COUNCIL OF GOVERNORS

Devolution Case Digest
Volume 1 (2015)

48 Governments, 1 Nation

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Typeset and published by the National Council for Law Reporting
(Kenya Law)
PO Box 10443 - GPO 00100 Nairobi.

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 case digest 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 case digest 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

ACKNOWLEDGEMENTS

I would like to thank UNDP – Governance Unit for their financial support that enabled the CoG secretariat under the guidance of the Legal Directorate produce the Case Digest and the Devolution Law Report.

I would also like to thank National Council for Law Reporting team lead by their CEO Mr. Long'et Terer for bringing to fruition this digest.

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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COUNCIL OF GOVERNORS

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Summaries of Devolution Cases from Kenya and other Common Law Jurisdictions

Introduction

Devolution is a form of decentralization where political, administrative and fiscal authority is transferred from the national level to sub-national constitutional units. Kenya has adopted this system which involves the transfer of powers, functions and responsibilities by law to independent popularly elected County Governments where citizens play a central role in governance.

Devolved governance, as enshrined in the Constitution in August 2010, introduced two levels of government: the National and the County governments listed in the First Schedule to the Constitution. Both levels are distinct and interdependent and are required to conduct their mutual relations on the basis of consultation and cooperation. The intended goals why Kenya shifted from a highly centralized regime to a devolved system are well articulated in Article 174 of the Constitution, which illuminates the objects and principles of devolved government.

The devolved system departs from a dispensation where power and resources were inequitably distributed and where citizens had minimal participation in governance. In essence, the system was for the most part, dysfunctional, discriminatory, unresponsive, and unrepresentative. Devolution is thus seen as a renewal of the social contract between the Kenyans and their government. Sovereign power of the people is now exercised at the national and county levels, and governments at these two levels are distinct and inter-dependent and are obligated to conduct their mutual relations on the basis of consultation and cooperation. Additionally, and in the spirit of devolution, national state organs are required to ensure reasonable access to their services in all parts of Kenya.

The Constitution of Kenya assigned functions between two levels, the National Government and the County Governments. The Constitution also introduced a bicameral legislature with the National Assembly and the Senate constituting Parliament. County Governments were inaugurated in March 2013, ushering a new era of governance. Since this paradigm shift occurred, and noting that financial, administrative and political power devolved all at the same time, the transition has experienced controversy and conflict in implementation where there is legislative lacunae and hence need arises for judicial interpretation. For instance, on matters of distribution of functions between the two levels of government, division of revenue and removal processes of county staff. In such cases, the courts have been the final arbiters on these issues.

This means that there is emerging jurisprudence on devolution and related matters and that the courts are setting standards and principles on many aspects on devolution. These standards and principles will be relied upon now and in future. Indeed the judiciary, particularly the High Court whose mandate among others is constitutional interpretation; and the Supreme Court whose mandate under Article 163(6) is to give '*advisory opinion, upon request, on matters concerning county governments*', have played a role in ensuring that devolution is steered as intended by the people of Kenya and also in ensuring compliance with the principles, values and prescriptions of the Constitution.

This Case Digest therefore gives a synopsis of selected cases on devolution emanating from the Kenyan Courts and draws comparative lessons from other commonwealth jurisdictions. The Digest is arranged thematically along the following seven key areas: Public Service, Public Finance Management, Equity and Inclusivity, Removal from Office and Suspension of County Governments, Transition to Devolved Government and Transfer of Powers & Functions, Intergovernmental Relations as well as Public Participation and Citizen Engagement.

The Digest will be modelled as a quick and ready guide to the emerging jurisprudence on devolution in Kenya and will prove useful to all legal practitioners who interact with nascent legal issues touching on devolution, in the transition period and beyond.

Cases Emanating from Superior Courts of Record in Kenya

Public Service

Cases Emanating from Superior Courts of Record in Kenya

1. Public Service

Mistreatment of interim County Staff Amounts to Unfair Labour practice

"The Transition to Devolve Governments Act, 2012 empowered the transitional authority to facilitate the county governments, among other things, to have competent staff at inception and in accordance with section 15 of the sixth schedule to the Constitution"

James Omariba Nyaoga v Speaker of the Kisii County Assembly & 2 others
Petition 88 of 2014
High Court of Kenya at Nakuru
Byram Ongaya
May 23, 2014

The petitioner sought to challenge the actions of the speaker of the Kisii County Assembly, he alleged that since his appointment as an interim clerk of the Kisii County Assembly, by the Service Board; the speaker had no due regard for his service and had at all times curtailed his service and mocked his duty. He therefore termed the said actions *inter alia* as amounting to unfair labour practices; the respondents later own subjected the petitioner to intimidation, harassment and more so perceived him as against the solidarity of the respondents. The solidarity of the respondents was channeled towards not recognizing the petitioner as a duly appointed clerk of the Assembly and subjecting him to discomfort in exercise of his duty.

The main issue before court was whether the petitioner was the duly appointed Clerk for the Kisii County Assembly. The court affirmed that the petitioner was competitively recruited by the Public Service Commission for deployment to the County Assembly as interim clerk. It could not be said that the subsequent substantive appointment as Clerk did not meet the constitutional and statutory provision carefully provided. The kind of petitioner's appointment as Clerk was during the unique transition season.

The court further stated that the absence of the relevant payroll that was alleged, would justify the petitioner's appointment, did not override the appointment since the appointment was made in accordance with the section 13(1) of the County Governments Act, 2012.

The Petitioner was duly appointed and constituted Clerk, Kisii County Assembly and hence has the mandate and authority to exercise the functions of the office of Clerk, Kisii County Assembly

The actions of the speaker of the Kisii County Assembly amounted to unfair labour practices, mistreatment of the Petitioner and gross abuse of office.

Public Appointments Act not applicable to Appointments under the County Government Act

"If Parliament had intended the provisions of section 10 of the Public Appointments (Parliamentary Approval) Act to apply to appointments under the County Governments Act it should have incorporated it expressly. Though section 14 of the County Governments Act referred to incorporation or adoption of standing orders of the National Assembly, there was no express provision for adoption of the practice under section 10 of the Public Appointments (Parliamentary Approval) Act. The provision would only be regarded as directory and not mandatory in relation to rejected nominees."

