation of the Constitution and the law. 1
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22. It was the Respondents' contention that in the report of the special committee of Senate there was a clear exposition of how the charges and the facts founding these charges relate to the Governor including his own actions in procuring condemned maize seeds and distributing it to farmers for planting and a further determination that in the context of article 181 of the Constitution these charges and threshold had been substantiated. 10
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23. On the issue of equal protection of the law in respect of removal of the 1st Appellant under article 181, the Respondents submitted that equal protection before the law was never an issue for determination by the High Court and ought not be raised and considered in this appeal. Without prejudice to the aforementioned submission, the respondents argued that a Court's jurisdiction is limited to applying the law as it is; that unless and until the Constitution is amended together with section 33 of the County Governments Act, those provisions have the power and force of the law; and a court cannot expand or limit the scope therein as suggested by the Appellants. The Respondents submitted that there was no basis in law for the court to declare that the provisions relating to impeachment of a Governor should be construed in the same way as the provisions obtaining for the removal of the President under article 145 of the Constitution. 20
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24. According to Mr Njenga, the 1st Appellant as the Governor was responsible for the actions of the County Executive Committee and the Senate properly applied the principle of collective responsibility. It was submitted that the present appeal was tantamount to seeking a review by this Court of the findings of the Senate made on 14th February, 2014. Counsel emphasized that the judiciary and courts have no jurisdiction to hear an appeal over a decision made by the Senate. 35
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25. We have considered the rival submissions by counsel and examined

26. It is our considered view that the following issues arise for determination:

- i. Did the learned Judges err in law in holding that the County Assembly and the Senate (as opposed to the Courts), were best placed to determine whether a motion for the removal of a Governor was in accordance with the Constitution” 10
- ii. Did the learned Judges err in law by failing to exercise their constitutional mandate under article 165(3)(d)(iii) and (iv) of the Constitution to determine whether the grounds for removal of the 1st Appellant met the constitutional threshold under article 181 of the Constitution” 15
- iii. Must there be a nexus between the allegations in the motion tabled in the County Assembly and the 1st Appellant” 20
- iv. Was impeachment and removal of the 1st Appellant as governor in accord with the Constitution and the County Governments Act” 25

27. The Respondents submitted that the County Assembly and the Senate is the exclusive and best placed forum to determine whether a motion for the removal of a Governor is in accordance with the Constitution. It was submitted that the court's role cannot precede the County Assembly's inquiry role; and the role of the Court is not to conduct a merit review of the Assembly's actions. The Respondent cited the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* - Civil Appeal No 290 of 2012 in support of the submission.

28. The pertinent issues for consideration in this appeal is to determine if the County Assembly and the Senate have exclusive mandate and jurisdiction to remove a Governor from office and the threshold for removal of a Governor from Office. The core function test is the guiding principle where no organ should interfere with the core

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- functions of another. As was stated in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*, (*supra*), the doctrine of separation of powers does not proscribe organs of government from interfering with the other's functions; it also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over the functions vested elsewhere. 1 5
29. The procedure for removal of a governor from office is stipulated in section 33 of the County Governments Act (No 17 of 2012). 10
The section provides:
- “33. Removal of a governor
- (1) A member of the county assembly may by notice to the speaker, supported by at least a third of all the members, move a motion for the removal of the governor under article 181 of the Constitution. 15
 - (2) If a motion under subsection (1) is supported by at least two-thirds of all the members of the county assembly— 20
 - (a) the speaker of the county assembly shall inform the Speaker of the Senate of that resolution within two days; and
 - (b) the governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section. 25
 - (3) Within seven days after receiving notice of a resolution from the speaker of the county assembly— 30
 - (a) the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor; and
 - (b) the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter. 35
 - (4) A special committee appointed under subsection (3)(b) shall— 40
 - (a) investigate the matter; and
 - (b) report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated.

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(5) The governor shall have the right to appear and be represented before the special committee during its investigations.	1
(6) If the special committee reports that the particulars of any allegation against the governor—	5
(a) have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or	
(b) have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the impeachment charges.	10
(7) If a majority of all the members of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.	
(8) If a vote in the Senate fails to result in the removal of the governor, the Speaker of the Senate shall notify the speaker of the concerned county assembly accordingly and the motion by the assembly for the removal of the governor on the same charges may only be re-introduced to the Senate on the expiry of three months from the date of such vote.	15 20
(9) The procedure for the removal of the President on grounds of incapacity under article 144 of the Constitution shall apply, with necessary modifications, to the removal of a governor.	25
(10) A vacancy in the office of the governor or deputy governor arising under this section shall be filled in the manner provided for by article 182 of the Constitution”.	30
30. The Appellants’ case is founded on the interpretation of article 181 of the Constitution and section 33 of the County Governments Act. It is the Appellant’s submission that the learned Judges erred in law in interpreting section 33 and making a finding that the County Assembly and the Senate are best placed to determine whether a motion for the removal of a Governor is in accordance with the Constitution. It is the Appellants’ submission that the Courts have the final say to determine whether a motion for the removal of a Governor is in accordance with the Constitution.	35 40
31. Our reading and interpretation of article 181 of the Constitution as read with section 33 of the County Governments Act shows that	

how the County Assembly and Senate perform duties in which they have discretion.	1
Jurisdiction of the High Court in the process of removal of a Governor from office:	5
33. We have stated that the process of removal of a Governor from office is a constitutional and political process which is quasi-judicial. <i>In the Matter of the Interim Independent Electoral Commission (Applicant)</i> - Constitutional Application No 2 of 2011, the Supreme Court stated that where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. In our view, the High Court has four distinct constitutional jurisdictional mandates relevant to the question of removal of a Governor from office. These are:	10
a. Article 165(6) of the Constitution which vest upon the High Court supervisory jurisdiction over any body or authority exercising judicial or quasi-judicial functions.	15
b. Article 165(3)(d)(ii) which vest upon the High Court jurisdiction to hear any question whether anything said to be done under the authority of Constitution or any law is inconsistent with or in contravention with the Constitution.	20
c. Article 165(3)(d)(iii) that vest upon the High Court jurisdiction to hear and determine any matter relating to constitutional powers of State Organs in respect of county governments. (Article 260 of the Constitution defines a state organ to include any body established by the Constitution. It is our considered view that both the Senate and the County Assembly are state organs and are subject to the jurisdiction of the High Court as provided for in article 165(3)(d)(ii) and (iii).)	25
d. Article 165(3)(d) vests upon the High Court the jurisdiction to interpret the Constitution and in the instant case, the issue relates to interpretation of gross violation in article 181 of the Constitution.	30
34. Our reading of article 165(6) of the Constitution reveals that the role of the High Court for purposes of removal of a Governor from office is <i>inter alia</i> supervisory in nature to ensure that the procedure and threshold provided for in the Constitution and the County Governments Act are followed. If the process for removal	35
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36. The threshold and criteria for removal of a County Governor is provided for in article 181 of the Constitution. The Article provides: Removal of a county governor 1
- “(1) A county governor may be removed from office on any of the following grounds— 5
- (a) gross violation of this Constitution or any other law;
- (b) where there are serious reasons for believing that the county governor has committed a crime under national or international law; 10
- (c) abuse of office or gross misconduct; or
- (d) physical or mental incapacity to perform the functions of office of county governor”.
37. The Appellants submitted that it is the duty of the Court to ensure that the threshold and criteria for removal of a Governor from office has been established and proved; that in the instant case, the ground for removal of the 1st Appellant was that he committed gross-violation of the Constitution and other laws. It is the appellants’ contention that the learned Judges erred in law in failing to find that there must be proof that the appellant personally committed the acts of gross-violation as alleged; that there must be nexus between the alleged acts of gross-violation of the Constitution and any other law and the conduct of the Governor who is to be removed; that there must be proof of personal wrongdoing in order to establish gross violation; that there has to be an element of *mens rea* or wrongful conduct analogous to *mens rea*. 15 20 25
- Is nexus or conduct analogous to *mens rea* required for removal of a Governor”
38. The Appellant submitted that the Respondents erred in removing the 1st Appellant from office based on acts and omissions which he did not personally commit and based on the concept of collective responsibility. It was submitted that there must be personal wrongdoing and an element analogous to *mens rea* in order to find that a Governor is liable for gross violation of the Constitution or any other law. 30 35
39. We have considered the submission by the Appellant as to whether personal conduct and an element analogous to *mens rea* need to be established in order to remove a Governor from office. The process of removal of a Governor from office is neither a civil nor criminal trial; it is *sui generis* political and quasi-judicial process that must 40

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- adhere to constitutional criteria and threshold. The process involves policy and political responsibility and is a tool for ensuring good governance. In the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (*supra*) at Para 54 it was stated that when a court examines the constitutionality of any action, the Courts will not be sitting in appeal over the opinion of the relevant organ but only examining whether relevant material and vital aspects having a nexus to the constitutional and legislative purposes were taken into account in the actual process. The issue for consideration is whether the process had a clear nexus with the determination to meet the objective criteria established by law. 1 5 10
40. The learned Judges of the High Court held that there must be a nexus between the Governor and the alleged gross violation of the Constitution or any other written law. Kenya's legal system is premised on the concept of individual and personal liability or responsibility; this means that the act or omission complained of must have been done or undertaken with the knowledge, consent or connivance of the person charged. The Senate in impeaching the 1st Appellant adopted the concept of collective responsibility and cited article 226(5) of the Constitution. The article stipulates that a holder of a public office who directs or approves the use of public funds contrary to law or instruction is liable for any ensuing loss. 15 20
41. We are of the view that collective responsibility is a policy, governance and accountability concept and not a principle of personal liability or individual culpability. If it were so, in the instant case, collective responsibility would imply that all individual members of the various organs of the County Government would be personally responsible for acts or omissions of any person in the employ of the County Government. Collective responsibility does not mean that the leader/ head is individually responsible and politically liable for all acts or omissions of subordinates. If collective responsibility were to be a principle of culpability and liability, it would follow that all persons who are collectively bound must individually be held answerable, blameworthy and accountable; this is not the intendment and import of the concept of collective responsibility. We concur with the statement by the High Court that there must be nexus between the alleged gross violation and the conduct of a Governor. We agree with submission by counsel for the appellant that an element of personal knowledge that includes intentional, brazen or willful gross violation of the 25 30 35 40

Constitution or other written law must be established. In the instant case, the High Court erred by not making a determination as to whether on the facts before it, nexus was established between the appellant and the alleged gross violation. Having found that nexus had to be proved, it was the duty of the High Court to make a determination whether nexus had been established on the facts of the case. We are fortified in this view by the provisions of article 165(3)(d)(ii) of the Constitution which vests the High Court with jurisdiction to determine if anything done under the authority of the Constitution or any law is inconsistent with or in contravention of the Constitution. (*See Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*, (*supra*) at Para 87).

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Standard of Proof:

42. What standard should be applied in implementing the threshold for removal of a Governor” The learned Judges of the High Court stated that there is need to maintain a high threshold for removal of the Governor and the need to ensure that the law is strictly followed. We do concur with the learned Judges and add that the standard of proof is neither beyond reasonable doubt nor on a balance of probability. Noting that the threshold for removal of a governor involves “gross violation of the Constitution”, we hold that the standard of proof required for removal of Governor is above a balance of probability but below reasonable doubt. Definition of gross violation of the Constitution:

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43. The Appellant contends that the High Court erred in that it did not interpret or define the term “gross-violation” in article 181 of the Constitution. We note that the Constitution does not define gross-violation. What amounts to gross violation must be considered on a case by case basis taking into account the peculiar facts and circumstances of each case. We concur with High Court’s statement that whether conduct is gross or not will depend on the facts of each case and not every violation of the Constitution or other law is gross violation. The Nigerian Supreme Court in the case of *Hon Muyiwa Inakoju & others v Hon Abraham Adesola Adeleke*, SC 272/2006 opined as follows: The following constitute grave violation or breach of the Constitution:

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“a. interference with the constitutional functions of the legislature and the judiciary by an exhibition of over constitutional executive power;

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b. abuse of the fiscal provisions of the Constitution;

c. abuse of the Code of Conduct for public officers;	1
d. disregard and breach of the provisions on fundamental rights;	
e. interference with local government funds and stealing from the funds, pilfering of the funds...for personal gains...;	5
f. instigation of military rule and military government and	
g. any other subversive conduct which is directly inimical to the implementation of some other major sectors of the Constitution.”	10
44. As observed herein not each violation of the Constitution may amount to gross-violation. Consequently, the motion to remove a Governor from office and particulars of the charge must expressly state that the alleged violation is gross and give particulars of the alleged gross violation. We are minded to draw analogy in this Court’s decisions in criminal cases involving robbery with violence where it was stated where the charge against the accused person involves an allegation that the weapon used was offensive and dangerous; the charge sheet must expressly contain the words offensive and dangerous. In the case of <i>George Omondi v R</i> - Criminal Appeal No 5 of 2005, this Court citing the case of <i>Juma v R</i> , (2003) 2 EA 471 stated as follows:	15
“Where the prosecution is relying on the element or ingredient of being armed, it must be stated in the particulars of the charge that the weapon or instrument with which the Appellant was armed was a dangerous or offensive one”.	20
	25
In the instant case, it is our view that if violation of the Constitution is alleged to be gross, the motion and charges against the Governor must expressly indicate the words “gross violation”in the charge and the specific particulars of the alleged gross violation must be given. The rationale for this is that where the violation is not gross, then the removal process under article 181 of the Constitution is not available. In the instant case, the word “gross”was omitted from the charges leveled against the Governor. A Governor is entitled to notice and particulars of the charges facing him and notice as to whether the allegation is merely an allegation of violation of the Constitution or other law or gross violation of the Constitution and other law.	30
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45. Counsel for the Appellant urged this Court to come up with guidelines for determining if the constitutional threshold for removal	

of a Governor has been attained. The High Court in its judgment at paragraph 252 agreed with the persuasive decision of the Nigerian Supreme Court as to what constitutes grave violation or breach of the Constitution. (See case of *Hon Muyiwa Inakoju & others v Hon Abraham Adajolu Adeleke (supra)*). We concur and adopt the following findings of the High Court as part of what constitutes gross violation:-

“253. The question therefore is how to measure what constitutes gross violation. We are of the view, that the standard to be used does not require a mathematical formula, but it must take into account the intendment of article 181(1) of the Constitution. In our view therefore whatever is alleged against a Governor must;

- “a. Be serious, substantial and weighty.
- b. There must be a nexus between the Governor and the alleged gross violations of the Constitution or any other written law.
- c. The charges framed against the Governor and the particulars thereof must disclose a gross violation of the Constitution or any other written law.
- d. The charges as framed must state with degree of precision the Article(s) or even sub-article(s) of the Constitution or the provisions of any other written law that have been alleged to be grossly violated.”

46. We reiterate that what constitutes gross violation of the Constitution is to be determined on a case by case basis. Gross violation of the Constitution includes violation of the values and principles enshrined under article 10 of the Constitution and violation of Chapter six (Leadership & Integrity) of the Constitution; or intentional and/or persistent violation of any article of the Constitution; or intentional and blatant or persistent violation of the provisions of any other law. The rationale for this definition is that the values and principles embodied in the Constitution provide the bedrock and foundation of Kenya’s constitutional system and under article 10(1) these values bind all state organs, state officers, public officers and all persons. We hasten to state that the facts that prove gross violation as defined above must be proved before the relevant constitutional organ. Examples of the constitutional articles whose violation amounts to gross violation include:

- i. Chapter 1 on the Sovereignty of the People and

Supremacy of the Constitution more specifically articles 1, 2, and 3 (2) of the Constitution.	1
ii. Chapter 2- article 4 that establishes Kenya as a sovereign multi-party Republic & article 6 that establishes devolution and access to services.	5
iii. Article 10 on national values and principles of good governance. iv. Chapter 4 on the Bill of Rights.	
v. Chapter 6- Articles 73 to 78 on Leadership and Integrity.	
vi. Chapter 12 - Article 201 on principles of public finance.	10
vii. Chapter 13- Article 232 on values and principles of public service.	
viii. Chapter 14 - Article 238 on principles of national security.	
ix. Article 259 (11) on advice and recommendation.	15
x. Any conduct that comes within the definition of the offence of treason in the Penal Code (cap 63 of the Laws of Kenya).	
Does the High Court have jurisdiction to determine if the Constitutional threshold for removal of a Governor has been proved”	20
47. At paragraphs 218 and 231 of the High Court judgment, the learned Judges correctly stated that the court has jurisdiction to determine whether the impeachment or removal of a Governor was done in accordance with the Constitution; it is not contested that the County Assembly and the Senate are the bodies constitutionally mandated to undertake the process leading to removal of a Governor from office. The appellants contend that the learned Judges of the High Court shied away and misdirected themselves in implementing the provisions of article 181 of the Constitution; that the High Court erred in finding that it is the County Assembly and Senate that are best placed to decide whether there has been a gross violation of the Constitution. It was submitted that it is the function of the High Court to determine whether a gross violation of the Constitution has been proved and it is also for the High Court to determine if any conduct amounts to gross violation; that since the Constitution requires gross violation to be proved, the final verdict as to whether gross violation exists is a determination by the Court not the County Assembly or the Senate.	25 30 35 40
48. The Appellant urged this Court to find that the learned Judges	

erred in law by failing to exercise their constitutional mandate under article 165(3)(iii) and (iv) of the Constitution to determine whether the grounds for removal of the 1st appellant met the constitutional threshold under article 181 of the Constitution. Mr Muite submitted that the High Court properly stated the law at paragraph 207 of the judgment where it is stated that the court cannot exercise restraint where the Constitution has been violated or is threatened with violation; that the appellant was not asking the High Court to conduct his impeachment trial but was asking the court to determine whether his impeachment by the County Assembly and the Senate violated the Constitution and County Governments Act. Counsel submitted that the High Court correctly appreciated the law and facts but erred in applying article 181 of the Constitution to the facts of the case; that the court erred by failing to determine if the threshold for removal of a Governor under article 181 had been proved.

49. The Appellants contend that the High Court erred in misapplying the principle in the case of *Nancy Barasa v Judicial Service Commission & 9 others* Petition No 23 of 2012 where it was held that:

“It is not for this Court or the Commission to find that the allegations made against the Petitioner did not amount to gross misconduct. In fact according to Prof Yash Pal Ghai’s “Kenya Constitution: An instrument for Change” cited by the Petitioner “whether a conduct is gross or not will depend on the matter as exposed by the facts which it is the duty of the tribunal to establish”.

The Appellants submitted that the High Court erred in applying the dicta in the *Nancy Barasa* case and adopting the quote “that it is not for the Court or the Commission to find that the allegations made against the Petitioner did not amount to gross misconduct”. It was submitted that the *Nancy Barasa* case is distinguishable from the present case. That the issue in the *Nancy Barasa* case was whether a *prima facie* case had been established to warrant the Judicial Service Commission to make a recommendation to the President to establish a Tribunal; that in the instant case, the issue was not whether a *prima facie* case had been made but a final decision had been made by the County Assembly and the Senate and for this reason, it was incumbent upon the High Court to make a determination to find out, in exercise of its supervisory jurisdiction, if the charges against the appellant amounted to a gross violation of the Constitution or

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- other written law. 1
50. It is the Appellants' contention that the High Court further
erred in paragraph 246 of the judgment when it stated, "However,
we are aware that Mr Muite did not move this Court to make a
determination on the merit or otherwise of the charges framed
against the 1st Petitioner". Counsel for the Appellant submitted
that it was the duty of the High Court to review the decision of
the County Assembly and the Senate to determine if facts had been
laid to establish if the constitutional threshold for removal of the
Governor had been attained; that the learned Judges erred in failing
to make the determination whether indeed facts had been laid to
prove the threshold for removal of the 1st appellant as Governor. 5 10
51. On our part, we note that article 165(3)(d)(iii) and (iv) of the
Constitution provides the High Court with jurisdiction to hear any
question relating to the interpretation of the Constitution including
the determination of any matter relating to constitutional powers of
state organs in respect of county governments; any matter relating
to the constitutional relationship between the levels of government
and a question relating to conflict of laws under article 165. It is
the appellants' contention that the learned Judges erred in failing
to exercise their mandate under the said article. 15 20
52. In our view, in addition to the supervisory jurisdiction of the High
Court under article 165(6) of the Constitution, the High Court
has a specific constitutional jurisdiction under article 165(3)(d)(ii)
and (iii) of the Constitution. These paragraphs vest upon the High
Court jurisdiction to hear any question on whether anything said
to be done under the authority of the Constitution or any law is
inconsistent with or in contravention of this Constitution; and to
hear and determine any matter relating to constitutional powers of
state organs in respect of county government. It is not contestable
that removal of a Governor from office is a thing done under the
authority of the Constitution and it is the duty of the High Court
to determine if such removal is inconsistent with or in contravention
to the Constitution. 25 30 35
53. It is incumbent upon the High Court to determine if the facts
in support of the charges against a Governor meet and prove the
threshold in article 181 of the Constitution. For example, was the
4th Appellant an employee of the 1st Appellant or of the County
Government" Is a Governor to bear personal vicarious liability 40

for the acts and omissions of officers of the County Government” 1
We are of the view that article 181 and section 33 of the County 2
Governments Act are not ouster clauses that limit or oust the 3
jurisdiction of the High Court as conferred by article 165(3)(d) 4
(ii) and (iii) of the Constitution. Though the process of removal 5
of a governor from office is both a constitutional and a political 6
process, the political question doctrine cannot operate to oust the 7
jurisdiction vested on the High Court to interpret the Constitution 8
or to determine the question if anything said to be done under the 9
authority of the Constitution or of any law is consistent with or in 10
contravention of the Constitution.

Equal Protection under the Law:

54. The Appellant urged this Court to enforce the concept of equal 1
protection of the law between the offices of Governor, Members 2
of the County Assembly and the President. This Court was urged 3
to hold that the constitutionality of the process of removal of a 4
Governor is to be determined by considering the removal or recall 5
process of a member of a County Assembly; a member of either 6
houses of Parliament and the criteria for impeachment of the 7
President under article 145 of the Constitution. It was submitted 8
that the constitutional intendment is that the process of removal 9
of a person elected to the office of Governor should be at par with 10
the removal of the President in article 145(1) of the Constitution. 11

55. We have considered this submission and note that the grounds for 1
removal of a Governor stipulated in article 181 of the Constitution 2
is in *pari materia* with some of the criteria in article 145 of the 3
Constitution for impeachment of the President. In both Articles, 4
one of the criteria for removal of the President or Governor is gross 5
violation of the Constitution or any other law or where there are 6
serious reasons for believing that the office bearer has committed 7
a crime under national or international law or if there is gross 8
misconduct on the part of the office bearer. 9

56. It is a principle of interpretation that provisions in *pari materia* are 1
construed to have the same meaning. We hold that the term “gross 2
violation of the Constitution or any other law” and the meaning of 3
the term “gross misconduct” in articles 145(1)(a) & (c) and 181(1) 4
(a) & (c) of the Constitution is the same. The facts that give rise to 5
invocation of the provisions of the respective Articles may differ but 6
the meaning and import of the terms remain the same. 7

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57. The Appellant in support of the concept of equal protection of the law submitted that under section 27(3) of the County Governments Act, the process of recall of a member of County Assembly shall only be initiated upon a judgment or finding by the High Court confirming the grounds specified in the Act. The Appellant urged this Court to hold that the process of removal of a Governor shall only be constitutional if the grounds set out in article 181 of the Constitution are affirmed by a finding or judgment of the High Court. The Appellant contend that since section 27(3) of the County Governments Act require the grounds of recall of a member of the County Assembly to be confirmed by the High Court, it follows that if the same standard is not applied in the removal of a Governor, this would amount to discriminatory treatment and violation of the equal treatment and equal protection before the law.
58. In *Charles Omanga & another v The Independent Electoral & Boundaries Commission & 2 others* Nairobi Petition No 2 of 2012 it was stated that:-
- “The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position.... Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality”.
59. We are of the view that the office of Governor is different from the office of Member of County Assembly although both are subject to a competitive electoral process. The rule of differentiation is inherent in the doctrine of equality; different treatment of different offices is equality of treatment. Parliament through the County Government Act has prescribed different procedure and threshold for removal of Governors and Members of the County Assembly. In relation to members of the County Assembly, the High Court must confirm the grounds for removal. Whereas this is not the case with Governors, the supervisory jurisdiction of the High Court as well as the High Court’s jurisdiction to interpret the Constitution ensures that a Governor cannot be removed from office if the constitutional procedure has not been followed and the constitutional threshold established and proved. We find that the difference in procedure and grounds for removal of the President, Governor or Member of the County Assembly does not vitiate the constitutional process and threshold that must be fulfilled for each of the distinctive offices.

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60. Finally, in their memorandum of appeal, the Appellants urged this Court to issue orders in terms of prayers (c), (e) and (f) of the Amended Petition dated 7th March, 2014. In these prayers, the Appellant sought declaratory orders that the proceedings before the Embu County Assembly that led to the removal of the 1st Appellant be declared null and void as the said proceedings did not meet the threshold required under article 181 of the Constitution; and that a Governor cannot be removed from office under the principle of collective responsibility.
61. We have considered the appellants prayer as per the memorandum of appeal. A court of law cannot act in vain. The proceedings before the Embu County Assembly and the Senate that led to removal of the 1st Appellant as Governor were declared null and void and quashed by the judgment of the High Court dated 16th April, 2014. No appeal was lodged to challenge the decision of the High Court in declaring the said proceedings to be null and void. We hold that the judgment by the High Court dated 16th April, 2014 on this issue stands.
62. It totality, we find this Appeal has merit and is partly allowed. The final orders of this Court are as follows:
- i. Save as expressly stated in this judgment and as ordered here below, the judgment of the High Court dated 16th April, 2014, is hereby affirmed.
 - ii. We find that the learned Judges did not err in law in holding that the County Assembly and the Senate were best placed to determine whether a motion for the removal of a Governor was in accordance with the Constitution. However, this is subject to the supervisory and interpretation jurisdiction of the High Court under article 165 of the Constitution.
 - iii. We find that the learned Judges erred in law by failing to exercise their constitutional mandate under article 165(3)(d), (ii) and (iii) of the Constitution to determine whether the purported removal of the 1st appellant as Governor was inconsistent with or in contravention of the Constitution.
 - iv. We find that the learned Judges erred in law by failing to exercise the supervisory jurisdiction of the High Court under article 165(6) to determine the specific question whether the constitutional threshold for removal of the

1st Appellant as Governor had been proved and if there was any nexus between the allegations in the motion tabled in the County Assembly and the 1st Appellant.	1
v. The political question doctrine and the concept of separation of powers cannot oust the jurisdiction of courts to interpret the Constitution or to determine the question if anything said to be done under the authority of the Constitution or of any law is consistent with or in contravention of the Constitution as per article 165(3)(d)(iii).	5
vi. What constitutes gross violation of the Constitution is to be determined on a case by case basis. Gross violation of the Constitution includes violation of the values and principles enshrined under article 10 of the Constitution and violation of Chapter Six (Leadership and integrity) of the Constitution; or intentional and/or persistent violation of any Article of the Constitution; or intentional and blatant or persistent violation of the provisions of any other law.	10
vii. The 5th and 6th Respondents shall bear half the costs of this Appeal.	15
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**Cereal Growers Association & another *v* County
Government of Narok & 10 others
[2014] KLR - HCK**

High Court, of Kenya (Constitutional
and Human Rights Division) September 11, 2014
I Lenaola, J

Petition No 385 of 2013 10

Brief facts

The second Respondent was a board member in the 1st Respondents' organization, which was a registered farmers' based organization. The 1st Respondent claimed that they were not satisfied with the mode of legality and use of Agricultural Produce Cess which they had been paying to the Municipal County and City Councils. They petitioned that the 1st to 8th Respondents' actions in levying Agricultural Produce Cess without a legal framework violated provisions of the Constitution under article 210(1). They also claimed that the County Governments violated the Constitution under article 209(5), by charging Agricultural Produce Cess in a discretionary and arbitrary manner. They also sought an advisory opinion to be issued to the Respondents to adopt administrative and legal mechanism on the use of cess.

Issues

- i. Whether the High Court had jurisdiction to give an advisory opinion
- ii. Whether there existed a legal framework for the charging of Agricultural Produce Cess by the Counties
- iii. Whether the County Governments violated their power to impose tax and duty
- iv. Whether there were any provisions in law providing for levying of Agricultural Produce Cess

Constitutional Law – public finance – revenue raising powers and public debt – imposition of taxes – power of the County Government to impose tax – whether the County Government could charge Agricultural Produce Cess – what were the requirements before a County could charge Agricultural Produce Cess – Constitution of Kenya, 2010 articles 209 and 210.

Constitutional Law – Jurisdiction – Advisory opinions – jurisdiction to give advisory opinions – whether the High Court had the right to give advisory opinions as to whether a Claimant could file a Petition for an

advisory opinion in the High Court – Constitution of Kenya, 2010, article 163(6). 1

Held:

1. Jurisdiction is a fundamental issue that has to be resolved at the beginning of the decision. It is the fountain from which the flow of the judicial process originated. According to article 163(6) of the Constitution the jurisdiction to render an advisory opinion was in the exclusive mandate of the Supreme Court. 5
2. The County Government had the power under article 209(3) of the Constitution, to impose entertainment tax and any other tax as authorized by an Act of Parliament. Article 209(4) of the Constitution therefore conferred County Governments with legislative discretionary powers to impose charges for services rendered. Article 210(1) made it clear that no tax could be imposed or waived unless it was provided for by legislation 10 15
3. Agricultural Produce Cess was previously levied under the provisions of section 192A(1) of the Agricultural Act (Repealed). Section 201 of the Local Governments Act then gave the local authorities general powers to make by-laws and it was within that power that the local authorities made by-laws imposing agricultural produce cess. Section 24 of the Interpretation and General Provisions Act provision saved subsidiary legislation issued or made under an Act when that Act was repealed and it was also clear that there was no subsidiary legislation in force as regards the levying of agricultural produce cess. 20 25
4. A tax was to be imposed based on legislation and administered in accordance with a certain legal framework. Tax could not be an administrative decision. It was a legal function and Part 8 of the First Schedule to the Agriculture, Fisheries and Food Authority Act would not be applicable. 30
5. County Governments had powers to raise revenue and they were to continue to raising revenue under the law being in force at the time before the new laws were enacted by the County Government for imposing taxes. Given that the Agriculture Act and the Local Government Act were repealed, it followed that there was no law in place governing taxation of Agricultural Produce Cess and accordingly section 23 of the County Government Public Finance Management Transition Act would not apply. 35 40
6. County Assemblies had the power to enact laws that imposed taxes, but those laws had not been enacted. It was clear that the

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- Nairobi County had the legal framework for imposing taxes and it was irrelevant as to whether the particular item for taxation was mentioned in the Finance Act or not so long as it was previously levied by the defunct Nairobi City Council. 1
7. The 7th Respondent (Nandi County) claimed that it charged the Agricultural Produce Cess based on Legal Notice No 5769 of 2009 Vol CXI No 46. A gazette notice was not a legal framework through which a tax would be levied. It was a medium of communication between the Government and the people and was based on a certain legal decision under a clear law. 5
8. Agricultural produce cess is a tax and being so; it is to be imposed in accordance with the law and anchored in an Act of Parliament or an Act of a County Assembly. To do otherwise would have been in violation of article 209(3) and 210(1) of the Constitution. 10
- A declaration that the 1-8th Respondents in continuing to levy/charge Agricultural Produce Cess or related tax without a supporting legal framework expressly violated the provisions of article 210(1) of the Constitution was issued.* 15
- An order was issued directing the 1-8th Respondents to stop the levying/charging of Agricultural Produce Cess or related tax in their areas of jurisdiction until such time as they would have enacted a supportive legal framework or until they produced evidence of such a legal framework within the next 30 days.* 20
- Each Party ordered to bear its own costs.* 25

Cases

East Africa

1. *Anarita Karimi Njeru v Republic (No 1)* [1976–1980] 1 KLR 1272; [1979] KLR 154 – (Mentioned) 30
2. *Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County Government of Nairobi & 3 others* Petition No 486 of 2013 – (Mentioned)
3. *Okoiti, Okiya Omtatah & another v Attorney General & 3 others* Petition No 593 of 2013 – (Mentioned) 35
4. *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 – (Followed)
5. *In re the Matter of the Interim Independent Electoral Commission* [2011] 2 KLR 32 – (Followed) 40

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<i>East Africa</i>	
1. Constitution of Kenya, 2010 articles 10, 22(1)(2); 163(6); 185(1); 196(1)(b); 209(1)(3)(4)(5); 210(1); 258(2); Sixth Schedule sections 7(1); 15 – (Interpreted)	5
2. County Governments Act, 2012 (Act No 17 of 2012) sections 21, 23; Part XI, section 105(1)(f); 108 – (Interpreted)	
3. County Governments Public Finance Management Transition Act, 2013 (Act No 8 of 2013) sections 22, 23 – (Interpreted)	10
4. Agriculture Act (cap 318) (Repealed) section 192A(1) – (Interpreted)	
5. Agriculture, Fisheries and Food Authority Act, 2013 (Act No 13 of 2013) sections 41, 45; First Schedule Part 8; – (Interpreted)	
6. Interpretation and General Provisions Act (cap 2) section 24 – (Interpreted)	15
7. Nairobi City County Finance Act, 2013 (Act No 2 of 2013) section 22 – (Interpreted)	
8. Nakuru County Finance Act, 2013 (Act No 3 of 2013) - In general (Interpreted)	20
9. Local Government Act (cap 265) (Repealed) section 201 – (Interpreted)	
10. Provisional Collection of Taxes and Duties Act (cap 415) - In general – (Interpreted)	
11. Public Finance Management Act, 2012 (Act No 18 of 2012) - In general – (Interpreted)	25
Advocates	
1. <i>Miss Kamau</i> for the 1 st Respondent	
2. <i>Mr Tanui H/B for Mr Wanyama</i> for the Petitioners	
3. <i>Mr Terer</i> for the 7 th Respondent	30
September 11, 2014, I Lenaola, J delivered the following Judgment	
Introduction	
1. The 1 st Petitioner, the Cereal Growers Association, is a member-based farmers' organization registered in 1996. It claims that it brings together cereal farmers for collective action to ensure sustained improvement of their farming enterprises. It also offers cereal farmers fully functioning business structures and business support services that grow their farming businesses and improve farmers' livelihoods. The 2 nd Petitioner, Hugo Wood, is a Board Member of the 1 st Petitioner and has been engaged in large scale wheat, maize and french beans farming for over 36 years.	35 40

2. The members of the 1st Petitioner through the latter, claim that they are dissatisfied with the mode, legality and use of Agricultural Produce Cess which they have been paying to the Municipal, County and City Councils up to 4th March 2013 and subsequently to the 1st to 8th Respondents. They have thus filed this Petition claiming that the actions of the 1st to 8th Respondents in levying Agricultural Produce Cess and related tax without a supporting legal framework violates the provisions of article 210(1) of the Constitution that provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation.
3. Further, that the County Governments are violating the Constitution to the extent that they are charging Agricultural Produce Cess in a discretionary and arbitrary manner in violation of article 209(5) of the Constitution that requires that taxation and other revenue-raising powers of any County shall not be exercised in a way that prejudices the national economic policies and activities across County boundaries or the national mobility of goods, services, capital or labour.
4. In the Petition dated 25th July 2013, they thus seek the following orders;
 - “(a) A declaration that the actions of the 1-8th Respondents in continuing to levy/charge Agricultural Produce Cess or related tax without a supporting legal framework expressly violates the provisions of article 210(1) of the Constitution that provides that that no tax or licensing fee may be imposed, waived or varied except as provided b legislation.
 - (b) An order directing the 1-8th Respondents to stop the levying/charging of Agricultural Produce Cess or related tax in their areas of jurisdiction until such time as they would have enacted a supportive legal framework.
 - (c) A declaration under the provisions of article 10 of the Constitution that it is mandatory for the 1-8th Respondents to widely consult the public in the process leading to the preparation and enactment of any legal instrument to any form of taxation including the Agricultural Produce Cess.
 - (d) An advisory opinion to be issued to the Respondents to adopt administrative, policy, legal and regulatory mechanisms that will allow the development of legislation

to levy Agricultural Produce Cess in framework of maximum public/stakeholder participation.	1
(e) An advisory opinion to be issued to the Respondents to adopt administrative, policy, legal and regulatory mechanisms that will allow the transparent use of Agricultural Produce Cess. For instance;	5
(i) Procurement of graders to improve County roads should be done in a system that is fair, equitable, transparent, competitive and cost effective.	10
(ii) The mode of collection of Agricultural Produce Cess should be streamlined. Corrupt employees should be fired.	15
(iii) The County Government should continuously engage stakeholders in the sector to give views on how to improve the use of Agricultural Produce Cess.	20
(f) An advisory opinion to be issued to the Respondents to adopt short-term, medium-term and long-term administrative, policy, and legal mechanisms to prevent double-taxation in the levying of Agricultural Produce Cess in accordance with article 209(5) that provides that the taxation and other revenue-raising powers of a County shall not be exercised in a way that prejudices national economic policies, economic activities across County boundaries or the national mobility of goods, services, capital or labour.	25
(g) There be no order as to Costs.”	
The Petitioners’ Case	30
5. The Petitioners claim that Agricultural Produce Cess is a form of tax on the movement of agricultural produce and applies to all farm agricultural produce, livestock and products marketed in all outlets managed by local authorities (now County Governments) and on transit within the Country. That the rate at which and how Agricultural Produce Cess is administered is arbitrary and changes from time to time at the discretion of the respective County Government’s sued in this Petition.	35
6. The Petitioners further claim that the proceeds of Agricultural Produce Cess were initially collected under section 201 of the Local Government Act (Cap 265 Laws of Kenya) as read with section 192A of the Agricultural Act (Cap 318 Laws of Kenya), which had	40

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- empowered local authorities to pass by-laws imposing payments of agricultural produce cess. That following the repeal of the Local Government Act by the County Government Act and the repeal of the Agriculture Act by section 41 of the Agriculture, Fisheries and Food Authority Act of 2013, the new Acts (County Government Act and Agriculture, Fisheries and Food Authority Act) do not contain legal and regulatory provisions that save the taxation regime contained in the Repealed Local Government Act and Agriculture Act. That at the moment therefore there is no legal basis for the levying of Agricultural Produce Cess by County Governments and that article 210 of the Constitution prohibits levying of any tax unless it is provided for by legislation. 1
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7. They also contend that the agricultural sector accounts for 24% of Kenya's Gross Domestic Product (GDP) and accounts for 60% of Kenya's export earnings and 45% of government revenue, and this is even so, despite the many factors that adversely affect the performance of agriculture such as soil fertility, technological advancement, weather etc as well as the legal system and Government policy. On the present legal and regulatory framework for the agricultural sector in Kenya, they claim that it is characterized by *inter alia* existence of outdated laws enacted prior to Independence, existence of many parastatals that play multiple overlapping functions and ambiguous roles, lack of a stable and enabling policy and poor enforcement of rules and regulations governing the sector. 15
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8. That under the provisions of the Fourth Schedule to the Constitution, County Governments have exclusive mandate over agriculture including crop and animal husbandry, livestock sale yards, County abattoirs, and animal disease control and fisheries. It therefore means that County Governments are the center of agricultural development with an enormous duty to create a framework that will transform the agricultural sector into a more commercially oriented and competitive sector capable of attracting and providing higher incomes and employment for citizens. In that regard, the Petitioners argue that County Governments should boost productivity in the agricultural sector by providing smart subsidies which would encourage small scale and indeed all farmers to shift to high yield crop varieties, undertake research and encourage them to adopt new inputs which in the end would focus on building agriculture as the mainstay for the Kenyan economy. 30
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9. They further claim that for Kenya to achieve sustainable agricultural development, it must enact a modern, efficient and harmonized legal and regulatory framework that will facilitate achievement of the desired outcomes and overall economic growth and development. That under article 185(1) of the Constitution the County Assembly exercises the legislative authority of the County Government and therefore makes laws that are necessary and incidental to the exercise of the functions and powers of any County Government in relation to matters specified under the Fourth Schedule to the Constitution, including the levying of agricultural produce cess. Further, that in passing that legislation, County Assemblies should set up proper structures to ensure maximum public participation.

10. The Petitioners thus claim that this court has jurisdiction to determine the constitutionality of the levying of Agricultural Produce Cess and to issue an advisory opinion that will help the National and County Governments adopt short-term, medium-term and long-term regulatory interventions that will streamline the taxation regime in the agricultural sector, particularly the mode of charging, and use of agricultural produce cess. That the orders elsewhere set out above should therefore be granted as prayed.

The Respondents Case

11. The 3rd, 5th, 6th and 8th Respondents did not file any response(s) to the Petition nor did they participate in the proceedings in any way.

1st Respondent's case

12. The 1st Respondent, the County Government of Narok in response to the Petition, filed a Replying Affidavit sworn by Daudi Naisho, the Administrator of the said County Government, on 6th December 2013.

13. Mr. Naisho deponed that the Petitioners do not have the locus standito bring the Petition in a representative capacity on behalf of all farmers in the named Counties as those farmers were not identified by name. Further, that the 2nd Petitioner has filed the Affidavit in support of the Petition without the authority of the 1st Petitioner. He also stated that the Petition is an abuse of the Court process as the matters raised herein do not fall within the scope of article 22(1) of the Constitution. In addition, that the Petition does not satisfy the prerequisites for a Constitutional Petition as the Petitioners have not set forth with any degree of precision the manner in which the Constitution has been infringed.

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14. On prayers (d), (e) and (f) requiring the issuance of advisory opinions, the 1st Petitioner claims that those are matters reserved for the Supreme Court and this Court has no jurisdiction under article 163(6) to issue any such opinion. That an advisory opinion is exclusively reserved for the Supreme Court and is exercised at the request of the National Government, any state organ or any County Government with respect to any matter concerning County Governments. In any event, that the Petitioners have no legal standing to usurp the role of the National Government, state organs or County Government by seeking such advisory opinions. 1
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15. On the issue of levying agricultural produce cess, the 1st Respondent contends that it has been levied so as to generate income to enable the Respondents provide services to residents of their respective Counties and is therefore a lawful undertaking. 15
16. That the Petition as filed contains suggestions and proposals and the Court cannot direct the Legislature or the County Assembly on what laws to make or what should be legislated upon. Further, that taxation matters are in a special category of legal proceedings and cannot be determined by way of a Constitutional Petition. 20
17. The Narok County Government also claimed that the present legal and regulatory framework for the agricultural sector in Kenya does not violate the Petitioner's rights and the issues raised in the Petition should be dealt administratively and are not matters for the Courts. That under article 209(4) of the Constitution, County Governments are conferred discretionary powers to impose charges for services and powers to raise revenue and the Agricultural Produce Cess is a charge for raising revenue and does not in any way prejudice national economic policies as alleged by the Petitioners. That in fact it is not clear whether the Petitioners seek to challenge the constitutionality of levying Agricultural Produce Cess or whether they are seeking to enforce the Agricultural Sector Development Strategy 2010-2020. 25
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18. The 1st Respondent then urged the Court to dismiss the Petition for lack of conclusive evidence to support the Petitioners' contentions since the Court has no evidence to determine the issues raised. That the Petition is in any event meant to pervert the course of justice in favour of an individual, Hugo Wood, and should be dismissed with costs. 35
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The 2 nd Respondent's case	1
19. The 2 nd Respondent, the County Government of Nairobi opposed the Petition through its Grounds of Opposition dated 7 th May 2014 where it also adopted the Affidavit of Daudi Naisho sworn on 6 th December 2013 and the 7 th Respondent Affidavit sworn on 19 th March 2014. It also filed Supplementary Grounds of Opposition dated 16 th June 2014. Its Grounds of Opposition read as follows;	5
(1) That the 2 nd Petitioner (or the Petitioners if at all) has selectively presented to the Court the Laws of Kenya [and] specifically no reference has been made to-	10
a. The County Governments Public Finance Management Transition Act, No 8 of 2013, (section 22).	
b. Nairobi City County Finance Act, No 2 of 2013, (section 22).	15
c. Provisional Collection of Taxes and Duties Act, Cap 415.	
(2) That the 2 nd Petitioner (or the Petitioners if at all) seeks orders not available or flowing from this Court [and] specifically advisory opinions(s).	20
(3) That the 2 nd Petitioner (or the Petitioners if at all) has/ have not demonstrated any authority to institute this action on behalf of Cereal Growers Association members.	
(4) That the Petition by the 2 nd Petitioner (or the Petitioners if at all) is an academic endeavor constructed by subjective opinions, diminutive on legal substance and merit demonstrated by paragraphs 27 to 30, 32 to 35, 42 and 43 of the Petition.	25
(5) That no facts have been provided to demonstrate on the excesses of the taxes imposed on the 2 nd Petitioner (or the Petitioners if at all) amounting to a constitutional breach and warranting the attention of this Court.	30
(6) That no decisive factors have been presented demonstrating that the 2 nd Petitioner (or the Petitioners if at all) have and continue to be adversely exposed to the Cess regime beyond the public, other subject of this tax (including horticulture, cash crop firm, ranchers).	35
(7) That no decisive factors have been presented why the 8 specific Counties out of 47 Counties have been subject to this constitutional action.	40
(8) That the 2 nd Petitioner (or the Petitioners if at all) has	

made wild allegations including alleged corruption without factual or empirical data in support.	1
(9) That in addition to the contents of paragraph 8 above this is not an appropriate forum to determine the matter of alleged corruption.	5
(10) That the Supporting Affidavit and Annextures attached have no nexus to the 2 nd Respondent.	
(11) That the facts proclaimed in the Petition inclined towards a private grievance between the 2 nd Petitioner and the 1 st Respondent and as such the 2 nd Respondent is not a necessary party. And further grounds to be adduced at the hearing.”	10
The 4 th Respondent’s case	
20. The 4 th Respondent, the County Government of Murang’a, opposes the Petition through its Grounds of Opposition dated 12 th March 2014, and they read as follows;	15
“(1) That the Petition is a sham, an abuse of the Court process, misconceived, frivolous and totally devoid of merit.	
(2) That the Petition does not demonstrate any violation of any law by the 4 th Respondent.	20
(3) That the Court does not have jurisdiction to grant the orders sought in the Petition.	
(4) That the Petition is discriminatory and malicious against the 4 th Respondent.	25
(5) That the Petition is speculative, consists of mere generalities and seeks to curtail the provision of services by the devolved units of governance.”	
The 7 th Respondent’s Case	
21. The 7 th Respondent, the County Government of Nandi, in reply to the Petition filed a Replying Affidavit sworn by George Tarus, the County Attorney on 19 th March 2014.	30
22. Mr Tarus deponed that the Cess on agricultural produce helps in raising revenue for the Counties to be used in important infrastructure development projects including roads which in turn benefit farmers. That the levying of Agricultural Produce Cess does not in any way discourage production but promotes general public good and cess levied has never been excessive or punitive.	35
23. He stated that there exist legislative provisions that sanction levying of fees and levies by the County Government and that	40

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- the provisions of the Agriculture, Fisheries and Food Authority Act, 2013, 1st Schedule Part 8, provides that the administrative decisions made by a former institution or made by the Minister before the appointed date have effect as if directed by the Authority or Cabinet Secretary under the Act. Further, that the County Government Act provides for county planning principles under Part XI, section 105(1)(f) which includes effective resource mobilization for sustainable development and that this principle forms the basis for the incorporation and implementation of revenue raising processes including cess collection and other payments. Further, that section 108 of the County Government Act empowers County Governments to develop a County integrated plan which includes a resource mobilization framework and therefore the imposition of cess taxes on agricultural produce is one of the resource mobilization strategies used by the County Governments to ensure adequate resources for the County. He contended that if the levying of cess on agricultural produce is discontinued, then it would have negative effects on the County Government development plan.
24. He also claimed that County Governments have followed the law in levying the cess taxes and that they have not in any way breached the provisions of article 209(5) of the Constitution in levying cess tax as alleged by the Petitioners and the Petition should be dismissed with costs.
- The 9th, 10th and 11th Respondents' Case
25. The 9th, 10th and 11th Respondents filed joint written Submissions dated 14th March 2014. They submitted on the Petition as follows;
26. That subsidiary legislation made under any Act is not repealed by virtue of the repeal of the Act or part of the Act and such subsidiary legislation remains in force unless it is inconsistent with the repealing Act or until it has been repealed by subsidiary legislation issued or made under the provisions of the repealing Act. They thus claimed that the regulations and orders made under the Repealed Agriculture Act on fees and charges including agricultural produce, are still in force as if they had been issued under the Agriculture, Fisheries and Food Authority Act of 2013 and that regulations made under the repealed Local Government Act continue to apply irrespective of the repeal of the said Act.
27. Further, that County Governments are empowered by articles 209 and 210 of the Constitution to impose taxes and charges

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- as revenue raising measures and they may do so under existing
by-laws, directions etc and such by laws are not inconsistent
with articles 209 and 210 of the Constitution or the County
Governments Act. In addition, that by dint section 7(1) of the
Sixth Schedule to the Constitution such by-laws shall be construed
with the alterations, adaptations, qualifications and exceptions as
are necessary to bring them into conformity with the Constitution
and the County Governments Act, 2012 and other legislation on
devolved Government.
28. They also claimed that section 23 of the County Governments
Act and the Public Finance Management Transition Act of 2013
authorize County Governments to impose rates and charges with
necessary modification until a law relating to imposition of rates and
charges is enacted. That the revenue raising measures approved by
the Minister for Local Government continue being in force until the
new budgets of the decentralized units have been approved by the
relevant County Assemblies as provided for in the Public Finance
Management Act.
29. In addition, they submitted that all County Assemblies have
enacted Finance Acts for example the Nairobi County Finance
Act, Kiambu County Finance Act etc providing for revenue raising
measures and the Schedules to these Finance Acts provide for the
items to be taxed and the amounts thereof. Further, the County
Governments have saved the defunct local authorities by-laws on
taxes, duties, rates and charges provided for in the by-laws through
their respective Finance Acts. They gave as an example in that regard,
section 2(2) of the Nairobi City County Finance Act, 2013 and
they also claimed that by the County Governments Finance Acts,
all by-laws, directions, resolutions, orders and authorizations on or
relating to financial management including taxes, fees and charges
issued and given by the local authorities subsisting or valid before
the cessation of the application of the Local Government Act shall
be deemed to have been given or issued under the authority of the
respective County Assemblies.
30. They thus submitted that there was in fact and existing a legal
and statutory basis for levying of cess by the County Governments
and the same was in compliance with articles 209 and 210 of the
Constitution.
31. It was also the submission of the 9th, 10th and 11th Respondents

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- that this Court is not the appropriate forum for determination of the Petition on the matters raised and relating to legislative and policy matters as those are issues best addressed through legislative and executive mechanisms. They claimed therefore that the Court lacks jurisdiction to issue legislative or policy statements/directives on the issues subject of the Petition. Further, that the Constitution at article 10 and article 196(1)(b) provides for public participation of the members of the public in legislative and other business of the County Assemblies, and therefore the Petitioners should, in exercise of their right of public participation, direct their views or opinions to the appropriate authorities dealing with legislative and policy matters. 1 5 10
32. Lastly, it was their contention that this Courts lacks jurisdiction to give the advisory opinions sought by the Petitioners in prayers (d) (e) and (f) of the Petition as it is the Supreme Court that is vested with jurisdiction to give such advisory opinions and on this issue they claimed that the Petitioners lacked the *locus standi* to seek such an advisory opinion as it is only the National Government, State organ or any County Government that may seek such an advisory opinion from the Supreme Court. They therefore urged the Court to dismiss the Petition with costs for the above reasons. 15 20
- Determination
33. It will be recalled that the issue of this Court's jurisdiction was attacked on the basis *inter alia* that this Court cannot issue prayers (d), (e) and (f) of the Petition as they seek advisory opinions on matters concerning County Governments which are matters reserved for the exclusive jurisdiction of the Supreme under article 163(6) of the Constitution and further, that an advisory opinion is exercised at the request of the National Government, any State organ or any County Government with respect to any matter concerning a County Government. 25 30
34. In that regard, and as I understand it, Jurisdiction, in any matter coming up before a Court, is a fundamental issue that must be resolved at the beginning of any decision. It is the fountain from which the flow of the judicial process originates and that position is clear from the words of Nyarangi, JA in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 14. 35 40
35. As to what amounts to an advisory opinion, the Supreme Court in *Re the Matter of the Interim Independent Electoral Commission*,

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- Sup Ct Const Appl No 2 of 2011; stated as follows; 1
- “...we consider that such an opinion, in the context of article 163(6) of the Constitution, means legal advice rendered by the Court to the public body or bodies seeking the same, by virtue of scope created by law. Since such an opinion does not flow from any contest of rights- claims, or claims disposed of by regular process, it does not fall in the class of judgment, or ruling, or order, or decree.” 5
36. The jurisdiction to give an advisory opinion as stated the the Supreme Court above is provided for under article 163(6) of the Constitution which stipulates that; 10
- “The Supreme Court may give an advisory opinion at the request of the National Government, an State organ, or any County Government with respect to any matter concerning County Government.” 15
- Regarding the appropriateness of a question as an advisory opinion, The Supreme Court in *Re the Matter of the Interim Independent Electoral Commission*, (*supra*) stated as follows; 20
- “(1) For a reference to qualify for the Supreme Court’s Advisory-Opinion discretion, it must fall within the four corners of article 163(6): it must be ‘a matter concerning County Government.’ The question as to whether a matter is one ‘concerning County Government’ will be determined by the Court on a case-by-case basis. 25
- (2) The only parties that can make a request for an Advisory Opinion are the National Government, a State organ, or a County Government. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as intervener (interested party) or as *amicus curiae*. 30
- (3) The Court will be hesitant to exercise its discretion to render an Advisory Opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court.... 35
- (4) Where a reference has been made to the Court, the subject matter of which is also pending in a lower Court, the Court may nonetheless render an Advisory Opinion if the Applicant can demonstrate that the issue is of great public importance and requiring urgent resolution through an Advisory Opinion....” 40

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Constitution have been violated. They have in my view set out with some degree of precision how the said provisions have been violated by the named County Governments and Assemblies and elsewhere above, I have summarized their case in that regard. I have seen no arguments regarding any alleged violation of the Bill of Rights and that is all to say in that regard.	1 5
41. Having expressed myself as above, and looking at the Petition again, and as I have stated at the outset, there is only one issue left for determination in respect to prayers (a) and (b); whether a legal framework exists for levying agricultural produce cess, and as a corollary to that issue, whether there is a violation of articles 209 and 210 of the Constitution.	10
42. The Petitioners allege in the Petition that the 1st to 8th Respondents are levying agricultural cess without the requisite legislation granting them powers to do so as the Local Government Act and the Agriculture Act which provided for the levying of Agricultural Produce Cess have since been repealed without saving the provisions that imposed the said cess. They thus claim that the Respondents actions are unconstitutional, illegal and unlawful as they offend the provisions of articles 209(3) and 210(1) of the Constitution.	15 20
43. Article 209(3) of the Constitution provides that a County Government may impose the following taxes; “a. Property rates b. Entertainment taxes, and c. Any other tax that it is authorized to impose by an Act of Parliament”	25
Article 210(1) of the Constitution is to the effect that; “no tax or licensing fee may be imposed waived or varied except as provided by legislation.”	30
44. Looking at the provisions of article 209(3) and 210(1) together, it is clear that a tax, levy or charge can only be charged if it is provided for under the law. In the present Petition, it is not contested by either party that Agricultural Produce Cess was imposed under the Repealed Local Government Act and the Agricultural Act. The question therefore is whether there is any provision in any law presently providing for the levying of agricultural produce cess.	35 40
45. According to the Petitioners, no framework exists for levying the cess but the Respondents contend otherwise. Firstly, under article	

209(4) of the Constitution, County Governments are conferred with discretionary powers to impose charges for services and the Agricultural Produce Cess is a charge levied for purposes of raising such revenue. Secondly, the provisions of the 1 st Schedule Part 8 to the Agriculture, Fisheries and Food Authority Act, 2013 provides that administrative decisions made by a former institution and made by the Minister before the appointed date have effect as if directed by the Authority or Cabinet Secretary under the Act. Thirdly, the County Government Act provides for county planning principles under Part XI of Section 105(1) (f) thereof which includes effective resource mobilization for sustainable development and this principle forms the basis for the incorporation and implementation of revenue raising processes including cess collection and other payments. Fourthly, section 108 of the County Government Act empowers County Governments to have a County integrated plan which includes a resource mobilization framework and the imposition of cess taxes on agricultural produce is one of the resource mobilization strategies used by the County Governments to ensure adequate resources for the County. Further, under section 24 of the Interpretation and General Provisions Act, subsidiary legislation made under any Act is not repealed by virtue of the repeal of the Act or part of the Act. That such subsidiary legislation remains in force unless it is inconsistent with the repealing Act or until it has been repealed by subsidiary legislation issued or made under the provisions of the repealing Act. They thus contend that the regulations and orders made under the Repealed Agriculture Act on fees and charges including agricultural produce are still in force as if they were issued under the Agriculture, Fisheries and Food Authority Act of 2013 and also that the regulations made under the repealed Local Government Act continue to apply irrespective of the repeal of the said Act. Lastly, that section 23 of the County Government Act and the Public Finance Management Transition Act of 2013 authorizes County Governments to impose rates and charges with necessary modification until a law relating to imposition of rates and charges is enacted. In that regard they claimed that the revenue raising measures approved by the Minister for Local Government continue being in force until the new budgets of the decentralized units have been approved by the relevant County Assemblies as provided for in the Public Finance Management Act. To sum up, they claimed that County Governments have in their respective cases enacted County Finance Acts that have provided for the levying of	1 5 10 15 20 25 30 35 40

- agricultural produce cess. 1
46. Weighing the rival arguments and to my mind, it is clear that under article 209(3) of the Constitution, a County Government has powers to impose entertainment tax and any other tax as authorized by an Act of Parliament. Undoubtedly, article 209(4) of the Constitution therefore confers County Governments with legislative discretionary powers to impose charges for services rendered. In my view therefore and reading the provisions of article 209(3) and 209(4) of the Constitution, the County Government may impose an entertainment tax as it is constitutionally provided for but then any other tax or charge that may be imposed by the County Government must be provided for under an existing Act of Parliament. I say so because in my view a charge is a form of tax. *Black's Law Dictionary*, 8th Edition defines the term 'tax' as follows; 5
- "A monetary charge imposed by the government on persons, entities, transactions or property to yield revenue" 10
- Article 210(1) has then made it clear that no tax can be imposed or waived unless it is provided for by legislation. But where then is the legislation providing for levying of agricultural produce cess" 15
47. Agricultural Produce Cess was previously levied under the provisions of section 192A(1) of the Agricultural Act which stated as follows; 20
- "A local authority may, with the consent of the Minister given after consultation with the Minister for the time being responsible for local government, by by-laws impose a cess on any kind of agricultural produce, and may in the by-laws make such incidental provisions as is necessary or expedient, and the cess shall form part of the Local authority's revenue." 25
- Section 201 of the Local Governments Act then gave the local authorities general powers to make by-laws and it is within this power that the local authorities made by-laws imposing agricultural produce cess. 30
48. The two Acts above were repealed post 2010 and regarding by-laws and any subsidiary legislation passed under them, section 24 of the Interpretation and General Provisions Act, provides as follows; 35
- "when an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not 40

inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder". 1

As can be seen this provision saves subsidiary legislation issued or made under an Act when that Act is repealed and it is also clear that there is no subsidiary legislation in force as regards the levying of agricultural produce cess. I say so because the Agricultural Produce Cess as can be seen above is levied under the provisions of section 192A(1) of the Agricultural Act (which has since been repealed). I have combed the Agricultural Act and there is indeed no subsidiary legislation reproduced therein in regard to agricultural produce cess. Indeed the Schedule to the subsidiary legislation is in certain terms that it does not reproduce the by-laws made under section 192A(1). That being the case, I must now examine the current legal framework to determine whether there is any law providing for imposition of agricultural produce cess. 5 10 15

49. The starting point would be the provisions of the 1st Schedule Part of Agriculture, Fisheries and Food Authority Act 2013. The preamble to this Act states as follows; 20

“An Act of Parliament to provide for the consolidation of the laws on the regulation and promotion of agriculture generally, to provide for the establishment of the Agriculture, Fisheries and Food Authority, to make provision for the respective roles of the national and county governments in agriculture excluding livestock and related matters in furtherance of the relevant provisions of the Fourth Schedule to the Constitution and for connected purposes” 25 30

The Act came into force on 17th January 2014. section 45 thereof repealed the Agriculture Act (Cap 318 Laws of Kenya).

50. The Respondents contend that the First Schedule and Part 8 of the Agriculture, Fisheries and Food Authority Act saves the administrative decisions made by a former institution and made by the Minister under the Repealed Agriculture Act before the new Act and such decisions have the effect as if directed by the Authority or Cabinet Secretary under this Act. For avoidance of doubt this Section provides as follows; 35 40

“The administrative decisions made by a former institution or by the Minister which are in force immediately before

the appointed day shall, on or after such day, have force as if they were directions made by the Authority or the Cabinet Secretary under this Act.”	1
51. I have already stated elsewhere above that a tax must be imposed based on legislation and administered in accordance with a certain legal framework and to my mind therefore, tax cannot be an administrative decision. It is a legal function and Part 8 of the First Schedule to the Agriculture, Fisheries and Food Authority would thus not be applicable in the circumstances.	5 10
52. I must now then consider the import of the provisions of section 23 of the County Government Public Finance Management Transition Act No 8 of 2013 which provides that; “For avoidance of doubt, until a new law relating to imposition of rates and charges is enacted, County Governments, urban areas and cities may, with necessary modifications, continue to impose rates and charges under the law for the time being in force in relation thereto.”	15
53. The County Government Public Finance Management Transition Act was enacted pursuant to the provisions of section 15 of the Sixth Schedule to the Constitution which makes provision for devolution of functions from the National Government to County Government. The Preamble to this Act states that it is; “An Act of Parliament to provide for, pursuant to section 15 of the Sixth Schedule of the Constitution, a framework for establishment and functions of Transition County Treasuries; the transition county budget process; transition revenue raising measures and expenditures for county governments; responsibilities of transition county accounting officers and receivers of revenue and for connected purposes”	20 25 30
54. It is therefore clear from the above that County Governments have powers to raise revenue and in that regard, they will also continue to raise revenue under the law being in force at the time before the new laws are enacted by the County Government for imposing taxes. This then takes me back to where I began; was there any law governing the imposition of Agricultural Produce Cess at the commencement date of the Act i e 25 th January 2013” Given that the Agriculture Act and the Local Government Act were repealed, it simply follows that there was no law in place governing taxation of Agricultural Produce Cess and accordingly section 23 of the	35 40

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- County Government Public Finance Management Transition Act would not apply. 1
55. Having expressed myself as above, I now turn to consider the arguments made under the County Governments Act; that section 23 of the County Government Act authorizes County Governments to impose rates and charges. I have in that regard looked at the provisions of section 23 of the County Government Act and that section does not deal with the issue of powers of the County Governments to impose taxes but has made a provision for publication of a Bill in the Kenya Gazette. The County Government Act at section 21 is the one that deals with the legislative powers of the County Assemblies. The Section states as follows; 5
- “21(1) A County Assembly shall exercise its legislative power through Bills passed by the County Assembly and assented to by the governor. 15
- (2) A Bill may be introduced by any member or committee of the County Assembly, but a money Bill may be introduced only in accordance with sub-section (4). 20
- 56(3) In the case of a Money Bill, the County Assembly may proceed only in accordance with the recommendation of the relevant committee of the County Assembly after taking into account the views of the County executive committee member responsible for finance. 25
- (4) For the purposes of this Act, “Money Bill” means a Bill that contains provisions dealing with— 30
- (a) taxes;
- (b) the imposition of charges on a public fund or the variation or repeal of any of those charges;
- (c) the appropriation, receipt, custody, investment or issue of public money;
- (d) the raising or guaranteeing of any loan or its repayment; or
- (e) matters incidental to any of those matters.” 35
57. It is thus clear that County Assemblies have powers to enact laws imposing taxes. But where is the law enacted and imposing Agriculture Produce Cess” The 9th, 10th and 11th Respondents submitted that the County Governments have enacted Finance Acts e.g the Nairobi County Finance Act, Kiambu County Finance Act which provide for revenue raising measures and have saved the defunct local authorities by-laws on taxes, duties, rates and charges 40

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- provided for in the by-laws through their respective Finance Acts. 1
58. It is instructive to note that none of the 1st to 8th Respondents availed
their Finance Acts to the Court for scrutiny on the issue whether
they have imposed tax on agricultural produce or not. The answer 5
by the 9th, 10th and 11th Respondents that County Governments
Act has enacted Finance Acts which impose Agricultural Produce
Cess was general and not one provision was even tabled in Court in
that regard. But I also note that I was referred to the provisions of
section 2(2) of the Nairobi City County Finance Act 2013 which 10
has made provisions for levying of taxes. This Section states that;
“2(2) For the greater certainty, the taxes, fees
and charges applicable and payable to the
government of the City County of Nairobi at
the commencement of this Act, but which are 15
not included in the Schedule to this Act, shall
continue to apply under the existing by-laws of
the defunct City Council of Nairobi until such
by laws are specifically repealed or replaced by 20
county legislation”.
- It is therefore clear that the Nairobi County has the legal framework
for imposing taxes and it is irrelevant as to whether the particular
item for taxation is mentioned in the Finance Act or not so long
as it was previously levied by the defunct Nairobi City Council. 25
59. The above being case with Nairobi County, I do not know the
situation with the other Respondents. I am not even sure that they
have enacted their respective Finance Acts. My independent research
on that issue however led me to the Nakuru County Finance Act 30
No 3 of 2013 but I do not know the situation as it regards the 1st,
3rd, 4th, 5th, 6th and 7th Respondent save that the 7th Respondent
claimed that it charges the Agricultural Produce Cess based on
Legal Notice No 5769 of 2009 Vol CXI No 46 which came into
effect on 1st July 2009. I have seen the said Gazette Notice and my 35
thoughts on it are clear; A Gazette notice is not a legal framework
through which a tax would be levied. It is at the very least a medium
of communication between the Government and the people and
must be based on a certain legal decision under a clear law. That is
all to say in that regard. 40

Conclusion

60. It is against the above background that I find that agriculture

produce cess is a tax and being so, it must be imposed in accordance with law and must be anchored in an Act of Parliament or an Act of a County Assembly. To do otherwise would be in violation of article 209(3) and 210(1) of the Constitution and I so find.

61. But I must state in passing and I am generally in agreement with the Respondents that this Court cannot direct the 1st – 8th Respondents County Assemblies on how to exercise their mandate of levying agriculture produce cess and how to administer the same. In their wisdom as the law making bodies of each County, they must legislate having taken into consideration public views, their policies as well as the revenue intended to be raised. It is not the place of this Court to direct them on how to carry out any of those administrative or legislative functions - See *Nairobi Metropolitan PSV Saccos Union Ltd & 25 others v Nairobi County Government & 3 others* Petition No 486 of 2013 and *Okiya Omtatah Okoiti & another v Attorney General & 3 others* Petition No 593 of 2013.

62. Looking at the Petition again, and as I have stated elsewhere above, I have no evidence on the situation with regard to the direct imposition of agricultural cess with the other Counties save for Nairobi City County which has a general provision with regard to taxes. The responses to that extent were general, unhelpful and unclear. In that context therefore and in the interests of justice. The appropriate reliefs in the specific circumstances of this Petition are as follows;

“(a) A declaration that unless there is a specific legal framework on the subject of the levying of agricultural produce cess, the actions of the 1-8th Respondents in continuing to levy/charge Agricultural Produce Cess or related tax without a supporting legal framework expressly violates the provisions of article 210(1) of the Constitution that provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation.

(b) An order is hereby issued directing the 1-8th Respondents to stop the levying/charging of Agricultural Produce Cess or related tax in their areas of jurisdiction until such time as they would have enacted a supportive legal framework or until they produce evidence of such a legal framework within the next 30 days.

(d) The issues raised in the Petition would necessitate that although the Petitioners have partly succeeded, each Party

should bear its own costs.	1
(e) Mention on a dated fixed by this Court to enable the 1 st , 2 nd , 3 rd , 4 th , 5 th , 6 th , 7 th and 8 th Respondents comply with order (b)above and for further directions.	
(f) Each Party at liberty to apply.”	5

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Okoit & another *v* Attorney General & 6 others [2014] KLR – HCK

High Court, at Nairobi (Constitutional and
Human Rights Division)
I Lenaola J

August 6, 2014

Petition No 593 of 2013

Brief facts

The Petitioners sought an interpretation of the terms ‘national referral health facilities’ and ‘county health facilities’. They claimed that the Respondents had wrongly interpreted the two terms. They explained that the proper interpretation would be that national health referral facilities would not only include Kenyatta National Hospital and Moi Teaching and Referral Hospital but would also include all public hospitals from Level 2 to Level 6 as designated by the Ministry of Health. They further elaborated that county health facilities and pharmacies would refer to health facilities previously managed by local authorities or which Counties would reasonably be expected to establish.

In opposition to the Petition issues concerning the Court’s jurisdiction to hear the Petition and the Court’s capacity to adjudicate on the complex issue of healthcare provision were raised. On jurisdiction, it was contended that the matter was *res judicata* as it concerned issues that had been raised and decided on in a concluded suit (JR No 317 of 2013) and that even if it had jurisdiction, the dispute was not ripe for determination as the dispute resolution mechanism established under the Constitution and the Intergovernmental Relations Act had not been exhausted.

Issues

- i. Meaning and essence of the doctrine of *res judicata*.
- ii. Whether there was a dispute as envisaged in the context of section 33 of the Intergovernmental Relations Act and whether the Petition fell within the category.
- iii. Meaning and interpretation of the words “national referral health facilities” in Part I of the Fourth Schedule to the Constitution and the words “County health facilities and pharmacies” in Part 2 section 2(a) of the Fourth Schedule to the Constitution.

Constitutional Law – devolved system of government – National

Governments – vis-vis County Government – distribution of functions between the National Government and County Governments – provision of healthcare facilities – provision of healthcare facilities by the National Government and the County Government – meaning of ‘national referral health facilities’ and ‘county health facilities’ – Constitution of Kenya 2010, Part 1 & Part 2 of the Fourth Schedule to the Constitution. 1
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Civil Practice and Procedure – *res judicata* – circumstances in which the plea of *res judicata* could be raised – requirements for similar parties and similar issues in raising the plea of *res judicata*. 10

Jurisdiction – intergovernmental disputes – jurisdiction to determine intergovernmental disputes – meaning of intergovernmental disputes – whether a matter raised by private citizens could constitute an intergovernmental dispute – Constitution of Kenya 2010, articles 6, 165(3)(d) & 189; Intergovernmental Relations Act, No 2 of 2012, section 30. 15

Held:

1. For *res judicata* to be invoked in a civil matter, the issue in a current suit ought to have been decided by a competent court. Secondly, the matter in dispute in the former suit between the parties ought to be directly or substantially in dispute between the parties in the suit where the doctrine was pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title. It therefore followed that the essence of the doctrine of *res judicata* was to bring an end to litigation and a party ought not be vexed twice over the same cause. 20
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2. In the instant Petition, the 3rd Interested Party (The Kenya Medical Practitioners, Pharmacists and Dentists Union), the 1st Interested Party, (The Kenya National Union of Nurses together with The Kenya Health Professionals Society) were the *ex parte* Applicants while the Respondents herein were the Respondents in the concluded suit. Therefore, the parties were not quite the same as in the instant Petition because the Petitioners were different. The first hurdle had therefore been passed. Further, the Petition did not raise the same matters that were raised in the concluded suit and the principle of *res judicata* could not therefore be invoked. 30
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5. The legislation contemplated in article 189(4) of the Constitution had already been enacted i.e the Intergovernmental Relations Act, which had established institutions and set out mechanisms of resolution of intergovernmental disputes. The Act was 40

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- intended *inter-alia* to establish mechanisms for the resolution of intergovernmental disputes pursuant to the provisions of articles 6 and 189 of the Constitution. The dispute resolution mechanisms were then specifically established under sections 30 to 35 of that Act. Section 30 stipulated as to when a dispute could be said to have arisen between the two levels of Government. 1
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6. The reasoning behind the above enactment was not hard to find; that alternative dispute resolution mechanisms should be sought in the first instance so as not to strain the relationship between the National Government and the County Governments and in the case of counties, among themselves. Article 6 of the Constitution had therefore mandated the two levels of Government to conduct their mutual relations on the basis of consultation and co-operation. Section 31 had indeed provided for the measures to be undertaken in dispute resolution. 10
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7. It was clear that the first step to have a dispute resolved amicably was the formal declaration of the dispute by the parties to it. The parties, subject of the dispute, were either the two levels of government (National and County) or amongst counties themselves. The Petitioners did not fall within the category. 20
8. The dispute could not be resolved through recourse to the intergovernmental dispute resolution principles as contemplated in article 189 of the Constitution and the Intergovernmental Relations Act. There was no dispute as between the National and County Governments. In fact, the County Governments were in agreement with the impugned Legal Notices issued by the Transition Authority. Accordingly, no dispute could be said to exist as between the two levels of Government to warrant the Court to invoke the dispute resolution mechanisms contemplated under sections 30-35 of the Intergovernmental Relations Act. The intention of the Legislature was not to bring any issue, real or perceived, as a dispute by any person other than the two levels of Government or as between counties, within the purview of the dispute resolution mechanisms under the Intergovernmental Relations Act. 25
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9. It was necessary to get the exact conception of the aim, scope and aspect of the whole Act in order to arrive at the meaning of the provision of an Act. In the instant Petition, since no government had filed any dispute, the position taken by the *Amicus Curiae* was untenable, attractive as it sounded. 40
10. The Petitioners had invited the High Court to address a specific problem caused by what they considered as the wrong interpretation

of the words ‘national referral health facilities’ in Part 1 of the fourth schedule to the Constitution and the words ‘county health facilities and pharmacies’ in Part 2, section 2(a) of the fourth schedule to the Constitution. It was therefore clear that the Petitioners had invoked the jurisdiction of the High Court to interpret the Constitution as provided under article 165(3)(d) of the Constitution. To find that the High Court had no jurisdiction to entertain that issue, would leave the Petitioners without an avenue to ventilate their grievances and in any event, article 258(1) of the Constitution also granted the Petitioners the right to institute this Petition.

12. The argument by the Petitioners that the government should have been guided by the definition of national referral system by WHO and as regards the County Health Facilities, which include 'county health facilities and pharmacies', were facilities which were established and previously managed by local authorities and which offered primary healthcare could not suffice and because the Local Government Act had been repealed and the Constitution had created a new governance structure between the two levels of Government. The fourth and the sixth Schedules to the Constitution dealt with the distribution of functions between the National Government and the County Governments and transition provisions, respectively. The Petitioners ought therefore to understand and know that devolution had brought in a new structure of governance and it could not be compared with the Local Authorities system as it was known under the repealed Constitution. County Governments under the Constitution of Kenya, 2010 had been elevated to the level of semi-autonomous Governments but inter-dependent with the National Government.

13. Looking at the provisions of Part 1 section 23 of the fourth schedule to the Constitution, national referral health facilities were without doubt the function of National Government and there was no contest about that issue. Part 2 section 2 of the fourth schedule on the other hand dealt with county health services and states as much.

14. According to the provisions of the fourth schedule, and the entire Constitution as well as the statutes on devolution, nowhere were the words 'national referral health facilities' and 'County health facilities' been defined'. Nowhere was it mentioned which health facilities belonged to Level 1, Level 2, Level 3, Level 4, Level 5 and Level 6 so as to say that they specifically belonged either to the national referral health system or county health system. To that extent therefore, the classification of the hospitals into levels and

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- eventually into national referral health facilities or national health system and county health facilities and system, was a policy issue to be determined in accordance with the provisions of section 15 of the sixth schedule which established guidelines for the devolution of functions to be made by an Act of Parliament. The provision required no more than a literal interpretation and in addition, the Court's jurisdiction was limited to interpretation of the law and did not include either the enactment of policy or the law as that was the mandate of parliament for national legislation and county assemblies for county legislation as well as the national and county executives in the case of policies. 1
16. The policy governing the classification of the health facilities into Levels was contained in the Ministry of Health, "National Health Sector Strategic Plan 1999-2004" and "Reversing the Trends, The Second National Health Sector Strategic Plan 2005-2010" and even with devolution, the policy in that document had remained the same; that of hierarchy of hospitals with Kenyatta National Hospital at the apex. The 2005-2010 Strategic Plan classified health facilities on the basis of levels of care at various levels. 5
17. The 2005-2010 policy was not based on any geographical zoning, but the level of service that each facility was providing. Indeed the Attorney General also confirmed that per the 2005-2010 policy, it would be incorrect to state that level 1 facilities were the only county health facilities and the rest of the facilities were national referral health facilities and that as contemplated under section 23 of the fourth schedule to the Constitution, the referral system in Kenya had always included national referral hospitals (Kenyatta and Moi), as well as provincial and district hospitals. To that end therefore, the national referral facilities ought to only refer to Kenyatta National Hospital and Moi Teaching and Referral Hospital. 10
18. The Constitution had not classified the health facilities into certain levels, as that was a matter of policy. The Court was not the maker of the health policy in Kenya and had no ability or mechanism to determine the criteria to be used to categorize hospitals. It did not have the capacity to examine the equipment, facilities and manpower available in the hospitals, as that was the exclusive mandate of the National Government through the Executive. The High Court could not determine the issues raised as it would have amounted to implementing and making policies for and on behalf of the Executive. To paraphrase that finding, the Court would be stepping into the mandate of the Executive state organs and agencies. 15
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- Petition dismissed.*

East Africa

1. *Ayuma, Satrose & 11 others v Attorney General & 3 others* Petition No 65 of 2010 – (Distinguished) 35
2. *Federation of Women Lawyers Kenya (FIDA) & 5 others v Attorney General & another* Petition No 102 of 2011 – (Mentioned)
3. *Karia & another v Attorney General & others* [2005] 1 EA 83 – (Mentioned) 40
4. *Kimutai v Lenyongopeta & 2 others* [2005] 2 KLR 317 – (Followed)
5. *Mburu, Kinyua v Gachini Tuti* [1976-80] 1 KLR 790; [1978] KLR

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69 – (Mentioned)	1
6. <i>Kiprop, Arap Biegon v John Arap Bii & another</i> Civil Suit No 38 of 2003 – (Mentioned)	
7. <i>Kuya, Moses Tompu & 5 others v Attorney General & 2 others</i> Petition No 65 of 2008 – (Mentioned)	5
8. <i>Law Society of Kenya v Transition Authority & 2 others</i> Petition No 190 of 2013 – (Mentioned)	
9. <i>Mombasa Maize Limited v Hassan Sura Dele & another</i> Civil Appeal No 37 of 2012 – (Mentioned)	
10. <i>Mukweluine, Dickson v Attorney General & 4 others</i> Petition No 390 of 2012 – (Followed)	10
11. <i>Nabori & 9 others v Attorney General</i> [2007] 2 KLR 331 – (Mentioned)	
12. <i>Narok County Council v Trans Mara County Council & another</i> Civil Appeal No 25 of 2000 – (Explained)	15
13. <i>Ndiema, John Kilei & 26 others v Matasi Cooperative Society Ltd</i> Civil Case No 59 of 2012 – (Mentioned)	
14. <i>Nyarangi & 3 others v Attorney General</i> [2008] KLR 688 – (Mentioned)	20
15. <i>Omondi v National Bank of Kenya Ltd & others</i> [2001] EA 177 – (Mentioned)	
16. <i>Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd</i> [1989] KLR 1 – (Mentioned)	
17. <i>Republic v Minister for Agriculture & 16 others</i> Judicial Review Miscellaneous Application No 78 of 2012 – (Mentioned)	25
18. <i>RM (a Minor) & 3 others v Attorney General</i> [2006] 2 KLR 697; (2008) 1 KLR (G&F) 574 – (Mentioned)	
19. <i>Speaker of National Assembly v Karume</i> [1992] KLR 22; (2008) 1 KLR (EP) 425 – (Explained)	30
20. <i>Thuo, Edwin v Attorney General & another</i> Petition No 212 of 2012 – (Mentioned)	
21. <i>Shariff, Towhida Awo & 2 others v Registrar of Titles & 4 others</i> Constitutional Petition No 302 of 2011 – (Mentioned)	
22. <i>Uhuru Highway Development Ltd v Central Bank of Kenya & 2 others</i> Civil Appeal No 36 of 1996 – (Mentioned)	35
South Africa	
1. <i>Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000 (Liquor Bill Case)</i> [1999] ZACC 15; 2000(1) BCLR 1 – (Mentioned)	40
2. <i>National Gambling Board v Premier of Kwazulu Natal & others</i> [2001] ZACC 8; 2002 (2) BCLR 156; 2002 (2) SA 715 – (Mentioned)	

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3. <i>Prinsloo v Van der Linde and another</i> [1997] ZACC 5; 1997 (6) BCLR 759; 1997 (3) SA 1012 – (Mentioned)	1

United Kingdom

1. <i>Chokolingo v Attorney General of Trinidad and Tobago</i> [1981] 1 WLR 106; [1981] 1 All ER 244 – (Mentioned)	5
2. <i>Henderson v Henderson</i> (1843-60) All ER 378 – (Followed)	

Statutes

East Africa

1. Civil Procedure Act (cap 21) section 7 – (Interpreted)	
2. Constitution of Kenya, 2010 articles 6(1)(2); 6(3); 10(2); 27; 43(1) (a); 45(a); 62(1)(b); 62(2)(b); 93; 165(3)(d); 174 (h); 175; 185(2); 186; 186(1); 187; 189(1)(2)(4); 190(1)(3); 235; 258(1); Fourth Schedule Part 1 sections 1-14,23,28; Part 2 sections 2,2(a); Sixth Schedule section 15 – (Interpreted)	10
3. County Governments Act, 2012 (Act No 17 of 2012) sections 21,5(2)(e); 58; 59; 121 – (Interpreted)	15
4. Intergovernmental Relations Act, 2012 (Act No 2 of 2012) sections 24, 28; 30-35 – (Interpreted)	
5. Local Government Act (cap 265) (Repealed) sections 145(i); 160; 167 – (Interpreted)	20
6. National Government Co-ordination Act, 2013 (Act No 1 of 2013) section 21 – (Interpreted)	
7. Transition to Devolved Government Act, 2012 (Act No 1 of 2012) sections 7,21,23,24,35(2)– (Interpreted)	25

Advocates

1. <i>Mr Wanyama</i> for 3rd Respondent	
2. <i>Miss Omuko</i> for 2nd Interested Party	
3. <i>Mr Wanyoike</i> for <i>Amicus Curiae</i>	30

August 6, 2014, **I Lenaola, J** delivered the following Judgment.

Introduction

1. The Petitioners, Okiya Omtatah Okoti and Nyakina Wyclife Gisembe in their Petition dated 18th December 2013, describe themselves as law-abiding citizens of Kenya, public spirited individuals and human rights defenders. They are also members of Kenyans for Justice and Development Trust, a legal trust incorporated in Kenya and said to be founded on republican principles and set up with the purpose of promoting democratic governance, economic development and prosperity.	35
2. They have filed this Petition seeking <i>inter alia</i> an interpretation of	40

section 23, Part 1 of the Fourth schedule to the Constitution and
section 2, Part 2 of fourth schedule to the Constitution 2010 as
regards the meaning of the words “national referral health facilities”
and “County health facilities”. They particularly claim that the
Respondents as well as the 2nd Interested Party, have given the
wrong interpretation to the words “national referral health facilities”
in section 23, Part 1 of the Fourth schedule and the words “county
health facilities and pharmacies” in section 2(a), Part 2 of the Fourth
schedule to the Constitution. According to the Petitioners, the words
“national health referral facilities” do not mean only the Kenyatta
National Hospital and Moi Teaching and Referral Hospital, but
mean all public hospitals from Level 2 to Level 6, as designated
by the Ministry of Health. Further, that the words” county health
facilities and pharmacies” refer to health facilities previously
managed by local authorities, or which presently, Counties may
and are reasonably expected to establish.

3. The Petitioners are therefore seeking the following declarations
and orders;

- a. That this Court gives a declaration that the national
referral health facilities existing before the effective date
and referred to in Part 1 section 23 of the Fourth schedule
to the Constitution were not devolved to the County
Governments, and remain a core function of the National
Government.
- b. That this Court gives a declaration that the words
“national referral health facilities” in Part 1 section 23 of
the Fourth Schedule to the Constitution refer to the Level
2, Level 3, Level 4, Level 5, and Level 6 health facilities
belonging to the National Government.
- c. That this Court gives a declaration that the words “County
health service”, including, in particular- (a) “county health
facilities and pharmacies” in Part 2 section 2(a) of the
Fourth Schedule to the Constitution refer to primary
health services inherited from local authorities and those
to be established by County Governments.
- d. That this Court declares that the WHO’s definition of a
national health referral system is applicable to Kenya.
- e. That this Court declares that for purposes of article 6(3) of
the Constitution, the National Government must operate
national referral health facilities within the boundaries of

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any and all counties.	1
f. That this Court gives a declaration that each County Government ought to establish community of Level 1 (i.e., entry point or initiating) facilities in their counties to enhance the provision of primary health care in the counties.	5
g. That this Court gives a declaration that county governors and County Governments do not have the capacity to hire and/or fire workers in Level 2, Level 3, Level 4, Level 5 and Level 6 national referral health facilities.	10
h. That this Court gives an order ordering the 2 nd and 3 rd Respondents to keep off and stop interfering with the national referral health facilities.	
i. That this Court gives an order ordering the 1 st Respondent not to dismantle the national referral health system and hand its facilities and human resources over to any third parties, including the 2 nd and 3 rd Respondents.	15
j. That the Court do issue an order quashing all the legal notices, including Legal Notice Nos. 137 to 182 of 2013, dated 9 th August 2013, purportedly devolving Level 2, Level 3, Level 4 and Level 5 national referral health facilities to County Governments issued by the 3 rd Respondent.	20
k. That the Court be pleased to issue a permanent order of Prohibition prohibiting the 1 st , 2 nd and 3 rd Respondents, whether by themselves, or any of their employees or agents or any person claiming to act under their authority from proceeding to give effect, in any way whatsoever to the unconstitutional transfer of Level 2, Level 3, Level 4 and Level 5 national referral health facilities from the National Government to County Governments.	25 30
l. That this Court gives an order directing the 1 st Respondent that, when Hon. Attorney General drafts the Bill for Parliament to enact legislation regarding national referral health facilities are protected.	35
m. That this Court gives any other orders required to advance the cause of justice in this case.	
n. That the costs of this Petition be borne jointly and severally by the Respondents.”	40

Factual Background	1
4. The factual background to the dispute, if at all, leading to this Petition can be traced to Legal Notice No 137 of 2013 published in the Kenya Gazette Supplement No 116 on 9 th August 2013 by the 2 nd Respondent. The Transition Authority where in it gave notice of transfer of certain functions from the National Government to the County Government pursuant to the provisions of section 15 of the sixth schedule to the Constitution as read with sections 23 and 24 of the Transition to Devolved Government Act, 2012 and in furtherance to Legal Notice No 16 of 2013. In that Gazette Notice it stated as follows with regard to health services;	5
“Legal Notice No 137 of 2013	
The Constitution of Kenya	15
The Transition to Devolved Government Act, 2012 (No 1 of 2012)	
Transfer of Functions	
Pursuant to section 15 of the sixth schedule to the Constitution as read with sections 23 and 24 of the Transition to Devolved Governments Act, 2012 and further to the Legal Notice No16 of 2013, the Transition Authority approves the transfer of the functions specified in the Schedule to the County Government of Baringo, with effect from the 9 th August, 2013.	20
Provided that the responsibility for the personnel emoluments related to the discharge of the devolved functions shall be managed by the National Government for a period not exceeding six months or as shall be agreed upon between the two levels of government, whichever comes first.	25
1. ...	30
2. County health services	
(a) county health facilities and pharmacies including-	35
(i) county health facilities including county and sub-county hospitals, rural health centres, dispensaries, rural health training and demonstration centres, rehabilitation and maintenance of county health facilities including maintenance of vehicles, medical equipment and machinery, inspection and licensing of medical	40

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premises including reporting.	1
(ii) county health pharmacies including specifications, quantification, storage, distribution, dispensing and rational use of medical commodities:	
Provide that until alternative intergovernmental arrangements are made, all counties shall procure medical commodities from the Kenya Medical Supplies Authority except where a particular commodity required by a County Government is not available at the Kenya Medical Supplies Authority;	5
(b) ambulance services including emergency response and patient referral system;	
(c) promotion of primary health care including health education, health promotion, community health services, reproductive health, child health, tuberculosis, HIV, malaria, school health program, environmental health, maternal health care, immunization, disease surveillance, outreach services, referral, nutrition, occupation safety, food and water quality and safety, disease screening, hygiene and sanitation, disease prevention and control, ophthalmic services, clinical services, rehabilitation, mental health, laboratory services, oral health, disaster preparedness and disease outbreak services. planning and monitoring, health information system (data collection, collation, analysis and reporting), supportive supervision, patient and health facility records and inventories;	10
(d) licensing and control of undertakings that sell food to the public including food safety and control;	15
(e) veterinary services to carry out, coordinate and oversee veterinary services including clinical services, artificial insemination, and reproductive health management; but excluding regulation of the profession; and;	20
(f) enforcement of waste management policies, standards and regulations; in particular –	25
(i) refuse removal (garbage) including, provision of waste collection bins, segregation of waste at source, licensing of waste transportation;	30
(ii) refuse dumps including zoning waste operation	35
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areas, conducting environmental impact assessment for the siting of dumps, fencing of dumps, controlling fires, monitoring waste characteristics and monitoring of waste water from the dumpsite (leachate); and	1
(iii) solid waste disposal including enforcement of national waste management policies, standards and laws with respect to landfilling, incineration with energy recovery, compositing, recycling and operation for transfer stations”	5
It is the above Gazette Notice as read with Part 1, section 23 and Part 2, Section 2(a) of the Fourth Schedule that triggered the present Petition.	10
The Petitioners’ Case	15
5. The Petitioners submitted that the Respondents have given the wrong interpretation to the words “national referral facilities” in section 23 of Part 1 of the fourth schedule to the Constitution and to the words “County health facilities and pharmacies” in part 2, section 2(a) of the fourth schedule to the Constitution. The Petitioners contend as earlier stated, that the words ‘national referral health facilities’ do not mean only Kenyatta National Hospital (hereinafter KNH) and Moi Teaching and Referral Hospital (hereinafter MTRH) or any other hospital selected by whatever criteria, but the words mean the totality of the nationwide network comprising all public health facilities operated by the Ministry of Health, including; dispensaries, health centers, primary, secondary and tertiary hospitals classified as Level 2, Level 3, Level 4, Level 5 and Level 6 health facilities and upon which the national referral health system operates.	20
6. The Petitioners also claimed that the land upon which Level 2, Level 3, Level 4, Level 5 and Level 6 national referral health facilities are located is public land vested in the National Government as provided for in article 62(1)(b) as read with article 62(2)(b) of the Constitution and therefore the purported transfer from the National Government to County Governments of Level 2, Level 3, Level 4 and Level 5 national referral health facilities violates section 21 of the National Government Co-ordination Act, 2013 which forbids the transfer of property, assets, rights, liabilities, obligations, agreements and other arrangements of the National Government.	25
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7. It was the Petitioners' further submission that section 2(a), Part 2 of the fourth schedule to the Constitution states that health services are for the promotion of primary health care and primary health care denotes preventive and emergency healthcare provided at the community level. That the purpose of primary health care is to keep people healthy so that they are not in need of hospitalization and that means that primary health care does not include Level 2 to Level 5 national referral health facilities.
8. Further, that the words "county health facilities and pharmacies" do not merely refer to any public health facility located within the boundaries of a county. Instead they argued that county health facilities are those facilities which were previously owned by local authorities or which County Governments may and are reasonably expected to establish. They contended therefore that under section 2, Part 2 of the fourth schedule, County Governments have a preventive function which is comprised of primary health care formerly provided for under section 160 of the Local Government Act (Cap 265 Laws of Kenya). That sections 161 to 167 of that Act had listed functions which were donated to local authorities which functions are similar to those in section 1 to 14 of Part 1 of the fourth schedule to the Constitution, 2010.
9. In addition, the Petitioners contended that county health facilities comprise county health facilities and pharmacies which were established and previously operated by local authorities under section 145(i) of the Local Government Act and included mobile units and ambulances for first aid. That those health facilities provide preventive care as opposed to curative care, and according to the World Health Organization (WHO), primary health care needs to be delivered close to the people and they include the following essential components;
- (a) Education for the identification and prevention/control of prevailing health challenges
 - (b) Proper food supplies and nutrition, adequate supply of safe water and basic nutrition sanitation
 - (c) Maternal and child care, including family planning
 - (d) Immunization against major infectious diseases
 - (e) Prevention and control of locally endemic diseases
 - (f) Appropriate treatment of common diseases using appropriate technology
 - (g) Promotion of mental, emotional and spiritual health

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- (h) Provision of basic drugs They therefore claimed that any patient examined by a county primary healthcare provider or at an emergency care unit, who is deemed to be in need of specialized treatment or requires care and procedures that cannot be provided at the said level, must be referred to a National Government's national referral health facility capable of providing the level of care the patient needs. The Petitioners then opined that the transfer of patients from one institution/unit of the national healthcare delivery network to another may be dangerous for the patient especially because specialized vehicles or planes may be required for the evacuation and it is not viable to expect each county to own such planes and vehicles. They thus further argued that the primary healthcare which the Constitution assigns to County Governments ought to compliment the national referral system as per the provisions of article 6(2) of the Constitution. And further, that counties should set and develop sufficient primary healthcare infrastructure and work for better integration between national referral health facilities and county based services. In any event, they claimed that the term 'county referral health facilities' does not appear anywhere in the Constitution and it appeared for the first time in the impugned Legal Notices and in policy papers prepared by the Ministry of Health, in 2012.
10. On the national referral health facilities, it was the Petitioners' contention that these are the infrastructure for the national referral health system and includes those dispensaries, health centers, primary hospitals, secondary hospitals and tertiary hospitals which are Level 2, Level 3, Level 4, Level 5 and Level 6 of the health facilities owned and operated by the Ministry of Health and spread across the country. They argued that Kenya's referral health system is structured in a step-wise manner so that complicated cases are referred to a higher level, or horizontally to where certain limited facilities and expertise exist, and less complicated cases are referred to a lower level or, horizontally to a facility of the same level. That the structure of the national referral system consists of;
- (a) Primary/Community=Level 1(entry point or initiating facility- primary health care).

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(b) Dispensaries=Level 2 (referral).	1
(c) Health centers=Level 3 (referral)	
(d) Primary hospitals=Level 4 (district/sub-district level referral)	
(e) Secondary hospitals=Level 5 (provincial level referral)	5
(f) Tertiary hospitals=Level 6 (national level referral) 11.	
The Petitioners thus claimed that based on the above structure, the Cabinet Secretary for Health can equip and graduate any lower level referral facility to the next higher level referral facility, up to Level 6, to address specific requirements. That depending on the facilities available, any of the Level 2 to Level 6 facilities could serve as a national referral centre for the management of specific health issues. For instance, they picked the following examples as some of the hospitals which serve as national referral hospitals;	10
a. Mathari District Hospital, a level 4 facility in Nairobi County which is said to be the national referral centre for psychiatric cases.	15
b. Mbagathi District Hospital, a Level 4 facility in Nairobi County is the national referral centre for tuberculosis and other respiratory cases.	20
c. National Spinal Injury Hospital, a Level 4 facility in Nairobi County which is said to be the national referral centre for spinal cord injuries	25
d. Alupesu District Hospital, a level 4 facility in Busia County which is said to be the national referral centre for leprosy and other skin diseases. Allupe is also an East African Regional referral centre for leprosy and other skin diseases.	30
12. It was therefore the Petitioners' case that instead of dismantling the national referral system as the Respondents and the 2nd Interested Party have set out to do, the referral system should be strengthened between the various levels and that since all healthcare required cannot be obtained at any given level of the system, an effective referral mechanism is a key element for the delivery of health care by the National Government.	35
13. Further, relying on the WHO definition of referral and counter-referral or return referral, the Petitioners contended that a health care delivery system must promote and encourage patients to access	40

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- the health system through primary care at the community level and only in emergency cases should patients be allowed to access hospital care directly. And that for every referral, there must be a counter referral, and once the reason for referral has been resolved, the patient must be referred back to the originating attending healthcare provider for follow up. The Petitioners thus contended that the Constitution refers to primary healthcare and not to referral health facilities at county level because counties are responsible for primary health services.
14. It was the Petitioners' further submission that devolution to County Government is only autonomous in the implementation of distinct functions as listed in Part 2 of the fourth schedule, and the National Government has a role to play at the County level by performing all the other functions which are not assigned to County Governments as listed in Part 1 of the fourth schedule. They argued that in accordance with the principles of devolution set out under article 174 of the Constitution, education, the judiciary and the police services etc are not devolved and in the health sector, only the facilities which deliver primary healthcare services are subject to devolution. That the other healthcare facilities including the referral facilities remain under the responsibility of the National Government under the Ministry of Health.
15. It was therefore the Petitioners' case that County Governments bear the overall responsibility for planning, financing, co-ordinating, delivering and monitoring county health services which include county health facilities and pharmacies towards the fulfillment of the right to the highest attainable standard of health under article 43(a) of the Constitution. And the National Government bears overall responsibility for planning, financing, coordinating, delivering and monitoring the national referral health facilities in fulfillment of article 45(a) of the Constitution. It was therefore the Petitioners' further case that the Respondents have wrongly interpreted the Constitution and the Ministry of Health has produced a policy document titled, 'Health Sector Strategic and Investment Plan (KHSSP) for July 2013-June 2017, the Second Medium Term Plan for Health' and has in page 17 wrongly defined health services and interventions to be provided for each policy objective, by level of care and cohort as follows;
- "80.1 Community level: The foundation of the service delivery system, with both demand creation (health promotion

services), and specified supply services that are most effectively delivered at the community. In the essential package, all non-facility based health and related services are classified as community services – not only the interventions provided through the Community Health Strategy as defined in NHSSP II.

80.2 Primary Care Level: The first physical level of the health system, comprising all dispensaries, health centres, maternity/nursing homes in the country. This is the 1st level care level, where most clients' health needs should be addressed.

80.3 County level: The first level hospitals, whose services compliment the primary care level to allow for a more comprehensive package of close to client services.

80.4 National level: The tertiary level hospitals, whose services are highly specialized and complete the set of care available to persons in Kenya.” They thus contend in the above regard that the Respondents failed to appreciate that Level 2, Level 3, Level 4 and Level 5 national referral health facilities are an integral part of the national referral health system, which has been assigned to the National Government by the Constitution.”

16. It was also the Petitioners' position that the transfer has violated the fourth schedule on the distribution of functions between the National and County Government, violates article 6(3) of the Constitution on devolution and access to services and violates section 21 of the National Government Coordination Act. They thus claimed that Legal Notice No 137 of 2013 aforesaid is illegal, null and void for purporting to transfer Level 2, Level 3, Level 4 and Level 5 national referral health facilities from the National Government to the County Governments. For the above reasons they now seek the orders elsewhere set out above.

The 1st Respondent's Case 18.

The 1st Respondent, The Attorney General, in his submissions dated 3rd April 2014, urged the point that, while interpreting the phrases “National referral health facilities” and “County health services”, the Court should read and interpret articles 174, 175, 186, 187 and the fourth schedule to the Constitution harmoniously. That as per the provisions of article 186(1), the functions and powers of the National Government and the County Governments are set

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- out in the fourth schedule and it is clear from the provisions of the said fourth schedule that National Referral Health facilities are a mandate of the National Government, while county health services are a mandate of the County Government. As regards the Petitioners' interpretation to the effect that National Referral Health Facilities belonging to the National Government being Levels 2, 3, 4, 5 and 6 health facilities and County health services refer to primary health services inherited from local government, the Attorney General contended that such an interpretation is absurd as it defeats the decentralization of state organs, their functions and services from the Capital of Kenya. Further, that such an interpretation renders articles 174(h) as read with article 186(1) and sections 23 of Part 1 of the fourth schedule and section 2 of Part 2 of the fourth schedule inapplicable in respect to the health sector.
19. It was his position that only two health facilities in Kenya qualify for the description of National Referral Health Facilities, and these are the Kenyatta National Hospital and, Moi Teaching and Referral Hospital as can be drawn from these institutions' constitutive instruments as well as the National Health Sector strategic plans. In the case of Kenyatta National Hospital, he stated that it was established as a national referral hospital by the Kenyatta National Hospital Board Order, 1987 vide Legal Notice No 109 of 1987 and in the case of Moi Teaching and Referral Hospital, it was established as a national Referral Hospital by the Moi Teaching and Referral Hospital Board Order, 1998 vide Legal Notice No 78 of 1998. He therefore argued that from the constitutive instruments of the two health institutions, it is notable that the two health facilities are the only national referral systems while the other health facilities are 'other hospitals', and therefore the other health facilities such as dispensaries, maternity homes, health centers, nursing homes and clinics cannot be classified as national health facilities. It was his submission that according to the Ministry of Health, National Health Sector Strategic Plan 1999-2004, health facilities are hierarchical and that Kenyatta National Hospital is at the apex of the health referral system in Kenya and with devolution, the same hierarchical system has remained in place.
21. He contended that the classification of health facilities on the basis of levels of care was introduced by the Ministry of Health, through the National Referral Sector Strategic Plan 2005-2010 and according to that plan, Levels 2 and 3 are facilities which include health centers,

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- maternity/nursing homes which basically handle preventive care but also offer some curative services. Levels 4-6 (primary, secondary and tertiary hospitals) on the other hand, undertake mainly curative and rehabilitative activities in their service delivery package. 1
22. Further, that the classification of health facilities by the 2005-2010 policy was not based on any geographical zoning, but the level of service which each facility was providing, and therefore, it would not be correct to state that save for Level 1 facilities, the rest of the facilities are national referral health facilities, contemplated by section 23, Part 1 of the fourth schedule. That in any event, the referral system has always included National Referral Hospitals, Provincial and District Hospitals and he thus claimed that section 23, Part 1 of the fourth schedule contemplated Kenyatta National Hospital and Moi Teaching and Referral Hospital as being the national referral health facilities and the rest of the facilities then assume the classification of county health services. 5
23. It was also the contention of the Attorney General that sections 28, Part 1 of the fourth schedule to the Constitution places the formulation of the national health policy on the National Government. To that extent therefore, and as far as the Petitioner seeks definition of various technical terms from the Court, the Petition undermines the doctrine of separation of powers. He claimed therefore that the Court lacks jurisdiction to direct the National Government and the County Governments on how and where to establish and operate national referral facilities within counties or establish community/Level 1 facilities, respectively. He claimed that an attempt to do so would amount to this Court overstepping its mandate and assuming the mandate of the Executive, he submitted. 10 15 20 25 30
24. As to prayers (j) and (i) of the Petition, the Attorney General submitted that this Court cannot issue those orders as the same were the subject matter of Nairobi High Court JR No 317 of 2013 where the Court declined to grant the said orders. He claimed that the said issue is *res judicata* as far as it attempts to re-litigate a matter already decided by a court of competent jurisdiction. Reliance was placed on the case of *Towhida Awo Shariff & 2 others v Registrar of Titles & 4 others* (2012) eKLR in support of that proposition. 35 40
25. On prayer (k), it was his submission that it cannot issue against the 1st Respondent as it is speculative and is beyond the mandate of the

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- Attorney General since legislation is a role reserved for Parliament under articles 93 of the Constitution. 1
26. The Attorney General thus urged the Court to dismiss the Petition with costs. 5
- The 2nd Respondent's Case
27. The 2nd Respondent, the Transition Authority, in response to the Petition filed an answer to the Petition dated 20th January 2014 and an Affidavit sworn by Kinuthia Wamwangi sworn on the same date. It also filed submissions dated 20th January 2014. 10
28. It was its submissions that the same issues raised in this Petition are *res judicata* as they were subject of the issues raised in Nairobi High Court JR No 317 of 2013 where the *Ex-parte* Applicants, the Kenya Medical Practitioners, Pharmacists and Dentists Union (KMPDU), The Kenya National Union of Nurses (KNUN) and the Kenya Health Professionals Society (KHPS), who in the Present Petition are the Interested Parties, had sued the 2nd Respondent and the Council of Governors. That the issues raised in this Petition are actually similar to those in JR No 317 of 2013 and the judgment in that regard was delivered on 18th December 2013 and therefore the present Petition is an abuse of the Court process. It relied on the cases of *Mombasa Maize Limited v Hassan Sura Dele & another* Mombasa High Court Civil Appeal No 37 of 2012, *Mburu Kinyua v Gachini Tuti* (1976-80) I KLR 790, *Uhuru Highway Development Ltd v Central Bank of Kenya & 2 others*, Civil Appeal No 36 of 1996, *John Kilei Ndiema & 26 others v Matasi Cooperative Society Ltd* HCCC No 59 of 2012, *R v Minister for Agriculture & others* JR Misc Applic No 78 of 2012 and *Edwin Thuo v Attorney General & another* Nairobi High Court Petition No 212 of 2012, all which espouse the law on *res judicata*. 15
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29. In addition to that point, Kinuthia Wamwangi in his affidavit in support of the answer to the Petition explains how JR No 317 of 2013 received wide publicity in both the print and television media and deponed that the Petitioners ought to have sought leave to be enjoined in those proceedings to enable them ventilate their argument that Levels 2-5 health facilities constitute national referral facilities and that Legal Notices Nos 137-182 of 2013 contained in Kenya Gazette Supplement No 116 of 2013 issued by the 2nd Respondent ought to be quashed. That *res judicata* guards against the possibility of re-litigating the same cause of action in different 35
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- perspectives and the principle is clearly applicable to the present Petition. 1
30. It was also the argument of the 2nd Respondent that the Petition 5
offends the doctrine of separation of powers, is speculative and vague
and ought to be dismissed. That the classification of health facilities,
Levels 2-5 inclusive, as County Health Facilities and the reasons
thereof is a policy undertaking by the Executive duly facilitated by
the 2nd Respondent and other government agencies and also through
public participation. That this Court cannot direct the National 10
Government on its policies as that would amount to delving into
policy making which is preserved for the National Government.
Further, that the Court cannot issue the prayers sought at paragraph
(e) and (f) as the Court would be making determinations of a policy
nature and that the Fourth Schedule at Part 2(2)(c) already assigns 15
the function of 'promotion of primary health care' to the County
Governments. As to how that function is interpreted and rolled out
is the business of the County Governments and this Court cannot
prescribe that action and in any event, the County Governments 20
have just begun the implementation of the policy and the issue
raised by the Petitioners is not ripe for litigation and can only be
speculative as at now. And lastly on this point, that the Court cannot
prescribe how the Executive shall interpret policy into draft law, as
sought under prayer (k). That in that regard, the Petitioners should 25
await legislation to be enacted and only then can they challenge it
in court for failing to meet the constitutional test.
31. It was the 2nd Respondent's further position that the Petition
as presented does not disclose any cause of action capable of
being resolved by this Court and that the transfer to the County 30
Governments of health functions enumerated in Legal Notices No
137-182 of 2013 took effect on 9th August 2013 and the enumerated
County Health Services which are a component in the said Legal
Notices were effectively transferred to the County Governments on
9th August 2013 and delivery of the impugned health services by 35
the County Governments has taken full effect and is ongoing and
therefore there is nothing capable of being suspended as prayed.
Further that the Court in JR No 317 of 2013 having declined to
quash the Legal Notices, any transfer of the functions between the 40
County Governments and the National Government may only be
effected by the two levels of government pursuant to article 187 of
the Constitution and sections 24 to 28 of the Intergovernmental

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- Relations Act. And that the National Government may only intervene in the activities of County Governments pursuant to the provisions of article 190(3) of the Constitution and section 21 of the County Governments Act. 1
32. It further alleged that the Petitioners have failed to demonstrate how the Constitution has been violated and have merely listed the provisions of the Constitution without demonstrating how those provisions have been breached. Further, that the Petitioners have not demonstrated any breach of their constitutional rights as alleged. 5
33. The 2nd Respondent submitted in addition that it has acted within its jurisdiction and followed statutory procedures in its actions and its decision are not unreasonable or in defiance of logic as established in the Wednesbury Principle. That if the orders sought were to be granted, there would be chaos and public inconvenience in the delivery of health services as finances have already been budgeted for, allocated to the County Governments and spending is ongoing. 10
34. It was also the 2nd Respondent's submission that adequate constitutional and legal safeguards have been provided in order to ring-fence the efficient delivery of services and provide the necessary back-stopping by the National Government and the Petitioners have therefore not suffered any harm and indeed their right to health has been secured. 15
35. The 2nd Respondent went on to submit that County Governments are not synonymous with the defunct local authorities and the previous system of governance under the Repealed Constitution which comprised of a central government with delegation of powers to local authorities. That under the Constitution, 2010 on the other hand, County Governments are distinct levels of Government and it is erroneous for the Petitioners to claim that county health facilities and pharmacies are those inherited from local authorities and further that county functions cannot be exercised beyond their administrative jurisdictions neither can counties purport to have the capacity to operate Level 4, Level 5 and Level 6 referrals which serve multiple counties. 20
36. It was the further position of the 2nd Respondent that the promotion of primary health care is one of the many functions of County Governments and the listing of the health functions under section 2 of Part 2 of the Fourth Schedule is not exhaustive as the 25
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word ‘including’ is deliberately used. That the Section does not in any event anticipate that County Governments will only provide referral healthcare but that they would also provide primary health care

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37. In response to the Petitioners’ argument that section 21 of the National Government Co-ordination Act has been violated due to the transfer of Levels 2-5 health facilities to the County Governments, the 2nd Respondent submitted that the said section cannot override the provisions of the Constitution. That article 190(1) of the Constitution provides that County Governments shall be given adequate support to enable them to perform their functions and section 121 of the County Government Act has operationalised this constitutional provision.