John Kipng'eno Koech & 2 others v Nakuru County Assembly Committee on Appointments & 5 others
Petition No 23 & 25 of 2013 (Consolidated)
High Court at Nakuru
M J Anyara Emukule, J
September, 25 2013

The petitioner was challenging the decisions made by the first respondent and adopted by the third respondent as contained in the First Report of Vetting Committee of the County Assembly of Nakuru on appointments of nominees for the County of Nakuru Executive Committee, County Public Service Board members and County Secretary purporting to reject the nominations of the candidates to the said Committee and Board on grounds of not meeting the required constitutional and statutory threshold and that it was unconstitutional. The petitioners alleged that the Governor had resubmitted the

list of rejected nominees to the County Assembly for appointment subsequent to holding meetings with members of the County Assembly where a deal was struck to appoint rejected members. The petitioners contended that the resubmission of rejected names in that manner was both against the national values and the principles of governance, transparency, integrity, accountability, rule of law and sovereignty of the people.

The court observed that *Locus standi* under section 84(1) of the repealed Constitution was established in two respects; firstly, if the contravention related to the petitioner personally, and if the contravention related to a detained person. Those were the only instances where *locus standi* was conferred upon an individual, under the said section 84(1) of the repealed Constitution. In contrast, article 3 of the Constitution of Kenya, 2010 conferred upon every person in Kenya, the obligation to respect, uphold, protect and defend the Constitution of Kenya, and any attempt to establish a government otherwise than in compliance with the Constitution was unlawful.

The court held that the national values and principles of governance bound all state organs, state officers, public officers and all persons whenever any of them made or implemented public policy decisions. Those values and principles included patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people, good governance integrity transparency and accountability. Consequently, the Constitution of Kenya granted the individual a much wider scope in terms of *locus standi* than section 84(1) of the repealed Constitution.

The court also observed that under the Constitution, the court was bound to inquire and determine matters on their merit, and where the matter in issue could be deciphered from the pleadings, then the court was bound to determine such matter even when the particulars of breach had not been specifically pleaded. In addition, article 258(1) granted every person the right to institute court proceedings claiming that the Constitution had been contravened, or was threatened with contravention. Any person acting in the public interest could also institute court proceedings.

The court noted that the petitioners filed their Petitions on their own behalf as residents of County of Nakuru and also in the public interest. They had a genuine interest in the functioning of the County Assembly and in particular over the appointments of members of the County Executive Committee whose functions not only impacted upon them, but also the other ordinary residents of the County of Nakuru. The petitioners therefore, had the necessary *locus standi* in the circumstances.

The court stated that, it was vested with the jurisdiction to determine the constitutionality of the process of appointments by the County Assembly of the nominees by the Governor and as well as the constitutionality of making such appointments by the Governor. The scope of the court's jurisdiction extended to the procedural improprieties, as well as the legality of the appointment decision to determine whether it was accorded with the constitutional threshold. The court applied an objective test where each case was determined on its own merit.

Section 9 of the Public Appointments (Parliamentary Approval) Act was to the effect that nominees were deemed approved after the expiration of fourteen (14) days period. However, the court noted that there was no evidence provided by the Petitioner that fourteen days had expired before the County Assembly considered the List of Nominations for the Executive Committee and Public Service Board. The record showed that the List of Nominees was forwarded and the County Assembly had submitted its Report within the prescribed period of fourteen (14) days. The nominees could not therefore take benefit of the said provision. Therefore, the nominees were interviewed within the period prescribed by the Public Appointments (Approvals) Act, 2012.

Under the Public Appointments (Parliamentary Approval) Act, which the Committee adopted for use in the hearings, section 7, required that an approval hearing ought to focus on a candidate's academic credentials, professional training and experience, personal integrity and background, and the criteria set out in the Schedule ought to be used by a committee during an approval hearing for the purpose of vetting a candidate. The court opined that the criteria were cumulative in effect, and none of them ought to have been taken in isolation or regarded as more important than the other. None of them were cited as grounds for rejection of the nominees for positions of the executive committee of County of Nakuru. Therefore, the respondents acted *ultra vires* the Constitution and the County Governments Act.

The court stated that although the candidate could continue serving as the Interim County Secretary pending competitive recruitment of a substantive holder in terms of section 44(2)(a) of the County Governments Act, he was not competitively sourced and the County Assembly of Nakuru acted within the law in rejecting his nomination. The question however remained on whether the orders of *certiorari* and *mandamus* could be granted in respect of other rejected nominees.

In conclusion, the court opined that if Parliament had intended the provisions of section 10 of the Public Appointments (Parliamentary Approval) Act to apply to appointments under the County Governments Act it should have incorporated it expressly. Though section 14 of the County Governments Act referred to incorporation or adoption of standing orders of the National Assembly, there was no express provision for adoption of the practice under section 10 of the Public Appointments (Parliamentary Approval) Act. The provision would only be regarded as directory and not mandatory in relation to rejected nominees.

Order of certiorari issued to bring to the Court and quash the findings and decisions of the County Assembly of Nakuru as set out in the First Report of the Committee on the Vetting of Nakuru County Executive Committee Nominees; County Public Service Board, Members and County Secretary.

Public Officers serving on Secondment cannot be placed on Probation

"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."

Silas Kipruto and another v County Government of Baringo & another
Industrial Court at Nakuru
Cause No. 30 of 2014
April 4, 2014
B Ongaya, J

The claimants were serving civil servants in accordance with the relevant regulations made by the Public Service Commission. They applied for various positions as advertised by the Transition Authority where the successful candidates were to be seconded in the constitutional transition arrangements to the County Governments. The Transitional Authority recruited them for 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.

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.

The main issues before the court were; first, whether public officers serving on secondment could be placed on probation. Second, 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. Third, whether the appointment of the claimants was illegal for want of advertisement, competitive recruitment, short listing, public participation, and approval by the County Assembly.

The court held that the claimants, being serving civil servants, were legitimately identified in a transparent and accountable process. They were not newly appointed employees therefore they were not eligible to be put under probationary service as they were seasoned public officers constitutionally provided to build capacity in the county government. Placing the claimants on probationary service would have amounted to adverse variation of their respective terms and conditions of service and any such probationary service decision would have been unlawful, null and void.

Court upheld the claimant's claim.

Court stops recognition Agreements with County Governments

"Section 54(1) of the Labour Relations Act provided that an employer could recognize a trade union that represented the simple majority of unionisable employees."

Union of Civil Servants v Kenya County Government Workers Association & Another
Cause No. 289 of 2014
Industrial Court of Kenya at Nairobi
L Ndolo, J
May 16, 2014

The applicant brought the instant application seeking *inter alia* that the recognition agreement signed between the 1st and 2nd respondents be stayed pending the final determination of this application; that in the alternative, the recognition agreement entered between the 1st and 2nd respondents dated 27th February, 2014 be declared a nullity and revoked and finally that

during the hearing and determination of this application, the respondents to be prohibited from entering into any recognition agreement with any other county government.

Thus the main issues was whether the Employment and Labour Relations Court could grant orders staying and/ or revoking the recognition agreement signed between the 1st and 2nd respondents and barring the 1st respondent from entering into recognition agreements with any other County Governments.

The court held that the applicant had proven their case for injunctive orders as provided in the case of *Giella v Cassman Brown*. The applicant's position was that because of an ongoing rationalization programme as between the National and County governments, it was not possible to tell with certainty which union enjoyed a simple majority within the 2nd respondent and other county governments for purposes of recognition.

Section 54(1) of the Labour Relations Act provided that an employer could recognize a trade union that represented the simple majority of unionisable employees. Recognition was therefore a matter of evidence based on real numbers. As things stood, the actual membership status of various trade unions with members working in the County governments could not be ascertained. Thus the recognition agreement between the 1st and 2nd respondents dated 27th February, 2014 was premature. It was therefore too early in the day to determine which trade union had achieved a simple majority status for purposes of recognition and collective bargaining.

High Court's jurisdiction to review decisions of County Assemblies on appointments

"… for the court to interfere with the decisions of a County Assembly or Parliament 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 . . ."

Simon Wachira Kagiri v County Assembly of Nyeri & 2 Others
Petition 7 of 2013
High Court at Nyeri
N. Abuodha, J
September 10, 2013

The petition was 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 such as the decision was discriminatory, violated the petitioner's right to human dignity, the right to fair labour practices, right to fair administrative action, right to access to justice etc.

On the other hand, the County Assembly stated that their reasons for rejecting the petitioner was that; first, the petitioner having been charged and acquitted in a Criminal Case he did not satisfactorily answer questions touching on integrity issues. Secondly, that the petitioner did not demonstrate appropriate knowledge and understanding of relevant docket. Thirdly, that though well versed in tourism matters he failed to address satisfactorily in matters relating to culture, gender, youth and sports.

The main issues for determination were; first whether the High Court had the powers to review decisions of County Assemblies and secondly whether the County Assembly was right in rejecting the petitioner for the position of County Executive Committee based on the fact that he had been previously charged and acquitted in a criminal case.

The court held that, for the court to interfere with the decisions of a County Assembly, 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. 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.

Further the court opined that whether 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 alone 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.

The court concluded that 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.

Petition dismissed costs to be borne by each party.

Court bars Kisumu County Assembly Board from advertising for vacant positions before conducting staff rationalization and deployment

"From the provisions of article 176 of the Constitution, 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 its service to the extent that was efficient and practicable."

Kenya County Government Workers Union v Kisumu County Assembly Public Service Board
Industrial Court at Kisumu
Cause No. 50 of 2014
Hellen Wasilwa J.
April 30, 2014

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. The interested parties were deployed to Kisumu County Assembly by their respective deployment letters.

However, the respondents advertised their jobs and shortlisted without carrying out an audit or even rationalization as provided for in the Transition to Devolved Government Act. The applicants therefore sought an injunction against the respondents from carrying on any interviews, recruitment or employment of any staff to the County Assembly before staff rationalization and deployment to determine the vacancies that could be filled by the interested parties.

The respondents' however contended that it had been wrongly sued as it was created under section 12 of the County Governments Act, which determined membership of the Board for which the respondent was not one of them. Further, that the interested parties were previously employees of the Local Government, public servants and became employees of County government and not of the respondents. It was also their contention that Guidelines of the Governors did not bind the speaker of the County Assemblies, as they were different entities.

The court held that from the provisions of article 176 of the Constitution, the County Government consisted of the County Assembly and the County Executive. It further held that under article 176(2), the County Government could decentralize its function and provision of its service to the extent that was efficient and practicable.

According to the court, the decentralization envisaged was the one broken down under the County Government Act, which set out various bodies and assigned them various duties.

The argument by the respondents therefore did not have the force of law as the respondents were part and parcel of the County Government. 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 court found that indeed the decision of the respondents affected the County Government and *vice versa* as they were part and parcel of one entity.

In conclusion, the court held that the interested parties remained staff of the County Government of Kisumu and as deployed to the respondents and that their positions should not be disturbed without following the laid down procedures.

Application allowed

Applicability of the Doctrine of pleasure to dismissals by the Governor under section 31(a) of the County Governments Act

"Section 31 (a) granted power to a Governor to dismiss a member of the County Executive Committee at any time, that is, at his pleasure. However, the said power was qualified to the extent that he could only exercise the same reasonably and not arbitrarily or capriciously. 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 members of the County Executive Committee assisted the Governor to carry out his mandate under the law. 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."

County Government of Nyeri & another v Cecilia Wangechi Ndungu
Civil Appeal 2 of 2015
Court of Appeal at Nyeri
Alnashir Visram, Martha Koome, J Otieno-Odek, JJA
March 18, 2015

The respondent was the County Executive Secretary in charge of Culture, Gender and Social Development, appointed by the Governor of Nyeri County on September 27, 2013. The Governor dismissed her from service on June 24, 2014 and she filed a Petition at the Industrial Court claiming that she had been dismissed unfairly.

In her petition she asserted that her rights to fair administrative action had been violated. She stated that her dismissal was via a press conference address that was made known to her by members of the public and she was not given reasons for the dismissal. In its judgment, the Industrial Court found that the dismissal amounted to a violation of the respondent's rights, quashed the dismissal decision and reinstated the respondent into service at the Nyeri County.