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38. Lastly, it was the 2nd Respondent’s submission that there is no basis for this Court to determine the questions raised by the Petitioners and urged the Court to issue only those orders that shall facilitate the implementation by the County Governments of its functions and not issue orders that seek to stall their operations. It therefore prayed that the Petition should be dismissed with costs.

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The 3rd Respondent’s Case

39. The 3rd Respondent, The Council of Governors, in response to the Petition filed an Affidavit sworn on 23rd January 2014 by Isaac Ruto, the Governor of Bomet County and the Chairperson of the 3rd Respondent. It opposed the Petition and claimed that it is based on an erroneous interpretation of the Constitution.

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40. Mr Ruto deponed that the Constitution, 2010, has established a framework of governance where power is shared between the two levels of government at the National level and County levels and that this structure is different from the previous government system comprising of a central government and local authorities. He thus contended that the argument that County Governments can only manage the health facilities previously under the management of local government is wrong. That the distribution of functions between the two levels of government is contained in the Fourth Schedule of the Constitution and that such a distribution cannot be based on the legal and constitutional order that existed prior to the promulgation of the Constitution, 2010. That it cannot be true that ‘County health facilities’ mean the health institutions ran by former local authorities, because the health facilities were limited

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- to municipal councils only and that only 5 Municipal Councils (Nairobi, Eldoret, Kisumu, Mombasa, Nakuru) had such health facilities. That the Constitution did not intend to limit these services to 5 out of 47 counties and further to that, limiting the same to only 5 areas will be in violation of the spirit of devolution. 1
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41. It was its submission that article 6(1) of the Constitution 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 co-operation. Further, that article 189 of the Constitution has detailed rules of operation to govern and give effect to the cooperative government and co-operative inter-governmental relations. It relied on the South African case of *Ex Parte President of the Republic of South Africa, in Re: Constitutionality of the Liquor Bill 2000* (Liquor Bill Case) (no citation provided), where the South African Constitutional Court held that chapter 3 of the South African Constitution introduced a new philosophy, namely that of co-operative government and its attendant obligations. 10
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42. It was the 3rd Respondent's further submission that the 2nd Respondent has duly exercised its statutory mandate under section 35(2) of the Transition to Devolved Government Act when it issued the impugned Legal Notices wherein it provided the scope of functions to be undertaken by counties and key conditions to follow for smooth transfer of the said functions. It thus submitted that unless there was a violation of the Constitution, this Court cannot question a determination of the Transitional Authority on the assignment and unbundling of functions in the health sector and this Court should not be drawn into the dispute as to whether Level 1 to Level 6 hospitals are national referral facilities since those are technical matters that are better addressed by the Transitional Authority in the transitional period, and eventually through legislation, policies etc 25
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43. On the issue whether the words 'national referral health facilities' in Part 1, Section 23 of the Fourth Schedule to the Constitution refer to Level 2, Level 3, Level 4, Level 5 and Level 6 health facilities, the 3rd Respondent submitted that the words "national referral health system" cannot be defined by the use of dictionary semantics but within the Constitution and The Health Sector Strategy, 2012-2017 which differs with the Petitioners' views. Further, that the 40

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- WHO's definition cannot be applied since it violates the doctrine of separation of powers as formulation of policies is a preserve of the Executive under the Fourth Schedule to the Constitution. 1
44. The 3rd Respondent then contended that the Petition lacks merit and ought to be dismissed with costs and urged the Court to hold that the unbundling of health service provisions from the National Government to County Governments *vide* Legal Notices Nos 137-182 of 2013 and dated 9th August 2013, issued by the Transition Authority was done in accordance with the law. 5
- The 1st Interested Party's Case 10
45. The 1st Interested Party, the Kenya National Union of Nurses supported the Petition and agreed with the Petitioners' submissions entirely as reproduced elsewhere above. 15
46. It submitted extensively on the issue of *res judicata* and in that regard urged the point that this Court should abhor technicalities and challenges to its jurisdiction and only look into the issues raised as long as there is an allegation of a constitutional violation. They relied on the case of *Nabori & 9 others v Attorney General* [2007] KLR 331 and *Moses Tompu Kuya & 5 others v Attorney General & 2 others* Petition No 65 of 2008 in support of that submission. It was also its submission that this Petition does not violate the provisions of section 7 of the Civil Procedure Act on *res judicata* allegedly because the parties to this suit are not the same as those in JR No 317 of 2013 and the issues in that suit are different as to those in this Petition and which issues have never been addressed to their conclusion by a competent court. On that point it cited the case of *Kiprop Arap Biegon v John Arap Bii & another* [2005] eKLR. 20
47. In addition, it was its position that this Court has original and unlimited jurisdiction to hear any constitutional question and since the present proceedings seek for the enforcement of fundamental rights and freedoms, the doctrine of *res judicata* would not apply. That the Court should therefore determine the Petition on merit and cited the case of *Chokoling v The Attorney General of Trinidad and Tobago* (1981) 1 WLR 106 to buttress that point. 25
48. Further, it submitted that the National Government is devolving valuable assets to the County Governments without following due process and as a result its members are being forced to be absorbed in County Governments on new terms and separate contracts 30
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- without proper arrangements being put in place. That by devolving health services, the Respondents have killed the referral system and allocated certain specialist institutions to the counties. They thus claimed that such action would amount to discrimination and a violation of article 27 of the Constitution as it would be difficult to cross-refer patients to county hospitals and it would also be difficult to get specialist services across the counties where a referral hospital is wrongly devolved. They also claimed that discrimination has also been visited on the 1st Interested Party's members since different benefits and preferential payments to staff of the 1st Interested Party will be accorded in the various counties. It relied on the cases of; *RM & Another v Attorney General* (2008) 1 KLR (G7F) 574, *Federation of Women Lawyers Kenya (FIDA) & 5 others v The Attorney General & another* Petition No 102 of 2011, *Nyarangi & 3 others v Attorney General* (2008) KLR 688 and *Prinsloo v Van Der Linder & another* 1997 (3) SA 1012 (CC) in support of those arguments.
49. It was also the 1st Interested Party's contention that the Respondents have violated its members' right to fair labour practices by exposing them to extreme differential payments in the period before and after the devolution of the health services. That the Respondents have also created an unfavorable environment and the Interested Party claimed that their right to good health entitlement has been violated. Further, that their right to fair administrative action, and right to property have all been violated.
50. The 1st Interested Party thus urged the Court to grant orders in the Petition as prayed.
- The 2nd Interested Party's Case
51. The 2nd Interested Party, the Commission for the Implementation of the Constitution, opposed the Petition. It filed submissions dated 4th March 2014.
52. It was its case that not all Level 2 to Level 5 health facilities have the capacity to perform policy functions and that it would be impractical and unworkable to include those health facilities as 'national referral health facilities' as envisaged by section 23, Part 1 of the 4th Schedule to the Constitution. Further, that the phrase 'county health facilities and pharmacies' does not refer only to health facilities which used to be managed by local authorities under the Local Government Act.

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53. That the Constitution does not restrict a County Government from providing goods and services for persons from other counties and that it is not impossible for a County Government to operate a specialized health facility that caters for referrals from other counties, as long as that provision is funded by tax payers' monies allocated by Parliament. Indeed that the referral of patients requiring treatment between Levels 2 to 5 health facilities in various counties is achievable and is in fact provided for by the existing constitutional and statutory framework of devolved government through the provisions of articles 6(2), 10(2) 189(1) and (2) of the Constitution and section 5 (2)(e) of the County Government Act. 1
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54. It submitted in addition that the Petitioners' reliance on meanings and interpretations attributed to the WHO is misplaced because the structure/system of provision of health services in Kenya has traditionally been, and continues to be determined by the National Health Policy/Strategic Plan whose formulation is vested by the Fourth Schedule to the Constitution in the National Government and not any legislation. That even in the absence of implementing legislation, the definition of 'national referral health facilities' and 'county health services' has been left to the National Government, other than the threshold duties assigned to County Governments under section 2, Part 2 of the 4th Schedule to the Constitution. It therefore submitted that as at 27th August 2010, there were only two national referral facilities ie Kenyatta National Hospital (KNH) and Moi Teaching and Referral Hospital (MTRH). 15
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55. It also submitted that the transfer of health services to counties does not discriminate against health workers, as compared to teachers, police or other civil servants and public officers, since it is the Constitution that has differentiated the employment of certain public servants. Further, that sections 58 and 59 of the County Government Act establishes a county public service board, in pursuance of article 235, in each County, with the power to exercise disciplinary control similar to that of the Public Service Commission and promote in the County public service the values and principles referred to in articles 10 and 232 of the Constitution. 30
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56. As regards the Petitioners' prayers, it contended that those prayers are unsuitable in law since they are asking the Court to make descriptive declarations that are in the nature of policy making and infringe on the National Government's constitutional role of making 40

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- national health policy. It thus urged the court to dismiss the Petition. 1
- The 3rd Interested Party's Submissions
57. The 3rd Interested Party, the Kenya Medical Practitioners, Pharmacists and Dentists Union did not file an answer to the Petition nor did it participate in the proceedings at all. 5
- The *Amicus Curiae* submissions
58. The *Amicus Curiae*, Katiba Institute (KI), submitted that the complexity of the issues involved, especially on the policy and administrative implications, makes this Petition unsuitable for the Court to make declarations as prayed by the Petitioners. That discussions on the complexity, meaning and application of the Fourth Schedule should be informed by several factors such as past institutional practices especially on technical aspects such as medical referral, strategies put through policies, expert assessment of the sector by specialists, the set standards and the transition period. That the court does not have all these details to determine the Petition on its merits. 10 15
- 59 It was its further submission that Courts are not the only means through which disputes relating to devolution must be resolved and that the Constitution has placed great emphasis in resolving disputes relating to devolution through an intergovernmental disputes resolutions mechanism as established under Chapter 11 of the Constitution and in particular under article 189(2) of the Constitution and under the Intergovernmental Relations Act, 2012. It thus contended that matters touching on intergovernmental relations such as are in the present Petition should best be resolved at the first instance through the governmental relations mechanism contemplated under article 189 of the Constitution. Reliance was made in that regard on the case of *Law Society of Kenya v Transition Authority and 2 others* [2013] eKLR and *National Gambling Board v Premier of Kwa Zulu-Natal & others* 2002 (2) SA 715 (CC). It opined further that if at all there was any dispute capable of resolution, then it is either the National Government or the County Government that can declare the dispute and invoke the statutory provisions to do so and not the Petitioners. It submitted that even in disputes which private citizens have raised for resolution, like the present Petition the Court can provide proper guidance that ensures that the matters are resolved through recourse to the intergovernmental dispute resolution mechanism and the Court can also ensure that 20 25 30 35 40

the said mechanism is undertaken in compliance with all relevant constitutional requirements, including further ensuring that it is as participatory as possible and is not just a government to government process.

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60. It was its additional submission that a right-based approach to health would likely be the one that assigns significant responsibility of health care facilities, goods and services to the County Governments while leaving the responsibility of developing health policy, national health strategy and harmonization standards to the National Government. It thus argued that the centralization of health facilities and services would likely impede on service delivery and hence compromise the health rights provided for in article 43(1) (a) of the Constitution.

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61. It was also the submission of Katiba Institute that in order to understand the terminologies that form the subject of the Petition, it is important to understand the drafting history as an interpretation of the Constitution must take into account the historical background leading to the impugned enactment. In that regard therefore, the phrase 'county health facilities' may mean those hospitals that were formerly known as district hospitals, sub-district hospitals and dispensaries and that what were previously referred to as provincial hospitals and should be considered as county health facilities but a special arrangement for funding and administration that involves heightened participation of the National Government as well as other counties must be established. That a hospital for several counties is the responsibility of the National Government, but it could also be established within a county for a group of counties, provided it was done with the involvement of all the counties it intends to serve. And lastly, that several counties could agree together to set up a joint hospital but argued that a hospital run by a single county, yet intended to serve several counties, with no involvement and no accountability to the people of those other counties is unconstitutional. In the end as *amicus curiae*, Katiba Institute left the Petition in the hands of the Court.

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Determination

62. Before I turn to determine the merits or otherwise of this Petition, I recall that the issue of jurisdiction was raised extensively; that this Court has no jurisdiction to determine the Petition because the matters raised in it are *res judicata* and that even if it had such

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jurisdiction, the dispute herein is not ripe for determination as the dispute resolution mechanism established under the Constitution and the Intergovernmental Relations Act have not been exhausted. In that regard, the issue of jurisdiction is not an idle one as jurisdiction is everything and without it a Court of law must down its tools - See *Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd* [1989] KLR 1. 1
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63. I will therefore begin by addressing the issue of *res judicata* and whether in view of the judgment in JR No 317 of 2013, I should down my judicial tools. 10

Res judicata

64. The law on *res judicata* in civil law is found at section 7 of the Civil Procedure Act which provides as follows; 15
“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.” 20

For *res judicata* to be invoked in a civil matter therefore, the issue in a current suit must have been decided by a competent court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title. (See the case of *Karia and another v the Attorney General and others* (2005) 1 EA 83). It therefore follows that the essence of the doctrine of *res judicata* is to bring an end to litigation and a party should not be vexed twice over the same cause. This was what was held with approval in *Omondi v National Bank of Kenya Ltd and others* (2001) EA 177. 25
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“Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of *res judicata* can and should only be invoked in constitutional matters in the clearest of cases and where a 40

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- party is relitigating the same matter before the Constitutional Court and where the Court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious.” 1
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65. Can the present Petition therefore and in the above context be said to be barred by the principle of *res judicata*? In the instant Petition, the 3rd Interested Party, The Kenya Medical Practitioners, Pharmacists and Dentists Union, the 1st Interested Party, The Kenya National Union of Nurses together with The Kenya Health Professionals Society were the *Ex-Parte* Applicants while the Respondents herein were the Respondents in the JR No 317 of 2013. As can be seen, the parties are not quite the same as in this Petition because the Petitioners are different. The first hurdle has therefore been passed. 10
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66. As to the subject matter, the Court in *Henderson v Henderson* (1843-60) All ER 378 set out the extent of *res judicata* in the subject matter as follows; 20
- “... where a given matter becomes the subject of litigation in, and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The pleas of *res judicata* applies, except in special case, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time” 25
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67. Applying the same criteria in the present Petition, in JR No 317 of 2013, the *ex-parte* Applicants sought the following orders in their Notice of Motion dated 23rd September 2013; 40
- “1. The Court be pleased to issue an Order of *Certiorari* to remove into this Court and quash Legal Notices No 137-182 (Kenya Gazette Supplement No 116) being a

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Notice issued by the Transition Authority on the 9 th of August 2013 in relation to the transfer of County Health Services.	1
2. The Court be pleased to issue an order of Prohibition prohibiting the transition authority or any other body whether by itself, or any of its employees or agents or any person claiming to act under the direction of the said Authority from proceeding to enforce Legal Notice No 137-182 (Kenya Gazette Supplement No116) in respect only to the transfer of functions relating to County Health Services.	5 10
3. That consequent to grant of prayers (a) and (b) above the Court be pleased to issue such further directions as may be necessary to give effect to the foregoing orders;	15
4. That the cost of and occasioned by the Application be provided for.”	
The Motion was based on the following grounds;	
“(i) The Transition Authority is required to at all times comply with the law and specifically the Constitution of Kenya, 2010, the County Government Act 2012, the Transition to Devolved government Act 2012 and all other provision of the law and in particular;	20
a. The coordinated transition to the devolved system of County Government Act must be undertaken side by side with the continue delivery of quality services to citizens which duty is vested on the Transition Authority (“The Authority”) in section 7 of the Act.	25
b. The said Authority is required, while carrying out this statutory mandate, to comply with the provisions of section 7 and 24 of the Act in toto and also ensure that the ideals of article 43 of the Constitution of Kenya are at all times protected and effected.	30 35
c. The Authority has in contravention of the law and <i>ultra vires</i> caused to be published Kenya Gazette Supplement No 51 containing Legal Notices No 137 – 182 on the 9 th of August 2013.	40
d. In transferring the Health Component to the 47 Counties, the Respondent has grossly violated	

the provisions of sections 7 and 24 of the Transition to Devolved Government Act (and other pertinent portions of the same statute) and has failed to adhere to the ideals of article 43 of the Constitution in toto.	1
ii. In acting contrary to the law the Respondent has acted irrationally, and in abuse of statutory powers and if not prohibited, will cause great hardship and loss both to the Applicant's members and the general public without justification in law."	5
The issue therefore is whether the subject matter of this Petition was also in issue in JR No 317 of 2013. On a serious consideration of the matter and in the specific circumstances of this Petition. I think not.	10
68. I say so because in JR No 317 of 2013, the <i>ex parte</i> Applicants sought to quash Legal Notices No 137 to 182 of 2013 on grounds <i>inter-alia</i> that in transferring the health component to the 47 counties, the Respondents had grossly violated the provisions of section 7 and 24 of the Transition to Devolved Government Act and had failed to adhere to the ideals of article 43 of the Constitution. Further, that the Respondents had acted irrationally and in abuse of statutory powers. In the instant Petition, the Petitioners are still aggrieved with the same Legal Notices but they claim that the wrong interpretation has been accorded to the words "national referral health facilities' as set out in Part 1 section 23 of the Fourth Schedule and the words "county health facilities' as set out in Part 2, section 2 of the Fourth Schedule to the Constitution. They therefore seek an interpretation from the court on the meaning of those two phrases. While the import of the quashing of the two Legal Notices may be the same, the real issue in contest now is different and this being a constitutional matter, I am not prepared to block the Petitioners from ventilating their constitutional grievances.	15
69. In the totality of things therefore I do not find that the Petition raises the same matters that were raised in JR No 317 of 2013 and the principle of <i>res judicata</i> cannot therefore be invoked and I so find.	20
Import of article 189 of the Constitution to these proceedings	25
70. I now turn to examine the import of the alleged ouster of the Court's jurisdiction under article 189 of the Constitution. It was submitted by the Respondents and the <i>amicus curiae</i> in that regard	30
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- that the Courts are not the only means through which disputes relating to devolution must be resolved. That the Constitution has placed great emphasis in resolving disputes relating to devolution through an intergovernmental dispute resolution mechanism and that is the proper mechanism to resolve the present dispute. 1 5
71. The starting point in addressing the issue is article 6 of the Constitution which must be read with article 189 of the Constitution. Article 6 provides that; 10
- “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”.
- Article 189 of the Constitution has then provided as to how the co-operation between national and County Governments is to be achieved. This Article provides that; 15
- “(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; 20
 - (b) Assist, support and consult and, as appropriate, implement the legislation of the other level of government; and 25
 - (c) Liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity. 30
- (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. 35
- (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. 40
- (4) National legislation shall provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation,

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- mediation and arbitration.” 1
72. The legislation contemplated in article 189(4) has already been enacted ie the Intergovernmental Relations Act of 2012, which has established institutions and sets out mechanisms of resolution of intergovernmental disputes. The Preamble to this Act state that it is; 5
- “An Act of Parliament to establish a framework for consultation and cooperation 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.” 10
73. As can be seen from the above, the Act was intended *inter-alia* to establish mechanisms for the resolution of intergovernmental disputes pursuant to the provisions of articles 6 and 189 of the Constitution. The dispute resolution mechanisms are then specifically established under sections 30 to 35 of that Act. Section 30 stipulates as to when a dispute can be said to have arisen between the two levels of government as it provides thus; 15
- “30(1) In this Part, unless the context otherwise requires, “dispute” means an intergovernmental dispute. 20
- (2) This Part shall apply to the resolution of disputes arising—
- (a) between the National Government and a County Government; or 25
- (b) amongst County Governments.”
74. The reasoning behind the above enactment is not hard to find; that alternative dispute resolution mechanisms should be sought in the first instance so as not to strain the relationship between the National Government and the County Governments and in the case of counties, among themselves. Article 6 of the Constitution has therefore mandated the two levels of government to conduct their mutual relations on the basis of consultation and co-operation. 30
- Section 31 has indeed provided for the measures to be undertaken in dispute resolution as follows; 35
- “31. The national and County Governments shall take all reasonable measures to—
- (a) resolve disputes amicably; and 40
- (b) apply and exhaust the mechanisms for alternative dispute resolution provided under this Act or

-
- any other legislation before resorting to judicial proceedings as contemplated by article 189(3) and (4) of the Constitution.” 1
- The place of judicial proceedings in the dispute resolution mechanism provided for under the Act is clear; that judicial proceedings are a last resort and section 35 specifically states that; 5
- “Where all efforts of resolving a dispute under this Act fail, a party to the dispute may submit the matter for arbitration or institute judicial proceedings.” 10
75. In applying the above provisions to this Petition, I am aware that the Court of Appeal as well as the High Court have in the past extensively dealt with the importance of exhausting the mechanisms contemplated by the Constitution or statute in dispute resolution before resorting to judicial proceedings. Such has been the gist of the cases like *The Speaker of the National Assembly v Karume* (2008) 1 KLR 426. In *Narok County Council v Trans Mara County Council and another*, Civil Appeal No 25 of 2000, the Court of Appeal expressed itself as follows in that regard; 15
- “Although section 60 of the Constitution gives the High Court unlimited jurisdiction, it cannot be understood 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; it is where the Statute is silent on what is to be done in the event of a disagreement ... Where the Statute provides that in case of a dispute the Minister is to give direction, the jurisdiction of the Court can be invoked only if the Minister refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter, his decision can be challenged by an application to the High Court for a writ of *certiorari* because under the relevant section the decision is to be made on a fair basis. But if the Minister simply refuses to discharge his statutory duty, his refusal can also be challenged in the High Court by way of mandamus to compel the Minister to perform his statutory duty but not by way of a suit ... If the Court acts without jurisdiction, the proceedings are a nullity ... 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 20 25 30 35 40

express provisions or by necessary implication, so confer or limit ... The jurisdiction of the High Court can be ousted by an Act of Parliament and in such cases all that the High Court can do is to enforce by judicial review proceedings, the implementation of the provisions of the Act; certainly not, to usurp the powers of the Minister... Even though resort to the judicial review process, may in appropriate cases not be a bar to other proceedings such as a plaint, this may not apply in peculiar circumstances such as this one, so as to entitle the Judge to do not only what he was not requested to do, but also, to do what he had no jurisdiction to embark upon... Where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the dispute.”

76. As to the place of alternative dispute resolution mechanisms in the Constitution 2010, Majanja J in *Dickson Mukweluine v Attorney General & 4 others* Nrb HCC Petition No 390 of 2012, expressed himself as follows;

“That alternative dispute resolution processes are complementary to the judicial process and by virtue of article 159(2)(c) of the Constitution of Kenya, 2010, the Court is obligated to promote these modes of alternative dispute resolution and that it is not inconsistent with articles 22 and 23 to insist that statutory processes be followed particularly where such processes are for the specific purpose of realising, promoting and protecting certain rights. Accordingly the Court is entitled to either stay the proceedings until such a time as the alternative remedy has been pursued or bring an end to the proceedings before the Court and leave the parties to pursue the alternative remedy. In the result we are of the view and hold that the Court’s jurisdiction under article 165 can be limited and/or restricted by an Act of Parliament.”

I wholly agree with the learned Judge.

77. In the instant Petition, the question therefore is whether there is a dispute between the parties contemplated under section 33 of the Act. This issue is important in making a finding because the Act contemplates that there must be a formal declaration of the dispute. Section 33 provides thus;

“33(1) Before formally declaring the existence of a

dispute, parties to a dispute shall, in good faith, make every reasonable effort and take all necessary steps to amicably resolve the matter by initiating direct negotiations with each other or through an intermediary. 1
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- (2) Where the negotiations under subsection (1) fail, a party to the dispute may formally declare a dispute by referring the matter to the Summit, the Council or any other intergovernmental structure established under this Act, as may be appropriate.” 10

It is clear therefore that the first step to have a dispute resolved amicably is the formal declaration of the dispute by the parties to it. As stated elsewhere above, the parties, subject of the dispute, are either the two levels of government (National and County) or amongst counties themselves. Do the Petitioners fall within this category? Obviously they do not. 15

78. In that regard, and further to my findings above, the *Amicus Curiae* submitted that the Petitioners are private citizens and have raised a matter that can be characterized as an intergovernmental dispute, and therefore the dispute can be resolved through recourse to the intergovernmental dispute resolution principles as contemplated in article 189 of the Constitution and the Intergovernmental Relations Act. I disagree with that argument. First, there is no dispute as between the National and County Governments. In fact, the County Governments through the Affidavit of Isaac Ruto are in agreement with the impugned Legal Notices issued by the Transition Authority. Accordingly, no dispute can be said to exist as between the two levels of Government to warrant me invoke the dispute resolution mechanisms contemplated under sections 30-35 of the Intergovernmental Relations Act. In so holding, it is clear to my mind that the intention of the Legislature was not to bring any issue, real or perceived, as a dispute by any person other than the two levels of government or as between counties, within the purview of the dispute resolution mechanisms under the Intergovernmental Relations Act. As was held by the Court of Appeal in *Kimutai v Lenyongopeta & 2 others* [2005] 2 KLR 317; 20
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“It is an elementary rule that a thing which is not within the letter of a Statute will, generally, be construed as not within the Statute unless it also be within the real intention of the legislature, and the words, if sufficiently flexible, must be 40

construed in the sense which, if less correct grammatically, is more in harmony with that intention... It was necessary, in order to arrive at the real meaning, to get to the exact conception of the aim, scope and aspect of the whole Act, to consider how the law stood when the Statute to be construed was passed, what the mischief was of which the old law did not provide, and the remedy provided by the Statue to cure that mischief... The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of Statutes. The literal method is now completely out of date and has been replaced by the approach described as the “purposive approach”. In all cases now in the interpretation of Statutes such a construction as will “promote the general legislative purpose” underlying the provision to be adopted. It is no longer necessary for the judges to wring their hands and say, “There is nothing I can do about it”. Whenever the strict interpretation of a Statue give rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind”.

I am duly guided and therefore it is necessary in order to arrive at the meaning of the provision of an Act, to get the exact conception of the aim, scope and aspect of the whole Act. In this Petition, since no government has filed any dispute, the position taken by the *Amicus Curiae* is untenable, attractive as it may sound.

80. Secondly, the Petitioners have invited this Court to address a specific problem caused by what they consider as the wrong interpretation of the words ‘national referral health facilities’ in Part 1 of the fourth schedule to the Constitution and the words ‘county health facilities and pharmacies’ in Part 2, section 2(a) of the fourth schedule to the Constitution. It is therefore clear to my mind that the Petitioners have invoked the jurisdiction of this Court to interpret the Constitution as provided under article 165(3)(d) of the Constitution. For avoidance of doubt this article provides,
- “(1) There is established the High Court, which—
 - (2) ...
 - (3) Subject to clause (5), the High Court shall have—
 - (a) Unlimited original jurisdiction in criminal and civil matters;

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- (b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; 1
 - (c) Jurisdiction to hear an appeal from a decision of a tribunal; 5
 - (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; 10
 - (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; 15
 - (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; and 20
 - (iv) a question relating to conflict of laws under article 191; and”
81. To my mind therefore, because the Petitioners have invoked this Court’s jurisdiction to interpret the Constitution, then the Court indeed has jurisdiction to address the issue, the merits or otherwise notwithstanding. According to the Petitioners, therefore, the words ‘national referral facilities’ do not mean only Kenyatta National Hospital and Moi Teaching and Referral Hospital but mean all public hospitals from Level 2 to Level 6, which form, in their view, the national referral health system. To find that this Court has no jurisdiction to entertain that issue, would leave the Petitioners without an avenue to ventilate their grievances and in any event, article 258(1) of the Constitution also grants the Petitioners the right to institute this Petition. This article provides that; 25
- “258(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention”. 30
- 35
- With that clarification, I am of the firm view and find that this Court has jurisdiction to entertain the Petitioners’ claim and so I will. Can the Petition be entertained as framed and argued” 40

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82. Having so held, the next issue therefore is whether the Petition can be entertained on the specific issues raised by the Petitioners. As stated earlier, the Petitioners' case seems to mainly rotate around the meaning and application of the phrases "national health referral facilities" and "county health services". According to them, national referral health facilities refer to Level 2, Level 3, Level 4, Level 5 and Level 6 health facilities and not only to Kenyatta National Hospital and Moi Teaching and Referral Hospital. That the government should be guided by the definition of national referral system by WHO and as regards the County Health Facilities, which include 'county health facilities and pharmacies', the Petitioners contended that these are facilities which were established and previously managed by local authorities and which offer primary healthcare. 1 5 10
83. To my mind, the latter argument cannot suffice and for a good reason; that the Local Government Act has been repealed and the Constitution 2010, has created a new governance structure between the two levels of government. The fourth and the sixth Schedules to the Constitution, 2010, deal with distribution of functions between the National Government and the County Governments and transition provisions, respectively. The Petitioners must therefore understand and know that devolution has brought in a new structure of governance and it cannot be compared with the Local Authorities system as we knew it under the Repealed Constitution. County Governments under the Constitution, 2010 have now been elevated to the level of semi-autonomous governments but inter-dependent with the National Government. 15 20 25
84. With that context in mind and looking at the provisions of Part 1 section 23 of the fourth schedule to the Constitution, national referral health facilities are without doubt the function of National Government and there is no contest about that issue. Part 2 section 2 of the fourth schedule on the other hand deals with county health services and states that; "County health services, including, in particular— 30 35
- a. county health facilities and pharmacies;
 - b. ambulance services;
 - c. promotion of primary health care;
 - d. licensing and control of undertakings that sell food to the public;
 - e. veterinary services (excluding regulation of the profession); 40

-
- f. cemeteries, funeral parlours and crematoria; and 1
 - g. refuse removal, refuse dumps and solid waste disposal”

are the preserve of County Governments
 - 85. Looking again at the provisions of the fourth schedule, and the 5

entire Constitution as well as the Statutes on devolution, nowhere have the words ‘national referral health facilities’ and ‘County health facilities been defined’. Again, nowhere is it mentioned which health facilities belong to Level 1, Level 2, Level 3, Level 4, 10

Level 5 and Level 6 so as to say that they specifically belong either to the national referral health system or county health system. To that extent therefore, I must agree with the Respondents, the 2nd 15

Interested Party and the *Amicus Curiae* that the classification of the hospitals into levels and eventually into national referral health facilities or national health system and county health facilities and system, is a policy issue to be determined in accordance with the 15

provisions of section 15 of the sixth schedule which establishes guidelines for the devolution of functions to be made by an Act of Parliament. This section provides that;

 - “(1) Parliament shall, by legislation, make provision for 20
 - the phased transfer, over a period of not more than
 - three years from the date of the first election of county
 - assemblies, from the National Government to County
 - Governments of the functions assigned to them under 25
 - article 185(2). The legislation Mentioned in subsection
 - (1) shall—
 - a. provide for the way in which the National
 - Government shall—
 - i. facilitate the devolution of power; 30
 - ii. assist County Governments in building their
 - capacity to govern effectively and provide the
 - services for which they are responsible...
 - iii. support County Governments;
 - (b) establish criteria that must be met before particular 35
 - functions are devolved to County Governments
 - to ensure that those governments are not given
 - functions which they cannot perform;
 - c. permit the asymmetrical devolution of powers to 40
 - ensure that functions are devolved promptly to
 - counties that have the capacity to perform them but
 - that no county is given functions it cannot perform;

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and d. provide mechanisms that ensure that the Commission on the Implementation of the Constitution can perform its role in monitoring the implementation of the system of devolved government effectively.”	1 5
86. That provision requires no more than a literal interpretation and in addition, this Court’s jurisdiction is limited to interpretation of the law and does not include either the enactment of policy or the law as that is the mandate of Parliament for national legislation and county assemblies for county legislation as well as the national and county executives in the case of policies.	10
87. The intended legislation under section 15 of the sixth schedule is the Transition to Devolved Government Act No 1 of 2012. The Preamble to this Act states that it is; “An Act of Parliament to provide a framework for the transition to devolved government pursuant to section 15 of the sixth schedule to the Constitution, and for connected purposes”	15 20
Sections 23 and 24 of the Act have then made provisions for transfer of certain services and I shall revert to those provisions shortly.	
88. The Attorney General explained in his submissions that the policy governing the classification of the health facilities into Levels is contained in the Ministry of Health, “National Health Sector Strategic Plan 1999-2004” and “Reversing the Trends, The Second National Health Sector Strategic Plan 2005-2010” and even with devolution, the policy in that document has remained the same; that of hierarchy of hospitals with Kenyatta National Hospital at the apex. The 2005-2010 Strategic Plan classified health facilities on the basis of Levels of care at various levels. The argument therefore by the Petitioners that counties have been given health facilities based on geographical locations cannot be true and I agree with the Attorney General’s clarification. The Attorney General also confirmed that the 2005-2010 policy was not based on any geographical zoning, but the level of service that each facility was providing. Indeed the Attorney General also confirmed that per the 2005-2010 policy, it would be incorrect to state that Level 1 facilities are the only county health facilities and the rest of the facilities are national referral health facilities. He stated that as contemplated under section 23 of the fourth schedule to the Constitution, the referral system in	25 30 35 40

Kenya has always included national referral hospitals (Kenyatta and Moi), as well as provincial and district hospitals. To that end therefore, the national referral facilities must only refer to KNH and MTRH and I wholly agree. I say so well aware that the said policy was made before the promulgation of the Constitution, 2010 and as to its applicability in the present constitutional dispensation, the Court in *Republic v The Transition Authority* (*supra*) stated as follows;

“To the contrary in the fourth schedule, Part 1 No 28 to the Constitution, it is clear that the Health Policy remains a function of the National Government. The inadequacies of provision of health services in this County is a matter of national concern and it is the obligation of the National Government to ensure that every person’s right to the highest attainable standard of health as stipulated under article 43 of the Constitution is attained... The fact that Health services are devolved does not discharge the National Government from its obligation to ensure that its Constitutional obligations are fulfilled. In our view, under article 1(3)(b) of the Constitution, there is only one State organ known as the Executive with structures at national level and in the County Governments. Accordingly, we do not accept the contention that devolution of Health services ipso facto ought to necessarily lead to loss of jobs or disadvantageous terms of employment, salaries, Remuneration, pensions and gratuities which terms in our view ought to be determined by the Salaries and Remuneration Commission.”

I am in complete agreement and that also addresses the issues raised by the 1st Interested Party that the terms and conditions of service of its members have been affected by the health policy. In any event, the 1st Interested Party’s claims were largely speculative and had no factual basis. I say so with respect, because they tendered no facts to support that very emotive issue.

89. I have deliberately discussed the submissions by the Attorney General because he has, in my view, answered the Petitioners’ fears, and has to some extent clarified the Petitioners’ views that there are other national referral hospitals in the referral system other than KNH and MTRH.

90. But even then, as I stated elsewhere above, the Constitution has not classified the health facilities into certain levels, as that is a matter of

policy. I therefore politely decline to get into the arena of defining what the phrases ‘national referral health facilities’ and ‘county health facilities’ are or what hospitals belong to what category. I say so because the Court is not the maker of the health policy in Kenya. The Court has no ability or mechanism to determine the criteria to be used to categorize hospitals, and it does not have the capacity to examine the equipment, facilities and manpower available in the hospitals, as that is the exclusive mandate of the National Government through the Executive. I am therefore in agreement with the submissions by the Respondents, the 2nd Interested Parties and the *Amicus Curiae* that this Court cannot determine the issues raised herein as it would amount to implementing and making policies for and on behalf of the Executive. To paraphrase that finding, the Court will be stepping into the mandate of the Executive state organs and agencies which act is generally constitutionally frowned upon and in that regard I am also in agreement with the High Court in *Republic v The Transition Authority (supra)* where the learned Judges stated;

“The inadequacies of provision of health services in this County is a matter of national concern and it is the obligation of the National Government to ensure that every person’s right to the highest attainable standard of health as stipulated under article 43 of the Constitution is attained....”

91. Accordingly, I am clear in my mind that application of the fourth schedule in determining which health facilities fall within which category is the preserve of the National Government as it would be more informed in that regard by several factors and details which may not be within the knowledge of this Court. I also find that issues of transition are best left to the relevant State organs and agencies such as the 2nd Respondent and the 2nd Interested Party as they would be the best judges of the merit of doing so and they would have all the necessary information critical in making such decisions. They would also be responsible for setting, reviewing and maintaining the standards they set. In that regard, section 24 of the Act states as follows;

“24(1) Subject to section 23, the criteria for the transfer of functions shall include—

- (a) whether there is in existence legislation relating to the function applied for;
- (b) whether a framework for service delivery has been

put into place to implement the function;	1
(c) whether, where applicable, the County Government has identified or established administrative units related to the function;	
(d) whether the County Government has undertaken a capacity assessment in relation to the function;	5
(e) the arrangements for and the extent of further decentralization of the function and provision of related services by the County Government;	
(f) whether there is the required infrastructure and systems to deliver the function;	10
(g) financial management systems in place;	
(h) whether the County Government has an approved plan in relation to the function;	15
(I) any other variable as may be prescribed after consultations between the Authority, County Governments and the Commission for the Implementation of the Constitution and the Commission on Revenue Allocation.	20
(2) The Authority shall perform the functions specified under subsection (1) in accordance with article 187 of the Constitution.”	
In the same regard, article 187 of the Constitution deals with the transfer of functions and powers between levels of government. The Article states that;	25
“(1) A function or power of government at one level may be transferred to a government at the other level by agreement between the governments if—	30
(a) the function or power would be more effectively performed or exercised by the receiving government; and	
(b) the transfer of the function or power is not prohibited by the legislation under which it is to be performed or exercised.	35
2. If a function or power is transferred from a government at one level to a government at the other level—	
a. arrangements shall be put in place to ensure that the resources necessary for the performance of the function or exercise of the power are transferred; and	40

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- b. constitutional responsibility for the performance of the function or exercise of the power shall remain with the government to which it is assigned by the fourth schedule.” 1
92. To my mind therefore, and in line with the above provisions of the law, it is very clear that the Court is not the best judge as regards the transfer of functions and powers between the two levels of government. The Constitution and Statutes have created adequate safeguards and institutional arrangements on the subject and the Court’s intervention cannot be sought in the manner that the Petitioners have done. 5
- Whether the orders sought should be granted 10
93. Having held as I have done above and looking at the critical issues to be addressed in the Petition, the prayers in the Petition can be grouped into two categories; 15
- (i) those that seek orders regarding devolution of referral health facilities – prayers (a), (b), (c), (d), (e), (f), (g), (h), (i) and (k) (ii) those relating to Legal Notices No137 and 182 of 2013 dated 9th August 2013 – prayers (j) and (l) 20
- I have already stated that this Court has no mandate to purport to determine what referral facility should be at what level and so the prayers in category (i) cannot be granted. Similarly, in the context of the present Petition, it would not be proper for this Court to quash the Legal notices in issue and I have said why. Regarding prayer (m) of the Petition, I am not able to issue any other orders to advance the cause of justice as I do not see what orders can issue in a matter such as the one before me although in the conclusion, I will digress and make one statement addressed to the Petitioners and the 1st Interested Party that have joined to support the Petition. 25 30
- Conclusion 35
94. It is clear by now that the Court will not accede to any claims based on speculation and conjecture without any lawful basis being laid for their grant. I say so because the Petitioners, even after seeking the definition of the words “national referral health facilities” and “county health facilities” and seeking to quash Gazette Notices Nos 137 and 182 of 2013 made omnibus allegations and the Court therefore did not have the proper facts to determine if at 40

Okeyo v County Government of Kisumu & 2 others [2014] KLR-HCK

High Court, at Kisumu
AO Muchelule, J

May 7, 2014

Petition No 1'A' of 2014

Brief facts

The 2nd Respondent (Joseph Omulo) was the Executive Committee Member for Treasury for the 1st Respondent, Kisumu County Government. On September 13, 2013 he wrote a letter of notification of award of contract for solid waste management which was made to the 3rd Respondent, Madam Enterprises. The firm was given the exclusive responsibility to collect garbage and manage all solid waste for 15 years. The letter of offer indicated that the contract was envisaged to run from 2013 to 2028 for a sum of Kshs 1.2 billion per year. The Petitioner went to court to challenge that award after trying in vain, to obtain from the Respondents evidence that a tender had been floated, invitation to the tender advertised and evaluation of bids before the award. The Petitioner's case was that the process used to award the tender to the 3rd Respondent was not fair, equitable, transparent, competitive or cost effective.

Issues

- i. Whether failure to adhere to procurement law amounted to an infringement of the Petitioner's fundamental rights and freedoms and rendered the procurement process null and void.
- ii. Whether the contracting of the 1st Respondent's obligations in recruitment of service providers as set out in the Forth Schedule to the Constitution was a major policy decision requiring public participation.

Constitutional Law – *fundamental rights and freedoms – enforcement of fundamental rights and freedoms – right to public participation – public procurement – whether County Government procurement was a major policy decision requiring public participation in the County – whether failure to follow procurement law amounted to an infringement of the Petitioner's fundamental rights and freedoms and rendered the procurement process null and void – Constitution of Kenya, 2010, articles 27,42,46 75,201,210 227 & 232(1).*

Procurement Law – *public procurement-procedure for public procurement – whether County Government procurement was a matter*

of public policy decision which required public participation – whether failure to involve the public in county tendering process makes the whole process invalid – Public Procurement and Disposal Act sections 3(1)(k), 3(2) & 4; Public Procurement and Disposal (County Government) Regulations 2013 regulation 5.

Held:

1. There was no dispute that Kisumu County was a public entity under Public Procurement and Disposal Act sections 3(1)(k), 3(2) and 4 and regulation 5 of the Public Procurement and Disposal (County Government) Regulations 2013. Any procurement by Kisumu County was to follow the Constitution and the Public Procurement and Disposal Act and had to be fair, equitable, transparent, competitive and cost effective. 10
2. The 1st Respondent had, on behalf of the residents of Kisumu County, a responsibility to collect garbage and solid waste. How that raw material was going to be collected and managed was under the Constitution the responsibility of the 1st Respondent on behalf of the residents. That responsibility was to be exercised to benefit the residents and the decision to enter into a public private partnership in relation to solid waste management was a major policy decision that required public participation under the Constitution. 15 20
3. The decision as to which private entity would help the 1st Respondent in managing solid waste required public procurement under article 227(1) of the Constitution and under sections 2, 3, and 4 of the Public Procurement and Disposal Act. It was only an open and competitive procurement that was going to ensure value for money. It was only by the procurement as outlined in the law that would ensure a technical evaluation process that would give the best outcome. The 3rd Respondent may very well have had the technical and financial abilities to manage waste, but that had to be tested against other pre-qualified bids. In so far as the 3rd Respondent was not so procured, the 1st and 2nd Respondents breached the Constitution and the Act and to that extent the award was null and void. 25 30 35
4. The 1st and 2nd Respondents should have sworn affidavits showing the tender advertisement, the bids received and the evaluation done to decide on the 3rd Respondent. No affidavit was sworn. The Petitioner was a tax payer and resident of the County who was entitled to all the information regarding the award. His right was violated when no such information was forthcoming. 40

5. A decision by a public servant should not be influenced by nepotism, favoritism or improper motives. Under section 43 of the Public Procurement and Disposal Act, the 2 nd Respondent was under a duty to declare his relationship with the 3 rd Respondent. The award was voidable given the undisclosed conflict of interest and it offended the Constitution in so far as it was signed off by the 3 rd Respondent's relative (2 nd respondent).	1 5
6. The Constitution and the County Governments Act provided for citizen participation in elections and appointments; legislation; policy formulation, planning and development; effective resources mobilization and use for sustainable development; project identification, privatization, planning and implementation; and the alignment of county financial and institutional resources to agreed policy objectives and programs. The Act further required each County to provide continual and systematic civic education to its residents. That was out of the realization that it was only when citizens were enlightened that they could effectively participate in governance matters affecting them.	10 15
7. There was no evidence to show how the solid waste management project was conceived, neither was there evidence that the project was as a result of any policy decision and objective in which the residents of the County were engaged. The project was therefore constitutionally and legally indefensible.	20
8. Allowing the Respondents to proceed with the project in the illegal manner would have led to imprudent and irresponsible use of a precious resource without assuring the public that there was value for money.	25
<i>Petition allowed</i>	30
Cases	
None referred to	
Statutes	
<i>East Africa</i>	
1. Constitution of Kenya, 2010 articles 35, 42, 46, 75, 201, 227(1); 232 – (Interpreted)	35
2. County Governments Act, 2012 (Act No 17 of 2012) In general – (Interpreted)	
3. Environmental Management and Co-ordination Act, 1999 (Act No 8 of 1999) In general – (Interpreted)	40
4. Public Procurement and Disposal Act, 2005 (Act No 3 of 2005) sections 2, 3(1)(k),(2); 4; 43 – (Interpreted)	

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5. Public Procurement and Disposal (County Governments) Regulations, 2013 (Act No 3 of 2005 Sub Leg) regulation 5 – (Interpreted) 1

Advocates

1. *Mr Njuguna* for the Petitioner 5
2. *Mr Lore* for the 1st Respondent
3. *Mr Aron* for the 2nd Respondent
4. *Mr Okongo* for the Members of the County Assembly
5. *Mr Ogonda* for KIWAMA 10

May 7, 2014, **AO Muchelule, J** delivered the following Judgment.

- 1). The 2nd Respondent is the executive committee member for Treasury for the 1st respondent. On 13-9-2013 he wrote a letter of notification of award of contract for solid waste management (“EO1”) in the following terms: 15

“We wish to advise that after careful evaluation of your bid alongside others, we found your bid to be substantially responsive to our needs and requirements.

Further, the financial and technical evaluations revealed that you have the capacity, machinery and financial capabilities to carry out the above mentioned job. 20

On behalf of County Government of Kisumu, I am pleased to inform you that your bid has been accepted. Consequently you are required to sign the contract award agreement form on it before 20th October, 2013. 25

The contract is envisaged to run for 15 years that is from 2013 – 2028 for a sum total of Kshs 1,200,000,000 per year.”

The award was being made to the 3rd Respondent. The firm was being given the exclusive responsibility to collect garbage and manage all solid waste for 15 years for the value indicated. 30

- 2). On 20-2-2014 the Petitioner came to court to challenge this award. He did this after he had tried, in vain, to obtain from the respondents evidence that a tender had been floated, there was invitation to the tender advertised and there was evaluation of bids before the award. The petitioner is a resident of Kisumu and a tax payer and states that no such tender was floated or bids invited. He made reference to article 227(1) of the Constitution of Kenya 2010 which commands that: 35

“227(1) Where a state organ or any other public entity contracts for goods or services, it shall do so in accordance with a 40

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system that is fair, equitable, transparent, competitive and cost effective.”	1
His case was that the process used to award the tender to the 3rd Respondent was not fair, equitable, transparent, competitive or cost effective.	5
3). The second Complaint by the Petitioner was that the 3rd Respondent is actually a business name (“EO2”) whose owner is Renish Achieng Omullo who does not have the necessary qualifications, capability, experience, resources, equipment and facilities to perform the contract on waste management worth Kshs 1.2 billion per year. Related to this was the allegation that the respondent was given the tender because she is related to the 2nd Respondent. He made reference to article 75 which asks a state officer to conduct himself in a manner that avoids any conflict between personal interests and public or official duties.	10 15
4). Thirdly, the tender was questioned because the question of refuse removal, refuse dump and solid waste management was an environmentally sensitive one that required, not only the involvement of the National Environmental Management Authority (under the Environmental Management and Co-ordination Act No 8 of 1999) but also public participation as envisaged under article 201, now that public resources were involved. A policy needed to be developed following public participation before any tender could be floated. The petitioner pleaded that the 3rd respondent was going to levy charges from the public from whom such garbage or waste was collected. He found a problem with that levy in view of lack of legislation (article 210) to allow such imposition.	20 25 30
5). Fourthly, he complained about the Respondents refusal to provide information regarding the tender. His case was that that was public information to which he was entitled, and which he had been denied, under Article 35.	35
6). Lastly, he complained that his right to a clean and healthy environment under Article 42 was threatened as were his consumer rights under Article 46.	40
7). The 3rd Respondent filed a replying affidavit through its commercial manager Fredrick Agoro in which he stated that, by the award the firm was going to collect solid waste “and use it as raw material for generation of electricity and	40

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- making of fertilizer at its biogas plant all at its own expense.” 1
- In so doing, the public was going to benefit as:
“the garbage will be removed and the environment made
cleaner without the 1st Respondent using tax payers money 5
or levying charges on the public.”
- He stated that the 3rd Respondent was going to collect garbage and
solid waste for free without levying any tax or charge to the public.
The 3rd Respondent, he stated, was not going to get any payment 10
from the 1st Respondent. The 3rd Respondent’s case was that the
Petitioner used to provide security services to it, that the services
were terminated which led to the petitioner suing it. This petition,
therefore, is intended to intimidate the respondent into settling
that personal dispute. 15
- 8). The 2nd Respondent filed grounds of opposition in which he
denied that the Petitioner had any legitimate complaint. He denied
that his human or fundamental rights and freedoms had been
violated or were threatened with violation. He stated that no contract 20
had so far not been signed, and that in any case
- “9. The intended contract and the attendant Public Private
Partnerships envisaged is in the interest of the public,
as it will eliminate the solid waste management in the
County at no cost to the public.” 25
- His case was that, now that no public funds were to be expended
the provisions of article 227(1) and those of the Public Procurement
and Disposal Act and the Regulations thereunder did not apply.
- 9). The 1st Respondent filed grounds of opposition to say that no right
or freedom of the Petitioner has been infringed, or is threatened 30
to be infringed. It was contended that if the Petitioner had any
grievance with the award he should have sought remedy under the
Public Procurement and Disposal Act, and that, in any case, he had
complained to the Ethics and Anti-Corruption Commission who 35
were investigating the matter. The Respondent stated that:
- “7. There was no evidence that the contract if entered
into and performed by the 3rd Respondent will not be
beneficial or that it will be detrimental to the members
of the public resident in Kisumu County.” 40
- 10). Priscah Auma Misachi, Yonah Maina Koko, Jane Omolo,
Mohamed Aslam Khan, Philip Anayo and Malin Olero are members

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- of Kisumu County Assembly. They successfully applied to be joined in the petition as interested parties. They supported the award to the 3rd Respondent. In the affidavit sworn by Priscah Auma Misachi, they stated that: 1
- “9. The 1st Respondent does not have capacity to manage the same and therefore it would be unfair for this court to be used to deny a philanthropist an opportunity to help alleviate this obvious problem.” 5
- They stated that the 2nd Respondent had access to international funds which they intend to use to establish a solid waste management plant, and 10
- “to establish necessary infrastructure towards that purpose and they should be allowed to use waste.”
- 11). The Court also allowed Kisumu Waste Management Association (KIWAMA) to join in the petition as an interested party. This is a duly registered society that has a membership of 54 community organizations that deal in waste management. They have a letter of no objection from the National Environmental Management Authority (NEMA) as having complied with all the legal provisions of Environmental Management and Co-ordination (Waste Management) Regulations of 2006. They are based in Kisumu. They state that, until this Petition was filed they were unaware that the 1st Respondent had awarded a tender to the 3rd respondent to handle garbage collection and waste management. They say that they were unaware of any procurement process leading to the award. They were not invited to bid. Their contention is that the award offended article 227(1) of the Constitution. They are tax payers who were denied the right to participate in the tender. They took issue with the fact that the 3rd Respondent had been issued an award whose value was Kshs 1.2 billion per year for 15 years 15
- “which money is to be paid from the tax payers money hence the public members of Kisumu County stand to suffer economic loss by virtue of a contract which has been procured illegally.” 20
- They stated that they were aware that the proposition of the 3rd Respondent was relative of the 2nd Respondent who signed away the award. 25
- 12). Honourable Fredrick Outa, Honourable J Olago Aluoch and Honourable Aduma Owuor are members of the National Assembly 30
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representing constituencies in the County. They successfully sought to be joined in the petition as interested parties to oppose the petition which they stated that it was: 1

“frivolous, vexations and constitutes an abuse of the process of the Court.” 5

Their contention was that the failure to follow the procurement law, if at all, did not amount to an infringement of the Petitioner’s fundamental rights and freedoms; that no public funds are to be used and therefore the provisions of the Public Procurement and Disposal Act did not apply to the situation. Lastly, they stated: 10

“9. That the intended contract and the attendant Public Private Partnerships envisaged is in the interest of public, as it will eliminate the solid waste menace in the County as no cost to the public.” 15

13). The Petitioner sought the following declarations:

- a. that the contracting of the 1st Respondent’s obligations as set out in Schedule 4 of the Constitution was a major policy decision requiring public participation as provided for in the Constitution more so in articles 201 and 232; 20
- b. that the 1st Respondent was bound by article 227(1) of the Constitution;
- c. that the awarding of the contract contravened article 227 as read with articles 201 and 75 and ought to be set aside; 25
- d. that the award threatens the right of the Petitioner under articles 42 and 46;
- e. that, in so far as the award did not follow the provisions of the Public Procurement and Disposal Act and article 227 of the Constitution, it was null and void; 30
- f. that the levying of fees or licences by the 3rd Respondent was illegal and contravened Article 210 of the Constitution.

The Petitioner sought an order compelling the 1st Respondent to commence a fresh procurement process that is competitive, transparent, fair and has public participation. He also asked for costs. 35

14). The Respondents, the members of the County Assembly and the members of National Assembly sought that the petition be dismissed with costs. 40

15). Mr Njuguna represented the petitioner; Mr Yogo represented the 3rd Respondent and the members of the National Assembly; Mr.

M/S Aron represented the 2nd Respondent; Mr Lore represented the 1st Respondent; Mr. Okongo represented the Members of the County Assembly; and Mr Ogonda represented KIWAMA. Submissions were filed on behalf of the Petitioner, the 1st Respondent and the 3rd Respondent. I have considered them and considered the authorities cited.

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16). There is no dispute that the 2nd Respondent is the 1st Respondent's County Executive Committee Member for Treasury. He did not swear any affidavit to deny that on 13-9-2013 he wrote ("EO 1") to notify the 3rd Respondent that its bid to manage solid waste had been accepted by the 1st Respondent, and that a contract in that regard would be signed on 20-10-2013. This letter of offer indicated that the contract was envisaged to run for 15 years (from 2013 to 2028) for a sum of Kshs 1.2 billion per year. The replying affidavit sworn on behalf of the 3rd respondent admitted that it had received the letter of award, but denied that any funds would be used in the project. The members of the National Assembly and the Members of the County Assembly who joined the Petition took the position that the project was going to be beneficial to the County, and that no public funds would be spent. The 1st Respondent did not get any of its officers to swear an affidavit to deny the letter, or its contents. I find that indeed the 1st and 2nd Respondents issued the letter of award.

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17). The Petitioner's case was that the 1st and 2nd Respondent were under a duty to subject this procurement to due process as is required under article 227(1) and the provisions of the Public Procurement and Disposal Act and the Regulations thereunder. There is no dispute that under sections 3(1)(k), 3(2) and 4 of the Act and regulation 5 of the Public Procurement and Disposal (County Government) Regulations 2013 Kisumu County is a public entity. Any procurement by it was to follow the Constitution and the Act. It had to be fair, equitable, transparent, competitive and cost effective. The Petitioner says that the procurement was not any of these. He was not able to trace any document to show that the tender was advertised or processed as is required by law. KIWAMA is a body of registered associations in the County that deal in waste management. They only learnt of the award after the petition was filed. The 1st, 2nd and 3rd Respondents took the position that, now that no public funds were being spent the provisions of the Constitution and the Act in relation to procurement did not apply. In the same

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- on the 3rd Respondent. No affidavit was sworn. The petitioner, I find, is a tax payer and resident of the County who was entitled to all the information regarding the award. His right was violated when no such information was forthcoming. 1
- 20). The petitioner stated, and was supported by KIWAMA, that the 2nd respondent and the 3rd Respondent were related. There was no affidavit sworn to deny this. The petitioner's contention was that the award was influenced by this relationship. He cited article 75 which requires that a public officer be objective and impartial in decision – making. A decision by a public servant should not be influenced by nepotism, favouritism or improper motives. Under section 43 of the Act the 2nd Respondent was under a duty to declare his relationship with the 3rd Respondent. The award was voidable given this undisclosed conflict of interest. The award offended the Constitution in so far as it was signed off by the 3rd Respondent's relative (2nd respondent). 5 10 15
- 21). Lastly, the Constitution and the County Governments Act (No 17 of 2012) provide for citizen participation in elections and appointments; legislation; policy formulation, planning and development; effective resources mobilization and use for sustainable development; project identification, prioritisation, planning and implementation; and the alignment of county financial and institutional resources to agreed policy objectives and programmes. Further, the Act requires each County to provide continual and systematic civic education to its residents. This is out of the realization that it is only when citizens are enlightened that they can effectively participate in governance matters affecting them. There was no evidence to show how this solid waste management project was conceived. There was no evidence that the project was as a result of any policy decision and objective in which the residents of the County were engaged. This project is therefore Constitutionally and legally indefensible. 20 25 30 35
- 22). I hope I have said enough to show that allowing the Respondents to proceed with this project in this illegal manner would lead to imprudent and irresponsible use of a precious resource without assuring the public that there is value for money. It is for the foregoing reasons that I allow the Petition. I declare that: 40
- (a) the decision to enter into a public private partnership in relation to solid waster management was a major policy

decision that required public participation;	1
(b) the decision as to which private entity would help the 1st respondent in managing solid waste required public procurement under article 227(1) of the Constitution and under sections 2,3, and 4 of the Public Procurement and Disposal Act; and	5
(c) in so far as the 3rd Respondent was not so procured the 1st and 2nd respondents breached the Constitution and the Act and, to that extend the award was null and void.	10
On the issue of costs, I consider that the 1st to 3rd Respondents were engaged in a blatant illegal enterprise that was going to deny the County and the its residents enormous resources. It is for this reason that I order that they jointly and severally pay the costs of the petitioner who has brought this matter to the attention of the public.	15
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**Kenya County Government Workers Union
v Kisumu County Assembly Public Service
Board [2014] KLR-E & LRCK**

Employment and Labour Relations
Court, of Kenya at Kisumu
H Wasilwa, J

April 30, 2014

Cause No 50 of 2014

Brief facts

The Applicant's (a registered Union) contended that the County Assembly of Kisumu had advertised for various positions to be filled without taking into account the interest or job security of the interested parties who were earlier employees of various Local Authorities in Kisumu County prior to 4.3.2013. The Interested Parties were deployed to Kisumu County Assembly by their respective deployment letters as watchmen, clerks, drivers, hansard reporters etc. They were however surprised that the Respondents advertised their jobs without carrying out an audit or even rationalization as provided for in the Transition to Devolved Government Act. The jobs were advertised and several people were short-listed, without indicating their identity card numbers, an indication that the process was not fair. It was the Applicant's contention that the respondents had not carried out a staff audit and their action therefore amounted to an unfair administrative action contrary to what was envisaged under article 47 of the Constitution of Kenya, 2010.

Issues

- i. Whether the County Assembly Public Board could be said to be part of the County Government
- ii. Whether the decisions of the County Assembly Public Board affected the County Government
- iii. Whether the orders sought by the Interested Parties could be granted in the circumstances.

Constitutional law – devolution – County Assembly Public Boards – whether the County Assembly Public Boards were part of the County Governments – whether the decisions of the County Assembly Public Boards affected the County Governments – Constitution of Kenya, 2010, article 176(1) & (2)

Civil Practice and Procedure – remedies – injunction – claim that the respondents unfairly advertised for the applicants job positions without

carrying a staff audit which amounted to an unfair administrative action – whether the orders sought by applicants could be granted. 1

Constitution of Kenya, 2010

Article 176(1) states that:- 5

There shall be a County Government for each County consisting of a County Assembly and a County Executives.

Article 176(2) states that:-

Every County Government shall decentralize it's functions and the provisions of it's services to the extent that it is efficient and practicable to do so". 10

Held:

1. The provisions of article 176 of the Constitution were to the effect that the County Government consisted of the County Assembly and the County Executive. Under article 176(2), the County Government could decentralize its function and provision of service to the extent that was efficient and practicable to do so. The decentralization envisaged was the one broken down under the County Government Act which had set out various bodies and assigned them various duties. 15
2. The decision to be taken was going to affect the running of the entire County Government and therefore it was imperative that the Respondents' actions be properly calculated in order not to affect the rest of the County Government. The decision of the Respondents therefore affected the County Government and *vice versa* as they were part and parcel of one entity. 25
3. There was no evidence that the advice by the Transition Authority that, in view of the massive restructuring of both the National and County Governments following the promulgation of the Constitution, rationalization of structure and staff was deemed necessary, had been carried out by the respondents nor the County Government of Kisumu. Therefore, the Interested Parties remained staff of the County Government of Kisumu and as deployed to the Respondents. Their positions ought not to have been disturbed without following the laid down procedures. 30

Orders

- i. *Injunction orders issued pending the hearing and determination of the suit* 40
- ii. *An order directing the respondents to first take staff rationalization of the staff working in the Kisumu County Assembly and determine*

- vacancies that exists and thereafter place advertisements for only those positions that could not be filled by the current staff from the claimants membership.* 1
- iii. *An injunction against the Respondents from termination or dismissal of the claimants from their employment without following the law and their terms and conditions of employment.* 5
- iv. *Respondents to bear costs of the suit.*

Cases

East Africa

1. *Giella v Cassman Brown & Co Ltd* [1973] EA 358 – (Explained) 10

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 47, 176 – (Interpreted)
2. Civil Procedure Act (cap 21) sections 3A, 63(c)(e) – (Interpreted) 15
3. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 40 rules 2, 3, 4, 8; order 51 rules 1, 3, 4– (interpreted)
4. County Governments Act, 2012 (Act No 17 of 2012) sections 12, 59, 62, 63, 72, 74, 75, 76 – (Interpreted)
5. Transition to Devolved Government Act, 2012 (Act No 1 of 2012) section 3, 5(a) (b) (c); 24 – (Interpreted) 20

Advocates

1. *Omondi Advocate* for Claimants
2. *Okongo Advocates* for Respondents 25

April 30 2014, **H Wasilwa J**, delivered the following Ruling.

The Application before court is the one dated 11.3.2014. The Application was filed under certificate of urgency by the firm of Otieno, Yogo, Ojuro & Co Advocates. It was brought through a Notice of Motion filed on the same day and brought under section 3A and 63(c) and (e) of the Civil Procedure Act Cap 21 Laws of Kenya and order 40 rules 2, 3, 4, and 8 and order 51 rules 1, 3, and 4 of the Civil Procedure Rules 2010 and Constitution of Kenya and sections 62 and 63 of the County Government Act. sections 72, 74, 75 and section 6 of the Guidebook to Governors and any other applicable provisions of law. The applicants seeks order that:- 30

1. That this Application be heard as a matter of urgency and *ex parte* in the first instance.
2. That pending the hearing and determination of this matter *inter parties* there do issue a temporary order of injunction against respondent, its agents, officers or 40

persons acting under their instruction from carrying on with any interviews scheduled for 1.3.14 to 3.4.14 or other date, recruitment or employment of any staff to the County Assembly before staff rationalization and deployment to determine the vacancies that cannot be filled by the interested parties.	1
3. That pending the hearing and determination of this matter there do issue an order of injunction against respondent, its agents, officers or persons acting under their instruction from carrying on with any interviews scheduled for 1.3.14 to 3.4.14 or other date, recruitment or employment of any staff to the County Assembly before staff rationalization and deployment to determine the vacancies that cannot be filled by the interested parties.	5
4. An order directing the Respondent to first take staff rationalization of the staff working in the Kisumu County Assembly and determine vacancies that exists and thereafter place advertisements for only those positions that cannot be filled by current staff from the claimants membership.	10
5. An injunction against the respondent from termination and/or dismissal of the claimants from their employment without following the law and their terms and conditions of employment.	15
6. Costs of this suit plus interests at court rates.	20
7. That costs of this application.	25
And the Application is supported by the annexed Affidavit of Joel Omondi Ondu and William Otieno Didi and further on following grounds:-	30
(a) The interested parties were deployed The County Assembly of Kisumu from various local authorities within the Kisumu County by virtue of the County Government Act after the general elections held on 4.3.2013.	35
(b) The interested parties have worked diligently from the months of March, 2013 to-date.	
(c) The Respondent in the months of October to December 2013 placed advertisements in the national print media in which it advertised for various vacancies within the	40

Kisumu County Assembly which positions some were being held by the Interested Parties.	1
(d) The transitional authority in a letter and press release to the county governments did advice against such recruitment without staff rationalization, deployment and audit to determine the vacancies that exist to determine the positions to be advertised for recruitment.	5
(e) The Claimant did write to the Interim Secretary to object to the action being taken by the Respondent to no avail.	10
(f) The Respondent action violated Constitution of Kenya 2010, sections 59, 61, 63 and 72, 74, 75 and 76 of the County Government Act, Section 6 of the Guidebook for Governors.	15
(g) The Claimants state that the Respondents lacks the legal or contractual authority or basis to act as they purport to do until and unless staff audit, rationalization, placement, deployment and staff to determine the vacancies that exist for recruitment ought to be prevented from such acts.	20
(h) The Interested Parties are likely to lose their employment without due process of the law or following their terms and conditions of employment hence they are likely to face extreme hardship and injustice by the actions of the Respondent and unless the Respondent are restrained, the claimants' legal and constitutional rights shall continue to be infringed upon.	25
It is the Applicant's case that the County Assembly of Kisumu advertised for various positions to be filled without taking into account the interest and/or job security of the interested parties who were earlier were employees of various Local Authorities in Kisumu County prior to 4.3.2013. The Applicant is a Union registered as per its' registration certificate annexed as JOO 1(a) and (b). The interested parties were deployed to Kisumu County Assembly by their respective deployment letters JOO2. They were deployed as watchmen, clerks, drivers, hansard reporters etc. they were however surprised that the respondents advertised their jobs without carrying out an audit and even rationalization as provided for in the Transition to Devolved Government Act. JOO3 is the advertisement. The jobs were advertised and several people short-listed some without indicating their identity card numbers an indication that the process is not fair.	30
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The Applicants further content that contrary to respondents response, the County Assembly Service Board is rightly sued as is the body that placed the advertisement and it cannot be divorced from the County Government as the 2 bodies are created under article 176 of the Constitution and section 12 of County Government Act establishes the office of the County Public Service Board.

The Applicants have also submitted that section 3 of the Transition to Devolved Government Act sets out objectives of the Authority on sections 5(a), (b) and (c) provides fir the policy and operational procedures and audit of liabilities of assets – HR matters which applicants fall. Further section 66 of the Governors Guidelines explain what happen to staff of former local authorities. The Applicants contend that the positions of the interested parties are being filled without staff rationalization and audit. The said staff had been deployed to the County Assembly and not seconded there as so their deployment was not a permanent placement.

It is applicants contention that the Respondents have not carried out a staff audit and their action amounts to an unfair administrative action – contrary to what is envisaged under article 47 of the Kenya Constitution. They further submitted that the principles of *Giella v Cassman Brown* have been established and therefore the orders sought should be granted.

The Respondents opposed the Application. They filed their grounds of opposition dated 14.3.2014 through the firm of Okongo Wandago & Co Advocates. It is their contention that the Respondents have been wrongly sued as the Respondents is created under section 12 of the County Government Act, (CGA). This section determines membership of the Board for which the Respondent is not one of them. It is respondents further submission that the interested parties were previously employees of the Local Government. They were public servants and became employees of County government and not of the respondents. It is also their contention that Guidelines of Governors do not bind the speaker of the County Assemblies as they are different entities.

They asked the Court to dismiss this Application stating that the interested parties are free to apply for the advertised posts and have not been discriminated against.

Having heard submissions of both parties, issues for consideration

are as follows:- 1

1. Whether the County Assembly Public Board is part of the County Government.
2. Whether the decisions of the County Assembly Public Board affects the County Government. 5
3. Whether the orders sought by the interested parties can be granted.

Article 176(1) of the Constitution states that:-

“There shall be a County Government for each County consisting of a County Assembly and a County Executives”. 10

Article 176(2) states that:-

“Every County Government shall decentralize it’s functions and the provisions of it’s services to the extent that it is efficient and practicable to do so”. 15

The Respondents have argued that they were wrongly sued as they are not part and parcel of the County Government of Kisumu.

They argued that they are created under section 12 of the County Government Act as the County Assembly Service Board and are not part of the County Government. They further argue that the interested parties were in place before the Respondents were established in August 2013 and the deployment letters were done by the County Government of Kisumu and not by the respondents. 20
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From the provisions of article 176 of the Constitution, the County Government consists of the County Assembly and the County Executive. Under article 176(2) this County Government can decentralize it’s function and provision of it’s service to the extent that is efficient and practicable to do so. The decentralization envisaged is the one broken down under the County Government Act which sets out various bodies and assigns them various duties. The argument by the Respondents does not therefore have the force of law as the Respondents are part and parcel of the County Government. 30
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The decision to be taken was going to affect the running of the entire County Government and therefore it is imperative that the Respondents actions be properly calculated in order not to affect the rest of the County Government. Thus this answers my 2nd issue for determination that indeed the decision of respondents affect the County Government and *vice versa* as they are part and parcel of one entity. 40

Having argued as above, the next issue for determination is whether the Claimants are entitled to orders sought? The interested parties have submitted that their positions were advertised without consideration of their future positions. A press release by the Transition Authority dated 24.12.2013 – App JOO4 advised that in view of the massive restructuring of both the National and county Governments following the Promulgation of the Constitution rationalization of structure and staff is deemed necessary. The authority therefore advised as follows:-

“The Authority therefore advises that both levels of Government should suspend recruitment of new staff from outside the Public Service until the rationalization exercise is finalized and the existing public officers deployed accordingly. This exercise will include:-

- (a) Carrying out a capacity and skills need assessment of all devolved functions in line with section 24 of the Transition to Devolved Government Act 2012 to determine areas of deficit and surplus.
- (b) A thorough review of all structures, systems process, staffing levels and determining those that should be retained, transferred, merged, abolished, contracted out or privatized.
- (c) Undertaking a comprehensive workload analysis to establish optimal staffing levels.
- (d) Matching the existing staff to the established structures.”

There is no evidence that this advise has been carried out by the Respondents nor the County government of Kisumu.

The interested parties remain staff of the County Government of Kisumu and as deployed to the Respondents. Their positions should not be disturbed without following the laid down procedures. I therefore find for applicants and make orders that:-

1. Pending the hearing and determination of this suit, an order of injunction do issue against the Respondents, it's agents, officers or persons acting under their instructions from carrying on with any interviews they had scheduled for 11.3.2014 to 3.4.2014 or other date, recruitment on employment of any staff to the County Assembly before Staff rationalization and deployment to determine the vacancies that cannot be filled by the interested parties.
2. An order directing the Respondents to 1st take staff rationalization of the staff working in the Kisumu

Kenya County Government Workers Union v Kisumu County 907
Assembly Public Service Board (H Wasilwa, J)

County Assembly and determine vacancies that exists and thereafter place advertisements for only those positions that cannot be filled by the current staff from the claimants membership.	1
3. An injunction against the Respondents from termination and/or dismissal of the Claimants from their employment without following the law and their terms and conditions of employment.	5
4. The Respondents to bear costs of this suit.	10
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Gakuru & others v Governor Kiambu County & 3 others [2010] KLR -HCK

High Court, at Nairobi
GV Odunga, J

April 17, 2014

Petition No 532 of 2013; Petition Nos 12, 35, 36, 42 & 72 of
2014 & Judicial Review Miscellaneous Application No 61 of 2014
(Consolidated)

Brief facts

The Petitioners sought a declaration that the Kiambu Finance Act, 2013 published in the Kiambu County Gazette Supplement No 8 (Act No 3) violated various constitutional provisions and was null and void. The basis of the Petition was that the Act was enacted without public participation and its provisions violated constitutional stipulations.

The Petitioners claim was that the Act was unreasonable, punitive and amounted to double taxation. They claimed that the taxation terms in the Act exposed them to risks of business closure and loss of livelihood and thus amounted to a denial of the right to earn a living. A further claim was that the Act exposed them to unfair competition from traders in other Counties who did not have to pay similar levies.

Issues

- i. Whether the Kiambu Finance Act, 2013 was passed with sufficient public participation as required by the Constitution of Kenya 2010.
- ii. Whether the County Government of Kiambu was entitled to publish or raise new taxes.
- iii. Whether the levies and charges provided for under the Kiambu Finance Act were within the terms provided for in the Fourth Schedule to the Constitution of Kenya, 2010.

Constitutional Law – national values and principles of good governance – public participation – threshold required for public participation – facilitation, providing information and education on the intended legislation, and holding public meetings – Constitution of Kenya, 2010, articles 10, 174, 196 & 201; County Governments Act, No 17 of 2012, sections 87 & 115.

Constitutional Law – Devolved Government – County Governments entitlement to raise revenue for governance and service provision-the nature of taxes that County Governments could impose legally – Constitution of Kenya 2010, articles 175(b), 190(1), 202, 203 & 209; County

Governments Act, No 17 of 2012, section 120. 1

Statutes – constitutionality of statutes – constitutionality of the Kiambu Finance Act 2013 – whether the Kiambu Finance Act 2013 was enacted without public participation and violated various provisions of the Constitution – Constitution of Kenya 2010, articles 10, 163(3)(d) & 209; County Governments Act, No 17 of 2012, sections 87, 88 & 115. 5

Held:

1. Public participation was to be real and not illusory and it was not to be treated as a mere formality for purposes of fulfilling constitutional dictates. In enacting legislation, County Assemblies were obligated to ensure that the spirit of public participation was attained both qualitatively and quantitatively. County Assemblies were required to do whatever was reasonable to ensure that as many constituents as possible were aware of the intention to pass legislation. 10
2. Where legislation involved important aspects such as the payment of taxes and levies, the duty to ensure public participation was even more onerous. It was the duty of the County Assembly to encourage its constituents to participate in the process of enacting the legislation in question by making use of as many fora as possible including churches, mosques, temples, public *barazas* national and vernacular radio broadcasting stations and other avenues where the public was known to converge to disseminate information. 15
3. Huddling a few people into a five star hotel on one day could not be termed as public participation for purposes of meeting a constitutional and legislative threshold. 20
4. Whereas the magnitude of publicity required would vary depending on the action to be undertaken, a one day newspaper publication in a country where newspapers were a luxury and poverty and illiteracy were an issue would not suffice for purposes of seeking public participation. 25
5. With respect to the contents of the newspaper advertisement there was no facilitation for purposes of public participation. The advertisement did not provide adequate information or education on the import of the Finance Bill which would enable meaningful public engagement. 30
6. Under the Constitution, the law-making process was both representative and participative meaning that it would be a dialogue between the representatives and the people. It would not suffice to state that participation was attained by having elected representatives at the County Assembly to present the peoples' views. The people 35

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- had to have a voice in the process which extended beyond the representations offered by the elected members of the County Assembly. 1
7. Under article 209 of the Constitution a County Assembly could only impose property rates and entertainment taxes unless otherwise authorized by an Act of Parliament. Additionally, County Governments could impose charges for the services that they provided. 5
8. The levying of taxes was not to be such as to prejudice national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour. 10
9. Tariffs and the pricing of services had to comply with the provisions of section 120 of the County Government Act. However, the Court was not entitled to interfere with tariffs and pricing of services simply on the basis that the Court would have decided otherwise as the Court was required not to substitute its opinion for that of the County Government. 15
10. Whereas under article 175(b) of the Constitution, County Governments were entitled to reliable sources of revenue in order to govern and deliver services effectively, the revenue entitlement was to be attained in a manner that was consistent with legislation and the Constitution. 20
11. If the existing modes of raising revenue were insufficient, the County Government would have to petition the National Government to increase allocations to them or enact legislation which allowed them to deliver on their constitutional mandate as required under articles 190(1), 202 and 203 of the Constitution. 25
12. The option of petitioning the County Government on any issue which was the responsibility of the County Government under section 88 of the County Government Act did not oust the jurisdiction of the Court to declare legislation unconstitutional under article 165(3)(d) of the Constitution of Kenya 2010. 30
- Petition allowed. (The Court issued a declaration that the Kiambu Finance Act, 2013 violated the Constitution and was null and void.)* 35

Cases

East Africa

1. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal No 290 of 2012 – (Applied) 40
2. *Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County of Nairobi Government & 3 others* Petition No 486 of 2013

– (Mentioned)	1
3. <i>Njuguna, Stephen & others v Lewis Nguyai & others</i> Petition No 118 of 2011 – (Explained)	
South Africa	
1. <i>Doctors for Life International v Speaker of the National Assembly and others</i> [2006] ZACC 11; 2006 (12) BCLR 1399 – (Explained)	5
2. <i>Glenister v President of the Republic of South Africa and others</i> [2011] ZACC 6; 2011 (7) BCLR 651 – (Explained)	
3. <i>Matatiele Municipality and others v President of the Republic of South Africa and others (No 2)</i> [2006] ZACC 12; 2007 (1) BCLR 47 – (Explained)	10
4. <i>Merafong Demarcation Forum and others v President of the Republic of South Africa and others</i> [2008] ZACC 10; 2008 (5) SA 171; 2008 (10) BCLR 968 – (Explained)	
5. <i>S v Acheson</i> 1991 (2) SA 805 – (Explained)	15
Statutes	
East Africa	
1. Advocates Act (cap 16) section 34 – (Interpreted)	
2. Civil Procedure Rules (cap 21 Sub leg) order 9–(Interpreted)	20
3. Constitution of Kenya, 2010 articles 1, 2(4); 47; 10; 25(b); 26 -51; 120(1); 165(3)(d); 174(c); 175(b); 185(2); 190(1); 196(1)(a)(b); 201, 202(1); 203; 209(3)(4)(5) – (Interpreted)	
4. County Governments Act, 2012 (Act No 17 of 2012) sections 87, 88; 91, 115, 120 – (Interpreted)	25
3. Public Finance Management Act, 2012 (Act No 18 of 2012) – (Interpreted)	
South Africa	
1. Constitution of South Africa section 72 –(Interpreted)	30
Advocates	
1. <i>Dr Wangai</i> for the Petitioners in Petition No 532 of 2013	
2. <i>Mr Mwaniki</i> for the Petitioner in Petition No 72 of 2014	
3. <i>Mr James Kariuki</i> for the Petitioner in Petition No 42 of 2014	
4. <i>Mr Magani & Mr Havi</i> for the Petitioners in Petition No 12 of 2014	35
5. <i>Mr Kiragu</i> for the Petitioner in Petition No 36 of 2014	
6. <i>Mr Mungao</i> for the Applicants in Application No 61 of 2014	
5. <i>Mr Nakhone</i> for the Respondents	
7. <i>Mr Masese</i> for the Respondents in Petition Nos 35, 36, 41, 42, 61 & 72 of 2014	40

April 17, 2014, **GV Odunga, J** delivered the following Judgment. 1

Introduction

1. This judgement is the subject of Petition Nos 532 of 2013 filed by Robert N Gakuru, Petition No 12 of 2014 filed by Likambu Matatu Savings & Credit Co-operative Society Ltd and others, Petition No 35 of 2014 by Quarry Owners Association of Kenya, Petition No 36 of 2014 filed by Eliud Ngugi Ngigi and others, Petition No 42 of 2014 filed by Gacheru Kariuki, Petition No 72 of 2014 filed by Townlink Cabs Limited and Judicial Review Application No 61 of 2014 filed by Patrick Kamau Kungu & others variously against the Respondents herein. The said matters were consolidated as the issues involved in all the matters were similar and cut across the said causes. 5 10

The Case for the Petitioners/Applicants

2. In the said matters the Petitioners and the Applicants are seeking in the main a declaration that the Kiambu Finance Act, 2013 gazetted vide Kiambu County Gazette Supplement No 8 (Act No 3) (hereinafter referred to as the Act) violates various provisions of the Constitution and that the same is null and void. 15 20
3. The grounds on which these matters were based were that no consultations took place and no invitations were made by the Respondents before the said Act was enacted. It was further contended that the provisions of the said Act contravene the provisions of the Constitution as it contains levies and/or taxes which the Respondents are not empowered to impose. 25
4. From the affidavits filed in support of the petitions and the application, it comes out clearly that the petitioner/applicant's complaint is centred on the fact that no proper public participation was factored into the enactment of the impugned Act and as a result thereof the Respondents passed a piece of legislation containing unreasonable provisions which provisions were punitive with some amounting to double taxation. Consequently, the petitioners/applicants have been subjected to discrimination in terms of taxation and hence exposing them to a real risk of closure of business and loss of livelihood thus denying them fundamental right to economic well-being and the right to earn a living contrary to the provisions of the Constitution. 30 35
5. According to the Petition No 12 of 2014, although their views were sought at a meeting held between them and the members of the County Assembly at Windsor Hotel (hereinafter referred to as 40

- the Windsor Hotel Meeting) with respect to an earlier Bill and the draft Bill incorporated their view, the said Bill was rejected when the same was tabled in the Assembly. However when the impugned Act was gazetted, it was a departure from what was agreed between them and the Respondents in terms of the levying of taxes. In the said petition it was contended that the provisions of the impugned Act were contrary to what the stakeholders agreed upon and that its provision placed a heavy burden upon the said petitioner. 1
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6. The Petitioners in Petition No 36 of 2014 on their part took issue with the fact that they were left out of the said Windsor Hotel meeting despite being members of Kabete Sub-County Business Owners and Services Association who are major stakeholders in the County. 10
7. That no consultation was done was reiterated by the Applicants in Judicial Review Application No 61 of 2014. According to them the imposition of the levies in the County will expose them to unfair competition from other meat traders from the neighbouring Counties who do not face similar levies. 15
8. In the submissions filed on behalf of the Petitioners in Petition No 532 of 2013, it was contended that media advertisement in the *Daily Nation* inviting the public to Consultative forums did not indicate the Act as one of the items in the agenda. As the first Bill which was placed before the County Assembly had been rejected, it was submitted that there was a need for further consultation on the changes which were introduced therein. 20
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9. In his submissions Dr Wangai, learned counsel for the Petition in Petition No 532 of 2013 submitted inter alia that article 10 of the Constitution provides for national values and principles of governance and Clause (2)(a) identifies among others patriotism and participation of the people as one of such values and principles. According to him, the people did not participate in the enactment of the Act. In his view article 174(c) of the Constitution which talks of objects and principles of devolved government identifies the need to give powers of self-governance to the people. It was therefore submitted that the people ought to participate in the governance as well as public financing as provided for under article 201 of the Constitution which requires openness and accountability including public financial matters. Since article 202(1) of the Constitution talks of sharing of revenue between the National and County Governments, the County Governments can get money from the 30
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- National Government. According to learned counsel article 209 deals with areas in which the County Government can levy taxes and source revenue and these are property, entertainment and taxes levied by virtue of an Act of Parliament. However, in other areas not mentioned the County Government has no mandate to levy taxes. 1
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10. With respect to the provisions of the County Governments Act No 17 of 2012, it was submitted that it is provided in section 87 thereof that the participation of the citizens in the running of County Governments is recognised while section 91 thereof provides for platforms for citizens participation. Section 115 on the other hand provides for the participation in the county planning. In learned counsel's view there were no such platforms hence the people of Kiambu were not consulted. Learned counsel urged this Court to define public participation and consultation. 10
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11. Referring to the replying affidavit he submitted that what was exhibited as a form of public participation were names of persons who were paid which would not in his view constitute public participation without an agenda and minutes of the meeting and their contributions. Since the county has 1.6 million people the number of 935 people. 20
12. It was therefore his case that to the extent that there was no consultation the Act is unconstitutional and that the mode of taxation is also unconstitutional and that the costs be awarded to the Petitioners. 25
13. While submitting on behalf of Mr Magani for the Petitioners in Petition No 2 of 2014, Dr Wangai contended that whereas the said petitioners were consulted on the earlier Bill the Act contained new figures which were different from the one which were contained in the Bill that was rejected. He further submitted that the mode of advertisement in the *Daily Nation* Newspaper did not lend itself to a proper avenue for public participation in that the advertisement was only on 17th August 2013 for a meeting to be held on 20th August, 2013 without proper circulation of the notice. To him the said advertisement cannot be a basis of consultation since the same was in any case in English language which is not the local dialect of the majority of the residents of the County. To him the advert itself was confusing in the sense that it did not speak of the Act. 30
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14. On behalf of the Petitioner in petition No 35 of 204, it was

submitted that the fact that so many suits have arisen from so many different quarters over the same Act of one legislature goes to show that there is great folly not only in the contents of the Act but also in the manner in which it was enacted. According to the petitioners herein, the public advertisement which appeared in the Daily Nation Newspaper of 17th August 2013 mentioned a discussion of the County Integrated Plan and did not address itself to the contents of the proposed Finance Bill hence had no direct bearing on the Kiambu Finance Act, 2013.

15. It was therefore submitted that the Respondents did not engage in sufficient or proper public participation hence the Act is unconstitutional. Apart from that it was contended that under article 209 of the Constitution only the National Government may impose Income Tax, Value Added Tax, Customs and other duties and Excise Tax while a County may impose Property Tax, Entertainment Tax and any other Tax authorised by an Act of Parliament. However, both Governments may impose charges for the services they provide such as parking, trade licences etc although the taxation and other revenue raising powers of a County cannot be exercised in a way that prejudices national economic policies, economic activities across the County boundaries or the national mobility of goods, service, capital or labour. However, it was the petitioners' view that the levy of Kshs 1 on every stone transported from the members' quarries as stipulated under Schedule I part VII of the Act qualifies as a production tax since there is no service shown that the Respondents are providing. Secondly to impose taxes on the goods as they are transported as stipulated in Schedule I Part VII is a contravention of article 209(5) which prohibits counties from prejudicing economic activities across County boundaries since the effect of the said action would be to discourage the sell of quarried stones to persons outside the County.

16. It was further submitted that to require the quarry owners to collect the said illegally imposed taxes would be to force the quarry owners to be tax collecting agents without following the law and by forcing the said quarry owners to provide free services contrary to articles 25(b) and 209(4) of the Constitution. Since part 2(7) of the 4th Schedule to the Constitution deals with Trade Development and Regulation to include market trade licences etc it was submitted that the Schedule does not deal with imposition of new taxes or raising of existing levies hence the imposition of the Transport taxes under

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- Schedule I Part VII of the Act falls outside the ambit of the said Schedule 4 of the Constitution which deals with the provision of services. It was therefore submitted that even had the Respondents adhered to the requirement of public participation the actions of the Respondents would still have been illegal. 1
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17. Submitting on behalf of the said Petitioners Mr Murithi, their learned counsel while associating himself with the submissions made by Dr Wangai reiterated the contents of the written submissions filed in the said petition that the levying of Kshs 1 per stone was a tax and not a levy since it is based on a turnover and is not therefore a licence which is a one off charge for services rendered. 10
18. According to the Petitioners in Petition No 36 of 2014, in the exercise of the powers conferred by article 185 of the Constitution Kiambu County Assembly prepared Kiambu County Finance Bill 2013. However the said Bill was prepared and passed without proper participation and consultation of the public/petitioners of Kabete Sub-county and to a larger extent the residents of Kiambu County contrary to sections 87 and 115 of the County Government Act, 2012 which provide for the principles of citizenship participation in the counties and public participation in county preliminary process. It was submitted that the raising of permits and licence fees by between 100% and 30% is out of reach of many of the petitioners who are small scale traders. 15
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19. It was submitted that the Act did not provide the petitioners with timely and reasonable access to information to enable them make an informed decision contrary to article 35 of the Constitution since many members were not aware and were never consulted on the Act. It was contended that the documents exhibited to the replying affidavit do not disclose the minutes of the proceeding and the agenda of deliberations. The omission to exhibit the minutes and proceedings of the alleged public forums weakened the legitimacy and diminishes the public confidence in the county government and leads to the conclusion that the alleged forums were not for the enactment of the Finance Bill and in any case the Finance Bill was not an item in the agenda of the forum whose agenda was ambiguous. 30
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20. It was therefore submitted that the Act contravened the constitutional and statutory provisions. 40

21. According to Mr Kiragu, learned counsel for the petitioner in
Petition No 36 of 2014, apart from seeking the common prayers,
his clients were seeking an order directing the County Assembly
to amend the Act and lower the charges. He similarly associated
himself with the submissions made by other counsel and added
that his clients are representative of the people of Kabete which
has residents of more than 30,000 though only 201 participants
allegedly attended the consultative forum and were paid Kshs 500
as a form of inducement.

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22. The applicants in Judicial Review Application No 61 of 2014
on their part submitted that that the Act was superfluous as there
exists a taxation regime that is applicable uniformly to a subsidiary
legislation and that to the extent that there is in force subsidiary
legislation No 147 of 2008 the Act is illegal. Further the Act is
discriminatory and biased as it is being enforced selectively against
the 1st applicant. The applicants also submitted that there was no
consultation and public participation and the rights of the residents
were infringed and that the Act is an affront to public policy.

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23. In his oral address Mr Mungao, learned counsel for the
applicants in application no 61 of 2014, associated himself with
the foregoing submissions although the County Government has
its own slaughterhouse, the fees which are being levied against
the 1st applicant are not applicable to the County Government's
slaughterhouse hence the County Government's action amount to
unfair trading practices and its action is discriminatory. Since these
charges do not apply to other neighbouring counties, it is likely
that the slaughterhouses bordering the County will move out and
leave the 1st applicant's abattoir. It was further submitted that the
charges levied in so far as they are based on the volume of trade
are uncertain.

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24. Citing several provisions of the Constitution, James Gacheru
Kariuki, the Petitioner in Petition No 42 of 2014 contended that
the Finance Act contravenes the provisions of article 120(1) and
209(3) of the Constitution and is hence illegal and unconstitutional.
On his part, Anthony Ikonya Mwaniki, the Managing Director
of Townlink Cabs Limited, the petitioner in Petition No 72 of
2014, while associating himself with the foregoing submissions
contended that by seeking to have the petitioner pay parking fees
while it is already subjected to payment of single business permit,

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the County Assembly has imposed double taxation since business permit includes parking. 1

Respondents' Case

25. The case for the Respondents as gleaned from the replying affidavits filed herein was that the entire Kiambu County including the petitioners is represented in the County Assembly of the County Government of Kiambu (hereinafter referred to as the Assembly) by elected leaders and that the Assembly is the legislative organ of the County Government of Kiambu. According to the Respondents the introduction of the Act was preceded by invitations for public participation and consultation. To this end the Bill was submitted to the Assembly for debate and consideration on 2nd October 2013 by the County Executive Committee member for finance and planning in accordance with the budget proposal for 2013-2014 financial year and prior thereto the draft Bill was published in the official website of the County on 17th August 2013 and an invitation to the public made to participate therein. Apart from that a notice was published in the *Daily Nation* of the same day towards the same end. A notice was also circulated to churches in the county for publication on 18th August 2013 and the public was consulted on and participated in the deliberations of the contents of the Bill on 20th August 2013 before its submission to the Assembly which was preceded with a request to the Law Reform Commission for review and confirmation. 5 10 15 20 25
26. Although the County Finance Bill, 2013 was rejected by the Assembly on 13th November, 2013 with recommendations on what needed to be included, it was the respondents' position that these recommendations included in the reintroduced County Finance Bill 2013 on 3rd December, 2013 an exemption of the 6 months period having been obtained. The Respondents' position was that the legislative process subsequent to the reintroduction of the Finance Bill, 2013 into the Assembly and the enactment of the Finance Act, 2013 did not require any consultation with the Petitioners in the manner implied or at all. An invitation to the public having been made and public participation and consultation having been undertaken before the introduction of the initial Finance Bill, 2013 into the Assembly. 30 35 40
27. The Bill then went through the requisite legislative process having been preceded by the widest public consultation and engagement

- in accordance with the Constitution, The Public Finance Management Act, 2012 and the County Government Act, 2012, hence its provisions are lawful and valid. It was contended that both stakeholders and the public were invited to participate and did participate in the process leading to the enactment of the Act and that the same neither infringes upon the Constitutional rights of the petitioners nor does it impose harsh, primitive, offensive exorbitant permit fees as alleged. 1
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28. It was the Respondents' case that the County Government is empowered by the Constitution, the County Government Act 2012 and Public Finance Management Act 2012 to impose permit fees, licence fees, rents fees charges for services to finance its operations and provision for services which do not infringe upon the Petitioners' rights. The said levies having been sanctioned by the Act the same are lawful and proper. 10
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29. According to the Respondents the meeting held on 17th September, 2013 at Windsor Hotel did not have anything to do with the discussions on the Finance Bill and the Act but was called to discuss broad issues of development within the County hence there was no agreement with respect to parking fees with the petitioners or at all. To them in the absence of particularisation of the constitutional provisions breached, the orders sought are not warranted. 20
30. On behalf of the Kiambu County Assembly, it was submitted after setting out what the Respondents believe were the petitioners' complaints and the Respondents' response that fundamental rights and freedoms are specifically set out in Chapter Four of the Constitution of Kenya, 2010 which rights and freedoms are individually identifiable and defined from article 26 to 51 of the Constitution. It follows therefore, that a breach of any of the rights and freedoms must be specifically pleaded, particulars thereof set out and facts in respect thereof indicated in the Affidavit of a Petitioners which the Petitions do not. Hence as it cannot be ascertained what actual right or freedom has been contravened and in what way, the Petitions should fail on the author of the decisions in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR and *Stephen Njuguna & others v Hon Lewis Nguyai & others*, HC Petition No 118 of 2011 (UR) where it was held that: 25
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- “The jurisdiction of the court under article 22 and 23 of the Constitution is one for enforcement of fundamental rights

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- and freedoms guaranteed under the Bill of Rights. Each right under the Constitution is specifically defined and has specific contents. It therefore follows that a party who invokes these provisions must set out clearly the sections or provisions he claims have been infringed or violated and show how these sections are infringed in relation to him. The principle has been established in a long line of cases dating from *Anarita K Njeru v R* [No 1] (*Supra*).....I also agree with the respondent that the petitioners' complaints are of a general nature and relate to dissatisfaction in the manner the ESP has been implemented. If this is the case, then, unless there are specific provisions of the Bill of Rights that have been infringed, I consider that the Petition is lacking in merit." 1 5 10
31. It was submitted that although the Petitioners claim that the Respondent has breached articles 1, 2, 47 and 196(1)(a) and (b) of the Constitution, only articles 47 and 196(1)(a) and (b) are relevant to the issues in dispute here and whereas article 47 concerns fair administrative action, the Petitioners have not demonstrated how, in light of the evidence in the Replying Affidavit of the Respondent, this Article was contravened. Article 196(1)(a) and (b) on the other hand relates to public participation. However, the Petitioners have again, failed to demonstrate contravention by the Respondent. It was therefore submitted that the Petitions should be dismissed for failure of adequate pleading, particulars and evidence of violation of fundamental rights and freedoms. 15 20 25
32. According to them, though it cannot be denied that public participation in legislation is a constitutional and statutory requirement, the Petitioners have, in their written submissions shifted from their main pleaded complaint to an alternative complaint of want of consultation. However, the fact is that there was public participation and no discussions or an agreement on the parking fees were ever held and/or made respectively, on 17th September, 2013 with the Petitioners or at all. 30 35
33. The Respondents' case was that article 209(4) of the Constitution donates the power to the national and county governments to impose charges for the services they provide and there was no plea or evidence whatsoever that the Respondent did not act in accordance with these constitutional requirements in the enactment of the Act. In support of this submission the Respondents relied on *Nairobi* 40

Metropolitan PSV Saccos Union Limited & 25 others v County of Nairobi Government & 3 others (2013) eKLR. 1

34. In his oral address, Mr Havi submitted that the preamble to the Act deals with fees and charges which is a power the County Government can deal with under article 209(3) of the Constitution providing for the power to impose taxes and charges. In the 4th Schedule Part II to the Constitution the County Government has the functions and as regards trafficking and parking raised in Petition No 12 of 2014, the Respondent was empowered to levy charges and fees in respect thereof. With respect to Petition No 532 of 2013, it was submitted that it was difficult to understand the petitioner's grievances save for complaints about burial charges and rent for housing all of which the County Government is empowered by the Constitution to deal with. Under article 209, it was submitted the County Government may impose property rates hence the petitions in so far as they allege unconstitutionality are without merit. 5
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35. On public participation, it was submitted that the County Government of Kiambu is an elected Government and is representative of the people of Kiambu with a County Assembly. Therefore the people of Kiambu must understand that democracy is to elect leaders to formulate policies and to govern. Public consultation and participation has been given by the Act and the Constitution hence the question of definition of participation is moot and reference was made to sections 87 and 88 of the County Government Act which provide for the principle of participation. Section 88, learned counsel submitted deals with how citizens are to participate by way of petitions yet none of the petitioners have demonstrated that any petitioned. He submitted that the Respondents have demonstrated that the County Government prepared the platform for the participation. Since the petitioners have representatives in the Assembly the court must exercise restraint in micro managing administrative action as the plethora of petitions is not indicative of the failure of the Government but that of the petitioners. In the result the court was urged to dismiss the petitions with costs. 20
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36. On his part Mr Masese, learned for Respondents in petition Nos 35, 36, 41, 42, 61 and 72 while associating himself with Mr Havi's submissions submitted that under article 185(2) of the Constitution the County Government have been given the power to legislate 40

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- and provide for services in the 4th Schedule in exercise of which the Kiambu Finance Act was enacted. Learned counsel submitted that the functions and powers in the 4th Schedule in the Constitution as read with articles 185 and 209 thereof have given the power to legislate hence the Act is as a result of powers donated by the Constitution. In support of this submission reliance was placed on *Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County of Nairobi Government & 3 others* (*supra*). 1
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37. It was submitted that an Act of Parliament is presumed to be Constitutional which presumption can only be rebutted by a Petitioner and in considering whether the Act is unconstitutional the Court must give effect to the provisions of the Constitution. In this case articles 185 and 209 as read with the 4th Schedule to the Constitution mandate County Governments to provide services to residents of the County and come up with legislation. 10
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38. With respect to the judicial review it was submitted that what is sought to be quashed is a letter rather than a decision hence the same cannot be quashed. Petition No 72, it was submitted that the pleadings contravene section 34 of the Advocates Act as read with order 9 of the Civil Procedure Rules as they are signed by the petitioner who did not annex evidence that he was a duly authorised agent of the petitioner. In the result he similarly urged the Court to dismiss the petitions. 20
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- Determinations
39. Before proceeding with the matters, I directed the parties to formulate the issues for determination of this Court.
40. Pursuant thereto, the following broad issues were formulated for determination by this Court. 30
1. Whether the Kiambu Finance Act, 2013 was passed with sufficient public participation as required by the Constitution of Kenya, 2010.
 2. Whether the County Government of Kiambu is entitled to publish and/or raise new or existing taxes. 35
 3. Whether the levies and charges under the Kiambu Finance Act are within the meaning of the 4th Schedule of the Constitution of Kenya. 40
41. Before determining these issues it is important to deal with the legal provisions which are relevant to the matters before this Court.

42. Article 10 of the Constitution of Kenya provides as follows: 1
- (1) The national values and principles of governance in this article bind all State organs, State officers, public officers and all persons whenever any of them—
 - (a) applies or interprets this Constitution; 5
 - (b) enacts, applies or interprets any law; or
 - (c) makes or implements public policy decisions.
 - (2) The national values and principles of governance include—
 - (a) patriotism, national unity, sharing and devolution of power, the Rule of Law, democracy and participation of the people; 10
 - (b) human dignity, equity, social justice, inclusiveness, equality, 15
 - (c) good governance, integrity, transparency and accountability; and
 - (d) sustainable development.
43. Article 174 of the Constitution provides: 20
- The objects of the devolution of government are—
- (a) to promote democratic and accountable exercise of power;
 - (b) to foster national unity by recognising diversity;
 - (c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; 25
 - (d) to recognise the right of communities to manage their own affairs and to further their development; 30
 - (e) to protect and promote the interests and rights of minorities and marginalised communities;
 - (f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; 35
 - (g) to ensure equitable sharing of national and local resources throughout Kenya;
 - (h) to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and
 - (i) to enhance checks and balances and the separation of powers. 40

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44. Article 196 on the other hand provides: 1
- (1) A county assembly shall—
 - (a) conduct its business in an open manner, and hold its sittings and those of its committees, in public; and
 - (b) facilitate public participation and involvement in the legislative and other business of the assembly and its committees. 5
 - (2) A county assembly may not exclude the public, or any media, from any sitting unless in exceptional circumstances the speaker has determined that there are justifiable reasons for doing so. 10
 - (3) Parliament shall enact legislation providing for the powers, privileges and immunities of county assemblies, their committees and members. 15
45. Article 201 of the Constitution provides:
The following principles shall guide all aspects of public finance in the Republic—
- a. there shall be openness and accountability, including public participation in financial matters; 20
 - b. the public finance system shall promote an equitable society, and in particular—
 - (i) the burden of taxation shall be shared fairly;
 - (ii) revenue raised nationally shall be shared equitably among national and county governments; and 25
 - (iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;
 - (c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations; 30
 - (d) public money shall be used in a prudent and responsible way; and
 - (e) financial management shall be responsible, and fiscal reporting shall be clear. 35
46. Section 87 of the County Government Act, 2012 provides:
Citizen participation in county governments shall be based upon the following principles—
- a. Timely access to information, data, documents, and other information relevant or related to policy formulation and implementation; 40

b. Reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards;	1
c. protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information;	5
d. legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities;	10
e. reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes to promote shared responsibility and partnership, and to provide complementary authority and oversight;	15
f. promotion of public-private partnerships, such as joint committees, technical teams, and citizen commissions, to encourage direct dialogue and concerted action on sustainable development; and	20
g. recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight	25
47. Section 115 of the same Act provides:	
1. Public participation in the county planning processes shall be mandatory and be facilitated through—	30
(a) mechanisms provided for in Part VIII of this Act; and	
(b) provision to the public of clear and unambiguous information on any matter under consideration in the planning process, including—	35
(i) clear strategic environmental assessments;	
(ii) clear environmental impact assessment reports;	
(iii) expected development outcomes; and	
(iv) development options and their cost implications.	
2. Each county assembly shall develop laws and regulations giving effect to the requirement for effective citizen participation in development planning and performance	40

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- management within the county and such laws and guidelines shall adhere to minimum national requirements. 1
48. These being constitutional provisions one needs to keep in mind the words of Mahomed, AgJA in Namibian case of *S v Acheson* 1991 (2) SA 805 (Nm HC) at 813 that: 5
- “The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.” 10 15
49. From the foregoing provisions it is clear that public participation plays a central role in both legislative and policy functions of the Government whether at the National or County level. It applies to the processes of legislative enactment, financial management and planning and performance management. 20
50. Due to its centrality it is important to determine what exactly amount to public participation.
51. This principle has been dealt with by the South African Constitutional Court in a number of matters. It must be appreciated that the Constitution of South Africa has several similarities to our own current Constitution. To appreciate these similarities it is necessary to reproduce section 72 of the Constitution of South Africa. The said section provides: 25 30
- “(1) The National Council of Provinces must –
- (a) facilitate public involvement in the legislative and other processes of the Council and its committees; and
- (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken – 35
- (i) to regulate public access, including access of the media, to the Council and its committees; and
- (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person. 40

- (2) The National Council of Provinces may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.” 1
52. In order to understand how the South African Constitutional Court has interpreted the principle of public participation, I will reproduce in *extenso* the pronouncements of the said Court in the following cases. 5
53. In *Doctors for Life International vs Speaker of the National Assembly and others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC), Ngcobo, J who delivered the leading majority judgement expressed himself as follows: 10
- “The right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements: a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected..... 15
- Significantly, the ICCPR guarantees not only the “right” but also the “opportunity” to take part in the conduct of public affairs. This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation.....The right 20
- to political participation includes but is not limited to the right to vote in an election. That right, which is specified in article 25(b) of the ICCPR, represents one institutionalisation of the right to take part in the conduct of public affairs. The broader right, which is provided for in article 25(a), envisages 25
- forms of political participation which are not limited to participation in the electoral process. It is now generally accepted that modes of participation may include not only indirect participation through elected representatives but also 30
- forms of direct participation.....” 35
54. While appreciating that political participation is also contained in international instruments the Judge then proceeded to determine what constitutes participation in the following terms: 40
- “The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be

elected into public office. The general right to participate in the
conduct of public affairs includes engaging in public debate
and dialogue with elected representatives at public hearings.
But that is not all; it includes the duty to facilitate public
participation in the conduct of public affairs by ensuring
that citizens have the necessary information and effective
opportunity to exercise the right to political participation.....
The international law right to political participation reflects
a shared notion that a nation’s sovereign authority is one that
belongs to its citizens, who ‘themselves should participate
in government – though their participation may vary in
degree.’.....This notion is expressed in the preamble of the
Constitution, which states that the Constitution lays “the
foundations for a democratic and open society in which
government is based on the will of the people.” It is also
expressed in constitutional provisions that require national
and provincial legislatures to facilitate public involvement in
their processes. Through these provisions, the people of South
Africa reserved for themselves part of the sovereign legislative
authority that they otherwise delegated to the representative
bodies they created.....The very first provision of our
Constitution, which establishes the founding values of our
constitutional democracy, includes as part of those values
“a multi-party system of democratic government, to ensure
accountability, responsiveness and openness.” Commitment
to principles of accountability, responsiveness and openness
shows that our constitutional democracy is not only
representative but also contains participatory elements. This
is a defining feature of the democracy that is contemplated.
It is apparent from the preamble of the Constitution that one
of the basic objectives of our constitutional enterprise is the
establishment of a democratic and open government in which
the people shall participate to some degree in the law-making
process.....”

55. Public participation ought not to be seen as a derogation from
Parliamentary representation or representation at the County
Assembly level. This the Judge recognised by expressing himself
as follows:

“In the overall scheme of our Constitution, the representative
and participatory elements of our democracy should not be

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- seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist. Therefore our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the lawmaking processes. Parliament must therefore function in accordance with the principles of our participatory democracy.....”
56. What then does facilitation of public participation connote” The issue was dealt with by the Judge thus:
- “The phrase “facilitate public involvement” is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are “facilitate” and “involvement”. To “facilitate” means to “make easy or easier”, “promote” or “help forward”. The phrase “public involvement” is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of “involve” includes to “bring a person into a matter” while participation is defined as “[a] taking part with others (in an action or matter); . . . the active involvement of members of a community or

organization in decisions which affect them”. According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the plain meaning of section 72(1)(a). This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in *New Clicks*, “[t]he Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies.” The democratic government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process.....”