The appellant filed an appeal at the Court of Appeal against the Industrial Court judgment. 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 to do. They asserted that the Governor's powers in that respect were similar to the 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.

The court noted that there were two methods by which a member of a County Executive Committee could be dismissed from service. Under section 40, a Governor could dismiss a County Executive Committee member on any specified ground following a resolution by the County Assembly for dismissal. 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 so.

The court held that the respondent's dismissal was within the terms of section 31(a) of the County Government Act, No 17 of 2012. Under section 31(a) of the County Government Act, No 17 of 2012, the dismissal of a member of a County Executive Committee was within the discretion of the Governor.

The court held that the power given to a Governor to dismiss a County Executive Committee member section 31(a) of the County Government Act, No 17 of 2012 was qualified to the extent that that power could only be exercised reasonably and not arbitrarily.

The court explained that 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. If the Governor lost confidence in a County Executive Committee member, it was necessary for the Governor to have the capacity to remove that member without delay so as to enable the County Government to function for the benefit of the County.

The court further noted that 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. Therefore, the court found that the exercise of powers by the Governor under that section included an obligation on the Governor to exercise the power only when necessary or appropriate and the obligation entailed reasonableness on the part of the Governor.

The court also observed that what section 31(a) of the County Governments Act required was that the Governor would have to act reasonably and have valid and compelling reasons for dismissing a County Executive Committee member. The section did not require the Governor to commence a disciplinary process and it allowed the Governor, depending on the sensitivity or urgency of the matter, to dismiss a member without giving notice of his intention to issue a dismissal.

The court further held that 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 apparent that the 2nd appellant's actions were arbitrary and they occasioned a violation of the respondent right to fair administrative action as provided for in article 47 of the Constitution of Kenya, 2010.

A final finding of the court was that 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, the applicable statute and the principles of fair administrative action and the rules of natural justice.

Appeal was dismissed.

"Pleasure Doctrine" not applicable in Kenya's Public Service

"The Governor's executive disciplinary process under section 31(a) and the County Assembly's process under section 40 of the County Governments Act should comply with the established rules of natural justice; the due process of law. In particular, section 76 of the County Governments Act, 2012 provided for prohibition of imposition of punishment contrary to the Constitution. Subsection 76(2) provided that no public officer could be punished in a manner contrary to any provision of the Constitution or any Act of Parliament. The 1st and 2nd respondents were bound by the provision and it was not open for the 2nd respondent to dismiss the petitioner under a fictitious unchained discretion misconceived on the basis of section 31(a) of the County Governments Act."

Richard Bwogo Birir v Narok County Government & 2 others [2014] eKLR
Petition 1 of 2014
Employment and Labour Relations Court at Nakuru
Byram Ongaya
March 14, 2014

The petitioner (*Richard Bwogo Birir*) was appointed as the Executive Committee Member for Livestock and Fisheries in the County Government of Narok. Later, the 2nd respondent (*Samuel K. Tunai*, Governor – Narok County) wrote him a letter of dismissal hence the filing of the petition by the petitioner who alleged infringement of his fundamental rights and freedoms under the Constitution. Conversely, the respondents submitted that the dismissal was not unlawful and was done in accordance with the County Governments Act, 2012. The respondents' further contended that the relationship between the petitioner and the 1st respondent (Narok County Government) was a contractual one and as such could be lawfully terminated. The main issue before the court was hence whether the dismissal of a public servant under the pleasure doctrine amounted to contravention of the constitutional and statutory provisions.

The court held that all persons holding public or state office in Kenya in the executive, the legislature, the judiciary or any other public body and in national or county government are servants of the people of Kenya. Despite the level of rank of state or public office as may be held, no public or state officer is a servant of the other but all are servants of the people. Thus, the idea of servants of the Crown was substituted with the doctrine of servants of the people under the new Republic as nurtured in the Constitution of Kenya, 2010.

The court emphasized that the string that flowed through the constitutional provisions was that removal from public or state office was constitutionally chained with due process of law. At the heart of due process were the rules of natural justice. Thus, the pleasure doctrine for removal from a state or public office had been replaced with the doctrine of due process of law. Article 236 was particularly clear on the demise of the pleasure doctrine in Kenya's public or state service.

The court observed that the decision in *Muriithi v. Attorney General* (1983) KLR 3 was no longer the law in Kenya as it had expressly been overridden by the Constitution of Kenya, 2010 through the demise of the pleasure doctrine. In the new Republic, public service by public and state officers was guided by the doctrine of 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. The demise of the pleasure doctrine and the doctrine of servants of the Crown in the new Republic's constitutional framework constituted the very foundation of the Republic, namely, Kenya was a sovereign Republic and all sovereign power belonged to the people of Kenya and should be exercised only in accordance with the Constitution.

The court pointed out that under section 31(a) of the County Governments Act, 2012, the Governor was required to make a judgment (consider) that it was suitable (appropriate) or needed (necessary) that the executive member was removed from office. The 1st and 2nd respondents were obligated to accord the petitioner due process of law and to give reasons to satisfy the provisions of the section. Due process of law would establish that the 2nd respondent made a consideration and giving of reasons would show that the removal was appropriate or necessary. According to the court on the basis of the material on

record, no one could tell what could have justified the removal of the petitioner from office. Such mysterious decisions could not obtain under the new Republic.

The court affirmed that a Governor as established and provided for in the Constitution and the enabling legislations were not an imperial ruler. Tenets of good governance, human rights, transparency and accountability as envisaged in article 10 of the Constitution could not be said to have been upheld by the Respondent and the dismissal could not be said to have met the tests of responsibilities of leadership as provided for in article 73 of the Constitution. Mysterious decisions like the dismissal of the petitioner by the 2nd respondent in the present case could not be in furtherance of the donated sovereign power that vested in the people because such mysterious decisions were incapable of being submitted to accountability and transparency as they are opaque decisions that belong to the murky world and not a civilized democratic republic like Kenya.

Under section 31 of the County Governments Act, 2012, the procedure for dismissal was initiated by the Governor and concluded by the Governor as an in-house executive process, while under section 40 of the County Governments Act, 2012 the process was initiated by a member of the County Assembly. The mischief was obvious; there may have been instances of adverse circumstances against a given county executive committee member and the Governor failed to invoke the executive disciplinary process under section 31(a) and in which event a County Assembly member may have invoked the oversight jurisdiction of the County Assembly under section 40 to deal with the mischief. That was where the difference in the provisions of the two sections ended. Otherwise they were both disciplinary proceedings that demanded due process of law.

The court in its conclusion observed that it had long been established that the delivery of human resource functions in Kenya's public service was guided by an objective criteria set by the law and that delivery was not based on subjective judgments of individual government actors. The subjective judgments of individual government persons were not to be allowed to override the objective criteria set in the Constitution and relevant statutes for the good delivery of our public and state service. Where such subjective judgments of individual government persons infringed on others constitutional and statutory rights and protections like in the present case, a proper remedy would be available to vanquish the offensive decision. There was no any established bar to the making of an order of certiorari to issue in the circumstances of the case.

Petition was allowed with costs

County Public Service Boards under duty to adhere to the national values and principles of governance in Article 10 of the Constitution

"A process which is shrouded in secrecy cannot be said to meet the set criteria under Article 10 and section 65 of the Act (County Governments Act). Transparency and accountability demands that public officers make public their intended decisions and thereafter strictly adhere to their publicized intentions"

Republic v Secretary County Public Board, Ex-parte Hulbai Gedi Abdille
High Court at Nairobi
Judicial Review Application No 271 of 2014
GV Odunga J
July 17, 2015

The main issue for determination was 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.

The applicant sought 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.

The court held that if the Board intended to fill the said position it ought to have followed section 66 of the County Governments Act which provided that if a public office was to be filled, the County Public Service Board should 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.

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. 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 a County 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.

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. 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.

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. The decision by the Public Service Board to make the said appointments was tainted with both illegality and procedural impropriety.

The court further held that 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. However, 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.

The court issued 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.

There is no conflict between Article 251 and Section 58 of the County Government Act, 2012

"The court was circumspect in declaring provisions of a statute in conflict with the Constitution unless in obvious and clear cases. Ambiguity of language or lack of clarity alone did not render a provision of a statute in conflict with the Constitution especially if the ambiguity or lack of clarity could be cleared by reading in or out the words that would help clear the ambiguity or bring more clarity."

Mundia Njeru Geteria v Embu County Government & 4 others [2014] eKLR
Petition 116 of 2013
Employment and Labour Relations Court at Nyeri
N J Abuodha, J
March 27, 2014

One of the main issues for determination by the court was whether section 58 of the County Governments Act was inconsistent with article 251 of the Constitution of Kenya, 2010 to the extent that it did not provide for a legal framework for removal of a Chairperson to the County Public Service Board.

The applicant filed an application for an order of stay pending appeal on grounds that the respondent (petitioner) had indicated his intention to resume duties as the Chairman Embu County Public Service Board pursuant to the order of the court while the applicant was in the process of filing an appeal against the judgment of the court.

The court observed that it did not shackle the applicant in any way in handling their dispute with the petitioner. The court had during trial declared that the process of removal of the petitioner adopted by the applicants did not adhere to the Constitution and the County Governments Act. Thus, nothing contained in the judgment stopped the applicant's from taking cue from the court and embarking on a removal process that adhered to the law and the Constitution. That being the case, the court stated that the applicant had not met the required threshold to warrant an order of stay.

The court had adequately addressed the issue of the apparent conflict between article 251 of the Constitution and section 58 of the County Governments Act holding that there was no conflict. Further, the court was circumspect in declaring provisions of a statute in conflict with the Constitution unless in obvious and clear cases. Ambiguity of language or lack of clarity alone did not render a provision of a statute in conflict with the Constitution especially if the ambiguity or lack of clarity could be cleared by reading in or out the words that would help clear the ambiguity or bring more clarity. However the applicant had an opportunity to take up the issue with the appellate court.

Application dismissed.

Section 77 of the County Government Act, 2012 does not oust or restrict the jurisdiction of the ELRC for want of exhaustion of the procedure and remedies envisaged under the section.

"Section 77 of the County Government Act, 2012 does not oust or restrict the jurisdiction of the court for want of exhaustion of the procedure and remedies envisaged under the section… The original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between employers and employees rests 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"

Abdikadir Suleiman v County government of Isiolo & Another
Employment and Labour Relations Court of Kenya Nyeri
Cause No. 76 of 2015
Byram Ongaya J.
July 31, 2015

The claimant filed the memorandum of claim and prayed for judgment against the respondent for an order of restatement in to 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 the memorandum of response and prayed 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 pubic 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.

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 on grounds that court did not have jurisdiction to entertain the suit, that the suit was fatally defective, incompetent and incurable in law. They further stated that the respondents were non suited and their names should be struck off and that the suit was an abuse of the court process.

The respondents contended 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 and that the legitimate action was for the claimant to appeal to the Commission and not to move the court.

The claimant contended that the court enjoyed jurisdiction under section 12 of the Employment and Labour Relations Court Act and the employment relationship was not in dispute and further that the claimant was orally dismissed by the 2nd respondent. The claimant further claimed that the suit, which was about the manner in which the respondents had proceeded to dismiss the claimant unlawfully, illegally, unconstitutionally and against the law, was filed long before the alleged compulsory leave pending investigations. 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 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.

The main issue before the court was 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 pubic 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.

In its determination, court started by stating that 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 and that article 262 defined "public service" to mean the collectivity of all individuals, other than state officers, performing a function within a state organ. 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. Suffice to say that 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, court observed that the subject matter was set out in section 77 of the Act but that the decisions the Commission may make were not set out in the Act or the Constitution. Court further observed that

in 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.

Court further observed that on appeal, the appeal process dealt with the merits or substance of the case and not procedural or legal propriety of the case since 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 disciplinary matters, court making reference to section 76 of the County Governments Act, 2012 stated that the section was elaborate that punishment contrary to the Constitution could not be imposed against a public officer and further 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. Court further stated that it was clear that the legitimacy of the procedure or punishment imposed as measured against this section would be an issue of law and therefore not appealable to the Commission but subject to the jurisdiction of the court. Referring to the compliance to the section, court stated that 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 neither would it 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.