57. The issue of who and to what extent the issue of public participation ought to be determined was dealt with as follows:

“Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement. This discretion will apply both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes. Yet however great the leeway given to the legislature, the courts can, and in appropriate cases will, determine whether there has been the degree of public involvement that is required by the Constitution. What is required by section 72(1)(a) will no doubt vary from case to case. In all events, however, the NCOP must act reasonably in carrying out its duty to facilitate public involvement in its processes. Indeed, as Sachs J observed in his minority judgment in *New Clicks*:

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as “a continuum that ranges from providing information and building awareness, to partnering in decision-making.” This construction of the duty to facilitate public involvement is not only consistent with our participatory democracy, but it is consistent with the international law right to political participation. As pointed out, that right not only guarantees the positive right to participate in the public affairs, but it simultaneously imposes a duty on the State to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised. It will be convenient here to consider each of these aspects, beginning with the broader duty to take steps to ensure that people have the capacity beginning with the broader duty to take steps to ensure that people have the capacity to participate.....”

58. The Judge then proceeded to deal with the evidence that was placed before it and expressed itself as follows:

“At the outset, it is necessary to comment on the evidence presented by the respondents. The respondents’ evidence includes several broad and sweeping claims, amongst other things, that the NCOP Select Committee and the respective provincial portfolio committees ‘have conformed with the requirements of sections 59, 72 and 118 of the Constitution by holding public hearings . . . [,] by inviting members of the public to participate either by making oral or written submissions, and by extensively advertising and publicising the fact that the relevant committees would be meeting in relation to one or more of the contested Bills.’ These allegations are largely unsupported by any documentary evidence. In addition, some of the allegations are inconsistent with the documents furnished by the respondents and with what this Court was told in the course of oral argument was common cause between the parties. There is no suggestion on the record that the NCOP held public hearings or invited written representations on any of the Bills. Insofar as the provincial legislatures are concerned, some but not all of the provinces held hearings in respect of some but not all of the Bills. Some provincial legislatures considered written representations

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- that had been submitted to the National Assembly but it is not clear on the record whether any of them invited new or supplementary representations from the public. In the result, this Court has had to work with evidence that leaves a great deal to be desired and to speculate on what may have happened. It is not desirable that this should have happened in a case such as this, where the facts are crucial to determining whether the NCOP complied with its constitutional obligations..... It is not reasonable to offer participation at a time or place that is tangential to the moments when significant legislative decisions are in fact about to be made. Interested parties are entitled to a reasonable opportunity to participate in a manner which may influence legislative decisions. The requirement that participation must be facilitated where it is most meaningful has both symbolic and practical objectives: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws.....”
59. That the nature and the extent of public participation may depend on the nature of what is at hand is not in doubt. However, that does not permit the complete blackout of the public from participation and this was similarly recognised by the Judge in holding as follows: “It is true, as discussed previously, that time may be a relevant consideration in determining the reasonableness of a legislature’s failure to provide meaningful opportunities for public involvement in a given case. There may well be circumstances of emergency that require urgent legislative responses and short timetables. However, the respondents have not demonstrated that such circumstances were present in this case. When it comes to establishing legislative timetables, the temptation to cut down on public involvement must be resisted. Problems encountered in speeding up a sluggish timetable do not ordinarily constitute a basis for inferring that inroads into the appropriate degree of public involvement are reasonable. The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.”
60. The Judge then considered the options available to the Court where the Court finds that the Constitutional threshold of public

participation is not met and held:

“I have found that the NCOP failed to fulfil its constitutional obligation comprehended in section 72(1)(a) in relation to the CTOP Amendment Bill and the THP Bill. Pursuant to section 172(1)(a) of the Constitution, this Court is obliged to declare that the conduct of the NCOP in this regard is inconsistent with the Constitution and is therefore invalid. The respondents did not contend otherwise. A declaration to that effect must accordingly be made. The question which was debated in the Court is whether the CTOP Amendment Act and the THP Act must as a consequence be declared invalid. Counsel for the respondents contended that this Court has no power to declare the resulting statute invalid. To do so, it was submitted, would infringe upon the doctrine of separation of powers. This Court has emphasised on more than one occasion that although there are no bright lines that separate its role from those of the other branches of government, ‘there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation.’ But at the same time, it has made it clear that this does not mean that courts cannot or should not make orders that have an impact on the domain of the other branches of government.”

61. The Judge added:

“When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold in any given case that Parliament has failed to do so, it is obliged by the Constitution to say so. And insofar as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by the Constitution itself. What should be made clear is that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process. Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of

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- this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty. As O'Regan J explained in a recent minority judgment, 'the legitimacy of an order made by the court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.' In order for the founding values that lie at the heart of our Constitution to be made concrete, it is particularly important for this Court to afford a remedy, which is not only effective, but which should also be seen to be effective. The provisions of section 172(1)(a) are clear, and they admit of no ambiguity; '[w]hen deciding a constitutional matter within its power, a court . . . must declare that any law or conduct that is inconsistent with the Constitution is invalid'. This section gives expression to the supremacy of the Constitution and the rule of law, which is one of the founding values of our democratic state. It echoes the supremacy clause of the Constitution, which declares that the 'Constitution is supreme . . . ; law or conduct inconsistent with it is invalid'. It follows therefore that if a court finds that the law is inconsistent with the Constitution, it is obliged to declare it invalid.....".
62. The justification for this course is to be found in article 2(4) of our Constitution which provides as follows:
- Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.
63. Dealing with a similar provision the Judge pronounced himself thus:
- "Thus in peremptory terms, section 72(1)(a) imposes an obligation on the NCOP to facilitate public participation in its legislative and other processes including those of its committees. And the supremacy clause of the Constitution requires that this 'obligation [which is] imposed by [the Constitution] must be fulfilled.' Public involvement provisions therefore give effect to an important feature of democracy: its participative nature. The 'participation of citizens in government . . . forms the basis and support of democracy, which cannot exist without it; for title to government rests with the people, the only body empowered

to decide its own immediate and future destiny and to designate its legitimate representatives.’ Public participation in the law-making process is one of the means of ensuring that legislation is both informed and responsive. If legislation is infused with a degree of openness and participation, this will minimise dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy. What is significant in the context of the present case is the legislative scheme contemplated by our Constitution. That scheme envisages that the provinces will participate in the proceedings of the NCOP and thus in the national legislative process ‘in a manner consistent with democracy’. The purpose of this participation is ‘to ensure that provincial interests are taken into account in the national sphere of government.’ The provincial interests must of course be determined in a manner that is consistent with our democracy, in particular, in a manner that complies with the duty to facilitate public participation in the law-making process. Permitting the public to participate in the law-making process ensures that the provincial interests are taken into consideration in a manner that is consistent with the Constitution. Under our Constitution, therefore, the obligation to facilitate public involvement is a requirement of the law-making process. It is trite that legislation must conform to the Constitution in terms of both its content and the manner in which it was adopted. Failure to comply with manner and form requirements in enacting legislation renders the legislation invalid.....”

64. It may be argued that where the action taken is in consonance with the Constitution in its formal aspects then the mere fact that there was no public participation ought not to nullify such otherwise legal action. However the Judge dealing with the issue said:

“The obligation to facilitate public involvement is a material

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- part of the lawmaking process. It is a requirement of manner and form. Failure to comply with this obligation renders the resulting legislation invalid. In my judgment, this Court not only has a right but also has a duty to ensure that the law-making process prescribed by the Constitution is observed. And if the conditions for law-making processes have not been complied with, it has the duty to say so and declare the resulting statute invalid. Our Constitution manifestly contemplated public participation in the legislative and other processes of the NCOP, including those of its committees. A statute adopted in violation of section 72(1)(a) precludes the public from participating in the legislative processes of the NCOP and is therefore invalid. The argument that the only power that this Court has in the present case is to issue a declaratory order must therefore be rejected.” 1 5 10 15
65. However the Court cannot be blind to the effects of such action which is not “substantially” illegal and where as a result of its implementation certain rights may have been acquired and obligations undertaken which may cause chaos and lead to undesirable disruption and vacuum. Whereas that state of affairs does not legitimise the action undertaken an abrupt change may be undesirable and in such circumstances the Court may invoke its powers under article 23(3) of the Constitution to grant an appropriate remedy including the suspension of the invalidity of the action taken with such period as would enable the authority concerned to remedy the defect. 20 25
66. On this point the Judge expressed himself as follows: 30
 “However, these two statutes have come into operation. Members of the public may have already taken steps to regulate their conduct in accordance with these statutes. An order of invalidity that takes immediate effect will be disruptive and leave a vacuum. In terms of section 172(1)(b)(ii), this Court has discretion to make an order that is just and equitable, including an order suspending the declaration of invalidity. Parliament must be given the opportunity to remedy the defect. In these circumstances, I consider it just and equitable that the order of invalidity be suspended for 18 months to enable Parliament to enact these statutes afresh in accordance with the provisions of the Constitution.” 35 40

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67. It must however be made clear that not all persons must be heard orally. Therefore even in cases where there are oral public hearings the mere fact that a particular person has not been so heard does not necessarily warrant the whole process being nullified. It was therefore held by the Judge that: 1
- “Where Parliament has held public hearings but not admitted a person to make oral submissions on the ground that it does not consider it necessary to hear oral submissions from that person, this Court will be slow to interfere with Parliament’s judgment as to whom it wishes to hear and whom not. Once again, that person would have to show that it was clearly unreasonable for Parliament not to have given them an opportunity to be heard. Parliament’s judgment on this issue will be given considerable respect. Moreover, it will often be the case that where the public has been given the opportunity to lodge written submissions, Parliament will have acted reasonably in respect of its duty to facilitate public involvement, whatever may happen subsequently at public hearings. However, for citizens to carry out their responsibilities, it is necessary that the legislative organs of state perform their constitutional obligations to facilitate public involvement. The basic elements of public involvement include the dissemination of information concerning legislation under consideration, invitation to participate in the process and consultation on the legislation. These three elements are crucial to the exercise of the right to participate in the law-making process. Without the knowledge of the fact that there is a bill under consideration, what its objective is and when submissions may be made, interested persons who wish to contribute to the lawmaking process may not be able to participate and make such contributions.” 5 10 15 20 25 30
68. Sachs, J who concurred with Ngcobo, J had this to add: 35
- “The principle of consultation and involvement has become a distinctive part of our national ethos. It is this ethos that informs a well-defined normative constitutional structure in terms of which the present matter falls to be decided. This constitutional matrix makes it clear that although regular elections and a multi-party system of democratic government are fundamental to our constitutional democracy, they are not exhaustive of it. Their constitutional objective is explicitly 40

declared at a foundational level to be to ensure accountability, responsiveness and openness. The express articulation of this triad of principles would be redundant if it was simply to be subsumed into notions of electoral democracy. Clearly it is intended to add something fundamental to such notions. It should be emphasised that respect for these three inter-related notions in no way undermines the centrality to our democratic order of universal suffrage and majority rule, both of which were achieved in this country with immense sacrifice over generations. Representative democracy undoubtedly lies at the heart of our system of government, and needs resolutely to be defended. Accountability of Parliament to the public is directly achieved through regular general elections. Furthermore, we live in an open and democratic society in which everyone is free to criticise acts and failures of government at all stages of the legislative process. Yet the Constitution envisages something more. True to the manner in which it itself was sired, the Constitution predicates and incorporates within its vision the existence of a permanently engaged citizenry alerted to and involved with all legislative programmes. The people have more than the right to vote in periodical elections, fundamental though that is. And more is guaranteed to them than the opportunity to object to legislation before and after it is passed, and to criticise it from the sidelines while it is being adopted. They are accorded the right on an ongoing basis and in a very direct manner, to be (and to feel themselves to be) involved in the actual processes of law-making. Elections are of necessity periodical. Accountability, responsiveness and openness, on the other hand, are by their very nature ubiquitous and timeless. They are constants of our democracy, to be ceaselessly asserted in relation to ongoing legislative and other activities of government. Thus it would be a travesty of our Constitution to treat democracy as going into a deep sleep after elections, only to be kissed back to short spells of life every five years. Although in other countries nods in the direction of participatory democracy may serve as hallmarks of good government in a political sense, in our country active and ongoing public involvement is a requirement of constitutional government in a legal sense. ⁷ It is not just a matter of legislative etiquette or good governmental manners. It is one of constitutional obligation.	1 5 10 15 20 25 30 35 40

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69. According to the learned Judge: 1
- “A vibrant democracy has a qualitative and not just a 1
quantitative dimension. Dialogue and deliberation go hand in 2
hand. This is part of the tolerance and civility that characterise 3
the respect for diversity the Constitution demands. Indeed, 4
public involvement may be of special importance for those 5
whose strongly-held views have to cede to majority opinion in 6
the legislature. Minority groups should feel that even if their 7
concerns are not strongly represented, they continue to be part 8
of the body politic with the full civic dignity that goes with 9
citizenship in a constitutional democracy. Public involvement 10
will also be of particular significance for members of groups 11
that have been the victims of processes of historical silencing. 12
It is constitutive of their dignity as citizens today that they 13
not only have a chance to speak, but also enjoy the assurance 14
they will be listened to. This would be of special relevance 15
for those who may feel politically disadvantaged at present 16
because they lack higher education, access to resources and 17
strong political connections. Public involvement accordingly 18
strengthens rather than undermines formal democracy, by 19
responding to and negating some of its functional deficits. 20
A long-standing, deeply entrenched and constantly evolving 21
principle of our society has accordingly been subsumed into 22
our constitutional order. It envisages an active, participatory 23
democracy. All parties interested in legislation should feel 24
that they have been given a real opportunity to have their say, 25
that they are taken seriously as citizens and that their views 26
matter and will receive due consideration at the moments 27
when they could possibly influence decisions in a meaningful 28
fashion. The objective is both symbolical and practical: the 29
persons concerned must be manifestly shown the respect due 30
to them as concerned citizens, and the legislators must have 31
the benefit of all inputs that will enable them to produce 32
the best possible laws. An appropriate degree of principled 33
yet flexible give-and-take will therefore enrich the quality of 34
our democracy, help sustain its robust deliberative character 35
and, by promoting a sense of inclusion in the national polity, 36
promote the achievement of the goals of transformation.” 37
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70. In *Glenister v President of the Republic of South Africa and others* 38
(CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) 39

BCLR 651 (CC), it was held that: 1

“For the opportunity afforded to the public to participate
in a legislative process to comply with section 118(1), the
invitation must give those wishing to participate sufficient 5
time to prepare. Members of the public cannot participate
meaningfully if they are given inadequate time to study the
Bill, consider their stance and formulate representations to
be made. Two principles may be deduced from the above
statement. The first is that the interested parties must be given 10
adequate time to prepare for a hearing. The second relates to
the time or stage when the hearing is permitted, which must be
before the final decision is taken. These principles ensure that
meaningful participation is allowed. It must be an opportunity
capable of influencing the decision to be taken. The question 15
whether the notice given in a particular case complies with
these principles will depend on the facts of that case.”

71. However the caution expressed by Sachs, J in *Merafong*
Demarcation Forum and others v President of the Republic of South
Africa and others (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 20
(CC); 2008 (10) BCLR 968 (CC) must always be kept in mind. In
that case the learned Judge of the Constitutional Court of South
Africa pronounced himself thus:

“The passages from the *Doctors for Lifemajority* judgment,
referred to by the Applicants, state reasons for constitutionally 25
obliging legislatures to facilitate public involvement. But being
involved does not mean that one’s views must necessarily
prevail. There is no authority for the proposition that the
views expressed by the public are binding on the legislature 30
if they are in direct conflict with the policies of Government.
Government certainly can be expected to be responsive to
the needs and wishes of minorities or interest groups, but
our constitutional system of government would not be able
to function if the legislature were bound by these views. 35
The public participation in the legislative process, which
the Constitution envisages, is supposed to supplement and
enhance the democratic nature of general elections and
majority rule, not to conflict with or even overrule or veto
them. To say that the views expressed during a process of 40
public participation are not binding when they conflict with
Government’s mandate from the national electorate, is not the

same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind. Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public. It is the specific conjunction of these three factors which, in my view, must guide the evaluation of the facts in this matter. Civic dignity was directly implicated. Indeed, it is important to remember that the value of participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect.....Given that the purpose of participatory democracy is not purely instrumental, I do not believe that the critical question is whether further consultation would have produced a different result. It might well have done. On the facts, I am far from convinced that the outcome would have been a foregone conclusion. Indeed, the Merafong community might have come up with temporising proposals that would have allowed for future compromise and taken some of the sting out of the situation. For its part, the Legislature might have been convinced that the continuation of an unsatisfactory status quo would have been better even if just to buy time for future negotiations than to invite a disastrous break-down of relations between the community and the government. Yet even if the result had been determinable in advance, respect for the relationship between the Legislature and the community required that there be more rather than less communication..... There is nothing on the record to indicate that the Legislature took any steps whatsoever even to inform the community of the about-turn, let alone to explain it. This is not the sort of information that should be discovered for the first time from the newspapers, or from informal chit-chat.

72. In this case, it is not in doubt that there was an earlier Bill which was tabled before the Assembly which Bill was rejected. According to the respondents there were certain recommendations which were made by the Assembly which recommendations were taken into account in the Bill which gave rise to the Act. The Respondents' position is that there was no necessity for the subsequent Bill to

be subject to further public participation. In fact it is not claimed that the said subsequent Bill was so subjected. According to the petitioners who were consulted earlier what was contained in the said subsequent Bill was not what had been agreed upon during the earlier consultation. In my view where a Bill has been rejected by the Assembly and a fresh Bill introduced as opposed to mere amendments, the principle of public participation must equally apply. Unless this is so the principle may be defeated by the Assembly simply rejecting a Bill in which the public has had an input with its own Bill disregarding the input by the public and not subjecting it to public participation. That in my view would defeat the very principle of public participation. As was aptly put in *Merafong Demarcation Forum and others v President of the Republic of South Africa and others* (*supra*):

“Once structured processes of consultation were put in place, with tangible consequences for the legislative process and of central importance to the community, the principle of participatory democracy required the establishment of appropriately formal lines of communication, at least to clarify, if not to justify, the negation of those consequences. In my view, then, it was constitutionally incumbent on the Legislature to communicate and explain to the community the fact of and the reasons for the complete deviation from what the community had been led to believe was to be the fruit of the earlier consultation, and to pay serious attention to the community’s response. Arms-length democracy is not participatory democracy, and the consequent and predictable rupture in the relationship between the community and the Legislature tore at the heart of what participatory democracy aims to achieve..... I would hold that, after making a good start to fulfil its obligation to facilitate public involvement, the Legislature stumbled badly at the last hurdle. It ended up failing to exercise its responsibilities in a reasonable manner, with the result that it seriously violated the integrity of the process of participatory democracy. In choosing not to face the music (which, incidentally, it had itself composed) it breached the constitutional compact requiring mutuality of open and good-faith dealing between citizenry and government, and thereby rendered the legislative process invalid.”

73. In my view the spirit of the devolved system of governance in this

country was meant to bring services to the people and to ensure equitable sharing of the resources by the people of the Republic of Kenya. It was meant to bring to end the hitherto existing centralised system of governance which was geared towards rewarding the cronies, supporters and court jesters. However the drafters of the Constitution were well aware of the risk of the country being compartmentalised into semi-states with god fathers or war lords as the chief executives. Accordingly, proper safeguards were put into place to ensure that in spite of the devolved system of governance the country remained a one unitary State and was not transformed into a confederacy. Accordingly, in legislating the County Assemblies in the devolved governments must take into account the fact that their devolved units must co-exist with other units and that their actions do not unduly infringe upon the rights of residents of other units as enshrined under the Constitution. Unless this restriction and limitation on the powers of the devolved units is observed there is a risk of some counties being a preserve of a certain class by making life intolerable for certain classes of people hence forcing them out of those counties to other counties where less stringent legislation prevail. In other words devolution was not meant to balkanise the country into fiefdoms.

74. These principles are clearly enumerated in the objects of devolution in article 174 of the Constitution which has been reproduced elsewhere in this judgement.

75. In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may fora as possible such as churches, mosques, temples, public *barazas* national and vernacular

radio broadcasting stations and other avenues where the public
are known to converge to disseminate information with respect to
the intended action. Article 196(1)(b) just like the South African
position requires just that. Dealing with the issue I wish to reiterate
what was held in *Doctors for Life International vs Speaker of the*
National Assembly and others (supra) to the effect that:

“The phrase “facilitate public involvement” is a broad concept,
which relates to the duty to ensure public participation in
the law-making process. The key words in this phrase are
“facilitate” and “involvement”. To “facilitate” means to “make
easy or easier”, “promote” or “help forward”. The phrase
“public involvement” is commonly used to describe the process
of allowing the public to participate in the decision-making
process. The dictionary definition of “involve” includes to
“bring a person into a matter” while participation is defined
as “[a] taking part with others (in an action or matter); .
. . the active involvement of members of a community or
organization in decisions which affect them”. According
to their plain and ordinary meaning, the words public
involvement or public participation refer to the process by
which the public participates in something. Facilitation
of public involvement in the legislative process, therefore,
means taking steps to ensure that the public participate in
the legislative process. That is the plain meaning of section
72(1)(a). This construction of section 72(1)(a) is consistent
with the participative nature of our democracy. As this Court
held in *New Clicks*, “[t]he Constitution calls for open and
transparent government, and requires public participation in
the making of laws by Parliament and deliberative legislative
assemblies.” The democratic government that is contemplated
in the Constitution is thus a representative and participatory
democracy which is accountable, responsive and transparent
and which makes provision for the public to participate in
the law-making process.”

76. In my view to huddle a few people in a 5 star hotel on one day cannot
by any stretch of imagination be termed as public participation for
the purposes of meeting constitutional and legislative threshold.
Whereas the magnitude of the publicity required may depend
from one action to another a one day newspaper advertisement in
a country such as ours where a majority of the populace survive

on less than a dollar per day and to whom newspapers are a luxury leave alone the level of illiteracy in some parts of this country may not suffice for the purposes of seeking public views and public participation. As was held in *Doctors for Life International v Speaker of the National Assembly and others (supra)*: 1

“Merely to allow public participation in the law-making process is, in the prevailing circumstances, not enough. More is required. Measures need to be taken to facilitate public participation in the law-making process. Thus, Parliament and the provincial legislatures must provide notice of and information about the legislation under consideration and the opportunities for participation that are available. To achieve this, it may be desirable to provide public education that builds capacity for such participation. Public involvement in the legislative process requires access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens....[the Assembly] should create conditions that are conducive to the effective exercise of the right to participate in the law-making process. This can be realised in various ways, including through road shows, regional workshops, radio programs and publications aimed at educating and informing the public about ways to influence Parliament, to mention a few.....It is implicit, if not explicit, from the duty to facilitate public participation in the law-making process that the Constitution values public participation in the lawmaking process. The duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of state that the Constitution contemplates that the public will participate in the law-making process.....In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by 5 10 15 20 25 30 35 40

Parliament to facilitate public participation, the nature of the
legislation under consideration, and whether the legislation
needed to be enacted urgently. Ultimately, what Parliament
must determine in each case is what methods of facilitating
public participation would be appropriate. In determining
whether what Parliament has done is reasonable, this Court
will pay respect to what Parliament has assessed as being the
appropriate method. In determining the appropriate level of
scrutiny of Parliament's duty to facilitate public involvement,
the Court must balance, on the one hand, the need to respect
parliamentary institutional autonomy, and on the other, the
right of the public to participate in public affairs. In my view,
this balance is best struck by this Court considering whether
what Parliament does in each case is reasonable."

77. Similarly in *Matatiele Municipality and others v President of the
Republic of South Africa and others* (2) (CCT73/05A) [2006] ZACC
12; 2007 (1) BCLR 47 (CC), where Ngcobo, J held that:

"...the provincial legislatures have broad discretion to choose
the mechanisms that, in their view, would best facilitate public
involvement in their processes. This may include providing
transportation to and from hearings or hosting radio programs
in multiple languages on an important bill, and may well
go beyond any formulaic requirement of notice or hearing.
In addition, the nature of the legislation and its effect on
the provinces undoubtedly plays a role in determining the
degree of facilitation that is reasonable and the mechanisms
that are most appropriate to achieve public involvement.
Thus, contrary to the submission by the government, it is
not enough to point to standing rules of the legislature that
provide generally for public involvement as evidence that
public involvement took place; what matters is that the
legislature acted reasonably in the manner that it facilitated
public involvement in the particular circumstances of a given
case. The nature and the degree of public participation that
is reasonable in a given case will depend on a number of
factors. These include the nature and the importance of the
legislation and the intensity of its impact on the public. The
more discrete and identifiable the potentially affected section
of the population, and the more intense the possible effect on
their interests, the more reasonable it would be to expect the

The provisions of the Constitution must be construed in a manner that is compatible with these principles of our democracy. Our system of government requires that the people elect representatives who make laws on their behalf and contemplates that people will be given the opportunity to participate in the law-making process in certain circumstances. The law-making process will then produce a dialogue between the elected representatives of the people and the people themselves. The representative and participative elements of our democracy should not be seen as being in tension with each other.....What our constitutional scheme requires is “the achievement of a balanced relationship between representative and participatory elements in our democracy.” The public involvement provisions of the Constitution address this symbolic relationship, and they lie at the heart of the legislative function. The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process.....To uphold the government’s submission would therefore be contrary to the conception of our democracy, which contemplates an additional and more direct role for the people of the provinces in the functioning of their provincial legislatures than simply through the electoral process. The government’s argument that the provisions of section 118(1)(a) are met by having a proposed constitutional amendment considered only by elected representatives must therefore be rejected..... Before leaving this topic, it is necessary to stress two points. First, the preamble of the Constitution sets as a goal the establishment of “a society based on democratic values [and] social justice” and declares that the Constitution lays down “the foundations for a democratic and open society in which government is based on the will of the people.” The founding values of our constitutional democracy include human dignity and “a multi-party system of democratic government to ensure accountability, responsiveness and openness.” And it is apparent from the provisions of the Constitution that the democratic government that is contemplated is partly representative and partly participatory, accountable, transparent and makes provision for public participation in the making of laws by legislative bodies. Consistent with our

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- constitutional commitment to human dignity and self respect, section 118(1)(a) contemplates that members of the public will often be given an opportunity to participate in the making of laws that affect them. As has been observed, a “commitment to a right to . . . public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self respect.” 1
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79. In support of their position that there was public participation, the Respondents have exhibited an advertisement in the *Daily Nation* of 17th August, 2013. However, a careful perusal of the said advert reveals that apart from the mention of the Finance Bill in the title of the advert and the mention of the Bill in passing, there was not much mention of the said Bill. In other words there was no attempt to exhort the public to participate in the process of the enactment of the Bill. In my view there was no “facilitation”. That the Finance Bill was an important Bill cannot be doubted. Its effect on the people of Kiambu in terms of ordering their way of life was bound to be far reaching. It was therefore crucial that the information going out to the public be clear and ought not to have admitted any ambiguity. The other document relied upon were list of certain persons. However, the said lists only referred to County Integrated Development Plan and not the Finance Bill. There is no evidence at all that at the said meetings the participants were invited to comment on the said Bill let alone that the contents of the same were availed to them. 80. The next issue for determination is the scope of article 209(3)(4) and (5) of the Constitution. The said article provides as follows: 15
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- (3) A county may impose—
- (a) property rates;
- (b) entertainment taxes; and
- (c) any other tax that it is authorised to impose by an Act of Parliament. 35
- (4) The national and county governments may impose charges for the services they provide.
- (5) The taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, 40

capital or labour. 1

81. It is therefore clear that the County Assembly may only impose property rates and entertainment taxes unless otherwise authorised by an Act of Parliament and this position is emphasised by the provisions of article 210(1) of the Constitution which expressly provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation. County Governments are however empowered to impose charges on services they provide. Such service would include parking and market fees. However to levy charges on the stones quarried unless authorised by an Act of Parliament or any services rendered by the County Governments towards that end would be clearly illegal. Further the levying of such taxes ought not to be such as to prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour. Tariffs and pricing of services must however comply with the provisions of section 120 of the County Government Act. The Court however is not entitled to interfere with the Tariffs and pricing of services simply on the ground that the Court would have decided otherwise since the Court ought not to substitute its opinion for that the County Government. As long as the provisions of the Constitution and the relevant legal provisions are complied with and the applicable principles are taken into the Court ought not to interfere.

82. I must however stress that County Governments are under article 175(b) of the Constitution entitled to have reliable sources of revenue to enable them to govern and deliver services effectively. However this entitlement must be exercised in accordance with the Constitution and the law and where the existing legislation is not adequate for the purposes of ensuring the efficient governance and delivery of services the County Government ought to petition the National Government to increase allocation to them or enact appropriate legislation to enable them carry out their constitutional mandate as required under articles 190(1), 202 and 203 of the Constitution.

83. It was contended on behalf of the Respondents that the petitioners/applicants ought to have petitioner the County Government pursuant to section 88 of the County Government Act. Whereas the said section provides for the right by a citizen to petition in writing the County Government on any matter under the responsibility

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- of the county government, it is clear that the power to declare legislation unconstitutional rests with the High Court pursuant to article 165(3)(d) of the Constitution. Accordingly the right to petition the County Government in the circumstances of this case would not have afforded the Petitioners/application an effective remedy hence that option cannot be taken to oust the jurisdiction of this Court to hear determine and grant the orders sought herein. 1
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84. Having considered the foregoing the inescapable conclusion I come to is that there was no public participation as contemplated under the Constitution and the County Government Act, 2012. 10
85. In the instant case, it has not been alleged that any interests have been acquired under the said Act that would militate against the immediate nullification of the said Act. Accordingly, I hereby declare that the Kiambu Finance Act, 2013 gazetted *vide* Kiambu County Gazette Supplement No 8 (Act No 3) violates the Constitution and that the same is null and void. 15
86. On the issue of costs, it is clear that a number of the petitions were brought on behalf of the wider public in particular the people of Kiambu and just as I would have held had the petitions/application been unsuccessful, there will be no order as to costs. 20
87. Orders accordingly. 25
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**Wambora & 4 others v Speaker of the Senate
& 5 others [2014] KLR - HCK**

High Court, at Kerugoya April 16, 2014 5
BN Olao, CW Githua & HI Ong’udi, JJ

Petition No 3 of 2014

Brief facts

This was a consolidated petition that sought to challenge the constitutionality of the process leading to the removal of the 1st Petitioner as the Governor of Embu County. This was occasioned by a botched tender regarding the refurbishment of Embu County Stadium and supply of maize seeds, whereby the County Assembly of Embu following the recommendations made by their Joint Committees of Infrastructure, Youth and Sports and that of Agriculture, Livestock, Fisheries and Co-operations had proceeded to impeach the 1st Petitioner and his deputy. That was due to the fact that the Joint Committees had recommended the removal from office of the 4th Petitioner (County Secretary Embu County) who proceeded to court and got conservatory orders stopping the process hence the 1st Petitioner was unable to act on these recommendations to remove her from office. The County Assembly nevertheless went ahead to institute impeachment proceedings against the 1st Petitioner and his deputy who being aggrieved by that action sought court orders to stop the process. The matter in contention included contempt of court proceedings against the 1st Respondent (Speaker of the Senate) for ignoring several court orders directed at them stopping their summoning of the Petitioner for impeachment proceedings and the subsequent gazettment of the same without providing the 1st Petitioner with grounds upon which the impeachment was based on or a fair hearing.

Issues

- i. Whether the High Court had jurisdiction to hear a matter regarding the impeachment of a County Governor 35
- ii. Whether the making of the recommendations by the Joint Committees of Embu County Assembly without having formally heard the 1st Petitioner amounted to a violation of the rules of natural justice 40
- iii. Whether the validity or otherwise of a Governor’s removal from office by way of impeachment was a dispute amenable to Judicial

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- review or whether it is a political question 1
- iv. Whether the National Assembly Powers and Privileges Act ousted the High Court's jurisdiction with regard to actions of the Speaker of the Senate due to parliamentary immunity
- v. Whether a Deputy Governor could assume office where the Governor was removed from office without due regard to procedure 5
- vi. Whether the proceedings leading to the resolution and removal of the 1st Petitioner from office was done in accordance with the law
- Constitutional Law*** – devolution – County Governments – impeachment of a Governor – process for the removal of a County Governor from office – circumstances under which a Governor could be removed from office – whether gross violation must be proved for a Governor to be removed from office – Constitution of Kenya, 2010, article 181; County Governments Act, 2012, sections 30, 33, 34. 10
- Jurisdiction*** – jurisdiction of the High Court-whether High Court has jurisdiction to hear a matter regarding the impeachment of a County Governor – the quasi-judicial nature of County Assemblies during impeachment proceedings-Constitution of Kenya, 2010, article 165(6). 15
- Civil Practice and Procedure*** – contempt of court – when a court can declare a party to be in contempt of court – effect of contempt proceedings on officials of the Senate – effect of decisions made in violation of court orders – Civil Procedure Rules, order 40 rules 2, 3. 20
- Held:** 25
- Article 165(6) of the Constitution gave the High Court supervisory jurisdiction over all subordinate courts and over any person, body or authority exercising a judicial or *quasi*-judicial function. Since the issue in contention was the process followed by the Joint Committees in arriving at their decision, then the court in the exercise of its judicial review jurisdiction had the mandate to investigate whether the process used complied with the law. This was due to the fact that the Joint Committees being established under the County Governments Act and in the discharge of their duties were acting as quasi-judicial bodies and as such their decisions were subject to judicial review. 30
 - The deliberations of the Joint Committees only amounted to preliminary inquiries and it was not necessary to formally hear the applicant before making their recommendations. These recommendations did not amount to a decision that would affect the Applicant's rights at this stage. Good administration required that a party being investigated regarding suspected irregularities 40

- in the execution of his/her official duties, step aside to pave way
for investigation to avoid a possibility of interference with the
investigations. 1
3. Though the right to a hearing encompassed the right to be given
sufficient notice of the allegations made and sufficient time to 5
respond, there was no universal principle regarding what amounted
to sufficient notice. Whether a notice given was sufficient or not
depended on the circumstances of each case and the nature of the
allegations to be answered. The notice given to the 4th Petitioner was
not short as to be unreasonable since she was not being summoned to 10
defend herself against any allegations of wrongdoing and moreover
the matter she was being summoned for was not new to her since
she had communicated before about it with the Respondents. The
4th Petitioner should have honored the summons, attended the
committees and subsequently asked for extension of time to provide 15
additional information should it have been needed.
4. The order of *certiorari* sought by the 4th Petitioner could not apply
in the instant case since the Embu County Assembly only made
recommendations which did not amount to a decision capable of 20
being quashed by such order. The rule contained in order 53 rule
7 of the Civil Procedure Rules was put in place to ensure that an
actual decision actually existed capable of being removed to the
High Court for quashing. The 4th Petitioner having failed to avail
the resolution containing the alleged decision by the Embu County 25
Assembly, the court was unable to find that such a decision actually
existed thus the remedy of *certiorari* could not be made available
to the 1st Petitioner.
5. The order of prohibition was normally issued to prevent a tribunal
or body from continuing with proceedings conducted in excess of 30
jurisdiction or contrary to the laws of the land or to prohibit the
making of contemplated unlawful decisions. The Court could not
issue an order of prohibition whose effect would be to shield the
Applicant from investigations by the Ethics and Anti-Corruption
Commission, which was an independent commission created under 35
the Ethics and Anti- Corruption Commission Act and whose sole
mandate was to investigate allegations of corruption. The Court
could not prohibit a statutory body from executing its lawful
mandate. 40
6. The Court is the only arm of Government vested with the power
to interpret the Constitution and to intervene where violation of
the Constitution by other arms of Government and state organs

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- is alleged. The amended petition contained allegations of the Petitioners' rights and freedoms with regard to his removal from office thus the doctrine of separation of powers did not inhibit the Court's jurisdiction to handle the matter. 1
7. In Kenya the constitutional power to impeach a Governor was donated to the County Assembly and the Senate. The 1st Petitioner had asked the Court to determine whether his impeachment was done in accordance with the Constitution and the County Government Act which stipulated the procedure for impeaching a Governor. Given that the 1st Petitioner alleged a violation of his fundamental rights and freedoms, the Petition ceased to be a political question but one that was justiciable. 5 10
8. Section 29 of the National Assembly (Powers and Privileges) Act in its wording ousted the jurisdiction of the Court with regard to the actions of the Speaker and officers of the National Assembly. However, even though Senate had the powers to impeach a Governor, it had to do so within the limits prescribed by the Constitution. The court would step in and lift the veil of parliamentary privilege if it was of the view that the Senate had violated the Constitution. The Speaker and other like officers could only enjoy immunity from court action if their decisions were made in accordance with the Constitution, hence section 12 and 29 of the National Assembly (Powers and Privileges) Act did not oust the court's jurisdiction to hear the Petition. 15 20 25
9. With regard to whether the amended petition was drafted accordingly, it was trite law that for a petition to be said to be competent it had to comply with the provisions of rule 10 of the Mutunga Rules. The Rule provided the specific contents that a petition of such nature had to contain before it could be allowed to pass muster. The Petitioners in this case had stated the facts in support of the Petition, the particulars of the alleged violation and also the reliefs sought. The amended petition had therefore met the threshold required under Rule 10 of the Mutunga Rules. 30 35
10. The law regarding the removal of a Governor from office was contained in article 181 of the Constitution and the bodies mandated to do so were the County Assembly and the Senate. The Constitution provided that for such a process to commence, gross violation by a party had to be proved. The removal of a Governor being a very weighty matter, had to be done in strict accordance with the law since it was a limitation of the right of a Governor to hold political office as well as the right of the electorate to elect a 40

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- person of their choice to a political office. 1
11. Knowledge supersedes personal service. If a party was able to prove that there was knowledge of court orders, then that was sufficient to form a basis for finding of contempt of court orders. The 5th and 6th Respondents had knowledge of the court orders preventing them from going on with the motion proposing the removal of the 1st Petitioner from office without giving him an opportunity to be heard. 5
12. It was the responsibility of the Speaker of the County Assembly to preside over the business of the County Assembly. It was also his duty to ensure that the Court order was obeyed. In allowing the motion proposing the removal of the 1st Petitioner from office to be debated and passed, the 5th Respondent acted in disobedience of court orders and thus was guilty of contempt of court. 10
13. Anything done in disobedience of court orders was null and void *ab initio* and thus the resolution passed by the 6th Respondent for the removal of the 1st Petitioner from office which was forwarded to the Speaker of the Senate was invalid. 15
14. Court orders once issued ought be obeyed by those it was directed to unless they were discharged or set aside. The orders bound everyone alike without discrimination. The Senate acted in violation of court orders when it chose not to obey them but the Court could not cite the Speaker and Clerk of Senate for contempt proceedings since no such application had been brought before court. 20
15. The Deputy County Governor could not assume office under article 182(2) of the Constitution since the proceedings removing the 1st Petitioner from office were in violation of court orders and a party could not be allowed to benefit from an illegality. Article 182(2) of the Constitution could only apply where a Governor had been removed from office legally. An act done in disobedience of a court order was illegal and invalid and could not affect any change in the rights and liabilities of others. 25
16. The right to a hearing ought to be accorded to a Governor at any time that the motion proposing removal from office was being debated before it was approved or rejected. The County Assembly of Embu had already made provisions as to the right to a hearing in its Standing Orders so in ignoring those same provisions and denying the 1st Petitioner a right to be heard, they violated his right to fair administrative action as enshrined in article 47 of the Constitution. The right to be heard should apply whenever section 33(1) of the County Governments Act was invoked by any County 30
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- Assembly member. 1
17. The 1st, 2nd, 5th and 6th Respondents acted in violation of Court orders previously given which made the removal of the 1st Petitioner from office by the Senate a nullity in law. The 1st Petitioner's right to fair administrative action was also violated by the 6th Respondent. 5

Judicial Review application by 4th Petitioner dismissed with no order as to costs.

Proceedings for impeachment of the Governor quasi-judicial in nature thus subject to the jurisdiction of the High Court, order of certiorari granted quashing decision to remove Governor from office and quashing the Gazette Notice on his impeachment and each party to bear its own costs. 10

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1. *Anarita Karimi Njeru v Republic (No 1)* [1976–1980] 1 KLR 1272; [1979] KLR 154 – (Followed) 15
2. *Athi River Services Board v Nairobi City Water & Sewerage Co Ltd* Civil Application 135 of 2010 – (Mentioned)
3. *Baraza, Nancy v Judicial Service Commission & 9 others* Petition No 23 of 2012 – (Followed) 20
4. *Center for Rights Education and Awareness (CREW) & 7 others v Attorney General* Petition No 36 of 2011 – (Mentioned)
5. *Commercial Bank of Africa Ltd v Ndirangu* [1990-1994] EA 64 – (Mentioned) 25
6. *Criticos, Basil v Attorney General & 12 others* Petition 258 of 2011 – (Followed)
7. *Gacheche, Jeanne W & 6 others v Judges and Magistrates Vetting Board & 2 others*, Judicial Review No 295 of 2011 – (Mentioned)
8. *International Center for Policy and Conflict & 5 others v Attorney General* Petition No 552 of 2012 – (Mentioned) 30
9. *Judicial Service Commission v Speaker of the National Assembly & another* Petition No 518 of 2013 – (Explained)
10. *Judicial Service Commission v Speaker of the National Assembly & another* Petition No 518 of 2013 – (Followed) 35
11. *Kariuki & 2 others v Minister for Gender, Sports, Culture & Social Services & 2 others* [2004 1 KLR 588 – (Explained)
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13. *Kenya Pipeline Limited v Hyosung Ebara Company Limited & 2*

<i>others</i> Civil Appeal No 145 of 2011 – (Mentioned)	1
14. <i>Kenya Tea Growers Association v Francis Atwoli & 5 others</i> Petition No 64 of 2010 – (Followed)	
15. <i>Kileleshwa Service Station Limited v Kenya Shell Ltd</i> [2008] KLR 55 – (Mentioned)	5
16. <i>Kituku, Godfrey Kilatya & 6 others v Malindi Municipal Council</i> Civil Case No 45 of 2005 – (Explained)	
17. <i>Matembe & others v Attorney General</i> [2005] 2 EA 200 – (Explained)	
18. <i>Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others</i> Civil Appeal No 290 of 2012 – (Followed)	10
19. <i>Mugendi, Daniel N v Kenyatta University & 3 others</i> Civil Appeal No 6 of 2012 – (Mentioned)	
20. <i>Mutitika v Baharini Farm Limited</i> [1985] KLR 227 – (Mentioned)	
21. <i>Musau, Florence v Minister for Health & 2 others</i> Miscellaneous Application No 12 of 2007 – (Mentioned)	15
22. <i>Mwau, John Harun & 3 others v Attorney General & 2 others</i> Petition No 65 of 2011 – (Mentioned)	
23. <i>Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County Government of Nairobi & 3 others</i> Petition No 486 of 2013 – (Mentioned)	20
24. <i>Njenga, Mwangi & another v Truth Justice and Reconciliation Commission & 4 others</i> Petition No 286 of 2013 – (Followed)	
25. <i>Ochino & another v Okombe</i> [1989] KLR 165 – (Explained)	
26. <i>Onyango Oloo v Attorney General</i> [1986-1989] EA 456 – (Followed)	25
27. <i>Republic v Aga Khan Education Services ex parte Ali Sele & 20 others</i> Miscellaneous Application No 12 of 2002 – (Followed)	
28. <i>Republic v Gachoka & another</i> [1999] 1 EA 254 – (Mentioned)	
29. <i>Republic v Gachoka & another</i> [1999] 1 EA 254 – (Mentioned)	
30. <i>In re the Matter of the Interim Independent Electoral Commission</i> [2011] 2 KLR 32 – (Followed)	30
31. <i>Royal Media v Telkom Kenya</i> [2001] EA 210 – (Mentioned)	
32. <i>Kinuthia, Rumba v Attorney General</i> Civil Case 1408 of 2004 – (Followed)	
33. <i>Rwanyarare & others v Attorney General</i> [2003] 2 EA 664 – (Explained)	35
34. <i>Shah & another t/a Lento Agencies v National Industrial Credit Bank Ltd</i> (2005) 1 KLR – (Mentioned)	
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36. <i>Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd</i> [1989] KLR 1 – (Followed)	

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37. <i>Trusted Society of Human Rights Alliance v Attorney General & 2 others</i> [2012] 2 KLR 518 – (Followed)	1
38. <i>Union Insurance Company of Kenya Ltd v Ramzan Abdul Dhanji</i> Civil Application No Nai 179 of 1998 – (Followed)	
39. <i>Wildlife Lodges Ltd v County Council of Narok & another</i> [2005] 2 EA 344 – (Explained)	5

South Africa

1. <i>Doctors for Life International v Speaker of the National Assembly and others</i> [2006] ZACC 11; 2006 (12) BCLR 1399 – (Followed)	
2. <i>President of the Republic of South Africa & others v South African Rugby Football Union & others</i> 2000 (1) SA 1; [1999] ZACC 110 – (Followed)	10

Nigeria

1. <i>Muyiwa Inakoju & 17 others v Abraham Adeolu Adeleke & 3 others</i> (2007) 4 NWLR Pt 1025; (2007) 1 NILR 121	15
2. <i>Michael Dapianlong v Chief (Dr) Joshus Chibi Dariye</i> Supreme Court of Nigeria SC 39/2007 (UR) – (Followed)	

Zimbabwe

1. <i>Smith v Mutasa & another</i> NNO [1990] LRC (Const) b87; 1990 (3) SA 756; 1989 (3) ZLR 183 – (Followed)	20

United States of America

1. <i>Nixon v United States</i> , 506 US 224 (1993)– (Followed)	
2. <i>Marbury v Madison</i> , 5 US 137 (1803) – (Followed)	

United Kingdom

1. <i>Clarke & others v Chadburn & others</i> [1985] 1 All ER 211 – (Followed)	25
2. <i>Hadkinson v Hadkinson</i> [1952] 2 All ER 211 – (Followed)	
3. <i>Lewis v Heffer & others</i> [1978] 3 All ER 354 – (Followed)	
4. <i>Russel v Duke of Norfolk & others</i> [1949] All ER 109 – (Followed)	30

Texts & Journals

1. Duane, J., Balboni, M., (Eds) (1986) <i>New York's Impeachment Law and the Trial of Governor Sulzer: A case for Reform</i> Fordham Urban Law Journal, London: Berkeley Electronic Press Vol 15 issue 3	
2. Oni, MA., (Ed) (2013) <i>Judicial Review of Governors Ladoja and Obi Impeachment in Nigerian's Fourth Republic</i> Singaporean Journal of Business Economics and Management Studies Lagos: Babcock University Vol 1 No 6	35
3. Bacchin, S., (Ed) (2011) <i>Concise Oxford English Dictionary</i> , London: Oxford University Press 12th Edn p 1201	40
4. Hogg, QM., (Lord Hailsham) <i>et al</i> (Eds) (1989) <i>Halsbury's Laws of England</i> London : Butterworths 4th Edn Reissue Vol 1(1)	

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5. Garner, BA., (Ed) (2009) *Blacks Law Dictionary* St Paul Minnesota: West End Publishers 9th Edn 1
 6. Connolly, D., *et al* (Eds) (2010) *Halsburys Laws of England*, London: LexisNexis 5th Edn Vol 61

Statutes 5

East Africa

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 53 rule 7 – (Interpreted)
2. Constitution of Kenya, 2010 articles 1,2(2);3(1);6(2); 10(2)(a);19;20;22;23(3);24;25;27;28;35;38;47(1)(2);50(1)(2)(c);73;95(4);117;125;144;145;159(2)(d)(e);160;162(2);165(3)(d)(iii)(5)(b)(6);174;175;179(4)(6);181(1);182(1)(e);185;189;196;226(1)(b)(5);227; Sixth Schedule section 7 – (Interpreted) 10
3. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (Constitution of Kenya, 2010 Sub Leg) rules 10(2)(c)(d); 11(1)(2);26; – (Interpreted) 15
4. Elections (Parliamentary & County Elections) Petition Rules, 2013 (Act No 24 of 2011 Sub Leg) regulation 22 – (Interpreted)
5. National Assembly (Powers and Privileges) Act (cap 6) sections 4,6,9,12,29 – (Interpreted) 20
6. County Governments Act, 2012 (Act No 17 of 2012) sections 14,17, 30(3)(a)(f); 33(1)(2) (3)(b)(4)(6)(b);96(b) – (Interpreted)
7. County Government Public Finance Management Transition Act, 2013 (Act No 8 of 2013) section 3 – (Interpreted) 25
8. Ethics and Anti-Corruption Commission Act, 2011 (Act No 22 of 2011) – In general
9. Intergovernmental Relations Act, 2012 (Act No 2 of 2012) – In general
10. Judicature Act (cap 8) section 5(1) – (Interpreted) 30
11. Public Finance Management Act, 2012 (Act No 18 of 2012) sections 103(3);104; 148;149(1) – (Interpreted)
12. Public Procurement and Disposal Act, 2005 (Act No 3 of 2005) – In general

Advocates 35

1. *Mr Muite, Mr Ahmednasir, Mr Nyamu, Mr Njoroge, Mr Issa Mansur, Mr Wanyama* for the Petitioners
2. *Mr Mwangi Njoroge, Mr Thande Kuria* for the Attorney General’s case. 40
3. *Mr Kibe* for the 4th Respondent
4. *Mr Njenga, Mr Ng’ang’a* for the 5th and 6th Respondent’s

April 16, 2014, the following Judgment of the Court was delivered.	1
Introduction	
1. A Constitution is the instrument or law that organizes and manages governance and state power. It defines, distributes and constrains the use of state power and provides a power map for the construction of the society and the running of the affairs of state. The Constitution 2010 adopted two levels of Government; the National and County Governments. County Government in particular are founded upon the concept of decentralization and devolution of power. According to article 10(2)(a) of the Constitution of Kenya, 2010, devolution and sharing of power are identified as values and principles that guide the Kenyan governance system. It therefore means that in enacting the Constitution 2010 Kenyans settled for a devolved system of Government.	5 10 15
2. The consolidated Petitions seek to challenge the constitutionality of the process leading to the removal of the 1st Petitioner from office as the Governor of Embu County. They also seek an interpretation of article 181 of the Constitution regarding the threshold for removal of a County Governor from office. The Amended Petition which condensed the issues raised in all the consolidated Petitions, therefore raises pertinent issues with regard to devolution, especially on the law governing removal proceedings of a County Governor.	20
Background to the Petition before consolidation JR No 6 of 2014	25
3. The first case filed in connection with the subject matter of the removal of the County Governor of County of Embu was Kerugoya JR No 6 of 2014 (formerly Nairobi JR No 17 of 2014). The Applicant Margaret Lorna Kariuki, the County Secretary County Government of Embu filed the Notice of Motion application dated 16th January 2013 against the Speaker County Assembly of Embu, the Clerk County Assembly of Embu, County Assembly of Embu, The Ethics & Anti-Corruption Commission, the Attorney General and the Governor County of Embu seeking the following reliefs;	30
(a) An order of <i>certiorari</i> to remove into Court and be quashed the finding and or recommendations by the County Assembly of Embu joint committees of infrastructure, youth and sports on the face lifting of the Embu Stadium made in a meeting held on 6th January 214.	35 40
(b) An order of <i>certiorari</i> to remove into Court and be quashed the findings of the County Assembly of Embu	

joint committee on the Agriculture, Livestock, Fisheries and Co-operations and Committee on public accounts and investments on maize seeds procurement by the County Executive made in a meeting held on the 6th January 2014.

(c) An order of *certiorari* to remove into court and be quashed the decision of the County Assembly of Embu to adopt the rights, recommendations mad or findings of both the Committee of the Assembly relating to alleged acquisition of defective maize seeds and alleged fraudulent face lifting of Embu County Stadium as contained in the letter by the 2nd Respondent herein to the Secretary/Chief Executive Officers, Ethics and Anti-Corruption commission dated 7th January 2014.

(d) An order of prohibition directed at the 4th Respondent prohibiting them from commencing investigations against the *ex parte* Applicant or indeed any civil servant and or officer in the Embu County Public Service on the basis of the reports made by the joint committees on the procurement of maize seeds and face lifting of the Embu County stadium on the 7th January 2014.

(e) An order of prohibition directed at the Governor the County Government of Embu prohibiting them from acting as recommended in the reports made by the joint committees on the procurement of maize seeds and face lifting of the Embu County stadium on the 6th January 2014 and adopted by the County Assembly of Embu on 7th January 2014.

(f) A declaration that the County Assembly of Embu's resolution made on the 7th January 2014 on the basis of reports made by both joint committees in relation to the procurement of maize seeds and face lifting of the Embu County stadium is ultra vires the principle of natural justice and hence null and void.

(g) The costs of these proceedings be provided for.

4. Odunga J upon hearing counsel for the *ex parte* Applicant on 17th January 2014 granted leave to the Applicant to commence Judicial Review proceedings against the Respondents. On 21st January 2014 upon hearing all the parties, Odunga J ordered that the *status quo* be maintained pending the *inter partes* hearing on 3rd February 2014.

Petition No 3 of 2014	1
5. The second Petition to be filed was Petition No 3 of 2014 (Formerly Embu Petition No 1 of 2014) filed by the 1st Petitioner Hon Martin Nyaga Wambora, the Governor of the County Government of Embu and the 2nd Petitioner, the County Government of Embu against the County Assembly of Embu, The Clerk County Assembly of Embu, the County Assembly of Embu, the Speaker Senate and the Attorney General seeking the following prayers;	5
(a) A declaration that the notice of motion for the removal of the 1st Petitioner and the Deputy Governor from office intended to be debated on the 23rd January 2014 is in contravention of article 10, 35, 47, 50 and 196 of the Constitution.	10
(b) A declaration that 1st, 2nd and 3rd Respondents motion for the removal of the 1st Petitioner and the Deputy Governor tabled in the County Assembly on 16th January 2014 contravenes articles 10, 35, 47 and 96 of the Constitution.	15
(c) A declaration that the process undertaken by the 1st, 2nd and 3rd Respondents offends the principle of separation of powers envisaged under articles 179(6) and 185) of the Constitution.	20
(d) This Honourable Court be pleased to issue orders of certiorari to quash any resolution made by the 1st, 2nd and 3rd Respondents in relation to the removal of the 1st Petitioner and the Deputy Governor, Embu County from office based on the motion tabled in the County Assembly of Embu on 16th January 2014 or thereabout.	25
(e) This Honourable Court be pleased to issue an order of prohibition prohibiting the 4th Respondent from convening the Senate to hear charges against the 1st Petitioner and the Deputy Governor based on the motion, initiated and tabled in the County Assembly on 16th January 2014 and or resolutions passed in furtherance of the same matters connected therewith.	30
(f) A declaration that the 1st, 2nd and 3rd Respondents are in violation of the principles of natural justice and separation of powers in relation to the 1st Petitioner and the Deputy Governor, County Government of Embu.	35
(g) A declaration that any motion passed relating to the removal of the 1st Petitioner and the Deputy Governor	40

based on the motion tabled on the 16th January 2014 is null and void. (h) This Honourable Court be pleased to issue any other order or relief as it may deem fit and just to ensure that law, order and Constitutionality is observed. (i) Costs of the Petition. 6. The Petition was placed before Githua J on 23rd January 2014 who granted a conservatory order restraining the Speaker of the County Assembly of Embu, the Clerk County Assembly of Embu, the County Assembly of Embu from holding any impeachment proceedings without having first served the Applicant with a notice containing specific grounds/charges upon which the impeachment was being proposed and without giving him an opportunity to be heard.	1 5 10 15
7. Subsequently, the County Assembly of County of Embu proceeded with its sittings and on 28th January 2014, it approved a motion to remove from office by impeachment the Governor and Deputy Governor of Embu County. The Speaker of the County Assembly of Embu therefore forwarded the resolution to the Speaker of the Senate pursuant to the provisions of section 33(2) of the County Government Act of 2012. Thereafter the Speaker of the Senate issued Gazette Notice No 627 dated 31st January 2014 calling for a Special sitting of the Senate for the purposes of transacting <i>inter-alia</i> business concerning the hearing of charges against Mr Martin Nyaga Wambora and Mrs Dorothy Nditi Muchungu, and the legislative sitting was to commence on 4th February 2014. Petition No 4 of 2014 8. Meanwhile, The Hon Martin Nyaga Wambora filed Petition No 4 of 2014 (formerly Nairobi Petition No 51 of 2014) against The Speaker of the Senate and the Attorney General seeking the following orders; (a) A declaration that the Motion for the removal of the Petitioner and his Deputy from office was in contravention of a court order and therefore unconstitutional, illegal, null and void and of no effect whatsoever. (b) A declaration that the Resolution by the Embu County Assembly for the impeachment of the 1st Petitioner and his Deputy was in contravention of a court order and therefore unconstitutional, illegal, null and void and of	20 25 30 35 40

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- no effect whatsoever. 1
- (c) A declaration that the Gazette Notice No 627 by the 1st Respondent convening the Senate to deliberate impeachment on an unconstitutional resolution is unconstitutional, illegal, null and void and of no effect whatsoever. 5
- (d) A declaration that the Speaker of the County Assembly of Embu and 1st Respondent's are in violation of the principles of natural justice and in violation of the Petitioner's rights as guaranteed under articles 27, 28, 35, 47 and 50 of the Constitution. 10
- (e) A declaration that the Motion and the Resolution for impeachment was passed in contravention of the rules of natural justice. 15
- (f) This Honourable Court be pleased to issue an order of *Certiorari* to quash the Resolution passed by the County Assembly of Embu to impeach the Petitioner. 15
- (g) This Honourable Court be pleased to issue an Order of Prohibition prohibiting the 1st Respondent from convening a meeting based on the illegal and unconstitutional resolution. 20
- (h) This Honourable Court be pleased to issue any other or relief as it may deem fit and just to ensure that law, order and Constitutionality is observed. 25
- (i) Costs of the Petition. 25
9. Majanja J on 3rd of February 2014, issued a conservatory order restraining the Speaker of the Senate from introducing, discussing, sitting or deliberating the impeachment of the 1st Petitioner based on the resolution forwarded by the County Assembly of Embu. On 4th February 2014, the Learned Judge transferred Nairobi Petition No 51 of 2014 to Kerugoya High Court. 30
10. The Governor, Hon Martin Nyaga Wambora also filed a Notice of Motion dated 28th January 2014 in Misc Application No 4 of 2014 (formerly Embu Misc Application No 21 of 2014) against Justus Kariuki Mate and Jim G Kauma seeking that that they be held in contempt of Court and be committed to civil jail for six months and an award of costs. 35
11. On 5th February 2014, Githua J ordered that the files be placed before the Chief Justice for the purposes of empanelling a bench of 40

at least 3 judges. The current bench was constituted.	1
Petition No 6 of 2014	
12. This Petition was filed by the Council of Governors against the Senate and the Speaker of the Senate on 18th February 2014, seeking the following orders;	5
(a) A declaration that resonating the intention of articles 2(2), 3(1) 10 and within the intendment of article 159 of the Constitution if the Constitution makes provisions as to how the legislature should conduct its internal affairs or as to the mode of the exercise of its legislative powers, a Court of law can exercise its jurisdiction to ensure the legislature comply with the Constitutional requirement.	10
(b) A declaration that resonating the intention of articles 2(2), 39(1) 10 and within the intendment of article 159 of the Constitution the Respondents are subject to the jurisdiction of this Honourable Court.	15
(c) A declaration that the impeachment proceedings undertaken by the Senate on Governor Martin Nyaga Wambora of Embu County Government is a nullity on account of violation of Court orders issued in the following cases;	20
(i) High Court Petition No 51 of 2014 Martin Nyaga Wambora and the County Government of Embu and Speaker of the Senate and Attorney General.	25
(ii) Petition No 1 of 2014 at the High Court of Kenya at Embu, the Notice dated 17th February 2014	
(d) A declaration that the special issue of the Kenya Gazette No. 1052 and 1053 issued by the Speaker of the Senate Hon Ekwe Ethuro pursuant to the alleged impeachment of Governor Martin Nyaga Wambora is invalid.	30
(e) An order of certiorari be and issued to quash the Special Issue of the Kenya Gazette Notice dated 17th February 2014 No 1052 and 1053 issued by the Speaker of the Senate Hon Ekwe Ethuro pursuant to the alleged impeachment of Governor Martin Nyaga Wambora of Embu County.	35
Majanja J referred the Petition to the Chief Justice who on 19 th February 2014 referred it to this bench for determination.	40

Miscellaneous Application No 4 of 2014	1
13. The first Petitioner/Applicant obtained leave to file contempt proceedings against the Respondents (Justus Kariuki Mate and another). He did file the said proceedings which are the subject of this miscellaneous application.	5
Consolidation	
14. When parties appeared before us on 24th February 2014 they consented that Petition No 3 of 2014, Petition No 4 of 2014, Petition No 5 of 2014, Judicial Review No 6 of 2014 and Miscellaneous Application No 4 of 2014 be consolidated with Petition No 3 as the lead file. It was further agreed that Petition No 5 of 2014 would be heard after the hearing of the consolidated petition. Leave to amend and file petitions was sought and granted with the corresponding leave to file amended responses. The amended petitions and responses were subsequently filed and served.	10 15
15. The orders sought in the amended Petition No 3 are as follows;	
(a) A declaration that proceedings for impeachment of a Governor under article 181 of the Constitution are quasi judicial in nature and are therefore subject to the jurisdiction of the High Court under article 165(3)(d) of the Constitution.	20
(b) A declaration that the proceedings and resolution for removal of the 1st Petitioner before the Embu County Assembly that were held in violation and disregard of a Court order were null and void.	25
(c) A declaration that the proceedings before the Embu County Assembly for removal of the 1st Petitioner as Governor violated the provisions of section 33(1), (2) & (3)(b) of the County Governments Act No 12 of 2012 and was therefore null and void.	30
(d) A declaration that the proceedings and resolution for impeachment of the 1st Petitioner before the Senate that were held in violation and willful disregard of a Court order were null and void.	35
(e) A declaration that the proceedings for removal of the 1st Petitioner as Governor before the Senate did not meet the threshold required under article 181 of the Constitution or the standard of proof required under section 33(3) of the County Government Act 2012 of proof beyond reasonable doubt.	40

(f) A declaration that under article 181 of the Constitution of Kenya and sections 30 and 34 of the County Government Act 2012, a Governor cannot be removed from office under the principle of collective responsibility over acts or omissions or members of the County Executive Committee, County Secretary or Country Public Service.	1 5
(g) A declaration that the entire impeachment proceedings conducted by the 1st and 2nd Respondents and consequential Gazette notices, actions, and any communication issued were in contravention of valid Court orders and therefore in violation of the Constitution, null and void and of no effect whatsoever.	10
(h) A declaration that the Senate has no jurisdiction to summon Governors under article 125 of the Constitution to question them on county finance management as the oversight role is vested in County Assemblies under article 226 of the Constitution.	15
(i) This Honourable Court be pleased to remove to the High Court and issue an Order of Certiorari to quash the Resolution passed by the County Assembly of Embu to impeach the 1st Petitioner.	20
(j) This Honourable Court be pleased to remove to the High Court and issue an Order of Certiorari to quash the impeachment proceedings and resolution by the Senate of 14th February 2014.	25
(k) This Honourable Court be pleased to remove to the High Court and issue an Order of Certiorari to quash the Gazette Notice Number 1052 of 17th February 2014 on the resolution of impeachment of the 1st Petitioner.	30
(l) The Senate be prohibited from summoning Governors and County Finance executive officers to answer queries on county financial management in contravention of the Constitution.	35
(j) This Honourable Court be pleased to issue any other appropriate order or relief as it may deem fit and just.	
(k) Costs of the Petition.	
16. Following the order of consolidation of 24th of March 2014 whereby Petition No 5 of 2014 would be heard separately but concurrently with Petition No 3 we have decided to write a separate judgment for Petition No 5 of 2014 which raises different issues	40

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- and has different parties. 1
- The factual background to the Petition
17. The factual background to this Petition is as explained by Hon Martin Nyaga Wambora in his Amended Petition dated 7th March 2014 and is as follows; 5
18. Sometimes in 2013 the County Government of Embu procured services of contractors to face-lift the Embu County Stadium (“the Stadium”) and also advertised a tender for supply of maize seeds for distribution to farmers in the County. The procurement of these services was meant to nurture sport talent and enhance food security in the County. 10
19. The County Assembly was dissatisfied with the manner in which the refurbishment of the Stadium and the type and quality of maize supplied. On 3rd January, 2014, the County Assembly summoned the County Secretary, (4th Petitioner herein) to appear before two different joint committees on 6th January 2014 at 11 00 a m and 2:30 pm to answer queries arising from the two tenders. 15
20. The summons to attend was received by the 4th Petitioner on the 6th January, 2014 when she reported at work at 8:30 am. Because of the short period in which she was required to gather evidence and answer to the charges, the 4th Petitioner wrote to the respective committees requesting for 21 days to enable her prepare for a comprehensive reply to the questions raised with regard to the two tenders. 20
21. Both the County Assembly Committees rejected the request for extension of time as requested by the 4th Petitioner and proceeded to make a recommendation that the 1st Petitioner suspends the 4th Petitioner (the County Secretary) pending investigations by the Ethics & Anti-Corruption Commission (“the EACC”). 25
22. The 1st Petitioner was not privy to all events regarding the summons until on 7th January, 2014 when the 1st Petitioner was copied on the letter addressed to the Ethics and Anti-corruption Commission asking for the probe of the County Secretary. 30
23. On the 16th January, 2014 the County Assembly before waiting on the outcome of Ethics and Anti-corruption Commission on the probe of the County Secretary, and without giving the 1st Petitioner and opportunity to be heard proceeded to table a motion of impeaching the 1st Petitioner from office on the grounds that 35
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- he refused and/or neglected to act on its recommendations. In the motion, it was alleged the aforesaid neglect and/or refusal amounted to a gross violation of the Constitution and also amounted to an abuse of office. 1
24. On 16th January 2014, the County Secretary filed Judicial Review Miscellaneous Application No 17 of 2014 asking this Honourable Court to quash the decisions of the County Assembly joint committees to have her probed by the Ethics and Anti-corruption Commission or removed from the office by the Petitioner, Odunga J upon hearing the Notice of Motion application in presence of counsel for all parties issued an order for maintainance of status quo pending *inter partes* hearing of on 3rd February, 2014. 5
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25. In obedience to the Orders issued by the High Court, the 1st Petitioner was unable to act on the recommendations of the County Assembly to suspend the 4th Petitioner as to do so would have amounted to contempt of orders of the Court. 15
26. Despite the Court Orders, members of the Embu County Assembly evinced an intention to proceed to impeach the 1st Petitioner. On 22nd January 2014, the Petitioner filed before the High Court in Embu, Petition No 1 of 2014 together with an application dated 22nd January, 214 under certificate of urgency seeking orders restraining the 5th and 6th Respondents from proceeding with any motion for his removal pending hearing of the Petition; and an order restraining the Respondents from holding any proceedings under article 181 of the Constitution and section 33 of the County Government Act, 2012 on removal from office of the 1st Petitioner and his Deputy. Upon hearing of the Chamber Summons application *ex parte*, the Her Ladyship Honourable Justice Cecilia Githua on the 23rd January, 2014 issued the following orders:- 20
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- “(a) The matter herein is certified urgent
- (b) Conservatory orders be and are granted restraining the 1st, 2nd and 3rd Respondents from holding any impeachment proceedings without having first served the applicant with a notice containing specific grounds/charges upon which the impeachment was being proposed and without giving him an opportunity to be heard 35
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- (c) The order will remain in force till 5th February, 2014 when the matter will be placed before the resident judge,

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- Embu for directions and 1
- (d) The Petitioner to serve all the Respondents with the
Petition and the application within the next five days
together with a mention notice of 5th February, 2014.” 5
27. The said orders were served on the 5th Respondent on the 23rd
January 2014 and further on the County Assembly offices on the
24th January, 2014. On the 26th and 27th January 2014, the
orders were advertised in both the Daily Nation and the Standard
Newspaper to notify all County Assembly Members in the event 10
they were not informed of the Court orders by the 5th and 6th
Respondents.
28. Despite having been served and notified, the County Assembly
of Embu in blatant and willful disobedience of the orders of the 15
Honourable Court convened the proceedings where the motion
for the impeachment of the 1st Petitioner was debated and passed.
29. The 6th Respondent in further contempt of the Court order went
ahead and passed a resolution to impeach the 1st Petitioner without 20
supplying the 1st Petitioner with grounds and/or charges upon
which the purported impeachment was being proposed.
30. On the 28th January 2014, the 1st Petitioner sought leave to
institute contempt proceedings against the Speaker and Clerk of
the County Assembly of Embu herein and members of the County 25
Assembly participated in the motion in Miscellaneous Application
Number 21 of 2014. These proceedings are pending hearing before
this Honourable Court.
31. On 29th January 2014, the 5th Respondent in further
disobedience of the Court order issued on the 22nd January, 2014, 30
forwarded the illegal resolution of the County Assembly to the
Senate purportedly pursuant to the provisions of section 33(3) of
the County Government Act, 2012.
32. On 31st January, 2014, the 1st Respondent acting on the patently 35
unlawful resolution, issued and/or caused to be issued a Gazette
Notice Number 627 purporting to convene the Senate for purposes
of hearing the complaints against the 1st Petitioner and appointing
a special committee to investigate the conduct of the Petitioner. 40
33. Despite efforts by the 1st Petitioner to obtain copies of the notice
and resolution for impeachment, the 5th Respondent has refused
to supply the Petitioner with copies of the same.

34. The 1st Petitioner avers that on the 30th December, 2013, the 2nd Petitioner through the County Secretary by a letter to the Controller of Budget and copied to the Salaries and Remuneration Commission sought advice and clarification on the recruitment and payment schemes of salaries payable to persons employed in the County Assembly Service Board. 1
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35. The advice given by both the Controller of Budget and the Salaries and Remuneration Commission when implemented elicited discontent and discomfort amongst members who had flouted the provisions of the County Government Act, 2012 and the Constitution of Kenya, 2010. 10

36. It is clear from the foregoing that the recommendation for the suspension and investigation of the 4th Petitioner and the impeachment of the 1st Petitioner was a deliberate scheme hatched to settle scores and was actuated with malice, bad faith, ill spite, witch-hunting and revenge. 15

37. On 4th February 2014, the 1st and 2nd Petitioners filed Petition No 51 of 2014 before the High Court Constitution and Human Rights Division where justice Majanja issued a Conservatory Order restraining the 1st and 3rd Respondents from introducing, discussing, sitting or otherwise deliberating the impeachment of the 1st Petitioner based on the resolution forwarded by the Embu County Assembly until further orders of the Court. 20
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38. The Court Orders was duly served on the 1st, 2nd and 3rd Respondents on 4th February 2014. Despite having been served with the orders of the Court, the 1st and 2nd Respondents unlawfully proceeded with impeachment proceedings and unanimously purported to impeach the 1st Petitioner from his position as the Governor of Embu. 30

39. Whereas the Special Committee appointed for purposes of impeaching, the committee found the 1st Petitioner liable for violation of the Public Finance Management Act, 2012 the Public Procurement and Disposal Act, 2005 and the Constitution of Kenya, 2010, particularly articles 73 and 179(4) in relation to procurement of goods and services and also Public Finance Management Act, 2012. 35
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- The 1st Petitioners' submissions 1
40. The case of the Governor of Embu is contained in the Amended Petition dated 7th March 2014, his Affidavits sworn on 19th February 2014, 23rd February 2014, and his supplementary Affidavit sworn on 17th March 2014. And further in the Affidavits of Isaac Ruto sworn on 18th February 2014 and Affidavit of Margaret Lorna Kariuki sworn on 16th January 2014. 5
41. Mr Muite, Senior Counsel and Mr Ahmednasir (SC) led Mr Nyamu, Mr Njoroge, Mr Issa Mansur and Mr Wanyama in presenting the Petitioners' case. 10
42. It was Mr Muite's submission that in deterring this petition, this Court must appreciate upfront the profound change in the governance of this Country ushered in by the Constitution 2010 in regard to devolution. He urged the Court to be guided by the reasoning of the Chief Justice in his concurring opinion in the Supreme Court's Advisory Opinion No 2 of 2013, *Speaker of the Senate & another v Hon Attorney General & 3 others* where the Chief Justice recognised the fundamental change brought about by devolution. He submitted that article 6(2) of the Constitution creates two levels of Governments which must consult and cooperate. He thus urged the Court to recognise the historical context of devolution in Kenya and read the Constitution wholly so as not to kill devolution and that the Court must bear in mind the importance of devolution and the aspirations of the people of Kenya in enacting the Constitution. He submitted that the objects of devolution are outlined under article 174 of the Constitution. Further that, article 189 calls for cooperation between the National and County Governments. 15
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43. He submitted that pursuant to article 189 of the Constitution, Parliament enacted the Inter-Governmental Relations Act of 2012 which creates the Summit whose chairman is the President and the 47 Governors are members. That co-operation and consultation are the pillars of governance and not subordination and that the central Government should never use its tyranny of numbers in the senate to dilute Devolution because under article 6(2) of the Constitution both National and County Governments are Government. 35
44. In regard to the issue of the removal of a Governor, it was Mr. Muite's submissions that the threshold under article 181 of the Constitution must be very high. That a Governor should be held 40

- accountable by the County Assembly and not the Senate since the Governor’s position is analogous to that of the Chief Executive or the President. That even in the Ministries, it was the Principal Secretaries that are accountable for finances of the Ministry and not the Minister. He submitted that article 145 of the Constitution should be contrasted with article 181 of the Constitution. That the word “gross” in article 181 of the Constitution is used deliberately. It was not just any violation of the Constitution that was required but gross violation. He relied on the Nigerian case of *Hon Muyiwa Inakoju & 17 others v Hon Ibrahim Adeolu Adeleke* Supreme Court of Nigeria SC 272 Of 2006 which defined the term ‘gross violation’. It was his submissions that not every misconduct could lead to the removal of a Governor but that it must be extreme negative conduct. In that respect, he contented that the County Assembly of Embu recommended removal of the Governor on the basis of violation of the Constitution on several issues and even the Senate in its report did not consider whether the Governor was in gross violation of the Constitution or any other written law. He urged the Court to define the term gross violation.
45. It was Mr Muite’s submissions that the Governor was not the County’s accounting officer. His case was that article 226(1)(b) of the Constitution provided for the designation of an accounting officer who would be responsible for all the financial management of the County. In its oversight role in Embu County the County Assembly was concerned about money expenditure by the Embu County Government. In that regard, the County Assembly set up two committees to investigate the maize and stadium issues. The said committees investigated the matters and made recommendations for adoption by the County Assembly. One of the recommendations was the suspension of the County Secretary. The County Assembly asked the Governor to effect the suspension which he did not. It was Mr Muite’s submissions that it was improper for the County Assembly to recommend his impeachment on that basis. In any event, Mr Muite added that, the Governor could not remove the County Secretary when there were Court orders in place stopping her removal from office.
46. With regard to the removal of the Governor, Mr Muite urged the Court to find that the procedure for his removal was not followed and that this being a quasi - judicial process, and not a political one, the due process under article 50 of the Constitution had to

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- be adhered to. He submitted further that the County assembly should have explained to the Governor in clear terms the alleged provisions of the law that he had violated and then granted him an opportunity to be heard on the alleged violations. On the procedure before the Senate, it was the Learned Senior Counsel's contention that at the conclusion of the report, the Senate should have allowed other Constitutional bodies such as the Ethics and Anti-Corruption Commission and Criminal Investigations Department to investigate the matter since they are the bodies granted the powers to investigate. He thus urged the Court to guard against mob lynching. 1
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47. It was Mr Muite's position that under article 95(4) of the Constitution, the National Assembly had an oversight role over National revenue and that the Senate does not have an oversight role over the County Government. 15
48. On the removal/impeachment process, it was the Learned Senior Counsel's submissions that there had to be a framing of the charges stating the alleged gross violation of the Constitution and any other law. That the impeachment of the 1st Petitioner had been politicized due to the ongoing war between the Senators and the Governors even though the impeachment under the Constitution was not a political process. Rather it is a legal process which starts at the County Assembly and ends with the Senate and that further, one must be given an opportunity to prepare his case. 20
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49. He submitted that by the time the 1st Petitioner appeared before the Senate, he did so under protest. However, the Senate warned him that it would proceed with the impeachment notwithstanding the Court orders. He referred the Court to the scholarly article of *John Duane and Michael Balboni, 'New York's Impeachment Law and the Trial of Governor Sulzer: A case for Reform'* *Fordham Urban Law Journal*, Vol 15 issue 3 1986 where the writers argue that the impeachment of a Governor must be restrictive as it would affect the rights of his voters. He thus contended that it was the obligation of this Court to set the threshold for the removal of a Governor. He also referred the Court to the article by Michael Abiodun Oni, *'Judicial Review of Governors Ladoja and Obi Impeachment in Nigerian's Fourth Republic'*, *Singaporean Journal of Business Economics and Management Studies* Vol 1, No 6 2013 where the authors argue that the Courts can intervene in the removal process of Governors where due process was not followed. It was therefore the Learned 30
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Senior Counsel’s submissions that from the Nigerians scholarly writings, it was clear that this Court should question whether;	1
1. There were substantial grounds for removal of the Governor under article 181 of the Constitution.	5
2. There was procedural fairness	5
3. Due process was followed.	5
50. It was therefore his case that there were Court orders that were issued before the process started which orders were violated by both the County Assembly and the Senate. He urged the Court to nullify the impeachment because any act done in disobedience of a Court order is a complete nullity thus the removal of the Governor was a nullity and ought to be set aside and the Governor reinstated.	10
51. In respect to the violation of the right to fair administrative action under article 47 of the Constitution, it was the Senior Learned Counsel’s submissions that the County Assembly did not summon the Governor, and further that, the accusations made against him are not described as of gross violation.	15
52. On the issue of jurisdiction, it was Mr Muite’s submissions that this Court has jurisdiction under articles 165, 23 and 159 of the Constitution. That the Court was faced with a historical moment to change the history of this country based on the 2010 Constitution which is a transformative charter.	20
53. On the representation of the Senate, it was Mr Muite’s submission that it had been served and elected not to appear. He thus urged the Court to find that the 1st Petitioner’s case against the Senate is not contested and that it was infact treating the Court with further contempt. He claimed that the contempt proceedings in this case are against the Speaker and the Clerk of the Senate and the consequences of such contempt is that anything done in disobedience of a Court order is a nullity. He added that it was not for the Speaker of the Senate or County Assembly to interpret a Court order and choose whether to obey it or not. That even if an order is not properly issued, the remedy was not to disobey it. He called upon the Court that in order to enhance public confidence in the judicial system it must punish the Speaker and the Clerk of the County Assembly of Embu for disobeying Court orders. He relied on the case of <i>Rwanyarare & others v Attorney General</i> (2003) 2 EA 664 where it was held that the Court cannot reward a party that has shown contempt for Court orders. He also relied on <i>Wildlife Lodges Ltd v County Council of</i>	25 30 35 40

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- Narok & another* (2005) 2 EA 344 and *Judicial Service Commission v Speaker of the National Assembly & another* Petition No 518 of 2013 where the Court stated that the whole purpose of litigation would be lost if Court orders are disobeyed. 1
54. Mr Wanyama submitted that under article 182(1)(e) as read with article 181(1) of the Constitution reveals that a Governor should only be removed for something he did personally. That the 1st Petitioner was removed on allegations based on the Public Finance Management Act of 2012 while he breached nothing under that Act. That the Public Finance Management Act provides for structures for the management of public finance at the County level. And that article 226 is implemented in the Public Finance Act since it has established an accounting entity and defined who an accounting officer is. 5 10 15
55. He submitted that before the Governors were sworn in on 27th March 2013, there were mechanisms in place under the County Government Public Finance Management Transition Act 2013 and that there was no lacuna at anytime. Under section 3 of that Act, the Governor had no responsibility over County finances and therefore he could not be said to have misappropriated any funds. Indeed, that Act did not outline any responsibilities of a Governor. He thus contended that it was unprocedural for the County Assembly to allege violation of the Public Finance Management Act when the County Executive Committee had not been summoned to explain the county finances. Further, that under section 103(3) of the Public Finance Management Act, the head of the County Treasury together with the County Treasury established under section 104 of the Public Finance Management Act were responsible for fiscal responsibilities in the County. 20 25 30
56. It was Mr Wanyama's position that if one is found to have misappropriated funds, section 149(1) Public Finance Management Act provided that the accounting officer is accountable to the County Assembly on financial issues. Thus the impeachment of the Governor for misappropriation of funds was premature and irregular. That the County Assembly should have summoned the County Executive Committee to explain the misappropriation of funds and the steps taken. It was thus illegal to impeach the Governor on the basis of collective responsibility when it had not been demonstrated that he personally violated the law. 35 40

57. He submitted that the responsibilities of a Governor are provided for under section 30 of the County Government Act of 2012. That the function of the Governor was to provide for policy on management and he is accountable to the President. And he urged the Court to find that if there was a conflict between the Public Finance Management Act and the County Government Act, the former overrides the later. 1
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58. On the issue of procurement, Mr Wanyama submitted that article 227 of the Constitution had provided guidelines on matters of procurement. He claimed that the Governor had not violated article 227 of the Constitution in anyway since the allegations of failure to set up procurement committees and procedures on the works in the stadium as made against the Governor were so vague and did not meet the threshold required. That under Regulation 22 of the County (Regulations) 2013 there are systems and guidelines on public procurement. These guidelines stipulate that there must be a tender committee and the Governor was not a member of this committee. In that respect, he submitted that the Governor had been impeached on account of functions of committees that he did not have control over. It was therefore Mr Wanyama’s position that the Court must set down the threshold applicable in the removal of a Governor. 10
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59. Mr Issa Mansur submitted that the procedure for the removal of any County Official is provided for under section 40 of the County Government Act, which requires that such a motion must be moved by a member of the County Assembly, and after the motion is passed a Committee must be set up to investigate and make a report which is then taken back to the County Assembly. A vote is then taken on the motion. It was thus his position that the Speaker of County of Embu Mr Kariuki Mate acted unprocedurally and the Governor could not suspend the County Secretary since the matter had been referred to the Ethics and Anti-Corruption Commission. 25
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60. In regard to the proceedings at the Senate for the removal of the County Governor, it was Mr Issa Mansur’s submissions that the Senate acted in violation of a Court order which it was aware of. He added that the Senate indeed deliberated on the Court order issued by Majanja J and deliberately chose not to obey it before the commencement of the proceedings. That under section 33 of the County Government Act, it was the responsibility of the Speaker to 40

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- convene the meeting of the Senate. That, having been served with the order he had two options, first to comply with the same by degazetting the Notice summoning the Senate or second, to have the Court order set aside so that Senate would proceed with its session. 1
61. On the issue of the Deputy Governor, it was Mr Issa Mansur's submissions that she had changed goal posts. On the one hand, she alleged that Court orders must be obeyed and on the other hand she claimed that she must now be sworn in as a Governor since there was a vacancy in the office of the Governor while the Court pursues those who disobeyed the Court order. It was thus his position that if the motion moved did not comply with the Constitution, the same is null and void and was defective *ab initio*. 5 10
62. Mr Nyamu submitted on the issue of contempt of Court. It was his position that in impeachment proceedings under section 33(1) of the County Government Act (CGA), a member of the County Assembly may move a Motion to remove a County Governor. That in the instant case this happened on 16th January, 2014, at the Embu County Assembly. That subsequently the same was placed before the Speaker who scheduled it to be moved on 23rd January, 2014 which prompted the 1st Petitioner to move to Court and file Embu Petition No 1 of 2014. That conservatory orders were issued on 23rd January, 2014 and served on the same day on the Respondents. It was averred that the orders were to the effect that until and unless the County Assembly of Embu served the 1st Petitioner with the grounds and charges on the basis of which they wished to impeach him, they were barred from proceeding with the impeachment proceedings. The 1st Petitioner contended that these conditions were not complied with as he was not served with the charges and neither was he given an opportunity to be heard by the County Assembly. 15 20 25 30
63. That on 24th January, 2014 the pleadings and orders were again served on the County Assembly of Embu as explained in the Affidavit of Service of Njunguna Njoroge sworn on 29th January, 2014. That the motion for the removal of the 1st Petitioner was not moved on 23rd January 2014 as slated but was postponed to 28th January, 2014 when it proceeded under section 33(2) of the County Government Act. It was also submitted that by then, the Speaker and Clerk of County Assembly of Embu were aware of the orders of the Court and even filed a Notice of appointment of counsel. 35 40

- According to Mr Nyamu, this confirms that there was service of the orders of the Court on 23rd January, 2014. That further, there was a letter dated 28th January, 2014 from the Deputy Registrar of Embu writing in response to the County Commander with regard to the authenticity of the order, which letter confirmed the validity of the said order. That furthermore the County Assembly had acknowledged the receipt of the Court Orders. 1
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64. It was therefore submitted that despite receiving the Court orders, the County Assembly went ahead with the motion of the removal of the Governor on 28th January, 2014. Accordingly Mr Nyamu contends that the 1st Petitioner was able to demonstrate that by the time the impeachment proceedings took place at the County Assembly, the Speaker and the Clerk of the County Assembly of Embu including the County Assembly itself, were aware of the existence of the orders dated 23rd January, 2014. 10
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65. With regard to the Contempt proceedings Mr Nyamu submitted that as a consequence of the acts of the County Assembly the Petitioner applied for leave to institute contempt proceedings, against the Speaker and the Clerk of the County Assembly of Embu, which leave was granted. That it is clear from the above submissions that the Orders of this Court were intentionally disobeyed by the two Respondents. Mr Nyamu pointed out that the fact that the said Respondents sought clarification regarding the validity of the said orders is indicative that they were aware of the orders of the Court. 20
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66. He further stated that the Clerk of the County Assembly of Embu deposed in his replying affidavit in response to the contempt motion that he did not violate any Court orders, because he does not sit in the assembly. According to Mr Nyamu, this stance was misleading as the Clerk of the County Assembly was responsible for the preparation of Order papers, while the Speaker approves and presides over the motion. That therefore the Speaker and Clerk of the County Assembly of Embu were firmly in control of the impeachment proceedings within the County Assembly. Accordingly it was contended that the two were personally liable for their misdeeds when they acted outside their mandate and violated Court orders. It was therefore submitted that both the Speaker and the Clerk of the County Assembly should be held to account and be committed for contempt of court. Mr Nyamu therefore urged the Court to grant the orders prayed for in the 1st Petitioner’s 30
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- application for contempt dated 28th January, 2014 and filed on 31st January, 2014. 1
67. With regard to the contempt by the Senate, it was Mr Nyamu's submissions that as a consequence of the acts of the County Assembly the 1st petitioner on 27th January, 2014 served the Speaker of the Senate with the pleadings with regard to Embu Petition number 1 of 2014 together with the order of the Court issued on 23rd January 2014. That even then the speaker ignored the Court orders and proceeded under section 33(2)(a) of the County Government Act and issued a Gazette Notice No 627 dated 31st January, 2014 convening the Senate. That on 4th February 2014 at 2:30 pm the issue of County Governor and Deputy Governor of Embu was discussed as one of the agenda items in the Senate. 5 10
68. Consequently, the 1st Petitioner proceeded to file Nairobi Petition 51 of 2014 on 3rd February 2014 where the Hon justice Majanja issued Orders stopping the proceedings of impeachment at the Senate until the hearing and determination of the suit. It was submitted that the Court ordered that the Senate be served for hearing on 4th February, 2014 10 a m A ruling was made to that effect and served on 4th February 2014 at 7 30 a m on the Senate. An Affidavit of service to that effect was then filed on 4th February 2014. Mr Nyamu also told the court that the Attorney General was served at 9 30 a m of the same day. That the Court convened at 10 30 a m., where the Attorney General appeared for the inter parties hearing, but there was no attendance by the Speaker. That subsequently, the orders issued earlier were extended by the Court and the matter was transferred to Embu High Court for hearing and final determination. According to Mr Nyamu, the Orders were thereafter extracted and served on the Senate at 2:11 pm to arrest impending impeachment proceedings. 15 20 25 30
69. He then submitted that by the time the proceedings commenced the Speaker of the Senate was aware of the Court Order. That had the Speaker of Senate adhered to the Order of 3rd February, 2014 and extended on 4th February, 2014 the impeachment would not have proceeded. Mr Nyamu therefore asserted that the Speaker of the Senate chose to blatantly ignore the Order of the Court by allowing the impeachment proceedings to commence. He urged the Court to find that the impeachment proceedings before Senate were a nullity as the same occurred in disobedience of a Court order. 35 40

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70. With regard to the argument advanced by the Respondents that by the time the Speaker was served with the order of the Court, he had already convened a meeting of the Senate, Mr Nyamu contended that upon receiving the Court order, the 1st Respondent should have revoked the Gazette Notice convening the Senate and awaited the outcome of the Court. That the Speaker under the law is given seven days to convene the Senate. It was asserted that by the time the order of Court was issued on 4th February, the seven days were yet to lapse. It was further argued that if the Speaker was worried about the issue of time, he should have moved to this Court and sought to set aside the orders. As such, it was contended that the impeachment proceedings could not stand and that the Court should find that any action taken in disobedience of the Court order was null and void.
71. In regard to the 4th Petitioner’s case on the Judicial Review, Mr Nyamu submitted that the County Secretary was summoned to appear before the two different committees of the County Assembly (the joint committees of infrastructure, youth and sports; and the joint committee on the Agriculture, Livestock, Fisheries and Co-operations) (hereinafter referred to as (“the committees”) on 6th January, 2014 at 11:00 am and 2:30 pm respectively. That the said summonses were through letters from the County Clerk dated 3rd January, 2014 and delivered to the 4th Respondent’s office at 5:30pm on the same day. According to the 4th Respondent, she only saw the aforementioned letters on 6th January, 2014 when she entered her office at 8:30am. It was contended that the 4th Respondent replied to the said letters from the Clerk of the County Assembly of Embu requesting for more time to adequately prepare herself and liaise with other relevant departments with regard to the queries raised by the County Assembly committees. That the said committees did not respond to her request and instead proceeded to make recommendations adverse to her, including the recommendation that the Governor of Embu suspend her from office pending the investigations by the Ethics and Anti-Corruption Commission (EACC). The said recommendation was ratified by the County Assembly and a letter to that effect was issued to the commission and copied to the 1st Petitioner.
72. It was therefore the 4th Respondent’s case that her right to fair administrative action and a fair hearing as enshrined in articles 47 and 50 of the Constitution were violated as she was condemned

unheard. Mr Nyamu further argued that the 4th Petitioner's right to prepare an adequate defence under article 50(2)(c) of the Constitution was also violated. In his submissions, Mr Nyamu pointed out that the 6th Respondent had a vendetta against the 4th Petitioner as she had sought an advisory opinion from the Salaries and Remuneration Commission ("SRC"), Controller of Budget and Commission for the Implementation of the Constitution ("CIC") with regard to the recruitment and salaries payable to persons known as ward staff, employed by the County Assembly Service Board. That the responses thereto were to the effect that the said officers were illegally in office as their employment was unprocedural. It was therefore the submission of the 4th Respondent that this caused discontent and discomfort amongst the County Assembly Members who purportedly hatched a scheme to remove the 4th Petitioner from office.

73. It was Mr Nyamu's further submission that the EACC deployed an officer (Mr Japheth Baithalu) to commence investigation at the County Secretary's office who had also sworn an affidavit in response to the instant matter. Mr Nyamu pointed out that the Ethics and Anti-corruption Commission through the affidavit of Mr Baithalu had also been categorical that a person under investigation should only be suspended after full investigations had been carried out and criminal charges instituted. Mr Nyamu consequently claimed that the ex parte applicant's suspension was therefore unlawful. Further, he opined that there were Orders issued by Justice Odunga stopping the suspension of the County Secretary. That these Orders were issued inter parties on 21st January, 2014 and the County Assembly Embu was enjoined and represented in those proceedings.

74. Consequently the 4th Respondent contended that the Court had the jurisdiction under article 165 of the Constitution to interfere with the proceedings of the County Assembly as long as they were unlawful. In the foregoing she asked the Court to grant her the reliefs sought.

The *Amicus Curiae* Submissions

75. Mr Nani acting as *Amicus Curiae* and on behalf of the Commission for the Implementation of the Constitution (CIC) with the consent of all other counsels submitted on point of law. He concurred with Mr Muite's submissions on three issues;

1. That this Court has jurisdiction

2. Any actions in violations of a court order are null and void, thus the removal of the 1st Petitioner was null and void

3. That the County Assembly of Embu failed to follow due process in the removal of the Governor.

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76. He then added that the right to hold the seat of the Governor was a political right under article 38 of the Constitution. And that people have a right to make political choices. And that this right of the citizens was violated by the County Assembly since they limited the 1st Petitioner’s rights under article 24 of the Constitution and the County Assembly violated his right to a due process which demands that the 1st Petitioner ought to have been served with the charges against him and should have been heard at the County Assembly before sending him over to the Senate. It was therefore Mr Nani’s submissions that when exercising a quasi-judicial function one must follow the due process. He referred the Court to the case of *Marbury v Madison* 5 US 137 (1803), adding that even section 33 of the County Government Act does not preclude the County Assembly from invoking article 25, section 14 of the County Government Act and the County of Embu Standing Orders.

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77. On the issue of threshold, it was his submissions that this Court should use the rationality test and must follow the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*, Civil Appeal No 290 of 2012 which applied the rationality test. He thus opined that the Petition should be allowed and the Governor reinstated.

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78. On the issue of contempt it was Mr Nani’s submissions that there was disobedience of Court orders. However, the Court could neither fine nor imprison the contemnors by virtue of the immunity they enjoy under section 4 of the National Assembly Powers and Privileges Act, section 17 of the County Government Act and articles 117 and 196 of the Constitution. In his view, the appropriate remedy would be to nullify the proceeding.

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- The Respondents’ submissions
79. All the Respondents, save for the 1st and 2nd Respondents, addressed us wholesomely with regard to the various issues raised by the petitioners, through their filed pleadings and oral submissions.

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80. The 1st and 2nd Respondents did not enter appearance with regard

to the Petitions despite service of the pleadings and hearing notices on them by the 1st Petitioner. 1

The 3rd Respondent's Submissions

81. Mr Mwangi Njoroge assisted by Mr Thande Kuria presented the Attorney General's case. He stated that the Constitution had set boundaries between the three arms of Government and the mandate of each arm of Government should not be invaded. He further argued that the free expression of the will of the people as expressed through the election process for both the Members of Parliament and the County Assemblies should be protected by this Court when determining the issue of impeachment. In Mr Mungai's submission, the Court should interpret the Constitution in a manner that would protect the principles and objectives of devolution under article 174 of the Constitution. According to Mr Mungai, article 165(3)(d)(iii) of the Constitution gives the High Court unlimited jurisdiction to determine any question with regard to the interpretation of the Constitution. That even though such powers are conferred on the Court, it behooves it to exercise maximum restraint when dealing with disputes involving either of the State organs. 5 10 15 20
82. With regard to the jurisdiction of the Court on the impeachment process, it was the 3rd Respondent's submission that article 181 of the Constitution gives the County Assembly and the Senate express authority to remove a County Governor from office and that the same should be devoid of any interference by the Courts. According to the 3rd Respondent impeachment is a process that starts at the County Assembly level. That a motion supported by at least two thirds majority of the members of the County Assembly has to be passed, before the resolution is passed on to the Senate which then examines the motion to check the excesses of the County Assembly. 25 30
83. Mr Njoroge therefore opined that the impeachment process is self-contained and is meant to safe guard the rights of the Governor. In the opinion of the 3rd Respondent the merits of the outcome of the process of impeachment at both the County Assembly and the Senate level cannot be subjected to the intervention of the Court. That in the foregoing a Court can only review the process of impeachment at both the County Assembly and Senate level and not the merits of such a decision. Citing the Case of *Mumo Matemu v Trusted Society of Human Rights Alliances & others* (2004) eKLR, Mr Njoroge added that if the Court were to review the merits of a 35 40

decision made by the County Assembly or Senate the same would amount to interference which is in contradiction with the doctrine of the separation of powers. He stated that the impeachment process was a preserve of the Senate and the County Assembly under article 181 of the Constitution and the County Government Act (“CGA”) and that the Courts have no role to play in the process.

84. While citing the case of *Nixon v USA* 506 US 224- Supreme Court 1993, Mr Njoroge submitted that the Petitioner acceded to the authority of the Senate. That in the foregoing 1st Petitioner could not come to this Court and raise the issues he had raised at the Senate. He argued that the Court in this case, does not have concurrent jurisdiction with the Senate. Further it was submitted that the Court must examine whether there are judicial discoverable standards in resolving the dispute at hand. Mr Njoroge urged the Court to find that impeachment is a political question that can only be resolved politically. He therefore urged the Court to exercise utmost restraint in the matter and not to encroach on the mandate of other arms of government. While citing the Case of *Shah & another t/a Lento Agencies v National Industrial Credit Bank Ltd* (2005) I KLR, Mr Njoroge submitted that if any of the Respondents are able to demonstrate that the Court issued orders in excess of its jurisdiction, the Court is mandated to revisit the said orders.

85. In a rebuttal to the submissions of the 1st Petitioner that the Governor is not the accounting officer of a county and cannot therefore be held liable for the misuse of the County financial resources, Mr Thande Kuria urged the Court to examine section 148 of the Public Finance Management Act and section 30(3) of the County Government Act in light of article 179 of the Constitution which deals with the County Executive Committee. It was his submission that the office of the Governor and that of the County Executive Committee are so closely intertwined that none can be severed from the other. As such, it was Mr Kuria’s argument that under article 226(5) of the Constitution, the 1st Petitioner as the holder of the office of Governor was liable for any loss of any public funds that were utilized for a purpose that was contrary to law. He urged the Court to dismiss the Petition.

4th Respondent’s Submissions

86. In response to the consolidated Petitions, the 4th Respondent, the Deputy Governor of Embu County filed a replying Affidavit

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- sworn on 17th March, 2014. She opposes the consolidated Petition on various legal grounds. 1
87. Mr Kibe presented the 4th Respondent's case. He asserted that the Petition was based on the notion of the purported violation of the Constitution and disobedience of Court orders. Mr Kibe in his submissions, pointed out that under the law, the Petitioners had the duty to plead their case in a concise manner to enable the Court grant the reliefs sought. That in this petition, the Petitioners did not plead the Constitutional provisions violated by the Respondents and the injury suffered as required under rule 10(2)(c) and (d) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (hereinafter referred to as the Mutunga Rules). 5 10
88. Further that, under rule 11(2) of the Mutunga Rules, the Petition was not supported by an Affidavit stating the alleged violations or illegality that occurred together with all the annexures necessary. Mr Kibe was emphatic that rule 11(2) required that in a petition seeking orders of *certiorari*, it was mandatory for such proceedings to be annexed in the Petitioner's Affidavit. As such it was submitted that it was essential for the 1st Petitioner to annex the Senate's Report of the Special Committee and the resolution for impeachment thereof. That since the said resolution and proceedings were not availed by the Petitioner, the Court had no jurisdiction to quash any resolution as prayed for by the 1st Petitioner. The 4th Respondent relied on the case of *Prof Daniel Mugendi v Kenyatta University & 3 others* Nairobi Court of Appeal Civil Appeal No 6 of 2012 (UR) and the *Mumo Matemu Case (supra)* in support of that contention. 15 20 25
89. The 4th Respondent also sought to distinguish the case of *Hon Muiywa Inakoju & 17 others v Hon Ibrahim Adeolu Adeleke* Supreme Court of Nigeria S C 272/2006 (UR) cited by the 1st Petitioner in support of his case. He submitted that that case was not helpful to the 1st Petitioner's case. According to Mr Kibe, the said case involved the removal of a Speaker, while the instant case involves the question of the removal of a Governor. That further, there was an issue with regard to the numbers required for the motion of the removal of the Speaker to succeed. That in the said case, the court determined that the number had not been met which rendered the impeachment a nullity. It was therefore Mr Kibe's view that the case can be distinguished since the two thirds majority by the members 30 35 40

of the Senate and the County Assembly had been met in removing the 1st petitioner from office. That the same issue also arose in the case of *Hon Michael Dapianlong v Chief (Dr) Joshus Chibi Dariye* Supreme Court of Nigeria SC 39/2007 (UR). 1

90. With regard to contempt of court the 4th Respondent associated herself with the submissions of the 5th and 6th Respondents with respect to the Order of the Court issued on 23rd January, 2014 against the County Assembly of Embu. In relation to the Order issued by Majanja J on 3rd February, 2014 and extended on 4th February, 2014, it was Mr Kibe’s argument that the same was not directed against the Senate, but at the Speaker of the Senate and the Attorney General. That furthermore the Court could not assume or infer that any person disobeyed a Court order without a specific finding of such disobedience. In his submission, Mr Kibe pointed out that a formal application for contempt of Court orders by the 1st Petitioner against the Speaker of the Senate and the Senate had to be made before the Court determines the issue of contempt. That Contempt is a matter of proof which can only be done through instituting proceedings under section 5(1) of the Judicature Act, such as the proceedings instituted against the Speaker and the Clerk of the County Assembly of Embu. Mr Kibe relied on the cases of; *R v Gachoka and another* (1999) 1 EA 392, *Mutitika v Baharini Farm Limited* (1985) KLR, 227 and *Commercial Bank of Africa Ltd v Ndirangu* (1990- 1994) EA 64 (CAK), 69 in support of these arguments. 5 10 15 20 25

91. It was the 4th Respondent’s disposition that by the time the Order was made on 3rd February, 2014 and served on 4th February 2014, the Speaker of the Senate had already convened a meeting of the Senate *vide* Gazette Notice Number 627 dated 1st February 2014. That the Senate thereafter resolved to form a Senate Committee to deliberate on the matter on 5th February, 2014. The 4th Respondent thus argued that by the time the Order was made, the Speaker had already discharged his role of convening the Senate and that the order dated 3rd February, 2014 had been overtaken by events and was therefore of no effect. Accordingly, the same did not bar the Senate from instituting a Special Committee to investigate the Conduct of the 1st Petitioner. As such, it was submitted that the decision by the Senate to impeach the 1st Petitioner was not in disobedience of any Court order. Further, that the Court cannot set aside the Senate’s decision based on the disobedience of a Court 30 35 40

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- order, since the Senate had not been made a party to the proceedings in which the order was made. The case of *Royal Media v Telkom Kenya* (2001) EA, 210 was cited in support of this proposition. 1
92. On the issue of separation of power, justiciability and jurisdiction of this Court, Mr Kibe alleged that this Court has to ensure that each organ of the state has the space to discharge its mandate. Therefore the Court cannot assume powers vested in other organs of the State. Mr Kibe stated that the Court has a duty to protect the supremacy of the Constitution and that when a Court seeks to impeach the acts of another State Organ it must do so on the premise that the acts of such an organ were unconstitutional. He referred to the case of *Matembe & others v AG* 2005 2 EA 200 where it was held that when Parliament was seized of a matter the Court could not intervene. 5 10
93. With regard to justiciability, Mr Kibe submitted that impeachment is an inquiry that has political connotations and controversies and as such, the Courts in various jurisdictions have been reluctant to wade into such issues due to their political nature. Mr Kibe further claimed that even where the Court may have jurisdiction with regard to the impeachment process there are certain issues that the Court cannot determine. These include the threshold of impeachment and what is to be construed as gross misconduct and gross violation of the Constitution and any other written law. 15 20
94. Furthermore it was Mr Kibe's case that the Senate's Committee may not have applied procedures that were appropriate or convenient to the 1st Petitioner but nevertheless that such inappropriateness and inconvenience cannot lead to the nullification of the process unless there was a Constitutional failure on the part of the Senate. He relied on the case of *Nairobi Metropolitan PSV Saccos & 25 others v County of Nairobi Government & 3 others* Nairobi High Court Petition No 486 of 2013 in support of this argument. 25 30
95. Mr Kibe further argued that it was important to look at the political reactions and consequences of a reversal of the Senate's decision. In his assessment, the Court should restrain itself from such an invitation as held in the *Nixon Case* (*Supra*) where the Court held that the reason for forbidding the Court's intervention in cases of impeachment was to ensure political stability. From this standpoint, the 4th Respondent urged the Court to hold and find that the process of impeachment was non-justiciable. That further, a member of County Assembly cannot be enjoined from bringing 35 40

a motion for impeachment and in addition, once a motion is filed in both the Senate and the County Assembly, no Court can injunct the process. Mr Kibe therefore urged the Court to find that while the senate or its committee(s) is seized with the Resolution of the County Assembly no Court can intervene as it is a political process.

96. It was Mr Kibe’s further submission that this petition raises non-justiciable issues in light of section 12 of the National Assembly (Powers and Privileges) Act, cap 6 Laws of Kenya which stipulates that no proceedings of the Parliament and the County Assemblies can be questioned in Court. That effectively, section 12 of the aforesaid Act ousts the Court’s jurisdiction in relation to any decision of the Assembly. According to the 4th Respondent, even though the ouster clause is contained in an Act of parliament, the Court is bound to exercise its jurisdiction under both the Constitution and Statute Law. That unless section 12 of the National Assembly (Powers and Privileges) Act is declared unconstitutional the Court is bound by the same and cannot interfere with matters vested in the County Assembly, National Assembly and Senate.

97. Further, on the point of justiciability and jurisdiction, it was Mr. Kibe’s argument that under article 165(3) of the Constitution, the Court must exercise its Jurisdiction over other organs of the State under very extreme circumstances. That one such circumstance is if the Motion to impeach the 1st petitioner was not passed by a two thirds majority of either the Senate or County Assembly or if such removal was not based on the grounds laid down in article 181 of the Constitution. Mr Kibe was of the opinion that any other failure would fall within the internal processes of Parliament.

98. On the appropriateness of the orders sought in the Amended Petition, Mr Kibe submitted that that responsibility has been given to the County Assembly and Senate to ensure County Governors govern in a lawful and effective manner. That Impeachment was included in the law to provide for a mechanism for good governance. It was thus his contention that this purpose would be defeated if these first case with regard to enforcing good governance and accountability succeeded in the County Assembly and Senate but failed to do so in the Court.