Court warned that 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 observed that 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. The jurisdiction to determine a dispute as to a person's compliance with section 76 of the Act and to make a primary conclusive finding thereon, was therefore 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. Court further observed that the line was thin but clearly set apart 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.

Court was keen to observe that it was clear that legitimacy or lawfulness of the decisions was not one of the listed appealable subject matter under section 77 of the Act and it had not been shown that such would be a matter in the constitutional or statutory competence of the Commission to decide.

Regarding the provision of the Constitution or legislation 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 and those vesting in them 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, court stated that such constitutional and legislative provisions neither precluded 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 nor 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.

As of judicial authority, court in reference to article 159(1) stated that the same was vested in the judiciary 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. Further in reference to article 159(2)(b) and article 159 (2) (e) court stated that justice shall not be delayed and further that in exercise of judicial authority, the purpose and principles of the Constitution shall be protected and promoted.

Court further noted that since there were no established time lines for appealing and making of the decision by the Commission, 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.

In relation to the instant case, court ruled that 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 and 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.

Court further ruled that 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 and that the 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**.**

It was observed that the High Court by being of equal status, did 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 and vice versa, and that 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. However, status was not the same thing as jurisdiction.

Court ruled further that 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. Court further noted that such 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.

Court in dismissing the preliminary objection with costs observed that 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 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.

Strikes by employees offering essential services are illegal

"…the devolution of the health function has been controversial and County Governments should in good faith deal with the cases of the nurses initially employed under the Economic Stimulus Programme so as to engender industrial stability and peace within the health services"

County Government of Uasin Gishu v Kenya National Union of Nurses [2014]
Cause No. 470 of 2014
High Court of Kenya at Nakuru
R. Stephen J
November 14, 2014

An application was brought before the court by County Government of Uasin Gishu, seeking to challenge the strike that had been organized by the Kenya National union of Nurses. On 22nd August 2014 County Government of Uasin Gishu had received a letter from the Union in the respondent's Branch informing the claimant of the intended strike that was to take effect on 3rd September, 2014. Strike of which had the effect of pulling out the respondent's members out of their duty stations in solidarity with the nurses under the Economic Stimulus Programme

The main issue before the court was whether the intended strike called by the Union was warranted by the constitution and was legal.

The court held that, Section 78(1) (f) of the Labour Relations Act prohibited strikes if the employee were engaged in an essential service. Furthermore, section 81 of the Act read together with the Fourth schedule to the Act had defined what amounted to essential services which included; hospital services.

Application dismissed

Capacity Assessment and Rationalization of the Public Service (CARPS) Programme did not usurp roles of County Public Service Boards

"As regards membership of the CARPS programme, the County Public Service Boards formed part of the membership of the CARPS programme and hence had locus to complain about omissions from the membership if any. Therefore, the functions of the County Public Service Boards had not been usurped by the CARPS programme."

Kenya County Government Workers Union v Kisumu County Government & 91 others
Petition 270 of 2014
Industrial Court at Kisumu
H S Wasilwa, J
January 12, 2015

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 issues of staff 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.

The court held that 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.

The court stated that article 41 of the Constitution envisaged a right to fair labor practices including a right to form, join or participate in the activities and programmes of a trade union. Therefore, 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.

As regards membership of the CARPS programme, the court observed that the County Public Service Boards formed part of the membership of the CARPS programme and hence had *locus* to complain about omissions from the membership, if any. Therefore the functions of the County Public Service Boards had not been usurped by the CARPS programme.

The court opined that 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.

In conclusion, the court observed that 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.

Petitioners to be included in the committees set up in the CARPS Programme and the tools for data capture all workers whether on leave, on suspension or facing any disciplinary charges.

Public Finance Management

2. Public Finance Management

Extent of the oversight role of the Senate in National Revenue Allocations to County Governments

Council of Governors & 6 others v Senate
Petition 413 of 2014
High Court at Nairobi
Constitutional and Human Rights Division
I Lenaola, M Ngugi & G Odunga, JJ
June 4, 2015

The Senate, on August 12, 2014, summoned certain Governors to appear before the Sessional Committee on County Public Accounts and Investments to answer questions on County financial management. The questions emerged from the report of the Auditor General for the financial year 2012/2013. The Governors who had been summoned included 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. However, the Governors failed to appear before the Committee as required by the summons.

In response, the Senate passed a resolution to the effect that the Controller of Budget would 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.

The counties filed a petition in court to challenge the constitutionality of the summons and the resolution passed to stop withdrawals. Additional issues were raised and they included questions on whether, given the existence of parliamentary privilege, the court had jurisdiction to hear the petition and whether the Petition was barred by the doctrine of *res judicata* as it concerned issues that had been determined in a prior suit.

The court's holding was that under article 165(3) of the Constitution of Kenya 2010, it had the power to inquire into the constitutionality of the actions of the Senate. The court explained that notwithstanding the existence of parliamentary privilege, the place of the Constitution as the supreme law meant that Senate had to function within the limits prescribed by the Constitution.

The court also explained that the petition raised new issues, which had not been predetermined in the case of *Kerugoya H. C Petition No 8 of 2014* and the parties that were different from the parties in *Kerugoya H. C Petition No 8 of 2014*. The court found that the doctrine of *res judicata* was therefore inapplicable, as it would apply where a case concerned issues between parties, which had already been determined in another suit in which those same parties were litigating. Further, the court stated that both petitions dealt with the issuance of summons to Governors by the Senate. However, given the differences in the nature of the parties involved and the facts in support of each Petition, the law could apply to each set of facts differently.

The court explained that under 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.

The court elaborated that under article 96(3) of the Constitution oversight implied a procedural and substantive function for the Senate. Oversight was procedural in the sense that Senate would be involved in enacting legislation on the sharing of national resources between the National Government and the County Governments as envisaged in article 202 and 203 of the Constitution.

The Senate's substantive role, according to the court was that it ensured that the revenue allocated was disbursed to counties in accordance with the law and the County financial operations were going on normally.