99. Mr Kibe also took issues with the submission of the Commission for the Implementation of the Constitution made by Mr Nani that the Court cannot punish the 5th and 6th Respondents for contempt

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- but it can choose to annul the resolutions of both the Senate and the County Assembly as consequences of disobedience of Court orders. According to Mr Kibe such an approach is erroneous as a finding of contempt can only be determined through an inquiry and cannot be presumed. That as long as section 12 of the National Assembly Powers and Privileges Act is still in force, the 5th and 6th Respondents were protected by the law. The 4th Respondent however submitted that should the Court find that there was indeed disobedience of a Court order, the Court can order the 5th and 6th Respondents to pay costs or a fine, but that the option of committal was not viable. 1
100. On the issue of reinstatement of the 1st Petitioner as the Governor of Embu, it was Mr Kibe's submission that the Amended Petition did not disclose such a prayer. That an order for reinstatement must be specifically prayed for. In addition that even if the Court were to find the Senate's decision was unlawful, the Court would have to consider whether the 1st Petitioner contributed to that decision. Mr Kibe pointed out that the 1st Petitioner was found guilty of three out of the five counts he had been charged with by the Senate. 5 10 15 20
101. Lastly, Mr Kibe submitted that the Constitution 2010 is still at the nascent stages of implementation and therefore the Court should uphold the principle of Constitutionalism. He requested the Court to find that public officers must be held to account through the Constitution. Therefore he urged the Court to preserve the Resolutions of the County Assembly and the Senate for the Constitution to have meaning and prayed for the dismissal of the amended petition. 25 30
- The 5th and 6th Respondents' Submissions
102. In response to the consolidated Petitions, the 5th Respondent (the Speaker of the County Assembly) and the 6th Respondent (the County Assembly of Embu) filed Replying Affidavits sworn by Hon Justus Kariuki Mate the Speaker of the County Assembly on 24th February, 2014 and 14th March, 2014 and Jim Kauma the Clerk of the County Assembly sworn on 24th February, 2014. 35
103. Mr Njenga together with Mr Ng'ang'a presented the 5th and 6th Respondent's case together with County Clerk's case in respect to the Misc Application No 4 of 2014 and Judicial Review No 6 of 2014. 40
104. Mr Njenga contended that the amended petition is speculative,

- unfounded and without merit and bent on defeating the Constitution. He alleged that the same was instituted to defeat the purpose and objectives of devolution as enshrined in the Constitution. He argued that devolution was about democracy and accountability. He pointed out that article 175 of the Constitution was clear that County Governments shall be based on democratic principles and the separation of powers. It was further submitted that the County Assembly comprised of elected officials who exercised the oversight function over the County Executive Committee, whose members are selected and are answerable to the Governor elect. Mr Njenga further told the Court that County Executive Committees are charged with the responsibility of managing and controlling the systems with regard to the resources allocated to a County. In that regard he submitted that under section 30(3)(a) of the County Government Act, the Governor is charged with the responsibility of providing leadership in the County’s governance and development. That further section 30(3)(f) of the County Government Act also provides that a County Governor shall be responsible and accountable for the management and use of County resources. It was against this background that the 5th and 6th Respondents submitted that the Governor must always be called to account for county resources and blame must not be shifted to junior officers in case of any irregularities with regard to utilization of County Resources. That in view of section 30(3)(f) of the County Government Act, the role of the Governor cannot be construed as just providing policy and executive directions to the County as argued by the 1st Petitioner.
105. He argued that the County Assembly of Embu while exercising its oversight role made a resolution to impeach the 1st Petitioner as the County Governor of Embu. That the said resolution was submitted to the Senate for investigation. Mr Njenga therefore alleged that the reason for the resolution was based on the misuse of county public resources with regard to the procurement of maize seedlings and the Embu stadium renovation. That the said issue with regard to the misappropriation of funds was brought to the attention of the 1st Petitioner who chose to do nothing about the irregularities. It was contended that the 1st Petitioner resorted to shielding the 4th Respondents together with other officers within his office from investigation. Mr Njenga pointed out that the argument advanced by the 1st Petitioner that there was a court

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- order barring him from suspending the County Secretary ,who is the 4th Petitioner, was misleading as no such order was brought to the attention of this Court. 1
106. Mr. Njenga contended that the order issued by Odunga J with regard to the Judicial Review dated 21st January 2014 did not restrain any person from taking any action against the 4th Petitioner but directed that the status quo should remain. On the question of what was the status quo, Mr Njenga explained that it meant that the suspension of the 4th Respondent was still in force and the 1st Petitioner had to still account for his inaction to the County Assembly as he was the person in charge of managing the resources of the County of Embu. 5 10
107. With regard to the issue of jurisdiction to impeach the 1st Petitioner, it was Mr Nganga's submission that the Petitioners were asking the Court to substitute the decision of the Senate with its own. He thus contended that the Court did not have such jurisdiction, and in particular, to interrogate the merits of a decision made by the Senate. He claimed that the crux of the Petitioners' case was premised on article 181 of the Constitution and section 33 of the County Government Act. That under the County Government Act, a clear process had been set out on the removal of the Governor. Mr Ng'ang'a therefore argued that when the court is invited to interrogate the threshold of article 181 of the Constitution the same is tantamount to sitting on an appeal against the Senate's decision which amounts to usurpation of the Senate's role. 15 20 25
108. On the issue of the threshold applicable in the removal of a Governor, Mr Ng'ang'a submitted that it was clearly set out in article 181 of the Constitution and this Court cannot therefore set its own threshold. He argued that the Court cannot add any other further grounds of removal of a County Governor as claimed by the Petitioners. He referred the Court to the cases of *Kenya Pipeline Limited v Hyosung Ebara Company Limited & 2 others* Civil Appeal Number 145 of 2011, *Mumo Matemu v Trusted Society of Human Rights Alliances & others* (2004)eKLR and The Supreme Court Advisory Opinion No 2 of 2013 (*supra*). 30 35
109. It was Mr Ng'ang'a's further position that the Courts should allow other organs to decide their matters in the best way they know how. That since the Senate was seized with the jurisdiction to hear the impeachment of the Governor, the Senate had a right to either 40

- be correct or wrong on the issue of what Gross violation of the Constitution and any other written law amounted to, without the interference of the Court. Accordingly, Mr Ng’ang’a argued that the Senate followed due procedure and assigned its minds to the charges against the 1st Petitioner. 1
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110. With regard to the absence of the 1st and 2nd Respondents in this Petition, Mr Ng’ang’a asserted that the mere fact that the Senate and its Speaker did not enter appearance in the Petition, the Court should not make a finding that the Petitions are unopposed. Mr Ng’ang’a therefore urged the Court to interrogate all the documents from the Senate that have been brought to its attention when arriving at a determination of the issues before it. 10
111. On the question of justiciability, Mr Ng’ang’a contended that impeachment of the 1st Petitioner is not justiciable as the same is a political process here in Kenya and that the process of the removal of a County Governor is left to the Senate and not to the Courts. He relied on the *Nixon Case (supra)*. 15
112. On the issue of due process, Mr Nganga submitted that due process begins at the Senate level and not at the County Assembly. It was argued that the 1st Petitioner did not deny appearing before the Senate. That in the face of such an admission, the 1st Petitioner acceded to the jurisdiction of Senate. It was also submitted that the process of impeachment at the senate was fair. That in compliance with the Senate’s standing orders, the Special Committee of the Senate invited the 1st Petitioner to appear before it and allowed him to file documents and call witnesses in support of his defence. It was further pointed out that the issue of the 1st Petitioner appearing under protest or without prejudice is deceptive since the Senate invited the 1st Petitioner and did not summon him. That in the case of invitation to appear, the 1st Petitioner had the option of not appearing which is in contrast with a summons that bears penal consequences for those who do not honour them. It was therefore contended that the only reason why the 1st Petitioner filed the current Petitions was because he lost at the Senate. According to the 5th and 6th Respondents the Petitions now before this Court were for the sole purpose of forum shopping which is an abuse of the Court process. 20
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113. Mr Njenga submitted extensively on the issue of disobedience of court orders in relation to Miscellaneous Application Number

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- 4 of 2014 (*Hon Martin Nyaga Wambora & County Government of Embu v Justus Kariuki Mate & Jim G. Kauma*) and the order issued by Majanja J on 3rd February 2014 in Petition number 4 of 2014 (*Hon Martin Nyaga Wambora & County Government of Embu v The Speaker of the Senate & The Hon Attorney General*). 1
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114. He was of the opinion that when a party alleges disobedience of a Court order, there must be proof of such disobedience. According to Mr Njenga, the 5th and 6th Respondents had denied being served with the Court orders in their replying affidavits. That in the foregoing, it was incumbent on the 1st Petitioner to demonstrate how such service was carried out. It was further contended that there was no affidavit of service to show that the 5th and 6th Respondents were personally notified of the existence of the Court Order dated 24th January, 2014. As such it was Mr Njenga's submission that the order was not served in the manner prescribed by law. 10
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115. He further pointed out that the 1st Petitioner in his Notice of Motion dated 28th January, 2014 with regard to contempt had annexed a Newspaper cutting with regard to the said order. In Mr Njenga's submission this amounted to substituted service which requires the leave of the Court. That in this case no such leave was sought. He thus contended that there was no basis for service by way of publication and the Court should ignore the same. Furthermore the placing of such an advertisement in the newspaper was a clear admission on the part of the 1st Petitioner that no service had been effected with regard to the Court order. 20
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116. Mr Njenga further submitted that when the Motion to remove the Governor was introduced in the County Assembly by the Hon Ibrahim Swaleh, through a private member's motion on 16th January, 2014, there was no order of the Court injunctioning the said impeachment proceedings. That the Court order was issued on 23rd January, 2014 well after the proceedings had started. It was therefore the argument of Mr Njenga that the order was incapable of compliance by the Respondents. It was also his submission that the motion constituted part of the proceedings of the Assembly which brought it under the ambit of section 6, 12 and 29 of the National Assembly (Powers and Privileges) Act Cap 6 Laws of Kenya. Therefore the County Assembly members including the Speaker and the County Assembly Clerk were immune against Civil or Criminal proceedings for acts committed on the floor of 30
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- the house. He therefore alleged that the Speaker and Clerk of the County Assembly of Embu cannot be committed for contempt as prayed by the 1st Petitioner. 1
117. While referring to the case of *Dr Florence Musau v Minister for Health & others*, HC Misc No 12 of 2007 (UR), Mr Njenga also argued that the standard of proof in matters of contempt of Court is always beyond reasonable doubt. That it must be proved that the contemnor knew of the existence of the order. He took the view that the Application for contempt was incompetent given that the Petitioner had not demonstrated that the 5th and 6th Respondents had the knowledge of the existence of such an order. Mr Njenga further took issue with the fact that a notice to the Attorney General was not made before instituting the contempt proceedings. That the issuance of such a Notice was a mandatory provision as held in the case of *Godfrey Kilatya Kituku & 6 others v Malindi Municipal Council* Civil Case Number 45 of 2005. He also cited the case of *Kariuki & 2 others v Minister for Gender, Sports, Culture & Social Services & 2 others* Misc CA No 389 of 2004 in (2004) 1 KLR. Where Lenaola J found that service must be personal and that the issue of knowledge of the existence of the order was not material. Mr Njenga concluded that the law in Kenya provides that there must be personal service of an order. And in this case, no such service was effected on the 5th and 6th Respondents. 5 10 15 20 25
118. On his part, Mr Ng’ang’a invited the Court to interrogate the order issued on 23rd January, 2014. He argued that part (b) of the said order was clear that following an application made by the 1st Petitioner, both the Speaker and Clerk of the County Assembly of Embu and the County Assembly of Embu who were the 1st, 2nd and 3rd Respondents respectively, were restrained from holding any impeachment Proceedings before giving the 1st Petitioner an opportunity to be heard on the charges levelled against him. According to the Mr Ng’ang’a there were no impeachment proceedings that the County Assembly of Embu was seized of under section 33 of the County Government Act. That the only duty bestowed on the County Assembly was the framing of the charges for impeachment and the proposal for removal of the County Governor. Mr Ng’ang’a consequently argued that the Court was invited to injunct a process that the County Assembly was not seized of as the Senate is the only body mandated in both the Constitution and the County Government Act to carry out the process of impeaching 30 35 40

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- or removing a County Governor. In any event, the 1st Petitioner was still in office after the Motion to remove him was passed by the County Assembly, which was proof that the County Assembly does not have the mandate to impeach the County Governor. 1
119. In light of the foregoing, it was the contention of the 5th and 6th Respondents that since the Senate is the only body mandated to carry out impeachment, the 1st Petitioner secured an order that was inefficacious and as a consequence there was no disobedience of the Court order as alleged. He further submitted that an order must be taken for what it says and not for what it ought to say. He relied on the case of *Ochino & another v Okombe* Civil Appeal No 36 of 1989 KLR (1989) 165 in support of his argument where the Court of Appeal held that contempt can only arise if the order is clear and unambiguous. 5 10 15
120. In regard to the Court order issued by Majanja J on 3rd February, 2014, Mr Ng'ang'a associated himself with the submission of Mr Kibe; that by the time the Order was made and served on 4th February 2014, the Speaker of the Senate had already convened a meeting of the Senate *vide* Gazette Notice Number 627 dated 1st February 2014. Mr Ng'ang'a was therefore of the persuasion that by the time the Order was made, the Speaker had already discharged his role of convening the Senate and that the Court order dated 3rd February, 2014 had been overtaken by events. He thus contended that the Court did not have the Jurisdiction to injunct the Senate which had the Constitutional mandate to remove a County Governor. 20 25
121. Mr Ng'ang'a added that the order dated 3rd February, 2014 was not directed at the Senate, but at the Speaker and the Attorney General. That accordingly, the same did not bar the Senate from instituting a Special Committee to investigate the conduct of the 1st Petitioner since the Senate was not a party to the proceedings. In view of this, the order had already been overtaken by events. As such it was his contention that the order of the learned judge dated 4th February 2014 could not operate to annul a process that had already taken place as held in the case of *Kileleshwa Service Station Limited v Kenya Shell Limited Civil Application* No Nairobi 84 of 2008 (UR) and *Athi River Services Board v Nairobi City Water & Sewerage Co Ltd* (2010) eKLR. He was of the view that the Speaker became *functus officio* upon convening the Senate and therefore any 30 35 40

- order directed at him after that was not capable of being disobeyed. 1
122. In regard to the Judicial Review Application No 6 of 2014, Mr Nganga submitted that the Prayers sought by the 4th Petitioner should be dismissed because this Court has no jurisdiction to deal with the matter since the same raises questions of employment which, under articles 162(2) and 165(5)(b) of the Constitution are within the jurisdiction of the Industrial Court as was held in the case of *Prof Daniel N Mugendi v Kenyatta University & 3 others* Judicial Review (CA (Nrb) No 6/12. 5 10
123. Mr Ng’ang’a however submitted that in the event the Court found it indeed had jurisdiction over the matter, it would be important to note that the 4th Respondent was required to appear before the two committees of the County Assembly on 6th January 2014, at 11:00 am and 2:30 pm respectively. Accordingly the Applicant had the opportunity to attend the said sittings having been served with the summons on 3rd January 2014. Mr Ng’ang’a and Mr Njenga further submitted that the 4th Respondent’s office was within the precincts of the offices of the County Assembly and she should have therefore appeared before the committees and formally sought for more time to avail any document or make any clarification that was within her knowledge with regard to the inquiries raised by the Committees. According to Mr Ng’ang’a therefore, the fact that she chose to write a four page letter in response to the summonses to appear was a gesture of bad faith on her part as the Committees simply invited her for a dialogue. That after considering her response to the summonses, the Committees made a valid recommendation that investigations needed to be carried out by the Ethics and Anti-Corruption Commission. 15 20 25 30
124. It was also submitted that a recommendation to the Governor for the suspension of the 4th Respondent by the County Assembly did not take away or affect her rights. That in any case, the 1st Petitioner as the County Governor wrote a letter to the Speaker of the County Assembly informing him that the 4th Petitioner had stepped aside to allow for investigations and in her absence, another person would act as the County Secretary. That in the foregoing, the prayers sought had already been overtaken by events. Mr Ng’ang’a and Mr Njenga therefore urged the Court to dismiss the prayers sought by the 4th Respondent. 35 40

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- Response by the Petitioners 1
125. Mr Njoroge together with Mr Issa Mansur responded to the Respondents' submissions. Mr Njoroge submitted that the 1st Petitioner through the amended Petition was urging the Court to look at the Constitutionality of his impeachment. That the Court was not sitting on an appeal on the Senate's and the County Assembly's resolution to impeach the 1st Petitioner as suggested by the Respondents. That the Court is only enjoined to look at whether the Senate and the County Assembly acted within the four corners of the law when deciding to remove the 1st Petitioner from office. Mr Njoroge therefore asserted that the 1st Petitioner through the Amended Petition was able to illustrate how his rights had been violated and under what sections of the Constitution. 5 10
126. Mr Njoroge observed that the County Assembly of Embu did not follow the procedures laid out in their Standing Orders number 61 and 64 with regard to the removal of the 1st Petitioner as the Governor. That in the standing orders there are rules of procedure governing the proceedings of the house and have to be consistent with the Constitution. He further submitted that at the County Assembly, the Governor was never made aware of the charges against him by the County Assembly and only came to learn about the same when he was summoned to appear before the special committee of the Senate. He submitted that the impeachment process is akin to a trial process which starts at the County Assembly then goes to the Senate Committee and finally to the full Senate. Accordingly he submitted that the effect of non-compliance with the procedures laid out in the standing Orders in any of the three stages would render the process of removal of the County Governor a nullity. 15 20 25 30
127. Furthermore, he argued that time lines set for the removal of the Governor at the Senate under section 33 of the County Government Act violated the canons of a fair hearing under article 50 of the Constitution. It was Mr Njoroge's contention that two hearings for the removal of the Governor and Deputy Governor took place within ten days at the Senate. That the net effect was that the 1st petitioner and the Deputy Governor were not given adequate time to prepare their defences. In addition, the 1st Petitioner was only given fifteen minutes at the plenary session of the Senate to give his defence which, in Mr Njoroge's opinion, did not amount to a right to be heard but can only be construed as a mitigation. He thus argued that there was lack of due process. 35 40

128. While responding to the issues raised by the 4th, 5th and 6th Respondents with regard to the 4th Petitioner’s case, it was the submission of Mr Issa Mansur that the court had supervisory jurisdiction under article 165(6) of the Constitution to grant the prayers sought. That the facts in the 4th Petitioner’s case are interrelated with the removal of the 1st Petitioner as the Governor of Embu County. Mr Njoroge asserted that the 4th Petitioner was not accorded due process as envisaged by the County Assembly of Embu Standing orders. Further, it was submitted that the 1st Petitioner was merely an interested party in the matter since he was the one who appointed her. That the fact that he swore an affidavit with regard to the issue should not be construed as shielding her from investigations. Mr Njoroge therefore urged the Court to grant the prayers sought by the 4th Petitioner.
129. In response to the submissions made by the Respondents on the Court orders issued on 23rd January, 2014, it was Mr Njoroge’s response that the same were capable of execution since the impeachment process starts at the County Assembly level as per Standing Order number 61 of the Embu County Assembly Standing Orders. That the Speaker of the County Assembly of Embu had certain options when he received the order of the Court. First, under Standing Order number 45(3) of the County Assembly of Embu, the Speaker had an option to declare the same inadmissible given that it would infringe Standing Order Number 86(2) which deals with a matter that is subjudice. And since the 1st Petitioner had instituted a case against the county assembly which was yet to be concluded, the rule of subjudice applied in this case. Secondly, the same case applied to the Speaker of the Senate when he received the Order dated 3rd February 2014 and extended on 4th February, 2014. Mr Njoroge submitted that given the fact that neither the County Assembly nor the Senate obeyed the Court orders, the 1st Petitioner was prejudiced by the proceedings of the two institutions as the matters were subjudice. He referred the Court to the case of *R v Gachoka* (1999) 1 EA 254 in support of that submission.
130. Mr Issa Mansur on his part pointed out to the Court that law on contempt has changed in this Country. That knowledge of a Court order supersedes personal service. He submitted that there had been a demonstration by the 1st Petitioner that the 5th and 6th Respondents knew about the orders issued by the Court on 24th January, 2014, while the Senate knew of the orders issued on 4th

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- February, 2014. In addition, there was evidence of service of the orders through the Affidavits of Service filed herein. 1
131. On the issue of immunity of the County Assembly and its members as well as the Senate and its members, Mr Issa Mansur contended that the National Assembly (Powers and Privileges) Act chapter 6 of the Laws of Kenya does not apply with regard to Court orders. That immunity granted under that Act, is subject to the rule of law and in particular the Constitution. He submitted that the Senate, the Speaker of the Senate together with the Speaker of the County Assembly of Embu and the County Assembly of Embu must be held to account for disobedience of court orders. He referred the Court to the case of *Smith v Mutasa & another* (1990) LRC where it was held that the Court can interfere with Parliamentary immunity in instances where the Constitution has been violated. 5 10 15
132. He further asserted that state organs are bound by article 10(2) of the Constitution with regard to the National values and principles of good governance which includes the observance of the rule of law. He cited the case of *Commercial Bank of Africa v Ndirangu (supra)*, and urged the Court to find like Kwach J did, that disobedience of Court orders means a violation of the Constitution. He also urged the Court to find that any action done in disobedience of a Court order must be set aside. As such, Mr Mansur urged the Court to find that the resolutions by the Senate and the County Assembly of the 1st Petitioner are null and void. 20 25
133. With regard to the issue of forum shopping, Mr Issa Mansur asserted that the cases herein were instituted before the process of impeachment started. It was contended that the fact that the 1st Petitioner attended the Senate proceedings did not sanitize the proceedings therein. He therefore restated that the 1st Petitioner attended the same under protest and out of compliance with the law. It was his further submission that the resolution of the senate seeking to be quashed was the Gazette Notice Number 1052 of 17th March, 2014 which had been duly produced before the Court in the 1st Petitioner's application dated 19th March, 2014. 30 35
134. On the issue of the lack for a prayer of reinstatement, Mr Njoroge clarified that the effect of the prayers sought by the 1st Petitioner meant that the 1st Petitioner would resume the position of Governor of Embu and as such, there was no need to specifically ask for reinstatement. 40

135. On the issue that the Speaker, and not the Senate, was a party
Mr Njoroge conceded and submitted that the Speaker of the Senate
was under articles 106 and 107 of the Constitution, the Principal of
the Senate and that everything touching on the Senate goes through
him. Therefore, the Senate was enjoined through its Speaker. 1
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136. On the applicability of the *Nixon* case (*supra*) in the Petitions
before us and the proposition by the 3rd Respondent that the Court
should act with restraint in matters of impeachment, it was Mr
Mansur’s submission that the Court must apply article 159(2), on
judicial authority and uphold the rule of law regardless of status. 10
That the matter of the removal of the 1st Petitioner was before
the High Court before the Senate was seized of the same. That in
this case, it was the Senate that should have restrained itself from
interfering with matters that were before the Court. Consequently, 15
he argued that it was wrong for the Senate to prejudge and determine
the issues that were before the Court and ignore Court orders on
the basis of separation of powers.

137. Mr Issa Mansur therefore urged the Court to go the Nigerian way
and not follow the *Nixon* case (*supra*) with regard to whether the 20
Court can interfere with the impeachment process. That further, the
definition of what constitutes gross violation of the Constitution and
any other written law should be subject to the Court’s interpretation
and not left to the whims of the County Assembly and the Senate. 25
The Petitioners therefore urged the Court to grant the prayers sought
in the consolidated Petitions.

138. Having set out the parties submissions as above, we now proceed
to make a determination of all the issued in the amended Petition. 30
We propose to start with Judicial Review Application No 6 of 2014.

Determination

Judicial Review Application No 6 of 2014

139. We have stated the facts supporting the above application and
the relief sought in paragraph 3 of this Judgment. The issues for 35
determination as can be discerned from the statutory statement of
facts and the verifying affidavit sworn by the applicant, Margaret
Lorna Kariuki on 16th January 2014 are as follows;

- (a) Whether the court has jurisdiction to hear and determine 40
the application.
- (b) Whether the action of the joint committees of
infrastructure, Youth and Sports; the joint committees

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- on Agriculture, Fisheries and Livestock and the Public Accounts and Investments committees in recommending that the Applicant steps aside to pave way for investigations amounted to a violation of the rules of natural Justice or of her rights under article 47 and article 50 of the Constitution. 1 5
- (c) Whether the Applicant is entitled to the orders sought.
140. We shall now proceed to consider the arguments made by the parties on each of the above issues and make our determinations thereon. 10
- Whether the Court has jurisdiction to hear this Application
141. It was the 2nd and 3rd Respondents contention that this court, in the exercise of its Judicial Review jurisdiction is not empowered to deal with the application before it since it allegedly relates to issues of employment concerning whether the Applicant should be suspended from her employment. Relying on article 162(2) and article 165(5) of the Constitution, Mr Nganga, learned counsel for the 2nd and 3rd Respondents who appeared together with Mr Njenga submitted that the application ought to have been filed in the Industrial Court which is the Court vested with jurisdiction to hear and determine disputes related to employment. 15 20
142. Responding to this claim, Mr Njoroge in his submissions on behalf of the 4th Petitioner/Applicant denied that the Application involved an employment dispute and maintained that this court was clothed with jurisdiction by article 165(6) to hear, determine and grant the orders sought in this Application. 25
143. Having considered the basis upon which the Respondents challenge on this Courts jurisdiction is premised, we think that this is an issue which we can quickly resolve by just looking at the provisions of article 165(6) of the Constitution and the pleadings filed in this matter. 30
144. Article 165(6) donates to this Court supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi judicial function. 35
145. In this case, a cursory look at the verifying Affidavit sworn by the Applicant on 16th January 2014 and the statutory statement of facts dated the same day shows clearly that the gist of the Applicant's complaint in this matter is that the joint committees of 40

- infrastructure, Youth and Sports; the Committees of Agriculture, Fisheries and Livestock and the Committee on Public Investments and Accounts (herein after referred to as the joint committees) made recommendations on 6th January, 2014 that she should step aside from the performance of her duties as County Secretary for the County Government of Embu pending investigations to be undertaken by the Ethics and Anti- Corruption Commission (EACC) without having given her an opportunity to be heard which in her view amounted to a violation of the rules of natural justice and her right to fair administrative action guaranteed under article 47 of the Constitution. 1 5 10
146. It is therefore clear from the pleadings that the Applicant’s complaint relates to the process adopted by the joint committees of the County Assembly of Embu in undertaking the inquiries before them leading to the impugned recommendations. The said complaint has nothing to do with a labour dispute. The Applicant was not for example seeking redress on grounds that she was unlawfully suspended from office in breach of her terms of employment or that any of her terms of employment had been breached by her employer. If the Application had raised such complaints, we would have readily agreed with Counsel for the Respondents that it is the Industrial Court not this court that would have jurisdiction to determine the issues raised therein but in so far as what is challenged is the process followed in arriving at the recommendations in question, we find that it is this court in the exercise of its judicial review jurisdiction that has the mandate to investigate whether that process complied with the law. 15 20 25
147. It is common ground, as this has not been disputed by any of the Respondents that the joint committees being committees established by the County Assembly of Embu under section 14 of the County Government Act while discharging their functions in the exercise of the Assembly’s mandate to oversee the proper and efficient management of the County Governments’ affairs including the use of financial resources at its disposal were acting as quasi judicial bodies and their decisions are therefore amendable to Judicial Review. 30 35
148. For the reasons stated above, we have no doubt that this court has jurisdiction to hear and determine the instant application and we so hold. 40

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- (2) Whether the joint committees in making the subject recommendations violated the rules of natural justice or violated the Applicant's right under article 47 and 50(1) of the Constitution 1
149. Article 47(1) of the Constitution states as follows; 5
- "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair"
- Article 47(2)
- "If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action." 10
150. Article 50(1) provides that every person has a right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or an independent and impartial tribunal or body. 15
151. Looking at these two articles of the Constitution, it is clear that they have elevated the rules of natural justice and the duty to act fairly when making administrative, judicial or quasi judicial decisions into constitutional rights capable of enforcement by an aggrieved party in appropriate cases. 20
152. The twin rules of natural justice that no man shall be a judge in his own cause (*Nemo judex in causa sua*) and that no man shall be condemned unheard (*audi alteram partem*) are cardinal principles of law which are fundamental in our justice system. They are basically an embodiment of the duty to act fairly. However, there is no legal definition or standard regarding what constitutes procedural fairness and each case must be decided on its own merits. 25
153. In this case, the Applicant's claim that summons requiring her to attend the two joint committees on Monday 6th January, 2014 at 11 30 a m and at 2 30 p m were delivered to her office on Friday 3rd January, 2014 is not disputed . The Applicant contends that both summons were delivered to her office at 5:30 pm but Mr Njenga claimed in his submissions on behalf of the Respondents that one of the summons was delivered at 1:30 pm. 30
154. It is also not disputed that her request in letters dated 6th January 2014 for extension of time within which to gather the information required and to attend the committees was declined and that the committees proceeded with their deliberations without having heard her views on the matters under investigation which led to 35
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- the recommendations sought to be quashed by orders of certiorari. 1
155. It is the Applicant’s case that making the impugned recommendations in those circumstances violated the Rules of natural justice. 5
156. The Respondents on their part denied that the committees violated the rules of natural justice as alleged by the Applicant. It is their case that the Applicant was afforded an opportunity to be heard through the service of summons to attend the deliberations of the committees but she failed or declined to utilize that opportunity; that having failed to take the opportunity provided to be heard on the matters under inquiry, the applicant cannot now turn around and claim that she had been condemned unheard. 10
157. In response to the Applicants claim that the period of notice was too short to gather the information required to be presented before the committees, the Respondents’ case was that the notice given to the applicant was sufficient in the circumstances of this case considering that the meetings were scheduled to be held at different times and the applicant’s office was within walking distance to the venue of the meetings. 15
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158. The question that the court must answer at this stage is whether the making of the recommendations in question without having formally heard the applicant amounted to a violation of the rules of natural justice. In *R v Aga Khan Education Services ex parte Ali Sele & 20 others* High Court Misc Application No 12 of 2002, this court while considering the applicability of the rules of natural justice held *inter alia* as follows:- 25
- “On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance”. 30
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- In *Union Insurance Company of Kenya Ltd v Ramzan Abdul Dhanji* Civil Application No Nai 179 of 1998, the Court of Appeal held that; 40
“Whereas the right to be heard is a basic natural-justice

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- concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it.” 1 5 10
159. And lastly in *Russel v Duke of Norfolk* (1949) All ER at 118, the Court had the following to say on the same issue; “There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly, I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case”. 15 20 25
160. We find that the golden thread running through the above cited authorities is that the requirements of natural justice are not applicable in all situations involving the making of administrative and quasi-judicial decisions. Their application depends on the circumstances of each case, the nature of the inquiry, and whether the person concerned was given a reasonable opportunity of presenting his or her case. 30
161. Though the right to a hearing encompasses the right to be given sufficient notice of the allegations made and sufficient time to respond, there is no universal principle regarding what amounts to sufficient notice. Whether a notice given is sufficient or not depends on the circumstances of each case and the nature of the allegations to be answered. 35 40
162. In the instant case, it should be remembered that the Applicant had not been summoned to attend the joint committees to defend

herself against any alleged wrong doing. The summons only required her to attend for purposes of providing information on matters related to the procurement and use of funds allocated to the face-lifting of the Embu Stadium and purchase of maize seedlings	1
163. Although the period of notice given to the Applicant in this case would in any other case appear short and probably insufficient, in this case we are satisfied that the notice was not short as to be unreasonable for two main reasons ; Firstly, the Applicant was not being summoned to defend herself against any allegations of wrong doing or to show cause why disciplinary action should not be taken against her for any number of reasons in which case she would have required time to prepare a response. Secondly, it is clear that the matters under investigation were not new as admitted by the Applicant in her letters dated 6th January 2014 requesting for extension of time. The said letters are referred to in her verifying affidavit and are exhibited as annextures marked ‘MLK 3’.	5 10 15
164. A reading of those letters confirms that the matters under investigations were not new to her as they had been discussed in several forums. That being the case and considering her official position as County Secretary whose duties included coordination of activities of the various departments of the entire county, it cannot be validly said that she was not seized of the information required by the joint committees.	20 25
165. Since it is not disputed that the meetings of the joint committees were to be held on a working day at different times; that the Applicants office was within walking distance from the venue of the meetings and there is no claim that the Applicant was away from the County on that day or was prevented by reason of distance or any other good reason from attending the committees’ sessions, we hold the view that she should have honoured the summons, attended the committees and provided whatever information which was at her disposal and if it was found to be insufficient, she would have at that juncture sought more time within which to provide additional information if necessary.	30 35
166. It is important to note that the Applicant had not just been invited to attend the joint committees but had been served with summons issued by the joint committees under article 195 of the Constitution. Summons are the tools which the courts, Parliament, County Assemblies and their committees use to compel attendance	40

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- of witnesses and when lawfully issued like they were in this case, unless there are good reasons preventing the person summoned from attending the summoning authority at the time and place required, they ought to be honoured. 1
167. Though the summons were principally meant to assist the committees get whatever information they required from the Applicant, we find that they also provided the Applicant with an opportunity to be heard in the event that there were issues she personally needed to respond to concerning the performance of her duties as County Secretary. 5 10
168. Having failed to utilize the said opportunity, we find that the applicant cannot validly complain that she was condemned unheard.
169. In any event, the joint committees only made recommendations for her suspension/stepping aside pending investigations which did not amount to a decision with the effect of adversely affecting her rights or interests at that stage. We make this finding because the word “recommendation” is defined in the *Oxford English Dictionary* 12th edition Oxford University Press at page 1201 to mean; 15 20
“A suggestion or proposal as to the best course of action”.
170. The recommendations would only have amounted to a decision if they were ratified and adopted by the County Assembly in accordance with the Embu County Assembly’s Standing Order No 180. In this case, no evidence was placed before this court to confirm that the said recommendations were ever tabled, debated and adopted as a decision of the Embu County Assembly through the passing of a resolution to that effect. And even if such a decision was made, it would still not amount to a final decision since for it to take effect, it had to be implemented by the County Governor and in any case, a suspension is different from a dismissal from employment. 25 30
171. Where a suspension from the performance of a person’s duties is being considered pending further investigations, we find that the rules of natural justice need not be strictly adhered to since no final decision is expected to be made at that point and such proceedings only amount to a preliminary inquiry. We are supported in this reasoning by the Learned authors of *Halsbury’s Laws of England* Fourth Edition Reissue Volume 1, where when discussing the applicability of the rules of natural justice stated as follows at Page 35 40

- 175 Paragraph 94; 1
 “The Rule generally applies, at least with full force, only to
 conduct leading directly to a final act or decision, and not to
 the making of a preliminary decision or to an investigation
 designed to obtain information for the purpose of a report 5
 or a recommendation on which a subsequent decision may
 be founded”
172. We are therefore of the view that the deliberations of the joint
 committees amounted to preliminary inquiries of the matters they 10
 were concerned with during their investigations and it was not
 necessary for them to formally hear the Applicant before making
 their recommendations.
173. In *Lewis v Heffer & others* (1978) 3 All ER 354 ,it was held 15
inter alia that where a suspension was made as a holding operation
 pending inquiries, the rules of natural justice did not apply
 because suspension was a matter of good administration. We
 agree with this finding because good administration requires that
 where investigations are about to be launched regarding suspected 20
 irregularities in the execution of duties assigned to a certain office,
 the occupant of such office should step aside to pave way for the
 intended investigations in order to avoid the possibility of any
 interference with the investigations and to safeguard the integrity
 of its outcome. 25
174. We are further persuaded by the decision in Scotland in the
 Petition of the *Newtongrange Branch of Scottish National Party*
and others, judicial review of a pretended decision of the National
 Executive Committee of the Scottish National Party dated 10th July 30
 1999 in Judicial Review of a pretended decision of the National
 Executive committee of the Scottish National Party dated 10th
 July 1999 where Lord Osborne in referring to the concept of
 administrative suspension held as follows:
- “In this kind of situation, at an early stage when action of 35
 some sort requires to be taken and taken firmly, in order to
 set the wheels of investigation in motion, in my view, natural
 justice would not demand the steps concerned.....
 indeed where an administrative suspension is decided
 upon, pending an investigation into some controversial 40
 circumstances, it would be inappropriate to hold a hearing
 into those circumstances, separate from the contemplated

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- investigation itself”. 1
175. In view of the foregoing, we have come to a firm conclusion that the joint committees in making their recommendations without having formally heard the Applicant did not violate the rules of natural justice or her right to fair administrative action. 5
- Is the Applicant entitled to the relief’s sought”
176. In her four prayers in the Application, the Applicant sought the Judicial Review remedies of *certiorari* and prohibition. The prayer for an order of *certiorari* was sought to quash the finding and/or recommendations by the joint committees made on 6th January 2014 and to quash the decision of the County Assembly in adopting the said recommendations. 10
177. The remedy of prohibition was sought against the 4th Respondent (EACC) to forbid it from commencing investigations against the Applicant or any civil servants or officers in the Embu County Public Service on the basis of reports made by the joint committees as adopted by the County Assembly of Embu on 7th January 2014. 15
178. The Court of Appeal in the case of *Kenya National Examinations Council v Republic* (1997) eKLR set out the principles upon which the three main Judicial Review remedies of Certiorari, Mandamus and Prohibition can issue. With regard to the order of certiorari, the court expressed itself thus; 20
- “Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is made without or in excess of jurisdiction or where the rules of natural Justice are not complied with or for such like reasons.....” 25
- From this holding by the Court of Appeal, it is clear that an order of certiorari targets to quash an unlawful or illegal decision. As noted earlier, the joint committees of the Embu County Assembly only made recommendations which as demonstrated in our paragraph 14 above did not amount to a decision. There is therefore no decision which is capable of being quashed by orders of *certiorari* as sought in prayers 1 and 2. 30
179. With regard to prayer 3, as noted earlier, no evidence in the form of a resolution was availed to this Court to prove that the Embu County Assembly ever met and formally adopted the joint committees recommendations thereby converting them into a 35
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- decision of the Assembly. The letter marked as ‘JK 2’ annexed to Jim G Kauma’s Replying affidavit sworn on 31st January, 2014 showing that the Embu County Assembly had made a decision on 7th January 2014 adopting the said recommendations cannot on its own amount to proof that such a resolution was ever made. 1
180. It is interesting to note that the said letter is dated 7 th January 2014 the same day the report containing the recommendations was made. Is it possible that the County Assembly met on the same day the report was made and adopted the recommendations without following the procedures laid out in its standing order no 180 detailing the steps to be taken before such a resolution is passed” Whatever the case, if such a resolution had been passed, why was it not annexed to the applicant’s pleadings or availed to the court at a later date” Could the reason for this failure be that the resolution did not infact exist” These are the questions we had to contend with but unfortunately no answers were forthcoming from the Applicant either from the submissions made on her behalf or from her pleadings. 5
181. In view of the above, it is clear that the Applicant has contravened the provisions of order 53 rule 7 of the Civil Procedure Rules which are expressed in mandatory terms as follows; 10
- “In the case of an application for an order of *certiorari* to remove any proceedings for the purpose of their being quashed, the Applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by Affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.” 15
182. This rule in our view was meant to ensure that before a court issues an order of *certiorari*, it is satisfied that there is a decision in existence which is capable of being removed to the High Court for the purpose of being quashed so that the court does not issue orders which are incapable of enforcement. 20
183. Having failed to avail the resolution containing the alleged decision by the Embu County Assembly and having failed to account for such failure, this court is unable to find that such a decision actually existed and consequently, it is our decision that the remedy of *certiorari* is not available to the Applicant. 25
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184. Secondly and more importantly, there is evidence that the Applicant had already stepped aside on 15th January 2014 to pave way for investigations as recommended by the joint committees. This can be seen from the deposition in Jim G Kauma's replying affidavit at paragraph 17 and the letter annexed thereto marked 'JK3' authored by the Governor of Embu County Martin Nyaga Wambora who was enjoined as an interested party in this case. 1 5
185. This position has not been disputed by the Applicant as she did not file a supplementary affidavit to controvert that averment. Infact, the Applicant in her pleadings did not make any mention of the fact that she had already stepped aside or disclosed the circumstances surrounding her alleged decision to step aside. Considering that this claim by the Respondents is not contested, this court is in the circumstances entitled to make a finding that the Applicant had indeed stepped aside on 15th January, 2014 a day before she filed her application seeking leave to commence these Judicial Review proceedings. 10 15
186. It is trite that Judicial Review remedies are discretionary in nature and the court in the exercise of its discretion may refuse to grant any one of them even where grounds for its issuance existed. The discretion of the Court being a judicial one is always exercised judiciously on the basis of evidence and sound legal principles including a consideration of whether the remedy sought is efficacious in the circumstances of the case. In this case, The effect of granting the order of *certiorari* as sought in paragraph 3 would be to quash the decision requiring the Applicant to step aside from her office pending investigations which action the Applicant had already taken on her own volition. In the circumstances, granting such an order would not serve any useful purpose. It would be tantamount to this Court granting orders in vain which is not permissible in law. 20 25 30
187. Turning now to the prayer for an order of prohibition, the law is that prohibition issues to prevent a tribunal or body from continuing with proceedings conducted in excess of jurisdiction or contrary to the laws of the land or to prohibit the making of contemplated unlawful decisions – see Court of Appeal decision in *Kenya National Examination Council v Republic (supra)*. Applying the above Principles to this case, we are of the view that the remedy of prohibition is also not available to the Applicant. This court cannot issue an order of prohibition whose effect would be to 35 40

shield the Applicant or any other member or official of the County Executive Board from investigations by Ethics and Anti-Corruption Commission, an independent commission created under the Ethics and Anti- Corruption Commission Act No 22 of 2011 with the sole mandate of investigating allegations of corruption and matters related to economic crimes. We have no hesitation in finding that a court of law cannot prohibit a statutory body from executing its lawful mandate. In the circumstances, we have to decline the Applicant’s invitation to issue an order of prohibition in terms of prayer 4. For all the foregoing reasons, we are satisfied that the application lacks merit and it is hereby dismissed with no orders as to costs.

188. Having disposed off the judicial review application, we now turn to consider the other issues raised in the Amended Petition. In our view, the following are the issues that arise for determination;

- (a) Whether this Court has jurisdiction to grant the reliefs sought.
- (b) Whether the Petition as drafted is competent.
- (c) Whether the proceedings leading to the resolution and removal of the 1st Petitioner from office was done in accordance with the law.
- (d) Whether the 1st, 2nd, 5th and 6th Respondents disobeyed Court orders issued on 23rd January 2014 and 3rd February 2014.
- (e) Whether a Deputy Governor can assume office under article 182(2) of the Constitution through a process of impeachment that was in violation of the Constitution.
- (f) Whether the fundamental rights and freedoms of the 1st Petitioner were violated in the process of his removal from office.
- (g) Whether accounting officer of a County government is answerable to the Senate or County Assembly in the financial management of county funds
- (h) the meaning, extent and scope of power to call for evidence as provided for under article 125 of the Constitution and whether that Article confers the Senate oversight role over the County Governments.

189. The last two issues will be addressed comprehensively in *International Legal Concultancy v The Senate and the Clerk of the Senate Kerugoya* Petition No 8 of 2014 which we retire to write

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- separately. 1
190. The jurisdiction of this Court was attacked on various fronts.
- First, on the ground that the Petition is an affront to the doctrine of separation of powers as this Court cannot intervene in the constitutional mandate of impeachment of the 1st Petitioner as that was the exclusive preserve of the Senate and the County Assembly. Secondly, that the issue of impeachment was a political question thus not justiciable. Thirdly, Section 12 of the National Assembly (Powers and Privileges) Act ousts the jurisdiction of this Court to determine this Petition. 5 10
191. We are alive to the fact that jurisdiction is indeed the first issue a Court should deal with, because without it, the entire proceedings become a nullity. In the celebrated case of *The Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd* [1989] KLR 1 14 Nyarangi J stated: 15
- “Jurisdiction is everything. Without it, a Court has no power to make one step, where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.” 20
192. We are duly guided by that important finding and in determining whether this court has jurisdiction, we shall answer the following questions; 25
- (a) Whether the principle of separation of power limits this Court’s jurisdiction to determine this matter.
 - (b) Whether impeachment is a political question thus non-justiciable. 30
 - (c) Whether parliamentary privilege ousts the Courts jurisdiction.
- (a) The doctrine of separation of powers 35
193. It was the submissions of the learned counsels for the Respondents that this Court has no jurisdiction to interfere with the mandate of the Senate in the impeachment process owing to the doctrine of separation of powers.
194. With regard to the doctrine of separatiuon of powers article 1 of the Constitution reposes the sovereign power to the people of Kenya but provides for the delegation of that power to various state organs. 40

- These include; Parliament, The County Assemblies, the Executive at the national and County Levels of Government, the judiciary, independent tribunals and Commissions. To facilitate the proper and effective exercise of that delegated power the Constitution allocates functions , powers and responsibilities to all these organs. While we agree that every state organ should be accorded the space to perform its constitutional mandate without undue interference, Article 2 of the Constitution states that;
- “(i) This Consitution is the Supreme law of the Republic and binds all persons and all state organs at both levels of government.
- (ii) No person may claim or exercise state authority except as authorised under this Constitution”.
195. This means that no person or state organ is above the law and above the Constitution. All organs created by the Constitution are subordinate to it. Further, article 10(1) binds all state organs, state officers, public officers and all persons while applying and interpreting the Constitution. Therefore, when any of these organs steps outside its area of operation, this Court will not hesitate to intervene. The Supreme Court has ably captured this in *Re The Matter of the Interim Independent Electoral Commission* Advisory Opinion No 2 of 2011 where it expressed itself as follows;
- “The effect of the constitution’s detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the Courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that the totality of governance- powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation.”
196. Subsequently, the Supreme Court in *Speaker of National Assembly v Attorney General and 3 others* (2013) eKLR where it stated as follows;
- “Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of

legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the Supreme law of the land, it is for the Courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering his Opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act. ”

The Court went on to state as follows;

“Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of “right” and “wrong” in such cases, short of a resolution in plebiscite, is only the Courts...”

197. The Court of Appeal also discussed this doctrine in *Mumo Matemu v Trusted Society of Human Rights Alliance (supra)* where it stated as follows;

“It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a per-commitment in our constitutional edifice. However, separation of power does not only proscribe organs of government from interfering with the other’s functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Court’s *dicta*

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- in the petition the subject of this appeal that: Separation of powers must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitution democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet as the Respondents concede, the Courts have an interpretive role, including the last word in determining the constitutionality of all governmental actions.”
198. We are also persuaded by the South African Constitutional Court case of *Doctors for Life International v Speaker of the National Assembly and others* (CCT 12/05) [2006] ZACC 11, where it stated as follows in regard to the duty of the court in defending the Constitution; “....under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament ‘must act in accordance with, and within the limits of, the Constitution’, and the supremacy of the Constitution requires that ‘the obligations imposed by it must be fulfilled.’ Courts are required by the Constitution ‘to ensure that all branches of government act within the law’ and fulfill their constitutional obligations.”
199. The Court being the only arm of government vested with the power to interpret the Constitution, and to safeguard, protect and promote its provisions has the duty and obligation to intervene in actions of other arms of government and state organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation.
- The Amended Petition alleges violation of the Constitution and violation of the Petitioner’s constitutional rights and freedoms with regard to his removal from office. In the circumstances, it is our finding that the doctrine of separation of power does not inhibit this Court’s jurisdiction to address the Petitioner’s grievances.
- (b) Justiciability
200. It was the Respondents’ contention that the issues raised by these Petitions are not justiciable as impeachment is a political question and the Court cannot intervene.
201. The doctrine of justiciability as we understand it has been elaborated by the High Court in several cases. For example, in

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- Trusted Society of Human Rights Alliance v Attorney General and another* (2012) eKLR the Court distinguished between a justiciable controversy; which is amenable to judicial review and a policy decision by the political branches of government; which is a “political question” and hence inappropriate for judicial review. The court stated;
- “The justiciability doctrine expresses fundamental limits on judicial power in order to ensure that courts do not intrude into areas committed to the other branches of government. The arguments on this issue are based on the foundational doctrine of separation of powers and its application to the case at hand.”
202. We are in agreement. And the issue before us now is whether the validity or otherwise of the 1st Petitioner’s removal from office, by way of impeachment is a dispute amenable to judicial review or whether it is a political question.
203. Mr Mwangi Njoroge for the Attorney General submitted that a dispute on the process of impeachment is a political question that could not be resolved by the Courts. He referred us to the decision of the Supreme Court of United States in the case of *Nixon v United States* 506 US 224 (1993) and he relied on the following passages of the decision at pages 224;
- “A controversy is non-justiciable where there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department, or lack of judicially discoverable andmanageable standards for resolving it”.
204. The issue of what amounts to a political question has in our view been defined aptly by Justice Stevens in his concurring decision in the *Nixon Case* (*supra*) when he opined thus;
- “Of course the issue in the political question doctrine is not whether the constitutional text commits exclusive responsibility for a particular governmental function to one of the political branches. There are numerous instances of this sort of textual commitment, and it is not thought that disputes implicating these provisions are non justiciable. Rather, the issue is whether the Constitution has given one of the political branches final responsibility for interpreting the scope and nature of such a power.” (Emphasis ours).
205. In the *Nixon Case* (*supra*) Walter Nixon had asked the Court

to determine whether Senate rule X1 which allows a committee of Senators to hear evidence against an individual who has been impeached and to report that evidence to the full Senate violates the impeachment trial clause. The Court held that the impeachment claim was not justiciable and could not be resolved by the courts because the language and structure of that Rule reposed the sole authority of impeachment on the Senate.

206. In our understanding, the US Supreme Court decision in the Nixon Case only expounded the doctrine of separation of powers; to the extent that when the law mandated an organ of the government, in our case the Senate to make decisions regarding impeachment of public officers, the Court could not intervene with that decision, unless it is demonstrated that the Senate in making that decision to impeach violated the law. The majority decision in the *Nixon Case* supports us in this finding. It held as follows;

“We agree with Nixon that Courts possess power to review either legislative or executive action that transgresses identifiable textual limits. As we have made it clear, ‘whether the action of either the Legislative or Executive Branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.’”

This was also the gist of Justice Stevens concurring opinion in the same case when he observed that;

”One can, nevertheless envision different and unusual circumstances that might justify a more searching review of impeachment proceedings. If the Senate were to act in a manner seriously threatening the integrity of its results, convicting say, upon a coin toss, or upon a summary determination that an officer of the United States was simply ‘a bad guy’ judicial interference might well be appropriate. In such circumstances, the Senate’s action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily cause silence. The Political question doctrine, a tool for maintenance of governmental order, will not be so applied as to promote only disorder’.

207. In Kenya, the Constitutional power to impeach a Governor

has been donated to the County Assembly and the Senate. The 1st Petitioner is challenging the validity of his removal from office claiming that it was not done in accordance with the law. The question that this Court must determine is whether it has any role in the impeachment process. Even if Mr Mwangi Njoroge for the Attorney General urged us to exercise restraint, we are of the view that the Court is the guardian of the Constitution and it must determine whether any act or power has been exercised in accordance with the Constitution and the law, if it finds that either the County Assembly or the Senate contravened the Constitution and the law in the process of removing the 1st Petitioner from office it must intervene by granting appropriate reliefs. The Court cannot exercise restraint in instances where it has been demonstrated that the constitution has been violated or has been threatened with a violation. We agree with the reasoning in *Marbury v Madison* 5 US 137 (1803) where the Court stated as follows;

“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule..... This is of the very essence of judicial duty.”

208. We are alive to the fact that the Petitioner is not asking this Court to conduct his impeachment trial, which would make the dispute before us a political question. Rather, he has asked the Court to determine whether his impeachment was tried by the County Assembly and the Senate by following the Constitution and the County Government Act which stipulates the procedure for impeaching a Governor. This Court cannot refrain from making that determination. In addition, we are aware that the 1st Petitioner has alleged a violation of his fundamental rights and freedoms as provided in the Bill of Rights in the process of his removal from office. In our view this removes any doubt that the Petition before us is justiciable.

(c) Parliamentary Privilege and Immunities

209. It was Mr Kibe’s submission that the jurisdiction of this Court has also been limited by virtue of section 12 of the National Assembly (Powers and Privileges) Act (cap 6 Laws of Kenya), which is to the effect that Parliament proceedings are not to be questioned in any court.

210. To answer that submission, we shall revert to the provisions of

article 117 of the Constitution, which provides that; 1

“117(1) There shall be freedom of speech and debate in Parliament.

(2) Parliament may, for the purpose of the orderly and effective discharge of the business of parliament provide for the powers, privileges and immunities of parliament, its committees, the leader of the majority party, the leader of the minority party, the chairpersons of committees and members. “ 5

Section 12 of the National Assembly (Powers and Privileges) Act provides; 10

“No proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with this Act shall be questioned in any court”. 15

Even though this provision in the National Assembly (Powers and Privileges) Act was enacted under the Repealed Constitution, section 7 of the sixth schedule to the Constitution provides that the same shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. We thus find that the provisions of section 12 of National Assembly (Powers and Privileges) Act are applicable to the Senate and the County Assembly. 20

211. We have no doubt in our minds that the Senate and the National Assembly hold, exercise and enjoy privileges, immunities and powers bestowed on them, their members and officers in terms of the provisions of the National Assembly (Powers and Privileges) Act . Indeed in so holding we are in agreement with the reasoning of Dumbutshena Chief Justice of Zimbabwe Supreme Court in *Smith v Mutasa and Another* (1990) LRC 87 where he cited with approval the holding of Evans CJHC I in *Re Clarke et al and AG of Canada* (1978 81 DLR (3d) 33 at 51 where he stated as follows; 25

“In dealing with the issue of parliamentary privileges, counsel for the respondent submitted that the Courts have no jurisdiction to determine the nature and extent of such privileges. He argued that Parliament is the source and the sole judge of the privileges of its Members. This would create an interesting obstacle for the applicants in the present case. I would point out, however, that I am asked to interpret Standing Order (SOR) /76-644. In doing so, I am asked to 35

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determine whether SOR/76-644 overrides or abridges existing parliamentary privileges. In this respect, I do not consider that I am infringing on the jurisdiction of Parliament.

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He went on to express himself as follows;

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Historically, there has always been some question whether the Courts have jurisdiction to determine the nature and extent of parliamentary privilege. As the supreme law –giving body, it would seem only natural that Parliament should be the source of authoritative guidelines on the subject. On the other hand, there is something inherently inimical about Members of Parliament determining the nature and extent of their own rights and privileges. The Courts have seized on this to consistently review the nature and extent of parliamentary privilege.’

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He continues at page 52:

‘.....the Courts apparently have an implicit jurisdiction to deal with questions of parliamentary privilege. Notwithstanding the submission of counsel for the respondent, I have no hesitation in proceeding to evaluate the effect of SOR/76-644 on the privileges of Members of Parliament. *Roman Corp. Ltd et al v Hudson’s Bay Oil & Gas Co Ltd et al* (1971) 2 OR 418, 18 DLR (3d) 134 (Houlden J (Ont H.C.)); affirmed (1972) 1 OR 444, 23 DLR (3d) 292 (C.A.); affirmed (1973) SCR 820, 36 DLR (3d) 413 (discussed, *infra*), is sufficient authority for the proposition that the Courts of law in Canada have jurisdiction to adjudicate on matters involving the privileges of members of parliament.’

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212. We appreciate that privileges, immunities and powers are such as those provided for by the National Assembly (Powers and Privileges) Act are essential for the proper governance and protection of Parliament because parliament needs them for the control of its internal procedures and for complete freedom of expression in their deliberations inside the National Assembly.

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213. It is undisputed that the resolution to impeach the 1st Petitioner was made within the proceedings of the Senate. We are clear in our minds that should the Senate violate the Constitution and the law in the course of its proceedings it falls upon the judiciary to say so and to pronounce such violation. The Court cannot ignore any breaches of the Constitution in favour of parliamentary privilege.

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- The Constitution is the Supreme law of the land and it binds all persons and all state organs at both levels of government. 1
214. We are also alive to the provisions of section 29 of the National Assembly (Powers and Privileges) Act which ousts jurisdiction of this court in regard to acts of the Speaker and officers of the National Assembly. The question therefore is whether this Court has the power to inquire into the constitutionality of the actions of the Members of Senate and Speaker and other officers of the National Assembly. Section 29 states that; 5
- ‘Courts not to exercise jurisdiction in respect of acts of Speaker and officers of the Assembly. Neither the Speaker nor any officer of the Assembly shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in the Speaker of such officer or by or under this Act or the Standing Orders.’ 10 15
215. This question was answered in the affirmative by Lenaola J in *Njenga Mwangi & another v The Truth Justice and Reconciliation Commission and 4 others* Petition No 286 of 2013 where he that; 20
- “I am also in agreement that under section 29 of the National Assembly (Powers and Privileges) Act, courts cannot exercise jurisdiction in respect of acts of the Speaker and other officers of the National Assembly, but I am certain that under article 165(3)(d) of the Constitution, this court can enquire into any unconstitutional actions on their part.” 25
- We agree with the Learned Judge
216. It is therefore important to remember that even though the Senate has powers to impeach a Governor, it must function within the limits prescribed by the Constitution. In this regard the Supreme Court of Zimbabwe while considering the extent to which Courts can interfere with parliamentary privilege stated in *the Smith v Mutasa and another (supra)* that; 30
- “In this case the House of Assembly has stepped beyond what its own statutes and the Constitution permit it to do. It cannot therefore seek refuge in illegality. The Courts must in cases such as this one step in to resolve the dispute.....” 35
217. We are persuaded to make a similar finding in the instant case. If the Senate violates the Constitution, the Courts being the guardian of the Constitution must step in and lift the veil on the doctrine of 40

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- parliamentary privilege if necessary. We have pondered deeply on the issue and we agree with the Zimbabwean Supreme Court that, if Members of Parliament, the Speaker and officers in his office, can only enjoy immunity from court action if their decisions or actions are made in accordance with the letter and spirit of the Constitution. We therefore find that section 12 and 29 of National Assembly (Powers and Privileges) Act on parliamentary privilege do not oust the jurisdiction of this Court to inquire into the legality of the 1st, 2nd, 5th and 6th Respondents actions.
218. In concluding this aspect of jurisdiction, we find that the Court has jurisdiction to determine whether the impeachment of the 1st Petitioner was done in accordance with the Constitution and the law for the simple reason that the Constitution requires the Courts to ensure that all organs of government act within the law. It is the duty of the Court under article 159(2)(e) of the Constitution to ensure that the purpose and principles of the Constitution are protected and promoted.
- (ii) Whether the Amended Petition as drafted is incompetent.
219. Mr Kibe's first line of argument in support of the above preliminary point was that the Petitioners had failed to plead their case with reasonable precision to enable the court grant the reliefs sought and that they had also failed to state the alleged violations of the Constitution
220. The rule that a constitutional petition ought to state clearly the alleged violation and relief sought was stated in the case of *Anarita Karimi Njeru v Republic* (1976-1980) KLR 154 where the Court stated at Page 156 of the judgment that:
- ‘We would however again stress that if a person is seeking redress from the High Court or an order which invokes a reference to the Constitution, it is important (if only to ensure that justice is done in his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.’
221. We are duly guided by the recent pronouncement of the Court of Appeal when emphasising on the importance of this rule in the *Mumo Matemu* case (*supra*) when the Court observed as follows;
- We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of

jurisdiction by a court. In essence, due process, substantive Justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand *exactitude ex ante* is to miss the point.

The Court went on to state that;

“However, our analysis cannot end at that level of generality. It was High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in *Anarita Karimi Njeru (supra)* underscores the importance of defining the dispute to be decided by the court. in our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the appellate jurisdiction act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealtwith justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru (supra)* that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.

222. For a Petition to be competent, the manner in which it is presented must comply with the provisions of rule 10 of the Mutunga Rules. This Rule provides that;

- 10(1) An application under rule 4 shall be made by way of a Petition as set out in Form A in the Schedule with such alterations as may be necessary.
- (2) The Petition shall disclose the following—
 - (a) the Petitioner’s name and address;

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- (b) the facts relied upon; 1
 - (c) the constitutional provision violated;
 - (d) the nature of injury caused or likely to be caused
to the petitioner or the person in whose name
the petitioner has instituted the suit; or in a 5
public interest case to the public, of persons or
community;
 - (e) details regarding any civil or criminal case,
involving the petitioner or any of the petitioners,
which is related to the matters in issue in the 10
Petition;
 - (f) the Petition shall be signed by the petitioner or
the advocate of the Petitioner; and
 - (g) the relief sought by the Petitioner. 15
223. The Amended Petition before us refers to articles 1, 2, 3, 6, 10,
19, 20, 22, 23, 47, 50, 73, 125, 159, 160, 165, 174, 181, 226,
227 and 259 of the Constitution in its title and the same are also
reproduced in its legal foundations. At paragraph 39 to 73 the
Petitioners state the facts in support of the Petition and also provided 20
the particulars for alleged violations and the manner in which the
Constitution was violated. They have also stated the reliefs sought.
In our view therefore, the Amended Petition has provided sufficient
particulars to support the alleged violations of the constitution that 25
would enable the court make a determination of whether or not to
grant the reliefs sought. We thus find that the Amended Petition
has met the threshold required under rule 10 of the Mutunga Rules.
224. The other ground urged by Mr Kibe is that the Petition was
defective as it was not supported by an affidavit together with all 30
the annextures necessary showing the alleged infringements .
225. Rule 11(1) of the Mutunga Rules states that;
- 11(1) The Petition filed under these rules may be supported
by an affidavit. 35
 - (2) If a party wishes to rely on any document, the
document shall be annexed to the supporting Affidavit
or the Petition where there is no supporting Affidavit.
226. A literal interpretation of this rule reveals that the requirement
that a Petition be supported by an Affidavit and annextures thereto 40
is not mandatory. The rules of procedure envisaged a situation where
there would be possibilities of the Petition not being supported by

an affidavit. Accordingly, we do not see how the Petition before us
can be said to be incompetent for lack of an affidavit in support. 1

227. But even if we were wrong, we agree with the submissions made
by Mr Issa Mansur that there is an affidavit on record sworn by the
Petitioner on 22nd January 2014 filed in support of the Petition 5
dated 22nd January 2014. This Petition was subsequently amended
with the leave of the court on 24th February 2014, hence the
Amended Petition before us.

228. Lastly, Mr Kibe attacked the validity of the Petition on grounds 10
that the Petitioners were seeking for orders of certiorari to quash
the resolution passed by the County Assembly and the Senate, yet
those resolutions had not been availed to the Court as provided for
under order 53 rule 7 of the Civil Procedure Rules 2010. 15

229. Having perused the court record, we are unable to agree with Mr
Kibe on this point. We find that the two resolutions to remove the
1st Petitioner from office forming the subject of this proceedings,
are before the court because they are contained in Gazette Notice
Number 1052 which reads as follows; 20

Gazette Notice No 1052

The Constitution of Kenya

The County Government Act (No 17 of 2012)

Standing Order No 65 of the Senate Standing Orders 25

Removal from Office of the Governor Embu County

It is notified for the information of the general public That
pursuant to article 181 of the Constitution and section 33 of
the County Government Act, 2012, on 28th January,2014 30
the County Assembly of Embu approved Motions “to remove
from office, by impeachment,” the County Governor and the
Deputy Governor of Embu County:

And that by letters dated 29th January, 214 (Ref: CAE/
SCA/1/28 and 29) and received in the Office of the Speaker of
the Senate on 30th January, 2014, the Speaker of the County
Assembly of Embu informed the Speaker of the Senate of the
approval of the Motion by the County Assembly and further 35
forwarded to the Speaker of the Senate documents in evidence
of the proceedings of the Assembly; 40

And further that, pursuant to section 33(3)(b) of the County Government Act, 2012 and Senate Standing Order No 65(1) (b), the Senate by resolution on Tuesday 4th February, 2014 appointed a special committee comprising eleven of its members to investigate the matter of the proposed removal from office of the Governor and Deputy Governor of Embu County and to report to the Senate within ten(10) days of its appointment on whether it finds the particulars of the allegations to have been substantiated ;

And that, pursuant to section 33(4) of the County Government Act, 2012 and Senate Standing Order No 65(2), the Special Committee investigated the matter and tabled its report in the Senate on Friday 14th February 2014;

And that, pursuant to section 33(4) and 96(b) of the County Government Act 2012 and Senate Standing Order 65(4) (b), the Special Committee found that the particulars of the following allegations against the Governor of Embu County had been substantiated; namely-

- (a) Violation of the Public Procurement and Disposal Act, 2005 and Regulations 2013;
- (b) Violation of the Public Finance Management Act, 2012; and
- (c) Violation of the Constitution of Kenya

And that, pursuant to section 33(6)(b) of the County Government Act, 2012 and Senate Standing Order 65(4)(b), the Senate After according the Governor of Embu County an opportunity to be heard, did on Friday, 14th February, 2014 resolve to impeach the Governor of Embu County on the following grounds; namely –

- (a) Violation of the Public Procurement and Disposal Act, 2005 and Regulations 2013;
- (b) Violation of the Public Finance Management Act, 2012; and
- (c) Violation of the Constitution of Kenya

Dated the 14th February, 2014.

Ekwee Ethuro

Speaker of the senate

230. The County Assembly and the Senate make decisions through

- resolutions, which are then communicated to the public through publication in the Kenya Gazette in the form of Gazette Notices. Therefore, we are satisfied that the Petitioner in annexing the aforesaid Gazette Notice No. 1052 availed the Resolutions sought to be quashed hence complied with the requirements of order 53 rule 7. 1
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- (iii) Whether the proceedings leading to the resolution and removal of the 1st Petitioner from office was done in accordance with the law.
231. It is not contested that the County Assembly and the Senate are the bodies constitutionally mandated to undertake the process leading to the removal of the 1st Petitioner from office. However, this process must be carried out in accordance with the law. 10
232. The law regarding the removal of a Governor from office is contained in article 181 of the Constitution. Article 181(1) establishes the grounds upon which a Governor can be removed from office. Article 181(2) mandates Parliament to enact legislation providing for the procedure for the removal of a Governor from office. Pursuant to this mandate, Parliament enacted the County Government Act (hereinafter referred to as the Act). At section 33 of the Act, Parliament provided the procedure to be used by both the County Assembly and the Senate in the removal of a Governor from office. 15
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233. Looking at the provisions of article 181(1), it is clear that, it contains the constitutional basis for the removal of a Governor and it is hence the substantive law on the subject. On the other hand, section 33 of the Act provides for the procedural law in the removal of a Governor and operationalises article 181. It is therefore our finding that for the removal of a Governor from office to be valid, the process used must strictly adhere to both the substantive and the procedural law contained in both article 181 of the Constitution and section 33 of the Act respectively. 25
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234. At this juncture the question we must answer is whether the process used in the removal of the 1st Petitioner from office complied with both substantive and procedural law. 35
235. In regard to the procedural law, the procedure is at outlined by Section 33 of the Act, and it is as follows; “ 33. Removal of a governor
- (1) A member of the county assembly may by notice to the speaker, supported by at least a third of all the members, move a motion for the removal of the governor under 40

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- article 181 of the Constitution. 1
- (2) If a motion under subsection (1) is supported by at least two-thirds of all the members of the county assembly—
- (a) the speaker of the county assembly shall inform the Speaker of the Senate of that resolution within two days; and 5
- (b) the governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section. 10
- (3) Within seven days after receiving notice of a resolution from the speaker of the county assembly—the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor; and the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter. 15
- (4) A special committee appointed under subsection (3) shall—
- (a) investigate the matter; and 20
- (b) report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated.
- (5) The governor shall have the right to appear and be represented before the special committee during its investigations. 25
- (6) If the special committee reports that the particulars of any allegation against the governor—
- (a) have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or 30
- (b) have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the impeachment charges. 35
- (7) If a majority of all the members of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office. 40
- (8) If a vote in the Senate fails to result in the removal of the governor, the Speaker of the Senate shall notify the speaker of the concerned county assembly accordingly and the motion by the assembly for the removal of the governor on the same charges may only be re-introduced

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- to the Senate on the expiry of three months from the date of such vote.
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- (9) The procedure for the removal of the President on grounds of incapacity under article 144 of the Constitution shall apply, with necessary modifications, to the removal of a governor.
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- (10) A vacancy in the office of the governor or deputy governor arising under this section shall be filled in the manner provided for by article 182 of the Constitution.”
236. Our understanding of section 33(4) of the Act, is that the Special Committee must investigate the matter. Investigate is defined in the *Blacks Law Dictionary* 9th Edition as a ‘systematic inquire into something’. Investigating here shall include the Committee satisfying itself that the Resolution presented to it was arrived at after due process was followed at the County Assembly. We agree with the Attorney General submission that the design of section 33 is meant to ensure that the process regarding impeachment is self correcting. So that any errors that may have occurred at the County Assembly level may be detected by the Special Committee of the Senate while performing its investigative role. For instance, in our present case, had the Senate investigated the manner in which the resolution forwarded to the Speaker of the County Assembly had been arrived at, it would have discovered that it was passed in disobedience of court orders. It was therefore not correct for the Special Committee to say that it would not look into what had transpired at the County Assembly.
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237. Where the Senate finds that the resolution is not properly before it then it is not obliged to admit it. We also need to add that, the timelines stipulated by section 33(2) starts running from the date the resolution is admitted for further action.
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238. We find that in the present case, the procedure followed at the Senate was not faulted. However, the 1st Petitioner claimed that the procedure used at the County Assembly denied him his rights to a hearing therefore violated his right to fair administrative action. We shall revert to this issue later in this judgment.
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239. Turning now to the substantive law, article 181(1) states that;
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- 181(1) A county governor may be removed from office on any of the following grounds-
- (a) gross violation of this Constitution or any other

written law;	1
(b) where there are serious reasons for believing that the county governor has committed a crime under national or international law	
(c) abuse of office	5
(d) physical or mental capacity to perform the functions of the office of county governor.	
240. With regards to the grounds for removal of a Governor as reproduced above, Mr Muite SC submitted that the use of the word gross is deliberate and appropriate; that it demonstrates the intention of the framers of the Constitution, that the threshold for the removal of a Governor must be very high. He further submitted that not every conduct should led to the removal of a Governor. He thus contended that the accusations made of the 1st Petitioner did not meet the threshold established under article 181 as they were not described as gross.	10 15
241. In rebuttal, Mr Nganga submitted that by being asked to interrogate the threshold for the removal of a Governor the same is tantamount to sitting on an appeal against the Senate's decision and this Court did not have such jurisdiction including powers to interrogate the merits of a decision made by the Senate. He thus contended that the threshold applicable in the removal of a Governor was set out under article 181 of the Constitution and the Court cannot set its own threshold.	20 25
242. From the material placed before us, we note that the 1st Petitioner at both the County Assembly of Embu and at the Senate was charged with the following;	30
(a) Violation of the Constitution	
(b) Violations of the Public Procurement and Disposal Act 2005 and Regulations 2013	
(c) Violation of the Public Finance Management Act 2012	
(d) Violation of the County Government Act 2012	35
(e) Abuse of office	
Subsequently, pursuant to section 33(6)(b) of the County Government Act, 2012 and The Senate Standing Order 65(4)(b), the Senate, after according the 1st Petitioner an opportunity to be heard, did on Friday 14th February, 2014 resolve to impeach the Governor of Embu County on the following three grounds that it found had been substantiated; namely;	40

- (a) Violation of the Public Procurement and Disposal Act, 2005 and Regulations 2013;

(b) Violation of the Public Finance Management Act, 2012;

(c) Violation of the Constitution of Kenya.

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- 243. The question before us now is whether the charges preferred against the Governor which the Senate found to have been substantiated leading to his removal met the constitutional threshold set by article 181(1). Mr Muite invited the Court to note that the charges as framed did not allege gross violation of the Constitution and the law in the statutes mentioned therein. He therefore urged the Court to find that they did not meet the constitutional threshold required to remove a Governor from office.

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- 244. Mr Nganga on the other hand, submitted on behalf of the 5th and 6th Respondents that the fact that the word gross was omitted from the charges does not mean that the violations attributed to the 1st Petitioner were not gross; that, what amounted to gross violation was determined by the content of the allegations and that the Senate was better placed to determine whether the allegations met the threshold of gross violation going by the evidence presented before it. Mr Nganga joined issue with Mr Mwangi Njoroge who submitted that this does not have jurisdiction to determine what amounts to gross violations since this would amount to reviewing the merit of the Senate’s decision to remove the Governor from office.

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- 245. We must to some extent agree with Mr Nganga that the County Assembly and the Senate are the best judge to determine whether the charges presented against the 1st Petitioner were in accordance with article 181 of the Constitution. The Constitution has set out that power of judging the merit of the charges to those two houses. It would thus be wrong in our view for this court to question the merits of the decision made by the County Assembly and the Senate. Indeed we wholly agree with the High Court decision in *Nancy Baraza v Judicial Service Commission & 9 others* (2012) e KLR 2013 it was held that;

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- “It is not for this Court or the Commission to find that the allegations made against the Petitioner did not amount to gross misconduct. In fact according to Prof Yash Pal Ghai’s ‘Kenya Constitution: An instrument for change’ cited by the Petitioner ‘whether a conduct is gross or not will depend on the matter as exposed by the facts’ which facts it is the duty

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- of the tribunal to establish’. 1
246. In support of this submission on this point, Mr, Nganga relied on the cases of *Kenya Pipeline Limited v Housing Ebara Company Limited & 2 others (supra)* *Mumo Matemu Case (supra)* and The Supreme Court Advisory Opinion No 2 of 2013 (*supra*). However, we are aware that Mr Muite did not move this Court to make a determination on the merit or otherwise of the charges framed against the 1st Petitioner. We understood him to be invoking the jurisdiction of this Court to interpret the extent, scope and applicability of article 181(1) of the Constitution. 5 10
247. The jurisdiction of the High Court to interpret the Constitution as provided for under article 165(3)(d) of the Constitution is not disputed by any of the parties herein. This Article provides thus; 15
- “(3) Subject to clause (5), the High Court shall have—
- (a)
 - (b)
 - (c)
 - (d) Jurisdiction to hear any question respecting the interpretation of this constitution including the determination of- 20
 - (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; 25
 - (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; and.....” 30
248. There is now a chain of authorities from High Court and the Court of Appeal confirming the position that this Court has jurisdiction to interpret the Constitution. See for example; *John Harun Mwau & 3 others v Attorney General and others* (2012) eKLR, *Center for Rights Education and Awareness & others v Attorney General* Petition No 36 of 2011, *International Center for Policy and Conflict & 5 others v Attorney General* Petition No 552 of 2012, *Jeanne W Gacheche & 6 others v Judges and Magistrates Vetting Board and others,* 35 40

- Nairobi Judicial Review No 295 of 2011. 1
249. We are therefore satisfied that we have the jurisdiction to interpret at this stage the meaning of the word “gross” as used in article 181(1) of the Constitution. In this interpretation, we will not be questioning the merit of the decision of the Senate, but we will be formulating a guideline on what constitutes gross violations of the Constitution and the law bearing in mind the office of the Governor in devolved government structure. 5
250. We begin by looking at the plain meaning of the word gross. 10
The *Concise Oxford English Dictionary* defines the word gross as;
‘Blatantly wrong or unacceptable’. That is the natural and ordinary meaning of the word ‘gross’. 15
- In his article Duru Onyekachi in *“Impeachment under Nigerian Law: A Journey through the cases”* available at <http://ssrn.com/author> states as follows while defining gross in relation to impeachment proceedings; 20
- “ ‘gross’ here means glaringly noticeable because of obvious inexcusable badness, or objectionableness or a conduct in breach of the Constitution. Accordingly, it is not every misconduct that will attract impeachment”. 25
251. With regard to the meaning of ‘gross’ violation and what it constitutes, we cannot do better than the Supreme Court of Nigeria did in *Hon Muyiwa Inakoju & others v Hon Abraham Adeolu Adeleke (supra)* when it defined it as follows; 30
- “The word ‘gross’ in the subsection does not bear its meaning of aggregate income. It rather means generally in the context atrocious, colossal, deplorable, disgusting, dreadful, enormous, gigantic, grave, heinous, outrageous, odious, and shocking. All these words express some extreme negative conduct. Therefore a misconduct which is the opposite of the above cannot constitute gross misconduct.” 35
- As to what constitutes gross violation, the Supreme Court stated as follows; 40
- “The following in my view, constitute grave violation or breach of the Constitution (a) interference with the constitutional functions of the legislature and the judiciary by an exhibition of overt unconstitutional executive power,

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- (b) Abuse of the fiscal provisions of the Constitution , (c) 1
 abuse of the Code of Conduct for Public Officers, (d)
 disregard and breach of Chapter IV of the Constitution on
 fundamental rights, (e) interference with local government
 funds and stealing from the funds, pilfering of the funds 5
 including monthly subventions for personal gains or for
 the comfort and advantage of the State Government, (f)
 instigation of military rule and military government, (g)
 Any other subversive conduct which is directly or indirectly 10
 inimical to the implementation of some other major sectors
 of the Constitution”.
252. We wholly agree with the Nigerian Supreme Court’s definition
 of what constitutes gross violation. To our mind therefore, whether
 a conduct is gross or not will depend on the the facts of each case 15
 having regard to the Article of the constitution or any written law
 alleged to have been violated. We find that it is not every violation
 of the Constitution or written law can lead to the removal of a
 Governor, it has to be a gross violation. 20
253. The question therefore is how to measure what constitutes gross
 violation. We are of the view, that the standard to be used, does
 not require a mathematical formula, but it must take into account
 the intendment of article 181(1) of the Constitution. In our view
 therefore whatever is alleged against a Governor must; 25
- (a) Be serious, substantial and weighty.
 - (b) There must be a nexus between the Governor and the
 alleged gross violations of the Constitution or any other
 written law.
 - (c) The charges framed against the Governor and the 30
 particulars thereof must disclose a gross violation of the
 Constitution or any other written law.
 - (d) The charges as framed must state with degree of precision
 the Article (s) or even sub-Article(s) of the Constitution 35
 or the provisions of any other written law that have been
 alleged to be grossly violated.
254. We agree with the sentiments of the Supreme Court of Nigeria
 in *Hon Muyiwa Inakoji & others v Hon Abraham Adeolu Adeleke*
(supra) where the court observed as follows; 40
- “It is not a lawful or legitimate exercise of the constitutional
 function in section 188 for a House of Assembly to remove

a Governor or a Deputy Governor to achieve a political purpose or one of organised vendetta clearly outside gross misconduct under the section. Section 188 cannot be invoked merely because the House does not like the face or look of the Governor or Deputy Governor in a particular moment or the Governor or Deputy Governor refused to respond with a generous smile to the legislature house on a parliamentary or courtesy visit to the holder of the office. The point I am trying struggling to make out of this light statement on a playful side is that section 188 is a very strong political weapon at the disposal of the House which must be used only in appropriate cases of serious wrong doing on the part of the Governor, which is tantamount to gross misconduct within the meaning of subsection (11). Section 188 is not a weapon available to the legislature to police a Governor or Deputy Governor in every wrong doing. A Governor or Deputy Governor, as human being, cannot always be right and he cannot claim to be right always. That explains why section 188 talks about gross violations. Accordingly, where a misconduct is not gross, then section 188, weapon of removal is not available to the House of Assembly.”

255. We agree with the sentiments of the Supreme Court of Nigeria in the case of *Hon Muyiwa Inakoju (supra)* which illustrates that the removal of a Governor through impeachment should not be taken lightly and that it should not be used for ulterior motives. In our view, that is why our Constitution at article 181 sets very high standards for removal of a Governor.

256. Again, the words of the Supreme Court of Nigeria, in *Hon Michael Dapianlong & 5 others v Chief Joshua Chibi Dariye* Supreme Court of Nigeria SC 39 of 2009 hold so true today and best describe the situation the 1st Petitioner finds himself in. The Court stated as follows;

“The office of the Governor or the Deputy Governor is an all important one. Any of them is in the office by the grace of the majority of the totality of that state. In getting him out of office for one reason or the other, the voice of the majority of the totality of the populace of the State must be reflected through the majority of the total members they voted into the house. The impeachment or removal of a Governor or Deputy Governor is a very serious business. Certainly, it

cannot be the intendment of the framers of the Constitution that the decision to impeach or remove anyone holding High office should be left in the hands of very negligible few as 8 (eight) members as it has been argued. The provisions of the Constitution must be interpreted in a just and holistic manner.” 1 5

257. We recall that Mr Kibe dissuaded us from following the Nigerian cases for the reason that those cases were filed to challenge the lack of two third majority rule required for impeachment of a Governor. Granted, that in those case, the issue for determination revolved around failure to attain the number threshold required to support a motion for impeachment, we find the authorities instructive regarding the importance of the office of a Governor and the need to maintain a high threshold for his removal. 10 15

258. As we have stated above, the removal of a Governor from office is a very grave issue. We wholly agree with Mr Nani Mungai that the right of a Governor to hold office is a political right recognised under article 38(3)(c). Article 38 also bestows on the people of Kenya the right to elect any person of their choice to a political office in including the office of a Governor. The decision to remove a Governor from office is essentially a limitation of those two rights which in this case is allowed by Article 181(1) of the Constitution. And this limitation justifies the need to ensure that the law is strictly followed in the removal of a Governor especially on the issue of threshold. 20 25

Whether the 1st, 2nd, 5th and 6th Respondents disobeyed Court orders issued on 23rd January 2014 and 3rd February 214. 30

259. It was Mr Muite’s SC submission that there must be due process in the removal of a Governor. He asserted that the 5th and 6th Respondents disobeyed the court order issued on the 23rd January 2014 which required that the 1st Petitioner be served with specific charges on which the County Assembly proposed to remove him from office and that he be given an opportunity to defend himself before a resolution for his removal was passed. Mr Njenga for the 5th and 6th Respondents disputed this claim and stated that by the time the orders of the Court were issued on 23rd January 2014, a private members motion by the County Assembly member known as Ibrahim Swaleh had already been introduced seeking to remove the 1st Petitioner from office. He thus contended that the order of 35 40

- the Court issued on 23rd January 2014 was incapable of compliance by the 5th and 6th Respondents. 1
260. Counsels for the 5th and 6th Respondents contended that the orders issued on 23rd January 2014 were not directed at the mover of the motion (Ibrahim Swaleh) who is not a party in this case but at the 5th and 6th Respondents who had nothing to do with the introduction of the motion. And that the orders were directed at the impeachment proceedings that were not before the County Assembly therefore incapable of compliance. 5
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261. In view, of the above rival submissions can it therefore be said that the court orders were disobeyed”
262. Before making that important finding, we need to consider the argument raised by Mr Njenga that the application for contempt before this Court is incompetent, given that notice was not served on the Attorney General a day before the application seeking leave to institute contempt proceedings against the 5th and 6th Respondents was filed. 15
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263. We are of the view that this objection is not merited. Since service of a notice to the Attorney General is a procedural technicality which has nothing to do with the substance of the application for contempt. This Court is enjoined by article 159(2)(d) of the Constitution to administer substantive justice without undue regard to technicalities, and in the circumstances this objection cannot be sustained. 25
264. It is not in dispute that a Member of the County Assembly may move a motion under section 33(1) of the County Government Act to remove a County Governor. It is not also in dispute that a motion for the removal of the County Governor was moved on 16th January 2014 by Ibrahim Swaleh, and the same was placed before the Speaker of the County Assembly who scheduled it to be moved on 23rd January 2014. On the 23rd January 2014, the 1st Petitioner filed Embu Petition No 1 of 2014 (*supra*) that was transferred to Kerugoya High Court and Githua J issued a conservatory order restraining the Speaker and the Clerk of the County Assembly of Embu and the County Assembly of Embu from holding such impeachments proceedings without having first served the Applicant with a notice containing the specific grounds/charges upon which his impeachment was being proposed and without giving him an 30
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- opportunity to be heard. It is also not in dispute that the Motion proposing the removal of the 1st Petitioner from office was finally tabled in the County Assembly on 28th January 2014 and passed on the same day. 1
265. Mr Njenga asked us not to make any findings of disobedience of Court orders against the 5th and 6th Respondents as he claimed that the Petitioners had failed to demonstrate that personal service of the court orders was effected on the 5th and 6th Respondents. He referred us to the case of *Kariuki & 2 others v Minister for Gender, Sports, Culture and Social Services & 2 others (Supra)* and Court of Appeal case of *Ochino & another v Okombo & 4 others* (1989) KLR 165 where it was held that personal service of court orders must be effected endorsed with a penal notice for a person to be held in contempt. He thus urged us to find that the law in Kenya provides that there must be personal service of an order. 5 10 15
266. We have seen a copy of the order issued by Githua J on 23rd January 2014. We have noted that it bears a stamp of the Speaker of the County Assembly of Embu on the face of the copy of orders which indicate that it was received by one Boniface Muthomi at 1904 hours on 23rd January 2014. Further, we have also read the affidavit of service sworn on 29th January 2014 by Mr Njuguna Njoroge, an Advocate of the High Court. In his Affidavit, Mr Njoroge explained that he served the pleadings and orders of Githua J on the County Assembly of Embu on 23rd January 2014. At paragraph 1 and 2 of his affidavit he states; 20 25
- “1. That on 24th January 2014, I received a court order dated 23rd January 2014, Certificate of Urgency and Notice of Motion dated 22nd January 214 and its supporting affidavit and annexures from Nyamu & Nyamu Advocates Nairobi with instructions to serve the same upon the Clerk, County Assembly of Embu, 30
2. That on the same day at 8:30am, I proceeded to the offices located at the County Assembly of Embu premises, alongthe Embu Meru Highway opposite Faith House in Embu and after explaining the purpose of my visit, I served the said documents upon the secretary who acknowledgedreceipt by stamping their official stamp on the face of my copies that I return herewith”. 35 40
267. We believe the above averments with regard to service as the

- same have not been controverted by any evidence to the contrary. To our mind, nothing would have stopped Boniface Muthomi and the Secretary to the County Assembly from filing affidavits denying service as alleged or by calling Mr Njuguna for cross-examination in respect to his averments on service. The 1st Petitioner’s claim that indeed the 5th and 6th Respondents were served with the Court orders is further supported by the stamps endorsed by the Office of the Speaker upon receipt of the same. Statements from the bar cannot therefore be taken as conclusive proof of lack of service.
268. We have seen the replying affidavit sworn by Justus K Mate, who is the Speaker of the County Assembly and Jim G Kauma, the Clerk of the County Assembly both sworn on 24th February 2014 denying service claiming that they were not personally served with a Copy of court orders. They also averred that they did not know about the court orders. We however note that the said Justus Mate has not denied that the office of the Speaker of the County Assembly of Embu was actually served with a copy of the court order of 23rd January 2014.
269. We therefore find that there was service of the court orders of 23rd January 2014 on the 5th and 6th Respondents.
270. We are alive to the 5th and 6th Respondents submissions that a finding on disobedience of court orders cannot be made unless there is evidence of personal service. For this proposition Mr Njenga relied on the holding by Lenaola J in the case of *Kariuki & 2 others v Minister for Gender, Sports, Culture and Social Services & 2 others (Supra)* where he expressed himself in the following terms;
- “.....But in our law, service is higher than knowledge and since the service here was frustrated.....I shall hold in accordance with the existing law that there was no service”
271. In our view, that was the law then which has since changed.
- The law as it stands today is that knowledge supersedes personal service. In support of our position, we cite the case of *Kenya Tea Growers Association v Francis Atwoli & 5 others* Petition No 64 of 201 where Lenaola J opined as follows;
- “In the case before me, I am more than satisfied that even at the higher level beyond reasonable doubt, when an individual has been served with and/or has knowledge of a court order but not only ignores it but in fact incites others to do the

same, the threshold for contempt has been met. Francis Atwoli in fact went further to arrogate himself the decision to determine when the strike should end despite the fact that the court order had stopped it. He went further to interpret it as made without jurisdiction and that only the workers court (Industrial Court) had jurisdiction to determine the matter. He did not do so once but on a number of occasion as he flew by helicopter from place to place on 18th October 2012. His contempt was obvious and his conduct and words can attract no other finding”

272. Further in *Basil Criticos v Attorney General & 8 others* (2012) eKLR while referring to the above quote in *Kenya Tea Growers Association Case (Supra)*, the Lenaola J stated as follows in regard to service of court orders;

“The point above is that where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary. That should be the correct legal position and I subscribe to it”.

273. We are in agreement with the Learned Judge. If a party can prove that there was knoweldge of court orders then in our view that would be sufficient to form a basis for the finding of contempt of court orders. That being the case, we now pause to answer the question whether the 5th and 6th Respondents had knowledge of Court orders as at 28th January 2014 when the motion for removal of the 1st Petitioner was deliberated upon.

274. We are clear in our mind that the Petitioners have demonstrated that the 5th and 6th Respondents had knowledge of Court orders. We have seen the letter dated 28th January 2014 and referenced CON/PET 1/2014 from the Deputy Registrar of Embu addressed “To Whom it May Concern” writing in response to the County of Embu Commander who had sought clarification of the seal of the Deputy Registrar at the High Court at Kerugoya affixed on the Court Order made on 23rd January 2014. The Deputy Registrar on that letter stated as follows;

“This is to confirm that the orders granted by the Honourable Lady Justice Cecilia Githua on 23rd January 2014 and issued on the same day are genuine and the Court seal is also genuine”

There is evidence to show that this letter was received by the County

Assembly on the same day, 28th January 2014. We have also noted the averment by the 5th Respondent in his Replying Affidavit to the effect that the court order was incompetent as it did not have a court seal. We take the view that the 5th Respondent could not have questioned the competence of the Court order in the manner described above, if he had not seen or had knowledge of the court order. 1
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275. We have also seen the newspaper advertisements in the Sunday Nation of 26th January 2014 and Daily Nation of 27th January 2014 reproducing verbatim the orders issued on 23rd January 2014 by Githua J. In The Standard Newspaper of 28th January 2014 the Petitioners caused to be published a penal notice to the effect that there were court orders issued on 23rd January 2014 at the High Court in Kerugoya and anyone who was in violation of those orders would be liable for contempt of court and would face penal consequences and detention in prison for a term not exceeding six months. It was the submission of Mr Njenga that the Court should disregard these newspaper advertisements as the same amounted to substituted service made without leave of the Court. However, we find no merit in this contention since in our view the newspaper advertisements amounted to a notice to members of the Public and indeed to the whole world, including Members of the County Assembly of Embu of the existence of court orders. 10
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276. We therefore find that the 5th and 6th Respondents had knowledge of those Court Orders issued on 23rd January 2014 and they cannot contest otherwise. Accordingly, the argument by Mr Njenga that the advertisements constituted substituted service cannot be true and we so find. 30

(a) Are the 5th and 6th Respondents in Contempt of Court

277. The motion for the removal of the 1st Petitioner was not moved on 23rd January 2014 as scheduled, but was moved on 28th January 2014. By then, we have already found as seen above that the Speaker and the County Assembly of Embu had been served with the orders of the Court and were aware of the Court orders. Despite having knowledge of the Court orders, it is not disputed that the 5th and 6th Respondents proceeded with the motion proposing removal of the 1st Petitioner without having served him and without giving him an opportunity to be heard on the same. It is contended by the 1st Petitioner and this is not disputed by the Respondents that he 35
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- saw the charges preferred against him by the 6th Respondent for the first time at the Senate. 1
278. As to the submission made by Mr Njenga that the 5th Respondent cannot be held in contempt of Court because the Speaker of the County Assembly of Embu was not the mover of the motion, and he does not sit in the County Assembly as a member to deliberate on the resolution to remove the Governor from office. We find that argument misleading as will be seen shortly from the provisions of Standing Order No 24 and 36 of the Standing Orders of the County Assembly of Embu. 5 10
279. Standing Order No 24 provides;
- “The Speaker shall preside at any sitting of the County Assembly but in absence of the Speaker, the deputy speaker shall preside and in the absence of both the Speaker and the deputy speaker, a member elected by the County Assembly for that purpose pursuant to article 178(2) of the Constitution shall preside” 15
- Then Standing Order No 36 provides that; 20
- “The Order Paper shall be prepared by the Clerk, showing the business to be placed before or taken by the County Assembly and the order in which it is to be taken, including a notice paper showing the business for each sitting day of the week, together with such other information as the Speaker may from time to time direct” 25
- From the provisions of the Standing Orders cited above, it is clear that it is the responsibility of the Speaker of the County Assembly to preside over the business of the County Assembly. In addition, it is his duty to direct the Clerk of the County Assembly in the preparation of the Order Paper showing the business for each sitting day of the County Assembly. We therefore find that the Speaker of the County Assembly of Embu, Mr Justus Kariuki Mate was the person who was in a position to ensure that the court order was obeyed given his role in the County Assembly. We have found that he allowed the motion, proposing the removal of the Governor from office to be debated and passed on 28th January 2014, without complying with the Court order. Accordingly, we find that the 5th Respondent, Mr Julius Kariuki Mate and the Clerk of the County Assembly of Embu Mr Jim Kauma acted in disobedience of court orders and are therefore guilty of contempt of court. We hereby cite 30 35 40

them for contempt of court and they will consequently, appear in this Court on a date to be decided by the Court when the appropriate sentence and or sanction shall be meted out against them. 1

Effect of disobedience of Court Orders 5

280. On the effect of disobedience of court orders, we cannot put it better than the Court did in *Hadkinson v Hadkinson* (1952) 2 All ER 211 where it was stated as follows;

“It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it...it would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null and void, whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question, that the course of a party knowing of an order which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed it must be obeyed. Such being the nature of this obligation, two consequences will in general follow from its breach. The first is that anyone who disobeys an order of the Court is in contempt of Court and may be punished by committal or attachment or otherwise. The second is that no application to the court by such a person will be entertained until he has purged himself of his contempt.” 10
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281. We however find the reasoning in *Clarke and others v Chadburn & others* (1985) 1 ll ER (P.C) 211_ most attractive in regard to our instant case. In this case it was held as follows; 35

“An act done in wilful disobedience of an injunction or court order was not only a contempt of Court but also an illegal and invalid act which could not, therefore, effect any change in the rights and liabilities of others. I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed. Wilful disobedience may 40

properly be described as being illegal. If by such disobedience the persons enjoined claim that they have validly effected some change in the rights and liabilities of others, I cannot see why it should be said that although they are liable to penalties for contempt of court for doing what they did, nevertheless those acts were validly done.....but the legal consequences of what has been done in breach of the law may plainly be very much affected by illegality. It seems to me on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted with illegality that produced them, even if the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it".

282. We are in agreement with the above authorities, to the effect that anything done in disobedience of court orders is null and void *ab initio* and is a nullity in law. Therefore the 6th Respondent having proceeded to pass a resolution for the removal of the 1st Petitioner from office in defiance of court order means that the resolution was a nullity. It is like that the resolution was never passed in the first place. In the circumstances, there was no valid resolution which could have been forwarded to the Speaker of the Senate for action under section 33(2) of the Act. The subsequent actions of the Senate are a nullity including the decision to remove the first Petitioner from office.

283. The above finding in our view would have been sufficient to dispose of the matter regarding the invalidity of the 1st Petitioner's removal from office. However, the Petitioners case is also that the 1st and 2nd Respondent acted in disobedience of court orders issued by Majanja J on 3rd of February 2014. We now turn to consider this issue.

Did the 1st and 2nd Respondent Act in disobedience of Court Orders

284. Following the resolution of the County Assembly to remove from office the 1st Petitioner despite the disobedience of court orders, the 1st Petitioner on 27th January 2014, served the Speaker of the Senate with the pleadings with regard to Embu Petition No 1 of 2014 (*supra*) together with the order of the Court issued on 23rd January 2014. The Speaker of the Senate proceeded to convene the Senate pursuant to the provisions of section 33(2)(a) of the

- County Government Act *vide* Gazette Notice No 627 dated 31st January 2014. 1
285. Consequently, the 1st Petitioner filed Nairobi Petition No 51 of 2014 (*supra*) on 3rd February 2014 where Majanja J issued orders 5
restraining the Speaker of the Senate from introducing, discussing, sitting or deliberating the impeachment of the 1st Petitioner based on the resolution forwarded by the Speaker of the Embu County Assembly. As it can be seen from the return of service of the affidavit of Wilfred Nyamu Mati sworn on 4th February 2014, the 1st and 10
2nd Respondents were served with the Court order and ruling of Majanja J. The ruling, Court order dated 3rd February 2014 and pleadings in Kerugoya Petition No 4 of 2014 (Formerly Nairobi Petition No 51 of 2014) were received by a Mr John Ngari who describes himself as the Legal Clerk on behalf of the Speaker of the 15
Senate on 4th February 2014 at 7 30am.
286. The 1st Respondent, the Speaker of the Senate and the 2nd Respondent, the Clerk of the Senate did not appear in Nairobi Petition No 51 of 2014 on 4th February 2014. As a result of which 20
Majanja J confirmed the *ex parte* orders issued on 3rd February 2014. Similarly, the 1st and 2nd Respondents did not file any responses or send a representative at the hearing.
287. Mr Nganga urged us not to find that the Petition was unopposed despite lack of responses from the 1st and 2nd Respondents. But 25
we are unable to yield to Mr Nganga’s request and for good reason. It is now trite law that although a party alleging a fact has the onus of proof of that fact, the opposing party is at the very least expected to file a response to those allegations of facts. Where such a party 30
does not respond to those facts, then the court can only but take it that those facts are actually uncontested. In so holding, we must associate ourselves with the sentiments of Wendoh J in *Rumba Kinuthia v Attorney General* Nairobi HCCC 1408 of 2004 where she held as follows; 35
‘Despite the fact that the applicant made very serious allegations against the defendant, government agents, servants and police officers, no affidavit was filed in reply, so that all the facts deponed to by the applicant in his affidavit are what the Court will take as representing the correct factual position’. 40
288. The question therefore is whether the facts as stated elsewhere above disclose that the 1st and 2nd Respondents are in contempt

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- of court as alleged by the Petitioners. 1
289. A perusal of the Court record of 4th February 2014 demonstrates that the court convened at 10 30am, there was no appearance for the Senate, Mr Nyamu appeared for the 1st Petitioner and The Attorney General was present. Majanja J then extended the *ex parte* orders of 3rd February 2014. As stated above, the service upon the Senate had been effected by Mr Nyamu on the morning of 4th February 2014 at 7.30 am. 5
290. Be as it may, had the Speaker of the Senate adhered to the Court orders of 3rd February 2014, the impeachment proceedings would not have been held. We must agree with Mr Issa Mansur that at the time the Speaker of the Senate received the court orders on the morning of 4th February 2014, he had three options. First, either appear in Court before Majanja J as ordered and seek to vary, set aside or discharge the Court orders already in place stopping any deliberations on the impeachment of the 1st Petitioner, secondly, choose to comply with the Court orders by not convening the Senate or lastly revoke his Gazette Notice No 627 convening the Senate and dated 31st January 2014. 10 15 20
291. However, the Speaker of the Senate allowed the Special sitting of the Senate to proceed on 4th February 2014. Following the deliberations on the motion the Senate resolved to establish a Special Committee comprising 11 members to investigate the proposed removal from office of the Governor and Deputy Governor of Embu County and report to the Senate within 10 days. The Committee before starting its work observed that there were orders issued by the High Court on 4th February 2014 and addressed itself as follows in its report; 25 30
- “The Committee observed that the High Court had issued conservatory orders restraining,.....The question before the Committee therefore was, What is the effect of that court order on the Senate and the Special Committee” The Committee resolved that it would defer its thoughts on the matter and hear the parties on the matter, if it would arise and therefore reserved its findings on the matter to the conclusion of the hearing of the evidence by the Parties”. 35
292. It is thus clear to our minds that the Senate was aware of the Court orders and indeed deliberated on those orders and choose not to obey the orders and instead commenced its proceedings. It 40

is clear that the Senate acted in violation of court orders and we so find. However, we cannot cite the Speaker and the Clerk of the Senate being the representatives of the Senate for contempt of court since no application for contempt is before the court. 1

293. We must state at this point that disobedience of court order is a grave issue as it undermines the rule of law. Article 10 of the Constitution identifies the rule of law as one of the national values and principles of governance. Article 3 of the Constitution is very clear that every person has an obligation to respect and defend the Constitution. So that any person who disobeys a court order also violates the Constitution. We agree with the sentiments of Odunga J in *Judicial Service Commission v The Speaker of the National Assembly & another* Petition No 518 of 2013 where the Learned Judge expressed himself as follows; 5

“Respect of Court orders however disagreeable one may find them is a cardinal tenet of the rule of law and where a person feels that a particular order is irregular the option is not to disobey it with impunity but to apply to have the same set aside. When decision to disobey particular court orders are left to the whims of the parties public disorder and chaos are likely to reign supreme yet under the preamble of our constitution we do recognise the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law”. 10

294. Article 159(1) states that judicial authority in Kenya is derived from the people and vests in and is exercised by, the courts and tribunals established under the Constitution. Courts of law speak through their Court orders, and it follows that those orders must be obeyed. The Court of Appeal in *Commercial Bank of Africa Ltd v Ndirangu* (1990-1994) EA 70 (CAK) recognised the importance of obeying Court orders and held that; 25

“A flagrant disobedience of a court order, if allowed to go unchecked, will result in the onset of an erosion of judicial authority”. 30

295. We cannot over emphasis the fact that court orders once issued must be obeyed by those against whom they are directed unless or until they are either discharged or set aside. More so because once a court order is issued, it binds all and sundry, the mighty and 35

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- the lowly equally, and the County Assembly and the Senate are no exception. The developing trend in our country where parties to litigation appear to be choosing which court orders to obey or disobey must be stopped in order to build the public confidence in the rule of law. 1
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- Whether A Deputy Governor can assume office under article 182(2) of the Constitution through a process of impeachment that was in violation of the Constitution.
296. We have already found that the proceedings in regard to the removal of the 1st Petitioner were carried out in violation of Court orders and found the proceedings to have been a nullity *ab initio*. Accordingly the Deputy Governor cannot assume office under article 182(2) and benefit from an illegal process, and the reasons are stated elsewhere in this judgment. However, for avoidance of doubt, an act done in disobedience of a court order is illegal and invalid act which cannot affect any change in the rights and liabilities of others. See *Clarke and others v Chadburn & others (supra)*. 10
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297. It must be remembered that article 182(2) is premised on assumption that a Governor has been removed from office legally. It therefore follows that if such removal is through an illegal process, then the Deputy Governor cannot assume office under article 182(2). 20
- Whether the fundamental rights and freedoms of the Petitioner were violated 25
- Right to Fair administrative Action
298. It was the 1st Petitioner contention that before the resolution to remove him from office by the County Assembly was passed, he was not accorded a hearing which amounted to a violation of article 47 of the Constitution. Article 47 provides that: 30
- “(i) Every Person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. 35
- (ii) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action”
299. In our view, article 47 anchors the rules of natural justice into our constitution. One of the rules of natural justice demands that no one should be condemned unheard. Looking at section 33(1) 40

of the County Government Act, it is clear that it does not contain a provision for the participation of a Governor leading to the resolution to recommend his removal. 1

300. Section 14 of the County Government Act has mandated County Assemblies to make Standing Orders consistent with the Constitution and the Act, to regulate the Procedure of the County Assembly including orders for the proper conduct of its proceedings. Pursuant to this provision, The Embu County Assembly has enacted the Embu County Assembly Standing Orders. The procedure for the removal of the Governor is found under Standing Order No 61 which has a detailed procedure for the removal of a Governor from office. It states; 5

“61(1) Before giving notice of motion under, section 33 of the county government act no 17 of 2012 the member shall deliver to the clerk a copy of the proposed motion in writing stating the grounds particulars upon which the proposal is made, for the impeachment of the governor on a ground of violation of a provision of the constitution or of any other law; where there are serious reasons for believing that the governor has committed a crime under national or international law; or for gross misconduct or abuse of office. The notice of motion shall be signed by the member who affirms that the particulars of allegations contained in the motion are true to his or her own knowledge and the same verified by each of the members constituting at least a third of all the members and that the allegations therein are true of their own knowledge and belief on the basis of their reading and appreciation of information pertinent thereto and each of them sign a verification form provided by the clerk for that purpose. 15

(2) The clerk shall submit the proposed motion to the speaker for approval. 20

(3) A member who had obtained the approval of the speaker to move a motion under paragraph (1) shall give a seven (7) days notice calling for impeachment of the governor. 25

(4) Upon the expiry of seven(7) days, after notice given, the motion shall be placed on the order paper and 30

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- shall be disposed of within three days; provided that
if the county assembly is not then sitting, the speaker
shall summon the assembly to meet on and cause the
motion to be considered at that meeting after notice
has been given. 1 5
- (5) When the order for the motion is read, the speaker
shall refuse to allow the member to move the motion,
unless the speaker is satisfied that the member is
supported by at least a third of all members of the
county assembly to move the motion; provided that 10
within the seven days' notice, the clerk shall cause
to be prepared and deposited in his office a list of
all members of the county assembly with an open
space against each name for purposes of appending
signatures, which list shall be entitled "Signatures
In Support of a Motion for removal of Governor by
Impeachment". 15
- (6) Any signature appended to the list as provided under
paragraph (5) shall not be withdrawn. 20
- (7) When the motion has been passed by two- thirds of
all members of the county assembly, the speaker shall
inform the speaker of the senate of that resolution
within two days." 25
301. As can be seen, the Standing Orders while providing for the
procedure for removal of the Governor have failed to provide for
the right of the Governor to be heard before the decision to remove
him can be made. 30
302. As to what constitutes fair administrative action, The
Constitutional Court of South Africa in *President of the Republic of
South Africa and others v South African Rugby Football Union and
others* (CCT16/98) 2000, while interpreting a provision similar to
our article 47 of the Constitution stated at paragraphs 135-136 as
follows; 35
- "Although the right to just administrative action was
entrenched in our Constitution in recognition of the
importance of the common law governing administrative
review, it is not correct to see section 33 as a mere codification
of common law principles. The right to just administrative
action is now entrenched as a constitutional control over the
exercise of power. Principles previously established by the 40

- common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades....”
303. In *Halsburys Laws of England*, 5th Edition 2010 vol 61 it is stated as follows in regard to the right to be heard;
- “The Rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This Rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court.”
304. A literal reading of that section 33(1) and Standing Order No 61 reveals that the procedure provided therein does not provide for the right of hearing for the Governor at the County Assembly. Mr Njoroge urged us to find that Standing Order No 64 provides for the right to be heard. This standing order reads;
- Right to be heard
- 64(1) Whenever the constitution, any written law or these standing order –
- (a) Requires the county assembly to consider a petition or a proposal for the removal of a person from office, the person shall be entitled to appear before the relevant committee of the county assembly considering the matter and shall be entitled to legal representation.
- (b) Requires the county assembly to hear a person on grounds of removal from office, or in such similar circumstances, the county assembly shall hear the person-
- (i) At the date and time to be determined by the

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- speaker. 1
- (ii) For a duration of not more two hours or such further time as the speaker may, in each case determine; and
- (iii) In such other manner and order as the speaker shall, in each case determine. 5
- (2) The person being removed from office shall be availed with the report of the select committee, together with any other evidence adduced and such note or papers presented to the committee at least three days before the debate on the motion. 10
305. Our reading of this Standing Order confirms that the Standing Order No 64(1)(b) applies to the removal of the Governor as it “Requires the county assembly to hear a person on grounds of removal from office, or in such similar circumstances, the county assembly shall hear the person-.”It therefore means that the Governor has a right to be heard at the County Assembly. 15
306. With due respect we do not agree with the submissions made by the Learned Counsel for the 5th and 6th Respondent that the proposal by a County Assembly to have a Governor removed from office was akin to the drafting of charges by the Director of Public Prosecutions when commencing a criminal prosecution against an accused person and that therefore serving a Governor with charges and according him a hearing at the County Assembly was not necessary; that section 33 should be read as a whole and that the right to a hearing provided for by section 33(2) to a Governor facing removal proceedings at the Senate was sufficient to satisfy the legal requirement for a fair hearing. 20 25 30
307. We take the view that the resolution proposing the removal of a Governor from office involves a process in which a motion is tabled in the County Assembly which is debated before it is either approved or rejected. This is the process that triggers the removal proceedings at the Senate in the event that the motion is approved. Since it is at the County Assembly that adverse findings against the conduct of a Governor while in office are first made, and it is those findings in the form of a resolution that lead to the removal proceedings at the Senate whose outcome may affect his political right to hold an elective office, we are persuaded to find, which we hereby do, that even at the County Assembly the right to a hearing must be accorded 35 40

- to a Governor at any time that the motion proposing removal from office is being debated before it is approved or rejected. 1
308. Failure of section 33(1) to make provision for a Governor facing a proposal of his removal from office is the Lacuna in law which Githua J sought to fill when she made the orders of 23rd January 2014 which we have found elsewhere in this judgment that the 5th and 6th Respondents chose to disobey. 5
309. As we have noted earlier, the County Assembly of Embu had already made provisions to as to the right to a hearing in its Standing Orders but for unknown reasons they chose to violate their own Standing Orders by not giving the 1st Petitioner an opportunity to be heard. It is therefore our finding that in so doing they also violated the 1st Petitioner’s right to fair administrative action enshrined under article 47 of the Constitution. We make this finding bearing in mind that it is not disputed in this case, that in passing the resolution proposing the removal of 1st Petitioner from office, the County Assembly was acting as a quasi judicial body. 10
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310. Even though section 33(1) of the Act does not provide expressly for the right to be heard, we are alive to the rule that there is a presumption in the interpretation of statutes that rules of natural justice will apply whenever administrative decisions with a potential to adversely affect an individual are made. In *Onyango Oloo v Attorney General* (1986-1989) EA 456 Court of Appeal stated as follows 20
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- “The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard....There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice....To “consider” is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion.... “Consider” implies looking at the whole matter before reaching a conclusion....A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the 30
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- same decision would have been arrived at....It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided.” 1 5
311. It is therefore clear in our mind the right to be heard should apply whenever section 33(1) of the Act is being invoked by any County Assembly. 10
- Right to Fair Hearing
312. The 1st Petitioner also alleged that his right to fair hearing was violated as provided for under article 50(1) of the Constitution. This article provides as follows; 15
- 50(1) Every person has the right to have any dispute that can be resolve by the application of law decided in a fair and public hearing before a Court of law or, if appropriate another independent and impartial tribunal or body.
313. In our view, the rights provided for under article 50(1) are available to a person charged in a criminal trial or to a party to a civil dispute in a court of law or other independent tribunals. The 1st Petitioner was not undergoing a criminal trial or civil proceedings and he cannot contend that his right to fair hearing had been violated. 20 25
- Conclusion
314. We have found that the 1st, 2nd, 5th and 6th Respondents acted in violation of the Court orders of 3rd February 2014 and 23rd January 2014 respectively. In the circumstances, the removal of the 1st Petitioner as the Governor of Embu County by the Senate was null and void *ab initio* and therefore amounted to a nullity in law. We have also found that the 1st Petitioner’s right to fair administrative action was violated by the 6th Respondent. 30 35
- Reliefs
315. Having made the foregoing findings, we must determine the appropriate reliefs in the circumstances of this Case. In so doing we are alive to the provisions of article 23(3) of the Constitution which provides that “in any proceedings brought under Aarticle 22, a Court may grant appropriate relief, which includes but is not limited to declaration of rights, injunction, conservatory order, a 40

declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24, an order for compensation; and an order of judicial review. 1

316. The orders that commend themselves to us are as follows; 5

(a) We declare that the proceedings for impeachment of a Governor under article 181 of the Constitution are quasi judicial in nature and are therefore subject to the jurisdiction of the High Court under article 165(3)(d) and 6 of the Constitution. 10

(b) We declare that the proceedings, resolution, consequential Gazette notices, actions and any communications with regard to the removal of the 1st Petitioner before the Embu County Assembly and the Senate were held in violation and in disregard of court orders and were therefore null and void. 15

(c) We hereby issue an order of *certiorari* to remove to the High Court and quash the resolution passed by the County Assembly of Embu dated 28th January 2014 and the Resolution of the Senate dated 14th February 2014 to remove the 1st Petitioner from office as the Governor of Embu County. 20

(d) We hereby issue an order of *certiorari* to remove to the High Court and quash the Gazette Notice No 1052 of 17th February 2014 on the resolution of impeachment of the first Petitioner. 25

(e) We hereby direct that summons be issued and served on the Respondents in Misc Application No 4 of 2014, namely, Mr Justus Kariuki Mate and Mr Jim G Kauma to appear before this Court on 15th May 2014 for further orders. 30

(f) On costs, rule 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and procedure Rules, 2013 provides that an award of costs is at the discretion of the Court. Taking into account the determination we have made in this matter, we order that each party should bear their own costs. 35

317. For the avoidance of doubt, we are aware that some of the reliefs we have granted in this Petition, have the effect of reinstating the 40

1st Petitioner to the office of Governor of Embu County. However, this should not be construed as a bar to any future removal from office should the need arise as long as the same is conducted in accordance with the law.	1
318. Finally, we must take this opportunity to thank all the counsel in this Petition. Mr Muite SC, Mr Ahmednasir SC, Mr Nyamu, Mr Issa Mansur, Mr Njoroge Njuguna, Mr Wanyama, Mr Nganga, Mr Njenga, Mr Kibe, Mr Mwangi Njoroge and Mr Thande for their invaluable submissions to the development of this important area of our law on devolution. We must appreciate them for their well reasoned arguments especially given that this is the first pronouncement on this area of the law on the removal of a Governor. They have materially assisted this Court for which we thank them. If we have not referred to all the authorities that were cited, it is not for lack of appreciation for their industry.	5 10 15
319. We must also appreciate our Research Assistants, Ms Carolene Kituku and Ms Ruth Kihuria, their efforts, commitment, diligence and support in the preparation of this judgment.	20
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**International Legal Consultancy Group v Senate
& another [2014] KLR-HCK**

High Court, at Kerugoya April 16, 2014
HI Ong’udi, CW Githua & BN Olao, JJ

Constitutional Petition No 8 of 2014

Brief facts

The Petitioner brought a Petition before the High Court challenging the decision of the Senate to summon the nine (9) County Governors and County Executive Members responsible for finance to appear before it and produce various documents and respond to various issues with regard to county finance and fiscal management within their counties.