The court stated that under section 164 of the Public Finance Management Act, No 18 of 2012, a County Government was required to submit its financial statements and summaries to the Auditor General. On his part, the Auditor General would make a financial management report and submit it to the National Assembly, Senate and the County Assemblies.

The Senate's role, according to the court, was to receive the financial management report, examine it and make recommendations. The Senate's role in examining the reports was provided for in section 163 & 164 of the Public Finance Management Act, No 18 of 2012.

Further, the court stated, that under article 125 of the Constitution, while examining the financial management report, the Senate had power to summon any person to appear before it for purposes of giving evidence or providing information. The court held that a County Governor was required to be accountable for the management and use of County resources as per

the requirements of section 30(3)(f) of the County Governments Act, No 17 of 2012. Therefore, according to the court, a Governor could appear before the Senate Committee to answer relevant questions on financial management.

The court explained that in making the appearance, the Governor could opt to be accompanied by the County Executive Committee Member for Finance and the designated Accounting Officer of the relevant County entity. Therefore, it was lawful and constitutional for the Senate to issue summons to Governors for them to answer questions on County financial management.

On the issue of the resolution to stop the withdrawal of funds the court stated that it was the Cabinet Secretary who was to initiate the process. Under article 225 of the Constitution and sections 93, 94 & 95 of the Public Finance Management Act, No 18 of 2012, a Cabinet Secretary had powers to stop the transfer of funds to County entities subject to Parliament's approval. However, the court stated that 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.

The court also explained that the import of article 228(4) of the Constitution was that the Controller of Budget could not approve any withdrawal from a public fund unless he was satisfied that law authorized the withdrawal. Conversely, the Controller of Budget could not stop a withdrawal unless the law authorized the stoppage.

Further, the court held that the Governors could not be asked to answer questions on the financial affairs of the defunct Local Authorities during the financial year 2012/2013 which fell in Phase One of the transition period. The court stated that during the transition period, under section 7 of the Transition to Devolved Government Act, 2012, 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.

As there was no evidence that County Government had, in a proper manner, taken over the assets and liabilities of the defunct Local Authorities, the court held that the County Governors could not answer questions on financial management that had been undertaken by the defunct Local Authorities.

Petition was partly allowed.

Senate has the Powers to Summon Governors and Members of the County Executive

"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 2012, 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, 2012 as read together with article 10(2)(c) of the Constitution on the National values and principles of governance".

International Legal Consultancy Group v Senate & another
High Court of Kenya at Kerugoya
Petition No 8 of 2014
HI Ong'udi, CW Githua, BN Olao JJ
April 16, 2014

The High Court sitting in Kerugoya ruled that the Senate in exercising its oversight powers under the Constitution of Kenya, 2010 had the powers to summon the Governors and Members of the County Executive. Justice Ong'udi, Githua and Olao held that 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 2012, they had to be held accountable by the Senate for the National revenue allocated to their respective Counties in view 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 petitioner had brought a Petition before the High Court challenging the decision of the Senate to summon 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 national 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. The petitioner argued that the Senate could not scrutinize County expenditures in the same way the committees and general assemblies of the county legislatures could.

The issue before the court was inter-alia whether the Senate by summoning the Governors and the County Executive Committee members of Finance in the respective counties was unconstitutional.

The High Court held that 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 2012, they had to be held accountable by the Senate for the National revenue allocated to their respective Counties in view 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 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.

The court also held that 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, it was held that 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.

It was further held that the Senate was 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 fostered and nurtured the principles of devolution in 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 court was of the view that 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.

Petition dismissed.

Court Restrains Senate from Summoning Governors and County Executive Members

"Article 226(2) of the Constitution of Kenya "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."

International Legal Consultancy Group v Senate & Another
Constitutional Petition No 74 of 2014
High Court at Nairobi
Mumbi Ngugi, J
February 19, 2014

The Senate and its Standing Committee on Finance, Commerce and Economic Affairs, through the clerk to the Senate, issued witness summons to governors named in the application and County Executive Committee members for finance to appear before it on diverse dates to answer questions on county financial management. The petitioner filed the petition challenging that decision. The main issue was whether the senate could summon governors and county executive committee members responsible for finance to answer questions regarding county government finances.

The court held that as the senate had not deemed it necessary to appear before the court to deal with the contentions made by the petitioner despite being served, the court had no benefit of its response and consequently the court had no material before it on the basis of which it could determine under what powers the senate exercised the mandate to summon the governors and demand production of the documents that it sought produced.

The court appreciated that the senate had an important role to play in the implementation of the Constitution, particularly with regard to devolved government. However, just like all other state organs, it was bound by the Constitution, and it could not arrogate to itself powers that it had not been given under the Constitution.

On the material before the court, and taking into account the provisions of article 226(2), the court was of the view that the senate could have overstepped its mandate in purporting to summon the governors and the County Finance Committees. While it did have power under article 125 to summon anyone, that power could not have been intended to be exercised arbitrarily and in isolation. Put differently, the provisions of article 125 could not be read in isolation, but had to be read in conjunction with other provisions of the Constitution that allocated functions and powers to the various organs created by the Constitution.

The court was alive to the doctrine of separation of powers but as the final arbiter under the Constitution, it was obliged to adjudicate any dispute between various arms of state and determine the contours of separation having regard to the constitutional functions of each organ. The orders then prayed for were merited.

The court took judicial notice of, and observed with regret, the recalcitrance of the legislative arm of government with regard to the exercise of judicial authority by the courts. While both the clerk to the senate and the senate as an institution were served with the application before the court, they had not deemed it necessary to appear before the court.

The court concluded that it would continue to exercise the judicial authority vested in it by the people of Kenya. The issues raised by the petition, which fell within the jurisdiction of the court under article 165(3)(d), as raising a critical and substantial question of law with regard to the powers of the senate vis a vis governors and oversight over county finances to merit hearing and determination by an uneven number of judges as provided under article 165(4) of the Constitution. The matter was referred 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 be heard and determined.

Pending the hearing and determination of the petition, a temporary injunction issued restraining the respondents from summoning the Governors and County Executive Committee members responsible for finance from appearing before it to answer questions on county government finances, and an order suspending the summons issued by the respondents to the Governors and County Executive Committees Members issued.