The Petitioner submitted that the Senate’s oversight role over nationally collected revenue was not identical to the County Assembly’s role over the County Executive Committee which was the executive arm of the County Government, arguing that the Senate could not therefore scrutinize county expenditures in the same way the committees and general assemblies of the County legislatures could.

Issues

- i. Whether the High Court had jurisdiction to determine the Constitutionality of the acts of the Senate in summoning the County Governors and the County Assembly Members of finance under article 125 of the Constitution.
- ii. Whether the summoning of the Governors by the Senate and the County Executive Committee members of Finance and demanding that they produce certain documentation in responding to financial management in their respective counties was unconstitutional.
- iii. Whether the High Court could issue a permanent injunction to restrain the Senate from summoning County Governors to appear before it to answer questions on public financial management.

Constitutional Law – County Government – where the Senate had summoned the Governors and Members of the Executive Committee of Finance to appear before it to answer questions on public financial management – whether the summoning was unconstitutional – Constitution of Kenya, 2010 article 1,10,159(2),259(2).

Constitutional Law – jurisdiction – petition challenging the decision of the Senate to summon County Governors and County Executive

Committee Members to answer charges – whether the High Court had jurisdiction to hear and determine the matter. 1

Civil Practice and Procedure – injunction – application for a permanent injunction to restrain the Senate from summoning County Governors to appear before it to answer questions on public financial management – whether the application had merit. 5

Held:

1. The High Court was clothed with the jurisdiction to hear any question concerning the interpretation of the Constitution. Additionally, in exercising its judicial authority, the High Court was obliged under article 159(2) of the Constitution to protect and promote the purpose and principles of the Constitution. In article 259 of the Constitution the High Court was also enjoined to interpret the Constitution in a manner that promoted its purposes, values and principles, advanced the Rule of law, human rights and fundamental freedoms in the Bill of Rights and which contributed to good governance. 10
2. Article 1 of the Constitution reposed the sovereign power to the people of Kenya but provided for the delegation of that power to various State organs. Those organs included Parliament, the County Assemblies, the Executive at the National and County levels of Government, the Judiciary and independent Tribunals/ Commissions. To facilitate the proper and effective exercise of the delegated power, the Constitution allocated functions, powers and responsibilities to all those organs. 15
3. No person or state organ is above the law and above the Constitution. All organs created by the Constitution are subordinate to it. Further, article 10(1) of the Constitution bound all State organs, State officers, public officers and all persons when applying and interpreting the Constitution. Therefore when any of those organs oversteps its area of operation as assigned by the Constitution, the Court would not hesitate to state so. 20
4. The High Court had been called upon to interpret various articles of the Constitution with regard to the role of the Senate *vis-a-vis* the County Assemblies in terms of oversight of financial resources allocated to the counties. It was against that background that the High Court indeed had the jurisdiction and power to hear and determine the matters raised in the Petition in regard to the Constitutionality of the actions of the Senate. 25
5. The National and County Governments were equal partners in the 30

- devolved structure though they were autonomous. That autonomy included certain distinct features such as political autonomy, functional autonomy, financial autonomy and administrative autonomy. Nonetheless, despite that autonomy, both levels of Government were inter-related and required to work together to discharge their various functions for the benefit of the Kenyan people. Though each level of Government was separate and distinct, none could work in isolation. Due to that inter-relation, the Constitution mandated co-operation and consultation between the two levels of Government to ensure that devolution worked for the benefit of the Kenyan people.
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6. The Senate represented the Counties, and served to protect the interests of the counties and their Governments at the National level. It was mandated to participate in the law-making function of Parliament by considering, debating and approving Bills concerning the Counties. The Senate also determined the allocation of National revenue among counties and exercised oversight over National revenue allocated to the County Governments. It also participated in the oversight of the Governors by considering resolutions with regard to their removal or impeachment under article 181 of the Constitution. Therefore the Senate and the County Governments were constitutionally designed to work together in ensuring the fruits of devolution. The Senate, which was at the National level of Government, had a critical role in ensuring that the counties interests were protected at the National Level of Government.
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7. The Senate was conferred with the powers to summon any person to appear before it to give evidence or to provide information, within its Constitutional and statutory mandate. The powers to summon by the Committees were equivalent to those of the High Court. The said provision was similar to article 195 of the Constitution which granted the County Assemblies similar powers to summon. However, that power to summon could not be exercised arbitrarily or capriciously.
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8. The powers to summon anyone under article 125 of the Constitution could only be exercised by the Senate when it was properly seized of a matter in execution of its constitutional mandate. The summons should also be issued against persons who were reasonably expected to have relevant knowledge or information necessary to assist the Senate with matters under consideration.
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9. A provision of the Constitution should be interpreted in harmony with the whole document of the Constitution and not in isolation.

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- Each section of the Constitution should sustain and not destroy the other. Therefore article 226(2) had to be read together with article 96 of the Constitution which provided for the roles of the Senate. Particularly, of importance was article 96(3) which gave the Senate a central role in the fiscal matters of the County Governments concerning the allocation of National Revenue. The Constitution under that proviso went further to provide that the Senate had an oversight role over the National Revenue allocated to Counties. That provision was clear and required no more than a literal interpretation. 1
10. The office of the Controller of Budget and Auditor General were shared institutions at both the County and National levels of Government whose role was to ensure that the two levels of Government operated within the principles of public finance stipulated under article 201 of the Constitution. Further, a committee of Senate was allowed to examine financial statements and other documents submitted to it pursuant to Part IV of the Public Finance Management Act of 2012 which dealt with County Government responsibilities with regard to management and control of public finance. 5
11. The Senate was entitled to examine and consider the Approved Budget Estimates for the fiscal year 2013/14 and Approved Supplementary Estimates for the Fiscal year 2013/14 from the requested County Governments by virtue of section 8(1)(c) of the Public Finance Management Act and article 96(3) of the Constitution, as the estimates would enable the Senate to examine and compare the same against the findings contained in the Report by the Controller of Budget regarding the implementation and expenditure of the funds allocated to each County out of the national revenue. 10
12. The Senate's power was not limited to oversight over National agencies which managed National revenue allocated to the counties such as the National Treasury. That would have been against the spirit and letter of article 96(3) of the Constitution which vested a wide power on the Senate to oversee both the provision and expenditure of the national revenue allocated to the counties. Therefore since the Senate was properly seized of the matters with regard to the issues raised by the Controller of Budget in the County Implementation Report, it had power to summon any person under article 125 for purposes of giving evidence or providing information concerning the issues raised in that report. 15
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13. The first persons of contact with regard to any issue of financial management of a county would be the accounting officers appointed at the county level. Those officers were accountable to the County Assemblies by virtue of article 226(2) of the Constitution and section 149 of the Public Finance Management Act. Nevertheless, the Constitution provided for oversight of county public finances at two levels, by the County Assemblies at the County level and by the Senate at the National level. That was the Constitution and unless amended, the High Court could only interpret it as it was. Moreover, the Constitution did not prohibit the Senate from summoning Accounting Officers and or County Executive members in performing its oversight functions under article 96(3) of the Constitution. Logically, in exercise of its powers under article 125 of the Constitution, the Senate was empowered to summon any person, including the accounting officers of the County Governments if such officers could provide information or evidence in relation to the National revenue allocated to a particular County. 1
14. Since the County Governors were not answerable to the County Assembly in terms of fiscal management of the County resources under section 149 of the Public Finance Management Act, they had to be held accountable by the Senate for the National revenue allocated to their respective Counties in view of the provisions of section 30(3)(f) of the County Governments Act, as read together with article 10(2)(c) of the Constitution on the National values and principles of governance. The Governors being State Officers were bound by the national values of transparency, accountability and observance of good governance when performing their duties as the Chief Executive Officers of the County Governments. 5
15. Under article 125 of the Constitution, the County Governor and the County Assembly Member for finance who belonged to the executive arm of the County Government could also be summoned by the Senate in exercise of their oversight mandate under article 96(3) of the Constitution. Though the executive arm of the County Government was also answerable to the County Assemblies of their respective counties, that did not preclude the said arm from providing information to the Senate when called upon to do so in exercise of their oversight mandate under article 96(3). 10
16. Under article 10(2) of the Constitution one of the values of governance enshrined in the Constitution was transparency and accountability. Every officer in every State organ and at both levels of Government had to respect and comply with any mechanism 15
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- of accountability established by the Constitution and the law to the fullest extent possible. The Court under article 259 of the Constitution had to therefore interpret the Constitution in a manner that promoted good governance through transparency and accountability. Put in another way, when persons in charge of managing County finances were not held to account, the objectives of devolution set out under article 174, which included promoting democratic and accountable exercise of power; and to enhance checks and balances of powers, would be defeated. 1
17. All Public Officers, including Governors had to be accountable to the public for the utilization of resources under their care. The Senate, which was one of the State organs in which the people had delegated their sovereign powers to, in exercise of its oversight powers under article 96(3) of the Constitution, had the powers to summon County Governors. Further, the Senate could also summon the County Executive Member for finance since such officers might also have had information with regard to the issues raised by the Controller of Budget or any query with respect to how the national revenue allocated to a particular county had been utilized and implemented within the County budgets. 5 10
18. The Senate's oversight role could not be likened to the role of the County Assembly under article 226(2) of the Constitution. Under article 96(3), the Senate's oversight role was restricted to the National revenue allocated to the counties. It had no oversight over grants, loans and revenue generated locally by the counties. Under article 226(2) of the Constitution the County Assembly had a wide berth to oversee all the financial resources of the county including revenues allocated by the National Government and the revenue generated locally by the respective County. The Senate could not therefore overreach its oversight mandate under article 96(3) to any other aspect of County Government operations and resources as that was the sole preserve of the County Assemblies. To that extent, the Senate and the County Assembly only had a collective role in the oversight of nationally allocated revenue to the Counties. 15 20 25 30 35
19. The Public Finance Management Act, which dealt with the financial management of public funds for all public bodies at both the National and the County level, did not provide for a mechanism on how both the Senate and the County Assemblies could exercise their oversight powers over National revenue allocated to the County governments in a manner that would avoid any jurisdictional overlaps. The Public Finance Management Act should therefore be 40

- amended to avoid duplication of roles and consequent inefficiencies with regard to the powers accorded to Senate under article 96(3) and the powers of oversight accorded to the County Assemblies under article 226(2) of the Constitution.
20. It was necessary to have a provision in the Public Finance Management Act to guide the Senate and the County Assemblies on how they should co-operate in the oversight of National revenue allocated to the County, while respecting the principle of separation of powers and in furtherance to article 189 of the Constitution.
21. Though the Senate and County Assembly were on two levels of Government which were autonomous, the National Government, through the Senate under article 96(3) of the Constitution was granted limited powers of oversight and supervision in county affairs in terms of financial management of the National revenue. However, since the oversight mandate granted to the Senate were powers that were constitutionally circumscribed and constrained, they did not subordinate the County Government to the National Government. The oversight powers of Senate under article 96(3) had to therefore be exercised within the framework of co-operative Government. If the Senate in exercise of its oversight powers over County finances was seen as an intrusion of the autonomy of County Governments, then that was an intrusion that was allowed by the People of Kenya when they enacted article 96(3) of the Constitution and the High Court could only give effect to the Sovereign will of the Kenyan People.
22. Article 125 of the Constitution granted the Senate and the National Assembly and their respective Committees the power to summon any person to give evidence or provide information with regard to a matter they were seized of. That Constitutional power had to be respected by all public officials at all times. However, when those powers were exercised in reference to members of the County Government, there had to be a measure of restraint by the Senate, it ought not do so arbitrarily and capriciously. It ought to exercise caution and refrain from acting in a manner that could be construed as micro-managing devolved units at the county level. It ought to endeavor to sustain the spirit and letter of the Constitution as enshrined in article 6(2).
23. Senate was required by the Constitution under article 6(2) of the Constitution when exercising its oversight powers over the County Governments under article 96(3) of the Constitution to do so in a manner that fosters and nurtures the principles of devolution in

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- the new Constitutional dispensation. Before resulting to summons, the Senate should have sought consultations or mediation with the respective County Governors with regard to the concerns raised by the Controller of Budget's report issued with deference to implementation of County budgets. In order to promote harmonious co-existence between the Senate and the County Governments for the sake of harnessing the fruits of devolution for the benefit of the people of Kenya, the Senate should only issue summons to Governors or other Officers of the County Government as a matter of last resort where it was clear that the County Governors and other County Officials had declined an invitation by the Senate or its Committee(s) to answer to matters of oversight of County Funds. The Senate should endeavor to improve accountability at the County level and not cripple the County Governments.
24. The Senate, which is one of the organs of the National Government and County Governments need to co-operate and engage on a platform of mutual relations and consultation as opposed to engaging in adversarial relations with regard to any matter touching on devolution. The Courts should therefore be used as a last point of call with respect to any dispute concerning the functional areas of any State organ under the new Constitutional dispensation.
25. The High Court could only issue the permanent injunctions against the Senate if it was demonstrated by the Petitioner that the Senate abused its parliamentary process and also issued summons to achieve ulterior political motives. The Petitioner did not demonstrate that. The Court therefore could not issue the permanent injunctions sought by the Petitioners
26. (**Obiter**) This cas has generated substantial public interest with regard to the Court's role in arbitrating the apparent conflict between the County Governments and the Senate. We take judicial notice of the fact that various threats have been issued against the Judiciary, some of its members and County Governments including a proposal that the Division of Revenue Bill should not be passed since the Governors do not wish to be held accountable. Not only will this be contrary to the Constitution, but such a stance will unfortunately lead to tragic consequences as the County Governments will be deprived of national revenue which is the antithesis of devolution. The same would also be contrary to the spirit of article 10 on the national values and principles and article 6 of the Constitution. We therefore urge both the Senate and County Governments through the Governors, to foster dialogue and co-operate in the interest of the

counties they represent and swore to protect while taking their oath of office. They are all servants of the people; elected by the people to promote their interests and should embrace servant leadership. Superiority contests will only kill rather than promote devolution.” 1

Petition dismissed; Judgment to be brought to the attention of the Attorney-General for necessary action; No orders as to costs. 5

Cases

East Africa

1. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal No 290 of 2012 – (Explained) 10
2. *Olum v Attorney General of Uganda* [2002] 2 EA 508 – (Explained)
3. *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 – (Mentioned)
4. *Speaker of the Senate & another v Attorney General & 4 others* Advisory Opinion No 2 of 2013 – (Applied) 15
5. *Tinyefuza v Attorney General* [1997] UGCC 3 – (Applied)

South Africa

1. *Doctors for Life International v Speaker of the National Assembly & others* [2006] ZACC 11; 2006 (12) BCLR 1399 – (Explained) 20
2. *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000 (Liquor Bill Case)* [1999] ZACC 15; 2000(1) BCLR 1– (Explained)

United States 25

1. *Smith Dakota v North Carolina* 192 US 268 (1940) – (Explained)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 1(3)(4); 2(2); 3; 10(1)(2) (c); 6(2); 93; 95(4)(c); 96(3); 125; 145; 149; 150; 159(1); 160(1); 165(3)(d)(i)(ii)(iii); 174; 181; 189(3)(4); 192; 195; 217; 226(2); 228(6); 229(8); 259; Sixth Schedule section 7 – (Interpreted) 30
2. County Governments Act, 2012 (Act No 17 of 2012) section 30(3) (f) – (Interpreted)
3. Intergovernmental Relations Act, 2012 (Act No 2 of 2012) section 31 – (Interpreted) 35
4. National Assembly (Powers and Privileges) Act (cap 6) sections 14, 15 – (Interpreted)
5. Public Finance Management Act, 2012 (Act No 18 of 2012) sections 8(1)(c); 148; 149 – (Interpreted) 40

Advocates

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1. *Mr Ahmednasir Abdullahi*, Senior Counsel, and *Mr Peter Wanyama* for the Petitioner

April 16, 2014, the following Judgment of the Court was delivered.
Introduction

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1. The Petitioner filed the Petition dated 17th February 2013, challenging the decision of the Senate to summon the nine (9) County Governors and County Executive Members responsible for finance to appear before it and produce various documents and respond to various issues with regard to county finance and fiscal management within their counties. The said summons dated 8th February, 2014 were issued pursuant to the provisions of article 125 of the Constitution. The nine Governors summoned (hereinafter “the Governors”) were as follows;

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- i. Kenneth Lusaka of Bungoma County
- ii. Isaac Ruto of Bomet County
- iii. William Kabogo of Kiambu County
- iv. Julius Malombe of Kitui County
- v. Jack Ranguma of Kisumu County
- vi. Kinuthia Mbugua of Nakuru County
- vii. Samuel Tunai of Narok County
- viii. Hussein Dado of Tana River County and
- ix. Ahmed Abdullahi of Wajir County

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Background

2. The Petition was filed at the Nairobi High Court as Nairobi Petition No 74 of 2014. Simultaneously with the Petition, the Petitioner also filed an application dated 17th February, 2014 seeking interlocutory relief. Through a ruling dated 19th February, 2014 the Hon Mumbi Ngugi J issued interim orders restraining the Respondents from summoning the Governors and the County Executive Committee members responsible for finance pending the hearing and determination of the suit. She further granted the orders prayed to suspend the summons dated 8th February, 2014 issued to the respective Governors and County Executive Committee members of finance pending the hearing and determination of the Petition.
3. Additionally, Hon Mumbi Ngugi J directed that the Petition be referred to the Chief Justice for the purposes of constituting a bench of uneven number of judges to hear and determine the Petition. On March 10th, 2014, the Hon Chief Justice directed that the Petition be

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transferred to this Court and be heard and determined by this bench. 1

The Petitioner’s Case

4. In the affidavit sworn on 17th February 2014 both in support of the Petition and the interlocutory application, Kipkoech Tanui, the Advocacy Manager of the Petitioner, deposes that the Petitioner is a public interest organization that champions the observance of the rule of law. He averred that the 1st Respondent and its Standing Committee on Economic and Finance affairs through the Clerk of the Senate, issued witness summons dated 8th February, 2014 to the Governors and County Executive Committee members for finance to appear before it on diverse dates from 19th February, 2014 and answer to questions with respect to County fiscal management. It was contended that the said summons contravene article 226(2) of the Constitution. 5
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5. The Petitioner asserted that the Senate’s role under article 96 of the Constitution is to *inter alia* participate in the law making function of Parliament by considering, debating and approving Bills concerning counties; to represent the counties and serve to protect their interest and to determine the allocation of National Revenue among counties as provided for in article 217. That therefore the Senate under article 6(2) and article 189 of the Constitution can only exercise its powers to summon strictly when exercising its Constitutional roles. 20

6. It was claimed that the Senate’s oversight role over Nationally collected revenue is not identical to the County Assembly’s role over the County Executive Committee which is the executive arm of the County Government. That therefore the Senate cannot scrutinize county expenditures in the same way the committees and general assemblies of the County legislatures can. In the foregoing, the Petitioner averred that the Senate’s power is limited to oversight over national agencies which manage National revenue allocated to counties such as the National treasury. 25
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7. It is also the position of the Petitioner that the Senate only has the powers to scrutinize county financial records under limited circumstances. That this include instances when the senate is called upon to make a determination with regard to the impeachment of a County Governor and further when it purposes to develop National legislation necessary for prudent management of public finances at the county level. The Petitioner therefore asserts that the Senate’s oversight role should be exercised in accordance with 35
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the Constitution and should refrain from acting in excess of its mandate. Consequently the Petitioner claims that the summons by the Senate issued to the Governors and the County Executive Committee members for finance are unconstitutional.	1
8. The Petitioner is therefore seeking the following reliefs;	5
i. A declaration that resonating the intention of articles 2,3, 10 and within the intendment of articles 159(1), 160(1) and 259 of the Constitution of Kenya if the Constitution makes provisions as to how the legislature should conduct its internal affairs or as to the mode of the exercise of its legislative powers, a Court of law can exercise its jurisdiction to ensure the legislature comply with the Constitutional requirement.	10
ii. A declaration that resonating the intention of article 96 and 226(2) of the Constitution of Kenya and section 148 of the Public Financial Management Act 2012 and section 30 of the County Government Act, 2012, the Senate cannot summon Governors to personally appear before it to answer questions on County Government finances.	15 20
iii. A declaration resonating the intention of article 96 and article 226(2) of the Constitution of Kenya that the Senate cannot summon an accounting officer of the County Government to answer questions on county financial management. This is an exclusive power of the County Assembly.	25
iv. A declaration that resonating the intention of article 96 of the Constitution and within the meaning of article 226(2) of the Constitution of Kenya, the Senate's oversight role over nationally collected revenue to counties is not identical to the County Assembly's oversight over the executive.	30
v. A declaration that resonating the intention of article 96 of the Constitution and article 226(2) of the Constitution of Kenya the Senate's power is limited to oversight over national agencies which manage national revenue allocated to counties such as the National Treasury.	35
vi. A declaration that the Senate can only exercise its powers under article 125 of the Constitution to scrutinize county financial and other records for purposes of	40

making a determination with regard to an impeachment, intervention in a county, suspension of a county, or for purposes of developing national legislation necessary for more prudent management of finances at the County level.

vii. A permanent injunction to be issued to restrain the Senate from summoning County Governors to appear before it to answer questions on public financial management.

viii. A permanent injunction to be issued to restrain the Senate from summoning County Executive Committee Members to appear before it to answer questions on county public financial management.

ix. A permanent injunction be issued to restrain the Senate from summoning accounting officers at the County level to appear before it to answer questions on county public financial management.

x. There be no orders as to costs.

9. The 1st and 2nd Respondents (hereinafter “the Respondents”) did not enter appearance in respect to the Petition. The Affidavits filed in Court indicate that the Petition was served on the Senate and Clerk of the Senate on the 17th of February, 2014. Hearing notices were also served on the Respondents. Despite such service, the Respondents did not file any responses to the Petition and were not represented in court during the hearing.

10. Consequently, Mr Ahmednasir Abdullahi Senior Counsel (SC) assisted by Mr Peter Wanyama presented the Petitioner’s case *ex parte*.

Petitioner’s Submissions

11. It was Mr Abdullahi’s submission that this petition was premised on a number of grave breaches of the Constitution. That the crux of the matter was about the interaction between the National and County Governments. Mr Abdullahi stated that the petition was triggered by the actions of the Senate’s standing Committee on Finance, Commerce and Economic Affairs when it issued summons to governors and county executive members of finance to appear before it and explain how money allocated to their respective counties was expended and utilized. It was alleged that by summoning the Governors, the Senate not only breached the constitution but attempted to wreak havoc on the delicate balance

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- that exists between the two levels of Government. 1
12. It was also Mr Abdullahi's contention that the Senate usurped the oversight role accorded to the County Assemblies by the Constitution when it issued the summons. Moreover, it was Counsel's submission that the Senate was trying to subjugate the County Government, which was unconstitutional. That if such an attempt is not checked by this court, the Senate would uproot an important pillar of our Constitutional dispensation which stipulates that no level of the Government is subordinate to the other under article 6(2). He also claimed that if the Senate's action were left to stand, the same would be a direct assault on devolution. 5 10
13. Mr Abdullahi moreover cited several provisions of the Constitution in support of the Petitioner's claims. He argued that articles 1(3) and (4) of the Constitution were explicit that there are two levels of Government, that is the County and the National Governments, and that none is lesser than the other. He also relied on article 2(2) which states that no person may claim any authority or exercise any power not granted by the Constitution. Mr Abdullahi further submitted that article 3 of the Constitution imposes an obligation on everyone to respect and uphold the Constitution and the rule of law. He also emphasized that under article 6(2) of the Constitution, the County and National Governments are distinct and interdependent and should conduct their relations on the basis of consultation and co-operation. That this fundamental tenet of the Constitution was breached when the Senate purported to issue summons to the members of the County Government. 15 20 25
14. It was also pointed out that under article 93, the Constitution provides for the establishment of Parliament which consists of the National Assembly and the Senate. It was his further submission that article 94 outlines the role of Parliament. He went on to add that article 95(4)(c) of the Constitution mandates the National Assembly to exercise oversight over National revenue and its expenditure. He thus submitted that this infers that the National Assembly supervises and checks how the National Government spends the national revenue allocated to it. 30 35
15. With regard to the Senate Mr Abdullahi, contended that article 96 of the Constitution assigns the role of Senate. That under article 96(3) of the Constitution, the Senate has the obligation of determining the allocation of National Revenue among counties as 40

provided in article 217 of the Constitution and exercises oversight over the National revenue allocated to the County Governments. It was therefore Mr Abdullahi’s claim that under this provision, the Senate does not have the powers to oversee expenditure of the County Governments. He restated that this power is only vested in the County Assemblies of the various County Governments as stipulated in the County Governments Act of 2012.

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16. On the issue of summoning the County Executive committee members of finance from the various counties, it was Mr Abdullahi assertion that article 179(1) and article 183 of the Constitution sets out the roles and functions of the County Executive Committees. That the County Executive Committee is vested with the executive authority of a county. While citing article 189(1)(a) of the Constitution on the relationships between Governments, it was Mr Abdullahi’s argument that the summoning of the executive arm of the County is unconstitutional as the same is a preserve of the respective County Assemblies. He further submitted that article 226(2) of the Constitution answers the lacuna in article 96 of the Constitution. Mr Abdullahi contended that under article 226(2) of the Constitution the accounting officer of a National public entity is accountable to the National Assembly for its financial management while the accounting officer of a County public entity is accountable to the county assembly for its financial management. To that end, Mr Abdullahi alleged that the effect of article 226(2) is that all National Public entities are answerable to the National Parliament, while all county public entities are answerable to the County Assemblies. According to him, the Senate does not feature in this chain of accountability.

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17. In his further submissions, Mr Abdullahi contended that the Senate while summoning the Governors and the County Executive Committee members for finance indicated that they did so under article 125 of the Constitution. It was argued that the citing of the aforementioned provision of law was a misguided attempt by the Senate to support its illegal actions. Mr Abdullahi opined that the article 125 and article 195 which give power Parliament and County Assemblies power to summon any person to give evidence on any issue are merely procedural provisions that facilitate both houses of Parliament and/or the County Assembly in gathering of evidence over matters in which they were constitutionally mandated to deal with. That the said articles of the Constitution can only be used to

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- compel a relevant and compellable witness and cannot be misused to summon anybody the Senate so wishes. Mr Abdullahi urged the Court to adopt the reasoning of the Court in the Supreme Court Advisory Opinion No 2 of 2013 *Speaker of the Senate & another v Hon Attorney General & 3 others* and *Tinyefuza v Attorney General* Const. Petition No 1 of 1996 (1997 UGCC 3) while interpreting article 125 and 195 of the Constitution. 1
18. On his part, Mr Wanyama concurred with the submissions of Mr Abdullahi. It was his contention that County Executive members, including accounting officers at the county level are accountable to the County Assemblies and other institutions set out in both the Constitution and other statutes. Mr Wanyama asserted that there is a distinct framework of accountability of county financial resources under the Constitution and various statutes. 5 10 15
19. He referred to articles 228 and article 229 of the Constitution which provides for the office of the Controller of Budget, who is mandated to submit to each house of Parliament a report on the implementation of budgets of the National and County Governments every four months. In addition, it was Mr Wanyama's submission that under article 229(8) of the Constitution, the Auditor General must also submit a report to Parliament or the relevant County Assembly with regard to various audit queries raised, for debate and necessary action. 20 25
20. It was also his position, that the Senate's role is well articulated under article 96 of the Constitution. That the same includes the mandate to protect devolution and the interest of counties only at the National level. It is on this premise, that Mr Wanyama argued that the Senate and County Government are supposed to co-operate and work together and not against each other. He also contended that the Senate only has the powers to scrutinize county financial and other records under special circumstances such as; 30
- a. when the Senate is intervening in a County where there is stoppage of funds by the National Government; 35
 - b. in the case of suspension a County under article 192 of the Constitution;
 - c. during impeachment proceedings of a County Governor under article 181 of the Constitution; and 40
 - d. for the purposes of developing legislation necessary for prudent financial management at the county level.

- To that end, it was Mr Wanyama’s opinion that the Senate has no role in the general oversight of county resources but that such function vests exclusively on the County Assembly. 1
21. The Court was also referred to the provisions of the Public Finance Management Act of 2012 (hereinafter referred to “as the Act”) by Mr Wanyama. He submitted that the Act provides for a clear and elaborate regime with respect to accountability of county financial resources. That under Part 2 and 3 of the Act, the same provides for a framework to give effect to article 226(3) of the Constitution. He urged the Court to examine the provisions of Part IV of the Act with respect to the County Government responsibilities concerning the management and control of public finance. It was in addition contended that under Part IV of this Act, no role has been ceded to the Senate. It was therefore Mr Wanyama’s position that under this framework, the issues raised by the Senate in the summons to the County Governors and the County Executive Committee members of finance can be adequately dealt with by the County Assemblies of the respective counties. 5 10 15 20
22. It was also Mr Wanyama’s submission that where there are issues at the County level that require National intervention, the Act also provides for the Intergovernmental Budget and Economic Council (“the council”) established under Section 187 which adequately addresses any concerns raised by the Counties. He emphasized that the Council has full representation drawn from both the national and County Government and supports the spirit behind article 6(2) of the Constitution. That inter alia, the Council decides how much shall be disbursed to each County from the consolidated fund. 25 30
23. Lastly, while submitting on the issue of jurisdiction, it was Mr Wanyama’s contention that under article 165(3)(d)(i)(ii) and (iii) the Court can mediate in disputes relating to the constitutional powers of state organs in respect of County Governments and the Constitutional relationship between levels of Government, without offending the principle of separation of powers. That therefore, when a state organ acts in excess of its mandate, the Court can effectively injunct such actions. He cited the Supreme Court Advisory Opinion No 2 of 2013 (*supra*) in support of this argument. Mr Wanyama therefore urged the Court to find that the Senate’s actions to summon the Governors and the County Assembly Committee members for finance had no basis in law and that the said action was 35 40

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- under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution; 1
- (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; and.....” (emphasis added) 5
27. From the above, it cannot be disputed that this Court is clothed with the jurisdiction to hear any question concerning the interpretation of the Constitution. Additionally, in exercising its judicial authority, this Court is obliged under article 159(2) to protect and promote the purpose and principles of the Constitution. In article 259 of the Constitution this Court is also enjoined to interpret the constitution in a manner that promotes its purposes, values and principles, advances the Rule of law, human rights and fundamental freedoms in the Bill of Rights and which contributes to good governance. 10 15
28. With regard to the separation of powers doctrine, article 1 of the Constitution reposes the sovereign power to the people of Kenya but provides for the delegation of that power to various State organs. These include Parliament, the County Assemblies, the Executive at the National and County levels of Government, the Judiciary and independent Tribunals/Commissions. To facilitate the proper and effective exercise of the delegated power, the Constitution allocates functions, powers and responsibilities to all these organs. While we agree that every State organ should be accorded the space to perform its Constitutional mandate without undue interference, article 2 of the Constitution states thus; 20 25 30
- i. *“This Constitution is the Supreme law of the Republic and binds all persons and all State organs at both levels of Government.*
 - ii. *No person may claim or exercise State authority except as authorized under this Constitution”* (emphasis added) 35
29. This means that no person or state organ is above the law and above the Constitution. All organs created by the Constitution are subordinate to it. Further, article 10(1) of the Constitution binds all State organs, State officers, public officers and all persons when applying and interpreting the Constitution. Therefore when 40

any of these organs steps outside its area of operation as assigned by the Constitution, this Court will not hesitate to state so. The Supreme Court has ably captured this in *Re The Matter of the Interim Independent Electoral Commission* Application No 2 of 2011 (Unreported) where it expressed itself as follows;

“The effect of the Constitution’s detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the Courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that the totality of governance-powers are shared out among different organs of Government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several Government organs functions in splendid isolation.”

30. The Court of Appeal also touched on the doctrine of Separation of powers in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal No 290 of 2012, where it expressed itself as follows;

“It is not in doubt that the doctrine of separation of powers is a feature of our Constitutional design and a per-commitment in our Constitutional edifice. However, separation of power does not only proscribe organs of Government from interfering with the other’s functions. It also entails empowering each organ of Government with countervailing powers which provide checks and balances on actions taken by other organs of Government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Court’s dicta in the Petition the subject of this appeal that: Separation of powers must mean that the Courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitution democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet as the Respondents concede, the Courts have an interpretive role, including the last word in determining the Constitutionality of all Governmental actions.”

31. Also in the case of *Doctors for Life International v. Speaker of the National Assembly and others* (CCT 12/05) [2006] ZACC 11, it

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- was held; 1
- “....under our Constitutional democracy, the Constitution is the supreme law. It is binding on all branches of Government and no less on Parliament. When it exercises its legislative authority, Parliament ‘must act in accordance with, and within the limits of, the Constitution” 5
32. We are duly guided. And having expressed ourselves as above, we find that this Court can intervene in actions of other arms of government and state organs where there exists a violation or threatened violation of the Constitution. The Petition before us presents one such instance. The Senate is alleged to have overstepped its mandate by summoning County Governors and County Executive Committee members, which according to the Petitioner, is contrary to articles 6(2) and 226(2) of the Constitution. 15
33. It is also noteworthy, that this Court has been called upon to interpret various articles of the Constitution with regard to the role of the Senate *vis-a-vis* the County Assemblies in terms of oversight of financial resources allocated to the counties. It is against this background that we find that this Court indeed has the jurisdiction and power to hear and determine the matters raised in the Petition in regard to the Constitutionality of the actions of the Senate. 20
- Whether the Senate acted unconstitutionally by summoning the Governors and the Members of the County Executive Members of Finance 25
34. Before we proceed to determine the Constitutionality or otherwise of the summons by the Senate, we find it necessary to set out what the Constitution provides in terms of devolution. The promulgation of the Constitution of Kenya 2010 brought with it drastic changes in Kenya’s system of Governance. It introduced devolution which overhauled the centralized system of Government which existed prior to the enactment of the new Constitution. Devolution as a form of decentralization can be defined as the process of transferring decision-making and implementation powers, functions, responsibilities and resources to legally constituted, and popularly elected local governments known as Counties. The Constitution of Kenya 2010 has thus established a multi-level system of Government often referred to as a devolved system of Government. 35 40
35. Article 1(4) of the Constitution is reflective of this position as it provides that the sovereign power of the people is exercised both at

the National and County Level. Further under article 6(2) of the Constitution, it is clear that the Governments at the National and County levels are distinct and interdependent and are mandated to carry out their mutual relations on the basis of consultation. We are therefore in agreement with the submissions of Mr Abdullahi (SC) that none of the levels of Government should be treated as subordinate to the other.

36. The National and County Governments are also equal partners in the devolved structure though they are autonomous. This autonomy encompasses certain distinct features such as political autonomy, functional autonomy, financial autonomy and administrative autonomy. Nonetheless, despite this autonomy, it is recognized that both levels of Government are interrelated and need to work together to discharge their various functions for the benefit of the Kenyan people. Though each level of Government is separate and distinct, none can work in isolation. Due to this interrelation, the Constitution mandates co-operation and consultation between the two levels of Government to ensure that devolution works for the benefit of the Kenyan people.
37. Central to the devolution structure of Government is the bicameral Parliament, which under article 93 of the Constitution comprises of the National Assembly and the Senate. These legislative bodies have their responsibilities ascribed by the Constitution and have to work together to discharge some of their functions. Such functions include the impeachment of the President and Deputy President under article 145 and 150 of the Constitution. Another instance where both the Senate and the National Assembly have to work together is during the enactment of the Division of Revenue Bill and the County Allocation Revenue Bill. However, under article 96 of the Constitution, the role of the Senate is broadly set out as representing the counties and protecting their interests. The said article provides as follows;
- “96(1) *The Senate represents the counties, and serves to protect the interests of the Counties and their Governments.*
- (2) *The Senate participates in the law-making function of parliament by considering, debating and approving Bills concerning counties, as provided in articles 109 to 113.*
- (3) *The Senate determines the allocation of National revenue among counties, as provided in article 217, and exercises oversight over National revenue allocated to the County*

- Governments.* 1
- (4) *The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with article 145.*” (Emphasis added) 5
38. From the above, it is clear that the Senate plays a vital role in the implementation of the Constitution, particularly with respect to devolution. The Supreme Court in Supreme Court Advisory Opinion No 2 of 2013 (*supra*) recognized this when it stated thus; 10
- “[144] It is evident that the Senate, though entrusted with a less expansive legislative role than the National Assembly, stands as the Constitution’s safeguard for the principle of devolved government. This purpose would be negated if the Senate were not to participate in the enactment of legislation pertaining to the devolved units, the counties [article 96(1), (2) and (3)].” 15
39. In view of the foregoing, it is not in doubt that the Senate represents the Counties, and serves to protect the interests of the counties and their Governments at the National level. It is mandated to participate in the law-making function of Parliament by considering, debating and approving Bills concerning the Counties. The Senate also determines the allocation of National revenue among counties and exercises oversight over National revenue allocated to the County Governments. It also participates in the oversight of the Governors by considering resolutions with regard to their removal or impeachment under article 181 of the Constitution. In our considered view, the Senate and the County Governments are constitutionally designed to work together in ensuring the fruits of devolution. It is therefore our position that the Senate, which is at the National level of Government, has a critical role in ensuring that the counties interests are protected at the National Level of Government. 20
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40. Bearing the above in mind, it is vital to determine under what provision of the law, the Senate summoned the Governors and the members of the County Executive Committees. As noted earlier on in this judgment, the Senate did not file any response in answer to this Petition. The Court does not therefore have the benefit of its responses. Likewise, the Court does not have any material before it on the basis of which it can determine under what circumstances 25
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- or power the Senate summoned the Governors apart from the documentation presented by the Petitioner. 1
41. We have seen, the summons issued to the Governors which have been annexed to the affidavit of Mr Kipkoech Tanui. A cursory examination of the same reveals that the summons were issued under article 125 of the Constitution and sections 14 and 15 of the National Assembly (Powers and Privileges) Act (Cap 6) as read together with section 7 of the Sixth Schedule to the Constitution which empowers the Senate to summon any person to appear before it for the purpose of giving evidence or providing information. The said summons required the Governors to produce in respect of their counties to the Standing Committee on Finance, Commerce and Economic Affairs the following documents; 5 10
- i. *A written response to the issues raised by the Controller of Budget in the County Budget Implementation Review Report for the First Quarter of the Fiscal Year 2013/14;* 15
 - ii. *Approved Budget Estimates for the fiscal year 2013/14;*
 - iii. *Approved Supplementary Estimates for the Fiscal year 2013/14; and* 20
 - iv. *All other relevant documentation in (their) possession.* (emphasis added)
42. It is thus important to examine article 125 of the Constitution. The same provides as follows; 25
- “(1) Either House of Parliament, and any of its committees, has power to summon any person to appear before it for the purpose of giving evidence or providing information.
 - (2) For the purposes of clause (1), a House of Parliament and any of its committees has the same powers as the High Court — 30
 - (a) To enforce the attendance of witnesses and examine them on oath, affirmation or otherwise;
 - (b) To compel the production of documents; and
 - (c) To issue a commission or request to examine witnesses abroad.” 35
- From the above provision, it is not in doubt that the Senate is conferred with the powers to summon any person to appear before it to give evidence or to provide information, within its Constitutional and statutory mandate. The powers to summon by the Committees are equivalent to those of the High Court . The 40

said provision is similar to article 195 of the Constitution which grants the County Assemblies similar powers to summon. However, it is our finding that the power to summon cannot be exercised arbitrarily or capriciously. In the ruling delivered by Hon Mumbi Ngugi J on 19th February, 2014 while determining the Chamber Summons application dated 17th February 2014 filed in this matter, the Learned Judge expressed herself thus;

“While it (the Senate) does have the power under article 125 to summon anyone, that power cannot have been intended to be exercised arbitrarily in isolation. Put differently, the provisions of article 125 cannot be read in isolation, but it must be read in conjunction with other provisions of the Constitution which allocate the functions and powers to the various organs created by the Constitution”

43. We associate ourselves fully with this finding. The powers to summon anyone under article 125 can only be exercised by the Senate when it is properly seized of a matter in execution of its constitutional mandate. The summons should also be issued against persons who are reasonably expected to have relevant knowledge or information necessary to assist the Senate with matters under consideration. The question that therefore needs to be addressed is whether the Senate had the powers to summon the Governors and County Executive members for finance. It is on the above question, that counsels to the Petitioner addressed us extensively. According to Mr Abdullahi and Mr Wanyama, the Senate exceeded its mandate when it summoned the Governors or any County Executive Committee member of finance since these powers of oversight over County finances are accorded to County Assemblies under article 226(2). That the Senate therefore arrogated to itself powers that had not been given to it by the Constitution.

44. We have considered the arguments by learned counsel and the various authorities referred to us. It is not in doubt that the County Assemblies are vested with oversight responsibilities with regard to public funds allocated to the counties. Of note are the provisions of article 226(2) of the Constitution where Parliament is mandated to enact legislation that provides for ;

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2. The accounting officer of a national public entity is accountable to the National Assembly for its financial management, and the accounting officer of a county

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- public entity is accountable to the county assembly for its financial management.” 1
45. This article is backed up by detailed provisions of the Public Financial Management Act of 2012 particularly under Part IV. The said part outlines the County Government responsibilities in public finances, including the establishment of County Treasuries and their responsibilities. The Act also includes the various roles and functions assigned to the County Executive Member of Finance and the County Accounting officers. Of particular importance is section 148 of the Public Finance Management Act, 2012 which states as follows; 5 10
- “148(1) A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the County Government entities as is specified in the designation. 15
- (2) Except as otherwise stated in other legislation, the person responsible for the administration of a County Government entity, shall be the accounting officer responsible for managing the finances of that entity.” 20
46. Further to the above and in furtherance to article 226(2) of the Constitution, section 149 of the Public Finance Management Act of 2012 states as follows; 25
- “149(1) An accounting officer is accountable to the county assembly for ensuring that the resources of the entity for which the officer is designated are used in a way that is— 30
- (a) lawful and authorised; and
- (b) effective, efficient, economical and transparent.”
47. However, it is our considered view that these statutory provisions should not be considered in isolation but must also be interpreted in relation to article 96(3), article 226(2) as well as other constitutional provisions. In *Olum v Attorney General of Uganda* [2002] 2 EA 508, the Court of Appeal of Uganda held; 35
- “The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. Constitutional provisions must be construed as a whole in harmony with each other without 40

This principle of harmonious interpretation of the Constitution was also discussed by the United States Supreme Court in the case of *Smith Dakota v North Carolina* 192 v 268 (1940) where the Court held that;

48. We fully agree with the interpretation given by the courts in the authorities cited above regarding the harmonization principle of interpretation which means that a provision of the Constitution should be interpreted in harmony with the whole document of the Constitution and not in isolation. Each section of the Constitution should sustain and not destroy the other. We therefore find that article 226(2) must be read together with article 96 of the Constitution which as earlier stated provides for the roles of the Senate. Of particular importance is article 96(3) which gives the Senate a central role in the fiscal matters of the County Governments concerning the allocation of National Revenue. The Constitution under that proviso goes further and states that the Senate has “an oversight role over the National Revenue allocated to Counties”. In our view, this provision is clear and requires no more than a literal interpretation.

49. Under article 217, the Senate is accorded the powers to determine and allocate the National revenue to, and between, counties once every five years through a resolution. The Senate makes the initial decision through requesting and considering the recommendations of the Commission on Revenue Allocation taking into account the Constitutional principles outlined in article 203 of the Constitution; considering public input, and inter alia the input of County Governors. The Senate's decision is final unless two-thirds of the National Assembly reject or change the basis of allocation. How then, can the Senate exercise its oversight role in ensuring that the National revenue allocated to the counties is fully implemented in the County's budgetary and expenditure plans? To our minds this is answered by article 228 and 229 of the Constitution, together with

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- section 8(1)(c) of the Public Finance Management Act of 2012. 1
50. Article 228 provides for the Office of the Controller of Budget who oversees the implementation of budgets at both the National and County level. Article 228(4) and (5) states as follows; 5
- “228(4) The Controller of Budget shall oversee the implementation of the budgets of the national and County Governments by authorizing withdrawals from public funds under articles 204, 206 and 207.
- (5) 10
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- (6) Every four months, the Controller shall submit to each House of Parliament a report on the implementation of the budgets of the national and County Governments.” 15
51. Article 229 of the Constitution also provides for the office of the Auditor General, who audits the accounts of all public bodies, including the accounts of the National and County Governments. The Auditor General after auditing the respective accounts then reports on the findings of a particular financial year. Under article 229(7) and 229(8) these audit reports must be submitted to Parliament or the relevant County Assembly, which shall then debate and consider the report within three months and take the appropriate action. 20
52. Further section 8(1)(c) of the Public Financial Management Act of 2012 states that ; 25
- “8(1) The Committee of the Senate established to deal with budgetary and financial matter’s has responsibilities for the following matters, in addition to the functions set out in the Standing Orders; 30
- (a) 35
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- (b) 40
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- (c) examine financial statements and other documents submitted to the Senate under Part IV of this Act, and make recommendations to the Senate for improving the management of Government’s public finances;.....”

From a reading of the above provisions of the law, it is clear that

the Senate is accorded tools to exercise its oversight function over expenditure of National revenue allocated to the County Governments which include receiving reports by the Controller of Budget and Auditor General. We therefore note that the office of the Controller of Budget and Auditor General are shared institutions at both the County and National level of Government whose role is to ensure that the two levels of Government operate within the principles of public finance stipulated under article 201. Further, a committee of Senate is allowed to examine financial statements and other documents submitted to it pursuant to Part IV of the Public Finance Management Act of 2012 which deals with County Government responsibilities with regard to management and control of public finance.

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53. However, for purposes of this judgment, we shall restrict ourselves to article 228 and section 8(1)(c) of the Public Finance Management Act of 2012, since it was the Petitioner’s submission that the summons were prompted by the report of the Office of the Controller of Budget concerning the County Budget Implementation for the first quarter of the financial year 2013/2014 (hereinafter “the Report”). Indeed the summons from the Standing Committee on Finance, Commerce and Economic Affairs indicate that the Governors were to provide “a written response to the issues raised by the Controller of Budget in the County Budget Implementation Review Report for the First Quarter of the Fiscal Year 2013/14”. Further to this, the Senate requested for financial statements such as the Approved Budget Estimates for the Fiscal year 2013/14 and Approved Supplementary Estimates for the Fiscal year 2013/14, which in our view are prepared pursuant to Part IV of the Public Finance Management Act of 2012.

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54. It therefore follows that the Court must first address its mind to what the Report of the Controller of Budget entailed. Under article 228(6) of the Constitution, the Controller of Budget is mandated to submit to each house of Parliament a report on the implementation of budgets of both the National and County Governments. This Court takes judicial notice of the fact that the Report gives a synopsis of the status of budget implementation and evaluates the performance of the County Governments in the management of public resources for a particular quarter in a financial year. We also note that the County Public resources include the National revenue allocated to each county together with the local revenue collected

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- by each county. 1
55. The Controller of Budget further reports on how both revenues and budgetary allocations were implemented by the Counties. Reporting on budget implementation in our opinion creates awareness among stakeholders and assists oversight bodies in ensuring transparency and accountability in public finances at the county level. Consequently, we find that by virtue of article 228(6) of the Constitution, the County Budget Implementation Review Report by the office of the Controller of budget was properly before the Senate. The Senate therefore had the mandate pursuant to article 96(3) of the Constitution to examine and consider the same in so far as it related to utilization of revenue allocated to the respective Counties. 5 10
56. We also find that the Senate was entitled to examine and consider the Approved Budget Estimates for the fiscal year 2013/14 and Approved Supplementary Estimates for the Fiscal year 2013/14 from the requested County Governments by virtue of section 8(1)(c) of the Public Finance Management Act and article 96(3) of the Constitution, as the estimates would enable the Senate to examine and compare the same against the findings contained in the Report by the Controller of Budget regarding the implementation and expenditure of the funds allocated to each County out of the national revenue. 15 20 25
57. We therefore reject the argument by the Petitioner that the Senate's power is limited to oversight over National agencies which manage National revenue allocated to the counties such as the National Treasury. To our minds, this would be against the spirit and letter of article 96(3) of the Constitution which vests a wide power on the Senate to oversee both the provision and expenditure of the national revenue allocated to the counties. In the foregoing, it is our determination that since the Senate was properly seized of the matters with regard to the issues raised by the Controller of Budget in the County Implementation Report, it had power to summon any person under article 125 for purposes of giving evidence or providing information concerning the issues raised in that report. 30 35
58. However, we wish to point out that the first persons of contact with regard to any issue of financial management of a county would be the accounting officers appointed at the county level. We note that these officers are accountable to the County Assemblies by virtue 40

- of article 226(2) of the Constitution and section 149 of the Public Finance Management Act of 2012. Nevertheless, the Constitution provides for oversight of county public finances at two levels; by the County Assemblies at the county level and by the Senate at the National level. That is the Constitution and unless amended, this Court can only interpret it as it is. Moreover, the Constitution does not prohibit the Senate from summoning Accounting Officers and or County Executive members in performing its oversight functions under article 96(3) of the Constitution. Logically, in exercise of its powers under article 125 of the Constitution, the Senate is empowered to summon any person, including the accounting officers of the County Governments if such officers can provide information or evidence in relation to the National revenue allocated to a particular County.
59. We have also examined section 30(3)(f), the County Governments Act of 2012 . The same states that the County Governor shall be accountable for the management and use of county resources. By implication, this provision means that the County Governor as the overall head of the county is accountable for the utilization of county resources including the National revenue allocated to his or her respective County. Since the accounting officers at the county are directly answerable to the County Assembly for the management of financial resources under the Public Finance Management Act 2012, who then is the Governor accountable to under section 30(3)(f)? In our considered view, since the County Governors are not answerable to the County Assembly in terms of fiscal management of the County resources under Section 149 of the Public Finance Management Act 2012, they must be held to account by the Senate for the National revenue allocated to their respective Counties in view of the provisions of section 30(3)(f) of the County Governments Act, 2012 as read together with article 10(2)(c) on the National values and principles of governance. The Governors being State Officers are bound by the national values of transparency, accountability and observance of good governance when performing their duties as the Chief Executive Officers of the County Governments.
60. It then follows that under article 125, the County Governor and the County Assembly Member for finance who belong to the executive arm of the County Government can also be summoned by the Senate in exercise of their oversight mandate under article

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- Assembly has a wide berth to oversee all the financial resources of the county including revenues allocated by the National Government and the revenue generated locally by the respective County. The Senate cannot therefore overreach its oversight mandate under article 96(3) to any other aspect of County Government operations and resources as that is the sole preserve of the County Assemblies. To that extent, we find that the Senate and the County Assembly only have a collective role in the oversight of nationally allocated revenue to the Counties. 1 5 10
63. The Public Finance Management Act of 2012, which deals with the financial management of public funds for all public bodies at both the National and the County level, does not however provide for a mechanism on how both the Senate and the County Assemblies can exercise their oversight powers over National revenue allocated to the County governments in a manner that would avoid any jurisdictional overlaps. In our view, the Public Finance Management Act of 2012 should be amended to avoid duplication of roles and consequent inefficiencies with regard to the powers accorded to Senate under article 96(3) and the powers of oversight accorded to the County Assemblies under article 226(2) of the Constitution. It is our view that it is necessary to have a provision in the said Act to guide the Senate and the County Assemblies on how they should co-operate in the oversight of National revenue allocated to the County, while respecting the principle of separation of powers and in furtherance to article 189 of the Constitution. 15 20 25
64. As the Supreme Court succinctly put it in the Supreme Court Advisory Opinion No 2 of 2013 (*supra*) 30
- “(146) we categorically affirm that lawful public-agency conduct under Kenya’s Constitution, requires every State agent to grapple, in good faith, with assigned obligations, and with a clear commitment to inter-agency harmony and co-operation. No State agency, especially where it is represented by one person, should overlook the historical trajectory of the Constitution, which is clearly marked by transition from narrow platforms of idiosyncrasy or sheer might, to a scheme of progressive, accountable institutional interplays” (emphasis added) 35 40
65. With regard to the issue raised by the Petitioner that the Senate was subjugating the County Governments by summoning the Governors

and the County Executive Member for finance, we find no merit to this argument. Though the Senate and County Assembly are on two levels of Government which are autonomous, the National Government, through the Senate under article 96(3) is granted limited powers of oversight and supervision in county affairs in terms of financial management of the National revenue. However, since the oversight mandate granted to the Senate are powers that are constitutionally circumscribed and constrained, they do not subordinate the County Government to the National Government as contended by Mr Abdullahi (SC). The oversight powers of Senate under article 96(3) must therefore be exercised within the framework of co-operative Government as alluded to earlier in this judgment. If the Senate in exercise of its oversight powers over County finances is seen as an intrusion of the autonomy of County Governments, then this is an intrusion that is allowed by the People of Kenya when they enacted article 96(3) of the Constitution and this Court can only give effect to the Sovereign will of the Kenyan People.

66. In conclusion, we find that the Senate acted within its Constitutional mandate under article 96(3) and article 125 of the Constitution when it issued the summons dated 8th February, 2014 to the Governors and the County Assembly Members of finance of the respective counties with regard to the report by the Controller of Budget.

67. Having made this finding, we wish to make a few observations. As stated earlier article 125 of the Constitution grants the Senate and the National Assembly and their respective Committees the power to summon any person to give evidence or provide information with regard to a matter they are seized of. This Constitutional power must be respected by all public officials at all times. However, it is the respectful view of this Court that when these powers are exercised in reference to members of the County Government, there must be a measure of restraint by the Senate. Put another way, when the Senate uses its powers to summon with regard to its oversight mandate under article 96(3), it must not do so arbitrarily and capriciously. It must exercise caution and refrain from acting in a manner that could be construed as micro-managing devolved units at the county level. It must endeavor to sustain the spirit and letter of the Constitution as enshrined in article 6(2) which states thus;

“(2) 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.” (emphasis added) 1

68. The Senate is therefore required by the Constitution under article 6(2) when exercising its oversight powers over the County Governments under article 96(3) of the Constitution to do so in a manner that fosters and nurtures the principles of devolution in the new Constitutional dispensation. We opine therefore that before resulting to summons, the Senate should have sought consultations or mediation with the respective County Governors with regard to the concerns raised by the Controller of Budget’s report issued with deference to implementation of County budgets. In order to promote harmonious co-existence between the Senate and the County Governments for the sake of harnessing the fruits of devolution for the benefit of the people of Kenya, the Senate should only issue summons to Governors or other Officers of the County Government as a matter of last resort where it is clear that the County Governors and other County Officials have declined an invitation by the Senate or its Committee(s) to answer to matters of oversight of County Funds. The Senate should endeavor to improve accountability at the County level and not cripple the County Governments. 5 10 15 20

69. We also wish to advise that in future, the various levels of Governments should utilize article 189(3) and (4) of the Constitution when resolving any disputes between them. The same states as follows; 25

“(3) In any dispute between governments the governments shall make every reasonable effort to settle the dispute, including by means of procedure provided under National Legislation. 30

(4) National Legislation shall provide procedures for settling Intergovernmental disputes by alternative dispute resolution mechanism including negotiation, mediation and arbitration.” 35

The National Legislation referred to under subsection (4) above is the Inter-governmental Relations Act 2012 which provides as follows under section 31:

“The National and County Governments shall take reasonable means to; 40

a. *resolve disputes amicably and*

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- b. *apply and exhaust the mechanisms for alternative dispute resolutions provided under the Act or any other Legislation before resorting to judicial proceedings as contemplated by article 189(3) and (4) of the Constitution*" (emphasis added) 1
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70. Though the existence of this alternative dispute resolution mechanisms provided for use by the different levels of Governments does not necessarily oust the jurisdiction of the Court, we find that pertinent political questions between the two levels of Government should be resolved in a manner that does not result in acrimony and hostility. The Supreme Court had an opportunity to duly address the issue of alternative dispute resolution between the different houses of parliament in Supreme Court Advisory Opinion No 2 of 2013 (*supra*) where it expressed itself as follows; 10
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- "[145] *It is clear to us, from a broad purposive view of the Constitution, that the intent of the drafters, as regards the exercise of legislative powers, was that any disagreement as to the nature of a Bill should be harmoniously settled through mediation. An obligation is thus placed on the two Speakers, where they cannot agree between themselves, to engage the mediation mechanism. They would each be required each to appoint an equal number of members, who would deliberate upon the question, and file their report within a specified period of time. It is also possible for the two Chambers to establish a standing mediation committee, to deliberate upon and to resolve any disputes regarding the path of legislation to be adopted for different subject-matter.*" 20
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- [146] *Had such an approach to the dispute been adopted, it is our opinion, this Court would probably not have been asked to give an Advisory Opinion, as a fitting solution would most likely have been found. What precipitated the current situation, as is clear from the facts, is the National Assembly Speaker's non-recourse to the provisions of articles 110(3), 12 and 113 of the Constitution, thus improperly excluding the prospects of consultation and mediation. Such a course of action is precisely what Archibald Cox had in mind: "If one arm of government cannot or will not solve an insistent problem, the pressure falls upon another." The pressure now falls on the Supreme Court.*" 30
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- (emphasis added) 1
71. Further in the case of *Ex parte President of South Africa: in re Constitutionality of the liquor Bill 2000 (Liquor Bill Case)* 2000(1) BCLR 1 the South African Constitutional Court held thus; 5
- “(40) Chapter 3 of the Constitution ‘introduced a “new philosophy” to the Constitution, namely that of cooperative government and its attendant obligations. In terms of that philosophy, all spheres of Government are obliged in terms of sections 40(2) to observe and adhere to the principles of cooperative Government set out in Chapter 3 of the Constitution.” 10
72. We associate ourselves fully with the findings of the Courts in the cases cited above. The Senate which is one of the organs of the National Government and County Governments need to co-operate and engage on a platform of mutual relations and consultation as opposed to engaging in adversarial relations with regard to any matter touching on devolution. The Courts should therefore be used as a last point of call with respect to any dispute concerning the functional areas of any State organ under the new Constitutional dispensation. 15 20
73. We are aware that this case has generated substantial public interest with regard to the Courts role in arbitrating the apparent conflict between the County Governments and the Senate. We take judicial notice of the fact that various threats have been issued against the Judiciary, some of its members and County Governments including a proposal that the Division of Revenue Bill should not be passed since the Governors do not wish to be held accountable. Not only will this be contrary to the Constitution, but such a stance will unfortunately lead to tragic consequences as the County Governments will be deprived of national revenue which is the antithesis of devolution. The same would also be contrary to the spirit of article 10 on the National values and principles and article 6 of the Constitution. We therefore urge both the Senate and County Governments through the Governors, to foster dialogue and co-operate in the interest of the counties they represent and swore to protect while taking their oath of office. They are all servants of the people; elected by the people to promote their interests and should embrace servant leadership. Superiority contests will only kill rather than promote devolution. 25 30 35 40

Whether the Petitioner is entitled to the Reliefs Sought	1
74. After carefully considering the Petition and also reviewing the oral submissions, including the authorities cited, we hereby grant the order sought as follows;	
1. We issue a declaration that resonating the intention of articles 2,3, 10 and within the intendment of articles 159(1), 160(1) and 259 of the Constitution of Kenya if the Constitution makes provisions as to how the legislature should conduct its internal affairs or as to the mode of the exercise of its legislative powers, a court of law can exercise its jurisdiction to ensure the legislature complies with the constitutional requirement.	5 10
2. We hold that the Senate can summon Governors, County Executive Members of Finance and County accounting officers to appear before it and answer to questions on County Government finances in so far as the National revenue allocated to the respective county is concerned, but such power should not be exercised in an arbitrary and capricious manner.	15 20
3. We hold that the Senate's power of oversight under article 96(3) is limited to National revenue allocated to the County Governments.	
4. With regard to the various injunctions sought, we recognize that the Court can only issue the permanent injunctions against the Senate if it was demonstrated by the Petitioner that the Senate abused its parliamentary process and also issued summons to achieve ulterior political motives. In our view the Petitioner did not demonstrate this. The Court therefore declines to issue the permanent injunctions sought by the Petitioners in prayer number (vii), (viii) and (ix) of the Petition.	25 30
5. Let this judgment be brought to the immediate attention of the Attorney-General for necessary action.	
6. With regard to costs, we note that costs follow the event, and are also at the discretion of the Court. The Petition that has been brought is on a matter of public interest. In the foregoing we shall make no orders as to costs.	35
75. In conclusion, we must commend the advocates appearing in this Petition, Mr Abdullahi and Mr Wanyama for their extensively researched presentation. If we have not referred to all the authorities	40

referred to, it is not because they were not enlightening in the determination of this case. We are also grateful to our Research Assistants for their dedication and research in all the issues forming the subject of this Judgment.	1
76. Orders accordingly.	5
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Kipruto & another *v* County Government of Baringo & another [2014] KLR – ICK

Industrial Court, at Nakuru
B Ongaya J

April 4, 2014

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Cause No 30 of 2014

Brief facts

The Claimants were serving civil servants who applied and were recruited by the Transitional Authority, on secondment by the Public Service Commission, to the County Government of Baringo. They were later dismissed from employment for alleged misconduct. They thereafter filed a Memorandum of Claim and prayed for judgment against the Respondent for, *inter alia*, a declaration that they were legitimate employees of the County Government and that the termination of their employment contract was in contravention of the law.

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The Respondent on their part prayed that the claim be dismissed with costs and counter-claimed, seeking a declaration that the appointment of the Claimants was illegal *ab initio* for want of advertisement, competitive recruitment, short listing, public participation, and approval by the County Assembly hence null and void.

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Issues

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- i. Whether public officers serving on secondment could be placed on probation
- ii. Whether the absorption of the Claimants to the County Government on secondment from the National Government entitled them to remain in County Government's permanent service
- iii. Whether the County Assembly Service Board was enabled by legislation to perform its human resource functions
- iv. Whether the appointment of the Claimants was illegal for want of advertisement, competitive recruitment, short listing, public participation, and approval by the County Assembly

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Constitutional Law – County Governments – County Public Service – Public officers – recruitment and secondment of the public officers – employment of public officers on secondment to the County Government – whether the absorption of the claimants to the County Government entitled them to permanent service of employment – whether public officers serving on secondment should be placed on probation – Constitution of Kenya, 2010 articles 176,235; section 15(2)(a) of the sixth schedule to

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the Constitution – County Governments Act, 2012 part vii. 1

Employment Law – termination of employment – where the County Service Board terminated the employment of the County Clerk.

Held: 5

1. The recruitment and secondment was founded upon section 15(2) (a) of the sixth schedule to the Constitution which provided that through legislation, the National Government was mandated to facilitate the devolution of power; to assist County Governments in building their capacity to govern effectively and to provide the services for which they were responsible; and support County Governments. 10
2. The Claimants, being serving civil servants, were legitimately identified in a transparent and accountable process and secondment to the Baringo County Government which under article 176 of the Constitution consisted of the respective County Assembly and County Executive. 15
3. The usual employment practice was to emplace new officers upon recruitment and appointment to probationary service, and if probation was successfully served, confirmation in appointment would follow. The officers in issue were not such newly appointed employees. The officers, including the Claimants, were not eligible to probationary service as they were seasoned public officers constitutionally provided to build capacity in the County Government. It would have been misconceived and untenable for any authority in the County Government to emplace the experienced officers on probationary service. 20
4. “Confirmed” as used by the Board could only have meant “absorbed in the service of the County Assembly on applicable permanent terms of service”. The Claimants were absorbed into the County Assembly service. The decision of absorption, once made by the Board, exhausted the Board’s jurisdiction in that respect and the Claimants became entitled to remain in permanent service as absorbed, unless the employment was lawfully terminated. 25
5. If the Claimants were to be placed on probationary service, then that would have amounted to adverse variation of their respective terms and conditions of service and any such probationary service decision would be unlawful, null and void. 30
6. The 2nd Claimant had been serving as appointed, with full knowledge of the Assembly. By its conduct, therefore, the Assembly was deemed to have approved the 2nd Claimant’s appointment 35

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- and in reliance on that conduct and the express decision by the County Assembly Service Board, the Claimant substantially and irreparably shifted his position by accepting the absorption into the County Government's permanent service, thereby relinquishing his employment in National Government. 1
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7. The 2nd Claimant was the duly appointed Clerk of the Baringo County Assembly and the Assembly or its Service Board was stopped from going back on that concluded transitional employment and especially in view of the transitional constitutional and statutory arrangements that formed the basis of the appointment. 10
8. The Claimants were appointed under the transitional arrangements under the County Governments Act and the unique appointments were for the benefit of the County Government and the best public interest; so much so, that the historical practical usefulness of the secondment and then the appointments by absorption or confirmation as it was called could not be erased to the disadvantage of the Claimants. 15
9. The case was about protection of the Claimants, as public officers with long experience and mandated to provide capacity for realisation of devolved governance, from victimization for performing their respective public office duties and from removal from public office or punishment without the due process of law and as provided for in article 236 of the Constitution. Accordingly, the prayers in the counterclaim seeking a declaration that the appointment of the Claimants was illegal for want of advertisement, competitive recruitment, short listing, public participation, and approval by the County Assembly as made failed. 20
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10. County Public Service Boards and the County Assembly Service Boards were vested with functions without enabling operational statutory provisions including basic matters such as the procedures for conducting the business of the service boards. The Boards were not vested with statutory authority to make any subsidiary legislation to guide their business and discharge of their functions. 30
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- The elaborate provisions of Part VII of the County Governments Act, 2012 on county public service were found not to apply to the County Assembly Service Board, with the consequence that the County Assembly Service Board was particularly not enabled by legislation to perform its human resource functions. 40
11. The 2nd Respondent had made decisions without guidance from any specific applicable human resource standards made for that purpose. The disciplinary action as purportedly initiated by it was

not based on any disciplinary regulations and rules. Similarly, if the service boards wanted to recruit, appoint, promote, exercise disciplinary control or retire the officers, there existed no step-by-step procedures and rules, nor substantive provisions to guide their decision making. 1
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Orders

- i. *The Claimants were legitimate employees of the County Government of Baringo.*
- ii. *The 2nd Respondent's instructions barring the Claimants from accessing their respective offices or performing their duties were unlawful.* 10
- iii. *The purported termination of the Claimants' employment contracts and the purported disciplinary action by the 2nd Respondent was in contravention of the law.* 15
- iv. *The Claimants to continue in employment in their respective capacities as the Chief Finance and Accounting Officer for the 1st Claimant and the Clerk to the County Assembly for the 2nd Claimant respectively.*
- v. *An order of permanent injunction barring the Respondents jointly and severally from arbitrarily terminating the employment of the Claimants was issued.* 20
- vi. *Judgment to be served upon the Attorney General, the Transitional Authority, the Commission for the Implementation of the Constitution, and the Public Service Commission to take steps towards concluding the relevant legislation under article 235 of the Constitution.* 25
- vii. *The 2nd Respondent to pay costs of the suit*

Cases 30

East Africa

1. *Muigua, David Kariuki v Attorney General & another* Petition No 161 of 2011 – (Distinguished)
2. *Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Service Limited & another* Petition No 5 of 2013 – (Distinguished) 35

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 10,176,235,236 – (Interpreted)
2. Constitution of Kenya, 2010 Sixth Schedule section 15(2)(a) – (Interpreted) 40
3. County Governments Act, 2012 (Act No 17 of 2012) sections

13(1); 60; 138; 138(1)(b), (2)(3) – (Interpreted)	1
4. County Governments Act, 2012 (Act No 17 of 2012) Part VII – (Interpreted)	
5. Public Finance Management Act, 2012 (Act No 18 of 2012) section 147 – (Interpreted)	5
6. Transition to Devolved Government Act, 2012 (Act No 1 of 2012) In general – (Interpreted)	
Advocate	
None Mentioned	10
April 4, 2014, B Ongaya, J delivered the following Judgment.	
The Claimants filed the Memorandum of claim on 12.02.2014 through Angu Kitigin & Company Advocates. The Claimants prayed for judgment against the Respondents for:	
a. A declaration that the Claimants are legitimate employees of the 2nd Respondent.	15
b. A declaration that the 2nd Respondent's instructions barring the Claimants from accessing their respective offices were unlawful.	20
c. A declaration that termination of the Claimants' employment contract by the 1st and 2nd Respondents was in contravention of the law.	
d. An order reinstating the Claimants to their respective capacities as the Chief Finance and Accounting Officer for 1st Claimant and the Clerk to the County Assembly for the 2nd Claimant in that order.	25
e. An order of permanent injunction barring the Respondents jointly and severally from arbitrarily terminating the employment of the Claimants.	30
f. Damages.	
g. Costs of the suit.	
The 2 nd Respondent filed the response to the claim and counterclaim on 24.02.2014 through Kipkoech B Ngetich of Gordon Ogola, Kipkoech & Company Advocates. The 2nd Respondent prayed that the claim be dismissed with costs and counterclaimed for judgment to be entered against the Claimants for:	35
a. A declaration that there were no appointment of the Claimants and if there were such appointments then they were illegal abinitio for want of advertisement, competitive recruitment, short listing, public participation, and	40

approval by the County Assembly and the appointments
are thus illegal abinitio hence null and void. 1

b. Costs of the claim and counterclaim.

The Claimants filed on 28.02.2014 a reply to the 2nd Respondent's
response and response to counter-claim. The 1st Respondent filed the
Memorandum of appearance on 06.03.2014 through ZK Yego Law
Offices. The Claimants by a notice of appointment filed on 6.03.2014
appointed Nyekwei & Company Advocates to act alongside their
initial Advocates. 5 10

The case was heard on 6.03.2014 when the Claimants testified
to support their respective cases; and William Kamket, the 2nd
Respondent (RW1) and David Ng'eno, the Sergeant at Arms at
the Baringo County Assembly (RW2) testified to support the 2nd
Respondent's case. The 1st Respondent opted to rely on the documents
on record and to file final submissions. 15

The Claimants are career civil servants. They were employed in the
civil service competitively in accordance with the relevant regulations
made by the Public Service Commission. 20

The 1st Claimant was 38 years of age at the time of hearing of this
case. He was employed by the Commission as an officer under the
local authorities' services. The 1st Claimant served as the Town Clerk
for the Municipal Council of Kabarnet prior to his service in the
County Government. He held that position from September, 2011
to the date of the 1st General Elections under the Constitution of
Kenya 2010 as held on 4.03.2013. 25

By the letter dated 19.06.2013, the 1st Claimant was deployed by the
Transitional Authority as the Interim Principal Finance Officer for the
Baringo County Assembly. Prior to the deployment, the Transitional
Authority had advertised the positions in December 2012, the 1st
Claimant had applied in December, 2012 for the position of Finance
Officer and he was successful to be shortlisted as one of the candidates
to be seconded in the constitutional transition arrangements. 30 35

The Transitional Authority conducted interviews whereby the Claimant
attended and was appointed to the position of Chief Finance Officer,
Baringo County effective 25.2.2013. On 5.08.2013, the 1st Claimant
received a letter conveying the decision of the County Assembly Service
Board that the 1st Claimant was appointed on permanent basis as the
head of finance and accounting with effect from 1.07.2013. Minutes 40

of the Board confirmed that the board had resolved that the serving 27 officers be confirmed and the 1st Claimant was one of the 27 officers confirmed by the Board. The Claimant testified that serving officers were entitled to priority in employment by County Government as provided for in section 60 of the County Government Act, 2012. The 1st Claimant's further testimony was that under section 138 of the Act, former local governments' staff would be seconded to County Governments. His testimony was that he was seconded and absorbed and no law was contravened.

The Transitional Authority wrote the letter dated 20.01.2014. The letter explained that the authority recruited officers to lay foundation to devolved governance and the officers were then seconded to County Governments by the Public Service Commission. The letter stated that the Authority lacked funds to sustain payment of top-up allowances to the seconded officers. Accordingly, if a County Government needed services of the seconded officers then the County Government was to meet payment of the requisite allowances; if services of seconded officers was still needed, then the County Government was to consider absorbing the officers; and if the services of the seconded officers were not required, then the officers were to be released back to the Authority for deployment to their former stations. The preferred option by the County Government was to be conveyed to the Authority by 31.01.2014 to enable the Authority to advise the affected officers accordingly. The 1st Claimant testified that at time of the letter, he had already been absorbed into the service of the County Assembly.

The 1st Claimant received the letter dated 2.02.2014 recalling him to report to the Authority and to handover to the Principal Budget Officer, Baringo County. The Claimant reported to the Authority which apologised by the letter dated 7.02.2014 nullifying the recall in the letter of 2.02.2014 and stating that the recall decision had been made without the knowledge that the Claimant had been confirmed in the position.

On 7.02.2011, the 1st Claimant reported on duty and security officers at the County Assembly's gate told the Claimant that the 2nd Respondent had declared the Claimant to be a former employee and the Claimant testified that the position was confirmed in press reports attributable to the 2nd Respondent as firing the Claimant.

The Claimant then received by email the letter dated 7.02.2014 alleging that the Claimant had, as per the meeting of the County

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of the County Assembly to take his car. Two security officers at the gate told the claimant that the 2nd Respondent had instructed that the Claimant should not enter the premises because he was a former employee of the Assembly. He asked for written instructions and the officers said they had been verbal. The Claimant testified that he took the car on 8.2.2014 and on 10.02.2014, he read reports in the print media that he had been sacked.

The 2nd Claimant testified that the Board was new and had not developed procedures for recruitment, appointment, promotion, retirement, disciplinary control and other human resource functions. The Claimant testified that he saw the letter by the 2nd Respondent dated 4.2.2014 which referred to him as a former employee. The letter expressly stated that the Claimants were former officers and would therefore cease to be bank signatories. The letter was done on the 2nd Respondent's letter head as the County Assembly Speaker and addressed to the 1st respondent to effect changes in the bank account signatories.

The 2nd Claimant also testified that he received the letter dated 7.02.2014 from the 2nd Respondent alleging that he had contravened the public service code of conduct as noted in the County Assembly Service Board meeting of 7.02.2014. The allegations included harassing junior staff; incompetence, laziness and insubordination; withholding vital information from the speaker and failure to advise the speaker; careless interpretation of Public Finance Management Act which led to surcharging of members and staff; revealing and leaking confidential matters to unintended customers; undermining the County Assembly Service Board and slow implementation of the Service Board recommendations; inability to coordinate the induction and orientate the new staff; and carelessness, in contravening the service board resolutions by confirming the newly appointed staff instead of putting them on 12 months' probation as resolved. The letter gave the 2nd claimant 14 days from 10.02.2014 to respond to the issues in writing and to appear before the board in person on 24.02.2014 at 2.00 pm without fail and in company of a person of the claimant's choice. He was to hand over his functions to one Jepkemoi Chemase, the deputy clerk- administrative.

It was the 2nd Claimant's testimony that he could not hand over because there had been no disciplinary procedure occasioning his removal and therefore, to hand over. The Claimant testified, and RW1 confirmed

that there were no known procedures guiding decision-making and delivery of human resource functions by the County Assembly Service Board. The Claimant testified that they relied on labour laws generally. The Claimant lamented that on 30.1.2014, he had not left on foreign travel and the Board purportedly met in his absence as the secretary. He had arrived from Nairobi to be told that the meeting was on. He did not recall issuing the 7 days usual notice for the meeting of 30.1.2014 and the 2nd Respondent was running the business of the Board without any procedures of good governance. As secretary, he had not delegated his duties and the meeting was therefore not valid and one of his deputies that had acted did not have his authority to act or represent him as secretary. The claimant further lamented that as per vouchers filed, other persons were approving payments without his approval as the accounting officer and as provided in section 147 of the Public Finance Management Act, 2012. The claimant testified that the 2nd Respondent had precluded him from performing duties as the accounting officer between 1.2.2014 to 12.2.2014 and he could not be held accountable.

The 2nd Claimant's case was that he had been absorbed into the service of the County Assembly by decision of the Board and he had never been told by his employer that the appointment was irregular. The Claimant admitted that under the County Government Act, his appointment was subject to approval by the County Assembly and he was not aware of any such approval.

RW1 testified that he was not aware of the Claimants being locked out of their offices and at time of the hearing they were at work. RW1 testified that there were issues at the county and the claimants came to court prematurely without giving the Board a chance to deal with the issues amicably and conclusively. RW1 referred to his letters of 7.2.2014. He denied that the claimants had been victimised because they came from outside the County of Baringo. It was his case that the Claimants and 25 others in the transitional engagement had been confirmed on probationary terms and the 2nd Claimant had acted incompetently by issuing the confirmation letters. The chief officers had been appointed without parliamentary approval because the 2nd Claimant had failed to advise RW1. It was his further testimony that staff was being deducted because they were overpaid due to the 1st Respondent's incompetence. He denied that the Board was going to terminate the 1st Claimant's employment.

It was RW1's testimony that the decisions he made as the speaker were the decisions of the Board. He admitted that the appointments of the claimants had been confirmed by the Board. RW1 testified that he had helped the Claimants by asking the Transitional Authority to recall them because his help was that they do not undergo disciplinary procedure and action. When the transitional authority revoked the recall, he invoked the disciplinary process. RW1 testified that he had not advertised the positions held by the claimants. He admitted that the Board had appointed the 2nd Claimant to the position of Clerk but without approval of the Assembly. 1 5 10

RW1 testified that he applied for the Speaker's job to the Independent Electoral and Boundaries Commission as a transitional function. The 2nd Claimant had presided as Clerk at the election of the 2nd respondent as Speaker. RW1 testified that he had a clerk in office and there was no vacancy. RW1 also testified that the meeting of 7.2.2014 for the Board members took place but he had no notice of the meeting, the agenda or the minutes filed in court. It was his testimony that there was no published procedure that guided the business of the Board and the relevant county bill was with the Government Printer. RW1 further testified that he did not seek the advice of the Attorney General in the ensuing litigation and running of the Board's affairs because it was not his business to seek such advice. 15 20

The testimony by RW2 was that RW1 had not instructed the security officers at the gate to lock out the claimants from accessing their respective offices. 25

The issues for determination in this case are as follows:

- a. Whether the Claimants are lawful employees of the County Assembly and the County Assembly Service Board at all Material times. 30
- b. Whether the Claimants were removed from office by the second Respondent, and if yes, whether the removal was lawful and valid. 35
- c. Whether the Claimants are entitled to the remedies as prayed for.
- d. Whether the 2nd Respondent is entitled to the remedies as prayed for.
- e. Whether there are uniform norms and standards for performing human resource functions in the County Governments 40

The Court has considered the pleadings, the evidence and the submissions and makes the following findings. 1

Whether the Claimants are lawful employees of the County Assembly and the County Assembly Service Board at all material times 5

The facts are clear on this issue. The Claimants were serving civil servants. They applied and the Transitional Authority recruited them for secondment by the Public Service Commission to the County Government of Baringo. The Court holds that the recruitment and secondment was founded upon section 15(2)(a) of the 6th schedule to the Constitution which provided that through legislation, the national government was mandated to facilitate the devolution of power; to assist County Governments in building their capacity to govern effectively and to provide the services for which they are responsible; and support County Governments. The Transition to Devolved Government Act, 2012 empowered the Transitional Authority to facilitate the young County Governments, among other things, to have competent staff at inception and in accordance with section 15 of the 6th schedule to the Constitution. The Court finds that the Claimants being serving civil servants were legitimately identified in a transparent and accountable process and secondment to the Baringo County Government - which under article 176 of the Constitution, consists of the respective county assembly and county executive. 10 15 20

The Claimants' case is that they were absorbed into the service of the County Assembly by the decision of the County Assembly Service Board. There is no dispute that the Claimants were "confirmed" in that service and the Board made the relevant decision. The only dispute as urged for the 2nd Respondent is that the Claimants were confirmed on probationary terms. There are minutes of the Board meeting of 3.08.2013 relied on by the Claimants stating that the 27 serving officers were confirmed. Those relied on by the 2nd Respondent and with respect to the same date and meeting, state that the officers were confirmed but on probationary terms. The conflicting minutes confirm the case as urged for Claimants and the 2nd Respondent that the Board operated without proper rules and procedures of conducting its business and making human resource decisions. Thus, it is difficult to confirm the genuine set of the minutes but weighing the evidence, as already found by the Court, the staffs was absorbed. The Court has carefully analysed the situation and circumstances of the officers that were being confirmed. They were all experienced civil servants carefully 25 30 35 40

identified as fit for the job by the Transitional Authority and seconded by the Commission. The Court reckons that the usual employment practice is to replace new officers upon recruitment and appointment to probationary service and if probation is successfully served, confirmation in appointment would follow. The officers in issue were not such newly appointed employees. The Court finds that the officers including the Claimants were not eligible to probationary service as they were seasoned public officers constitutionally provided to build capacity of the County Government. It would be misconceived and untenable for any authority in the County Government to emplace the experienced officers on probationary service. In the circumstances of the case, the Court finds, and as submitted for the claimants, that “confirmed” as used by the Board could only mean absorbed in the service of the County Assembly on applicable permanent terms of service. The Court finds that the claimants were absorbed into the County Assembly service. The Court further finds that the absorption decision once made by the Board exhausted the Board’s jurisdiction in that respect and the claimants became entitled to remain in the permanent service as absorbed unless the employment was lawfully terminated.

For avoidance of doubt that the Claimants could not be emplaced on probationary service by any authority in the County Government, section 138 (1) of the County Governments Act provides that officers serving on such secondment would retain their terms of service and the same would not be altered to their disadvantage. The court holds that if the claimants were to be placed on probationary service, then that would amount to adverse variation of their respective terms and conditions of service and any such probationary service decision would be unlawful, null and void.

For the 2nd Respondent, it was submitted that the recruitment of the Claimants was not open, it was not advertised, it was not competitive recruitment, it was devoid of public participation, it was illegal and it was null and void. The 2nd Respondent relied upon *David Kariuki Muigua –Versus- Attorney General and Another* Petition No 161 of 2011; article 10 of the Constitution; and *Trusted Society of Human Rights v Nakuru Water and Sanitation Service Limited and another* [2013] eKLR to urge that the Claimants’ employment had not been competitive. The Court has considered the submission and finds that it was misconceived because this case did not relate to recruitment of public officers. Far from that, it entailed an option, first by serving

officers to agree to provide their experienced services to County Government, and second, an option by the County Government to absorb the officers into their permanent service. The concerned Public Officers had long time ago before the transitional circumstances been competitively or in accordance with the prevailing laws, been appointed and promoted through their respective ranks in the civil service.

The Court has considered that the 2nd Claimant's appointment as Clerk required approval by the County Assembly. Section 13 (1) of the County Governments Act, 2012 provides that there shall be a Clerk of the County Assembly, appointed by the County Assembly Service Board with approval of the County Assembly. The Court has noted the unique transitional arrangements and further noted that the 2nd Claimant has continued to serve the assembly as appointed with full knowledge of the assembly. The Court finds that by conduct of the assembly, the assembly is deemed to have approved the 2nd Claimant's appointment and in reliance on that conduct and the express decision by the County Assembly Service Board, the Claimant substantially and irreparably shifted his position by accepting the absorption into the County Government's permanent service and thereby relinquishing his national government employment.

The Court has weighed the balance of conveniences and the fairness in the circumstances of the case and finds that the 2nd Claimant is the duly appointed Clerk of the Baringo County Assembly under section 138 of the County Governments Act, 2012 and the assembly or its service board is stopped from going back on that concluded transitional employment and especially in view of the transitional constitutional and statutory arrangements that formed the basis of the appointment.

In any event, the 2nd Claimant as the 1st Clerk of the County Assembly was appointed under the transitional arrangements in interim capacity long before the appointment of the county assembly service board and then absorbed into permanent service by the board. The Court holds that the Claimants were appointed under the transitional arrangements under section 138 of the County Governments Act, 2012 and more specifically subsections (2) and (3) of the Act and the unique appointments were to the benefit of the County Government and the best public interest so much so that the historical practical usefulness of the secondment and then the appointments by absorption

or confirmation as it was called cannot be erased to the disadvantage of the claimants. 1

The other collateral issue is the effect of the consent in High Court Petition No 5 of 2014 at Eldoret entered into on 17.02.2014 by the Board and one Stephen Kemei. The Court was reluctant to delve into that issue for obvious reasons of jurisdiction. It is sufficient to state here that it was submitted for the 1st Respondent that the consent order in that case did not have any effect on the lawful employment of the Claimants and that the suit was compromised to achieve malicious agenda against the Claimants. The Court finds that submission by the County Government which consists of the County Assembly and the County Executive to be the overriding position of the County Government in this dispute. 5 10

Thus, to answer the 1st issue for determination, the Court returns that the Claimants are lawfully employed in permanent capacity by the Baringo County Service Board in the respective offices they serve in the Baringo County Government, be it in the assembly or the executive. 15

Whether the Claimants were removed from office by the second Respondent, and if yes, whether the removal was lawful and valid 20

The 1st Respondent submitted that the Claimants were constructively dismissed on 7.2.2014 and 8.02.2014 respectively when they were prevented from accessing their offices. It was further submitted that the Claimants were not accorded any due process and the dismissal was unfair. 25

For 2nd Respondent, it was submitted that the Board enjoyed delegated disciplinary powers from the Public Service Commission as per the circular dated 21.02.2014. The Claimants, it was submitted for the 2nd Respondent, had been suspended in accordance with the delegated powers. 30

The Claimants submitted that they were not liable for any misconduct as charged, they had not been dismissed and they were not seeking reinstatement but that they wanted to continue in employment. 35

The Court has considered the evidence and the submissions. First, RW1 was clear in his testimony that his decisions as Speaker were the decisions of the Board. Secondly, RW1 testified that he arranged to help the Claimants by releasing the Claimants to the Transitional Authority but the Authority upheld the claimants' absorption in the county assembly's service. Thus, he decided not to help them anymore 40

and instead fired the allegations of breach of the public officer code of conduct so as to deal with the Claimants. The Court finds that the 2nd Respondent (RW1) invoked fictitious authority and made unilateral decisions to deny the Claimants their justified employment in the County Government.

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By his own evidence, RW1 testified that he usurped the authority of the County Service Board as he stated that his decisions as speaker were decisions of the Board. While admitting that the board had not published any regulations, rules or procedures of its business including those for making of human resource decisions, evidence showed that the 2nd Respondent had authored and conveyed decisions affecting the Claimants' employment but without any substantive or procedural authority to do so. Of particular interest, was the letter of 4.02.2014 in which the 2nd Respondent declared the Claimants to be former officers, suggesting in his mind their employment had been terminated, yet there was no board decision that the Claimants were no longer employees. By that letter, the Court finds that the 2nd Respondent effectively barred the Claimants from performing their duties and thereby prevented them from accessing their offices. RW1 further authored the letters for the alleged contravention of the public officer code of conduct against the Claimants and without any evidence of minutes showing the Board's decision in that regard.

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The Court has considered the circular by the Commission as relied upon in the 2nd Respondent's submissions. The Court finds that the circular provided for the Commission's delegated disciplinary powers for officers seconded or deployed by the Commission to serve in the County Governments. At the time of the offending actions and decisions by the 2nd Respondent, the Court finds that the Claimants had long before been absorbed or as it was called, been confirmed, in the permanent service of the county assembly. They were no longer deployed or seconded staff of the Commission and the provisions of the circular did not apply to the Claimants.

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The Court has carefully examined the circumstances of the case and find that the transitional provisions in section 138 of the County Governments Act, 2012 applied to the disciplinary control of the Claimants. Subsection 138(1)(b) is clear that the Claimants could not be removed from service except in accordance with the terms and conditions applicable to the Claimants as at the date immediately before the establishment of the County Government or in accordance with

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the law applicable to the claimants at the time of commencement of the proceedings for the removal. There is no dispute that at all material time, there was no specific law to guide the county service board in a disciplinary procedure for removal of the Claimants from office so that the law as provided in the relevant Public Service Commission Regulations was to apply and the Commission therefore retained residual disciplinary powers for disciplinary control of the claimants (as absorbed into permanent service of the County Government and until specific law for that purpose is legislated).

To answer the second issue for determination, the Court finds that the Claimants were not terminated from employment and the pretended removal from office by the 2nd Respondent was unlawful, null and void.

While making that finding, the Court finds that by RW1's evidence, he made the offending decisions as the speaker and the board was not shown to have made or even ratified the decisions. The Court therefore finds that the 2nd Respondent and not the board was the proper party to the suit.

Whether the Claimants are entitled to the remedies as prayed for In view of the earlier findings by the Court, the Court makes the further finding that the Claimants are entitled to the following orders:

- a. A declaration that the Claimants are legitimate employees of the County Government of Baringo.
- b. A declaration that the 2nd Respondent's instructions barring the Claimants from accessing their respective offices or performing their duties were unlawful.
- c. A declaration that the purported termination of the Claimants' employment contract by the 2nd Respondent was in contravention of the law.
- d. An order that the Claimants to continue in employment in their respective capacities as the Chief Finance and Accounting Officer for 1st Claimant and the Clerk to the County Assembly for the 2nd Claimant in that order.
- e. An order of permanent injunction barring the respondents jointly and severally from arbitrarily terminating the employment of the Claimants.
- f. Costs of the suit.

The Court finds that the Claimants did not provide evidence and did not urge for damages as prayed and that prayer shall fail.

Whether the 2nd Respondent is entitled to the remedies as prayed for 1
The Court has already found that this was not a case of competitive
recruitment of public officers but it was a case of open identification,
secondment and absorption of the serving public officers to serve the 5
County Government within the relevant transitional, constitutional
and statutory framework for facilitating, building capacity and
supporting the County Governments to take up the devolved
functions. The Court finds that the case was about protection of the
Claimants, as public officers with long experience and mandated 10
to provide capacity for realisation of devolved governance, from
victimization for performing their respective public office duties and
from removal from public office or punishment without the due
process of law and as provided for in article 236 of the Constitution.
Accordingly, the prayers in the counterclaim as made will fail 15

Uniform norms for human resource functions in County Government
A final issue that emerged in this case is whether there existed uniform
norms and standards prescribed by legislation to be applied by the
County Assembly Service Boards and the County Public Service 20
Boards as envisaged in article 235 of the Constitution.

The 2nd Respondent confirmed in his evidence and the 2nd Claimant
also testified that there were no known or published uniform standards
or norms that bound the County Government and particularly the
two service boards established in the County Governments Act, 2012 25
to be followed in the discharge of the human resource functions.
What transpired in the proceedings established that the County
Governments Act, 2012 prescribed general provisions applicable to
the County Public Service Boards and the County Assembly Service 30
Boards and falling short of the uniform norms and standards as
envisaged in article 235. The mischief as unearthed in this case was
that the boards are vested with functions without enabling operational
statutory provisions including basic matters such as the procedures
for conducting the business of the service boards. The boards, it
was established, were not vested with statutory authority to make 35
any subsidiary legislation to guide their business and discharge of
their functions. The elaborate provisions of Part VII of the County
Governments Act, 2012 on county public service are found not to
apply to the County Assembly Service Board with the consequence 40
that the County Assembly Service Board is particularly not enabled
by legislation to perform its human resource functions.

Thus, in the instant case, it was obvious that the 2nd Respondent had made decisions without guidance from any specific applicable human resource standards made for that purpose. The disciplinary action as purportedly initiated by the 2nd Respondent was not based on any disciplinary regulations and rules. Similarly, if the service boards wanted to recruit, appoint, promote, exercise disciplinary control or retire the officers, there exist no step-by-step procedures and rules as well as substantive provisions to guide their decision-making. This case has established that in absence of such legal provisions, individual players may take initiative that may undermine the purpose for which the service boards were established to serve and with outcomes that disastrously suppress fairness and due process in running of the public service in the counties.

Accordingly, it is the opinion of the Court that this judgment will be served upon the Attorney General, the Transitional Authority, the Commission for the Implementation of the Constitution, and the Public Service Commission to take steps towards concluding the relevant legislation under article 235 of the Constitution.

In conclusion, judgment is entered for the claimants against the Respondents and for:

- a. A declaration that the Claimants are legitimate employees of the County Government of Baringo.
- b. A declaration that the 2nd Respondent's instructions barring the Claimants from accessing their respective offices or performing their duties were unlawful.
- c. A declaration that the purported termination of the Claimants' employment contracts and the purported disciplinary action by the 2nd Respondent was in contravention of the law.
- d. An order that the Claimants to continue in employment in their respective capacities as the Chief Finance and Accounting Officer for 1st Claimant and the Clerk to the County Assembly for the 2nd Claimant in that order.
- e. An order of permanent injunction barring the Respondents jointly and severally from arbitrarily terminating the employment of the Claimants.
- f. The 2nd Respondent to pay costs of the suit.
- g. The Deputy Registrar to serve this judgment within 7 days upon the Attorney General, the Transitional Authority, the Commission for the Implementation of

**Kipruto & another *v* County Government of Baringo
& another (B Ongaya J)**

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the Constitution, and the Public Service Commission
towards taking priority steps for initiating the relevant
legislation under article 235 of the Constitution.

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Ndichu *v* Clerk Kiambu County Assembly & another [2014] KLR-ICK

Industrial Court, at Nairobi
MN Nderi, J

March 14, 2014

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Petition No 11 of 2014 (Formerly Petition No 90 of 2014)

Brief facts

The Petitioner was elected as the Speaker of Kiambu County Assembly. He was removed from office pursuant to a motion of impeachment passed by members of the County Assembly.

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The basis for the impeachment entailed allegations made against the Petitioner. The allegations included obtaining finances in an irregular manner in order to attend the Annual Law Society of Kenya Retreat in Brazil, irregularly appointing the 1st Interested Party to provide legal services and using derogatory language against members of the Kiambu County Assembly.

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The Petitioner went to court and sought various orders which included his reinstatement to office and orders to prevent the election of a new Speaker. The Petition was to be determined at the Industrial Court and a Preliminary Objection was raised to the effect that the Industrial Court lacked the jurisdiction to hear and determine the Petition.

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Issues

- i. Whether the Industrial Court had jurisdiction to hear matters concerning the removal of an elected County Assembly Speaker from office.
- ii. Whether questions concerning the impeachment of a County Assembly Speaker were justiciable.
- iii. Whether the circumstances of the case warranted the grant of an interlocutory injunction.

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Jurisdiction – *jurisdiction of the Industrial Court – whether the Industrial Court had jurisdiction over a dispute concerning the removal of a County Assembly Speaker – Employment Act, 2007, section 2.*

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Jurisdiction – *justiciability – impeachment of a County Speaker – whether questions concerning the impeachment of a County Assembly Speaker were justiciable and the Court could exercise jurisdiction over them.*

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Civil Practice and Procedure – *injunctions – circumstances in which an injunction would be granted – whether the Court would grant an*

injunction to prevent the election of a new Speaker to a County Assembly. 1

Held:

1. A reading of section 2 of the Employment Act, indicated that the law was not concerned with the method of acquiring an employee. Therefore, on the question of which person would be considered to be an employee, the law did not concern itself with whether the person in question was appointed or elected. 5
2. An employee, within the meaning of section 2 of the Employment Act, was a person who had an oral or written contract of service, who provided services to a real or legal person and received a wage or salary for the services rendered. 10
3. The Industrial Court had jurisdiction over employment disputes and the jurisdiction included determinations concerning infringement of fundamental rights and freedoms, violations of constitutional provisions and statutory requirements. 15
4. The question as to whether or not the Speaker of the Kiambu County Assembly was lawfully removed from office was justiciable and the Court had jurisdiction to hear the matter. That question was about issues as to whether the County Assembly had observed statutory and constitutional requirements in impeaching the Speaker. 20
5. In order to obtain an injunction, the Applicant was required to show the existence of a *prima facie* case and that unless the injunction was granted the Applicant would suffer irreparable injury which would not adequately be compensated by an award of damages. However, where the Court was in doubt the application for injunction would be decided on a balance of convenience. 25
6. In light of the applicable law, section 11 of the County Governments Act on the removal of a Speaker from office, standing order Nos 58 & 63 on the removal of the Speaker from office and the right to be heard, respectively, and the Hansard Report of the proceedings of the Kiambu County Assembly, there was a right which had apparently been infringed. 30
7. The Petitioner was unlikely to suffer irreparable harm as he could obtain compensation in the form of damages if the Court found that his removal from office was unconstitutional and unlawful. 35
8. The balance of convenience did not favour the grant of the injunction as the order sought would have the effect of grounding the operations of the Kiambu County Assembly which could not transact its business without a Speaker in office. It was only possible 40

to elect an acting Speaker for a specific sitting while the Speaker was absent but if the office of the Speaker was vacant, no business could be transacted by the County Assembly until a new Speaker was elected. 1

Application dismissed. 5

Cases

East Africa

1. *Aliviza, Mary & another v Attorney General of Kenya & another* Application No 3 of 210 – (Applied) 10
2. *Mugendi, Daniel N v Kenyatta University and 3 others* Civil Appeal No 6 of 2012 – (Approved)
3. *Mrao v First American Bank of Kenya Ltd and 2 others* [2003] KLR 125 – (Explained)
4. *Noor Mohamed, Hanmohamed v Kassamali Virji Madhani* (1953) 20 EACA 8 – (Mentioned) 15
5. *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 – (Explained)
6. *Sergeant v Paul* (1949) 16 EACA 63 – (Followed) 20
7. *Shollei, Gladys Boss v Judicial Service Commission* Petition No 39 of 2013 – (Approved)
8. *Speaker of the Senate & another v Attorney General & 4 others* Advisory Opinion No 2 of 2013 – (Explained)
9. *United States International University (USIU) v Attorney General* Petition No 170 of 2012 – (Applied) 25
10. *Wambora, Martin Nyaga v Speaker, County Assembly of Embu & 5 others* Petition No 3 of 2014 – (Applied)

United Kingdom

1. *Garden Cottage Food Limited v Milk Marketing Board* [1984] AC 130; [1982] QB 1114 – (mentioned) 30

United States

1. *Nixon v United States*, 506 US 224 (1993)

Texts & Journals

1. Garner, BA., *Black’s Law Dictionary* St Paul, Minnesota: West Publishing 35

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 22, 23, 159(1); 162(2); 165(3) (d)(i)(ii)(iii); 178(2)(b) – (Interpreted) 40
2. County Governments Act, 2012 (Act No 17 of 2012) sections 9(4); 11

3. Employment Act, 2007 (Act No 11 of 2007) section 2	1
4. Industrial Court Act, 2011 (Act No 20 of 2011) sections 12 – (Interpreted)	

Advocates

1. <i>Mr Mtange</i> for the Petitioner/Applicant	5
2. <i>Mr Kibe Mungai, Mr Ngaywa & Mr Ngige</i> for the 1 st & 2 nd Respondent	
3. <i>Mr Mbeya</i> for the 1 st Interested Party	
3. <i>Mr Paul Muite, Senior Counsel & M/s Kamar</i> for the 2 nd Interested Party	10

March 14, 2014, **MN Nduma, J** delivered the following Ruling.

1. The Petitioner, Nick Githinji Ndichu, is the speaker of the Kiambu County Assembly elected pursuant to article 178 of the Constitution. He is also an Advocate of the High Court of Kenya in active practice prior to his election.	15
2. The Petitioner was removed from the position of speaker pursuant to a motion of impeachment moved by a Member of the County Assembly Hon Mbuiyu Nelson Munga, on 25 th February, 2014. The motion was passed by the requisite numbers hence the removal of the Petitioner from office of speaker.	20
3. The Petitioner is alleged to have misconducted himself in the following respects;	25
i. The Petitioner authorized the Finance Department to pay Ksh 530,000 to be used by himself on a private errand, to attend the Annual Law Society of Kenya Retreat in Brazil. That this amounted to theft of public resources.	
ii. That the payment was not sanctioned by the interim clerk of the Assembly, and thus the payment was irregular.	30
iii. That the Petitioner irregularly appointed the 1 st Interested Party to provide legal services to the Kiambu County which firm was not one in the pre-qualified list of providers of goods and services in the county.	35
iv. That the Petitioner has been using derogatory language to members of the 2 nd Respondent who have raised concern over his leadership style and he employed political persecution to instil fear.	40
4. The Petitioner denies these allegations and has provided an extensive defence in his supporting affidavit sworn on 27 th February, 2014.	

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- The Petitioner therefore prays; 1
- a. a declaration be issued to declare the Petitioner's removal from office by the Respondent as illegal, unlawful and unconstitutional and contravenes the Petitioner's rights guaranteed under the Constitution; 5
 - b. a conservatory order do issue reinstating the Petitioner to office as existing ante 25th February 2014;
 - c. an order reinstating the degazettement of the Petitioner and/or in the alternative if gazetted, the said gazette Notice be brought before the Court for the purpose of quashing the same. 10
 - d. an order of *Certiorari* do issue quashing the 2nd Respondent's decision to impeach the Petitioner;
 - e. a permanent injunction restraining the Respondents by themselves, their agents, servants and/or employees or any person acting under them from advertising, recruiting, interviewing or in any other manner in filling the alleged vacancy in the office of the Petitioner; 15
 - f. costs of the suit; 20
 - g. any other order that the Honourable Court may deem fit to grant.
5. The law firm of George Mugoye Mbeya T/A Mugoye and Associates Advocates has joined this suit as the 1st Interested Party, whereas, the Law Society of Kenya has joined the suit as the 2nd Interested Party. 25
6. The Petition was filed at the High Court and was transferred to this Court by Hon Majanja J. pursuant to a consent dated 4th March, 2014. On the face of the record therefore, the parties had submitted themselves to the jurisdiction of the Industrial Court. 30
7. That notwithstanding, the Respondents in addition to the Replying affidavits in the matter on 4th March, 2014, noted a preliminary objection on the same date to wit;
1. The Industrial Court has no jurisdiction to adjudicate over the question of removal of the Petitioner as the speaker of the County Assembly of Kiambu. 35
 2. The Petitioner has no justiciable cause of action against the first and second Respondent.
 3. Under section 12 of the Industrial Court Act 2011 this Honourable Court has no jurisdiction to grant the reliefs sought by the Petitioner. 40

8. Meanwhile a notice of motion on a Certificate of Urgency was simultaneously filed with the Petition on 27th February 2014 seeking various interim reliefs. 1

When the matter came before me for directions, the Court entertained brief arguments from the parties and a temporary injunction was granted restraining the Respondents from recruiting, interviewing or in any other manner filling the position of speaker of the Kiambu County Assembly pending the hearing and determination of the application. 5
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The Preliminary Objection and the Notice of Motion were then set for hearing Interparties on the 6th March, 2014, at 2:30 pm.

The Interested Parties have duly filed their responses mainly in support of the Petitioner's case. 15

9. It is important that the issue of jurisdiction be determined at the outset in recognition of the decision in the case of *Owner of the Motor Vessel lillian "S" v Caltex oil Kenya Ltd* [1989] KLR where the Court of Appeal stated thus: 20

“without jurisdiction 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 before it. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.” 25

Jurisdiction is challenged by counsel for the Respondents Mr Kibe Mungai on two fronts;

- i. that there is no employment relationship between the speaker of County Assembly and the County Assembly of Kiambu, the speaker being an elected official and therefore not an employee; 30
- ii. that impeachment of a speaker being a political process is not justiciable and thus the Court cannot provide any remedy to the Petitioner. 35

10(i) Employment Relationship

Competing arguments on this point were heard from Advocate Kibe Mungai for the Respondents and Snr Counsel Paul Muite who led the case for the Interested Party and the Petitioner. 40

11. The jurisdiction of the Court under articles 162(2) as read with section 12 of the Industrial Court Act, 2011 is very clear and was

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- well elaborated by Hon Majanja J in the matter of *United States International University (USIU) v Attorney General* (2013) e KLR). 1
 In the matter, counsel Kibe Mungai persuaded the Court to find;
- a. The Industrial Court has jurisdiction to determine applications for enforcement of rights and fundamental freedoms under article 22 and 23 in relation to all matters within their jurisdiction under the Act; 5
 - b. for purposes of all matters falling within the Industrial Court, reference to the “High Court” in the Constitution shall be deemed to refer to the “Industrial Court”; and 10
 - c. in order to avoid apparent conflict, the Court having the status of the High Court should have all the powers of the High Court in determination of disputes.
12. The Honourable Judge relying on Kenyan and South African jurisprudence and statutory law found; at page 14: 15
 “In light of what I have stated, I find and hold the Industrial Court as constituted under the Industrial Court Act, 2011 as a court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provision of section 12 of the Industrial Court Act, 2011.” This decision was cited with approval by the Court of Appeal, at Nairobi in Civil Appeal No 6 of 2012 *Professor Daniel N Mugendi v Kenyatta University and 3 others*. Section 12(1) of this Act provides that the Court has jurisdiction to hear and determine disputes relating to employment and labour relations including: a. disputes relating to or arising out of employment between an employer and an employee Under section 2 of the employment Act, 2007 a ‘contract of service’ is defined to mean; “an agreement, whether oral or in writing, and whether expressed or implied to employ or to serve as an employee for a period of time.” Whereas an “employee” is defined as “a person employed for wages or a salary.” 20
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13. It is clear from the foregoing that the law is not concerned with the method of acquiring an employee. The law does not concern itself with whether the person was appointed or elected. Rather, the person must; 40
- (i) be having an oral or written contract of service;
 - (ii) be providing a service to a real or legal person;

- (iii) be receiving a wage/salary for the services rendered. If such a person has a dispute with the person with whom he/she has a contract of service and to whom he/she provides services for a wage or salary, the court has jurisdiction over such dispute and has available remedies for that purpose.
14. It is the Court's finding that the Petitioner has a relationship with all the above attributes with the 2nd Respondent. This Court has therefore got jurisdiction over this matter.
- 15(ii) Whether the impeachment of a speaker is justiciable. On this point, I will go no further than the recent decision of a three (3) Judge bench of the High Court of Kenya at Kerugoya in Petition No 3 of 2014, *Hon Martin Nyaga Wambora v Speaker, County Assembly of Embu and 5 others*. The Court upon review of the case of *Nixon v USA*, 506 US 224 (1993), and the decision of the Supreme Court of Kenya in the case of the *Speaker of the Senate and another and Attorney General and others* (Advisory opinion No 2 of 2013) found: "It is our view that under article 165(3)(d) (i – iii) of the Constitution, this Court has jurisdiction to hear any matter relating to any question with respect to the interpretation of the 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 the Constitution;
 - iii. any matter relating to constitutional power of state organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government."
16. Similarly article 159(1) of the Constitution provides as follows: "Judicial authority is derived from the people and vests in and shall be exercised by the Courts and tribunals established by or under this Constitution." There is no doubt in my mind that the Court cannot sit aside and watch while disputes clearly delineated under the Constitution to be within its purview continue to eat into the very fabric of the Republic of Kenya.
17. The Supreme Court Stated thus in the *Senate* case *supra*;
- "we are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that

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- Parliament must operate under the Constitution which is the supreme law of the land 1
- If parliament violates the procedural requirements of the supreme law of the land it is for the Courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution.” 5
- The Court was referred to the definition of ‘justiciable’ in the *Blacks Law Dictionary* as follows;
- “The Quality or state of being appropriate or suitable for adjudication by a Court.” 10
18. As the Judges in *Wambora* case observed: “It is clear from the above definition that whether a matter before a Court is justiciable or not depends on the facts and circumstances of each particular case but the Court must first satisfy itself that it has jurisdiction to entertain the matter before it can resolve the issue of justiciability.” 15
19. In this case, having regard to the competing issues outlined in the Petition and the replying affidavits of the Respondents and interested parties, it is clear that the question as to whether or not the speaker of the Kiambu County was lawfully removed from office is justiciable and this Court has jurisdiction to hear and determine the matter. 20
20. The question whether the County Assembly violated its own procedure and acted in excess of jurisdiction therefore in removing the speaker is one this Court is presently seized of. 25
21. Injunction Whether or not the Court is to extend the temporary injunction issued on 4th March, 2014 to stop the filling of the position of the speaker pending the hearing and determination of the Petition depends on the requirements for grant of interim orders well set out in the case of *Mary Aliviza & Okoth Mondol v Attorney General of Kenya and Secretary General of East African Community* Application No 3 of 210, EALS, Law Digest 2005 – 2011 P1 which is cited with approval in the Industrial Court of Kenya at Nairobi, Petition No 39 of 2013, *Gladys Boss Shollei v Judicial Service Commission* as follows, page 17; “The Judges relying on the authority in *Sergeant v Paul* (1949) 16 EACA 63 stated; 30
- “One, the grant or refusal of a temporary injunction which is an interlocutory order, is an exercise of Judicial discretion which must be exercised judiciously. Two, the purpose of a temporary injunction is to preserve the *status quo* (see: *Noor Mohamed, Hanmohamed v Kassamali Virji Madhani* 40

(1953) 20 EACA 8 and <i>Garden Cottage Food Limited v Milk Marketing Board</i> (1984) AC 130. Three, the conditions for the grant of an Interlocutory Injunction are now well settled in East Africa;	1
a. an applicant must show a <i>prima facie</i> case with a probability of success;	5
b. an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages; and	10
c. if the Court is in doubt, it will decide an application on the balance of convenience.”	
22. On the issue whether the Applicant has established a <i>prima facie</i> case with probability of success, I have carefully considered the competing arguments by counsel and in particular the following; Whether the Respondent violated the procedural requirements under the County Governments Act, No 17 of 2012 especially section 11 titled “Removal of speaker from office” which provides:	15
“(1) a speaker of a County Assembly may be removed from office by the County Assembly through a resolution supported by not less than seventy five percent of all the members of the County Assembly.	20
(2) a notice of the intention to move a motion for a resolution to remove the speaker shall be given in writing to the clerk of the County Assembly, signed by at least one third of all the members of the County Assembly stating the grounds for removal;	25
(3) a motion for a resolution to remove the speaker shall be presided over by a member of the County Assembly elected under section 9(4);	30
(4) Before the debate and voting on a motion under Sub-section (3), the speaker shall be accorded an opportunity to respond to the allegations on the floor of the County Assembly.” The Court has also considered the standing order applicable to the matter in particular standing order No 58 titled “procedure for removal of the speaker” which cites the provisions of section 11 of the County government Act verbatim. The Court is mindful that at this stage of the case, it is not supposed to go to the merits of the case but it is important for the Court to	35 40

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- satisfy itself as was stated by the Court of Appeal in *Mrao v First American Limited and 2 others* (2003) KLR that there is, “a case which on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter” and as was stated in *Mary Aliviza* case (*supra*). 1 5
23. “At this stage we must of course refrain from making any determination on the merits of the Application or any defence on it. A decision on the merits or demerits of the case must await the substantive consideration of the facts and applicable law after full hearing of the Reference.” 10
24. Having also, considered Standing Order No 63 – titled Right to be heard and the Hansard report of the proceedings by the Kiambu County Assembly on the material day, the Court at this stage is of the view that there exists a right which has apparently been infringed by the Respondents as to call for an explanation or rebuttal. 15 20
25. The Court is also of the view that if the Petitioner is eventually successful on the merits of the Petition, he is not likely to suffer irreparable harm since he is at liberty to pursue payment of damages if the Court finds that his removal was unlawful and in contravention of his constitutional rights as per prayer 25(a) in this Petition. 25
26. The matter also largely turns on the balance of convenience. Unlike in the case of *Wambora* (*supra*) where there is a constitutional provision for the Deputy Governor to assume the office of the Governor in his absence or upon his removal, this is not the case with respect to the position of the speaker of the County Assembly. 30
27. The provisions of the County Governments Act No 17 of 2012 and the standing orders of the Respondent do not provide for the automatic filling of the position of the speaker upon his removal other than by an election for substantive replacement. 35
28. Furthermore, it is apparent from the provisions of this Act, and the standing orders that, the Assembly may not be convened at all in the absence of the speaker other than for the purpose of electing a speaker on the first sitting. 40
29. Under article 178(2)(b) of the Constitution and section 9(4) of the Act, an acting speaker may only be elected during a specific sitting

convened by the substantive speaker if the substantive speaker is
absent from the house. 1

30. In fact, standing order 4(2) reads:

“If the office of speaker falls vacant at any time before the
expiry of the term of County Assembly, no business shall be
transacted by the County Assembly until the election of a
new speaker.” 5

31. It is clear that granting an interim order in the terms sought by
the Petitioner would ground the operations of the Kiambu County
Assembly to a halt. The balance of convenience is therefore not in
favour of granting the interim order sought. 10

Accordingly the Application is dismissed and costs will be in the
cause. 15

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Republic *v* Tana River County Assembly & 2 others [2014] KLR-HCK

High Court, at Malindi
CW Meoli, J

March 3, 2014

Judicial Review Miscellaneous Civil Application No 10 of 2013

Brief facts

The Governor of Tana River County (2nd Respondent) gazetted the names of the nominees to serve in the County Executive of Tana River. However, the Applicant (Ibrahim Bocha) filed an application for judicial review orders seeking to prohibit the gazettment of the nominees and an order of *certiorari* to quash the resolution of the County Assembly (1st Respondent) approving the 2nd Respondent's nominees. The grounds for the Application were that, the approved list of nominees did not meet the cultural diversity test as enshrined in the Constitution, since there were no nominees drawn from the minority communities and that there were only two women nominees in a list of nine people. It was also submitted that the period advertised for submission of applications was too short (6 days) and that the public did not get sufficient time to participate in the vetting exercise of the nominees.

Issues

- i. Whether the appointments of the Tana River County Executive members complied with the two-thirds gender rule under article 197 of the Constitution of Kenya, 2010.
- ii. Whether the list of the nominees met the cultural diversity test under article 197(2) of the Constitution and section 35(1)(a) of the County Governments Act; and whether the period advertised for submission of applications was adequate.

Constitutional Law – devolution – County Government appointments – whether the appointments of the Tana River County Executive members complied with the two-thirds gender rule under the Constitution – whether the list of the nominees met the cultural diversity test under the Constitution and the County Governments Act – whether the period advertised for submission of applications was adequate – Constitution of Kenya, 2010, articles 10, 174, 197; County Governments Act, sections 30, 35.

Judicial Review – prohibition and *certiorari* – application for orders

of prohibition and certiorari to prohibit the gazettelement of the County Executive nominees and to quash the approval of the nominees by the County Assembly of Tana River County – whether the Application was merited.

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Held:

1. The objects of devolution under article 174 of the Constitution resonated with the themes espoused as national values in article 10(2)(a) which include national unity, sharing, devolution of power, rule of law, democracy participation of the people, human dignity, equality, social justice, equity, human rights, non-discrimination, good governance and accountability. The Respondents were bound by those principles and therefore the impugned appointments contravened the dictates of the Constitution and the law and to that extent constituted an illegal exercise of the mandate and duty placed upon the respondents. 10 15
2. The Respondents had a duty to put in place measures to ensure diversity and representation of the minorities and marginalized groups. The Respondents misapprehended the extent of their duty as prescribed by the Constitution and the law as to constitute an error in law. The misapprehension of the law and the legal duty imposed upon the Respondents was further demonstrated by the evidently short notice of six (6) days given in the advertisement for submission of applications for the Executive Committee positions. 20 25
3. Although the Respondents were satisfied that they had fulfilled their duty, advertising in a national newspaper was only a minimum step. Under sections 66, 87(a-d), 91 and 97 of the County Governments Act envisaged other modes that were necessary for purposes of reaching the disadvantaged. Section 91 of the County Governments Act even suggested structures of dissemination of information in aid of public participation, including notice boards to announce jobs, appointments, awards and other important announcements of public interest. By relying solely on the newspaper advertisement and given the rather short notice to candidates, the Respondent clearly misdirected themselves as regarding the carrying out of their duties. Hence, the eventual list of nominees fails the cultural diversity test. 30 35
4. The rationale of those provisions of the law under the County Governments Act was that the outcome of any process was as good as the process itself. The Governor was therefore under a statutory duty to satisfy himself that the procedure adopted for the appointment of the County Executive could yield the correct mix of candidates 40

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- to satisfy the constitutional and statutory requirements. 1
5. No amount of extended vetting could have cured the flawed process which commenced with a newspaper advertisement giving very short notice. The vetting procedure could not sanctify an already flawed process. Further, the availability of a Petition procedure under section 15 and 88 of the County Governments Act could not exempt the Respondent from complying with the law under which they operated, or the consequences of noncompliance. 5
6. For the reason that the impugned appointments contravened the Constitution and the County Governments Act, the Respondent's resolution was illegal having been arrived at as a consequence of error of the law. 10
7. In an innovative attempt to salvage the situation the court was invited to consider issuing an order of *mandamus*, directing the Respondent to comply with article 197(2) of the Constitution by advertising for an extra position reserved for a woman who qualified under section 35(3) of the County Governments Act. That invitation though attractive was to a path wrought with many difficulties. In the first place, the Court had already found that the process of selection and appointment of the nine County Executives was flawed, for reasons other than failure to comply with article 197(2) of the Constitution. The Court could not purport to sanctify such a process by engaging a patently formalistic compliance mechanism. Secondly, the Court was least suited to determine whether such appointment would not run afoul of article 179(3) of the Constitution. Finally, the *ex parte* Applicant had not sought such an order. 15
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Application partially allowed; each party ordered bear their own costs.

Cases

East Africa

1. *Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge and 9 others* Civil Appeal No 266 of 1996 – (Mentioned) 30
2. *Meixner & another v Attorney General* [2005] 2 KLR 189 – (Followed) 35

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 10(2)(a); 20; 56; 160; 174; 179; 197(1) – (Interpreted) 40
2. County Governments Act, 2012 (Act No 17 of 2012) sections 15, 35(1)(b)(3); 66; 87(a-d); 88; 91; 97 – (Interpreted)

Advocates	1
1. <i>Mr Abubakar</i> for the Applicants	
2. <i>Mr Kilonzo</i> for the Respondent	
March 3, 2014, CW Meoli, J delivered the following Judgment.	5
Introduction	
1. The background to these proceedings can be summarized as follows:	
In April, 2013, the Tana River County Assembly (1 st Respondent) and the Governor of the County (2 nd Respondent) commenced the exercise leading to appointment of nine members of the County executive pursuant to their constitutional mandate. In this regard an advertisement was placed in a local newspaper, the <i>Daily National</i> published on 12 th April, 2013.	10
2. As required, the County committee on appointments presented its report on the vetting of the County executive nominees pursuant to article 179 of the Constitution, for appointment by the County Governor with the approval of the County Assembly. Eventually, nine persons were appointed, and their names gazetted vide Gazette Notice No 9397 of 8 th July, 2013. These are:	15
1. Adam Barissa Dhidha	
2. Abdi Bile Suleiman	
3. Alji	
4. Sophia. Hassan Barhe Kuno	25
5. Ismail Jilo	
6. Oblia Wedo	
7. Salim Mohamed Dame	
8. Omar Wachu Buketa	
9. Yussuf Adow Kuno	30
9. Eunice Lazima Mungatana	
The Pleadings	
3. On 17 th July, 2013 the <i>ex parte</i> Applicant Ibrahim Bocha approached the Court by way of certificate of urgency and successfully applied for leave to apply for judicial review orders of prohibition against the 2 nd Respondent to prohibit him from gazetting the appointees, and <i>certiorari</i> to quash the 1 st Respondent's resolution of 3 rd July, 2013 approving the 2 nd Respondent's nominees. The main motion was subsequently filed on 30 th July, 2013. It is supported by the Affidavit of the <i>ex parte</i> Applicant.	35
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4. The key complaint raised in the said affidavit was that the 1st Respondent's purported approval of the nominees, was in breach of the Constitution on the following grounds: 1
- Out of the nine members of the proposed executive only two were women. That three nominees previously rejected by the committee on appointments were approved. 5
- The approved list of nominees failed the cultural diversity test as it did not include any person from minority communities in the county such as the Malakote, Watta, Bajunis, Somaliwen, Kikuyu and Kamba. 10
- That the period advertised for submission of applications was too short (6 days) and the eligibility criteria too high.
- The public did not get sufficient time to participate in the vetting exercise. 15
5. The Respondents filed an affidavit in reply through the 2nd Respondent on 1st October, 2013. He depones that no application was received from the minority communities mentioned by the *ex parte* Applicant, even while confirming that the eventual appointees were drawn from the Pokomo, Orma and Wardei communities, and that only the two women met the appointment criteria under section 35(3) of the County Governments Act. Further that although the public was notified of the vetting of the nominees, the *ex parte* Applicant did not make any representations. He explained that the three nominees rejected at the vetting stage were unanimously approved for appointment by the County Assembly via an amended motion on 3rd July, 2013. Subsequently, the names approved were duly gazetted. The 2nd Respondent asserted that the Respondents acted within the law and the prayers sought by the *ex parte* Applicant do not lie. 20 25 30
6. On 2nd October, 2013 when the main Motion came up for hearing the parties agreed to dispose of it by way of written submissions, which were received on 7th November, 2013. The Court has considered the Motion and the parties' respective affidavits and submissions. 35

Analysis

7. The key facts leading up to this dispute are not contested. These include the process undertaken by the Respondents in the selection and appointment of the nine persons eventually gazetted as members of the Tana River County Executive Committee, on 8th July, 2013. 40

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- There is no doubt in my mind that the key question raised by these proceedings is one of the legality or illegality of the impugned exercise. In the case of *Meixner & another v Attorney General* [2005] 2 KLR 189 which Mr Kilonzo for the Respondents relied on, the Court of Appeal held that: 1
- “Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power.” 5
- Thus the scope of judicial review is in many ways narrower than in a constitutional petition such as the two cited by Mr Abubakar for the *ex parte* Applicant 10
8. The legal framework relating to the process of appointment of County Executive Committee Members is in Constitution and the County Governments Act. Thus in considering the legality or otherwise of the impugned exercise, the Court must consider whether there was full compliance with the said law. Finally, the remedies, if any available to the *ex parte* Applicant. I propose to deal with each limb of the *ex parte* applicant’s objections as earlier outlined in this judgment even while restating the same as issues for purposes of determination. 20
- A. Whether the appointments comply with article 197 of the Constitution
9. Article 197 of the Constitution is in the following terms: 25
- “(1) Not more than two-thirds of the members of any county assembly or county executive committee shall be of the same gender. 30
- (2) Parliament shall enact legislation to
- (a) ensure that the community and cultural diversity of a county is reflected in its county assembly and county executive committee; and 35
- (b) prescribe mechanisms to protect minorities within counties.”
10. The County Governments Act in giving effect to this article provides at section 35(3) the qualifications required for appointment into the County Executive Committee. A candidate must: 40

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- and communities, and community and cultural diversity within the county. 1
18. In paragraph 9 and 10 of his replying affidavit the 2nd Respondent stated: 5
- “That I am informed by Mr Tom Onyango the 1st Respondent’s clerk that there was no single application from the Kamba, Watta, Malakote, Kikuyu, Bajunis and Somali when communities for the listed positions and no application was received by the 1st Respondent from the said counties. 10
- That I am informed that majority of the Applicants who qualified for the position of the 1st Respondents county executive committee were from the Orma and Pokomo communities” 15
- The 1st Respondent’s duty under section 35(1)(b) must be read together with the definition of affirmative action under article 160 of the Constitution. 15
- It states: 20
- “affirmative action” includes any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom.” 20
19. That is not to suggest that the Respondents could very well appoint unqualified persons into the executive in breach of section 35(3). What it means is that the respondents must put in place measures to ensure diversity and representation of the minorities and marginalized. It does seem from paragraphs 9 and 10 of the Respondents’ affidavit that the Respondents misapprehended the extent of their duty as prescribed by the Constitution and the law as to constitute an error in law (See *Meixner’s* case). 30
20. This misapprehension of the law, and therefore, the legal duty imposed upon the Respondents is in my considered view further demonstrated by the evidently short notice given in the advertisement for submission of application for the executive committee positions. The advertisement published on April 12th 2013 gave the closing date as 18th April, 2013 “C a period of only six days. From the Respondent’s depositions, once they so advertised they were seemingly satisfied that they had done their duty. But in my considered view advertising in a national newspaper was only a minimum step. Section 66, 87 (a-d), 91 and 97 of the County 40

Government Act leaves no doubt that other modes are envisaged as necessary for purposes of reaching the disadvantaged. Section 91 even suggests structures for dissemination of information in aid of public participation, including notice boards to announce jobs, appointments, awards and other important announcements of “public interest”.	1 5
21. The rationale behind these sections is simple: the outcome of any process can only be as good as the process itself. The Governor’s functions and responsibilities as set out in section 30 of the County Governments Act are extremely wide, almost daunting. Section 30(3) further provides that: “In performing the functions in subsection (2) the governor shall; a) ... b) ... c) promote democracy, good governance, unity and cohesion within the county d) e) promote the competitiveness of the county f) g)	10 15 20
The 2 nd Respondent was therefore under a statutory duty to satisfy himself that the procedure adopted for the appointment of the county executive could yield the correct mix of candidates to satisfy constitutional and statutory requirements. By relying solely on the newspaper advertisement and given the rather short notice to candidates, the Respondents clearly misdirected themselves as regarding the carrying out of their duties. This amounts to an error of law in my humble view. The consequence is that the eventual list of nominees fails the cultural diversity test.	25 30
C) Whether sufficient time was allowed for public vetting of candidates	35
22. This question is superfluous in light of the foregoing. I am not convinced that any amount of extended vetting could have cured the flawed process, which commenced with a newspaper advertisement giving very short notice. I need not say more on this aspect. The respondents have faulted the <i>ex parte</i> Applicant for failing to avail himself of the vetting and the petition procedure under section 15 and 88 of the County Government Act. Partly, for the reasons I have	40

given earlier, the vetting procedure could not sanctify an already flawed process. Secondly, the availability of a Petition procedure under section 15 and 88 of the County Government Act cannot exempt the Respondents from complying with the law under which they operate, or the consequences of noncompliance. 1
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Determination

23. For the reason that the impugned appointments contravene the Constitution and the County Governments Act as outlined above, the respondent's resolution is illegal having been arrived at as a consequence of error of the law. The next question is whether the remedies sought by the applicant are available in the circumstances of this case. Firstly, I agree with Mr Kilonzo for the respondents that an order of prohibition cannot lie: the act proposed to be prohibited (gazettement) has already been done. (See *Kenya National Examinations Council v R ex parte Geoffrey Gathenji Njoroge & others* (1997) eKLR 10
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24. In an innovative attempt to salvage the situation, Mr Kilonzo has invited the Court to consider issuing an order of mandamus, directing the respondents to comply with article 197(2) of the Constitution by advertising for an extra position reserved for a woman who qualifies under section 35(3) of the County Governments Act. That invitation though attractive is to a path wrought with many difficulties. In the first place, this court already found that the process of selection and appointment of the nine County Executives was flawed, for reasons other than failure to comply with article 197(2) of the Constitution. The Court cannot purport to sanctify such a process by engaging a patently formalistic compliance mechanism. Secondly, the court is least suited to determine whether such appointment would not run afoul of article 179(3) of the Constitution. Finally, the *ex parte* Applicant has not sought such an order. I therefore decline the invitation. 20
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25. In the Kenya National Examinations Council case, the Court of Appeal stated that where a decision had already been made only an order of *certiorari* is appropriate. The court has been urged to eschew this remedy to avoid grounding the operations of the County Government of Tana River. It is however, not clear whether the county executive has assumed office since July 2013. Even while appreciating the additional cost and inconvenience a *certiorari* order is likely to cause, I do not accept that any body or organ could 35
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justify the suspension of the operation of the Constitution and the County Governments Act out of expediency. The considered provisions of the Constitution and County Governments Act exist for specific purpose and must be upheld, especially in a county where intermittent inter-ethnic strife, breakdown of the rule of law and complaints about marginalization and discrimination are a matter of public record. I do therefore grant prayer (ii) of the Notice of Motion filed on 30th July, 2013.

Due to the public interest nature of these proceedings, I order that each party bears its own costs.

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**County Government of Nyeri v Cabinet Secretary,
Ministry of Education Science and Technology
& another [2014] KLR-HCK**

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High Court, at Nyeri
J Wakiaga, J

February 17, 2014

Petition No 3 of 2014

Brief facts

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By a letter to all County Directors of Education, District Education Officers and all principals of secondary schools in Kenya the 2nd Respondent issued guidelines for form one selection in 2014 aimed at ensuring placement of candidates in schools of their choice and through merit, equity in school placement through quotas and affirmative action where applicable, proportionate sharing of national schools places between public and private schools candidates in every district based on the number of candidates taking KCPE from either category of primary schools and harmonization of the selection policies throughout the County at all levels National County and District.

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The extra-county schools (high performing schools with a mean score of 6.5 in KCSE) and county schools were supposed to admit students as follows: Extra County: 40% National, 40% from within county and 20% from the district hosting the school and County: 20% from the district hosting the school and 80% from the rest of the county.

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The Petitioner stated that the circular was not followed in schools within Nyeri county thereby violating the constitutional provision under article 27 of the Constitution of Kenya, 2010 by discriminating against the students from Nyeri County and its various districts by having negligible students admitted from its host district schools and a staggering number of students from other counties admitted in its schools over and above the 40% prescribed in the guidelines.

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Issues

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- i. Whether the court had jurisdiction to determine a dispute between the National and County Governments.
 - ii. What constituted a dispute between the National and County Governments within the provisions of the Intergovernmental Relations Act and the Constitution.
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Government Relations – *intergovernmental dispute* – *dispute between the National and County Governments* – *where a dispute arose as to the*

guidelines issued for selection process of form one students – where the dispute touched on the relations between the two levels of government – whether the dispute was one which could be termed as an intergovernmental dispute – Intergovernmental Relations Act, sections 30, 31; Constitution of Kenya, 2010, article 189; South African Intergovernmental Relations Frameworks Act, 2005. 1 5

Jurisdiction – jurisdiction of the High Court – where the jurisdiction of the High Court was questioned in regard to the provisions of the Intergovernmental Relations Act – where the dispute was framed as a constitutional question – whether the High Court had jurisdiction to hear the dispute as framed – Constitution of Kenya, 2010, article 165. 10

Constitution of Kenya, 2010

Article 189(1) “Government at either level shall:”

“Perform its functions and exercise its powers in a manner that respects the functional and institutional integrity of government as the other level and respect the constitutional status and institution of government at the other level and in case of county government within the county level.” 15

“Assist, support and consult and as appropriate implement the Legislation of the other level of Government and” 20

“Liase with government at the other level for purposes of exchanging information, coordinating polices and administration and enhancing capacity” 25

(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.” 25

(3) “In any dispute between governments the governments shall make every reasonable effort to settle the dispute, including by means of procedure provided under National Legislation. 30

(4) “National legislation shall provide procedures for settling Intergovernmental disputes by alternative dispute resolution mechanism including negotiation, mediation and arbitration. 35

Intergovernmental Relations Acts Cap 5(a)

Section 30(1) “In this part unless the context otherwise requires ‘dispute’ means an Intergovernmental dispute.” 40

Section 31 “The National and County Governments shall take reasonable means to: resolve disputes amicably and apply and

exhaust the mechanisms for alternative dispute resolutions provided under the Act or any other Legislation before resorting to judicial proceedings as contemplated by article 189(3) and (4) of the Constitution 1

South African Intergovernmental Relations Frameworks Act 2005 5

defined Intergovernmental Disputes as:

“a dispute between different governments or between organs of state from different governments concerning a matter: arising from Statutory powers or function assigned to any of the parties; an agreement between the parties regarding the implementation of a statutory power or function and which is justifiable in a Court of law and include any dispute between parties regarding a related matter” 10

Held: 15

1. What the provisions of the Constitution and statute in respect of the dispute resolution between the national and county governments did was not to oust the jurisdiction of the court but to postpone the same until the alternative dispute mechanism had been attempted. 20
2. The express provisions of article 165 of the Constitution gave the High Court unlimited original jurisdiction in criminal or civil matters and jurisdiction to determine the question whether a right or fundamental freedom in the bill of rights had been denied, violated, infringed or limited. 25
3. Section 30(1) of the Intergovernmental Relations Act provided that disputes, which could be resolved under the Act, were disputes between the National Government and a County Government or amongst County Governments. The existence of the alternative remedy and procedure could not necessarily oust the jurisdiction of the court. 30
4. The Court had jurisdiction but the exercise of that jurisdiction was postponed or the Court could decline to exercise jurisdiction pending settlement of the same.
5. In determining the question as to whether the dispute was one between a County and National Government to which dispute settlement mechanism under the Intergovernmental Relations Act applied and for which the court ought to postpone or decline the exercise of its jurisdiction to enable the parties exhaust the procedures set therein, a definition of a dispute had to be undertaken as it was missing from the Intergovernmental Relations Act and to get the definition thereof the court had to look at the South African 35 40

- Intergovernmental Relations Frameworks Act 2005. 1
6. The disputes referred to by both the Constitution and statute were those in respect of Traditional Government functions at the two levels of Governments established by the Constitution as stated at articles 6(2) & 189 which provided for cooperation between National and County Governments. A dispute between governments was a dispute in relation to the functions and exercise of powers between the different levels of Government. 5
7. The nature of the dispute had to be looked at in totality and the dispute before court related to selection of form one in county schools within Nyeri County. It was brought to enforce fundamental rights and freedoms under articles 22 and 23 and 27 of the Constitution and so was a dispute in respect of the functions of the Petitioner as stated in schedule 4 of the Constitution. There was no reason to hold that it was an intergovernmental dispute simply because the County Government of Nyeri was the Petitioner and an entity of the National Government which was the Respondent. 10 15
8. There was no reason to reduce an allegation of violation of fundamental rights to a dispute between a County and National Government as to do so would amount to judicially created limitations on the express provision of the Constitution. The Constitution was clear that any person could bring an action in respect of an allegation of breach of fundamental rights and freedom but the court was not persuaded that the Petitioner was not a person within the meaning of article 22 of the Constitution. 20 25

Preliminary objection dismissed.

Cases

East Africa

1. *Republic v Transition Authority & another ex parte Kenya Medical Practitioner, Pharmacist & Dentist Board (KMPDH) & 2 others* Judicial Review No 317 of 2013 – (Followed) 30
2. *Nyaga, John Njue v Nicholas Njiru Nyaga & another* Civil Appeal No 175 of 2010 – (Mentioned) 35
3. *Gachagua, Nderitu v Thuo Mathenge* Civil Appeal No 14 of 2013 – (Followed)

South Africa

1. *Uthekela District Municipality v President of Republic of South Africa* 2003(1) SA 687 – (Followed) 40
2. *National Gambling Board v Premier of Kwazulu Natal & others* [2001] ZACC 8; 2002 (2) BCLR 156; 2002 (2) SA 7157– (Followed)

Statutes	1
<i>East Africa</i>	
1. Constitution of Kenya, 2010 articles 6(2); 22; 23(1); 27(b); 53(1)(b)(2); 159(a)(c); 165(3)(b); 176(1); 189(3)(4); 259; 258(1) – (Interpreted)	5
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 40 rules 1, 2, 3, 4; order 51 rules 1, 2 – (Interpreted)	
3. Intergovernmental Relations Act, 2012 (Act No 2 of 2012) section 31(a) (b) – (Interpreted)	
4. Basic Education Act, 2013 (Act No 14 of 2013) sections 18, 20 – (Interpreted)	10
<i>South Africa</i>	
1. Intergovernmental Relations Frame Works Act 2005	
Advocates	15
1. <i>Miss Gathagu, Miss Munyi & Gatiri</i> for the Respondents	
2. <i>Mr Angima</i> for the <i>amicus curiae</i>	
3. <i>Mr Wahome</i> for the Petitioner	
February 17, 2014, J Wakiaga, J delivered the following	20
The Petitioner is the County Government of Nyeri established under article 176(1) of the Constitution of Kenya and the County Government Act No 17 of 2012 while the 1st Respondent is the Cabinet Secretary Ministry of Education Science and Technology and the 2nd Respondent is the Principal Secretary thereof.	25
The Petition is founded under articles 22 and 23 of the Constitution and alleges contravention of fundamental right and freedoms under article 27 of the Constitution in respect of Form one selection in 2014 in Nyeri County.	30
The Petitioner states that by a letter dated 15th November 2013 to all County Directors of Education, District Education Officers and all Principals of Secondary Schools in Kenya the 2 nd Respondent issued guidelines for form one selection 2014 aimed at ensuring:	35
i. Placement of candidates in schools of their choice and through merit.	
ii. Equity in school placement through quotas and affirmative action where applicable.	
iii. Proportionate sharing of National Schools places between public and private schools candidates in every district based on the number of candidates taking KCPE from either category of primary schools.	40

County Government of Nyeri v Cabinet Secretary, Ministry of Education Science and Technology & another (J Wakiaga, J) 1149

iv. Harmonization of the selection polices throughout the County at all levels National County and district.	1
That the extra-county schools (high performing schools with a mean score of 6.5 in KCSE) and county schools were supposed to admit students as follows	5
i. Extra County: 40% National 40% from within county and 20% from the District hosting the school. County: 20% from the District hosting the school and 80% from the rest of the County.	10
The Petitioner stated that this circular was not followed in schools within Nyeri county thereby violating the Constitutional provision under article 27 by discriminating against the students from Nyeri County and its various districts by having negligible students admitted from its host district schools and a staggering of students from other counties admitted in its schools over and above the 40% prescribed in the guidelines	15
The Petitioner prayed for:	
1. A declaration that the selection to form one places in the extra county secondary schools in Nyeri County is discriminating against the residents of Nyeri County against their legitimate expectation and unconstitutional.	20
2. An order annulling the selection of form one places in the extra county secondary schools in Nyeri county.	25
3. An order directing the Respondents to carry out a new selection for the extra county secondary schools in total and strict compliance with the guidelines dated 11st March 2013 the principles of equity and Constitution of Kenya.	30
4. An order stopping any admission of form one students in the extra count secondary schools in Nyeri county pending hearing and determination of this petition.	
5. Cost of the suit and interest at court rate.	
Any further or better relief.	35
Together with the Petition the Petitioner took out a notice of motion under certificate of urgency under order 40 rules 1, 2, 3 and 4 order 51 rules 1 and 2 of Civil Procedure Rules and the Constitution of Kenya for order that the Honourable court grant conservatory orders restraining any form one admission on the following extra county schools in Nyeri County Namely: Nyeri High , Tumutumu Girls,	40

South Tetu Girls, Kangubiri Girls, Othaya Girls, Chinga Boys, Karima Boys, Naromoro Girls and Othaya Boys until the full hearing and determination of the Application or until further orders of court. 1

The Application was certified urgent and fixed for interpartes hearing on 5th February 2014 when Mr Wahome appeared for the Petitioner and Mr Muthuri for the Respondent and upon Application for adjournment by Mr Muthuri to enable them file reply the Court issued temporary conservatory orders pending interpartes hearing on 7th February 2014. 5 10

On 7th February 2014 the Respondent took out preliminary objections on point of law and the subject of this ruling to wit

- a. The case before the Court is a dispute between a County and National Government and have been undertaken contrary to the letter and the spirit of the Constitution as provided for under article 159, 189(3) and 4 of the Constitution. 15
- b. The Petition is filed contrary to section 31(a)(b) of the Intergovernmental Relations Act Chapter 5G which provides that National and County Governments shall take all reasonable measure to resolve dispute amicably and no attempts have been made by the parties to use any of the alternative disputes machinery as provided for under the law and the suit is premature and court ought to decline jurisdiction as provided for under the Constitution. 20 25

The Court did not have jurisdiction on the matter and the conservatory order issued by this honourable court cannot stand. The notice of motion and petition dated 4th February 2014 should both be dismissed. 30

The Commissioner on Administrative Justice on 6th February 2014 filed an application to be granted leave to be joined in the Petition as *amicus curiae* or friend of court on the basis that the issues for consideration in the Petition herein raised weighty matter of Constitution and Administrative Law in which the Applicant may assist the Court in arriving at a fair just and expeditious resolution of offering its expertise in an impartial and non partisan manner. 35 40

When the matter appeared before me on 7th February 2014 Miss Gathagu appeared with Miss Munyi and Gatiri for the Respondents.

(Objector on the preliminary objection), Mr Angima for the *amicus curiae* and Mr Wahome for the Petitioners and I allowed the Application by Mr Angima to be enjoined in the proceedings aforesaid and I directed that the preliminary objection be taken first as it raised issues on points of law. 1
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Submissions

Miss Munyi submitted that the Petitioner is the County Government of Nyeri established under article 176(1) of the Constitution and County Government Act No 17 of 2012. she submitted that at paragraph 3 three of the Affidavit in support the Deponent County Secretary of Education stated that the County Government of Nyeri participates in the coordination, monitoring and education training in the County on behalf of the National Government in Nyeri County by virtue of being represented in the County Education Board under section 18 and 20 of the Basic Education Act number 14 of 2013 and is enjoined by the Constitution and other laws to protect the education interests of the Residents of Nyeri which is contrary to the 4th schedule of the Constitution and therefore as per articles 6, 53(1) (b) and (2), 159, 189(3) and (4) and 259 of the Constitution this is a dispute between County Government and National Government and therefore the provision of article 189(3) and (4) applies. 10
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It was submitted that the Legislation under subsection 4 above is the Intergovernmental Relations Act which provides for how disputes ought to be resolved at section 31 and in support thereof the case of *Republic v Transition Authority & Another Exparte Kenya Medical Practitioner, Pharmacist & Dentist Board (KMPDH) & 2 others* [2013] eKLR was cited where it was held that section 30(1) should be followed and court should be last resort and therefore the action is an abuse of the Court process. 25
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It was submitted that article 6(2) of the Constitution states that the Governments at the National and County levels are distinct and interdependent and shall conduct their mutual relationship on the basis of consultations and cooperation and that no attempt has been made by the Petitioner to use any alternative dispute resolutions provided and therefore the suit is premature and the Court ought to decline jurisdiction and in support of issue of jurisdiction the case of *John Njue Nyaga v Nicholas Njiru Nyaga & another* Court of Appeal at Nyeri Civil Appeal No 175 of 2010 was used. 35
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Mr Wahome for the Petitioner submitted that the dispute before

the Court was contravention of the rights of the child and that the County Government of Nyeri has come to court under articles 22 and 23 and 27 on the violation of rights. He submitted that County Government of Nyeri falls under the “anyone” stipulated in article 22 of the Constitution alleging that a right has been violated and that the people of Nyeri County have been discriminated on ground of their locality and in violation of article 27(b).

it was submitted that under article 358(1) every person has a right to claim that the Constitution has been violated and that the County Government has come on behalf of the children in the County who should have joined form one and in public interest. He submitted that it was not a dispute between the County Government and National Government.

He submitted that article 189 talks of relationship between the National Government and County Government and does not talk of the violation of rights. In support thereof he relied upon the case of *Transitional Authority supra*.

Mr Angima submitted that to know the nature of the dispute the case must be looked at in its entirety and that the disputes is about form one selection which is a function of the National Government and that the other party is the County Government and therefore if it is coming to court then it is a dispute which is subject to article 189 and Intergovernmental Relation Act.

On the issue of jurisdiction he submitted that Legislation does not take away the jurisdiction of the Court under article 165 but it would be premature before alternative dispute procedure is followed.

This Court is therefore called upon to determine three issues

1. Does the Court have jurisdiction to determine the issue herein?
2. Is the dispute before the Court a dispute between National Government and County Government?
3. What constitute a dispute between the County and National Government within the provisions of the Intergovernmental Relations Act and Articles of the Constitution?

County Government of Nyeri v Cabinet Secretary, Ministry of Education Science and Technology & another (J Wakiaga, J) 1153

Miss Munyi submitted that this court lacks jurisdiction since article 159(c) provides that when exercising judicial authority the court shall be guided by principles of alternative forms of disputes resolutions including reconciliation, mediation, arbitration and traditional dispute resolution mechanism shall be promoted. She further submitted that article 189(3) and (4) oust the jurisdiction of this Court on the dispute of this nature.

To understand the nature of Miss Munyi's objection I hereby quote article 189(3) and (4)

“(3) in any dispute between governments the governments shall make every reasonable effort to settle the dispute, including by means of procedure provided under National Legislation.

National Legislation shall provided procedures for settling Intergovernmental disputes by alternative dispute resolution mechanism including negotiation, mediation and arbitration.

The National Legislation referred to under subsection (4) above is the Intergovernmental Relations Acts Cap 5(a) which provides as follows: Section 31 the National and County Governments shall take reasonable means to

- a. resolve dispute amicably and
- b. apply and exhaust the mechanisms for alternative dispute resolutions provided under the Act or any other Legislation before resorting to judicial proceedings as contemplated by article 189(3) and (4) of the Constitution (emphasis added)

The crucial issue therefore is whether those two provisions oust the jurisdiction of this Court to determine the issues at hand and I have difficulty with this argument against the express provisions of article 165 of the Constitution which give this court

- a. unlimited original jurisdiction in criminal or civil matter.
- b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Right has been denied violated infringed or limited.

What these provisions of the Constitution and Statute in respect of the dispute resolution between the National and County Governments does is not to oust the jurisdiction of the court but to postpone the same until the alternative dispute mechanism have been attempted.

The issue was dealt with by the Court of Appeal at Nyeri on appeal against a judgment of this Court in *Nderitu Gachagua v Dr Thuo Mathenge* Civil Appeal No 14 of 2013 Where in dealing with dispute settlement mechanism in election petition the Court had this to say. 1

“Indeed article 88(4) (e) grants the 3rd Respondent jurisdiction to deal with election disputes before the declaration of the results. However, that does not take away the High Court original and unlimited jurisdiction to deal with any matter brought before it. It does not “exclude” or “limit” the High courts jurisdiction.” 5 10

I also find support in the case of *Republic v Transition Authority supra* where the Court having confirmed that section 30(1) of the Intergovernmental Relations Act 2012 provided that dispute that could be resolved under the Act were disputes (a) between National Government and a County Government or (b) amongst County Governments. The Court said that the existence of the alternative remedy and procedure could not necessarily oust the jurisdiction of the Court. 15

I would therefore agree with the submissions by the friend of the Court that the Court has jurisdiction but the exercise of that jurisdiction is postponed or that the Court can decline to exercise jurisdiction pending settlement of the same. I find support herein in the cases of (i) *Uthekela District Municipality v President of Republic of South Africa* 2003(1) SA 687 (CC) where the Constitutional court held that all extra judicial avenues for resolving disputes had to be exhausted before they become justiciable and (ii) *National Gambling Board v Premier of Kwazulu Natal & others* 2002 (2) SA 715 (CC) where the Court held that disputes should where possible be solved at political level rather than through adversarial litigation but the inclusion of the provision for dispute settlement did not oust the Court jurisdiction to hear intergovernmental disputes or disproved any organ of Government powers vested in it under the Constitution. 20 25 30

I therefore find no merit on the Respondent objection to the Courts jurisdiction. 35

Is this dispute therefore one between County and National Government to which dispute settlement mechanism under Intergovernmental Relations Act applies and for which this Court ought to postpone or decline the exercise of its jurisdiction to enable the parties exhaust the procedures set therein? In answering this question I note that what 40

County Government of Nyeri v Cabinet Secretary, Ministry of Education Science and Technology & another (J Wakiaga, J) 1155

amounts to Intergovernmental dispute is not defined in our Act which provides as follows: 1

section 30(1) in this part unless the context otherwise requires ‘dispute’ means an Intergovernmental dispute. 5

To get the definition thereof I had to look at the South African Act:- Intergovernmental Relations Frame Works Act 2005 which defines Intergovernmental Disputes as follows:

“a dispute between different governments or between organs of state from different governments concerning a matter 10

a. arising from

(i) Statutory powers or function assigned to any of the parties

(ii) an agreement between the parties regarding the implementation of a statutory power or function and 15

b. which is justiciable in a court of law and include any dispute between parties regarding a related matter”

For a dispute to fall within the ambit of IGR framework Act it must fulfill for basic requirements: 20

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. 25

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. 30

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

Intergovernmental relations is defined to mean relationships that arise between different governments or between organs of statute from different governments in the conduct of their affairs. 35

As submitted by Mr Angima that the nature of the dispute must be looked at in totality and as submitted by Wahome the dispute before the Court relates to selection of form one in county schools within Nyeri county and is brought to enforce fundamental rights and freedoms under article 22 and 23 and 27 of the Constitution, I am therefore not persuaded that this is a dispute in respect of the 40

functions of the Petitioner as stated in schedule 4 of the Constitution as submitted by Miss Munyi. 1

To understand the nature of Intergovernmental dispute covered by the Act one needs to look at the litigation on the same in South Africa where our Act is borrowed from and in the case of *National Gaming Board Supra* the dispute therein concerned the Constitutional status provisions or functions of any of those organs of the state and that distinction ought to be made between an institution or functionary exercising power or performing a function in terms of the Constitution. 5
The dispute herein was in respect to interpretation of statute. 10

I am therefore of the considered view that the dispute referred to by both the Constitution and the statute are those in respect of traditional government functions at the two levels of Governments established by the Constitution as stated by at articles 6(2) and 189 which provides for cooperation between National and County Governments where article 189 which provides as follows: 15

“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 as the other level and respect the Constitutional status and institution of Government at the other level and in case of County Government within the County level. 20
- b. Assist, support and consult and as appropriate implement the Legislation of the other level of Government and 25
- c. Liase with government at the other level for purposes of exchanging information, coordinating polices and administration and enhancing capacity 30

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.” 35

It therefore follows that the dispute between governments is a dispute in relation to the functions and exercise of powers between the different level of Government.

Does the dispute therefore before court fall with the above scope so as to be within the intergovernmental Relations Act? The dispute as I see it is an allegation of violation of fundamental rights and freedoms as 40

County Government of Nyeri v Cabinet Secretary, Ministry of Education Science and Technology & another (J Wakiaga, J) 1157

provided for under article 22, 23 and 27 of the Constitution and can therefore see no reason to hold that it is intergovernmental dispute simply because the County Government of Nyeri is the the Petitioner and an entity of the National Government is the Respondent as submitted by Mr Angima as to do so would lead to absurdity.

Is an allegation of violation of fundamental rights a dispute which can be subjected to alternative dispute settlement even if the Court were to find that it is a dispute within the meaning of the Act and the Constitution which I find it is not? Article 165 3(b) gives the High Court the exclusive jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied violated infringed or threatened. This is a jurisdiction which is not shared with any other organs of the State and is further restate in article 23(1) as follows;

“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.”

Article 22(1) provides that;

“Every person has a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Right has been denied violated infringed or is threatened (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by a) a person acting on behalf of another person who can not act on their own name.

(c) person acting in the public interest” emphasis added

I can see no reason to want to reduce an allegation of violation of fundamental rights to a dispute between County Government and National Government as to do so would amount to judicially created limitation on the express provision of the Constitution and since the Constitution as quoted herein above is very clear that any person can bring court action in respect of allegation of breach of fundamental rights and freedom I am not persuaded that the Petitioner is not a person with the meaning of article 22 having taken into account the history of infringement of fundamental rights in this Court where Courts could not allow enforcement of fundamental right on the basis of lack of *locus standi*.

It would therefore be a sorry day for our Constitution if this Court

would limit the enforcement of fundamental rights and freedom
by upholding the preliminary objection herein since whether or
not a right has been violated and which is the subject matter of the
Petition before the Court is a question which only the High Court
can determine and can not be mediated or settled through other
alternative measures.

I have given some thought to the preliminary objection herein as stated
above and find that the same lacks merit and is hereby dismissed with
cost being in the cause. The Petition herein shall proceed for hearing
and determination on its merits unless the parties herein are on their
own willing to engage in alternative settlement of the matters herein
for which the Court shall have no objection in light of the provisions
of article 159(a).

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**Speaker of the Senate & another v Attorney
General & another & 3 others [2013] KLR**

Supreme Court, at Nairobi November 1, 2013
W Mutunga, CJ; KH Rawal, DCJ; PK Tunoi,
MK Ibrahim, JB Ojwang, SC Wanjala & NS Ndungu, SCJJ

Advisory Opinion Reference 2 of 2013

Brief facts

The Reference was occasioned by the act of the Speaker of one Parliamentary Chamber, the National Assembly, reversing his action of referring a legislative matter to the other Chamber, the Senate, and having the National Assembly alone conclude deliberations on a Bill, which was then transmitted to the President for assent and which thereafter became enacted law. That was the Division of Revenue Bill, providing for a sharing in finances between the national and the County Governments. Whereas the National Assembly's stand was that the Bill was only concerned with the financing of County Government by the national government, and therefore was the exclusive legislative responsibility of the National Assembly, the applicants maintained that as the County Governments had a major interest in the monies in question, service of that interest, by the Constitution, involved the Senate's legislative contribution; and that no valid law could be enacted without such legislative contribution. Being anxious about the due functioning of the several institutions established under the Constitution of Kenya, 2010 and in particular, about the Senatorial function, as a safeguard for the principle of devolved government, the applicants moved the Supreme Court for an advisory opinion.

Issues

- i. What was the scope of the Supreme Court's jurisdiction to render an advisory opinion?
- ii. Whether the Supreme Court had jurisdiction to render an Advisory Opinion regarding the constitutional process attending the enactment of the Division of Revenue Act, 2013.
- iii. What was the Senate's role in the legislative process for Bills concerning County Governments?
- iv. When and how did a question for the consideration of the two Speakers in the two houses arise under article 110(3) of the Constitution?
- v. What was the role of the National Assembly *vis-à-vis* the Senate

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- in the origin, consideration and enactment of the division and allocation of revenue bills? 1
- vii. Whether the Supreme Court had jurisdiction to determine a dispute arising between the Senate and the National Assembly. 5
- viii. Whether the Supreme Court could interfere with Parliament's legislative authority, and if so under what circumstances. 5

Jurisdiction – Supreme Court – advisory opinion – jurisdiction of the court to give an advisory opinion – where the applicants moved the Supreme Court for an advisory opinion regarding the role of the Senate in legislative process leading to the enactment of the Division and Allocation of Revenue Act – claim by the interested parties that the relevant issues properly fell within the domain of the litigated cause rather than that of the advisory opinion – whether in the circumstances of the case the Supreme Court had jurisdiction to render an advisory opinion – Constitution of Kenya, 2010, article 163(6); Supreme Court Act, section 3(d). 10

Constitutional Law – devolution – the role of the Senate in legislation – division of revenue – whether the Senate had a role to play in the enactment of the Division and Allocation of Revenue Act – Constitution of Kenya, 2010, articles 110(3) & 112. 15

Held:

1. The Division of Revenue Bill (which had since become an Act) made provision for the division of revenue that was nationally collected, and for its sharing between the two levels of Government. It certainly had a significant impact on the County Governments. In the circumstances, therefore, the Reference in the instant case properly fell under article 163(6) of the Constitution, as a matter that concerned County Governments. The Supreme Court thus, had to exercise its discretion in favour of rendering an Advisory Opinion. 25
2. A matter was qualified to be regarded as one of County Government only where that was the case in the terms of the Constitution or it was the case in the terms of statute law or it was the case in the perception of the Court, in view of the function involved or the relation created as between the National Government and its processes, on the one hand, and the County Governments and their operations on the other. In the last instance, the Court would conscientiously consider the relationship between the two units as that emerged from the governance operation in question, or from any pertinent scenarios of fact. 30
3. An Opinion from the Supreme Court would not only resolve procedural uncertainties in the deliberation upon and passing of 35

- Bills, but would also chart out the proper constitutional path, and establish lines of legality. This was not a proper matter for litigation in the High Court. The public interest consideration was a relevant factor as to the issue whether the Supreme Court would, in the circumstances of the case, proceed to give an Advisory Opinion. 1
4. The separation of powers concept had to take into account the context, design and purpose of the Constitution, the values and principles enshrined in the Constitution and the vision and ideals reflected in the Constitution. 5
5. The Supreme Court had the responsibility for casting the devolution concept, and its instruments in the shape of the County Governments, in the legitimate course intended by the people. It devolved upon the Court to signal directions of compliance by state organs, with the principles, values and prescriptions of the Constitution; and as regards the functional machinery of governance which expressed those values, such as devolution and its scheme of financing, the Court had the legitimate charge of showing the proper course. 10
6. The context and terms of the Constitution vested in the Supreme Court the mandate when called upon to consider and pronounce itself upon the legality and propriety of all constitutional processes and functions of State organs. The effect was that the Supreme Court's jurisdiction included resolving any question touching on the mode of discharge of the legislative mandate. 15
7. It would be illogical to contend that as the Standing Orders were recognized by the Constitution, the Supreme Court, which had the mandate to authoritatively interpret the Constitution itself, was precluded from considering their constitutionality merely because the Standing Orders were an element in the internal procedures of Parliament. As a legal and constitutional principle, Courts had the competence to pronounce on the compliance of a legislative body, with the processes prescribed for the passing of legislation. 20
8. The scope for the Supreme Court's intervention in the course of a running legislative process had to be left to the discretion of the Court, exercised on the basis of the circumstances of each case. The relevant considerations could be factors such as: the likelihood of the resulting statute being valid or invalid; the harm that could be occasioned by an invalid statute; the prospects of securing remedy, where invalidity was the outcome; the risk that would attend a possible violation of the Constitution. 25
9. Kenya's legislative bodies had an obligation to discharge their 30
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- mandate in accordance with the terms of the Constitution, and they could not plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation. The Supreme Court recognized the fact that the Constitution vested the legislative authority of the Republic in Parliament. Such authority was derived from the people. That position was embodied in article 94(1) of the Constitution. 1
10. Article 93(2) of the Constitution provided that the National Assembly and the Senate were to perform their respective functions in accordance with the Constitution. It was therefore clear that while the legislative authority lay with Parliament, the same was to be exercised subject to the dictates of the Constitution. 5
11. While Parliament was within its general legislative mandate to establish procedures of how it conducted its business, it had always to abide by the prescriptions of the Constitution. It could not operate besides or outside the four corners of the Constitution. The Supreme Court would not question each and every procedural infraction that would occur in either of the Houses of Parliament. The Court could not supervise the workings of Parliament. The institutional comity between the three Arms of Government could not be endangered by the unwarranted intrusions into the workings of one arm by another. 10
12. Where a question arose as to the interpretation of the Constitution, the Supreme Court, being the apex judicial organ in the land, could not invoke institutional comity to avoid its constitutional duty. Parliament has to operate under the Constitution which is the supreme law of the land. 15
13. Where the Constitution decreed a specific procedure to be followed in the enactment of legislation, both Houses of Parliament were bound to follow that procedure. If Parliament violated the procedural requirements of the supreme law of the land, it was for the courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution. 20
14. The Supreme Court would be averse to questioning Parliamentary procedures that were formulated by the Houses to regulate their internal workings as long as the same did not breach the Constitution. Where however, as in the instant case, one of the Houses was alleging that the other had violated the Constitution, and moved the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in that context therefore, by rendering the Opinion, the Court would not be violating the doctrine of separation of powers. It would simply 25
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- be performing its solemn duty under the Constitution and the Supreme Court Act. 1
15. Whereas all State organs, for instance, the two Chambers of Parliament, were under obligation to discharge their mandates as described or signalled in the Constitution, there came a time when the prosecution of such mandates raised conflicts touching on the integrity of the Constitution itself. A reading of the Constitution indicated that the ultimate judge of right and wrong in such cases, was only the Courts and, ultimately, the Supreme Court. Therefore, the Supreme Court had the jurisdiction to hear and determine the dispute which arose between the two Chambers of Parliament. 5 10
16. A Bill concerning County Governments could be categorized as special or ordinary bill. Article 110(3) of the Constitution provided that prior to a consideration of the Bill, the Speakers of the National Assembly and Senate had to jointly resolve any question as to whether it was a Bill concerning Counties and, if so, whether it was a special or an ordinary Bill. 15
17. The Division of Revenue Bill was a Bill bearing provisions that dealt with the equitable sharing of revenue which would certainly affect the functioning of the County Government. The Bill dealt with equitable allocation of funds to the Counties, and so any improper design in its scheme would certainly occasion inability on the part of the county-units to exercise their powers and to discharge their functions as contemplated under the Constitution. 20 25
18. The Senate had a clear role to play, in the processing of the Division of Revenue Bill. The Speaker of the National Assembly should have complied with the terms of article 112 of the Constitution; and the National Assembly should have considered the deliberations of the Senate on record and, failing concurrence on legislative choices, the matter should have been brought before a mediation committee, in accordance with the terms of article 113 of the Constitution. 30
19. The internal parliamentary mechanism for consultation, co-ordination and harmony, though a constitutional prescription and a device of the democratic dispensation, had to be engaged in the first place by individual persons, in the shape of the two Speakers who however, in the instant case had disempowered the institutional design by simply showing a disinclination to reach out to each other. 35
20. The Senate's initial filtering role fell well within the design and purpose of the Constitution, and expressed the sovereign intent of the people: that could not be taken away by either Chamber or either Speaker. 40

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21. The dominant perception at the time of constitution making was that the decentralization of powers would not only give greater access to the social goods previously regulated centrally, but would also open up the scope for political self-fulfilment, through an enlarged scheme of actual participation in governance mechanisms by the people thus giving more fulfilment to the concept of democracy. 1
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22. Devolution as a required constitutional practice ran in parallel with an attendant set of values, declared in article 10 of the Constitution, the Rule of Law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and the protection of the marginalized communities. 10
23. It was obvious that the Speaker of the National Assembly by abandoning all engagement or consultation with the Speaker of the Senate, and proceeding as he did in the matter before the Supreme Court had acted contrary to the Constitution and its fundamental principles regarding the harmonious motion of State institutions. 15
24. Neither Speaker could to the exclusion of the other determine the nature of a Bill, for that would inevitably result in usurpations of jurisdiction to the prejudice of the constitutional principle of the harmonious interplay of State institutions. 20
25. It was evident that the Senate, though entrusted with a less expansive legislative role than the National Assembly, stood as the Constitution's safeguard for the principle of devolved government. That purpose would be negated if the Senate were not to participate in the enactment of legislation pertaining to the devolved units, the Counties. 25
26. From a broad purposive view of the Constitution, the intent of the drafters as regards the exercise of legislative powers was that any disagreement as to the nature of a Bill had to be harmoniously settled through mediation. An obligation was thus placed on the two Speakers, where they could not agree between themselves, to engage the mediation mechanism. 30
27. In the instant case, only the Court's guidance on critical constitutional questions was sought but the Court was not asked to make a conventional judicial order annulling the Division of Revenue Act. Thus, the Applicants' options in the rectification of a problematic statute, such as regular amendment procedures, remained uncompromised. 35
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28. The object of efficacy in law-making, as a constitutional task, stood in favour of sustaining the legislation already achieved. The

- Court's inclination in this respect, however, would not compromise its options in the future, in any matter akin to the instant one. 1
29. Devolution fell within the ambit of important constitutional and other legal matters, by the meaning of section 3(d) of the Supreme Court Act. That was why Advisory Opinions under article 163(6) of the Constitution were one of the two matters in which the Supreme Court was entrusted with exclusive jurisdiction. The other matter was the determination of disputes relating to election to the office of the President (article 163(3)(a)). 5
30. The creation of the Supreme Court as the apex Court in the Constitution was informed by a desire and need to have a fresh Court oversee the constitutional birth of a new order. In executing its mandate the Court had therefore, to be appreciative of its unique constitutional mission as a substantive rather than a decorative device, deliberately created to oversee Kenya's successful constitutional and institutional transition. 10
31. The devolution provisions in Chapter 11 of the Constitution were a major shift from the fiscal and administrative decentralisation initiatives that preceded it. It encompassed elements of political, administrative and fiscal devolution. There was a vertical and horizontal dispersal of power that put the exercise of state power in check. Importantly, the Constitution had created a Senate, an institution that enjoyed direct legitimacy and a popular mandate, commanding it to be the protector of devolution. 15
32. It would be completely out of order for the Speaker of the National Assembly to interpret the powers of the National Assembly by only looking at article 95 of the Constitution, without paying regard to articles 96 and 110 of the Constitution which unequivocally incorporated the role of the Senate and of its Speaker. 20
33. The constitutional commitment to protect, and its signal of the search for a more perfect devolution implied that, in interpreting the devolution provisions, where contestations regarding power and resources arose, the Supreme Court had to take a generous approach. The competing claims were not supposed to descend into institutional anarchy or dysfunctionality as that would compromise the developmental aspirations invested by the people, in devolution. The Supreme Court would not hesitate to pronounce itself with final authority, by laying down the proper juridical structures consolidating the devolution-concept where they were required, and stabilizing Kenya's Constitution, as was expected. 25
34. The fact that the constitutional clauses on devolution were founded 30
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- on political compromise by the elite was not sufficient reason to compromise the popular desire for a devolved system of government that empowered communities, and unlocked the developmental potential of the country. 1
35. Article 96 of the Constitution represented the purpose of the Senate as to protect devolution. Therefore, when there was even a scintilla of a threat to devolution, and the Senate approached the Court to exercise its advisory jurisdiction under article 163(6) of the Constitution, the Court had a duty to ward off the threat. The Court's inclination would not be any different if some other State organ approached it. Thus, if the process of devolution was threatened, whether by Parliamentary or other institutional acts, a basis emerged for remedial action by the Courts in general, and by the Supreme Court in particular. 5 10
36. The politics of formulae yielded the minimum allocation-provision of not less than fifteen per cent, a plain indication that more was anticipated. If there was no expectation for more, the framers would have prescribed not a floor, but an upper ceiling or, in the alternative, a specific and static percentage. However, the justice of formulae, which was the arena of the Supreme Court, moved the Court's interpretative indicator in the direction of the Senate's application, which stood for more resources to the Counties, in the future. 15 20
37. The Division of Revenue Bill was neither classified as an ordinary Bill nor a special Bill, in clear contrast to the County Allocation of Revenue Bill. Article 218 of the Constitution distinguished the purposes of the two Bills. Article 218(1)(a) provided that the Division of Revenue Bill was to divide revenue raised by National Government amongst the two levels of Government, in accordance with the Constitution. On the other hand, the County Revenue Allocation Bill was to divide among the Counties the revenue allocated to the county level of Government, on a basis determined by Senate resolution in force under article 217. 25 30
- Dissenting Per NS Ndungu, SCJ** 35
1. The instant case was not one where the Supreme Court's advisory jurisdiction was exercisable. The drafters of the Constitution no doubt knowingly used the term may under article 163(6), implying that the exercise of advisory jurisdiction was discretionary. That discretion was to be exercised in a manner that ascribed to the institutional architecture of the Constitution while protecting the authority of the Supreme Court and, effectively utilizing 40

- the principle of judicial restraint whenever necessary. Restraint covered other activities of judges such as applying strictly the rules of standing, declining to consider a case until the applicant had exhausted other remedies, and avoidance of determinations on political questions. 1
2. The exercise of powers by the Legislature and the Executive was subject to judicial restraint. However, the court's exercise of such power could only be subject to the self-imposed discipline of judicial restraint. 5
3. The Legislature is supreme in its own sphere under the Constitution and it is solely upon the Legislature to determine when and in respect of what matter the laws were to be enacted. Accordingly, to render an Advisory Opinion in this reference would inevitably interfere with the principle of separation of powers between the Judicial and the Legislative Arms of Government. The Judiciary is only obliged to consider the constitutionality of the substance of the impugned statute but not the legislative process. The instant matter only raised issues of process of arriving at, and not the constitutionality of the content of the subject statute - the Division of Revenue Bill. 10
4. The Court's role was to check that the legislature did not overstep its mandate and legislate on matters it was not mandated to legislate on, but the Court was not supposed to delve into the legislative process to find out whether the Parliamentary proceedings were carried on as required. That was for the separation of powers between the Legislative and Judicial Arm of Government to be preserved. 15
5. The Constitution did not oust the doctrine of separation of powers between the three Arms of Government. Just as Parliament was expected to operate within its constitutional powers as an Arm of Government so was the Judiciary. The system of checks and balances that prevented autocracy, restrained institutional excesses and prevented abuse of power applied equally to the Executive, the Legislature and the Judiciary. No one arm of government was infallible and all were equally vulnerable to the dangers of acting *ultra vires* the Constitution. 20
6. The Court's jurisdiction to render an advisory opinion in a reference of this nature that directly questioned internal workings of the Legislature was not to be exercised as it would encroach on separation of powers between the Legislative and Judicial Arm of Government. Even if the Courts were to intervene, they had to satisfy themselves that formal and informal dispute resolution mechanisms had first been fully exhausted. 25
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7. The matter before court was a dispute requiring an interpretation of the Constitution, and which had been disguised as a matter for an Advisory Opinion, in order to come before the Supreme Court. The Applicants requested for an Advisory Opinion, on a matter which was clearly adversarial and which should have followed a number of political or judicial processes before reaching the apex court. It left no room for any appeal or review and placed the Court in the difficult and inappropriate position of being arbiter in a dispute in the first and not last instance. That was clearly a situation in which the Supreme Court had to exercise its discretion not to give an Advisory Opinion. 1
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 8. Judicial resolution was not appropriate where it was clear in a matter such as in the instant case that the political question doctrine would apply. This doctrine was well established by, and has been in practice since, the decision of *Marbury v Madison* 5 US 137 (1803), in which the US Supreme Court deemed a question of law inappropriate for judicial review because it could be resolved by the political and not judicial process. Under this doctrine, the interpretation of the Constitution was left to the politically accountable branches of Government. 15
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 9. The interpretation of the Constitution was not an exclusive duty and preserve of the Courts but applied to all State organs including Parliament. What was exclusive to the Courts was interpretation of the Constitution within a legal dispute brought in the normal manner before a superior court and which was afforded the necessary processes of appeals, right up to the Supreme Court. Disputes, however, did exist in other forms that required not judicial intervention and determination, but rather resolution of a political nature. 25
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 10. The division of revenue was a process that concerned the Application of national resources to development and indeed how the resources would be allocated. The nature of the question was one of perennial debate and argumentative character. It required a combination of several political processes of demands, negotiations, debates, stand-offs, retreats and finally resolution. These disputes would also be multi-layered; inter-party, intra-party, inter-regional and even as in the instant case inter-chamber or internal institutional disagreements. 35
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 11. It was the National Assembly that determined the appropriation and allocation of revenue at the national level and between the levels of Government; conversely it was the Senate that allocated revenue

- among counties. There was certainly no doubt that the drafters of the Constitution intended on drawing a clear distinction between the functions of the National Assembly and the functions of the Senate with regard to division of revenue between the National Government and the County Government. 1
12. Only Bills that concerned County Governments would be considered by Senate. All other Bills were to be originated in and considered by the National Assembly, exclusively. 5
13. The devolved system in Kenya was based on a unitary system of Government that decentralizes key functions and services to the county unit. The Kenyan State model was not federal in nature and did not envisage the workings of a County as a politically and financially independent state. 10
14. For any Bill to be deemed as one concerning County Governments, it had to specifically affect the functions and powers of the County Governments as set out in the Fourth Schedule of the Constitution. In addition, the provisions of the Bill had to be limited to the ambit of Part 2 of that Schedule which provided for the functions and powers of County Governments. In the event that such a Bill went beyond the scope of Part 2 of that Schedule it could not in any way be deemed to be a Bill concerning County Governments. 15 20
15. A Bill that concerned the funding of functions outside of those specified to the Counties under the Fourth Schedule, such as the Division of Revenue Bill would fail the test of being considered as a Bill relating to County Governments. Allowing the Senate to participate in the enactment of a Bill that went beyond the parameters of what Counties could do within the Fourth Schedule, would certainly then be unconstitutional. 25
16. It was clear that a Money Bill was one that provided for levying taxes, altering taxes or appropriation of the consolidated funds. In quite a number of countries, the Speaker of the House that corresponded to the Kenyan National Assembly was the final determinant of what Bill would be considered to be a Money Bill and his decision was final. The Division of Revenue Bill would be considered a money bill and was subject to the same procedure as a Money Bill under article 114 of the Constitution which was the purview of the National Assembly. 30 35
17. In the same context the County Allocation of Revenue Bill would also be considered a money or supply Bill but was a Special Bill as the procedure for dealing with it was completely different. It was specifically provided for as a process within the Senate and not the 40

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- National Assembly under article 217 of the Constitution. 1
18. Once the Division of Revenue Bill that divided revenue between the National and County levels of Government was introduced in the National Assembly, Senate had no role to play. The Supreme law clearly gave the Senate an opportunity to make input into the Division of Revenue Bill but only before it was introduced into the National Assembly for debate. 5
19. Under article 215 of the Constitution the Senate commanded a majority in the nine-member commission that had five representatives from Senate alone, compared with only two from the National Assembly and only two from the Executive Arm of Government. That meant that the Senate commanded a decisive vote with regard to the recommendations that went into the drafting of the Division of Revenue Bill, long before it reached the National Assembly for determination. Any significant deviation from such recommendations would require a written explanation from the Cabinet Secretary responsible for finance. The intention and the rationale of the drafters of the Constitution was to ensure that the Senate had comprehensive input into the allocation of revenue at that stage, deeming unnecessary any more activity at the legislative stage. 10 15 20
20. The process of dealing with inter-chamber deadlock as applied to other Bills under article 110(3) of the Constitution was not suitable for the Division of Revenue Bill as the mediation process under that article presupposed a Bill that reached deadlock between the two houses could fail with the possibility of reintroduction after six months. That could not be done with regard to the Division of Revenue Bill as it was not a Bill that could be shelved without precipitating a constitutional financial crisis that would paralyze the workings of the entire Government and even cause its collapse. 25 30
21. The Senate would also canvass for expansion of its mandate by initiating an amendment of the Constitution through referendum as articulated under article 255(1) of the Constitution. Such an amendment could introduce common constitutional measures as practiced in other bicameral jurisdictions such as the introduction of a suspensive veto, joint sessions of the houses and even the possibility of dissolution of both houses in the event of deadlock. 35
22. To ask the Supreme Court to give Senate powers that belonged in plain language to the National Assembly would be seeking for an amendment to the Constitution in a manner not recognized by the supreme law. The tools for reviewing the Constitution to address 40

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**Speaker of the Senate & another v Attorney General & another
& 3 others (W Mutunga, CJ, KH Rawal, DCJ, PK Tunoi,
MK Ibrahim, JB Ojwang, SC Wanjala & NS Ndungu, SCJJ)**

restructuring of authority, power and functions of the Legislature and the roles of the Senate and the National Assembly lay squarely in a political and not judicial process. 1

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Advocates	
1. <i>Mr Kilukumi & Mr Nowrojee</i> for the Applicants	30
2. <i>Mr Ngatia</i> for the 2nd Interested Party	
4. <i>Professor Ojienda</i> for the 1st <i>Amicus Curiae</i>	
5. <i>Mr Nderitu</i> for the 2nd <i>Amicus Curiae</i>	
6. <i>Mr Wanyoike</i> for the 3rd <i>Amicus Curiae</i>	35
November 1, 2013, the following Advisory Opinion of the Court was delivered.	
A Introduction	
[1] The Reference herein was occasioned by the act of the Speaker of one parliamentary Chamber, the National Assembly, reversing his action of referring a legislative matter to the other Chamber, the Senate, and having the National Assembly alone conclude	40

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- deliberations on a Bill, which was then transmitted to the President for assent and which thereafter became enacted law. This was the Division of Revenue Bill, providing for a sharing in finances between the national and the County Governments. Whereas the National Assembly's stand was that the Bill was only concerned with the financing of County Government by the national government, and therefore was the exclusive legislative responsibility of the National Assembly, the applicants maintained that as the County Governments had a major interest in the monies in question, service of that interest, by the Constitution, involved the Senate's legislative contribution; and that no valid law could be enacted without such legislative contribution. 1 5 10
- [2] Being anxious about the due functioning of the several institutions established under the Constitution of Kenya, 2010 and in particular, about the Senatorial function, as a safeguard for the principle of devolved government, the Applicants moved the Supreme Court by virtue of article 163(6) of the Constitution which stipulates: 15
- "The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any County Government with respect to any matter concerning County Government. " 20
- B. Contest of Jurisdiction
- a. Submissions of Counsel 25
- [3] The Interested Parties contested this Court's jurisdiction in rendering an Advisory opinion. The first question in this regard was whether it was appropriate for the Court to render an Advisory Opinion in this matter. And the second question was: whether this Court has jurisdiction to render an Advisory Opinion regarding the constitutional process attending the enactment of the Division of Revenue Act, 2013 (Act No 31 of 2013). 30
- [4] Jurisdiction, in any matter coming up before a Court, is a fundamental issue that must be resolved at the beginning. It is the fountain from which the flow of the judicial process originates. The position is clear from the words of Nyarangi, J A in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 (at p 14): 35
- "Without jurisdiction, 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 40

evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. ” 1

The consequence of a Court proceeding without jurisdiction is stated, in unambiguous terms, in *Words and Phrases Legally Defined*, Vol 3: 1 – N (at p 113): “Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. ” 5

[5] Learned counsel, Mr Kilukumi for the Applicants urged that this Court has the competence and should exercise its advisory jurisdiction on the issues arising. He submitted that the Applicants duly satisfied the requirements set out in article 163(6) of the Constitution: firstly, the Applicants are State organs, entitled to move the Court for an Advisory Opinion; and secondly, the subject-matter, in this instance, should be one concerning County Government. It was submitted that the first Applicant is a State organ, as defined in article 260 of the Constitution: the office of Speaker of the Senate is established under Part 3 of Chapter 8 (“Offices of Parliament”) and in particular, article 106(1) of the Constitution. And the second Applicant is also a State organ, being a body established under article 93(1) of the Constitution. 10 15 20

[6] Counsel urged to be further relevant to the jurisdictional point, that the several agreed issues on which Advisory Opinion is sought, concern the constitutional process of enacting legislation that divides nationally-collected revenue between the Governments at the National and County levels. Counsel submitted that the financing of County Governments is founded upon the division of nationally-raised resources: and therefore, the Advisory Opinion sought, is “with respect to matters concerning County Government. ” 25 30

[7] Besides, counsel submitted, the Division of Revenue Bill is a matter that “concerns County Government”. On this point, and for effect, counsel invoked the content of this Court’s Ruling in *Re the Matter of the Interim Independent Electoral Commission*, Sup Ct Const Appl No 2 of 2011 (para 40): 35

“...any national level activity that has a significant impact on County Government would come within the purview of a matter concerning the County Governments. ” 40

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- [8] Learned counsel submitted that the division of revenue that has been collected nationally and is to be divided between two levels of government, obviously affects the running of County Governments. 1
- [9] To buttress the argument, Mr Kilukumi considered the effect of article 224 of the Constitution, which deals with county-government budgets and the County Appropriations Act. He urged that the County Governments will be unable to prepare their budgets unless the Division of Revenue Bill has been enacted by Parliament; hence, the effect of article 224 is that the Division of Revenue Bill is a matter that “concerns County Government”. 5 10
- [10] Regarding the appropriateness of the question for an Advisory Opinion, learned counsel submitted that the Supreme Court’s competence in this regard, flows directly from article 163(6) of the Constitution; and the Court’s jurisdiction is discretionary, being exercised as it considers fit. He urged that the Court to adopt its guidelines for the exercise of jurisdiction, set out in the earlier matter, *Re the Matter of the Interim Independent Electoral Commission*, Sup Ct Const Appl No 2 of 2011 (at para 83): 15
- “(1) For a reference to qualify for the Supreme Court’s Advisory-Opinion discretion, it must fall within the four corners of article 163(6): it must be ‘a matter concerning County Government.’ The question as to whether a matter is one ‘concerning County Government’ will be determined by the Court on a case-by-case basis. 20 25
- “(2) The only parties that can make a request for an Advisory Opinion are the National Government, a State Organ, or a County Government. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as intervener (interested party) or as *amicus curiae*. 30
- “(3) The Court will be hesitant to exercise its discretion to render an Advisory Opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court.... 35
- “(4) Where a reference has been made to the Court the subject matter of which is also pending in a lower Court, the Court may nonetheless render an Advisory Opinion if the Applicant can demonstrate that the issue is of great public importance and requiring urgent resolution through an Advisory Opinion.... ” 40

- [11] Learned counsel invoked the Supreme Court’s mandate in the interpretation of the Constitution: a dispute had arisen between the two Parliamentary Chambers, with a bearing on the interpretation of key articles of the Constitution; the Supreme Court as the apex Court operating in accordance with the Supreme Court Act, 2011 (Act No 7 of 2011), is empowered to give authoritative and final interpretation of the Constitution; the Supreme Court was the most suitable forum to render a pronouncement on the constitutional conflict raised in the instant matter; only the Supreme Court will be able to provide expeditious resolution to the disputed question which entails a matter of great public importance. 1
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- [12] Counsel recalled that the Supreme Court on an earlier occasion, in *Re the Matter of the Interim Independent Electoral Commission* (Application No 2 of 2011), had already indicated that it may undertake constitutional interpretation while rendering Advisory Opinion [paras 43 and 44]: 15
“The Supreme Court..., for the purpose of rendering an Advisory Opinion, may take its position guided by its own interpretation of the Constitution...” 20
- “It follows that the Supreme Court may, indeed, while rendering an Advisory Opinion under article 163(6) of the Constitution, undertake any necessary interpretation of the Constitution. ” 25
- [13] The foregoing principle was reiterated in another matter, *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, Sup Ct Appl No 2 of 2012 [para. 25]: 25
“It is clear to us that this Court, while rendering Advisory Opinion, will almost invariably engage in the exercise of constitutional interpretation, and it is not precluded from such an exercise. It does not follow, therefore, that the Court will decline a proper request for an Advisory Opinion, merely because rendering such Opinion will entail constitutional interpretation. The basic requirement for an application for an Advisory Opinion is that it should, as contemplated by article 163(6) of the Constitution, be seeking to unravel a legal uncertainty in such a manner as to promote the rule of law and the public interest. ” 30
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- [14] Mr Kilukumi submitted, from the authority of the earlier decisions, that the Supreme Court’s Opinion in this case, will, in law and in constitutional principle, be binding on all State organs 40

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- and on all persons, as its design is to bring certainty and to deliver closure on relevant issues. Learned counsel urged that such an Opinion would bring positive effect upon the Nation's legislative organs, insofar as they would be able to focus their agenda on the values of clarity, civility, decorum and etiquette. 1
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- [15] Counsel urged that the delivery of the Supreme Court's Advisory Opinion, in the circumstances of the instant matter, falls in line with constitutional principle, and, furthermore, would be duly proportionate to the gravity of the issues, and would be appropriate, just, fair and meet, in every respect. 10
- [16] Learned counsel glanced back at the troubled constitutional history of the Country with a devolved governance system, in the 1960s, being phased out by a central-government scheme which removed the local units together with their agency of representation and safeguard at the centre, namely, the Senate (YP Ghai and JPWB McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (Nairobi: Oxford University Press, 1970) (pp 213-14). He urged that the people's political choice of retracing their constitutional path to the 1960s model, be upheld, and that the Supreme Court bears responsibility for directing the path of governance on that course; and the Court should, in this regard, safeguard the constitutional processes designed to secure the County Governments. Counsel urged such an object to be in keeping with the Supreme Court's obligations as set out in section 3 of the Supreme Court Act, 2011 (Act No 7 of 2011), which provides in particular that [section 3(c)]: 15
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- "...the Supreme Court as a Court of final judicial authority [shall] among other things –
...
develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth.... "
- [17] In the contest of jurisdiction, it was the position of the interested parties that the relevant issues properly fell within the domain of the litigated cause, rather than that of the Advisory Opinion. However, learned senior counsel Mr Nowrojee, for the Applicants maintained that this was not a matter suitable for the ordinary dispute-resolution mechanism – with pleadings, and progressing from the lowest to the highest Court: the matter was urgent, and entailed the danger

of paralysis to the Parliamentary process of law-making. The matter, counsel submitted, involved the National legislative agenda – a matter of great public importance. He submitted that the public interest called for expeditious resolution of the stalemate: and an Advisory Opinion was the best recourse.

[18] Such a perception by counsel had been anticipated in an earlier Advisory Opinion, *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, Sup Ct Appl No 2 of 2012, in which the following passage appears:

“The Court recognizes...that its Advisory Opinion is an important avenue for settling matters of great public importance which may not be suitable for conventional mechanisms of justiciability. Such novel situations have clear evidence under the new Constitution, which has come with far-reaching innovations, such as those reflected in the institutions of County Government. The realization of such a devolved governance scheme raises a variety of structural, management and operational challenges unbeknown to traditional dispute settlement. This is the typical situation in which the Supreme Court’s Advisory-Opinion jurisdiction will be most propitious; and where such is the case an obligation rests on the Court to render an Opinion in accordance with the Constitution. ”

[19] Learned senior counsel advanced another justification for preferring the Advisory Opinion to the normal course of litigation: trial of fact was unnecessary; all the issues revolved around the correct interpretation of specified articles of the Constitution; and in any case, if any facts at all were to be a relevant question, all the facts were matters of permanent record in both Chambers of Parliament, were well agreed, and could most readily be ascertained.

[20] Learned senior counsel also urged the jurisdictional point on the basis of the broader context of the Constitution, and the inarticulate, general perceptions on the governance-role of the Supreme Court: the Court should render its Advisory Opinion as part of the function of promoting constitutionalism and the rule of law, values that are apt to be impaired whenever there is disagreement and stalemate between primary State organs. He submitted that the Advisory Opinion is a special device under the Constitution, for safeguarding the devolved governance system. He proposed that the Court should

lay down the proper procedure for the enactment of differing categories of legislation. 1

[21] The learned Attorney-General, while conceding that the Court indeed had jurisdiction to give an Advisory Opinion, submitted that its due exercise of discretion should exclude the instant matter. He proceeds by past example, contending that the stalemate in question was in respect of a live matter in progress within the ranks of the Legislature and the Executive; whereas in *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, Sup Ct Appl No 2 of 2012 the focus was on the gender quota in the membership of Parliament, a basic interpretational question; and in *Re the Matter of the Interim Independent Electoral Commission*, again, the question was essentially as to the interpretation of the Constitution. The Attorney-General submitted that the ultimate answer to the Applicant's question was judgment: and hence the proper forum was the Constitutional Division of the High Court – and a party who remains aggrieved has a straight path leading to the Court of Appeal. The Attorney-General urged that this was not a proper matter for the Supreme Court at this stage. 5 10 15 20

[22] By the submissions of learned counsel, Mr Ngatia for the second interested party, the jurisdiction of the Supreme Court has not been properly invoked: it is a matter involving competing rights and claims, and so cannot be resolved without the benefit of pleadings and evidence; since the Senate and the National Assembly have taken opposite stances regarding the interpretation of the Constitution and the Parliamentary Standing Orders, what is sought is not a “plain opinion statement” on the powers conferred upon each Chamber; the parties seek a judicial determination of the various claims and cross-claims. Counsel submitted that the true intendment of the Opinion Reference is to obtain a set of declarations and orders, the effect of which would be to declare the newly-enacted Division of Revenue Act unconstitutional and a nullity. He urged that the competing claims by the parties require a full hearing, attended with normal rights of appeal. Counsel disputed the contention that the High Court cannot dispose of the matter expeditiously, and contended that if the Supreme Court were to render an Advisory Opinion, then the “litigants” would be deprived of the benefits of a normal trial process. Mr Ngatia urged that an Advisory Opinion was an inappropriate short-cut recourse; and instead, the parties should have a first opportunity to arrive at a consensus, or settle 25 30 35 40

the matter through the alternative dispute-resolution mechanism,
failing which a normal suit should be filed in the High Court. 1

[23] Mr Ngatia submitted that an Advisory Opinion was inapposite,
as the legislative process contested has already matured into an
enactment; and he sought to draw from comparative lessons
favouring judicial restraint, in such a situation. The relevant material
is the article by Oliver P Field, “The Advisory Opinion: An Analysis,”
Indiana Law Journal, Vol 24 (1949) – at p 205: 5

“Advisory Opinions are given on pending [legislation] or
contemplated action by the Executive, while decisions are on
Acts passed or actions taken earlier, sometimes much earlier.” 10

At p 41:

“...the determining factor is that the Advisory Opinion is
conceived to be Advisory in the process of making statutes
rather than as a device adoptable to the settlement of rights
affected by enacted statutes.” 15

At p. 42:

“Despite this advantage on the part of [the] Advisory
Opinion, it must be concluded that Advisory Opinion
practice even at its best is a supplement to, not a substitute
for Judicial Review.” 20

Learned counsel urged the Court not to prefer the Advisory Opinion
and, by this, take a position that affects the rights and acts realized,
since the Division of Revenue Bill has taken the form of an Act of
Parliament. 25

[24] Learned Senior Counsel for first *amicus curiae*, Professor Ojienda,
began from first principles as expressed by this Court in *Samuel
Kamau Macharia and Another v Kenya Commercial Bank and
Two Others*, Sup Ct Appl No 2 of 2011: namely, that jurisdiction
emanates from the Constitution, or the ordinary law, or both. He
urged that the Supreme Court’s jurisdiction to render an Advisory
Opinion is donated by article 163(6) of the Constitution, and
should be exercised on the basis of two considerations: (i) the
competence of the party seeking an Opinion – whether this party
is a national government, a State organ, or a County Government;
and (ii) the nature of the subject – whether it concerns County
Government. By these principles, learned counsel urged, the Court
has a proper basis in law for proceeding to give an Advisory Opinion.
But learned counsel submitted that the Court, in giving an Opinion, 30
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- should take into account the fact that by the time it was moved, the subject Division of Revenue Bill had already evolved and attained the status of statute law. By counsel's submission, the subject is one of great public importance, which merits the Court's Advisory Opinion: devolution itself was a crucial democratic course which the people had chosen; harmonious operation of the two Chambers of Parliaments was a vital process under the new Constitution; profound conflict in the workings of the two Chambers, especially in relation to devolution, was a major challenge; and such course of resolution as may be adopted, would have impacts on the scheme of implementation of Chapters 11 and 12 of the Constitution.
- [25] Still canvassing the broad principle justifying the case for an Advisory Opinion, Professor Ojienda typified Kenya's current phase of political attainment as constitutional democracy: and this bears the precept that even the majoritarian entity that is Parliament, cannot claim sovereignty, and is subject to the terms of the constitutional document as it is interpreted and applied within the judicial process. The principle is born out by the universal acceptance that the Supreme Court can declare null any legislative measures that offend the Constitution: *Speaker of the National Assembly and others v De Lille MP and another* (297/98) [1999] ZASCA 50; *Democratic Alliance v The President of South Africa and others* (263/11) [2011] ZASCA 241. These decisions, of comparative relevance, have: affirmed the supremacy of the Constitution over Parliament; exemplified the role of the Courts in interrogating the legislative authority of Parliament, in a constitutional democracy; and upheld the principle that, in a constitutional democracy, the Courts have both the power and the duty to pronounce on the compliance of legislation with the terms and objects of the Constitution.
- [26] Learned counsel concluded that the Supreme Court, indeed, has the jurisdiction, as well as the duty, to inquire into the procedure that had been adopted by the National Assembly and the Senate, in respect of the passing of the Division of Revenue Bill.
- [27] Such a position, on broad terms, was taken too by learned counsel, Mr Nderitu for the second *amicus curiae*. He proceeded from the threshold that the Division of Revenue Act itself, as passed, provides for "the equitable division of revenue raised nationally between the National and County Governments in [the] 2013/14 financial year"; and he urged that the objects of the Act, the issues

raised by all the parties and, in particular, whether that legislation was constitutionally deliberated upon, enacted and assented to, were plainly matters “concerning County Government” – and consequently, the Supreme Court has jurisdiction to render an Advisory Opinion.

[28] Mr Nderitu proceeded, however, to submit that the Court, rather than settle the issues by way of Advisory Opinion, should give direction leading to mediation and extra-judicial process, by virtue of articles 110(3), 112 and 113 of the Constitution. Learned counsel submitted that such a process, by its non-adversarial nature, would best suit the requirements of good governance.

[29] For the third *amicus curiae*, learned counsel, Mr Wanyoike urged that while the issue in hand was a “matter of County Government,” the Court should decline to render an Advisory Opinion: because the question has already fallen under controversy, and therefore it belongs properly to the adjudicatory jurisdiction of the High Court, by virtue of article 165 of the Constitution.

(b) Analysis

[31] Are the Applicants proper persons or entities in whom the right to seek an Advisory Opinion reposes? By article 163(6) of the Constitution, such an Opinion can only be sought by the National Government, a State organ, or any County Government. After considering the relevant articles, namely 93, 96, 106 and 260, and also Part 3 of the Sixth Schedule to the Constitution, we have come to the conclusion that the Office of the Speaker is a State organ, as is also the Senate.

[32] Is it a “matter concerning County Government”? The answer is in the affirmative, as may be perceived from this Court’s Ruling in *Re the Matter of the Interim Independent Electoral Commission*, Sup Ct Const Appl No 2 of 2011 [para. 40]:

“We consider that the expression ‘any matters touching on County Government’ should be so interpreted as to incorporate any national-level process bearing a significant impact on the conduct of County Government.”

Now in the case of the Division of Revenue Bill (now an Act), it makes provision for the division of revenue that is nationally collected, and for its sharing between the two levels of government. It certainly has a significant impact on the County Governments. We hold, in the circumstances,

that the Reference herein properly falls under article 163(6) of the Constitution, as a “matter that concerns County Governments.”	1
[33] The next issue then becomes: whether, in all the circumstances of this case, the Court should exercise its discretion in favour of rendering an Advisory Opinion. The criteria for exercising this discretion were set out in our Ruling in <i>Re the Matter of the Interim Independent Electoral Commission</i> (2011) [para 83]:	5
“(i) For a reference to qualify for the Supreme Court’s Advisory-Opinion discretion, it must fall within the four corners of article 163(6): it must be ‘a matter concerning County Government.’ The question as to whether a matter is one ‘concerning County Government’ will be determined by the Court on a case-by case basis.	10
“(ii) The only parties that can make a request for an Advisory Opinion are the national government, a State organ, or a County Government. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as an intervener (interested party) or as <i>amicus curiae</i> .	15
“(iii) The Court will be hesitant to exercise its discretion to render an Advisory Opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court....	20
“(iv) Where a reference has been made to the Court the subject-matter of which is also pending in a lower Court, the Court may nonetheless render an Advisory Opinion if the applicant can demonstrate that the issue is of great public importance and requiring urgent resolution through an Advisory Opinion. In addition, the applicant maybe required to demonstrate that the matter in question would not be amenable to expeditious resolution through adversarial Court process.”	25
[34] It emerges that a matter qualifies to be regarded as one of County Government only where: that is the case in the terms of the Constitution; it is the case in the terms of statute law; it is the case in the perception of the Court, in view of the function involved or the relation created as between the National government and its processes, on the one hand, and the County Governments and their operations, on the other. In the last instance, the Court will	30
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conscientiously consider the relationship between the two units as this emerges from the governance operation in question, or from any pertinent scenarios of fact. 1

[35] Mr Kilukumi submitted that, subject to such controlling factors as the situation of County Government, or the intended party moving the Court, there is a discretionary scope entrusted to the Court: judicious considerations will determine whether or not an Advisory Opinion is to be given. And in the prevailing circumstances, learned counsel urged the Court to render an Opinion – for the purpose of giving full meaning and effect to the terms of article 163(6) of the Constitution. 5 10

[36] The first and second interested parties as well as the third *amicus curiae* took the common position that the relevant questions herein be laid before the High Court, as these are contentious and so, befit ordinary dispute settlement. The first interested party, though conceding that this Court indeed has jurisdiction to render an Advisory Opinion, urged that this was not a proper case for such an Opinion: as the Senate and the National Assembly were in essence, seeking a judgment. As for the second interested party, the contest raised facts-in-issue in respect of which there were divergent opinions: and consequently it was a matter for resolution by litigation in the High Court. The third *amicus curiae* raised yet another justification for such a preference: since the legislative measure in question had already been assented to as an Act of Parliament, any issues as to its legality fell to be determined on the basis of the validity criteria of the Constitution, a task which fell in the first place to the jurisdiction of the High Court. 15 20 25

[37] We have considered the merits of such argumentation, but arrived at a contrary perception. Upon examining the Affidavits sworn by the two Speakers of the Chambers of Parliament, which are in agreement as to the events preceeding the passage of the Division of Revenue Bill, 2013 we have been of the perception that the disagreement between the two would have been stoked by misconceptions as to the nature of that Bill, and as to the constitutional process governing its passage. A question relating to the constitutional validity of such a process, in our view, cannot be said to be an issue of fact: and so, there is no appearance of fact or evidence that would predispose the contest to ordinary trial. 30 35 40

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- [38] Both the first and second interested parties urged further that the disagreement was for ordinary litigation procedure, as it related to a live controversy set for final determination by way of judgment. Learned counsel, Mr Ngatia relied on cases which showed related matters, in various jurisdictions, to have been brought before the High Court. But in our opinion, such examples provide no compelling case in this instance, nor in Kenya's current constitutional and statutory context. It is our conviction that this Court would not be constrained by such a limited perspective of procedure culled from the said examples emanating from other jurisdictions. This Court's mandate is in the terms of the Constitution, which provides [Article 1(1)] that –
- “All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution. ”
- The broad scheme of the Supreme Court's interpretive approach is laid out in the Supreme Court Act, 2011 (Act No 7 of 2011), section 3(c):
- “.... [to] develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth.... ”
- [39] The matter before this Court bears novelty, and ill-fits the conventional dispute-settlement scheme, which is most appropriate in a matter involving two individuals, or one between State and individual. What comes before us is a “dispute” or “dilemma”, regarding the procedure for executing a public legal obligation. It is not normal dispute settlement, but is a broader constitutional question of great public interest, which can only be best resolved by a substantial, legitimate forum of resolution of public-interest questions, namely *the* Judiciary, and more specifically, the Supreme Court.
- [40] From the seven issues formulated by the parties, and from the depositions filed, it is clear that what is required of this Court is not a judgment, but an Advisory Opinion. As no declarations, orders or reliefs are sought by the parties, we fall back on our perception in an earlier matter, *Re the Matter of the Interim Independent Electoral Commission*, Sup Ct Const Appl No 2 of 2011 [para 33]:
- “...we consider that such an opinion, in the context of article 163(6) of the Constitution, means legal advice rendered by the Court to the public body or bodies seeking the same, by

virtue of scope created by law. Since such an opinion does not
flow from any contest of rights- claims, or claims disposed of
by regular process, it does not fall in the class of judgment,
or ruling, or order, or decree. ” 1

[41] Just as in the principle thus stated, what is required in this
instance, in our opinion, is constitutional guidance, in respect of
the agreed issues. The seven issues in question are by no means
abstract, having been formulated on the basis of a clear factual
background. The main issue is the Senate’s role in the legislative
process for every Bill concerning County Government – regardless
of the Chamber of origin. 5 10

[42] On that question an Opinion from this Court, we believe, will
not only resolve procedural uncertainties in the deliberation upon
and passing of Bills, but will also chart out the proper constitutional
path, and establish lines of legality. This is not a proper matter for
litigation in the High Court. 15

[43] The “public interest” consideration is a relevant factor as to the
issue whether this Court will, in the circumstances of the case,
proceed to give an Advisory Opinion. This is clear from the decision
in *Re the Matter of the Interim Independent Electoral Commission*
(2011) in which the following passage appears [para 83]: 20

“...the Court may nonetheless render an Advisory Opinion
if the Applicant can demonstrate that the issue is of great
public importance and requiring urgent resolution through
an Advisory Opinion. ” 25

[44] The same principle is expressed in yet another Opinion of the
Court, *In the Matter of the Principle of Gender Representation in the
National Assembly and the Senate*, Sup Ct Appl No 2 of 2012 [at
para 19]: 30

“The Court recognizes, however, that its Advisory Opinion
is an important avenue for settling matters of great public
importance which may not be suitable for conventional
mechanisms of justifiability. Such novel situations have
clear evidence under the new Constitution, which has come
with far-reaching innovations, such as those reflected in the
institutions of County Government. The realization of such
a devolved governance scheme raises a variety of structural,
management and operational challenges unbeknown to
traditional dispute settlement. This is the typical situation in 35 40

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- which the Supreme Court's Advisory-Opinion jurisdiction will be most propitious; and where such is the case, an obligation rests on the Court to render an Opinion in accordance with the Constitution. " 1
- [45] Entirely consistent with the foregoing principles, in our perception, is the matter now before this Court. The issues of law and of principle raised are weighty, peculiar and unique, and are focused on devolution, a key pillar of governance in the new constitutional order. 5
- [46] Judicial notice is to be taken of the fact that a Division of Revenue Bill, as conceived under the Constitution, will, now and in the future, constantly bear significant financial implications for the operations of County Governments. 10
- [47] It was the second Interested Party's position that Advisory Opinions are applicable only at early stages of legislation, or at the Executive's law-making policy stage, but not after statutory status has been realized. Learned counsel, Mr Odera, also submitted that the Courts have no jurisdiction to rule on a Parliamentary Chamber's compliance or non-compliance with law-making procedure. He was relying on the National Assembly (Powers and Privileges) Act (Cap 6, Laws of Kenya), which contains two relevant provisions [sections 4 and 29, respectively]: 15
- "No civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Assembly or a committee, or by reason of any matter or thing brought by him therein by petition, bill, motion or otherwise"; 25
- "...that neither the Speaker nor any officer of the Assembly shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in the Speaker or such officer by or under this Act or the Standing Order. " 30
- [48] For supporting principle to the foregoing provisions, learned counsel invoked the rationalization by scholars, notably H M Seerval, *Constitutional Law of India: A Critical Commentary*, 3rded. The author of that work argues that Parliaments have the right to be guardians of their internal affairs, relying on judicial precedents favouring that inference: *Richard William Prebble v Television New Zealand Ltd* [1994] 3 WLR 970; *British Railways Board and Another* 35
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v Pickin [1974] 1 All E R 609; *British Airways Board v Laker Airways Ltd* [1984] QB 142. 1

[49] Upon considering certain discrepancies in the cases cited, as regards the respective claims to legitimacy by the judicial power and the legislative policy – each of these claims harping on the separation-of-powers concept – we came to the conclusion that it is a debate with no answer; and this Court in addressing actual disputes of urgency, must begin from the terms and intent of the Constitution. Our perception of the separation-of-powers concept must take into account the *context*, design and purpose of the Constitution; the values and principles enshrined in the Constitution; the vision and ideals reflected in the Constitution. 5 10

[50] The South African case, *State v Makwanyane & another* (CCT3/94) (1995) ZACC3 [para 262 – per Mahomed, J] sheds light on our perception: 15

“All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future.” 20 25

[51] Kenya’s Constitution of 2010 is a transformative charter. Unlike the conventional “liberal” Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today’s Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy. This is clear right from the preambular clause which premises the new Constitution on – 30 35

“Recognising the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.” 35

And the principle is fleshed out in article 10 of the Constitution, which specifies the “national values and principles of governance”, and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved 40

the legitimate charge of showing the proper course. 1

[54] The context and terms of the new Constitution, this Court believes, vests in us the mandate when called upon, to consider and pronounce ourselves upon the legality and propriety of all constitutional processes and functions of State organs. The effect, as we perceive it, is that the Supreme Court’s jurisdiction includes resolving any question touching on the mode of discharge of the legislative mandate. 5

[55] The foregoing principle emerges clearly from a logical interpretation, for instance, of article 109 of the Constitution: 10

“(1) Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.

“(2) Any Bill may originate in the National Assembly. 15

“(3) A Bill not concerning County Government is considered only in the National Assembly....

“(4) A Bill concerning County Government may originate in the National Assembly or the Senate, and is passed in accordance with articles 110 to 113, 122 and 123 and the Standing Orders of the Houses. ” 20

It is clear to us that it would be illogical to contend that as the Standing Orders are recognized by the Constitution, this Court, which has the mandate to authoritatively interpret the Constitution itself, is precluded from considering their constitutionality merely because the Standing Orders are an element in the “internal procedures” of Parliament. We would state, as a legal and constitutional principle, that Courts have the competence to pronounce on the compliance of a legislative body, with the processes prescribed for the passing of legislation. 25 30

[56] Such a perception is vindicated in comparative experience. The Supreme Court of Zimbabwe, in *Biti & another v Minister of Justice, Legal and Parliamentary Affairs and another* (46/02) (2002) ZWSC10, was called upon to determine the constitutional validity of the General Laws Act, 2002 (Act No 2 of 2002). It had been claimed that the passing of the said statute was characterized by irregularities that constituted a breach of the Standing Orders as well as the Constitution of Zimbabwe and that, consequently, the statute was unconstitutional. The Court thus held: 35 40

“In a constitutional democracy it is the Courts, not Parliament, that determine the lawfulness of actions of bodies,

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- including Parliament.... In *Smith v Mutasa* it was specifically held that the Judiciary is the guardian of the Constitution and the rights of citizens.... ” 1
- [57] The position is not different in the case of Canada, as emerges from *Amax Potash Ltd v Government of Saskatchewan* [1977] 2 SCR 576 [at p590]: 5
- “A state, it is said, is sovereign and it is not for the Courts to pass upon the policy or wisdom of legislative will. As a broad statement of principle that is undoubtedly correct, but the general principle must yield to the requisites of the constitution in a federal state. By it the bounds of sovereignty are defined and supremacy circumscribed. The Courts will not question the wisdom of enactments which, by the terms of the Canadian Constitution are within the competence of the Legislatures, but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power. ” 10
- This principle is clearly stated in other Canadian cases as well; for instance, *Re Manitoba Language Rights* (1985) 1 SCR 721. 20
- [58] It is a long-established principle in the United States, by the well-known decision in *Marbury v Madison*, 5 US 137 (1803), where Marshall, CJ thus held: 25
- “So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. 30
- “If then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislatures, the Constitution, and not such ordinary act, must govern the case to which they both apply. ” 35
- [59] And in the South African case, *Doctors for Life International v Speaker of the National Assembly and others* (CCT 12/05) [2006] ZACC 11, it was held [para 38]: 40
- “...under our constitutional democracy, the Constitution is

the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament ‘must act in accordance with, and within the limits of, the Constitution’, and the supremacy of the Constitution requires that ‘the obligations imposed by it must be fulfilled.’ Courts are required by the Constitution ‘to ensure that all branches of government act within the law’ and fulfil their constitutional obligations. ” 1 5

On the possibility of the Court intervening in the process of legislation at any of its several stages of enactment, the Court in the *Doctors for Life International* case, thus held [para 55]: 10

“If Parliament and the President allow an unconstitutional law to pass through, they run the risk of having the law set aside and the law-making process commence afresh at great cost. ” 15

Is it conceivable that the Court may countermand ongoing legislative processes? This question is answered in the *Doctors for Life* case [para 68]:

“Courts [in the Commonwealth] have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and, in particular, out of respect for the principle of separation of powers. But at the same time they have claimed the right as well as the duty to intervene in order to prevent the violation of the Constitution. To reconcile their judicial role to uphold the Constitution, on the one hand, and the need to respect the other branches of government, on the other hand, courts have developed a ‘settled practice’ or general rule of jurisdiction that governs judicial intervention in the legislative process. ” 20 25 30

[60] It makes practical sense that the scope for the Court’s intervention in the course of a running legislative process should be left to the discretion of the Court, exercised on the basis of the exigency of each case. The relevant considerations may be factors such as: the likelihood of the resulting statute being valid or invalid; the harm that may be occasioned by an invalid statute; the prospects of securing remedy, where invalidity is the outcome; the risk that may attend a possible violation of the Constitution. 35 40

[61] It emerges that Kenya’s legislative bodies bear an obligation to discharge their mandate in accordance with the terms of the Constitution, and they cannot plead any internal rule or indeed,

any statutory scheme, as a reprieve from that obligation. This Court recognizes the fact that the Constitution vests the legislative authority of the Republic in Parliament. Such authority is derived from the people. This position is embodied in article 94(1) thereof. The said article also imposes upon Parliament the duty to protect the Constitution and to promote the democratic governance of the Republic. Article 93(2) provides that the National Assembly and the Senate shall perform their respective functions in accordance with the Constitution. It is therefore clear that while the legislative authority lies with Parliament, the same is to be exercised subject to the dictates of the Constitution. While Parliament is within its general legislative mandate to establish procedures of how it conducts its business, it has always to abide by the prescriptions of the Constitution. It cannot operate besides or outside the four corners of the Constitution. This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.

[62] However, where a question arises as to the interpretation of the Constitution, this Court, being the Apex Judicial Organ in the land, cannot invoke institutional comity to avoid its constitutional duty. We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the Supreme law of the land, it is for the Courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory

Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering this Opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act. 1
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[63] The vital and strategic governance-role of the Supreme Court, under the Constitution of 2010, is all evident, and is perceptible without any strain beyond a basic reflection on the import of article 2: 10

- (i) “This Constitution is the Supreme law of the Republic and binds all persons and all State organs at both levels of government” [article 2(1)];
- (ii) “No person may claim or exercise State authority except as authorised under this Constitution” [article 2(2)]; and 15
- (iii) “The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ” [article 2(3)].

[64] Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of “right” and “wrong” in such cases, short of a resolution in plebiscite, is only the Courts and, ultimately, the Supreme Court. On this account, we now declare that, indeed, the Supreme Court has the jurisdiction to hear and determine the dispute which has arisen between the two Chambers of Parliament. And from that threshold, we have considered the appropriateness of an Advisory Opinion. We have come to the conclusion that the Advisory-Opinion jurisdiction is well merited, in all the circumstances prevailing. 20
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[65] By the relatively open texture of an Opinion, the Court is able to lay down broad constitutional principles, and to hold out the foundation structures and the reinforcing matter that will sustain the growth of a democratic constitutional tradition. 35

c. Parliamentary Bills: The Competences of the Two Chambers
The third issue for consideration by this Court was framed thus: What is the role of the National Assembly *vis-à-vis* the Senate in the origination, consideration and enactment of the division and 40

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- allocation of revenue bills? 1
- [66] Learned Senior Counsel, Mr Nowrojee submitted that one of the functions of the National Assembly was to “[determine] the allocation of national revenue between the levels of government” [article 95(4)(a)]; but “determine” is the operative word, rather than “enact”: and hence the Constitution did not empower that Chamber to assume single-handedly the task of enacting the revenue-division or allocation law. Counsel drew analogy, in this regard, with article 218 which is concerned with “annual division and allocation of revenue Bills”, and which lodges no differentiated responsibility between the two Chambers, only prescribing that: 5
- “(1) At least two months before the end of each financial year, there shall be introduced in Parliament – 10
- a Division of Revenue Bill, which shall divide revenue raised by the National Government among the National and county levels of government in accordance with this Constitution; and 15
- b. County Allocation of Revenue Bill, which shall divide among the counties the revenue allocated to the County level of government....” 20
- [67] Learned counsel urged that it was necessary to safeguard the place of both Chambers of Parliament, in the legislation for both revenue division and allocation – and that this was the spirit and general intent of the Constitution. 25
- [68] Learned counsel anchored the foregoing argument on this Court’s Opinion in *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, Sup Ct Appl No 2 of 2012 [para 83]: 30
- “We would state that the Supreme Court, as a custodian of the integrity of the Constitution as the Country’s charter of governance, is inclined to interpret the same holistically, taking into account its declared principles, and to ensure that other organs bearing the primary responsibility for effecting operations that crystallize enforceable rights, are enabled to discharge their obligations, as a basis for sustaining the design and purpose of this Constitution.” 35
- [69] Counsel submitted that the division of nationally-collected revenue between the two levels of government has a direct fiscal bearing and impact on the capacity and the ability of County 40

- Governments, in discharging the functions bestowed upon them by the Constitution. He urged that the process of effecting a vertical division of revenue between the two levels of government bears a direct correlation to the efficacy of County Government; and that this consideration ought to inform the approach adopted in interpreting the Constitution, so as to sustain the scheme of devolution of governance. 1 5
- [70] Counsel also urged the Senate’s legislative role on the basis of the principle of financial equity, as provided for in article 201(b) (ii) of the Constitution: 10
- “The following principles shall guide all aspects of public finance in the Republic –
- a.
 - b. the public finance system shall promote an equitable society, and in particular – 15
 - (i)
 - (ii) revenue raised nationally shall be shared equitably among national and County Governments.... ” 20
- He also invoked article 202(1) which provides that: 20
- “Revenue raised nationally shall be shared equitably among the national and County Governments. ”
- [71] Counsel submitted that the Constitution’s intent, is that Senate be involved in the equitable division of national resources, between the National government and County Governments: and hence the Senate’s role in the requisite financial checks-and-balances should be upheld. 25
- [72] The basic relationship in the assignment of legislative roles, as between the two Chambers, is stated in article 109 of the Constitution, as follows: 30
- “(1) Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President. 35
- “(2) Any Bill may originate in the National Assembly.
- “(3) A Bill not concerning County Government is considered only in the National Assembly, and passed in accordance with article 122 and the Standing Orders of the Assembly. 40
- “(4) A Bill concerning County Government may originate in the National Assembly or the Senate, and is passed

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- in accordance with articles 110 to 113, articles 122 and 123 and the Standing Orders of the Houses. 1
- “(5) A Bill may be introduced by any member or committee of the relevant House of Parliament, but a money Bill may be introduced only in the National Assembly in accordance with article 114. ” 5
- [73] Mr Nowrojee submitted that the provision of article 109(5) is to be apprehended against the background of history, and in the context of the clear intent of the Constitution in its safeguard for devolved government. He urged that the provision for the “introduction” of money Bills in the National Assembly is but an unintended reflection of the English legislative experience; the House of Commons had resolved in 1671: 10
- “That in all aids given to the King by the Commons, the rate of tax ought not to be altered by the Lords. ” 15
- That dictate had been affirmed by the House of Commons by a resolution of 3/7/1968:
- “That all in aids and supplies, and aids to His Majesty in Parliament, are the sole gift of the Commons; and all bills for granting any such aids and supplies ought to begin with the Commons; and that it is the undoubted and sole right of the Commons to direct, limit and appoint in such bills the end, purposes, considerations, limitations and qualifications of such grants, which ought not to be changed or altered by the House of Lords. ” 20 25
- [74] But “a Bill concerning County Government” certainly entails the Senate’s legislative role. Such a Bill is defined in article 110(1) as: 30
- “(a) a Bill containing provisions affecting the functions and powers of the County Governments set out in the Fourth Schedule;
- “(b) a Bill relating to the election of members of a county assembly or a county executive; and
- “(c) a Bill referred to in Chapter Twelve affecting the finances of County Governments. ” 35
- [75] Bills of such a kind are subject to a prescribed procedure under article 110(3), (4) and (5), as follows: 40
- “(3) Before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties

- and, if it is, whether it is a special or an ordinary Bill. 1
- “(4) When any Bill concerning County Government has been passed by one House of Parliament, the Speaker of that House shall refer it to the Speaker of the other House. 5
- “(5) If both Houses pass the Bill in the same form, the Speaker of the House in which the Bill originated shall, within seven days, refer the Bill to the President for assent. ”
- [76] Learned counsel submitted that the Speaker of the National Assembly, which had initiated the Bill in question in the matter herein, ought to have referred it to the Speaker of the Senate after it had been passed – as was also required by the Senate’s Standing Orders. 10
- [77] Mr Nowrojee urged that a Division of Revenue Bill is an ordinary Bill concerning County Government and which, therefore, should be dealt with as provided under article 112 of the Constitution: 15
- “(1) If one House passes an ordinary Bill concerning counties, and the second House –
- a. rejects the Bill, it shall be referred to mediation committee appointed under article 113; or 20
- b. passes the Bill in an amended form, it shall be referred back to the originating House for reconsideration.
- “(2) If, after the originating House has reconsidered a Bill referred back to it under clause (1)(b), that House – 25
- a. passes the Bill as amended, the Speaker of that House shall refer the Bill to the President within seven days for assent; or
- b. rejects the Bill as amended, the Bill shall be referred to a mediation committee under article 113. ” 30
- [78] The procedure set out in article 112(2)(b) had not been followed, and the Senate’s voice had been overlooked. The Bill originated in the National Assembly and was then referred to the Senate, which amended it and sent it back to the National Assembly: but the National Assembly refused the Senate version, declined to comply with the resolution procedure under article 113, and dispatched it directly to and secured the assent of the President. The Speaker of the National Assembly, in so acting, had embraced the belated perception that it was an error in the first place, to forward the Bill as passed to the Senate. Counsel urged that such failure to engage the mediation mechanism of article 113, constituted a breach of 35 40

the terms of the Constitution.	1
[79] This was contested by the learned Attorney-General, Prof Githu Muigai, who submitted that the Bill in question wholly fell within the expansive legislative powers of the National Assembly and that, in this regard, “the Senate had very little legislative competence.” Prof Muigai submitted that the National Assembly “represented the people of Kenya in their full range” in contrast to the Senate, the scope of which was restricted to powers specially donated for named purposes, under the Constitution.	5
[80] Still advancing the point on Senate’s constricted mandate, the Attorney-General submitted that it does not fall within this Chamber’s mandate to appropriate funds for expenditure by the National Government, nor has Senate any oversight-competence as regards the National revenues. Prof Muigai submitted that the Senate’s competence was limited to participating in law-making and approval of Bills that concerned County Government: and so it follows that the procedures of the Division of Revenue Bill fell well outside the remit of the Senate.	10
[81] In further illustration of the argument, the Attorney-General submitted that the real issue herein was one of financial policy touching on the National revenue and the National allocation of funds – and that these issues were the preserve of the National Assembly. The learned Attorney-General urged that the division of revenue fell entirely within the legislative remit of the National Assembly, the Senate’s proper sphere being only in respect of “county allocation” which in any case, fell to the legislative competence of both Chambers.	15
[82] The Attorney-General submitted that it was the exclusive responsibility of the National Assembly to allocate national revenue to the two levels of government – by way of the Division of Revenue Bill – and that it fell squarely within the mandate of the National Government to finance the processes of County Government; so that only the task of dividing finances between the several counties was shared with the Senate.	20
[83] To fortify that argument, the Attorney-General cited the role of the State’s independent Commission on Revenue Allocation, provided for in article 215: this Commission functions as a check on the National Assembly by making recommendations regarding the	25
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equitable sharing of revenues generated by the National government,
as between that government and County Government. 1

[84] The Attorney-General submitted that the budgetary process
as conceived could not have incorporated the Senate-function as
annexed to County Government. He submitted that the Public
Finance Management Act, 2012 (Act No 8 of 2012) requires the
responsible Cabinet-Secretary to submit to Parliament the Division
of Revenue Bill and the County Allocation of Revenue Bill prepared
by the National Treasury, at the time of introducing the Budget
Policy. And section 42 of that Act provides: 5 10

“Parliament shall consider the Division of Revenue and
County Allocation of Revenue Bills not later than thirty days
after the Bills have been introduced, with a view to approving
them, with or without amendments.” 15

The Attorney-General urged that the Division of Revenue
Bill transcends conception just by the National Assembly, and
incorporates the role of the Commission on Revenue Allocation
which operates under specified constitutional prescriptions; the Bill
is then expressed in a policy framework by the National Treasury,
before taking the form that is laid before the National Assembly
for enactment. 20

[85] The County Allocation of Revenue Bill by contrast, the Attorney-
General submitted, lies squarely within the control of the two
Houses of Parliament – and so does not have the constraints bearing
upon the Division of Revenue Bill. 25

[86] For the second interested party, learned counsel, Mr Ngatia
submitted that even though the Constitution repeatedly refers
to Parliament in relation to the initiation of legislation, this does
not always point to both Chambers at the same time; and he gave
the example of article 109(3) which shows that the mandate in
the enactment of certain Bills lay with the National Assembly
exclusively – the Senate being concerned only with matters of
County Government. Arguing on the same lines, learned counsel,
Mr Odera submitted that while the Constitution’s reference to
“National Assembly” and “Parliament” lacked perfect consistency,
there were clear instances in which the term “Parliament” as applied,
must have been intended to mean “National Assembly” – as will be
the case with article 223(3). 30 35 40

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- [87] Of article 217(1) of the Constitution which provides that “Once every five years the Senate shall, by resolution, determine the basis for allocating among the counties the share of national revenue that is annually allocated to the county level of government,” Mr Odera submitted that the relevant Senatorial task was not a legislative process; and that the legislative process begins with the introduction of the Bill in the National Assembly, “this being a money Bill. ” 1
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- [88] By contrast, counsel for the first *amicus curiae*, Prof Ojienda submitted that the enactment of the Division of Revenue Bill and the County Allocation of Revenue Bill is a shared mandate between the two Chambers. 10
- [89] Prof Ojienda urged that the term “Parliament” wherever used in the Constitution, implied the roles of both Chambers. He urged that the Court should not adopt an interpretation which would imply that the drafters of the Constitution had been ignorant of the tenor and effect of the phraseology they adopted. In aid of this argument, counsel relied on a passage from the Ugandan case, *Tinyefuza v Attorney-General*, Const Pet No 1 of 1996 (1997 UGCC3), in which the Court of Appeal thus remarked: 15
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- “[T]he entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. ”
- Counsel urged that the said principle had been pronounced widely, in comparative judicial experience; and he cited the South African example, *Stephen Segoposto Tongoane and Three Others v National Minister for Agriculture and Land Affairs and Others*, (CCT100/09) [2010] ZACC 10. 25
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- [90] Learned Senior Counsel, Prof Ojienda urged that both the National Assembly and Senate are constitutionally required to participate in the enactment of *both* the Division of Revenue Bill and the Allocation of Revenue Bill. 35
- [91] For the second *amicus curiae*, learned counsel, Mr Nderitu urged that the Constitution incorporated a political principle which dictated that both Chambers had a role in respect of both the Division of Revenue Bill and the Allocation of Revenue Bill: the Senate serves to protect the devolved system of government – by ensuring the representation of county interest. And there is a common denominator, counsel urged, between the National 40

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- of the Houses. ” 1
- [95] It was common cause that article 110 of the Constitution provides the essential definition of the phrase, “Bill concerning County Government,” as follows: 5
- “(a) a Bill containing provisions affecting the functions and powers of the County Governments set out in the Fourth Schedule;
- “(b) a Bill relating to the election of members of a county assembly or a county executive; and
- “(c) a Bill referred to in Chapter Twelve affecting the finances of a County Government. ” 10
- [96] Such a Bill may be categorized as “special” or “ordinary”. And article 110(3) provides that prior to a consideration of the Bill, “the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill. ” 15
- [97] In the category of “a Bill concerning County Government” are Bills referred to in Chapter Twelve of the Constitution, as affecting the finances of County Governments. The said Chapter Twelve deals with public finance; but it also deals with certain categories of Bills: Division of Revenue Bill; County Allocation of Revenue Bill; County Appropriation Bill. Such Bills, to qualify as “Bills concerning County Government”, must relate to the finances of County Governments. 20 25
- [98] Article 110(3), (4) and (5) lays down special procedures to guide the passing of “Bills concerning County Government. ” As regards these Bills, neither Chamber of Parliament is to take a unilateral course. By article 110(3), the two Speakers are required to consult between themselves, and jointly resolve any emerging difference. 30
- [99] It emerges from the submissions of learned counsel that on issues of finance, and as regards monetary legislation, the separation of roles between the National Assembly and the Senate is blurred. The effect is to place an obligation on the Court, to consider the facts and circumstances, and to rely on established principle, in determining the situation in each case. 35
- [100] Such uncertainty, and the case for guidance by principle, are foreshadowed in an earlier matter before the Supreme Court: *Re the Matter of the Interim Independent Electoral Commission*, Sup Ct 40

Const Appl No 2 of 2011 [para 40]: 1

“There is..., in reality, a close connectivity between the functioning of national government and County Government We consider that the expression ‘any matters touching on County Government’ should be so interpreted as to incorporate any national-level process bearing a significant impact on the conduct of County Government. However, interpretation in this category is to be made cautiously, and on a case-by-case basis....” 5

[101] It was urged for the *amici curiae* that there does exist a link between the National Government and the 47 counties – and that this necessitated a clear definition of what “concerns or affects County Government.” This is necessary, it was urged, as there is the possibility – or indeed, likelihood – that prospective petitioners will label certain matters as “matters concerning County Government”, merely on account of trifling connections between the two levels of government. 10 15

[102] The Court’s observation in *Re the Matter of the Interim Independent Electoral Commission* is borne out in an official publication, *Final Report of the Task Force on Devolved Government Vol 1: A Report on the Implementation of Devolved Government in Kenya* [page 18]: 20

“The extent of the legislative role of the Senate can only be fully appreciated if the meaning of the phrase ‘concerning counties’ is examined. Article 110 of the Constitution defines bills concerning counties as being bills which contain provisions that affect the functions and powers of the County Governments as set out in the Fourth Schedule; bills which relate to the election of members of the county assembly or county executive; and bills referred to in chapter twelve as affecting finances of the County Governments. This is a very broad definition which creates room for the Senate to participate in the passing of bills in the exclusive functional areas of the National Government, for as long as it can be shown that such bills have provisions affecting the functional areas of the County Governments. For instance, it may be argued that although security and policing are national functions, how security and policing services are provided affects how County Governments discharge their agricultural functions. As such, a bill on security and policing would be a 25 30 35 40

bill concerning counties.... With a good Speaker, the Senate should be able to find something that affects the functions of the Counties in almost every bill that comes to Parliament, making it a bill that must be considered and passed by both Houses. ”	1 5
[103] Caution, therefore, must attend the determination of the status of the Division of Revenue Bill. Certainly, such is an issue of significant public interest, that requires informed deliberations, and that merits an Advisory Opinion from the Supreme Court.	10
E. The Division of Revenue Bill: Is this a Bill Concerning County Government?	
[104] Of the nature and effect of the Division of Revenue Bill, the applicants, through learned counsel, Mr Kilukumi urged that this Bill effects a vertical division of the finances collected on a national scale, from all the 47 Counties – as between the two levels of government. It was urged that the Senate, for its safeguard-role over vital county interests in such resources, is the veritable guardian-angel of the counties, especially in relation to the principle of devolved government. Accordingly, learned counsel submitted, the Senate must be involved in the process of sharing-out of the national financial resources.	15 20
[105] Even on elementary consideration, Mr Kilukumi urged, the Division of Revenue Bill bore the masthead-object: a Bill “to finance the functions of county assemblies. ” It deals with finances as provided under article 110 of the Constitution; each county’s receipt is to be seen as a share of the National Revenue that belongs to County Government; the success of the very constitutional scheme of devolution, and of County Government, is crucially dependent on the monetary plans and disbursements; therefore, a Bill that apportions and disburses financial resources to the counties, is indeed “a Bill concerning County Government. ”	25 30
[106] This was a case, counsel urged, in which the legislative responsibility, as attributed to Parliament under article 224 of the Constitution, merits proper interpretation as signifying Parliament in its two constitutive Chambers, and not just the National Assembly. Counsel submitted that the Senate’s role, in the contemplation of article 224, admits of no doubt:	35 40
“On the basis of the Division of Revenue Bill passed by Parliament under article 218, each County Government shall	

prepare and adopt its own annual budget and appropriation Bill in the form, and according to the procedure prescribed in an Act of Parliament. ” 1

[107] Learned counsel submitted, for greater effect, that the Court should consider whether the Division of Revenue Bill affects the functions and operations of County Government. Indications of the appropriate inference, Mr Kilukumi urged, are embedded in the Final Report by the *Task Force on Devolved Government*, Vol 1: A Report on the Implementation of Devolved Government in Kenya [at page 19]: 5 10

“The role of the Senate in the vertical and horizontal sharing of revenue is provided by article 218 as read together with article 96(2). Article 218 provides for both the Division of Revenue Bill and the County Allocation of Revenue Bill, which are required to be introduced in Parliament at least two months before the end of each financial year. It is notable that the article provides for the introduction of the two Bills in Parliament and not just in one of the two Houses of Parliament. This may mean that the Bills should be introduced and processed in Parliament at a joint sitting of the two Houses or that they should be introduced and processed in each of the two Houses of Parliament separately. Furthermore, these being Bills to be passed into Acts of Parliament, they must be read within the context of the provisions of article 96(2) which requires that Bills concerning counties be considered, debated and approved by the Senate. Bills which deal with the equitable sharing of revenue both vertically and horizontally within the meaning of articles 202, 203 and 204 are definitely Bills that affect the functions of County Governments and, therefore, Bills concerning counties in whose consideration, debate and approval the Senate has a role to play. ” 15 20 25 30

[108] The learned Attorney-General, by contrast, maintained that the National Assembly alone has the role of financing County Government – by allocating the national revenue, through the Division of Revenue Bill. He submitted that the Senate’s role is limited to some other regime of law-making, one that allots to different counties the finances already disbursed by the National Assembly by virtue of the latter’s exclusive law-making competence. 35 40

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- [109] The Attorney-General submitted that a perception of the Division of Revenue Bill as a Bill concerning County Government, would entail an erroneous outcome: that the Senate, while participating in the disbursement of national revenue to counties, would also be taking part in the determination of the revenue-portion going to the National Government – and this would entail conflict in the respective legislative powers of the two Parliamentary Chambers. 1
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- [110] Learned counsel, Mr Ngatia concurred in the foregoing perception, urging that in the terms of article 110 of the Constitution, the Division of Revenue Bill is not “a Bill concerning County Government”: because it carries no provisions on the functions and powers of County Governments as set out in the Fourth Schedule. The controlling factor, Mr Ngatia urged, was the conduct of national economic policy and planning, under which falls “division of revenue”, and which fell outside the remit of County Government. Mr Ngatia submitted that the Division of Revenue Bill fell outside the competence of County Government as it did not relate to the election of members of a county assembly or a county executive. This position was supported by learned counsel, Mr Odera, though not by learned counsel, Mr Nderitu, who urged that the Division of Revenue Bill, insofar as it entailed the allocation of a share of the National Revenue among county-government units, should be viewed as “a Bill concerning County Government.” 10
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- [111] From such perceptions, we have endeavoured to crystallize the points of merit. The Division of Revenue Bill declares in clause 3 that it is to provide for:
- “(b) additional resources to facilitate the proper functioning of County Governments in accordance with article 202 of the Constitution.... ” 30
- The Memorandum to the Bill also states that:
- “The principle object of the Bill is to provide for the equitable division of revenue raised nationally among the National and County levels of government as required by article 218 of the Constitution and to provide for resources to facilitate the proper functioning of County Governments and to ensure that ongoing services are provided for.” 35
- [112] The learned Attorney-General in his submissions, called for a broad, purposive approach to the interpretation of the Constitution, and conceded that such an unconstrained mode of interpretation 40

may take into account relevant secondary documents. A significant such document is the Final Report of the Task Force on Devolved Government; and this states (at p 19) that the Division of Revenue Bill deals with the vertical equal sharing of national revenue and, therefore, it is definitely a Bill affecting the functions of County Government and comes within the competence of the Senate. The emerging picture is plain, though unsupported by learned counsel, Mr Ngatia who contends that the provisions of the Division of Revenue Bill have relevance only for national economic policy and planning, a matter reserved to the national government. Such a position is not free of controversy: for the Division of Revenue Bill provides for the allocation of national revenue to the county-units, for the facilitation of County Government.

[113] This Court, in *Re the Matter of the Interim Independent Electoral Commission* (2011), had observed that there are certain functions shared between the National and County Governments, that give rise to a concurrent jurisdiction between the two levels; and finance is one such function [para 39]:

“Many offices established by the Constitution are shared by the two levels of government, as is clear from the fourth schedule...We have taken note too that the Senate (which brings together county interests at the National level) and the National Assembly (a typical organ of national government) deal expressly with matters affecting County Government; and that certain crucial governance functions at both the National and County level – such as finance, budget and planning, public service, land ownership and management, elections, administration of justice – dovetail into each other and operate in unity.”

[114] It is quite clear to us that the Division of Revenue Bill is a Bill bearing provisions that deal with the equitable sharing of revenue – which will certainly affect the functioning of County Government. We have found no justification in the contention that the Division of Revenue Bill deals strictly with “national economic policy and planning” and so, on this account, it is a measure unrelated to County Government. The Bill deals with equitable allocation of funds to the Counties, and so any improper design in its scheme will certainly occasion inability on the part of the county-units to exercise their powers and to discharge their functions as contemplated under the Constitution.

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- [115] This is a critical test which will require that the Division of Revenue Bill be perceived as “a Bill concerning County Government” and, therefore, a subject of the legislative competence of both the National Assembly and the Senate. 1
- [116] We find merit, therefore, in upholding the stand of the Applicants, on this question. It is clear to us that the Senate had a clear role to play, in the processing of the Division of Revenue Bill. The Speaker of the National Assembly should have complied with the terms of article 112 of the Constitution; and the National Assembly should have considered the deliberations of the Senate on record and, failing concurrence on legislative choices, the matter should have been brought before a mediation committee, in accordance with the terms of article 113 of the Constitution. 5 10
- F. Is The Division of Revenue Bill a ‘Money Bill’ under the Constitution? 15
- [117] It had been urged for the interested parties that the said Division of Revenue Bill fell exclusively within the National Assembly’s competence on the ground of its proper rubric being “money bill”. Counsel for the Applicants raised no doubts as to the validity of the legal principle thus raised, but submitted that the Division of Revenue Bill fell under the terms of article 218 of the Constitution rather than article 114(3) which provided for “money Bill. ” And learned *amicus* counsel, Mr Nderitu weighed in, submitting that the Division of Revenue Bill is not a “money Bill”, as it does not directly deal with the raising or spending of government revenue: it only deals with the manner in which the revenue once raised, shall be divided between the National and the County Governments. Upon reflecting on this question, taking into account the comparative material placed before us by counsel, we came to the conclusion that the Division of Revenue Bill is not a “money Bill,” in the terms of article 114(3) of the Constitution. It has become clear to us that a “money Bill”, in a proper case, may only be introduced in the National Assembly, though it is not a settled question whether the Senate may subsequently participate in the relevant legislative deliberations. 20 25 30 35
- [118] The Court’s ultimate task, in the circumstances, is to consider the position of the Speakers of the respective Chambers of Parliament, and to render an Advisory Opinion regarding their options. 40

A. Parliamentary Conflict: The Role of the Speakers	1
When and how does a question for the consideration of the two Speakers arise under article 110(3) of the Constitution?	
[119] Of the management function of the Speakers of Parliament, in relation to the process of legislation, article 110(3) of the Constitution thus provides:	5
“Before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill. ”	10
[120] Was this preliminary condition complied with, before the National Assembly proceeded to deliberate upon and to pass the Division of Revenue Act, 2013 which has occasioned the conflict in question?	15
[121] The common course on fact is that the National Assembly published the Division of Revenue Bill on 29/4/2013, and the Speaker of that Chamber then wrote a letter to the Speaker of Senate on 3/5/2013, “seeking the latter’s concurrence to the effect that the Division of Revenue Bill was a Bill concerning County Government”. The Senate Speaker concurred, by his letter of 9/5/2013; and on that very day the Bill was debated and passed by the National Assembly, with several amendments being effected. The Clerk of the National Assembly, on 13/5/2013, forwarded the Bill as passed, to the Speaker of the Senate, for debate. The Senate deliberated upon the Bill fully, and passed it with amendments, on 23/5/2013; and it was forwarded to the National Assembly for consideration of the amendments on 24/5/2013. Indeed, the National Assembly entered upon a second round of deliberations on the Bill; but the Speaker then had a change of mind, taking the position that it was an error of judgment to have involved the Senate in the process of legislation. He had taken into account the objections of members of the National Assembly raised during the second round of debate. The essence of the objections was that the Division of Revenue Bill was not “a Bill concerning County Government”.	35
[122] Not only did the National Assembly reject Senate’s amendments and exclude Senate’s legislative participation entirely, but the Speaker forwarded the National Assembly’s earlier-approved version of the Bill to, and obtained the assent of, the President on 10/6/2013.	40

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- [123] The emerging constitutional crisis occasioned genuine anxiety to the Speaker and members of Senate, and they moved this Court to find a solution in the form of an authoritative Advisory opinion. 1
- [124] Although the Constitution has special provisions in articles 110(3) and 113 for orderly, internal conflict resolution in the law-making process, these had not been resorted to; and it became clear the two Chambers and their respective Speakers were at odds, in a mode incompatible with the spirit of harmony required for the due discharge of State functions under the Constitution. 5
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- [125] The internal parliamentary mechanism for consultation, co-ordination and harmony, though a constitutional prescription and a device of the democratic dispensation, must be engaged in the first place by individual persons, in the shape of the two Speakers who, however, in this case, have disempowered the institutional design, by simply showing a disinclination to reach out to each other. We are touching on a mischief to the due functioning of Kenya's chosen constitutional mechanisms: and it becomes clear that such is not a question justiciable by the scheme of litigation, as was proposed by counsel for the interested parties. It is quite clear that this is a matter for the authoritative Advisory Opinion of this Court, as it fulfills the intent expressed in the Supreme Court Act, 2011 (Act No 7 of 2011, to [section 3(a)] "assert the supremacy of the Constitution and the sovereignty of the people of Kenya". 15
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- [126] This fundamental point is implicitly recognised by the Speaker of the National Assembly, who is one of the interested parties. In his deposition responding to the Senate's Reference, the National Assembly's Speaker avers: 30
"I now request the Supreme Court to also provide an Advisory Opinion with regard to when and how the question shall arise under article 110 of the Constitution together with the Opinion sought by the applicants herein. '
- [127] Learned Senior Counsel, Mr Nowrojee, on the requirement of consultation between the two Chambers, submitted that the critical starting point is article 110(3) of the Constitution: 35
"Before either House considers a Bill, the Speakers of the National Assembly and the Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill". 40

This provision, Mr Nowrojee submitted, is the very fulcrum of the Constitution's scheme of devolution: it seeks to guarantee the participation of Senate in the origination, determination and enactment of laws that affect the operations of the Counties, which are the basic units of devolved government. Learned counsel notes that article 110(3) is buttressed by operational Standing Orders of both the National Assembly and the Senate: in the case of the former, Standing Order Nos 121, 122 and 123; in the case of the latter, Standing Order No 116.

[128] Standing Order No 122 of the National Assembly thus provides:

- “(1) upon publication of a Bill, and before the First Reading, the Speaker shall determine whether:
 - (a) It is a Bill concerning County Governments and if it is, whether it is a special or an ordinary Bill or,
 - (b) It is not a Bill Concerning County Governments.
- “(2) The Speaker shall communicate the determination under paragraph (1) to the Speaker of the Senate for concurrence.
- “(3) Where the Speaker of the Senate does not concur with the determination of the Speaker under paragraph (1), the Speaker shall, jointly with the Speaker of the Senate, resolve any question whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill”.

[129] Prescriptions in similar terms are found too in the Senate's Standing Order No 116:

- “(1) Upon publication of a Bill, and before the first reading of the Bill, the Speaker shall, jointly with the Speaker of the National Assembly, resolve any question as to whether it is a Bill concerning counties and, if it is , whether it is a special or an ordinary Bill.
- (2) For the purposes of paragraph (1), upon publication of a Bill, and before the First Reading, the Speaker shall, by way of communication, seek the concurrence of the Speaker of the National Assembly whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill”.

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- [130] Is it in doubt, in view of the formal provisions of the law, when and how a question for the consideration of the two Speakers arises under article 110(3) of the Constitution? We do not think so. As Mr Nowrojee submitted, the requirement for a joint resolution of the question whether a Bill is one concerning counties, is a mandatory one; and the legislative path is well laid out: it starts with a determination of the question by either Speaker – depending on the origin of the Bill; such a determination is communicated to the other Speaker, with a view to obtaining concurrence; failing a concurrence, *the two* Speakers are to jointly resolve the question. Both sets of Standing Orders are crystal clear on this scenario, and both, on this point, as we find, faithfully reflect the terms of the Constitution itself.
- [131] Mr Nowrojee submitted, for eminently good cause, that the legislative path thus laid out should apply to each and every Bill coming up before either Chamber of Parliament; and it is the constitutional task of the two Speakers to jointly determine the route to be followed by legislative proposals. Where the Speakers determine that a Bill is not one “concerning County Government”, such a Bill is then rightly considered and passed exclusively by the National Assembly, and then transmitted to the President for assent. The emerging, broader principle is that both Chambers have been entrusted with the people’s public task, and the Senate, even when it has not deliberated upon a Bill at all the relevant stages, has spoken through its Speaker at the beginning, and recorded its perception that a particular Bill rightly falls in one category, rather than the other. In such a case, the Senate’s initial filtering role, in our opinion, falls well within the design and purpose of the Constitution, and expresses the sovereign intent of the people: this cannot be taken away by either Chamber or either Speaker thereof.
- [132] Learned counsel for the *amici curiae*, Prof Ojienda, Mr Nderitu and Mr Wanyoike expressed concurrence in the main lines of argument canvassed by Mr Nowrojee, while the interested parties, through learned counsel Mr Ngatia and Mr Odera, expressed disagreement. The two counsel submitted that all Bills in the legislative process are not required to follow the path laid out in article 110(3) of the Constitution, as reflected in the Standing Orders of the two Chambers. Rather than elaborate the fundamentals of this argument, both counsel focused attention on a perception that the Senate’s legislative role is greatly limited, as

compared to the National Assembly; it was urged that the National Assembly's unlimited competence rests in its ability to originate and consider any Bill at all, whether it concerns County Government or not – whereas the Senate's legislative role is limited to matters "concerning County Government".

[133] On the basis of the submissions of counsel, and upon a broad view of the question which led to this Court being moved, it has become clear that the proper functioning of the legislative process is one of the teething problems attending the consolidation and operationalisation of the democratic concept of the new Constitution. The question coming up before us, therefore, is one of great public importance. Not only have we determined that this, indeed, is a proper question for an Advisory Opinion, but we have re-examined the broader scope of the Supreme Court's place in the constitutional order, when complex challenges to the functioning of governance institutions arise.

[134] Reflecting on the role of the Courts, and in particular of the Supreme Court, and in relation to the long-established American governance system, Prof Archibald Cox [in *The Warren Court: Constitutional Decision as an Instrument of Reform* (Cambridge, Mass: Harvard University Press, 1968), at p 118] thus observed:

"[G]overnment is more pragmatic than ideal. In a practical world there is, and I suspect had to be, a good deal of play at the joints. If one arm of government cannot or will not solve an insistent problem, the pressure falls upon another. Constitutional adjudication must recognize that the peculiar nature of the Court's business gives it a governmental function which cannot be wholly discharged without the simple inquiry, 'which decision will be the best for the Country?'

"...[T]he Court can seldom be wholly neutral upon the social, political, or philosophical questions underlying constitutional litigation. Its opinions shape as well as express our national ideals."

[135] We are in a similar position. By a Constitution achieved after many false starts, the people have declared that "All sovereign power belongs to the people of Kenya" [Article 1(1)]; and they have established institutions of governance committed to named functions: the Executive; the National Assembly; the Senate; and numbers of others.

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- [136] The mandate of governance established by the people is defined by particular concepts, principles and values. One of these is devolution, which is defined in *Black's Law Dictionary*, 8thed (2004) [p 484] as: 1
- “The act or an instance of transferring ... rights, duties, or powers to another; the passing of such rights, duties, or powers by transfer or succession” 5
- The Kenyan people, by the Constitution of Kenya, 2010 chose to de-concentrate State power, rights, duties, competences – shifting substantial aspects to County Government, to be exercised in the County units, for better and more equitable delivery of the goods of the political order. The dominant perception at the time of Constitution-making was that such a deconcentration of powers would not only give greater access to the social goods previously regulated centrally, but would also open up the scope for political self-fulfilment, through an enlarged scheme of actual participation in governance mechanisms by the people – thus giving more fulfilment to the concept of democracy. 10
- [137] By article 1 of the Constitution, the people's sovereign power is delegated to Parliament and the legislative assemblies in the County units, the National and County Executives, the Judiciary and independent tribunals. 15
- [138] Devolution as a required constitutional practice runs in parallel with an attendant set of values, declared in article 10 of the Constitution: the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, the protection of the marginalized. 20
- [139] A fundamental element in the scaffolding structure for the said constitutional principles and values, is the institutional scheme of bicameralism in the legislative arrangement; and this is the dual-Chamber set-up in the institutions of law-making. The Constitution provides for a bicameral system, with each unit playing its role as prescribed. Article 93 stipulates: 25
- “(1) There is established a Parliament of Kenya, which shall consist of the National Assembly and the Senate. 30
- “(2) The National Assembly and the Senate shall perform their respective functions in accordance with this Constitution.” 35
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- [140] In the operations of each of the Chambers of Parliament, the role of the presiding officer, namely the Speaker, is critical. In respect of this office, the Constitution [Article 106(1)] thus provides: 1
- “(1) There shall be –
- A Speaker for each House of Parliament, who shall be elected by that House in accordance with the Standing Orders, from among persons who are qualified to be elected as members of Parliament but are not such members” 5
- [141] It is quite clear, though some of the counsel appearing before us appeared to overlook this, that the business of considering and passing of any Bill is not to be embarked upon and concluded before the two Chambers, acting through their Speakers, address and find an answer for a certain particular question: What is the nature of the Bill in question? The two Speakers, in answering that question, must settle three sub-questions – before a Bill that has been published, goes through the motions of debate, passage, and final assent by the President. The sub-questions are: 10
- is this a Bill concerning County Government? And if it is, is it a special or an ordinary bill? 15
- is this a bill not concerning County Government? 20
- is this a money Bill? 20
- [142] How do the two Speakers proceed, in answering those questions or sub-questions? They must consider the content of the Bill. They must reflect upon the objectives of the Bill. This, by the Constitution, is not a unilateral exercise. And on this principle, it is obvious that the Speaker of the National Assembly by abandoning all engagement or consultation with the Speaker of the Senate, and proceeding as he did in the matter before this Court, had acted contrary to the Constitution and its fundamental principles regarding the harmonious motion of State institutions. 25
- [143] Neither Speaker may, to the exclusion of the other, “determine the nature of a Bill”: for that would inevitably result in usurpations of jurisdiction, to the prejudice of the constitutional principle of the harmonious interplay of State institutions. 30
- [144] It is evident that the Senate, though entrusted with a less expansive legislative role than the National Assembly, stands as the Constitution’s safeguard for the principle of devolved government. This purpose would be negated if the Senate were not to participate 35
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in the enactment of legislation pertaining to the devolved units, the counties [Article 96(1), (2) and (3)].	1
[145] It is clear to us, from a broad purposive view of the Constitution, that the intent of the drafters, as regards the exercise of legislative powers, was that any disagreement as to the nature of a Bill should be harmoniously settled through mediation. An obligation is thus placed on the two Speakers, where they cannot agree between themselves, to engage the mediation mechanism. They would each be required each to appoint an equal number of members, who would deliberate upon the question, and file their report within a specified period of time. It is also possible for the two Chambers to establish a standing mediation committee, to deliberate upon and to resolve any disputes regarding the path of legislation to be adopted for different subject-matter.	5 10 15
[146] Had such an approach to the dispute been adopted, it is our opinion, this Court would probably not have been asked to give an Advisory Opinion, as a fitting solution would most likely have been found. What precipitated the current situation, as is clear from the facts, is the National Assembly Speaker's non-recourse to the provisions of articles 110(3), 12 and 113 of the Constitution, thus improperly excluding the prospects of consultation and mediation. Such a course of action is precisely what Archibald Cox had in mind: "If one arm of government cannot or will not solve an insistent problem, the pressure falls upon another". The pressure now falls on the Supreme Court. As we hereby render an Advisory Opinion, we categorically affirm that lawful public-agency conduct under Kenya's Constitution, requires every State agent to grapple, in good faith, with assigned obligations, and with a clear commitment to inter-agency harmony and co-operation. No State agency, especially where it is represented by one person, should overlook the historical trajectory of the Constitution, which is clearly marked by transition from narrow platforms of idiosyncrasy or sheer might, to a scheme of progressive, accountable institutional interplays.	20 25 30 35
Conclusion	
[147] In this Advisory Opinion, we have re-visited the conditions under which the Supreme Court will exercise the jurisdiction to render such an Opinion, and we have reviewed on merit the submissions of counsel, on the important question of the functioning of the legislative mechanisms instituted under the new	40

constitutional dispensation. In all such issues, our inclinations, and the grounds therefore, emerge, and may serve as reference-points in future matters of a constitutional nature. 1

[148] But our specific Advisory Opinion, which culminates from the detailed review, is as follows: 5

(a) The Division of Revenue Bill, 2013 was an instrument essential to the due operations of County Governments, as contemplated under the Constitution, and so was a matter requiring the Senate's legislative contribution. Consequently, the Speaker of the National Assembly was under duty to comply with the terms of articles 110(3), 112 and 113 of the Constitution, and should have co-operated with the speaker of the Senate, as necessary, to engage the mediation forum for resolution of the disagreement. 10 15

(b) With regard to any future lack of accord of a similar nature, between the two Chambers of Parliament, there shall be an obligation resting on the State organs in question to resort to mediation, as a basis for harmonious functioning, as contemplated by the Constitution. 20

[149] Although this was not a litigious matter and, thus, is not an occasion for an order or decree in the conventional sense, we must revert to the submissions made by two *amici*-counsel, Prof Ojienda and Mr Wanyoike, that if the Court were to find that the National Assembly acted in violation of articles 112 and 113 of the Constitution, then the outcome of its legislative process, in the shape of the Division of Revenue Act, 2013 should be declared unconstitutional. 25 30

[150] Earlier in this Advisory Opinion we have considered the proper scope of judicial discretion, where a failing is attributed to the internal procedures of Parliament during legislation; and our position is that while the Court has all the powers when such a course of conduct is set against the terms of the Constitution, it is necessary for the Court to have a sense of the prevailing state of fact; thus, the Court has a discretion in appraising each instance, and taking a decision as may be appropriate. Now guided by this principle, would the instant case be one in which the Court should make orders as urged by counsel? 35 40

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- [151] We do not think so, for several reasons. The judicial process, essentially, is the Constitution's answer to any controversial question arising, and is initiated and stoked by proper invocation, with the relevant gravamina plainly laid out. In the instant case, only the Court's guidance on critical constitutional questions was sought; but the Court was not asked to make a conventional judicial order annulling the Division of Revenue Act, 2013. So it is our sense that the Applicants' options in the rectification of a problematic statute, such, for instance, as regular amendment procedures, remain uncompromised.
- [152] Learned counsel, Mr Nowrojee submitted before the Court that what was sought was an authoritative opinion, in answer to the several issues agreed between the parties. The object, as it emerges from his submissions, is a clarification of the proper course of legislation, where county matters safeguarded by the Senate are concerned.
- [153] We take cognizance of certain practical situations in the legislative process: in particular, of the fact that since the misunderstanding between the two Chambers came to light, yet another Bill, namely the County Allocation of Revenue Bill, has been deliberated upon and passed by the Senate, culminating in the Presidential assent. In the light of that development, it is our perception that the object of efficacy in law-making, as a constitutional task, stands in favour of sustaining the legislation already achieved. The Court's inclination in this respect, however, would not compromise its options in the future, in any matter akin to the instant one.
- The Concurring Opinion of **Mutunga, CJ & President**
Principle and Context
- [154] I concur with the majority Advisory Opinion, but write separately to give a historical background that clarifies the central goals and the significance of devolution in Kenya's Constitution.
- [155] In both my respective dissenting and concurring opinions, In the Matter of the Principle of Gender Representation in the National Assembly and Senate, Sup Ct Appl No 2 of 2012; and *Jasbir Singh Rai and 3 others v Tarlochan Singh Rai and 4 others* Sup Ct Petition No 4 of 2012, I argued that both the Constitution, 2010 and the Supreme Court Act, 2011 provide comprehensive interpretive frameworks upon which fundamental hooks, pillars, and solid foundations for interpreting our Constitution should be

based. In both opinions, I provided the interpretive coordinates that should guide our jurisprudential journey, as we identify the core provisions of our Constitution, understand its content, and determine its intended effect. 1

[156] The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that lower courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretive guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the Country turns, in order to resolve these contradictions; clarify draftsmanship-gaps; and settle constitutional disputes. In other words, constitution-making does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that Constitutions borne out of long drawn compromises, such as ours, tend to create. The constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. The limitations of mind and hand should not defeat the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras. 5
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[157] Section 3 of the Supreme Court Act provides:
“The object of this Act is to make further provision with respect to the operation of the Supreme Court as a court of final authority to, among other things – 35

....
....

- (c) develop rich jurisprudence that respects Kenya’s history and traditions and facilitates its social, economic and political growth; 40
- (d) enable important constitutional and other legal matters,

including matters relating to the transition from the former to the present constitutional dispensation, to be determined having due regard to the circumstances, history and cultures of the people of Kenya. ”	1
In my opinion, this provision grants the Supreme Court a near-limitless, and substantially-elastic interpretive power. It allows the Court to explore interpretive space in the Country’s history and memory that, in my view, goes even beyond the minds of the framers whose product, and appreciation of the history and circumstance of the people of Kenya, may have been constrained by the politics of the moment.	5
[158] The provisions of the Act are reinforced by the Preamble to the Constitution, “[PROUD of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation; and committed to nurturing and protecting the well-being of the individual, the family, communities and the nation]”, and by articles 1(4), 174, 175(b), 189, 202, 203(2) and (3), 204, 215, 217 and 218. I will consider the provisions of article 174 in more detail later.	10
[159] Devolution falls neatly within the ambit of ‘important constitutional and other legal matters,’ by the meaning of section 3(d) of the Supreme Court Act. That is why Advisory Opinions under article 163(6) are one of the two matters in which the Supreme Court is entrusted with exclusive jurisdiction. The other matter is the determination of disputes relating to election to the office of the President (article 163(3)(a)). Both the determination of Presidential election disputes, and the rendering of Advisory Opinions on devolution by the Supreme Court, are given the same jurisdictional status in Kenya’s constitutional design. In my opinion, this speaks quite eloquently as to the order of importance of devolution.	15
[160] The Constitution of 2010 was a bold attempt to restructure the Kenyan State. It was a radical revision of the terms of a social contract whose vitality had long expired and which, for the most part, was dysfunctional, unresponsive, and unrepresentative of the peoples’ future aspirations. The success of this initiative to fundamentally restructure and reorder the Kenyan State is not guaranteed. It must be nurtured, aided, assisted and supported by citizens and institutions. This is why the Supreme Court Act imposes a transitional burden and duty on the Supreme Court. Indeed,	20
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constitutional relapses occur in moments of social transition, when individual or institutional vigilance slackens. 1

[161] The Supreme Court has a restorative role, in this respect, assisting the transition process through interpretive vigilance. The Courts must patrol Kenya's constitutional boundaries with vigor, and affirm new institutions, as they exercise their constitutional mandates, being conscious that their very infancy exposes them not only to the vagaries and fragilities inherent in all transitions, but also to the proclivities of the old order. This principle is well depicted in the words of Mahomed, AJ in the Namibian case, *S v Acheson*, 1991 (2) SA 805 (NM): 5 10

“The law requires me to exercise a proper discretion having regard, not only to all the circumstances of the case and the relevant statutory provisions, but against the backdrop of the constitutional values now articulated and enshrined by the Namibian Constitution of 1990. 15

The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the Government and the governed. It is a ‘mirror reflecting the National soul’, the identification of ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation...” 20 25

[162] It is in recognition of this duty to nurture Kenya's new order, that the Supreme Court Act, in Section 3(d), has extended an open invitation to the Supreme Court to pronounce itself in constitutional and legal ‘matters relating to the transition from the former to the present constitutional dispensation...having due regard to the circumstances, history and cultures of the people of Kenya’. The creation of the Supreme Court as the apex Court in the new Constitution was itself informed by a desire and a need to have a fresh Court oversee the constitutional birth of a new order, and also respond to the risks that our judicial history posed to this new Constitution. 30 35

[163] In executing its mandate the Court must, therefore, be appreciative of its unique constitutional mission as a substantive rather than a decorative device, deliberately created to oversee Kenya's successful constitutional and institutional transition. 40

[164] Devolution is one of the main fulcrums on which Kenya's newly renegotiated social contracts turns. The Court's operative statute invites it to take judicial notice of Kenya's history, in order to develop rich jurisprudence on the issue of devolution. Therefore, it is essential that I paint a historical canvas that helps to illuminate the discourse, and the resultant determination of the question at hand.

b. Historical Background: Inequality and Centralism

[165] The Kenyan state was founded on a partisan, sectarian, and exclusionary logic. It is this logic that the Constitution of Kenya, 2010 sought to deconstruct. There is no doubt that Kenya is a diverse and unequal country.¹ The inequalities within groups and between regions are manifested in the class structure of society, ethno-regional differences, rural-urban divides, and gender biases.

[166] When one examines the development-indicators that are periodically produced by the Ministry of Planning, one sees sharp disparities in development outcomes² There are large differentials in development-indicators between regions: life expectancy (at times, of over 15 years between two regions in the Country)³; infant and maternal mortality rates; under-five mortality; literacy rates; number of hospitals; doctor-patient ratios; and household incomes, among others.

[167] Kenya has been a highly centralized political and economic entity. The fusion of political and economic power has led to the emergence of state-made rather than market-created economic elites. Indeed, Kenya's socio-economic character is a product of public-policy choices made and pursued by the Government. State behaviour, flowing from this politico-economic fusion, and expressed mainly through official policy, markedly shape the specific character of Kenya's development outlook. Additionally, the colossal ethnic mobilization in the acquisition and retention of state power has led to an illiberal and undemocratic practice, whereby the allocation of development resources tends to favour the ethnic

1 Government of Kenya, *Geographical Dimensions of Well Being in Kenya: Where Are the Poor? Volume 1 and 11*, Ministry of Planning and National Development Nairobi, 2005; Society for International Development (SID), *Readings on Inequality in Kenya: Sectoral Dynamics and Perspectives*: SID, Nairobi, 2006.

2 Government of Kenya, *Welfare Monitoring Surveys (1994 and 1997), the Kenya Demographic and Health Surveys (various issues); National Population Census*.

3 *Ibid*.

base, to the exclusion of other factors of merit. Thus, the burden of taxation is shared and remains political-choice-neutral, but the benefit of public expenditure is skewed, and remains politically partisan. 1

[168] It is, therefore, rightly argued that the Country's developmental imbalance is a product of what policy researchers, Duncan Okello and Kwame Owino, have termed a "rigged-development" approach. The two researchers observe that the "rigging" character and orientation of the state, especially in the development arena, was inherent in the colonial bearings of the state. Its constitutive values were partisan, divisive and sectarian.⁴ 5 10

[169] The Independence Constitution attempted to correct these inherited defects through an elaborate devolution design, but these were soon frustrated by the Central Government. Having constitutionally dismantled the devolved system of government, the immediate post-independence government quickly moved to consolidate its political-constitutional 'gains' in the policy realms, and in a manner that re-validated the sectarian, partisan and exclusionary nature of the colonial state itself. In Kenya's founding policy paper, Sessional Paper No 10 of 1965 on African Socialism and its Application to Planning in Kenya, the Government gave official state approval to developmental segregation, discrimination, and exclusion. Under the section titled "*Provincial Balance and Social Inertia*", the Paper proclaimed this policy bias [in paragraph 133] thus: 15 20 25

One of our problems is to decide how much priority we should give in investing in less developed provinces. To make the economy as a whole grow as fast as possible, development money should be invested where it will yield the largest increase in net output. This approach clearly favours the development of areas having abundant natural resources, good land and rainfall, transport and power facilities and people receptive to and active in development. 30 35

[170] Premised on the colonial divisions of the Country into agro-ecological zones, the Paper privileged investments in high-potential areas, while neglecting low and middle-endowment lands, most of

4 Duncan Okello and Kwame Owino, '*Socio-Economic Context of Governance in Kenya*', in Bujra Abdallah (ed), *Democratic Transition in Kenya: The Struggle from Liberal to Social Democracy*, African Centre for Economic Growth and Development Policy Management Forum, Nairobi, 2005, p 205. 40

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- which were used for livestock farming. 1
- [171] Before and after independence, policy and practice positioned the Government as the engine of development. Centralized planning was in vogue. The state was seen as capable of mobilizing capital for major investments, and as holding the wisdom and entitlement to allocate developmental resources. Not only did this state-led development model fail, leading to the introduction of Structural Adjustment Programmes (SAPs) in the late 1980s, but it also occasioned distinct political costs. Centralized state power, and the fusion of economic and political power, led to the discriminatory investment and decision-making, in public policy. 5 10
- [172] Thus, in 1986, *Sessional Paper No 1 of 1986 on Economic Management for Renewed Growth* was introduced. It made the private sector, rather than the state, the engine of development. However, in spite of the privatization programme, the influential power of the state in determining the destination of private capital flows and investment, still remained considerably strong. In other words, whether it remains 'the engine' (pre-SAPs model), or is in retreat (SAPs model), the state remains an immensely important player in the development arena. 15 20
- [173] The Constitution's provisions on Devolution were key pillars in the deconstruction process. Indeed, a reading of the Final Report of the Constitution of Kenya Review Commission (CKRC) shows that, vast segments of the Kenyan population felt that they were victims of the state, either in terms of political repression, or in terms of developmental exclusion. Thus, the Constitution of Kenya, 2010 was attractive to a large number of Kenyans for many reasons. In particular, devolution was instrumental in mobilizing support for the Constitution in the referendum, because many people perceived its dispersal of economic and political power as an act of liberation. There is a large section of our society for whom the new Constitution is coterminous with devolution. It denotes self-empowerment, freedom, opportunity, self-respect, dignity and recognition. This perception is captured succinctly in the principles and objects of devolution, in article 174.⁵ Devolution is thus a positively emotive 25 30 35
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- 5 *These are: promoting democratic and accountable exercise of power; fostering national unity amidst diversity; enabling self-governance of the people towards their interrogation of the State; recognising the right of communities to self-management and development; protecting and promoting the rights and interests of minorities and marginalised groups; promoting socio-economic development; ensuring equi-* 40

capsule, in the political dispensation. 1

[174] Devolution was predicated on the understanding that even though equality of opportunity may not necessarily lead to equality in development outcomes inevitably, inequality of opportunity (which is Kenya's historical experience) would necessarily result in inequality in outcomes. This is the logic behind giving every Kenyan and every region a fair and equal chance, to succeed or fail. 5

[175] The centralized political and economic model that we have experimented with for 50 years has not elevated Kenya from its status at independence, as a third-world country, into a first or second-world power – an achievement realized by many other countries during the same period. Instead, we have witnessed significantly high poverty levels, asymmetrical development patterns, and highly ethnicised politics – basically a failed political culture, and a failed development paradigm. 10
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c. Decentralisation In Kenya: Historical Note

[176] Kenya has had a long but chequered history with decentralisation. The Country has experienced all three main aspects of decentralisation: deconcentration, delegation and now, devolution. These have had political, administrative, and fiscal dimensions. Most of these efforts have been inspired by the fear of domination and discomfort with rising horizontal inequalities, on the one hand, and on the other, a desire to take resources and services closer to the people. In this respect, decentralisation has been a product of both fear and aspiration – an emotionally mixed venture; and this fact has been a major element in the Country's political tribulations. 20
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[177] At independence, Kenya adopted the most radical form of decentralisation, which had Regional Assemblies, Regional Governors, and a Senate, to protect the process at the National level – the so-called majimbo system of government. However, this was soon undermined and subsequently abolished in the mid-60s, by the first post-independence regime whose antipathy for this system was all manifest. Its abolition coincided with the expansion of the power and influence of the Provincial Administration (PA), a staunch colonial-era law-and-order institution. The collapse of the 30
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table sharing of national and local resources; rationalising further decentralisation of State organs; and enhancing checks and balances. 40

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- initiatives of political decentralisation was followed in subsequent years by attempts at administrative decentralisation, and various gradations of delegation and deconcentration. ⁶ 1
- [178] The Special Rural Development Programme (SRDP) of 1971 was the first attempt at administrative decentralisation. Another attempt was the failed effort to reorient the Provincial Administration into an instrument of development. The establishment of the Local Authorities (LAs) through the Local Government Act (Cap 265, the Laws of Kenya), was an attempt at delegation, as was the establishment of several state-owned enterprises through legislation, or administrative action. 5 10
- [179] In 1983, an ambitious, though poorly designed decentralization programme, was launched, through the creation of the District Focus for Rural Development Strategy (DFRS), which sought to make the district 'the hub of development'. This failed for a number of reasons, including the dominance of the Provincial Administration and the Central Government in its operations; poor setting of priorities; delays in disbursement; low absorptive capacity; and lack of a governing legal framework. 15 20
- [180] After a long history of failure with initiatives of administrative and political decentralisation, the Country refocused its attention on 'fiscal decentralisation'. In 1994, the Road Maintenance Fuel Levy (RMFL) was established and, soon thereafter, the Rural Electrification Programme Levy, (REPLE) in 1998. In 1999, the Local Authorities Transfer Fund (LATF) was created by an Act of Parliament, to transfer 5% of the income tax to the 175 local authorities. This was followed by the establishment of the Constituency Development Fund (CDF), through an Act of Parliament in 2004. Many other local-level funds have been established, such as the Community Development Trust Funds (CDTF), Constituency Bursary Fund, and the Constituency HIV/AIDS Fund. 25 30 35
- [181] This avalanche of initiatives is evidence that, historically, the National demand and popular craving for decentralization has been outstanding, in spite of the unrelenting centralising instincts of the state, and despite the problems of design that have characterized the 40

6 Government of Kenya, *Final Report of the Taskforce on Devolved Government*, Office of the Deputy Prime Minister and Ministry of Local Government: Nairobi, 2011.

various initiatives. No wonder that when Kenya reached what may be described as its second constitutional moment on devolution (that is, from the forum of the Constitution of Kenya Review Commission (CKRC), to that of the Committee of Experts (CoE)), it became one of the most contentious issues, an important fibre in defining our new nationhood. Such contention was not unexpected; and that is why the Constitution, in article 163(6), provided for Supreme Court intervention. We are, therefore, not surprised that this matter is now before us for determination and issuance of constitutional guidance.

[182]The current devolution provisions in Chapter 11 of the new Constitution are a major shift from the fiscal and administrative decentralisation initiatives that preceded it. It encompasses elements of political, administrative and fiscal devolution. There is a vertical and horizontal dispersal of power that puts the exercise of State power in check. Importantly, the Constitution has created a Senate, an institution that enjoys direct legitimacy and a popular mandate, commanding it to be the protector of devolution.

d. Devolution: Constitutional Significance

[183]Devolution is the core promise of the new Constitution. It reverses the system of control and authority established by the colonial powers and continued by successive Presidents. The large panoply of institutions that play a role in devolution-matters, evidences the central place of devolution in the deconstruction-reconstruction of the Kenyan state. Thus, a “Chapter 11-Only” approach would wrongly obscure the interlocking nature of devolution with other aspects and institutions of *the* Constitution, an element which is critical to its success. These other elements include Treasury, which plays a significant role in public finance matters; Parliament, which requires a functional Senate to provide sufficient protection to the devolved governments, and ensure that there is no gridlock in the budgetary or legislative processes; Judiciary, particularly the Supreme Court, whose mandate under article 163(6) is to give ‘advisory opinion... on any matter concerning County Government’, and which is an arena for arbitrating conflicts between the National Government and County Governments; Independent Commissions and Offices, such as Controller of Budget and Auditor General, which are crucial in ensuring probity and accountability.

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- [184] If an interpretive framework were required to buttress this position, it would be the one reflected in the Ugandan case, *Tinyefuza v Attorney-General* Const Pet No 1 of 1996 (1997 UGCC 3). The Court of Appeal thus stated: 1
- “[T]he entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.”⁷ 5
- [185] This is the same rule of interpretation that I previously alluded to in the Advisory Opinion on Gender, in stating that a Constitution does not subvert itself. I therefore reiterate what the majority opinion has stated – that it would be completely out of order for the Speaker of the National Assembly to interpret the powers of the National Assembly by only looking at article 95 of the Constitution, without paying regard to articles 96 and 110 of the Constitution which unequivocally incorporate the role of the Senate and of its Speaker. 10 15
- [186] Given Kenya’s history, which shows the central government to have previously starved decentralized units of resources, the extent to which the Constitution endeavours to guarantee a financial lifeline for the devolved units is a reflection of this experience and, more specifically, an insurance against recurrence. Indeed, in practically all its eighteen Chapters, only in Chapter Twelve (on public finance with respect to devolution) does the Constitution express itself in the most precise mathematical language. This is not in vain. It affirms the “constitutional commitment to protect”; and it acknowledges an inherent need to assure sufficient resources for the devolved units. 20 25
- E. “Constitutional Commitment to Protect” 30
- [187] The “constitutional commitment to protect”, and its signal of the search for a more perfect devolution, implies that, in interpreting the devolution provisions, where contestations regarding power and resources arise, the Supreme Court should take a generous approach. Fixing the full meaning of devolution, especially in this operational phase, will continue to be characterised by contestation, as is normal with political issues. The competing claims should not, however, descend into institutional anarchy or dysfunctionality, as that would compromise the developmental aspirations invested by 35 40

⁷ Cited also in, *Commission for The Implementation of the Constitution v Parliament of Kenya & another* [2013] eKLR.

the people, in devolution. The Supreme Court will not hesitate to pronounce itself with final authority, by laying down the proper juridical structures consolidating the devolution-concept where they are required, and stabilizing our Constitution, as is expected.

[188] The Supreme Court, in this reference, bears a duty of care to ensure that the Senate shall realize its constitutional “duty to protect” the devolution process. Kenya’s history and heritage rings with a consistent demand for decentralization; but the power-elite has been unable to agree on the character, design and mechanics of devolution.⁸

[189] The fact that the constitutional clauses on devolution were founded on political compromise by the elite, is not sufficient reason to compromise the popular desire for a devolved system of government, that empowers communities, and unlocks the developmental potential of this country. The unity, development and security of this country are unlikely to be preserved by the old political logic of exclusion, discrimination and sectarianism; the Country is set to flower only if we respect its diversity and pursue policies of inclusivity and belonging.⁹ Devolution is one important constitutional instrument for achieving this objective.

[190] Article 96 of the Constitution represents the *raison d’être* of the Senate as “to protect devolution”. Therefore, when there is even a scintilla of a threat to devolution, and the Senate approaches the Court to exercise its advisory jurisdiction under article 163(6) of the Constitution, the Court has a duty to ward off the threat. The Court’s inclination would not be any different if some other State organ approached it. Thus, if the process of devolution is threatened, whether by Parliamentary or other institutional acts, a basis emerges for remedial action by the Courts in general, and by the Supreme Court in particular.

[191] The real issue regarding the passing of the Division of Revenue Act, 2013 was: what amount of revenue would be given to the Counties? In providing [article 203(2)] that the revenue allocated to counties ‘shall be not less than fifteen per cent of all revenue collected

8 Ghai, Y. & McAuslan, P. , *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, Oxford University Press, (1970).

9 Ghai, Y., & Ghai, J. L, *Ethnicity, Nationhood and Pluralism: Kenyan Perspectives*, Global Centre for Pluralism, Ottawa, Katiba Institute, Nairobi, 2013.

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- by the National government', the framers of the Constitution were making an important statement, namely: "we are aware that this is not enough, and as we work towards a more perfect devolution, the fifteen per cent will constitute the minimum bundle of financial goods for counties even though certainly, more is desirable". The array of functions of County Governments, as listed in the Fourth Schedule in the Constitution, would confirm this. 1 5
- [192] The "politics of formulae" yielded the minimum allocation-provision of not less than fifteen per cent, a plain indication that more was anticipated. If there was no expectation for more, the framers would have prescribed not a floor, but an upper ceiling or, in the alternative, a specific and static percentage. However, the "justice of formulae", which is the arena of the Supreme Court, moves the Court's interpretative indicator in the direction of the Senate's application, which stands for more resources to the Counties, in the future. 10 15
- [193] It is relevant to consider the range of responsibilities shouldered by these nascent County Governments. The Bill of Rights (Chapter 4 of the Constitution) is one of the most progressive and most modern in the world. It not only contains political and civil rights, but also expands the canvas of rights to include cultural, social, and economic rights. Significantly, some of these second-generation rights, such as food, health, environment, and education,¹⁰ fall under the mandate of the County Governments, and will thus have to be realized at that level. This means that County Governments will require substantial resources, to enable them to deliver on these rights, and fulfill their own constitutional responsibilities. 20 25
- [194] Kenya's renowned constitutional law Professors, Yash Ghai and Jill Cottrell Ghai, commenting on the provisions of article 174, observe that: 30
- "These objectives are elaborations of the National values and principles and show the importance of devolution to the new system of government. An essential purpose of devolution is to spread the power of the state throughout the Country; and reduce the centralisation of power which is the root of our problems of authoritarianism, marginalization of various communities, disregard of minority cultures, lack of accountability, failure to provide services to people outside 35 40

10 This is with respect to pre-primary education and village polytechnics only.

urban areas and even within them. ”¹¹ 1

[195] National values and principles are important anchors of interpretive frameworks of the Constitution, under article 259(a). Devolution is a fundamental principle of the Constitution. It is pivotal to the facilitation of Kenya’s social, economic and political growth, as the historical account clearly indicates. 5

[196] In my view, the constitutional duty imposed on the Supreme Court to promote devolution is not in doubt. The basis of developing rich jurisprudence on devolution could not have been more clearly reflected than in the provisions of the Constitution and the Supreme Court Act. 10

f. Conclusion

[197] One of the cardinal principles of the Constitution that can be gleaned from its architecture and wording is, “the more checks and balances, the better” for good governance. The relationship between the two Parliamentary Chambers should be reinforced by this principle. After all, legislative authority is derived from the people. Both Houses of Parliament represent the same people, and the resources at the core of this dispute, are owned by the people of Kenya. In the equitable distribution of resources owned by the people of Kenya, the principles of checks and balances, mediation, dialogue, collaboration, consultation, and interdependence are not necessarily conflictual, granted that they are all invoked in the interests of the people of Kenya. Since judicial authority is also derived from the people of Kenya, the constitutional duty of the Supreme Court in this Reference is to reinforce these principles, so as to ensure that the rights and interests (economic, social, political, and cultural) of the people of Kenya trump once and for all, the narrative of which of the two Houses is superior. 15
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The Concurring Opinion of **K H Rawal, DCJ & Vice-President**

[198] I concur with the opinion of the majority in this matter and must express my commendation of the meticulous, dexterous, and incisive scholarship expressed therein. 35

[199] In addition to the reasons articulated by the Court, I wish to put forth certain points to complement the emerging picture of the legislative process, as provided under the Constitution, and 40

11 Ghai, YP & Ghai, JC., *Kenya’s Constitution: An Instrument for Change*, Katiba Institute, 2011, p.119.

to propose further paths such as may advance the growth of our indigenous jurisprudence.	1
[200] I will begin by addressing the question of jurisdiction, which has already received detailed consideration in the majority opinion. To that analysis, I wish only to append further concepts and thoughts, as follows:	5
Firstly the jurisdiction of this Court to give Advisory Opinions is declared in article 163(6) of the Constitution, which states that: “The Supreme Court may give an advisory opinion at the request of the National government, any State organ or any County Government with respect to any matter concerning County Government.”	10
Thus, such an Opinion would not ordinarily flow from any contest of rights or claims disposed of by regular process, but would, instead, involve providing advice on serious issues on governance at two levels, ie , national and County Government. It is trite essence that the term “government” includes the legislative arm of governance; this is apposite in the instant matter. It is also expected that the matters brought under the said constitutional provision may have political dimensions, which this apex Court is well placed to consider, as part of its remit in the elaboration of constitutional principles.	15 20
[201] In comparative judicial experience, the South African case, <i>The President of the Republic of South Africa & others v South African Rugby Football Union & others</i> (CCT 16/98) 1998 ZACC 21, gives a fitting example. The Court accepted the submissions of counsel which stated:	25
“To preserve the comity between the judicial branch of government, on the one hand, and the legislative and executive branches of government, on the other hand, ... ensuring that only the highest Court in constitutional matters intrudes into the domain of the principal legislative and executive organs of State” [para29].	30 35
Further, the Court in <i>Doctors for Life International</i> referred to in the majority opinion above stated that since the Constitutional Court bears ‘the responsibility of being the ultimate guardian of the Constitution and its values’, section 167(4) vests it with exclusive jurisdiction in ‘crucial political areas’, and it bears the duty ‘to	40

- adjudicate finally in respect of issues which would inevitably have important political consequences. [paras 22-23] 1
- [202] It is for certain, as this emerges from article 163 of our Constitution, that this Court is the apex Court, and has authority to interpret the Constitution conclusively. It may be stated, in line with a broader interpretation to the said article, that this Court also has the exclusive power to decide on the “application” of the Constitution (see article 163(4)(a)). This is because the High Court, under article 165(3)(d), only has the powers “of interpretation” of the Constitution. By virtue of the broader powers, this Court is entitled to deploy its full capacity, and to consider the values and principles of the Constitution, at all times. 5 10
- [203] Secondly, I advert to the separate issue of the supremacy of the Constitution, as admirably reflected in the majority opinion. I would add thereto the observations made by Justice Kanyeihamba (JSC) in his judgment on appeal, in the case of *Paul Ssemogerere and another v Attorney-General* [2004] 2 EA noted that counsel for the Attorney-General relied heavily on authorities derived from English Courts while applying and interpreting the unwritten English Constitution which operates under a sovereign parliament. He further noted that in Uganda, it is not Parliament but the Constitution which is Supreme. 15 20
- The learned Judge further stated: 25
- “[t]hat if Parliament is to claim and protect its powers and internal procedures, it must act in accordance with constitutional provisions which determine its composition and the manner in which it must perform its functions. ” 30
- [204] In my view, the above observations are echoed under article 2(1) and (3) of our Constitution, which provides thus:
- “(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government. 35
- “(2) ...
- “(3) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.”
- [205] Against this background, what processes should have been undertaken, leading to the enactment of the Division of Revenue Act, 2013? 40

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- [206] The item before us is not an adversarial matter, and the Court has a broad-based obligation to consider all relevant provisions of the Constitution, even though these are not specifically referred to by the parties. 1
- [207] In my view, the relevant provisions in the Constitution touching on the issues at hand are: Articles 95 (role of the National Assembly); 96 (role of the Senate); 109 (exercise of legislative powers); 110 (Bills concerning County Government [specifically 110(2)(a)(ii) and (b)]); 111 (special Bills concerning County Governments); 112 (ordinary Bills concerning County Governments); 114 (Money Bills [particularly the definition of Money Bill in 114(3)]); 175 (principles of devolved government); 186 (4th Schedule – respective powers and functions of national and County Governments); 189 (co-operation between national and County Governments); 202 (equitable sharing of national revenue); and Chapter 12, Part 4 (revenue allocation). 5 10 15
- [208] The Court was not informed whether the Senate’s county division of revenue resolution, contemplated under article 217 (division of revenue) had been made; but in relation to the process of legislation, it is necessary to consider this provision, along with article 218 (annual division and allocation of revenue Bills). 20
- [209] Due for first-place consideration are articles 110 and 218 of the Constitution. Under article 110(2)(a)(ii), the annual County Allocation of Revenue Bill mentioned in article 218 is described as a special Bill, meaning that it must follow *the* processes established under article 111. Article 111 limits the powers of the National Assembly to amend or veto a special Bill; it requires at least a two-thirds majority, to amend. Failing this, the Bill as passed by Senate must be forwarded to the President for assent. 25 30
- [210] The Division of Revenue Bill, on the other hand, is neither classified as an ordinary Bill nor a special Bill, in clear contrast to the County Allocation of Revenue Bill. 35
- [211] Article 218 distinguishes the purposes of the two Bills. Article 218(1)(a) provides that the Division of Revenue Bill shall divide revenue raised by national government amongst the two levels of government, in accordance with the Constitution. On the other hand, the County Revenue Allocation Bill shall divide among the counties the revenue allocated to the County level of government, on a basis determined by Senate resolution in force under article 217. 40

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- [212] It is to be recalled that article 95(4)(a), provides that the National Assembly “determines” the allocation of revenue between the two levels of government, as provided in Part 4 of Chapter Twelve of the Constitution. 1
- [213] Chapter Twelve of the Constitution contains provisions relating to Public Finance. Article 202 provides that the National Revenue shall be shared equitably among the national and County Governments. Article 203 prescribes the criteria to be taken into account while determining equitable sharing. 5
- [214] Article 205 has an important bearing on the process of financial legislation. It stipulates: 10
- “(1) When a Bill that includes provisions dealing with the sharing of revenue, or any financial matter concerning County Governments is published, the Commission on revenue Allocation shall consider those provisions and may make recommendations to the National Assembly and the Senate. 15
- “(2) Any recommendations made by the Commission shall be tabled in Parliament, and each House shall consider the recommendations before voting on the Bill. ” 20
- [215] Thus, the process of financial legislation begins with recommendations from the Commission on Revenue Allocation, which are to be considered by both Houses, before voting takes place on those Bills. Article 216 provides for recommendations on the allocation process, being made by the said Commission. 25
- [216] This process is further provided for in article 218(2), which lays down the required content of the memorandum to accompany the Division of Revenue Bill and the County Allocation of Revenue Bill. 30
- [217] The Constitution, upto this stage, has made clear provisions on the legislative process, as well as on the functions of the National Assembly and the Senate in that process. 35
- [218] It is necessary to consider the budget process, as provided for in articles 220, 221 and 224. Article 221 stipulates that it is the National Assembly which is to be presented with estimates of revenue and expenditure, and it is the National Assembly which prepares the Appropriation Bill. 40
- [219] Article 220(2) specifies what national legislation shall prescribe, including the form and manner of consultation required between

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- the National Government and County Governments in relation to the preparation of their budgets. And article 224 stipulates that each county shall prepare and adopt its own annual budget and Appropriation Bill, in the form prescribed by an Act of Parliament, on the basis of the Division of Revenue Bill passed by Parliament under article 218. 1
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- [220] The crucial nature of article 218(1) is to be remarked: in view of the observations made in respect of the County Allocation Bill; considering that it is a special Bill; and in view of the limitation on the National Assembly's veto power as regards a special Bill, it does appear that the Allocation of Revenue Bill stands to be introduced by the Senate. 10
- [221] Both these Bills are required to be introduced "at least two months before the end of each financial year". Submissions before the National Assembly of the estimate by the Finance Cabinet Secretary, in accordance with article 221, is also required to take place "at least two months before the end of each financial year. " 15
- [222] A critical view of article 223 suggests that clauses (2) and (3) should not have used the word "Parliament", especially when article 223(4) refers to only National Assembly. 20
- [223] An overview of the foregoing provisions raises a question as to the practicability of finalizing the budgetary process in time, for the presentation of the two Bills before the Parliamentary Chambers including the time-allowance for mediation as stipulated under the Constitution. 25
- [224] Upon a careful reflection on these provisions, I am of the opinion that they fall short of giving a clear and comprehensive picture of the requirements for the legislative process for the two Bills, as provided under the Constitution. 30
- [225] In the circumstances, I would suggest that the process be reviewed by the legislative arm of government, with a view to achieving clarity and harmony, in keeping with the spirit of devolution; action on these lines may help to stave off the prospect of a financial crisis such as would undermine the functioning of established governance mechanisms. 35
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- [226] The Court, in the circumstances, should adopt a holistic approach to interpretation, with a view to protecting and promoting the purpose, effect, intent and principles of the Constitution.

- [227] The majority opinion has fully dealt with the provisions of articles 10 and 174 of the Constitution, regarding the values, purposes and objectives of the system of devolved government. article 175, in particular, deals with the principles of devolved government; and article 189 enshrines the principle of co-operation between the national and County Governments. 1
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- [228] I wish to add, in light of the foregoing provisions, that the core value of devolution is hinged upon the twin principles of co-operation and interdependence. The beads in a chain may have different appearances; however, when joined by a thread, they all become part of one ring; one cannot stand without the other. It is clearly articulated in article 6(2) of our Constitution:- 10
“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 co-operation”. 15
- [229] It is well to remember that the revenue collected is from and for the people, for whose benefit the three arms of the Government have been entrusted with power and authority, under the Constitution. Further, the wisdom of our Constitution is its categorical rejection of exclusionary claims to powers of governance: its letter and spirit is suffused with the call for accountability, co-operation, responsiveness and openness. 20
- [230] I reiterate the vitality of appropriate remedial action by making coherent and decisive provisions on the process of enactment of the two Bills which have a special operational role, in the conduct of two levels of government. 25
- Dissenting Opinion of Ndungu Njoki, SCJ** 30
- [231] This Court has been asked to exercise its jurisdiction in giving an advisory opinion with respect to seven issues, agreed upon by the parties, and which revolve around the substance and process of enactment of the Division of Revenue Act, No 31 of 2013. I have read the majority decision and, with respect, concur with it on only one of the issues to be determined. 35
- [232] I agree with my fellow brothers and sister judges, that article 163 (6) of the Constitution confers jurisdiction upon the Supreme Court to give an advisory opinion in matters concerning County Government and that this provision requires the Supreme Court to exercise its advisory-opinion jurisdiction within certain guidelines 40

that were outlined in *Re the Matter of the Interim Independent Electoral Commission*, Sup Ct Const Appl No 2 of 2011 [at para 83] [2011] eKLR as follows: 1

- “(i) For a reference to qualify for the Supreme Court’s Advisory-Opinion discretion, it must fall within the four corners of article 163(6): it must be “a matter concerning County Government. ” The question as to whether a matter is one “concerning County Government”, will be determined by the Court on a case-by-case basis. 5
- (ii) The only parties that can make a request for an Advisory Opinion are the National Government, a State organ, or County Government. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as an intervener (interested party) or as amicus curiae. 10 15
- (iii) ...
- (iv) ...”

[233] Within the ruling of the same Advisory Opinion the Court had, with regard to the expression “County Government”, observed that (at para 40): 20

“There is, therefore, in reality, a close connectivity between the functioning of national government and County Government: even though the amicus curiae Professor Ghai urged that the term “County Government” is not defined in the Constitution; and that the expression “County Government” should not be too broadly interpreted. We consider that the expression “any matters touching on County Government” should be so interpreted as to incorporate any national-level process bearing a significant impact on the conduct of County Government. However, interpretation in this category is to be made cautiously, and on a case-by-case basis, so as to exclude matters such as fall outside this Court’s Advisory-Opinion jurisdiction. (emphasis added). 25 30 35

[234] The matter at hand is an application for an advisory opinion by the Senate, which is a State organ, and whose primary role as articulated in article 96(1) of the Constitution is to “represent the counties, and serves to protect the interests of the counties and their governments”. The overall key issue in question before us is whether the process of enactment of the Division of Revenue Act principally impacts the conduct of County Government. In this regard, the 40

Application, in terms of the standing of parties, and the nature of the question involved, qualifies <i>prima facie</i> , within the advisory jurisdiction of this Court.	1
The Exercise of Jurisdiction.	5
[235] However, upon hearing the submission of the parties and a clear reading of the provisions of the Constitution, it is my conclusion that the matter before us is not one where this Court's advisory jurisdiction is exercisable. My departure from the majority decision on the exercise of advisory opinion jurisdiction stands on four key broad policy questions that I shall endeavor to address below though not sequentially.	10
Is the advisory opinion jurisdiction of the Supreme Court discretionary and if so when is it applicable?	15
Should this court exercise its advisory jurisdiction where an established dispute already exists?	
Should the Supreme Court exercise judicial restraint in a matter where the applicability of the doctrine of separation of powers is apparent?	20
Should the Court invoke the 'political question' doctrine in recognition of the limits of judicial intervention in specific cases?	
Is the Supreme Court's advisory opinion jurisdiction discretionary?	25
[236] Article 163(6) of the Constitution in conferring jurisdiction to the Supreme Court to render an advisory opinion provides as follows: "163(6) The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any County Government with respect to any matter concerning County Government".	30
The drafters of the Constitution no doubt knowingly used the term "may", implying that the exercise of this jurisdiction is discretionary. This Court observed as much in <i>Re the Matter of the Interim Independent Electoral Commission</i> where the Court stated; (paragraphs 34 and 82): "In so far as the jurisdiction reposed in the Supreme Court, under article 163(6) of the Constitution, employs the directory term "may", it is, in our opinion, purely discretionary, at the instance of this Court..."	35
"...It must be emphasized that the advisory jurisdiction of	40

the Supreme Court under article 163(6) is discretionary in nature. This being the case, and further, given the fact that the advisory jurisdiction is a novel phenomenon in Kenya, it is expedient that this Court should progressively develop guidelines for the exercise of this discretion. ”	1 5
This discretion, to my mind, then is to be exercised in a manner that ascribes to the institutional architecture of the Constitution while protecting the authority of this Court and, effectively utilizing the principle of judicial restraint whenever necessary.	10
Judicial Restraint and the doctrine of Separation of Powers.	
[237] Indeed, this Court in <i>Re the Matter of the Interim Independent Electoral Commission</i> cautioned on the need to exercise restraint in exercising its Advisory-Opinion jurisdiction. At paragraph 71 it outlined:	15
“... the Court’s preference for judicial restraint: if judges decide only those cases that meet certain justiciability requirements, they respect the spheres of their co-equal branches, and minimise the troubling aspects of counter majoritarian judicial review, in a democratic society, by maintaining a duly limited place in government. ”	20
In the same ruling, at paragraphs 76 and 84, this Court opined, that it would exercise its advisory-opinion jurisdiction with appropriate restraint and in reference to the exercise of the advisory-opinion jurisdiction by the Supreme Court of Canada it observed:	25
“... it is noteworthy that the Judicial Committee signaled a warning against excessive use of Advisory Opinions:	
‘...No one who has experience of judicial duties can doubt that if an act of this kind were abused, manifold evils might follow, including undeserved suspicion of the course of justice and much embarrassment and anxiety to the judges themselves...’”	30
[238] Cesare Pinelli in his article, “ <i>The Concept and Practice of Judicial Activism in the Experience of Some Western Constitutional Democracies</i> ,” <i>Juridica International</i> XIII 2007, explains judicial restraint as the approach taken by judges to the text that they are expected to interpret when the meaning or the words used or the intention of the drafters is deemed insufficient. He describes it as follows (at p 31):	35 40

“The more a judge feels himself free, in such circumstances, to give the text further meanings, the more he is considered ‘activist’. Conversely, the more a judge prevents himself from giving the text those meanings, the more he is deemed to be following a ‘restraint-based’ approach. ” 1
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He further opines that given a broader approach “restraint” covers other activities of judges such as applying strictly the rules of standing, declining to consider a case until the Applicant has exhausted other remedies, and avoidance of determinations on ‘political questions’. 10

[239] The Supreme Court of India in *Asif Hameed & others v State of Jammu & Kashmir & others* (1989) AIR 1899, 1989 SCR (3) 19 observed that the exercise of powers by the Legislature and the Executive is subject to judicial restraint. However, the Court’s exercise of such power can only be subject to the self-imposed discipline of judicial restraint. The Court further observed that (at paragraphs 3 and 4): 15

“When a State action is challenged, the function of the Court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the Constitution and if not, the Court must strike down the action. While doing so the court must remain within its self-imposed limits. 20
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“...The Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers. ” 30

[240] The Court proceeded to hold that the Legislature was supreme in its own sphere under the Constitution and it was solely upon the Legislature to determine when and in respect of what matter the laws were to be enacted. 35

[241] Accordingly, it is my considered opinion that to render an advisory opinion in this reference will inevitably interfere with the principle of separation of powers between the Judicial and the Legislative arms of government. Whereas, I agree with the submissions of counsel for the 1st *amicus curiae*, Prof Ojienda, that Kenya is a constitutional democracy where courts have both the 40

power and duty to determine whether legislation has been enacted as required by the Constitution, I am of the view that the Judiciary is only obliged to consider the constitutionality of the substance of the impugned statute but not the legislative process. It is noted that this present matter only raises issues of process of arriving at, and not the constitutionality of the content of the subject statute - the Division of Revenue Bill.

[242] As this Court pursues the development of indigenous jurisprudence, particularly on the delicate balance with regard to the doctrine of separation of powers, much can be learned from the experiences of foreign apex courts that have existed much longer than ours. Mr Ngatia, Learned Counsel for the 1st interested party, cited several decisions from foreign courts, which are persuasive in nature, including *US v Butler* 297 US 1 (1936) in which the US Supreme Court observed that:

“When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty: to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and having done that, its duty ends. ”

[243] The majority decision of this Court in this present matter cites the Supreme Court of Canada case of *Amax Potash Ltd v Government of Saskatchewan* [1977] 2 SCR in support of the argument that the Courts may question the legislative processes of Parliament. It is my opinion that this decision actually supports the view that courts will not question the legitimacy of a statute whose substance is constitutional. The observation of the Canadian court clearly indicates that the Court’s role is to check that the legislature does not overstep its mandate and legislate on matters it is not mandated to legislate on, but the Court does not delve into the legislative process to find out whether the Parliamentary proceedings were carried on as required. This, for the obvious reason, that the separation

of powers between the legislative and judicial arm of government must be preserved. 1

[244] Again, the decision of the Supreme Court of Canada in *Re Manitoba Language Rights* [1985] 1 SCR also cited in the majority decision in this matter, speaks only to the substance of the statute impugned since it did not contain both the English and French version as constitutionally required. This was properly within the jurisdiction of the Courts to determine. Similarly, with regard to the decision of the United States of America Supreme Court in *Marbury v Madison* 5 US 137 (1803), my observation is that the statements of Marshall C J, distinguish between the superior nature of constitutional provisions to the subordinate nature of statutory provisions when a court is called upon to interpret the law. This authority does not apply in the current circumstance where the issue is whether the Court should advice on the legislative process. 5
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[245] My Learned brother and sister Judges in their majority decision also refer to the decision of the Constitutional Court of South Africa in *Doctors for Life International v Speaker of the National Assembly and others* (CCT 12/05) [2006] ZACC 11 in support of their opinion that this Court should exercise jurisdiction in this present matter. I however, with respect, believe that this is a narrow interpretation of the findings of that case. That would result in an invalid statute. This reiterates my view that what this Court may question is the substance of the disputed statute but not the legislative process. 20
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[246] On the contrary, the South African case clearly indicates that courts must strive to strike a balance between their duty as the custodians of the Constitution and respect for the doctrine of separation of powers. Indeed that ruling unequivocally states at paragraph 37 that the judicial arm of government should not interfere in the processes of other arms of government except as mandated by the Constitution. 30

[247] This is a clear indication that the Courts ought not to indiscriminately take up all matters that come before them but must exercise caution to avoid interfering with the operations of the other arms of government save for where they are constitutionally mandated. In line with this reasoning, it is my considered view that this Court is not mandated by any provision in the Constitution, other than, on the face of it, under article 261(6) and (7) of the Constitution, to direct, query or interfere with a legislative process 35
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- by Parliament. 1
- [248] It is true and I do agree with the majority opinion of my learned brothers and sister judges and their reference to the observations of the South African court in *Speaker of the National Assembly and others v De Lille MP& another* (297/98) [1999] ZASCA that Parliament is subject to the supremacy of the Constitution. I am in no way suggesting that the Legislature can disregard constitutional provisions. The Constitution however does not oust the doctrine of separation of powers between the three arms of government. 5 10
- [249] Just as Parliament is expected to operate within its constitutional powers as an arm of government so must the Judiciary. The system of checks and balances that prevents autocracy, restrains institutional excesses and prevents abuse of power apply equally to the Executive, the Legislature and the Judiciary. No one arm of government is infallible and all are equally vulnerable to the dangers of acting *ultra vires* the Constitution. Whereas, the Executive and the Legislature are regularly tempered and safeguarded through the process of regular direct elections by the people, the discipline of an appointed and unelected Judicial arm of Government is largely self-regulatory. The parameters of encroachment on the powers of other arms of government must be therefore clearly delineated, limits acknowledged and restraint fully exercised. It is only through practice of such cautionary measures that the remotest possibility of judicial tyranny can be avoided. 15 20 25
- [250] I am persuaded that the Court's jurisdiction to render an advisory opinion in a reference of this nature that directly questions internal workings of the legislature, in the current instance a legislative process, should not be exercised as it will encroach on separation of powers between the legislative and judicial arm of government. Moreover, even if the courts were to intervene, which I do not think they should in the current instance, they ought to satisfy themselves that formal and informal dispute resolution mechanisms have first been fully exhausted. 30 35
- Does an established unresolved dispute already exist?
- [251] This Court has severally in past decisions, stated that as the Court of last resort, it will not entertain a matter that is in dispute, if that matter has not followed the hierarchy of the Courts in the determination of its resolution. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, Sup 40

Ct Appl No 2 of 2012 [at p 9 para 17] this Court advised that: 1
 “Only a truly deserving case will justify the Court’s Advisory
 Opinion, as questions amenable to ordinary litigation must
 be prosecuted in the normal manner; and the Supreme
 Court ought not to entertain matters which properly belong 5
 to first instance-Court litigation. Only by due deference to
 the assigned jurisdiction of the different Courts, will the
 Supreme Court rightly hold its mandate prescribed in section
 3 (c) of the Supreme Court Act, 2011 of developing “rich
 jurisprudence” that respects Kenya’s history and traditions 10
 and facilitates its social, economic and political growth. ”

This point was further emphasized in *The Kenya Section of the
 International Commission of Jurists v Attorney General*, Crim Appeal
 1 of 2012, [at p 4, paras 24-26] where this Court pronounced: 15

“We recognize that generally, the entry into the sphere of
 emerging jurisprudence is located at the High Court which
 bears original jurisdiction to interpret the Constitution and
 which has an appellate jurisdiction from lower Courts that
 address the basic scenarios of fact that spawn issues of jural 20
 character. The Supreme Court all by itself and without the
 benefit of such other Courts would be insufficiently resourced
 and empowered to develop rich jurisprudence as provided for.
 The law-making chain indeed goes back to the Subordinate
 Courts, which constitute the “grassroots” entry-point into 25
 the varied intellectual dimensions of law that will guide the
 process of construction of legal ideas.

It follows that the Supreme Court, to best situate itself so as
 to address the complexity of the construction of law, must 30
 safeguard the proper jurisdiction of the Courts below it. ”

[252] It is evident from both oral and written submissions of the
 parties in the present case and it is a matter of public knowledge
 that a dispute exists between the two Houses of Parliament. It is also 35
 apparent that, other than an exchange of letters between the two
 Speakers, there has been no attempt to use any structured formal or
 informal mechanism to resolve the disagreement either internally
 with the institution of the Legislature or, if deemed appropriate for
 judicial resolution, through the judicial system at the correct point 40
 of entry for interpretation of the Constitution, which is at the High
 Court. The High Court under the terms of article 165(3)(d) of the

Constitution has:

“(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 the 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 country governments and any matter relating to the constitutional relationship between levels of government.. ”

[253] The decision to seek an advisory opinion of this Court, as the first recourse, by the Speaker of the Senate therefore appears to be misguided. I agree with Mr Ngatia, Counsel for the 2nd interested party, in his submission citing *Re The Matter of the Interim Independent Electoral Commission* that this is a matter in which the Court should decline to render an advisory opinion due to the nature of the matter. In that advisory opinion this Court observed as follows [at para 46]:

“Although the applicant, in this instance, avowedly seeks an Advisory Opinion, the application amounts to a request for an interpretation of articles 101(1), 136(2)(a), 177(1)(a) and 180(1) of the Constitution, and clause 9 of the Sixth Schedule to the Constitution. As the applicant apprehends conflict in the said provisions, it is to be taken to be seeking the “correct” interpretation of the said provisions: it is not seeking a plain opinion-statement on the date of the next election. We find, therefore, that the question placed before us is not a normal one, within the Advisory-Opinion jurisdiction as envisaged under article 163(6) of the Constitution. ”

[254] I am in no doubt that what is before us is a dispute requiring an interpretation of the Constitution, and which has been either erroneously or deliberately disguised as a matter for an advisory opinion, in order to come before the Supreme Court. The Applicants request for an advisory opinion, on a matter which is (1) clearly adversarial and which (2) should have followed a number of political or, (if appropriate), judicial processes before reaching the apex court,

is clearly misplaced. It leaves no room for any appeal or review, and in my opinion places this Court in the difficult and inappropriate position of being arbiter in a dispute in the first and not last instance. This is a clearly a situation in which this Court should exercise its discretion not to give an advisory opinion.

If the existence of a dispute is established, is it a political or judicial question?

[255] It is my considered view that judicial resolution is not appropriate where it is clear in a matter such as this that the political question doctrine will apply. This doctrine was well established by, and has been in practice since, the decision of *Marbury v Madison* 5 US 137 (1803), in which the US Supreme Court deemed a question of law inappropriate for judicial review because it should be resolved by the political and not judicial process. Under this doctrine, the interpretation of the Constitution is left to the politically accountable branches of government. Although it may be argued in some quarters, that it is the Judiciary's sole responsibility to interpret the Constitution, this is a misapprehension of legal provisions that must be contextualized within all corners and provisions of the Constitution. Indeed, article 10 of the Constitution on national values and principles of governance states as follows:

“10(1) The national values and principles of governance in this article bind all State organs, State officers, public officers and all persons whenever any of them—

- (a) applies or interprets this Constitution;
- (b) enacts, applies or interprets any law; or
- (c) makes or implements public policy decisions.

” ...

[256] The interpretation of the Constitution, therefore, is not an exclusive duty and preserve of the Courts but applies to all State organs including Parliament. What is exclusive to the Courts is interpretation of the Constitution within a legal dispute brought in the normal manner before a superior court and which is afforded the necessary processes of appeals, right up to the Supreme Court. Disputes, however, do exist in other forms that require not judicial intervention and determination, but rather resolution of a political nature.

[257] Political disputes are formally resolved in Parliament, which is the National arbitration forum for resolving such disagreements.

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- Politics is a primary tool for squaring out many issues within society but outside of formal judicial channels. Courts should never become arbiters of political differences as the boundaries between what is law and what is politics must be faithfully observed. The matter before this Court raises issues regarding the process of enactment of the Division of Revenue Bill 2013. Before this Court proceeds to address itself on it, it is my opinion, that it must first answer the fundamental enquiry as to whether the division of revenue in itself, is a political or a judicial question? If the answer is to the latter, then by all means the relevant courts may proceed to deal with the issue. If, however, the former is true, then the Supreme Court or any other court for that matter, should not concern itself with this case any further. 1
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- [258] To my mind, the division of revenue is a process that concerns the Application of National resources to development and indeed how the resources will be allocated. The nature of the question is one of perennial debate and argumentative character. It requires a combination of several political processes of demands, negotiations, debates, stand-offs, retreats and finally resolution. These disputes will also be multi-layered; inter-party, intra-party, inter-regional and even as in this case before us inter-chamber or internal institutional disagreements. 15
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- [259] The subject matter of disputes will also be varied and not limited to power sharing, resource sharing, issues of inclusion and exclusion, a plethora of diverse commercial and public/private interests and equitable political representation. Should the Courts be involved in these disputes at a policy level? From where I sit, the only response is a resounding negative. 25
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- [260] Nevertheless, since it is the majority decision, that this Court should exercise its advisory opinion jurisdiction in this matter, I will then proceed to expound my opinion on the substantive questions in the present matter. 35
- Article 95 of the Constitution provides for the role of the National Assembly as follows:
- “(1) The National Assembly enacts legislation in accordance with Part 4 of this Chapter.
 - (2) The National Assembly –
 - a. determines the allocation of national revenue between the levels of government as provided for in
- 40

Part 4 of Chapter Twelve; 1

- b. appropriates funds for expenditure by the national government and other national State organs; and
- c. exercises oversight over national revenue and its expenditure.” 5

Senior counsel, Pheroze Nowrojee suggests that the word “determine” does not mean the same as “enact” and therefore does not give the National Assembly the sole responsibility of enacting the revenue division law. I disagree. In fact, the definition of the word “determine” according to the Legal Thesaurus “The Lawyers Roger’s” edited by William C Burton Macmillan 1980, includes the meanings, “adjudge, arrive at a conclusion, bring to an end, conclude, decide, declare, decree, make a resolution, pronounce, seal” and so forth. The use of the word “determine” in article 95, therefore, denotes a much wider scope of powers than the word “enact” which merely signifies a singular action. This, to me, confirms the sole command and authority of the functions given to the National Assembly therein. 10 15

A clear articulation of the role of the Senate is also to be found under the provisions of article 96 of the Constitution which states: 20

- “(1) The Senate represents the counties, and serves to protect the interests of the counties and their governments.
- (2) The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in articles 109 to 113. 25
- (3) The Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the County Governments. 30
- (4) ...”

[261] The plain meaning of the two above-mentioned articles is unambiguous and clear. It is the National Assembly that determines the appropriation and allocation of revenue at the national level and between the levels of government; conversely it is the Senate that allocates revenue among counties. There is certainly no doubt in my mind that the drafters of the Constitution intended on drawing a clear distinction between the functions of the National Assembly and the functions of the Senate with regard to division of revenue between the National Government and the County Government. 35 40

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- [262] I do agree with the submissions of the Attorney General that the Constitution recognizes that there are two levels of government which are distinct as well as inter-dependent and that they are not expected to duplicate functions, as doing so would undermine the bipartite nature of Parliament. 1
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- [263] My reading of the legal provisions as to the roles of both Houses of Parliament including the wider functioning and interrelationships between national and County Governments in both the Public Finance and Devolution Chapters of the Constitution, clearly demarcate a separation of legislative and other functions between the national and County Governments. 10
- Further, article 109 of the Constitution on how legislative powers are to be exercised by the Houses of Parliament, stipulates: 15
1. Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President. 15
 2. Any Bill may originate in the National Assembly.
 3. A Bill not concerning County Government is considered only in the National Assembly, and passed in accordance with article 122 and the Standing Orders of the Assembly. 20
 4. A Bill concerning County Government may originate in the National Assembly or the Senate, and is passed in accordance with articles 110 to 113, articles 122 and 123 and the Standing Orders of the Houses. 25
 5. A Bill may be introduced by any member or committee of the relevant House of Parliament, but a money Bill may be introduced only in the National Assembly in accordance with article 114. 30
- [264] It follows therefore that the only Bills that concern County Government will be considered by Senate. All other Bills are to be originated in and considered by the National Assembly, exclusively. This being the case, the central question in the present matter is – “what then is a bill to be considered as one concerning County Government?” 35
- [265] It is important from the onset to put into context, the structure of the county unit within the model of devolution crafted under the Constitution. The devolved system in Kenya is based on a unitary system of Government that decentralizes key functions and services to the County unit. The Kenyan State model is not federal in nature 40

and does not envisage the workings of a county as a politically and financially independent state. The role of the counties then is laid out in precise and exact terms under Chapter Ten of the Constitution. Article 186 states: 1

186(1) Except as otherwise provided by this Constitution, the functions and powers of the National Government and the County Governments respectively, are as set out in the Fourth Schedule. 5

(2) A function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government. 10

(3) A function or power not assigned by this Constitution or national legislation to a county is a function or power of the National Government 15

(4) ...

[266] Further, the Fourth Schedule, Part 2, comprehensively sets out the functions and powers of the County as those relating to agriculture; county health services; control of pollution, nuisances and outdoor advertising; cultural activities, public entertainment and public amenities; county transport, including county roads; animal control and welfare; trade development and regulation, county planning and development, preprimary education, implementation on national government policies on natural resources and environmental protection; county public works and services, water sanitation services; fire fighting and disaster management; control of drugs and pornography and the participation of communities in governance at the local level. 20
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[267] These functions are completely separate and distinct from those of the National Government set out in Part 1 of the same schedule. There are recognised exceptions where functions of the respective levels of government do detail into one another. For example, the National Government is in charge of Health policy but where that policy impacts on county health services then both levels of Government should rightly be involved in its development. In such a case the Senate would rightly be involved in the enactment of national legislation affecting such policy. On the other hand, legislation concerning the issuance of identity cards can only be determined by the National Assembly even though all residents of counties are required to possess such documents, as 35
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issues of immigration and citizenship is a function of the National Government. Similarly national legislation relating to construction of county roads or legal management of restaurants and cinemas would fall under the legislative mandate of the Senate.	1
[268] I am persuaded that for any Bill to be deemed as one concerning County Government it must specifically affect the functions and powers of the County Governments as set out in the Fourth Schedule of the Constitution. In addition, the provisions of the Bill must be limited to the ambit of Part 2 of that Schedule which provides for the functions and powers of County Governments. In the event that such a Bill goes beyond the scope of Part 2 of that Schedule it cannot in any way be deemed to be a Bill concerning County Government. Accordingly, a Bill that concerns the funding of functions outside of those specified to the Counties under the Fourth Schedule, such as the Division of Revenue Bill would, in my opinion fail the test of being considered as a Bill relating to County Government. To my mind, allowing the Senate to participate in the enactment of a Bill that goes beyond the parameters of what counties may do within the Fourth Schedule, would certainly then be unconstitutional.	5 10 15 20
Division of Revenue Bill: Is it a ‘Money Bill’ under the Constitution?	
[269] It was agreed by Counsel that article 218 of the Constitution provides for the introduction in Parliament of the Division of Revenue Bill and the County Allocation of Revenue Bill at the end of each financial year. It is also agreed that Article 109(5) confers powers to the National Assembly to deal with a ‘Money Bill’ to the exclusion of the Senate. However, counsel differed on the issue as to whether the Division of Revenue Bill was a ‘Money Bill’. Counsel for the Applicant, Mr Kilukumi, argued that the Division of Revenue Bill was not a ‘Money Bill’ as is provided for in article 114(3) of the Constitution. Mr Nderitu, for the 2 nd <i>Amicus Curiae</i> agreed with him that the Division of Revenue Bill did not deal with the raising or spending of money of the Consolidated Fund but rather an indication of the manner in which revenue will be shared between the two levels of government. Mr Ngatia, counsel for the 2 nd Interested Party differed, submitting that the Division of Revenue Bill was indeed a ‘Money Bill’ and could therefore only be introduced in the National Assembly.	25 30 35 40
[270] To comprehensively understand the universal meaning of a ‘Money Bill’ it is important to make a comparative analysis	

of parliamentary definitions, traditions and practice in other jurisdictions. Indeed in both the Westminster system as practiced in most of the Commonwealth and in the United States, a Money Bill or, as it is alternatively called a Supply Bill is one concerning taxation, appropriation or government spending as opposed to those bills that make changes in public law.

[271] In India, a ‘Money Bill’, as defined by article 110(1) of the Constitution of India, is one that contains provisions on the imposition or any alteration of tax, regulation of borrowing by the government, custody of the consolidated fund, appropriation of moneys out of the consolidated fund, declaration of any expenditure as one charged on the consolidated fund or receipt of money as part of the consolidated fund.

[272] Article 110(3) of the Constitution of India further provides that “if any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final.” The Indian Parliament is bicameral. It comprises of the *Lok Sabha* which is the House of the People, (similar to the National Assembly) and the *Rajya Sabha* which is the Council of States (similar to the Senate). A Money Bill can be introduced only in the *Lok Sabha* after which it is transmitted to *Rajya Sabha* for its concurrence or recommendations. *Rajya Sabha* cannot amend a Money Bill instead it only makes recommendations for amendment of the Money Bill by *Lok Sabha* which may accept or reject such recommendations.

[273] In the United Kingdom a Money Bill is defined under section 1 of the Parliament Act, 1911 as follows:

“A Money Bill means a Public Bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund, [the National Loans Fund] or on money provided by Parliament, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them. In this subsection the expressions “taxation,” “public money,” and “loan” respectively do not

include any taxation, money, or loan raised by local authorities or bodies for local purposes. ” 1

In the United Kingdom the Speaker of the House of Commons determines whether a Bill is a Money Bill or not and his ruling on that issue is final. 5

[274] In view of these examples of parliamentary practice it is clear that a Money Bill is one that provides for levying taxes, altering taxes or appropriation of the consolidated funds. It is also clear that in quite a number of countries the Speaker of the House that corresponds to the Kenyan National Assembly is the final determinant of what Bill will be considered to be a Money Bill and his decision is final. 10

[275] Is the Division of Revenue Bill 2013, then, a money Bill? article 114(3) of the Constitution of Kenya defines a money Bill as follows: “In this Constitution, “a money Bill” means a Bill, other than, a Bill specified in article 218, that contains provisions dealing with— 15

- (a) taxes;
- (b) the imposition of charges on a public fund or the variation or repeal of any of those charges; 20
- (c) the appropriation, receipt, custody, investment or issue of public money;
- (d) the raising or guaranteeing of any loan or its repayment; or 25
- (e) matters incidental to any of those matters. ”

Sub-article 4 further provides thus:

“In clause (3), “tax”, “public money”, and “loan” do not include any tax, public money or loan raised by a county. ” 30

[276] The main inquiry here then is whether the Division of Revenue Bill as specified in article 218 is indeed a money Bill. The answer to this will lie in the definition of the words “other than” which are in the first sentence of article 114(3) and as underlined above. The Merriam-Webster online Thesaurus defines the phrase “other than” as synonymous with the words “apart from, aside from, beside, besides, save for”. It gives the example of its use in the following sentence: “other than a new jacket, I bought no special clothes for the wedding”. Similarly the Oxford Dictionaries online describes synonyms for phrase “*other than*” as “apart from” or except for”. It also gives a sample of the proper use of the words “other than” 35 40

in this phrase: “he claims not to own anything, other than his home”. If this definition, then is applied in the context of article 114, it would then mean that the Bills under article 218 are also to be considered as money Bills in addition to those falling under the scope of article 114. A safe conclusion then, would be that the Division of Revenue Bill may be considered a money bill and is subject to the same procedure as a ‘Money Bill’ under article 114, which is the purview of the National Assembly is therefore subject to the provisions of article 109(5) as read together with article 114 of the Constitution. 1
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[277] In the same context the County Allocation of Revenue Bill may also be considered a money or supply Bill but is a Special Bill as the procedure for dealing with it is completely different. It is specifically provided for as a process within the Senate and not the National Assembly under article 217. 15

[278] What then is the role of the Senate in the origination, consideration and enactment of the Division of Revenue Bill and the County Allocation of Revenue Bill? With regard to allocation of revenue to the Counties, the role of the Senate is carefully detailed in articles 217 and 218(1)(b). However, my reading of the relevant provisions of the Constitution is that once the Division of Revenue Bill - that divides revenue between the national and county levels of Government - is introduced in the National Assembly, Senate has no role to play. The Supreme law clearly gives the Senate an opportunity to make input into the Division of Revenue Bill but only before it is introduced into the National Assembly for debate. The Constitution establishes the Commission on Revenue Allocation whose primary function under article 216 is to: 20
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- (1) make recommendations concerning the basis for the equitable sharing of revenue raised by the national government –
 - a. between the National and County Governments; 35
 - and
 - b. among the County Governments.
- (2) The Commission shall also make recommendations on other matters concerning the financing of, and financial management by, County Governments, as required by this Constitution and national legislation. 40

[279] Under article 215 the Senate commands a majority in the nine-

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- member commission that has five representatives from Senate alone, compared with only two from the National Assembly and only two from the Executive arm of Government. This means that the Senate commands a decisive vote with regard to the recommendations that go into the drafting of the Division of Revenue Bill, long before it reaches the National Assembly for determination. Any significant deviation from such recommendations will require a written explanation from the Cabinet Secretary responsible for finance. It must be noted here that in providing for a skewed and unequal representation of the Senate *vis-a-vis* the National Assembly, within the Commission of Revenue Allocation, the intention and the rationale of the drafters of the Constitution was to ensure that the Senate has comprehensive input into the allocation of revenue at that stage, deeming unnecessary any more activity at the legislative stage. The arguments, put forward by counsel for the Applicant, that the Senate is excluded from participating in the entire process of allocation therefore is a misapprehension of the law and holds no water.
- Conclusion
- [280] The Senate, has in this matter, raised its concerns relating to its participation in the allocation of the national cake beyond the limited provisions in article 215 of the Constitution, in relation to the Commission on Revenue Allocation. I believe such concerns pose political questions requiring political answers.
- [281] Given the nature and character of politics, political contests and allocation of political resources, as in this case before us, it is often necessary to employ various scientific techniques that remove arbitrariness or minimize opportunities to unfairly skew outcomes. To my mind there are only two ways for the Senate to canvass for an expansion of its constitutional role and mandate on the issue of allocation of national revenue.
- [282] The first route is the establishment, through the process of inter-chamber negotiations or legislation including through the Standing Orders of each house, of a joint consultative committee with clear mechanisms to deal with a deadlock, in the event of which, one house must give way to the other. This is common practice in many bicameral jurisdictions such that in the instant case, for example, and in the event of a deadlock, the Senate would give way to the National Assembly, whose constitutional responsibility ultimately it

is to determine the division of revenue between levels of government. 1

[283] It is to be observed, however, that the process of dealing with inter-chamber deadlock as applies to other Bills under article 110(3) is not suitable for the Division of Revenue Bill as the mediation process under that Article presupposes a Bill that reaches deadlock between the two houses, can fail, with the possibility of reintroduction after six months. This cannot be done with regard to the Division of Revenue Bill as it is not a Bill that can be shelved without precipitating a constitutional financial crisis that would paralyze the workings of the entire Government and even cause its collapse. Nevertheless, wherever possible, including informal or formal discussions around the Division of Revenue Bill, Parliament should encourage internal consultative processes. The how, where and when such a formal or informal mechanism, based on mutual understanding and respect, will be set up lies in the hands of the leadership of both houses, with only one rider: Mediation is not something one can command – it is all about managing relationships between disputing parties. The law itself, therefore, will have very little to do with a successful mediation outcome. Thus, any hiccups that may occur in the mediation process, including the one defined under article 110(3), will have to be ironed out through the development of a culture of consultation, the progression of mutual respect between the two chambers and the practice of collegiality between the Speakers of each House. This Court, I humbly submit, may not go further than to suggest this, as to delve into further details would border dangerously on giving direction to a different arm of Government on its internal processes. This would fly in the face of the doctrine of separation of powers. 5 10 15 20 25 30

[284] The second way, in which the Senate may canvass for expansion of its mandate, is to initiate an amendment of the Constitution through referendum as articulated under article 255(1) of the Constitution, which states:

“A proposed amendment to this Constitution shall be enacted in accordance with article 256 or 257, and approved in accordance with clause (2) by a referendum, if the amendment relates to the following matters – 35

....
h. Functions of Parliament; . . .” 40

Such an amendment could introduce common constitutional

Kagiri v County Assembly of Nyeri & 2 others
[2013] KLR-HCKHigh Court, at Nyeri
N Abuodha, J

September 10, 2013

Petition No 7 of 2013

Brief facts

The Petition was initiated as a result of the County Assembly of Nyeri's (the 1st Respondent) rejection of the nomination of Simon Wachira Kagiri (the Petitioner) to the Nyeri County Executive Committee by the Governor of Nyeri County (the 2nd Respondent). The Petitioner contested the decision as he alleged that it was based on illegal, unreasonable, irrelevant and unconstitutional grounds. One of the reasons given by the County Assembly for the rejection of the Petitioner's nomination was integrity concerns arising out of a past criminal case in which the Petitioner had been acquitted on technical grounds.

Issues

- i. Whether a County Assembly was a legal person, with corporate personality and capacity to sue and be sued in its own name.
- ii. Who were the proper parties to a suit against a County Assembly?
- iii. Whether the High Court had jurisdiction to determine disputes arising out of actions taken by County Assemblies in the exercise of their Constitutional and statutory mandates.
- iv. Whether the Petition amounted to a violation of the doctrine of separation of powers, by requiring the Court to interfere with the powers, functions and discretion vested in a County Assembly.
- v. Whether the rejection of the Petitioner's nomination by the County Assembly of Nyeri, based on previous criminal proceedings against him was in violation of his Constitutional rights.
- vi. Whether the County Assembly of Nyeri violated the Constitutional and statutory procedure prescribed for the vetting of public officers under the Constitution, the County Government Act, and the Public Appointments (Parliamentary Approval) Act.
- vii. Whether by rejecting to approve the Petitioner's candidature, the County Assembly of Nyeri disentitled the residents of Nyeri County their fundamental economic and social rights.
- viii. Whether the Petition was supported by sufficient evidence to discharge the Petitioner of the burden of proving and establishing

his allegations that his Constitutional rights were violated. 1
 ix. Who was entitled to the costs of the Petition?

Devolution – Devolved Government – County Assemblies – whether a County Assembly was a legal person capable of suing or being sued – County Government Act section 6. 5

Civil Practice and Procedure – parties to a suit – parties to a suit against a County Assembly – where the Attorney General was enjoined in a suit against a County assembly – Constitution of Kenya, 2010 article 159. 10

Jurisdiction – High Court – jurisdiction to review decisions of County Assemblies – High Court’s jurisdiction to determine disputes arising out of actions taken by County Assemblies in the exercise of their Constitutional and statutory mandate – County Governments Act, section 16 – National Assembly (Powers and Privileges) Act, section 12. 10

Constitutional Law – public officers – appointment of public officers – procedure prescribed for the vetting of public officers – whether the rejection of the Petitioner’s nomination to the Nyeri County Executive Committee based on previous criminal proceedings against him was in violation of his Constitutional rights – Public Appointments (Parliamentary Approval) Act section 7 – County Governments Act, section 35(2) – Constitution of Kenya, 2010, articles 47, 50, 165 and 179(2). 15
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County Government Act

Section 6

“As an entity exercising constitutional authority, a County Government shall be a body corporate with perpetual succession and shall have all the powers necessary for the discharge of its functions. ” 25

Section 16

“No civil or criminal proceedings may be instituted in any court or tribunal against a member of a county assembly by reason of any matter said in any debate, petition, motion or other proceedings of the county assembly. ” 30

National Assembly (Powers and Privileges) Act 35

Section 12

“No proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with this Act shall be questioned in any court. ” 40

Public Appointments (Parliamentary Approval) Act section 7

“The issues for consideration by the relevant House of

Parliament in relation to any nomination shall be—	1
(a) the procedure used to arrive at the nominee;	
(b) any constitutional or statutory requirements relating to the office in question; and	
(c) the suitability of the nominee for the appointment proposed having regard to whether the nominee’s abilities, experience and qualities meet the needs of the body to which nomination is being made.”	5
Held:	
1. The County Assembly as a distinct institution in the County Government carrying out public duties as mandated by the Constitution and the County Government Act was capable of suing or being sued in the absence of an express statutory provision. However such suit ought to have been brought through the Speaker. The omission to cite the Speaker as such party was a technical omission that however did not occasion the Assembly any prejudice.	10
2. The Governor of Nyeri County was the only party who had been properly brought before the Court. The Attorney General had nothing to do with the Petition and was wrongly joined to it. Article 156(4)(b) of the Constitution provided that the Attorney General would represent the National Government in court or any other proceedings to which the National Government was a party. Those proceedings were against the County Government and no allegation was made or any remedy was sought against the National Government to warrant representation by the Attorney General.	15
3. The doctrine of separation of powers applied with equal measure to County Governments which were structured and ordered in line with traditions and principles that governed the National Government. The Court could therefore only interfere with the proceedings and decisions of a County Assembly and Parliament in extreme situations when those bodies acted or conducted their proceedings in a manner that amounted to abrogation of the Constitution.	20
4. For the Court to interfere with the proceedings and decisions of a County Government, the Applicant or Petitioner had to demonstrate that the action or inaction by Parliament or the County Assembly or any state organ for that matter, attacked the very fabric of the Constitution which if left unchecked would destroy the foundation of Kenyan sovereignty and nationhood. The issue had to traverse beyond just personal rights and liberties of the Petitioner.	25
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5. If the consideration of the issue of the Petitioner's previous criminal case by the County Assembly was the sole reason for disqualifying the Petitioner, that did not amount to an extreme violation of the Constitution to warrant intervention by the Court, even though once a person was acquitted he had the right to be presumed innocent. The Petitioner had not sufficiently demonstrated that he was not prompted by personal agenda and that he was acting *bona fide* with a view to vindicating the cause of justice beyond a missed opportunity for employment. 1
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6. The Court was entitled to review the process of appointment to state or public offices for procedural infirmities as well as for legality. A proper review to ensure the procedural soundness of the appointment process included an examination of the process to determine if the appointing authority conducted proper inquiry to ensure that the person appointed met constitutional requirements. 10
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7. Not every criminal charge attacked the integrity of the person affected. It was therefore necessary that the County Assembly disclosed to the Court, the charge and the extent to which it touched on the Petitioner's integrity in order for the Court to be able to see whether there were issues that touched on the integrity of the Petitioner to warrant his disqualification for appointment. In the absence of those, the County Assembly could not justify its conclusion that the Petitioner did not satisfactorily answer the integrity issues. 20
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8. The County Assembly Committee on Appointments had the opportunity to interview the Petitioner and in the absence of any material to show that they acted in excess of their jurisdiction or took into account issues that they ought not to have taken into account, could not be faulted. In conducting the process, the Committee and the County Assembly were agents of the County Government hence had the duty and responsibility to recommend for appointment not only the best person for the job but also comply with the Constitution and enabling statutes with regard to national values, gender balance and equity in public appointments. 30
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9. No credible connection had been established between the Claimant's appointment and economic and social rights of the residents of Nyeri. Those rights were unspecified and also their connection with the disapproval for appointment of the Petitioner was too remote. The Petitioner did not and indeed could not possibly demonstrate that he had to be the one to be offered the job and if not the residents of Nyeri County were in jeopardy in so far as their socio-economic 40

- rights were concerned. 1
10. In order to develop jurisprudence based on the Constitution, the Court ought to display more latitude to people who have the courage to seek interpretation of the various values and principles contained in it. An order for costs was therefore to be made only in those cases where it could be sufficiently demonstrated that the Petitioner was not furthering the development of constitutionalism. 5

Petition dismissed, costs to be borne by each party.

Cases

East Africa

1. *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another* Petition 102 of 2011– (Followed)
2. *Matemu, Mumo v Trusted Society of Human Rights Alliance* Civil Appeal No 290 of 2013 – (Explained) 15
3. *Mureithi, John Peter & others v Attorney General* Petition No 398 of 2006 – (Explained)
4. *Ng'ok, Joseph Nathaniel v Attorney General & another* Civil Suit No 565 of 2004 – (Explained) 20
5. *Njeru v Republic* [1976-1980] 1 KLR 1272 – (Followed)
6. *Ogada, Peter Odoyo & 9 others v Independent Electoral & Boundaries Commission & 14 others* Civil Appeal No 307 of 2012– (Explained)
7. *Republic v Registrar of Societies & 5 others ex-parte Kenyatta & 6 others* Miscellaneous Civil Application No 747 of 2006 – (Explained) 25
8. *Trusted Society of Human Rights Alliance v Attorney General & 2 others* [2012] 2 KLR 518 – (Explained)

United Kingdom;

1. *Tower Hawlets of London v Chetnik Development Ltd* [1988] 1 All ER 956 – (Explained) 30

Statutes

East Africa

1. Appellate Jurisdiction Act (cap 9) sections 3A, 3B – (Interpreted)
2. Civil Procedure Act (cap 21) sections 1A, 1B – (Interpreted)
3. Constitution of Kenya, 2010 articles 12(1); 20(2); 22(1); 27(4); 27(5); 28; 39(3); 41(1); 43; 47(1); 48; 50(1)(2)(a); 56(c); 117; 159(2)(d)(e); 165(3)(d); 179(2)(b); 183 – (Interpreted) 35
4. County Governments Act, 2012 (Act No 17 of 2012) sections 6, 7, 16, 17, 35 – (Interpreted)
5. Criminal Procedure Code (cap 75) section 210 – (Interpreted) 40
6. National Assembly (Powers and Privileges) Act (cap 6) section 12– (Interpreted)

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7. Public Appointments (Parliamentary Approval) Act, 2011 (Act No 33 of 2011) sections 7, 8(7); 10 – (Interpreted) 1

Advocates

1. *Mr Ng'ang'a* for the Petitioner
2. *Mr Mugambi* for the 1st Respondent 5
3. *Mr Wahome* for the 2nd Respondent

September 10, 2013, **N Abuodha, J** delivered the following Judgment.

a) The Petition and Response to it

1. By a Petition dated 26th July, 2013 and filed before this Court on 29th July under certificate of urgency, the Petitioner, allegedly anchored by several provisions of the Constitution and relevant legislation governing appointment of chief officers of County Governments, sought to move the Court for the grant of orders: 10
 - a. A declaration that the proceedings of the Nyeri County Assembly to reject the Petitioner for appointment to Nyeri County Executive Committee breached the Petitioner's constitutional rights under articles 27(4), 27(5), 28, 39(3), 41(1), 43, 47(1), 48 and 56(c) of the Constitution of Kenya, and were null and void for all intents and purposes; 15 20
 - b. A declaration that the proceedings of the Nyeri County Assembly to reject the Petitioner for appointment to Nyeri County Executive Committee breached the Constitutional rights of the residents of Nyeri under article 43 of the Constitution of Kenya, and were null and void for all intents and purposes; 25
 - c. A declaration that the proceedings of the Nyeri County Assembly to reject the Petitioner for appointment to Nyeri County Executive Committee patently violated the provisions of section 35 of the County Government Act No 17 of 2012 and were null and void for all intents and purposes; 30
 - d. A declaration that the proceedings of the Nyeri County Assembly to reject the Petitioner for appointment to the Nyeri County Executive Committee patently violated the provisions of section 7 of the Public Appointments (Parliamentary Approval) Act No 33 of 2011 and were null and void for all intents and purposes; 35
 - e. That pending the hearing and determination of the application inter partes, conservatory orders of stay do issue to stay the decision of the respondents to reject the 40

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nomination of the Petitioner;	1
f. An order of Judicial Review Orders of Mandamus to remove into this honourable Court and compel the Nyeri County Assembly to approve the nomination of the Petitioner as a member of the Nyeri County Executive Committee there being no statutory and constitutional principle to reject the Petitioner from being appointed to the Nyeri County Executive Committee;	5
g. An order of Judicial Review Orders of Prohibition to remove into this honourable Court and prohibit the Governor of Nyeri County from presenting to the Speaker of Nyeri Assembly or any person whatsoever, any fresh names of nominees for approval by Nyeri County Assembly for appointment as members of Nyeri County Executive Committee;	10
h. An order of Judicial Review Orders of Mandamus to remove into this honourable Court and compel the Governor of Nyeri County to appoint the Petitioner as a member of the Nyeri County Executive Committee;	15
i. An order expunging the allegations contained in page 25 of the Committee of Appointment's report as unconstitutional and thus unlawful;	20
2. In support of the Petition, the Petitioner contended that:	25
a. The Petitioner being a person and citizen within the meaning of both articles 12(1) and 20(2) of the Constitution of Kenya, 2010, was entitled to each and all the fundamental rights and freedoms expressed and or implied in the Constitution.	30
b. Article 3 of the Constitution of Kenya, 2010 obliged the Petitioner (and indeed all other persons) to uphold and defend the Constitution and in particular to insist that all organs and or bodies of the Government of Kenya equally respect, uphold and defend the Constitution.	35
c. Article 22(1) of the Constitution of Kenya, 2010 entitled the Petitioner (and indeed all persons) to move the Honourable Court whenever a right or fundamental freedom in the Bill of rights was denied, violated, infringed or threatened.	40
d. Article 10 of the Constitution of Kenya, 2010 obliged the respondents to observe human rights, non-discrimination,	

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equity, social justice, rule of law, good governance, and integrity in exercise of their functions.	1
e. Article 47(1) of the Constitution of Kenya, 2010 entitled the Petitioner (in common with other persons) to a fundamental and inalienable right to a lawful and procedurally fair administrative action.	5
f. The 1st and 2nd Respondents had in blatant violation of various provisions of the Constitution of Kenya, various statutory provisions and Interim County Assembly Standing Orders, purported to refuse to approve the Petitioner for appointment to the Nyeri County Executive Committee, in the following respective sectors: Simon Wachira Kagiri. Tourism, Culture, Gender Youth and Sports.	10 15
g. The guiding principles when the 1st Respondent considers whether to approve or reject nominees for appointment to the County Executive Committee were set out in the following Constitutional and Statutory provisions:	20
(i) National values and Principles of governance set out in article of the Constitution of Kenya, including observance of human rights, non-discrimination, equity, social justice, rule of law, good governance, and integrity.	25
(ii) Section 35(2) of the County Governments Act No. 17 of 2012 enjoining the 1st Respondent to take into account:	
(iii) Section 7 of the Public Appointments (Parliamentary Approval) Act No 33 of 2010 that sets out the relevant factors to be taken into account in vetting a nominee for public appointment, to wit:	30
a) Procedure used to arrive at the nominee;	
b) Constitutional or statutory requirements relating to the office in question; and	35
c) Suitability of the nominee for appointment proposed, having regard to the nominee's abilities, experience and qualities.	
h. In blatant violation of the listed provisions of the Constitution of Kenya, County Governments Act and Public Appointments (Parliamentary Approval) Act, the respondents purported to reject the Petitioners for	40

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appointment to Nyeri County Executive Committee on the following illegal, unreasonable, irrelevant and unconstitutional grounds:	1
(i) That having been charged and acquitted in a Criminal Case he did not satisfactorily answer integrity issues.	5
(ii) That the Petitioner did not demonstrate appropriate knowledge and understanding of relevant docket.	
(iii) That though well versed in tourism matters he failed to address satisfactorily in matters relating to culture, gender, youth and sports.	10
i. In exercising its constitutional mandate under article 179(2) (b) of the Constitution of Kenya, the 1st Respondent, as evident, out rightly violated the Constitutional and statutory considerations to be taken into account in approving or rejecting nominees for appointment to County Executive Committee on illegal, unreasonable, irrelevant and unconstitutional grounds, the Respondents, jointly and severally violated the rights and freedoms of the Petitioner as follows:	15
j. By expressly admitting that the Petitioner had the right qualifications and good academic credentials, but declining to approve the Petitioner for appointment unreasonably and violated the Petitioner's right to fair labour practices contrary to the provisions of article 41(1) of the Constitution of Kenya;	20
k. By refusing to approve the Petitioner for appointment to the Nyeri County Executive Committee without giving cogent reasons for rejection of petitioner as nominees for appointment into the Executive Committee, the respondents acted illegally, unreasonably and violated the Petitioner's right to administrative action that is lawful, reasonable and procedurally fair, contrary to the provisions of article 47(1) and presumption of innocence contrary to article 50(2)(a) of the Constitution of Kenya.	25
l. By expressly admitting that the Petitioner had the right qualifications and good academic credentials and commending the 1st Respondent's Committee on Appointments for recommending the 2nd Respondent's approval of the appointment of the Petitioner to the Nyeri County Executive Committee, but declining to approve	30
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- the Petitioner for appointment to the County Executive Committee, the Respondents violated the Petitioner's right to administrative action that is lawful, reasonable and procedurally fair, contrary to the provisions of article 47(1) of the Constitution of Kenya. 1
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- m. By refusing to approve the Petitioners for appointment to the Nyeri County Executive Committee on illegal, unreasonable, unconscionable, irrelevant and unconstitutional grounds, the respondent paralysed the Nyeri County Executive Committee from executing its mandate in article 183 of the Constitution of Kenya as read together with part 2 to the Fourth Schedule thereof, thereby disentitling the residents of Nyeri County of their fundamental economic and social rights which include the right to accessible and adequate quantities, social security, and education, contrary to the provisions of article 43 of the Constitution of Kenya. 10
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- m. The Petitioner was reasonably apprehensive that, in seeking to rely on the provisions of section 10 of the Public Appointments (Parliamentary Approval) Act No 33 of 2011, the Governor of Nyeri County would submit to the 1st respondent, fresh names for approval by the 1st Respondent and subsequent appointment by the Governor, thereby rendering the Petition otiose; 20
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- The provisions of section 10 of the Public Appointments (Parliamentary Approval) Act No 33 of 2011 applied to the Governor in the circumstances of this petition by dint of the provisions of section 8(7) of the County Governments Act, which authorizes application of corresponding national legislation to counties on an issue that the County Governments Act was silent; 30
3. In opposition to the Petition, the 1st Respondent filed grounds of opposition contending on the main: 35
- a. That the Petition, its grounds and the Supporting Affidavit had not raised any, or any sufficient grounds, on the basis of which the Court would exercise its discretion to grant the orders prayed for, or at all. 40
- b. That the Petitioner's plea for a Conservatory Order in prayer (e) of the Petition did not lie in the matter, as the decision of the 1st Respondent in declining to approve the Petitioner had already taken place, and as such the

Petitioner had not met the legal threshold for grant of temporary orders at that stage of the proceedings.	1
c. That the Petition against the 1st Respondent was misconceived, frivolous and bad in law as the 1st Respondent was not sui juris, since the County Assembly, as constituted under the Constitution of Kenya and its establishing Statute was not an entity with capacity to sue, or to be sued, in its own name.	5
d. That the Petition as framed was misconceived and bad in law as the Honorable Court did not have the jurisdiction to grant the Orders sought in prayers (f), (g) and (h) of the Petition since the discretion to approve nominees for appointment to the County Executive was vested in the 1st Respondent.	10
e. That the application and indeed the Petition itself, sought to defeat the doctrine of separation of powers, which demanded that there should be a distinction between the legislative organ(s) of the government and other organs and as such, the Court in exercise of judicial power ought not to arrogate itself the powers of County Assembly and/or subjugate the powers exercisable by any other arm or organ of the government.	15 20
f. That indeed the material presented before the Court by the Petitioner was sufficient to demonstrate at the preliminary stage, that the 1st Respondent fulfilled and/or complied with all the provisions of the law in regard to the procedure followed by the County Assembly in the vetting process and arrived at its decision(s) fairly and in a manner that was sound, reasonable and within the law.	25 30
g. That the Application lacked merit as the Court lacked jurisdiction to entertain the Petition and any application for temporary or conservatory Orders in the circumstances attending the Petition before the Court.	35
4. When Mr Ng'ang'a for the Petitioner appeared before me on the 29th July, 2013, I was not persuaded that he had sufficiently demonstrated in his application that the 1st and 2nd Respondents were about to fill the post in respect of which his client had been	40

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- rejected. I therefore granted him leave to file supplementary documents, which he said he had, to that effect and directed that he serves the Application on the respondents and return before me on 30th July, 2013 for directions. 1
5. On 30th July, 2013, my brother Justice Ombwayo, sitting for me on this petition, heard the Interlocutory Application herein and issued conservatory orders pending the hearing of the main petition. 5
6. When the parties appeared before me on 13th August, 2013 for directions, it was agreed that in the interest of time and speedy disposal of the dispute, the Petition together with the preliminary issues raised in the Interlocutory Application be argued together on the 27th August, 2013 and that the Court renders one ruling in respect of the interlocutory application and the Petition. The parties agreed to frame issues along which they would format their submissions before the Court. 10 15
7. It was further agreed by the consent of the parties that since issues in this Petition and petition number 10 are similar, Petition number 7 (this Petition) be tried as a test case and the determination thereof and orders made, will apply to Petition number 10 with equal force. So that the determination of this Petition will render Petition number 10 spent in terms of issues for adjudication by the Court. 20
- b) Issues for determination. 25
8. When the matter came up for hearing on 27th August, 2013, Mr Ng'ang'a and Mr Mugambi who as it were, were the main protagonists in this matter framed seven issues, to wit:
- a. Whether the 1st Respondent is a legal person in the eyes of the law and as such sui juris, with corporate personality and capacity to sue and be sued in its own name. 30
 - b. Whether the 1st Respondent violated the Constitutional and statutory considerations in the procedure prescribed for the vetting process under the Constitution, the County Government Act, and the Public Appointments (Parliamentary Approval) Act. 35
 - c. Whether the Petition as framed is supported by sufficient evidence to discharge the Petitioner of the burden of proving and establishing his allegations that his rights were violated. 40

- d. Whether the nature and character of the Petition by the Petitioner, amounts to a violation of the doctrine of separation of powers by requiring the Court to interfere with the powers, functions and discretion vested in the 1st Respondent.
- e. Whether the honourable Court has powers and/or jurisdiction to grant the orders sought in prayers (f) (g) and (h) of the Petition.
- f. Whether by rejecting to approve the Petitioner's candidature, the 1st Respondent has disentitled the residents of Nyeri County their fundamental economic and social rights.
- g. Who is entitled to the costs of the Petition.
9. At the hearing of the Petition it was agreed that Counsel structure their submissions in the order in which the issues were framed. For simplicity in the determination of the Petition, the Court will adopt the same format in addressing the issues raised in the Petition merging them where they are cross-cutting and or overlapping.
- c) Submissions by Counsel
10. On issue number 1 regarding the proper party to sue, Mr Ng'ang'a for the Petitioner submitted that all bodies that perform public duties are subject to judicial review. He gave examples such as: administrative system of central Governments, local governments or County Governments, quasi-governmental bodies which exercise disciplinary function in respect of certain professions. To this list Mr Ng'ang'a added that all bodies that perform public functions or that are engaged in actions which although private are of public nature are subject to the interference by the Court. To support this submission Mr Ng'ang'a relied on the case of *Republic v Registrar of Societies & 5 others ex-parte Kenyatta & 6 others* Misc Civil Application No 747 of 2006 to which he urged the Court to consider the cases cited therein. Mr Ng'ang'a urged me to take into account the dictum of Lord Bridge in the case of *Tower Hawlets of London v Chetnik Development Ltd* [1988] 1 All ER 956 where he stated:
- "... a truly unfettered discretion will at once put the decision maker outside or as I would prefer to say, above the law. Public bodies and private persons are both subject to the rule of law, nothing can be more elementary. . . it is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake; at

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- every turn, all dealings constitute fulfillment of duties which it owes to others; indeed it exists for no other purpose. . . ” 1
11. According to Mr Ng’ang’a, the Committee on Appointments which consisted of the speaker, his deputy, leader of majority, leader of minority and two committee members presented its report to the County Assembly which was adopted by the latter hence it was the right party to sue. In any event, Mr Ng’ang’a submitted, article 159(2)(d) and (e) of the Constitution is clear that justice shall be administered without undue regard to procedural technicalities and that the purpose and principles of the Constitution shall be protected and promoted. 5 10
12. Mr Mugambi on his part submitted that the County Assembly, the 1st Respondent herein, is not a legal person who can sue or be sued in its own name. According to Counsel, the law (the Constitution and the County Government Act) recognises the corporate status of the County Government. He cites section 6 of the County Government Act (CGA) which provides: 15
- “... as an entity exercising constitutional authority, a County Government shall be a body corporate with perpetual succession and shall have all the powers necessary for the discharge of its functions” 20
13. According to counsel, the appointment process is carried out by the County Government whereby the 2nd Respondent nominates a candidate and the 1st Respondent approves. Any violation in the process of appointment is therefore attributable to the County Government and not the County Assembly. 25
14. Mr. Mugambi further submitted that in essence, the County Assembly is a collection of elected and nominated persons who perform the functions set out under the law. According to Mr Mugambi, the Speaker though an ex-officio member of the County Assembly, plays a key part in the exercise of the roles and functions of the County Assembly. It is therefore his submission that the appropriate way to bring legal action against the County Assembly is through the speaker. In support of this submission Mr Mugambi relied on the decision of Ojwang J in the in the case of *Ng’ok v The AG & another* [2005] eKLR where the Court rejected the argument that the AG had locus standi to file pleadings for a statutory corporation whose corporate status was set out under the provisions of a statute. 30 35 40

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15. Mr Ng'ang'a in response to Mr Mugambi's submissions on this issue argued that section 6 of the County Government Act provides for the duties of the County Government. These duties, according to counsel are exclusive to the County Government. He submitted that the legislature thought it wise not to include the power to sue so that this could be left to other bodies. Further, the County Assembly Appointments Committee had the speaker as one of its members and the decision being impugned was made by this body hence it was the correct body to sue. Mr Ng'ang'a further submitted that the matter before the Court was a constitutional matter hence procedure was to be kept minimal and further that the fact that certain aspects of the County Government had not been constituted made it unclear on the proper body to sue. 1
16. According to Mr Ng'ang'a the County Assembly was making a decision regarding constitutional rights of a person hence the right body to sue. According to counsel, *Arap Ng'oks* case sought to be relied on by the 1st Respondent was in respect off a civil procedure matter hence did not apply to a constitutional petition as was the case here. 5
17. On issue number 2 concerning the whether the 1st respondent violated the Petitioner's constitutional rights, Mr Ng'ang'a submitted that the report of the Appointments Committee at page 25 thereof stated that: 10
- “... the Committee found out that he had been charged with a court case but had eventually been acquitted under section 210 of the Criminal Procedure Code and though he had been acquitted under section 210 of the Criminal Procedure Code, the Committee observed that the case was dismissed on a technicality. . . the committee was of the view that he did not satisfactorily answer the integrity issues. . . ” 15
18. To this Mr Ng'ang'a submitted that it was a blatant contravention of article 50(1) and (2) of the Constitution. According to Counsel, presumption of innocence is a cornerstone of international law on human rights and is clearly entrenched in the Constitution. The fact that the Petitioner's arraignment in court and his subsequent acquittal was used as a reason to deny him a chance to fair labour treatment and equality in the eyes of the law was unfair, unreasonable and arbitrary. Mr Ng'ang'a therefore submitted that his client was entitled under article 258 of the Constitution to institute court 20
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proceedings claiming the Constitution has been contravened or is threatened with contravention. 1

19. Mr Mugambi on his part submitted that the Petitioner in the supporting affidavit to the Petition did not disclose evidence and facts in proof of the alleged violation. The Supporting Affidavit, counsel submitted, contained no averment of fact to establish that there were defects in the procedure, fundamental omissions or a consideration of an extraneous matter. According to counsel therefore, the evidence provided fell critically short in discharging the burden of proof imposed on the Petitioner by law. On this score, Mr Mugambi relied on the Court of Appeals decision in *Mumo Matemu v Trusted Society of Human Rights Alliance* [2013] eKLR where it was observed by that court thus: 5 10

“ . . . the general evidentiary standard applicable in judicial review of the procedural propriety of appointments process is that there must be a showing by the claimant that there were substantive defects in that procedure, fundamental omissions, or a consideration of extraneous considerations as to render the cumulative process unconstitutional. . . ” 15 20

20. Further it was Mr Mugambi’s contention that “the criteria for vetting/approval of nominees for appointment to public office by parliament questionnaire” which was structured pursuant to section 6 of the Public Appointments (Parliamentary Approval) Act (PA Act) required the Committee to consider whether any nominee has ever been charged in Court. In this respect Mr Mugambi submitted that it was outrageous for the Petitioner to argue that merely because the Committee on Appointments considered his having faced a criminal charge, his constitutional rights under article 50(1) and 50(2) were violated. It was Counsel’s submission that making a blanket assumption that the Petitioner was thus presumed guilty, was stretching the argument beyond the legislative intention in requiring the vetting body to take into account matters concerning criminal proceedings. According to counsel, the Court has no basis looking into the subjective mind of the decision makers in arriving at the conclusion that the Petitioner did not meet the integrity test. In this regard Mr Mugambi further relied on the Court of Appeal’s decision in *Mumo Matemu’s* case where that Court further observed thus: 25 30 35 40

“ . . . under this test, the Court will not be sitting in appeal over the opinion of the organ of appointment, but only examining whether the relevant material and vital aspects

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- having a nexus to the Constitutional and legislative purpose of integrity were taken into account in the actual process. Stated otherwise, the analysis turns on whether the process had clear nexus with a determination that the candidates meet the objective established in law rather than a judgment over the subjective state of mind of the decision makers. This in our view provides a fact-dependent objective test that is judicially administrable in such cases. . . ” 1
21. In this regard, Mr Mugambi submitted that the Petitioner did not establish any impropriety in the approval process. That is to say the burden was on the Petitioner to adduce evidence that the approval process as established by article 179(2)(b) of the Constitution and relevant provisions of the PA Act were violated in rejecting his candidature. 5 10
22. In response to Mr Mugambi’s submission on this point, Mr Ng’ang’a argued that it was not true that there was no impropriety on the part of the 1st Respondent. He urged the Court to look at the vetting report which took into account the criminal charges the accused once faced. It was Mr Ng’ang’a’s contention that once a constitutional issue was taken into account the other matters became irrelevant. According to him, the fact that the Petitioner was acquitted made the issue a non-issue. Besides no member of the public gave any evidence with regard to unsuitability of the Petitioner for appointment. The issue therefore was not a matter of procedure but of fundamental rights of the Petitioner. Further, counsel submitted that the Petitioner’s arraignment if at all was relevant, took place outside of 3 years hence was not within the contemplation of 6(8) PA Act which takes into account criminal charges within three years of the date of the intended appointment. 20 25 30
23. Concerning issue number 3, Mr Ng’ang’a submitted that this had been adequately dealt with in response to issue number 2 and added that the Petitioner’s disqualification was unconstitutional and referred the Court to the decision in *Ex Chief Peter Odoyo Oganda & others v IEBC & others* Civil Appeal No 307 of 2012 affirmed in *Mumo Matemu’s* case to the effect that decisions must be rational that limits arbitrariness and not discretion itself. 35
24. Mr Mugambi for his part submitted that the Petitioner has cited a flurry of constitutional provisions which he alleged had been violated without demonstrating in which way or manner they had 40

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- been violated. It was counsel's submission that it was not enough for the Petitioner to cite articles of the Constitution pleading they have been violated without furnishing evidence as to how violation has occurred. 1
25. On issue number 4, Mr Ng'ang'a argued that the County Assembly was not shielded by the Constitution in the manner that parliament was by virtue article 117 of the Constitution and National Assembly (Powers & Privileges) Act. According to him the Assembly ought to be regarded at the level of a tribunal hence amenable to the jurisdiction of the Court through judicial review of its actions. 5 10
26. According to Mr Mugambi, without factual evidence that there was procedural impropriety by the 1st Respondent in exercising its legal mandate, the Court had no jurisdiction to overturn the decision arrived at by the 1st Respondent. To do so, would be to do an exercise similar to vetting process which is the Constitutional mandate and statutory role of the 1st Respondent. Counsel submitted further that from the first report of the Committee on Appointments annexed to the Petitioner's Supporting Affidavit and the second report of the said committee read together with the explanation of the process contained in the 1st Respondent's Replying Affidavit, its duty was fully discharged. According to counsel therefore, what the Petitioner sought from the Court was for it to substitute its own evaluation of the material on the basis of which the Petitioner proposed his suitability. This Mr. Mugambi submitted would be a trap that if the Court were to fall into, it would be exercising an appellate jurisdiction over the 1st Respondent. A power the Court did not have. On this point he referred the Court to *Mumo Matemu's* case in which the Court of Appeal stated: 15 20 25 30
- “ . . . for avoidance of doubt, we also reiterate that a court reviewing the procedure of legislature is not a super-legislature sitting on appeal on the wisdom, correctness or desirability of the opinion of the impugned decision-making organ. It has neither the mandate nor the institutional equipment for that purpose in our constitutional design. Moreover, the process cannot be wrong simply because another institution, for example the Courts, would have conducted it differently. ” 35
27. In concluding this segment of his submission, Mr Mugambi argued that even if the Court were to uphold the Petition, the most it would do would be to refer the Petitioner back to the appointing and 40

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- approving body with directions on which procedural lapses occurred and require their correction by the 1st and 2nd Respondent. 1
28. Regarding issue number 5 on whether by rejecting the Petitioner's candidature, the 1st Respondent has disintitled the residents of Nyeri County their fundamental economic and social rights, Mr Ng'ang'a argued that the Petitioner had impeccable credentials hence the act by the 1st Respondent of taking into account irrelevant criminal prosecution to refuse the Petitioner's appointment deprived the people of Nyeri County of a person who could have advanced their fundamental economic and social rights. According to Mr Ng'ang'a therefore the Court had power to issue the orders sought. It was his position that the 1st Respondent was subordinate to the Court and hence the Court had supervisory power over it and the orders sought were thus within the powers of the Court. 5 10 15
29. Mr Mugambi for his part submitted on this issue that there was no evidence presented that the residents of Nyeri County had been disintitled their fundamental economic and social rights. Other than the Supporting Affidavit by the Petitioner, there was no material placed before the Court on the basis of which any findings on this issue could be made. 20
30. Concerning issue number 6 on whether the Court could grant the orders sought, Mr Ng'ang'a reiterated his submissions on issue numbers 1 and 2 while Mr Mugambi for his part submitted that the effect of the orders sought in the Petition had the sum effect of compelling the 1st Respondent to approve the appointment of the Petitioner, prohibiting the 2nd Respondent from undertaking his statutory duty under section 35 of the County Government Act and section 10 of PA Act and compelling the 2nd Respondent to appoint the Petitioner to Nyeri County Executive in spite of the nomination and vetting process. According to Counsel, under the Constitution, the Petitioner's appointment involved two stages: 25 30
- a) nomination of the 2nd Respondent's 35
 - b) approval (by way of vetting) by the 1st Respondent
31. According to Counsel, both these stages required the exercise of discretionary powers by the 1st and 2nd Respondent as donated by the relevant statutory provisions. According to counsel therefore, these powers being discretionary, the order of *mandamus* could not lie. In support of this argument, he cited the case of *John Peter Mureithi et al v AG* [2006] eKLR where the High Court stated: 40

“ . . . a *mandamus* issues to enforce a duty performance of which is imperative and not optional or discretionary. . . ” 1

Counsel further cited paragraphs of *Halsburys Laws of England* 4th Edition Vol 1 at 111 from paragraphs 89 as follows: 5

“The order of *mandamus* is of most extensive remedial nature, and is in form of justice directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing thereon specified which appertains to his or their office and is in nature of a public duty. 10

At paragraph 90 it is stated as follows:

“ . . . the order must command no more than the party against whom the application is made is legally bound to perform. Where a general statute which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way” 15

From the foregoing therefore Mr Mugambi concluded his submissions that it would be inopportune for the Court to grant the orders sought in prayers (f)(g) and (h) of the Petition. 20

Regarding the issue number 7 on costs, Mr Ng’ang’a submitted that this was a matter for the discretion of the Court however being a public interest litigation, each party ought to bear their own costs. Mr Mugambi for his part submitted that once the election process was concluded in March, 2013, the County Government was expected to proceed and constitute the County Executive as well as County Service Board. This process was stopped by the Petitioner and had occasioned costs including costs for the defence of the Petition. In the circumstances costs ought to follow the event. 25 30

The decision.

The Court will determine the first, fourth and fifth issues as framed by the parties together and at this stage since they revolve around the same legal questions and principles. 35

34. According to Mr Ng’ang’a for the Petitioner, the 1st Respondent, the County Assembly, in conducting the vetting process, was carrying out a public function hence the proper party to bring to Court. Mr Mugambi for the Respondent on his part however submitted that the County Assembly was not a legal person capable 40

of suing or being sued. According to Mr Mugambi, The County Government Act No 17 of 2012 (CGA) recognises the corporate status of the County Government only.

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33. Whereas both Counsel submitted on the question of legal capacity or otherwise of the 1st Respondent to sue or be sued, neither addressed me on the issue whether any suit can lie against the County Assembly as such, in the exercise of its constitutional and statutory mandate.

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34. On the issue of whether the County Assembly may be sued in its own name the Court takes the view that the County Assembly as a distinct institution in the County Government carrying out public duties as mandated by the Constitution and the County Government Act, is capable of suing or being sued in the absence of an express statutory provision. However such suit ought to be brought through its titular head - the Speaker. The omission to cite the Speaker as such party is a technical omission that does not occasion the Assembly any prejudice. It is however a practice that must not be encouraged. The Court is aware of the argument gaining momentum of late that the Court ought to focus on substance than technicalities while adjudicating disputes. To support this argument over-reliance has been placed on article 159(2)(d) of the Constitution which provides:

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“In exercising judicial authority, the Courts and tribunals shall be guided by the following principles—

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(d) justice shall be administered without undue regard to procedural technicalities. . .”

The operative words here are “undue regard”, which means technicality still has a place in the administration of justice by the Courts. Litigation must be structured and orderly for the Court to effectively adjudicate the dispute before it. Rules of procedure therefore define the manner and extent to which parties to litigation should engage. The Court of Appeal in *Mumo Matemu’s* case cited earlier in this judgment has stated:

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“ . . . the principle in *Anarita Karimi Njeru* case underscores the importance of defining the dispute to be decided by the Court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to article 159 of the Constitution and the overriding objective principle under

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- sections 1A and 1B of the Civil Procedure Act (cap 21 and section 3A and 3B of the Appellate Jurisdiction Act (cap 9). Procedure is also the handmaiden of just determination of cases. . . ” 1
35. I now turn to the issue whether the County Assembly may be sued for actions it undertakes pursuant to the Constitution and enabling legislation. Section 16 of the CGA provides that no civil or criminal proceedings may be instituted in any court or tribunal against a member of a county assembly by reason of any matter said in any debate, petition, motion or other proceedings of the county assembly. Further section 7 of the same Act provides that the national law regulating the powers and privileges of parliament shall with the necessary modification, apply to County Assembly. The national legislation alluded to in this section is the National Assembly (Powers and Privileges) Act which provides at section 12 that the decisions of parliament shall not be questioned in any court. The question therefore is: which and to what extent are the modifications envisaged by section 17 of the CGA? As a corollary, does the phrase “necessary modification” admit of the interpretation that the Court has jurisdiction to question anything done by the County Assembly in the exercise of its constitutional and statutory mandate? 5 10 15 20
36. County Governments are miniature national governments structured and ordered in line with traditions and principles that govern the national government. To this extent the doctrine of separation of powers apply with equal measure. 25
37. The County Governments were embraced in the new Constitution as vehicles for devolution through which government services could be brought closer to the people and also to provide them with opportunity to participate on how they would like to be governed. One of the mediums through which this participation is exercised is through the County Assembly. It is at the Assembly floor that matters concerning and affecting the County Government are debated and resolutions or legislation passed for the betterment of the residents of the County concerned. Depending on the issue and the way a particular debator may have been acculturated, contributions on the Assembly floor may at times be abrasive and out of decorum under ordinary circumstances but that should be no reason for the Judiciary through the Courts, as another arm of 30 35 40

government, to interfere unless in exceptional circumstances. It is expected that these Assemblies as institutions of democracy and governance ought to engender a culture of decorum and decency expected in a civilised and democratic society and therefor reign in on debators who hide behind the privileges of the Assembly to conduct debates in a manner that lacks decorum.

38. The only possible scenario in which the Court may be prepared to interfere with the proceedings and decisions of the County Assembly and indeed Parliament is in extreme situations when these bodies act or conduct their proceedings in a manner that amounts to abrogation of the Constitution. I say so because article 1 of the Constitution vests the sovereign power on the people of Kenya which they can either exercise directly or through their democratically elected representatives. This sovereign power is delegated to parliament, legislative assemblies of the County Governments, the judiciary and independent tribunals. So if in the purported exercise of this delegated sovereignty, an organ of the state acts in excess of such power, the High Court exercising its authority under article 165(3)(d) of the Constitution has power on being moved to issue appropriate orders in the circumstances. In recent case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal No 290 of 2012 the Court of Appeal in interpreting the breadth and scope of article 165(3)(d) took a similar view and held as follows:

“ . . . It is clear that on its face, the jurisdiction of the High Court is broad enough to cover review of the Constitutionality or legality of appointments by other organs of government. . . ”

A similar position was taken by the High Court in the case of *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v The Attorney General & another* [2011] eKLR when the Court held:

“ . . . If the process of appointment is unconstitutional, wrong, unprocedural or illegal, it cannot lie for the Respondents to say that the process is complete and this Court has no jurisdiction to address the grievances raised by the Petitioners. . . the jurisdiction of this Court is dependent on the process and constitutionality of the appointment. . . ”

39. In essence therefore, the intervention by the High Court in such cases is underpinned on the Constitutional supremacy which

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- requires that any violation of the Constitution by parliament and indeed any organ of the state in the performance of its functions is amenable to judicial review. 1
40. For the Court to interfere however, the Applicant or Petitioner ought to demonstrate that the action or inaction by parliament or county assembly or any state organ for that matter, attacks the very fabric of the Constitution which if left unchecked would destroy the foundation of our sovereignty and nationhood. The issue so to speak must traverse beyond just personal rights and liberties of the Petitioner. 5 10
41. The Petitioner's complaint is that he was refused recommendation for appointment to the Nyeri County Executive Committee on the allegations that he had once in his life faced a criminal charge in respect of which he was acquitted without prosecution. In as much as the Court may hold the view that once acquitted, a person has the right to be presumed innocent, the consideration of the issue of the Petitioner's prosecution by the county assembly if at all was the sole reason for disqualifying the Petitioner did not amount to an extreme violation of the Constitution to warrant intervention by this Court. That is to say, the Petitioner has not sufficiently demonstrated that he is not prompted by personal agenda and that he is acting bona fide with a view to vindicating the cause of justice beyond missed opportunity for employment. In this context, the Court comes to the inevitable conclusion that whilst there exist situations when action may be commenced against a county assembly, his complaints did not meet the threshold to warrant such action against the 1st Respondent. 15 20 25 30
42. Before I leave the issue of the proper parties to this Petition, it is important to state that the only party who was properly brought before this court was the 2nd Respondent. The Attorney General had nothing to do with the Petition and was wrongly joined to it. I say so because article 156(4)(b) of the Constitution provides that the Attorney General shall represent the national government in court or any other proceedings to which the national government is a party. . . " These proceedings were against the County Government. There is nowhere in the Petition where any allegation was made or any remedy was sought against the national government to warrant representation by the Attorney General. 35 40
43. The second set of issues for determination are (b), (c) and (f). To

- these, Mr Ng'ang'a submitted that reference to criminal proceedings in respect of which the Petitioner had been acquitted violated his constitutional rights more particularly article 50(1) and (2). That is to say the fact that the Petitioner's arraignment in court and his subsequent acquittal was used as a reason to deny him the appointment amounted to unfair labour practice and denied the Petitioner the benefit of equality in the eyes of the law. According to Mr. Ng'ang'a, the fact that the Petitioner had been acquitted made this a non-issue and the panel was thus guilty of impropriety by taking it into account. According to Mr Mugambi however, the Petitioner failed to show by way of affidavit, facts to establish that there were defects in procedure, fundamental omissions or consideration of an extraneous matter. 1
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44. From the report of the Committee on Appointments, the Petitioner was among sixteen people whose names were submitted by the 2nd Respondent for approval for appointment by the Assembly. The Assembly on 4th June, 2013 directed that the names and accompanying information be referred to the Committee on Appointments for vetting and a report be submitted to the Assembly within 14 days in accordance with standing order number 42. According to the report, the Committee held 13 sittings during which it came up with the modalities of the vetting exercise and the said 16 nominees appeared before the Committee and were vetted in accordance with the Public Appointments (Parliamentary Approval) Act No 33 of 2011. To this point the Petitioner has not raised any complaint that the procedure adopted by the 1st and the 2nd Respondent violated any laid down rule or procedure. That is to say nothing is contained in the Petition or the Supporting Affidavit that attacks the integrity of the process up to this stage. The Court therefore reasonably assumes that the 1st and 2nd Respondent to this extent, adhered to the law. 15
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45. The Petitioner therefore appears not to attack the procedure adopted by the 1st and 2nd Respondent, but the substance of the vetting process itself. Pausing here, does the Court have jurisdiction to do so? In the case of *Trusted Society of Human Rights Alliance v The AG & 2 others* Petition Number 229 of 2012 the High Court stated: 35
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" . . . the Court is entitled to review the process of appointment to state or public offices for procedural infirmities as well as for legality. A proper review to ensure the procedural soundness of the appointment process includes an examination of the

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- process to determine if the appointing authority conducted proper inquiry to ensure that the person appointed meets constitutional requirement. ” 1
46. The Court is therefore clothed with jurisdiction to question the substance of decisions made by other organs of government such as the 1st and 2nd Respondent but only to the extent of their constitutionality or otherwise. The Court must guard against the temptation to substitute its own opinion and judgment with that of other state organs properly mandated to make such decisions. 5 10
47. At page 25 of the report the Committee made the following observations:
- a) He has a Diploma in Philosophy, Diploma in theology, Bachelor in Religious Studies and a postgraduate Diploma in Development studies. 15
 - b) He is a part time lecturer at Kimathi University and also Chairman of the local Council of St Veronicah Catholic Church.
 - c) He is the Chairman and founder of Mt Kenya Tourism Circuit Association. He has been a member of the Nyeri Central Business District Association, Pembe Tatu neighborhood Association, Biashara Sacco Society Ltd amongst others. 20
 - d) He has previously worked with Caritas – Nyeri for 16 years as Director promoting community based development projects. 25
 - e) The Committee found out that he had been charged with a court case but had eventually been acquitted under section 210, of the Criminal Procedure code and though he had been acquitted under section 210 of the Criminal Procedure code, the Committee observed that the case was merely dismissed on a technicality. 30
 - f) The Committee was of the view that he did not satisfactorily answer the integrity issues. 35
 - g) Further the committee found that he did not demonstrate appropriate knowledge and understanding of the dockets under the department of Tourism, Culture, Gender, Youth and Sports.
 - h) Though well versed in tourism matters, he failed to address in any or any satisfactory way, matters relating to culture, Gender, Youth and Sports. 40

- i) The Committee was not satisfied with the capacity of the nominee to handle the functions under the department of Tourism, Culture, Gender, Youth and Sports.
 - j) The Committee found the nominee unsuitable for the appointment as the Executive nominee for Tourism, Culture, Gender, Youth and Sports.
48. The Petitioner was found unsuitable for appointment for two main reasons namely lack of integrity and failure to demonstrate appropriate knowledge and understanding of culture, gender youth and sports. Regarding the criminal case the Committee observed that the case was merely dismissed on a technicality. The relevant proceedings were attached to the Petition and they clearly stated that the criminal case against the Petitioner had been pending in court for close to four years during which time the trial did not start because of the constant absence of the appointed prosecutor and absence of the complainants.
49. The dismissal of the criminal case was indeed on a technicality as the veracity of the allegations against the Petitioner which culminated in his arraignment in court were never tested. However as stated earlier, technicalities are also essential to the administration of justice. To arraign a person in court and keep him attending court for that long without the prosecution commencing amounts to injustice. Justice delayed is justice denied. It may well be that the allegations against him were unfounded hence no one was prepared to come forward to testify.
50. It is curious that neither the Petitioner nor the 1st Respondent, disclosed the nature of the charges the Petitioner faced. The Committee too in its report did not make any such disclosure. All it said in conclusion was that the Petitioner did not satisfactorily answer the integrity issues.
51. Not every criminal charge attacks the integrity of the person affected. Some offences such as certain categories of traffic or licensing offences are not considered as going to the integrity of the person affected. It was therefore necessary that the Committee disclose to the Court, the charge and the extent to which it touched on the Petitioner's integrity in order for the Court to be able to see whether they were issues that touched on the integrity of the Petitioner to warrant his disqualification for appointment. In the

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- absence of these the 1st Respondent cannot justify its conclusion that the Petitioner did not satisfactorily answer the integrity issues. 1
52. But this was not the only reason for which the Petitioner was not recommended for appointment by the 1st Respondent. According to the Committee's report, the Petitioner also failed to demonstrate appropriate knowledge and understanding of the dockets under the department of Tourism, Culture, Gender, Youth and Sports to which he sought to be appointed. It was the Committee's view that although the Petitioner was well versed in tourism matters, he failed to address in a satisfactory way, matters relating to culture, gender youth and sports. The Petitioner did not attack the Committee's assessment on this issue. His major focus was on the fact that the committee made reference and presumably relied on his arraignment in court on charges that were ultimately dismissed for want of prosecution. However as stated before the criminal charge was not the sole reason for which his appointment was declined. 5 10 15
53. The Committee had the opportunity to interview the Petitioner and in the absence of any material to show they acted in excess of their jurisdiction or took into account issues that they ought not to have taken into account, cannot be faulted. In conducting the process, the Committee and the 1st Respondent were agents of the County Government hence had the duty and responsibility to recommend for appointment not only the best person for the job but also comply with the Constitution and enabling statutes with regard to national values, gender balance and equity in public appointments. Nothing has been shown by way of evidence or affidavit that they acted contrary to the Constitution or any law. The Petitioner has merely made broad allegations of violations by the 1st and 2nd Respondent without getting to the specifics of how and in what way the Committee violated those rights or failed to comply with the law. In the case of *Anarita Karimi Njeru v The Republic* (1976-1980) 1 KLR 1272 the Court held as follows with respect to constitutional applications: 20 25 30 35
- “ . . . if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed. ” 40

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54. Concerning the claim that by rejecting to approve the Petitioner's appointment the residents of Nyeri have been denied their fundamental economic and social rights, the Court while reiterating the observations in *Anarita Karimi's* case observes that no credible connection has been established between the claimant's appointment and economic and social rights of the residents of Nyeri. Such rights have not only been unspecified but also their connection with the disapproval for appointment of the Petitioner, too remote. For the Court to so hold would be tantamount to saying that without the Petitioner's skills the residents of Nyeri County's economic and social rights are in jeopardy. The Petitioner has not and indeed cannot possibly demonstrate that he must be the one to be offered the job and if not the residents of Nyeri County are in jeopardy in so far as their socio-economic rights are concerned.
55. Regarding who should bear the costs of the Petition, the Court takes the view that litigation around the new Constitution is one of the ways of its implementation. It has been lauded as one of the most progressive constitutions in modern times. In order to develop jurisprudence on its various provisions, the Court ought to display more latitude to people who have the courage to seek interpretation of the various values and principles contained in it. An order for costs should therefore be made only in those cases where it can be sufficiently demonstrated that the Petitioner was not furthering the development of constitutionalism.
56. It cannot be said that the Petition raised issues that were so insubstantial and so attenuated that this Court could not render an interpretation or a decision. The vetting process is a new phenomenon in our public appointment's hence litigation arising out of the process cannot by any manner of interpretation be considered insubstantial. The Court would in the circumstance order that each party bears his or her own costs.
57. To sum it all, for reasons given above, this Petition while presented an opportunity for the Court to interpret various issues arising out of the Constitution and more particularly the devolved government, fails on its own merit and is hereby dismissed with no order as to costs. This order as stated earlier will apply with the same effect to Petition number 10 of 2013.
58. It is so ordered.

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High Court, at Nairobi

(Judicial Review Division)

August 28, 2013

WK Korir J

Judicial Review No 110 of 2013

Brief facts

The 1st and 2nd *ex parte* Applicants (the Applicants) approached the High Court for certain orders amounting to a declaration that the election of the 1st Interested Party as Speaker of the Nairobi County Assembly was null and void on the ground that at the time of the election the County Assembly was not properly constituted as envisaged by article 177 of the Constitution.

Issues

- i. Whether the election of a Speaker of a County Assembly could be subjected to the election dispute resolution mechanism envisaged by the Elections Act.
- ii. Whether the election and removal of the Speaker was the same as that of other members of the County Assembly.
- iii. What were the circumstances under which a Speaker of a County Assembly could be removed?
- iv. Whether the Court could invalidate the election of a speaker where some seats of the County Assembly had not been filled.
- v. Whether the High Court had jurisdiction to entertain an application for removal of a County Speaker.

Constitutional Law – election – election of County Assembly Speaker – where the Speaker was elected while the seats for nominated members of the County Assembly had not been filled – whether in the circumstances the Court could nullify the election – the Constitution of Kenya, 2010, articles 165, 177, 178(3), 194(1)(c).

Jurisdiction – jurisdiction of the High Court – scope of jurisdiction of the High Court in removal of County Assembly Speaker – where the election of the County Speaker was contested – whether in the circumstances the High Court could order removal of the Speaker – Constitution of Kenya, 2010, article 165.

Article 177 of the Constitution of Kenya, 2010 provided as follows:-	1
“177(1) A county assembly consists of—	
(a) members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;	5
(b) the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;	10
(c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and	15
(d) the Speaker, who is an <i>ex officio</i> member.	
(2) The members contemplated in clause (1)(b) and (c) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with Article 90.	20
(3) The filling of special seats under clause (1)(b) shall be determined after declaration of elected members from each ward.	
(4) A county assembly is elected for a term of five years.”	25

Held:

1. Article 165(3) of the Constitution donated to the High Court extensive jurisdiction but expressly barred the Court from hearing and determining disputes relating to employment and labour relations; and the environment and the use and occupation of and title to land. The Court was also denied jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court under the Constitution. In such circumstances the Court’s boundaries were clearly delineated by the Constitution and the Court would be usurping the powers of other courts were it to delve into those exclusive areas. However, there were times when the issue of jurisdiction was not very clear and the Court had to carry out further enquiry in order to establish its boundaries. That was the situation in the instant case. 30 35 40
2. Where the Constitution or legislation provided a procedure for settling a dispute, such procedure had to be adhered to.

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3. It had to be noted from the outset that the Speaker was an *ex-officio* member of the County Assembly. The fact that he was an *ex-officio* member meant that he was a member by virtue of his office. He was not like the other members who became members after undergoing certain electoral processes. 1
4. Since the election of a Speaker of a County Assembly was in a class of its own, the only way to understand whether the Speaker was like the other members of a County Assembly was to study the law relating to the removal of the Speaker. 5
5. Article 178(3) of the Constitution clearly mandated Parliament to enact legislation providing for the election and removal from office of Speakers of County Assemblies. The Constitution did not therefore provide for the election and removal of Speakers of County Assemblies. 10
6. The makers of the Constitution intended that the procedures and the grounds for the removal of a Speaker and the other members of a County Assembly had to be different. The procedure for the election of a Speaker of a County Assembly was set out in the First Schedule of the Elections Act. The removal of a Speaker from office was contained in section 21(5) of the Elections Act. 15
7. Comparing the grounds for the removal of the other members of a County Assembly with those for removal of the Speaker, it was clear that the grounds were not the same. Article 194(1)(c) of the Constitution provided that the office of a member of a County Assembly became vacant if the member was removed from office under the Constitution or legislation enacted under article 80 of the Constitution. A removal under the Constitution would include a removal through an election petition. For a Speaker, unlike the other members, he could only be removed, if he violated the Constitution. That did not include a removal through an election petition since that would amount to a removal under the Constitution. 20
8. The Judiciary in a constitutional democracy could overturn the election of the Speaker of Parliament. The removal of the Speaker of Parliament through the judicial process applied to the removal of the Speaker of a County Assembly. 25
9. When the election of a Speaker did not comply with the Constitution and or legislation, the High Court could overturn such an election. The removal of the Speaker could thus be done by use of other procedures apart from an election petition. 30
10. Where a County Assembly failed to remove a Speaker and the Speaker had clearly violated the Constitution and or legislation, the 35
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Court, if properly moved, could not hesitate to affirm and establish the rule of law by removing the Speaker.	1
11. The High Court was mandated to interpret, protect and enforce the Constitution and the laws made thereunder and it could not shy away from fulfilling its mandate. However, that was a power that had to be exercised with extreme caution to avoid vexatious applications aimed at destabilizing the operations of County Governments.	5
12. The intention of Parliament was that a Speaker should be removed by the County Assembly. A dispute concerning the election of a Speaker of a County Assembly was not required to be addressed through an election petition. The best means for addressing such a dispute was through a judicial review application or constitutional petition.	10
13. The rules of procedure had to be adhered to. Not every rule of procedure had become a technicality to be dispensed with by quoting article 159(2)(d) of the Constitution. The Court had to consider the import of non-compliance with a rule of procedure before deciding whether non-compliance was a mere technicality.	15
14. A court of law could not allow the substance of a matter to be clouded by technicalities. The rules of procedure were meant to aid the Court in reaching a just decision. If failure to comply with a certain procedural requirement was not prejudicial to the other party, there was no reason for not overlooking such a provision. The failure by the applicants to exhibit the impugned decision was not in the circumstances of the instant case fatal to their application.	20
15. The election of a speaker in the absence of nominated members of Parliament was lawful. It was agreed that some seats had not been filled at the time of the election of the Speaker. However, there was nothing in the Constitution indicating that the absence of a certain category of members of the County Assembly could paralyze the operations of the Assembly. The Court would be putting its own words into the Constitution were it to find that the absence of some members had invalidated the proceedings of the Assembly. The absence of certain categories of the members of the County Assembly did not in any way make the election of the Speaker illegal or unconstitutional.	25
16. The public body whose decision was being challenged through the instant proceedings was not before the Court. The proper respondent could have been the Clerk of Nairobi County Assembly being the person mandated to preside over the election of the Speaker. The Assembly was only an interested party since its affairs	30
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- would have been affected by the outcome of the case. 1
17. A public body whose decision was being questioned by an applicant had to be made a Respondent to a judicial review application. The Applicants had named the wrong respondents. Their Application therefore had to fail. 5
18. **Obiter** - "In future the Commission should ensure that the nominated members are gazetted at the same time with the elected members so that they can equally participate in the business of the County Assembly starting with the election of the Speaker." 10
- Petition dismissed with no order as to costs.*

Cases

East Africa

1. *Baraza, Nancy v Judicial Service Commission* Petition No 23 of 2013 – (Explained) 15
2. *Frankline v Interim Clerk of Machakos County Assembly & 4 others* Election Petition No 5 of 2013 – (Followed)
3. *Kones v Republic & another ex-parte Kimani Wanyoike & 4 others* [2006] 2 KLR 266; (2008) 3 KLR [EP] 291 – (Followed) 20
4. *Macharia & another v Kenya Commercial Banks & 2 others* [2012]3KLR 199 – (Followed)
5. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal No 290 of 2012 – (Followed)
6. *Parsimei, Francis Gitau & 2 others v National Alliance Party & 4 others* Petition Nos 356 and 359 of 2012 (Consolidated) – (Explained) 25
7. *Ngoge, Peter O v Francis Ole Kaparo & 4 others* Miscellaneous Civil Application No 22 of 2004 (OS)
8. *Republic v National Environmental Management Authority* Civil Appeal No 84 of 2010 – (Followed) 30
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1. *Moyo and others v Zvoma and another* [2010] ZWHHC 28 – (Followed) 35

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1. Constitution of Kenya, 2010 articles 87, 88, 159(2) (d) 165(3) (5);

177; 178(3); 194(1) (c); 200 – (Interpreted)	1
2. County Governments Act, 2012 (Act No 17 of 2012) sections 11, 14(2) (a); 19; 138(3) – (Interpreted)	
3. Civil Procedure Rules, 2010 (cap21 Sub Leg) rule 7(1) order 53 – (Interpreted)	5
4. Elections Act, 2011 (Act No 24 of 2011) sections 21(5); 36(4); 75(1)(1A); 76(1)(a) – (Interpreted)	
5. Elections (Parliamentary and County Elections) Petition Rules, 2013 (Act No 24 of 2011 Sub Leg) rule 9 – (Interpreted)	
6. Transition to Devolved Government Act, 2012 (Act No 1 of 2012) section 4 – (Interpreted)	10

Advocates

1. <i>Prof Tom Ojienda</i> , Senior Counsel, for the 1st Respondent and the 1st Interested Party	15

August 28, 2013, **WK Korir, J** delivered the following Judgment.

On 22nd March, 2013 the 2nd Interested Party, the Assembly of Nairobi County (the Assembly) held its first sitting following the General Election held on 4th March, 2013. At that sitting, Alex Ole Magelo was elected the Speaker of the Assembly. He is the 1st Interested Party in these proceedings.

Crispus Fwamba and Benjamin Hinga Njeri, the 1st and 2nd *ex parte* Applicants (the Applicants) have approached this court for certain orders amounting to a declaration that the election of the 1st Interested Party is null and void on the ground that at the time of the election the Assembly was not properly constituted as envisaged by article 177 of the Constitution.

The 1st Respondent is the Transitional Authority (the Authority) and the 2nd Respondent is the Independent Electoral Boundaries Commission (the Commission). The Attorney General is the 3rd Interested Party. The Attorney General though duly served did not participate in these proceedings.

The Authority is a body corporate established under section 4 of the Transition to Devolved Government Act (Act No 1 of 2012) and its core function is to facilitate and co-ordinate the transition to the devolved system of government in accordance with the Constitution.

The Commission is a body created by article 88 of the Constitution and its general responsibility is conducting or supervising referenda and elections to any elective body or office established by the Constitution,

and any other elections as prescribed by an Act of Parliament. 1

After the Applicants obtained leave to commence these judicial review proceedings they proceeded to file a notice of motion application dated 4th April, 2013 in which they seek orders as follows:- 5

- A. An order of *Certiorari* to remove to this Honourable Court and quash the decision of the Transitional Authority, the 1st Respondent herein in ordering the elections of the speaker of the County Assembly for Nairobi County by an improperly constituted County Assembly. 10
- B. An order of Mandamus compelling the 1st Respondent to order fresh elections of the speaker of the County speaker (*sic*) of the County Assembly for the Nairobi County Assembly to facilitate the proper election of a person to that office by a properly constituted and inclusive county Assembly. 15
- C. An order of Mandamus compelling the 1st Respondent to declare the seat for speaker of the County Assembly, (Nairobi County) vacant and to re-advertise the same to allow election of such speaker by a properly constituted county Assembly. 20
- D. An order of Prohibition directed at the 2nd Respondent prohibiting it from issuing and/or Gazetting any person as the elected speaker of the county Assembly for Nairobi County. 25
- E. Costs.

The Application is supported by grounds on its face and a supporting affidavit sworn by the 1st Applicant on the date of the application. 30
It is also supported by a statutory statement and the 1st Applicant's verifying Affidavit which were filed in court on 27th March, 2013 in support of the chamber summons application for leave.

The Applicants' case is clearly brought out by the grounds, as contained in the statutory statement, upon which the Application relies. The grounds are:- 35

- 1. That the Applicants are aggrieved by the elections held for the office of the speaker of the County Assembly in Nairobi County as the said county assemblies are not properly constituted as provided by the Constitution. 40
- 2. That only a properly constituted county assembly can

hold elections for the office of the speaker of the County Assembly which was not the case in the recently held elections for speaker of county Assembly in Nairobi County.	1
3. That in carrying out the elections for the office of the speaker of the county assembly, the clerks to the respective county assembly is in breach of the Constitutional provisions in regard to ensuring proper & inclusive membership of the county assembly is achieved.	5
4. That the Transitional Authority overlooked the constitutional provisions governing county assemblies and did not properly fulfill its constitutional mandate in regard to the same acted ultra vires the relevant law and the Constitution and thus the resultant decision being rendered null and void.	10
5. That the business being carried out by the county assemblies in Nairobi County is unconstitutional as only duly elected constitutional office holders are capable of carrying out such duties in compliance with the Constitution.	15
6. That the Applicants' rights in regard to proper representation in the county assembly as voters have been violated.	20
7. That this Honourable Court is bestowed with the power to check and control constitutional compliance by all persons and bodies.	25
8. That this Honourable Court ensures that everyone has the right to an effective remedy for all actions that are in violation of the constitutional safeguards in place and as guaranteed by the Constitution.	30
9. That this court has the powers to grant the orders sought.	
Looking at the papers filed in court by the Applicants, it is clear that their case is that the election of the 1st Interested Party by the Assembly is null and void since at the time of the election the Assembly was not properly constituted as stipulated by article 177 of the Constitution. Article 177 provides for the membership of a county assembly as follows:-	35
"177(1) A county assembly consists of—	40
(a) members elected by the registered voters of the wards, each ward constituting a single member	

constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;	1
(b) the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;	5
(c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and	10
(d) the Speaker, who is an ex officio member.	
(2) The members contemplated in clause (1)(b) and (c) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with article 90.	15
(3) The filling of special seats under clause (1)(b) shall be determined after declaration of elected members from each ward.	20
(4) A county assembly is elected for a term of five years. ”	
The Applicants argue that the Authority acted illegally by calling for the election of the speaker of the Assembly before it was properly constituted in compliance with article 177.	25
The Applicants have roped in the Commission as the body “mandated to gazette all duly elected persons in their respective capacities in any given election within the Republic of Kenya”	
The Authority and the Assembly were represented by Professor Tom Ojienda. The Authority opposed the application through a replying Affidavit sworn by its CEO/Secretary, Mr Stephen Makori on 15th May, 2013. The 2nd Interested Party opposed the application by way of a replying affidavit sworn on 15th May, 2013 by the Governor of Nairobi County, Dr Evans Odhiambo Kidero.	30
Through the said Affidavits the Authority and Nairobi County oppose the application on the ground that the applicants have not established that they acted illegally, unreasonably or unfairly so as to merit the grant of the orders sought. They also assert that this Court lacks jurisdiction to hear this Application since the same challenges the election of a member of a county assembly and the proper forum provided by the law for such a challenge is before a Resident	35
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Magistrate's Court designated by the Chief Justice to hear an election petition. It is the Authority's case that in exercise of powers conferred upon it under section 138(3) of the County Governments Act (Act No 17 of 2012) it appointed interim county clerks to preside over the election of speakers for the county assemblies and in compliance with article 178(1) of the Constitution it advertised for the position of speaker of Nairobi County. It is the Authority's case that the 1st Interested Party's election was procedural, lawful and complied with the provisions of the First Schedule of the Elections Act, 2011. The Authority submitted that the first meeting of county assemblies after the first General Election under the Constitution promulgated on 27th August, 2010 was to be held within 14 days from the date of the Gazettement of the results of the General Election by the Commission. The Authority contended that a county assembly is required to elect its speaker in its first meeting before conducting any other business and that was what was done in respect to the election of the 1st Interested Party. The Authority argued that on the other hand section 36(4) of the Elections Act requires the Commission to designate within 30 days after the declaration of the election results, from each qualifying list, the party representatives on the basis of proportional representation. The Authority's case is that there was no illegality in proceeding with the election of the speaker in the absence of county assembly members to be nominated for the gender top up and special seats created by the Constitution.

It is the Authority's position that section 14(2)(a) of the County Governments Act takes care of the absence of certain members by providing that;

“a vacancy in the membership of county assembly does not invalidate county assembly proceedings. ”

The Authority finally argued that the application before this court is defective since the applicants have not submitted to the Court the decision they are asking this court to quash.

The Governor of Nairobi County adopted the Authority's position in regard to the application.

The Commission filed grounds of opposition dated 23rd April, 2013. Its grounds of opposition are:-

- “1. This Honourable Court lacks jurisdiction to determine the Application.
2. The Speaker of Nairobi County Assembly was lawfully

electd and has therefore gained the right to be Gazetted.	1
3. The 2nd Respondent has wrongfully been joined to these proceedings.	
4. The Application is frivolous, misconceived and an abuse of the Court process. ”	5
The Commission submitted that under article 177(1) of the Constitution, the speaker is an <i>ex-officio</i> member of a county assembly and in accordance with section 75(1A) of the Elections Act	
“A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice. ”	10
It is Commission’s case that this court is not a Resident Magistrate’s Court designated by the Chief Justice and it is therefore not clothed with jurisdiction to hear this matter. The Commission further submits that where the Constitution or statute provides a procedure for seeking a remedy then that procedure should be followed and this court should restrain itself from interfering with that process.	15
In support of this argument the Commission cited the decision of this Court (Majanja, J) in <i>Francis Gitau Parsimei & others v National Alliance Party and others</i> [2012] eKLR where it was stated that:-	20
“It is against this background that the Court of Appeal established the principle that where the Constitution and or statute establish a dispute resolution procedure, then that procedure must be used. Within the rubric of electoral process, that principle has been emphasized time and again. ”	25
Counsel for the Commission also referred this Court to the decision of the Court of Appeal in <i>Kipkalya Kiprono Kones v Republic & another Ex-Parte Kimani Wanyoike & 4 others</i> [2008] 3 KLR [EP] 291 where it was held that :-	30
“The jurisprudence underlying these decisions is that the Constitution itself and the National Assembly and Presidential Election Act deal with and set out in detail the procedure of challenging elections and nominations to the National Assembly. Those procedures ought to be followed and the judicial review process which in Kenya is provided for in the Law Reform Act, Chapter 26 of the Laws of Kenya and order 53 of the Civil Procedure Rules cannot oust the provisions of the Constitution in particular. The Law Reform Act and order 53 of the Civil Procedure Rules are both	35
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inferior to and can only apply subject to the provisions of the Constitution. ” 1

The second ground upon which the Commission opposed the application is that it has wrongfully been enjoined to these proceedings. The argument is that there is no claim, allegation or complaint made against it and neither have the applicants demonstrated that it has breached or threatened to breach the Constitution or any law. It is the Commission’s case that its role in relation to the election of a county assembly speaker ends once it determines the place, the date and the time of the first sitting as required by section 136 of the County Governments Act. 5 10

The Commission submits that Paragraph 3 of the First Schedule of the Elections Act provides that the clerk of the county assembly shall preside over the election of the speaker and if any Gazettement is to be done then it should be done by the clerk of a county assembly and not the Commission. It is the Commission’s case that there is no legal provision that mandates it to gazette an elected speaker and the claim that it was about to gazette the 1st Interested Party was not based on any fact or legal provision. 15 20

The Commission further submitted that the fact that it had been wrongfully joined in these proceedings confirms that this Application is intended to be an election petition. The Commission referred to rule 9 of the Elections (Parliamentary and County Elections) Petition Rules 2013 which provides that it shall be a respondent in an election petition filed under the Act. The Commission asserted that its enjoyment to these proceedings by the applicants demonstrates that this is an election petition which ought to have been filed in a Resident Magistrate’s Court designated to hear election petitions. 25 30

On the issue of the election of the 1st Interested Party, the Commission submitted that he was lawfully elected in accordance with the Standing Orders of the Assembly. The Commission cited various statutory provisions to buttress this argument. These are the provisions already cited by the Authority in its submissions and I need not reproduce them. 35

As to why it thinks the Application is frivolous, misconceived and an abuse of the Court process, the Commission submitted that an order of prohibition is not available to the applicants because the election of the 1st Interested Party was lawful. The Commission also argues that 40

since it has no mandate to gazette the election of the 1st Interested Party, the prayer for an order of prohibition by the applicants is frivolous and an abuse of the Court process. 1

The 1st Interested Party, Alex Sanaika Ole Magelo opposed the Application through a replying Affidavit sworn on 23rd April, 2013. 5
Through the said Affidavit he contends that the right procedure for the election of a county assembly speaker as provided by the Constitution, the Elections Act and the County Governments Act was duly followed in his election as the speaker of the County Assembly of Nairobi. 10
He argues that the remedy of judicial review is not available to the Applicants since he is a member of a county assembly and any dispute relating to his election is an election dispute which ought to be dealt with through the procedure for redress of election disputes prescribed by article 87 of the Constitution and the Elections Act. He therefore 15
argues that this court has no jurisdiction to entertain this application.

The 1st Interested Party submitted that the application before court is premature in that the applicants are challenging the results of his election before Gazettement of the results. Another objection to this cause is that the applicants have failed to prove that the respondents herein have made a decision detrimental to their interest which is capable of being investigated by way of judicial review or capable of being quashed by orders of certiorari and they have therefore failed to properly invoke the jurisdiction of the Court to issue the orders sought. 20
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The 1st Interested Party submits that an order of mandamus is not available to the Applicants in that they seek to compel the Authority to declare a seat of a county assembly vacant yet the procedure for declaring a seat of a county assembly vacant is only as provided by section 11 of the County Governments Act. The 1st Interested Party strongly submitted on the validity of his election and referred the Court to the provisions of the law cited by the respondents and the 2nd Interested Party. 30

The 1st Interested Party finally urged this court to consider the ramifications of allowing the application since the elections of the speakers of the other 46 counties were conducted under conditions similar to those of his election. 35

In reply to the submissions of the respondents and the interested parties, the applicants submitted that in accordance with article 165(3) of the Constitution, this court has unlimited original jurisdiction in 40

criminal and civil matters and this jurisdiction cannot be ousted, subverted, thwarted, undercut or limited by an Act of Parliament. It is the applicants' argument that electoral disputes are not categorized as among matters in which the High Court has no jurisdiction. The applicants argue that even though article 87 of the Constitution mandates Parliament to enact legislation to establish mechanisms for timely settling of electoral disputes, the High Court is not denied the opportunity to hear and determine electoral disputes. The Applicants sought to distinguish this matter from the decisions cited and argued that the election of speaker of a county assembly is not equivalent to the election of a member of a county assembly. The Applicants argue that the election of a county assembly speaker is not an election within the meaning of the Elections Act. Citing sections 75(1) and 75(1A) the Applicants argue that there is nothing in the said sections to show that a dispute involving the election of a speaker of a county assembly should be heard and determined by a Resident Magistrate's Court. The Applicants assert that if Parliament intended that disputes involving the election of a speaker should be heard by a Resident Magistrate's Court then it would have expressly said so. This Court was referred to the decision in the High Court Petition No 23 of 2013 *Lady Justice Nancy Baraza v The Judicial Service Commission* [2012] Eklr where the Court observed that:-

“If the Parliament, in its wisdom intended the process for removal of Deputy Chief Justice to be the same as that of removing the Chief Justice, nothing would have prevented it from saying so. ”

The Applicants reiterated that this is a judicial review application and this Court is properly seized of the matter.

Looking at the submissions made before this Court I am of the view that the issues for determination are:-

1. Whether this Court has jurisdiction to hear and determine this matter;
2. If the answer to the above is in the affirmative, whether there is a proper judicial review application before this Court;
3. If the foregoing questions are answered in the affirmative then the other issue would be whether the election of the 1st Interested Party as the speaker of the County Assembly of Nairobi breached article 177 of the Constitution or other provisions of the Constitution; and

4. Who should meet the costs of this Application?	1
It is now established law that where a question of the Court's jurisdiction has been raised, the Court should first carry out an enquiry to establish its jurisdiction before doing anything else. If a court finds that it has no jurisdiction, it should abandon the matter without any further action. In the case of <i>Samuel Kamau Macharia & another v Kenya Commercial Banks & 2 others</i> [2012] eKLR The Supreme Court addressed the issue of jurisdiction as follows:-	5
"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings..... Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law. "	10 15 20 25
I entirely agree with the decision of the Supreme Court. Article 165(3) of the Constitution donates to this court extensive jurisdiction but expressly bars the Court from hearing and determining disputes relating to employment and labour relations; and the environment and the use and occupation of, and title to, land. The Court is also denied jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court under the Constitution – see article 165(5). In such circumstances this Court's boundaries are clearly delineated by the Constitution and the Court would be usurping the powers of other courts were it to delve into those exclusive areas. However, there are times when the issue of jurisdiction is not as clear as day and night and the Court will have to carry out further enquiry in order to establish its boundaries. That is the situation in the case	30 35 40

before me. There is therefore need to carry out further interrogation on the matter of jurisdiction. 1

I have already reproduced at length, the stand points of the parties herein in regard to the issue of jurisdiction. The Respondents and interested parties are of the view that this is an election dispute and the correct forum is a Resident Magistrate's Court designated by the Chief Justice for hearing such disputes. The applicants think otherwise. 5

From the outset it should be noted that these judicial review proceedings are in essence aimed at removing the 1st Interested Party from the position of the speaker of the County Assembly of Nairobi. I agree with the sentiments of the Court of Appeal in the already cited case of Kipkalya Kones that where the Constitution or legislation provides a procedure for settling a dispute, that procedure should be adhered to. The Court of Appeal re-emphasized this position in the recent case of *Republic v National Environmental Management Authority*, Court of Appeal at Nairobi, Civil Appeal No 84 of 2010 when, it stated that:- 10

“Mr Ngatia, for the appellant, did not contend before the trial Judge or before us that there was no right of appeal against the Respondent's order of 20th January, 2009; what Mr Ngatia maintained before the trial Judge as well as before this Court is that in spite of the right of appeal provided under section 129 of the Act the Appellant was entitled to approach the High Court by way of judicial review. The trial Judge, as we have stated, agreed with that contention but went on to consider whether the orders sought should be granted and why those orders were preferred over the appeal process. She also held that the Appellant had not explained why the process of judicial review was preferred over the appeal process..... 20

We agree with Mr Ngatia that the issue raised in the Appellant's notice of motion were in the domain of public law. But we do not accept that once a matter falls within the public law domain, judicial review is the only way to litigate upon it or it must be through the judicial review process. As we pointed out earlier, Mr Ngatia did not contend that the matter fell outside the jurisdiction of the Tribunal specifically created to deal with disputes concerning the environment. 25

The Tribunal itself is a public body created by statute to administer the appeal process under the Act; it cannot deal with matters concerning private law for instance. The learned 30 35 40

Judge was merely weighing the issue of whether the High Court was in a better position to deal with the matter than the Tribunal. She dealt with the speed or pace at which the Tribunal would be able to resolve the matter and compared that with the speed or pace which would be adopted by the busier courts. She dealt with the expertise available in the Tribunal as against the High Court and such like matters and having taken all those considerations into account, she concluded that the matter ought to have been dealt with by way of an appeal rather than by way of judicial review. The Judge backed up her decision with authorities.....

The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it – see for example *R v Birmingham City Council, ex Parte Ferrero Ltd* Case. The learned trial Judge, in our respectful view, considered these strictures and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect, we agree with the Judge. ”

I entirely agree with the position of the Court of Appeal. What I will embark on at this stage is to establish whether the election of a speaker of a county assembly is an election to be subjected to the election dispute resolution mechanism envisaged by the Elections Act. If at the end of the journey I find that a dispute concerning the election of the speaker of a county assembly should be determined by an election court, then I will have no alternative but to down my judicial review tools.

It must be noted from the outset that the speaker is an ex-officio member of the County assembly. The fact that he is an ex-officio member means that he is a member by virtue of his office. He is not like the other members who become members after undergoing certain

electoral processes. Majanja, J correctly captured the unique position of a speaker of a county assembly in Election Petition No 5 of 2013 *Frankline v Interim Clerk of Machakos County Assembly and 4 others* when he observed at paragraph 50 of his judgment that:-

“The Petitioner’s rights under article 38 must be adjudicated in the context of the doctrine of separation of powers and the constitutional and legislative provisions that govern the organization of the county assembly which I have set out above. In this respect I agree with Mr Kilukumi that the election of a speaker is an election *sui generis*. A plain reading of article 38 as read with articles 178 and 196, the County Government Act, the Elections Act, 2011 and the Standing Orders do not envisage the election of the speaker as one based on universal suffrage; it is an internal election for speaker governed by special rules contained in the First Schedule to the Elections Act, 2011 and the Standing Orders which are all underpinned by statutory and constitutional provisions I have cited. The County Assembly, as a legislative assembly, is entitled to regulate its own proceedings including the election of the speaker. ”

Since the election of a speaker of a county assembly is *sui generis*, the only way to understand whether the speaker is like the other members of a county assembly is to study the law relating to the removal of the speaker. The best starting point is the Constitution. Article 178 refers to the speaker of a county assembly and states that:-

- “178(1) Each county assembly shall have a speaker elected by the county assembly from among persons who are not members of the assembly.
- (2) A sitting of the county assembly shall be presided over by—
- (a) the speaker of the assembly; or
- (b) in the absence of the speaker, another member of the assembly elected by the assembly.
- (3) Parliament shall enact legislation providing for the election and removal from office of speakers of the county assemblies. ”

Article 178(3) clearly mandates Parliament to enact legislation providing for the election and removal from office of speakers of county assemblies. The Constitution does not therefore provide for the election and removal of speakers of county assemblies.

When it comes to the “proper” members of the County assembly, the Constitution at article 194 provides for the vacation of office as follows:- 1

- “194(1) The office of a member of a county assembly becomes vacant— 5
- (a) if the member dies;
 - (b) if the member is absent from eight sittings of the assembly without permission, in writing, of the speaker of the assembly, and is unable to offer satisfactory explanation for the absence; 10
 - (c) if the member is removed from office under this Constitution or legislation enacted under article 80;
 - (d) if the member resigns in writing addressed to the speaker of the assembly; 15
 - (e) if, having been elected to the assembly—
 - (i) as a member of a political party, the member resigns from the party, or is deemed to have resigned from the party as determined in accordance with the legislation contemplated in clause (2); or 20
 - (ii) as an independent candidate, the member joins a political party;
 - (f) at the end of the term of the assembly; or 25
 - (g) if the member becomes disqualified for election on grounds specified in article 193(2).
- (2) Parliament shall enact legislation providing for the circumstances under which a member of a political party shall be deemed, for the purposes of clause (1) (e), to have resigned from the party. ” 30

Looking at the cited provisions of the Constitution, it is clear that the makers of the Constitution intended that the procedures and the grounds for the removal of a speaker and the other members of a county assembly should be different. The procedure for the election of a speaker of a county assembly is set out in the First Schedule of the Elections Act. The removal of a speaker from office is contained in section 21(5) of the Elections Act which provides that:- 35

- “(5) The office of speaker of a county assembly shall become vacant— 40
- (a) when a new county assembly first meets after an

election;	1
(b) if the office holder vacates office;	
(c) if the county assembly resolves to remove the office holder by a resolution supported by the votes of at least two-thirds of its members;	5
(d) if the office holder resigns from office in a letter addressed to the county assembly;	
(e) where the office holder violates the Constitution;	
(f) in the case of gross misconduct on the part of the office holder;	10
(g) where the office holder is incapable, owing to physical or mental infirmity, to perform the functions of the office;	
(h) where the office holder is bankrupt;	15
(i) where the office holder is sentenced to a term of imprisonment of six months or more; or	
(j) if the officer holder dies. ”	
Comparing the grounds for the removal of the other members of a county assembly with those for removal of the speaker, it becomes clear that the grounds are not the same. Of importance to note, is that article 194(1)(c) provides that the office of a member of a county assembly becomes vacant	20
“if the member is removed from office under the Constitution or legislation enacted under Article 80”	25
A removal under the Constitution would include a removal through an election petition. For a speaker, unlike the other members, he can only be removed, if he violates the Constitution. This in my view does not include a removal through an election petition since that would amount to a removal under the Constitution.	30
The procedure for removal of a speaker of a county assembly as captured by section 21(5) of the Elections Act compares well with the laws of other Commonwealth jurisdictions. Writing on election laws in India, P DT Achary at page 207 of Bharat’s Law of Elections, 1st Edition, Bharat Law House, 2004 observed that a speaker or deputy speaker could only vacate office as follows:-	35
“A member holding office as Speaker or Deputy Speaker of the House of the People-	40
a. shall vacate his office if he ceases to be a member of the House of the People;	

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- b. may at any time, by writing under his hand addressed, if such member is the Speaker, to the deputy Speaker, and if such member is the Deputy Speaker, to the Speaker resign his office; and 1
 - c. may be removed from his office by a resolution of the House of the People passed by a majority of all the then members of the House: 5

Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution: 10

Provided further that, whenever the House of the People is dissolved, the Speaker shall not vacate his office until immediately before the first meeting of the House of the People after the dissolution. " 15

Nowhere is the removal of a speaker by way of an election petition mentioned in the said book.

There are other reasons which make me think that the removal of a speaker through an election petition is not accommodated by the electoral laws that have been enacted. In an election petition, the Commission must be made a respondent - see paragraph 9 of the Elections (Parliamentary and County Elections) Petition Rules, 2013. However, the Commission does not in any way participate in the election of a speaker. How then can it be made a party to proceedings for which it plays no role? This should point to the conclusion that the election of a speaker of a county assembly cannot be challenged through an election petition. 20 25

It is also noted that legislation does not provide for Gazettement of the election of a county speaker. Yet section 76(1)(a) provides that; 30
 "A petition - to question the validity of an election shall be filed within twenty eight days after the date of the publication of the results of the election in the Gazette"

Since the election of a speaker is not subject to Gazettement how and when will the 28 days start running? When can a person aggrieved by the election of a speaker lodge an 'election petition'? 35

I also managed to get one decision from the Supreme Court of Zimbabwe which shows that the judiciary in a constitutional democracy like ours can overturn the election of the speaker of parliament. I am persuaded by the said decision and I hold that the 40

removal of the speaker of parliament through the judicial process applies to the removal of the speaker of a county assembly. In the cause of *Moyo and others v Zvoma and another*, (SC 28/10) [2011] ZWSC (10 March 2011), the Supreme Court of Zimbabwe held that the election of the speaker of Parliament could be challenged through the judicial process. The genesis of this case is that after the general election of 2008 the election of the Speaker of the House of Assembly/Parliament was challenged on the ground that the Speaker had not been elected through a secret ballot as dictated by the Constitution and the parliamentary standing orders. It was not disputed that six members had openly displayed their marked ballot papers before depositing them in the ballot box. The High Court dismissed the matter but on appeal, the Supreme Court in a majority judgement quashed the decision and held that the election of the speaker was illegal since it had not been conducted through a secret ballot as required by the Constitution and legislation.

The decision of the Supreme Court of Zimbabwe clearly shows that when the election of a speaker does not comply with the Constitution and or legislation, the Court can overturn such an election. The decision from Zimbabwe also confirms that the removal of the speaker can be done by use of other procedures apart from an election petition. In the said case the proceedings were commenced in the High Court through an application for judicial review and not an election petition although the complaint was that the laws relating to the election of a speaker had been overlooked by the parliamentary clerk who had conducted the elections.

The finding by the Supreme Court of Zimbabwe that courts can entertain a challenge to the election of a speaker was affirmed in passing by J G Nyamu, J (as he then was), R Wendoh and G A Dulu, JJ in *Peter O Ngoge v Francis Ole Kaparo & others* [2007] eKLR when they stated that:-

“The invitation to the Court to intervene in the matter of the election of a Speaker which is clearly regulated by the Standing orders and which is required to be the first item of the agenda of a new session would in itself be a clear breach of the Constitution in that it is not the function of this court to interfere with the internal arrangements of Parliament unless they violate the Constitution. The doctrine of separation of powers as regards the internal arrangements of Parliament demands that we do not interfere with and such

internal arrangement. The internal arrangements are those normally regulated by the Standing Orders of the House. There cannot therefore be a valid cause of action based on what would clearly be a violation of the Constitution by the Court if it was to intervene. The declarations and orders sought in this regard would be plainly in contravention of the Constitution. Moreover, it would result in the Court interfering with the immunity granted to Parliament on such internal matters which have nothing to do with any violation of the Constitution. The powers, privileges and immunities of Parliament are provided for by the National assembly (Powers and Privileges and Immunities Act Cap 6 Laws of Kenya). Our view is that the Court would only be entitled to intervene to uphold the provisions of the Constitution. An application which in substance invites the Court to violate a constitutional provision or doctrine of separation of powers is itself an abuse of the Court process, and is also incompetent and ought to be dealt with summarily. ” (The underlining is mine for emphasis).

In my view, where a county assembly fails to remove a speaker and the speaker has clearly violated the Constitution and or legislation, the Court, if properly moved, should not hesitate to affirm and establish the rule of law by removing the speaker. This Court is mandated to interpret, protect and enforce the Constitution and the laws made thereunder and it should not shy away from fulfilling its mandate. However, this is a power that should be exercised with extreme caution lest the Courts are inundated with spurious and vexatious applications aimed at destabilizing the operations of County Governments. It must always be borne in mind that the intention of Parliament is that a speaker should be removed by the county assembly.

One may then ask why the election of a speaker of a county assembly has been included in the Elections Act. In my humble view, such inclusion was just a matter of convenience. It can be compared to the inclusion of order 53 in the Civil Procedure Rules. This Order which deals with judicial review applications has no nexus with the other Civil Procedure Rules.

In summary, I express a guarded view that a dispute concerning the election of a speaker of a county assembly need not be addressed through an election petition. The best means for addressing such

a dispute is through a judicial review application or constitutional petition. On the issue as to whether this Application is properly before this Court, I therefore find and hold that the applicants have knocked on the right door. This court has jurisdiction to entertain their application and I will proceed to consider the same.

The second issue is whether these judicial review proceedings are defective. Judicial review proceedings are normally brought under strict rules found in order 53 of the Civil Procedure Rules, 2010. Much as article 159(2)(d) of the Constitution now directs the focus of the Court on the substantive justice, the rules of procedure cannot be ignored. The Court of Appeal had an opportunity to address this issue in the recent case of *Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others*, Nairobi Civil Appeal No 290 of 2012 where it observed that:-

- (41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude *ex ante* is to miss the point.
- (42) However, our analysis cannot end at that level of generality. It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in *Anarita Karimi Njeru (supra)* underscores the importance of defining the dispute to be decided by the Court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to article 159 of the Constitution and the overriding

objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the Court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru (supra)* that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. ”

I agree with Court of Appeal that the rules of procedure should be adhered to. Not every rule of procedure has now become a technicality to be dispensed with by quoting article 159(2)(d) of the Constitution. The Court should consider the import of non-compliance with a rule of procedure before deciding whether non-compliance is a mere technicality.

In opposition to this application, the respondents and interested parties submitted that the Application is bad in law since the applicants did not comply with the provisions of rule 7(1) of order 53 of the Civil Procedure Rules, 2010 (CPR). The rule provides that:-

“7(1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the Applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by Affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court. ”

The decision being challenged in these proceedings is the election of the 1st Interested Party. That decision was not Gazette and is not in the public domain. The Respondents and the interested parties have not denied the existence of the decision. The rule, however, gives an Applicant the option of accounting for the failure to lodge a copy of the decision with the Court. The Applicants did not utilize this alternative. It is clear that the applicants were careless in the manner in which they presented their application to court. However, I think it would be paying too much respect to the rules of procedure were

this court to dismiss this matter on the ground that the challenged decision has not been availed to the Court. I will therefore invoke article 159(2)(d) of the Constitution in order to save their application. In doing so, I am persuaded by the decision of J G Nyamu, J (as he then was) and R Wendoh, J in the case of *Republic v Returning Officer, Kamunkunji Constituency and another ex-parte Simon Nganga Mbuguah* [2008] Eklr in which they observed that :-

“In our view, order 53 rule 7 of the Civil Procedure Rules is only confined to the production of the formal orders specified therein either at the stage of leave or at the hearing stage and it does not apply to all other situations where it is clear that a decision has been made that on the ground that some decision has been acted on, yet it has no formal existence.....

Judicial review is perhaps the most powerful invention for the enforcement of the rule of law. It need not succumb to such technicalities especially taking into account that, parties to a judicial review are partners of the Court and have, a duty of disclosure to the Court of all material facts. In this case the respondents have clearly admitted that they did make the challenged decision and for this reason we find and hold that the absence of a final exhibited formal decision is not fatal to this application. In any event if an applicant as in this case has not exhibited a decision, the Respondents owe a duty to the Court to attach it or fully explain what happened in order to meet the challenge.

In the case before us the decision is fairly identifiable and it has not been denied that the challenged decision was made. The Respondents have a duty to the Court to clearly state what decision was made and for what reason. The moment a judicial review application is filed the Respondents have a responsibility of placing all their cards on the table

We therefore find that the absence of a formal decision is not fatal to this application. ”

A Court of law should not allow the substance of a matter to be clouded by technicalities. The rules of procedure are meant to aid the Court in reaching a just decision. If failure to comply with a certain procedural requirement is not prejudicial to the other party, there is no reason for not overlooking such a provision. There is no dispute that a decision was indeed made to conduct the election of the speaker of the Assembly and that decision was actually carried out as a result of which the 1st

Interested Party was elected. All the parties were aware of this decision and the respondents and the interested parties cannot claim that they have been taken by surprise by this Application. I therefore find that the failure by the Applicants to exhibit the impugned decision is not, in the circumstances of this case, fatal to their application.

This application, however, meets its Waterloo for a different reason. The public body whose decision is being challenged through these proceedings is not before this court. The proper respondent should have been the Clerk of Nairobi County Assembly being the person mandated to preside over the election of the speaker. The Assembly was only roped in as an interested party since its affairs would have affected by the outcome of this case. The Authority and the Commission had nothing to do with the decision that is being challenged by the applicants.

In the already cited case of Peter O Ngoge the Court found that the naming of the electoral body in a case challenging the election of the speaker of Parliament was improper. The Court observed that:

“We find no basis for having joined the Electoral Commission of Kenya in these proceedings, there is no clear logical linkage between the applicant’s alleged rights and the Electoral Commission of Kenya’s constitutional mandate on elections and the applicant has in the circumstances no standing to join the electoral body.”

In the case of *Frankline Musila Makola (supra)* Majanja, J noted that: “I find that there is no cause of action against the Transition Authority as it does not exercise any power or jurisdiction over the election of the County Speaker as evidenced by the Provisions of the County Government Act.”

I agree with the decisions in the above cited cases. I add that a public body whose decision is being questioned by an applicant must always be made a respondent to a judicial review application. The Applicants have named the wrong respondents. Their application therefore fails.

In case I am wrong in my finding that there is no proper application before this Court, I will proceed to consider whether the election of the 1st Interested Party contravened the provisions of article 177 of the Constitution. The Applicants have argued that at the time of the election of the 1st Interested Party the Assembly was not properly constituted as required by article 177 of the Constitution. The Court

was confronted with a similar question in the case of *Peter O Ngoge* 1
(*supra*) and the Court found that the election of a speaker in the
absence of nominated members of Parliament was lawful. In saying
so, the Court relied on the provisions of the Repealed Constitution
and observed that:- 5

“The argument that at the time of the election of the Speaker, the National Assembly was not properly constituted fails on these very clear provisions of the Constitution.

Section 56(2) of the Constitution reads: 10

“Subject to this Constitution, the National Assembly may act notwithstanding a vacancy in its membership (including a vacancy not filled when the Assembly first meets after a general election)....”

The fact that the nominated members were Gazetted after the election of Speaker does not invalidate the election of Speaker, on the very clear wording of the above section. The vacancy occasioned by the absence of the nominated members cannot and does not invalidate any business conducted at the first sitting after the dissolution of Parliament or at all. ”

It must be noted that the Repealed Constitution had clearly provided that the absence of a member would not affect the business of Parliament. No such provision has been pointed to me in the current Constitution in regard to the constitution of county assemblies.

Did the election of the speaker of Nairobi County breach the provisions of article 177 of the Constitution? Article 177 of the Constitution shows that a county assembly has four components namely:

- a. One elected member for each ward in the county; 30
- b. The number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;
- c. Members of the marginalized groups as prescribed by an Act of Parliament; and 35
- d. The Speaker, who is an ex officio member.

That is what constitutes a county assembly. The Applicants assert that a county assembly cannot be said to be legally constituted in the absence of the members of any of the four categories. The Constitution is quite clear that a county assembly cannot transact any business in the absence of the Speaker. In order to ensure that there is always

a person to preside over the proceedings of a county assembly, the Constitution provides through article 178(2) that:-	1
“A sitting of the county assembly shall be presided over by-	
(a) the speaker of the assembly; or	
(b) in the absence of the speaker, another member of the assembly elected by the assembly. ”	5
The Constitution has thus clearly provided for the absence of the speaker. As regards the other members of the assembly, there is no provision in the Constitution as to what should happen when a member is absent. The Constitution, however, foresees a situation where some members will be absent during the sittings of a county assembly. That is why in article 200 it provides that:-	10
“200(1) Parliament shall enact legislation providing for all matters necessary or convenient to give effect to this Chapter.	15
(2) In particular, provision may be made with respect to—	
(a) the governance of the capital city, other cities and urban areas;	
(b) the transfer of functions and powers by one level of government to another, including the transfer of legislative powers from the national government to County Governments;	20
(c) the manner of election or appointment of persons to, and their removal from, offices in County Governments, including the qualifications of voters and candidates;	25
(d) the procedure of assemblies and executive committees including the chairing and frequency of meetings, quorums and voting; and	30
(e) the suspension of assemblies and executive committees.” (The underlining is mine for emphasis).	
Parliament is thus mandated to pass laws to take care of procedure of assemblies and quorums of the assemblies. The legislation passed in this regard is the County Governments Act which provides at section 14(2)(a) that:-	35
“(2) The County Assembly proceedings are valid despite—	
(a) there being a vacancy in its membership at the particular time; or	
(b)	40

Section 19 of the same Act provides that the quorum of a county assembly is one third of all the members of the county assembly. It

must be noted that the law talks about the membership of the assembly as a whole and does not refer to elected or nominated members. Once one third of all the members of a county assembly are present, the assembly can transact business. 1

There is no dispute that section 19 was complied with at the time of the election of the 1st Interested Party. It is also agreed that some seats had not been filled at the time of the election of the speaker. There is nothing in the Constitution indicating that the absence of a certain category of members of the County assembly will paralyze the operations of the assembly. This Court would be putting its own words into the Constitution were it to find that the absence of some members had invalidated the proceedings of the Assembly. I therefore agree with the Respondents and the interested parties that the absence of certain categories of the members of the county assembly did not in any way make the election of the 1st Interested Party illegal or unconstitutional. 5 10 15

However, I must state that our Constitution promotes inclusiveness. In future the Commission should ensure that the nominated members are Gazetted at the same time with the elected members so that they can equally participate in the business of the County assembly starting with the election of the speaker. 20

The summary of it all is that the Applicants' case cannot succeed. The same is therefore dismissed. As regards the issue of costs, I note that this cause had a public interest element to it and I therefore make no orders as to costs. 25

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Law Society of Kenya *v* Transition Authority & 2 others [2013] KLR – HCK

High Court, at Nairobi
DS Majanja, J

June 14, 2013

Petition No 190 of 2013

Brief facts

The Law Society of Kenya exercising its mandate under the Law Society of Kenya Act (Cap 18) filed a Petition in public interest and in the interests of the proper and effective operation of County Governments, on the ground that it was necessary and important for the High Court to interpret various provisions and articles of the Constitution and sections of national legislation. The Petitioner stated that the petition was filed with a view to resolving competing interests and conflicts between the County Government and Office of the Governor *vis-à-vis* the Provincial Administration and County Commissioners.

Issues

- i. Whether the Law Society of Kenya had the authority to file a Petition with a view to resolving competing interests and conflicts between the Governors and the County Commissioners.
- ii. Whether the High Court had jurisdiction to resolve disputes between Governors and County Commissioners which arose out of their respective mandates or powers.

Constitutional Law – devolved system of government – government relations – intergovernmental disputes – dispute between the National and County Governments – resolution of such disputes – procedure to be followed to resolve such disputes – Intergovernmental Relations Act, sections 35; National Government Coordination Act, section 19.

Jurisdiction – jurisdiction of the High Court – dispute between Governors and County Commissioners – whether the High Court had jurisdiction to resolve disputes which arose out of the mandate or powers of any of the officers, or roles of respective officers of the County Governments and those of the National Government – whether the Law Society of Kenya had the authority to file a Petition with a view to resolving competing interests and conflicts between the Governors and the County Commissioners – Constitution of Kenya, 2010 article 189; Transition to Devolved Government Act, 2012; Intergovernmental Relations Act, 2012 section 35; National Government Co-ordination Act, 2013; County Government Act, 2013.

Constitution of Kenya, 2010 , article 189 provides;	1
189(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;	5
(b) assist, support and consult and, as appropriate, implement the legislation of the other level of government; and	10
(c) liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.	15
(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.	20
(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.	25
(4) National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.	30

Held:

1. Where a dispute arose as to the mandate or powers of any of the officers, or roles of respective officers of the County Governments and those of the National Government, section 19 of the National Government Co-ordination Act, provided for a mediation team to be constituted to deal with disputes. Where the mediation team failed to resolve the disputes within the stipulated time, the matter could be referred to the Summit under the Intergovernmental Relations Act, 2012 for resolution. 35
2. The instant case was not ripe for determination in view of the dispute resolution mechanism provided. Furthermore, judicial proceedings 40

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- were a last resort as section 35 of the Intergovernmental Relations Act, 2012 provided that, where all efforts of resolving a dispute under the Act failed, a party could submit the matter for arbitration or institute judicial proceedings. Indeed if there was a dispute then it was either the National Government or the County Government to declare the dispute and invoke the statutory provisions and not the Law Society. 1
3. The declarations sought in the petition could not be granted as no factual basis had been laid for any determination and no dispute existed capable for being resolved between the parties. The authority and jurisdiction of the High Court to interpret provisions of the Constitution and statutes including the authority to declare a statute unconstitutional did not exist in a vacuum and could not be so exercised in the absence of a real dispute. What passed for a factual dispute in the instant case was some newspaper article where Governors were stated to have walked out of their induction meeting. That was hardly the basis to institute such serious proceedings. 5
4. The obligation imposed on the National Government by section 17 of the Sixth Schedule to the Constitution was to restructure the provincial administration. That was not a one off event but was a process that involved public and stakeholder participation. In fact Parliament had had a say in the process by enacting various statutes to govern devolution which statutes could be amended as and when circumstances required within the process of restructuring. The National and County Governments were both recognized by the Constitution and had to be given effect in the manner contemplated by the Constitution. 10
5. As the County Governments had only just come into existence after the 4th March 2013 General Election, they had to be incubated and supported and the High Court was an integral part of that process. Article 189 of the Constitution required that the National and County Governments respect each other, assist and support each other and co-ordinate their functions. In effect, granting the declarations sought in the Petition would undermine the objective and process of implementation of the Constitution, devolution and the restructuring of the provincial administration. 15
- Petition dismissed with no order as to costs.* 20
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Cases 1

East Africa

1. *Kaluma, Peter v Attorney General* Petition No 79 of 2011 – (Mentioned) 1
2. *Mwau, Harun John & 3 others v Attorney General & 2 others* Petition No 65 of 2011 – (Mentioned) 5
3. *Kamau, Jesse & 25 others v Attorney General* Miscellaneous Application No 890 of 2004 – (Mentioned)

Statutes

East Africa 10

1. Constitution of Kenya, 2010 articles 1,174,189; Sixth Schedule section 17 – (Interpreted)
2. County Governments Act, 2012 (Act No 17 of 2012) In general – (Interpreted)
3. Intergovernmental Relations Act, 2012 (Act No 2 of 2012) In general – (Interpreted) 15
4. National Government Co-ordination Act, 2013 (Act No 1 of 2013) section 15,19,20,35 – (Interpreted)
5. Transition to Devolved Government Act, 2012 (Act No 1 of 2012) In general – (Interpreted) 20

Advocates

1. *Mr Kouna* for the Petitioner
2. *Ms Kambuni* for the 1st and 2nd Respondent
3. *Mr Moimbo* for the 3rd Respondent 25
4. *Ms Achitsa* for the Interest Party

June 14, 2013, **DS Majanja, J** delivered the following Judgment.

Introduction

1. The Law Society of Kenya (“Law Society”) exercising its mandate under the Law Society of Kenya Act has brought this matter in public interest and in the interests of the proper and effective operation of County Governments and on the ground that it is necessary and important for the High Court to interpret various provisions and articles of the Constitution and sections of national legislation. The petitioner states that the petition is filed with a view to resolving competing interests and conflicts between the County Government and office of the Governor *vis-à-vis* the Provincial Administration and County Commissioners. 30
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Petitioner's Case	1
2. The Law Society moved the Court by a Petition dated 11 th April 2013 seeking the following orders;	
(a) A declaration that the creation of the public office of County Commissioner, Assistant County Commissioner, Chief, Assistant Chief as offices under the national government is inconsistent with the provisions under the Constitution requiring that the national government shall structure the system of administration commonly known as the provincial administration to accord with and respect the system of devolved government established under the Constitution.	5 10
(b) Orders consequential upon the above declaration that;	
(i) Section 15 and 20 of the National Government Co-ordination Act 2013 are inconsistent with the principles of devolution as set out in article 1 and article 174 of the Constitution and are accordingly null and void to the extent of the inconsistencies and all appointments by the 2 nd and 3 rd Respondents to offices created under the sections are invalid, null and void.	15 20
(ii) An order that provincial administration purported to be structured under the National Government Co-ordination Act 2013 be deemed to be appointments under the County Government Act 2012 and accountable to the Governor and County Assembly.	25
(c) Such further declarations and or orders be granted by this Honorable Court as deemed appropriate for the lawful operationalisation of the system of devolved government under the Constitution.	30
(d) Costs.	
3. The Petition is supported by the affidavit of its Secretary and Chief Executive Officer, Mr Apollo Mboya, sworn on 11 th April 2013. The affidavit largely recites provisions of statutes and matters of law which is contrary to accepted practice that an affidavit must really be confined to stating facts. The deponent sets out, in paragraphs 9 and 10, the following factual statements;	35
[9] The LSK is aware that an induction workshop bringing together the 47 County Governors and the top leadership of the national government and	40

leaders of the constitutional commissions responsible for implementing the system of devolved governance turned stormy and forced governors to walk out in protest. A copy of a sample of media coverage of the induction workshop is annexed hereto and marked as LSK1.	1 5
[10] At the centre of the controversy are constitutional provisions relating to the system of government existing before the Constitution known as “Provincial Administration.”	10
4. The Petitioner avers that in purporting to exercise the role of National Government, the 1 st and 2 nd respondents have been and continue to usurp functions of the County Government in utter disregard of the principle of devolution set out in the Constitution under guise that they draw their power and jurisdiction from the Transition to Devolved Government Act, 2012 the Intergovernmental Relations Act, 2012, National Government Co-ordination Act, 2013 and the County Government Act, 2013.	15
5. The Petitioner avers that this state of affairs is likely to interfere and restrict the principles of devolution as enshrined in the Constitution as was amply demonstrated an the incident reported in the media where the Governors walked out of their induction meeting with the leadership of the National Government protesting delayed funding and alleged meddling by senior civil servants.	20 25
6. The Interested Party has filed written submissions and supports the Petitioner’s case.	
Respondents’ Case	30
7. The Petition has been opposed by the Respondents on various grounds but primarily on the ground that if there are disputes between the County and National Governments, there is in place a constitutional and legislative scheme to resolve these disputes. The Respondents further aver that the issues between the National Government and the County Government fall within the realm of implementation and if indeed there are disputes then the mechanisms provided by the law must be utilized as court proceedings are the last resort.	35 40

Determination	1
8. I have considered pleadings and written submissions by the parties and I take the following view of the matter. Resolution of disputes between the National and County Government is provided for under article 189 of the Constitution. It provides as follows;	5
189(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;	10
(b) assist, support and consult and, as appropriate, implement the legislation of the other level of government; and	15
(c) liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.	20
(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.	25
(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.	30
(4) National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.	35
9. Pursuant to these provisions, the Intergovernmental Relation Act, 2012 (“the Act”) was enacted to give effect to the dispute settlement provisions of article 189. As the petitioner has raised the spectre of conflict between County Commissioners and Governors and I would refer to section 19 of National Government Co-ordination Act, 2012 which provides that where a dispute arises as to the mandate or powers of any of the officers, or roles of respective officers	40

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- of the County Governments and those of the national Government, a mediation team shall be constituted to deal with the dispute. Should the mediation team fail to resolve the dispute within the stipulated time, the matter may be referred to the Summit under the Intergovernmental Relations Act, 2012 for resolution. 1
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10. Accordingly, I agree with Ms Kambuni, SC, for the 1st and 2nd Respondent, that this case is not ripe for determination in view of the dispute resolution mechanism provided. Furthermore, judicial proceedings are a last resort as section 35 of the Act provides that, “Where all efforts of resolving a dispute under this Act fail, a party may submit the matter for arbitration or institute judicial proceedings.” I also agree that if there is indeed a dispute then it is either the National Government or the County Government to declare the dispute and invoke the statutory provisions and not the Law Society. 10
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11. The declarations sought by the petition cannot be granted as no factual basis has been laid for any determination and no dispute exists capable for being resolved between the parties to this litigation. The authority and jurisdiction of the High Court to interpret provisions of the Constitution and statutes including the authority to declare a statute unconstitutional does not exist in a vacuum and cannot be so exercised in the absence of a real dispute (See *Peter Kaluma v Attorney General* Nairobi Petition No 79 of 2011 (Unreported), *Harun Mwau and others v Attorney General and others* Nairobi Petition No 65 of 2011 (Unreported) and *Jesse Kamau and 25 others v The Attorney General*, Nairobi Misc App No 890 of 2004 (Unreported). What passes for a factual dispute in this case is some newspaper article where Governors are stated to have walked out of their induction meeting. This is hardly the basis to institute such serious proceedings. 20
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12. The obligation imposed on the National Government by section 17 of the Sixth Schedule to the Constitution is as follows: 35
17. Within five years after the effective date, the national government shall restructure the system of administration commonly known as the provincial administration to accord with and respect the system of devolved government established under this Constitution. 40
13. The National Government has five years from 22nd August 2010 to restructure the provincial administration. This is not a one off event;