County Governments Cannot Impose Taxes without an enabling legislation

"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"

Republic v Kiambu& 5 others
Judicial Review Misc App No 355 of 2014
High Court at Nairobi
GV Odunga, J
June 25, 2015

The applicant sought orders of certiorari and prohibition against actions of Kiambu enforcement officers towards Kiambu County traders, in the pretext of enforcing provisions of the defunct/nullified Kiambu County Finance Act 2013.

Court in this regard had to determine if County Governments could Impose Taxes without an enabling proper legislative framework and if it could refuse to grant Judicial review orders even where the requisite grounds existed.

The court found that 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 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.

It therefore noted that article 209(3) and (4) of the Constitution 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.

On Judicial review orders, the court stated that these were discretionary and were not guaranteed, hence a court might 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.

It went on to note that being a discretionary jurisdiction, it had to be exercised judicially and judiciously based on the evidence of sound legal principles. 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.

Application dismissed.

A County Government must have enacted a Finance Act in order to charge Agricultural Produce Cess

"Agriculture produce cess was a tax and being so; it was to be imposed in accordance with law and 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."

Cereal Growers Association & Another v County Government of Narok & 10 others
In the High Court of Kenya at Nairobi
Constitutional and Human rights division
Petition no.385 of 2013
I Lenaola, J
September 11, 2014

The 1st petitioner, the Cereal Growers Association, is a member-based farmers' organization. The members of the Association brought a Petition claiming that the actions of the 1st to 8th respondents in levying agricultural produce cess and related tax without a supporting legal framework violated the provisions of article 210(1) of the Constitution that provided that no tax or licensing fee may be imposed, waived or varied except as provided by legislation.

It was argued that the County Governments were violating the Constitution to the extent that they were charging agricultural produce cess in a discretionary and arbitrary manner in violation of article 209(5) of the Constitution that required that taxation and other revenue-raising powers of any county shall not be exercised in a way that prejudiced the national economic policies and activities across county boundaries or the national mobility of goods, services, capital or labour.

The main issue for determination before the court was whether there existed a legal framework for the charging of agricultural produce cess by the counties and whether the County Governments violated their power to impose tax and duty.

The High Court held that County Governments had powers to raise revenue and they were to continue to raise revenue under the law being in force at the time before the new laws were enacted by the County Government for imposing taxes. That 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.

The court further held that the gazette notice that the claimants were founding their justification on the imposition of agricultural produce cess was not a legal framework through which a tax would be levied, but it was a medium of communication between the government and the people and was based on a certain legal decision under a clear law. The court ultimately issued a declaration that the continued act of the respondents in levying Agricultural Produce Cess or related tax without a supporting legal framework expressly violated the provisions of article 210(1) of the Constitution and ordered the 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.

County Governments are allowed to have reliable Sources of Revenue to enable them Govern and deliver Services

"Article 185(2), Constitution of Kenya, 2010, A county Assembly may make any laws that are necessary for or incidental to the performance of the functions and exercise of the powers of the County Government under the fourth schedule"

Polycarp Wathuta Kanyugo & 2 others v The County Government Of Kirinyaga
Judicial Review Application 9 of 2014
High Court at Kerugoya
15 Aug 2014
C W Githua J

By a Notice of Motion filed under a Certificate of Urgency, four applicants sought among other prayers leave to apply for the Judicial Review remedies of mandamus, prohibition and certiorari against the respondent, the County Government of Kerugoya, whose main grievance was that rents in the houses they occupied were arbitrary and exorbitantly increased by the respondent despite their protestations. The rent increment took effect through the passing of the Kirinyaga County Government Finance Act 2013 by the Kirinyaga county Assembly, the legislative organ of the Respondent.

The court held that County Governments were allowed to have reliable sources of revenue to enable them govern and deliver services to their people effectively. Under article 175 of the Constitution, County Governments were allowed to have reliable sources of revenue to enable them govern and deliver services to their people effectively.

According to the Court, in passing the Finance Act, the Kirinyaga County Assembly acted in the exercise of its legislative function as mandated by the Constitution and the decision of increasing rents in the houses leased to the applicant's among others was an administrative decision but the remedy of judicial review was not available to the Applicants because they were not opposed to the rental increments per se but were aggrieved by the rate at which the increments were done that amounted to a 300% increment which was too high.

On the allegation on whether the principles of inclusiveness and public participation which were enshrined in the Constitution of Kenya, 2010 and the County Governments Act were never adhered to before the Finance Act was enacted the court found that the application be made within a judicial review application leave alone in an application seeking leave to institute such proceedings.

In conclusion, the court held that the applicants chose the wrong forum to ventilate their grievances. Instead of seeking to commence judicial review proceedings, the applicants should have filed a Constitutional Petition under article 165(3) (d) of the Constitution to determine whether or not section 51 of the Finance Act 2013 was consistent with the Constitution.

Applications not merited- dismissed with costs

County legislation does not take effect unless gazetted

"Article 199 (1) of the Constitution was 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 also provided for the coming into law of the county legislation. The law was therefore clear that a County legislation took effect upon gazettement. The Appropriation Act aforesaid was never gazetted and that strictly meant that there was no law that could be used to implement the budget for Bomet County for the 2014/2015 financial year."

Tyson Ng'etich & another v Governor, Bomet County Government & 5 others
Petition 415 of 2014
High Court at Nairobi
I Lenaola J
May 29, 2015

The Petition sought to challenge 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 failing to conduct 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 are the summary facts of events that led to institution of the petition;

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.

b. The CECF did not publish the budget estimates as approved by the County Assembly in violation of Section 129(6) of the PFMA.

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.

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.

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 resent to the Governor on 17th July 2014 for assent but he declined to assent.

The budgetary process was later restarted 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.

The issues which came up include; 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; the effect of the Governor's failure to assent to a County Legislation; the effect of non-gazettment of a County legislation; the procedure undertaken for a supplementary budgetary process; and, the reliefs available to the petitioners.

In the instant petition, the court first established the *locus standi* of the petitioners. The Court stated that article 258(2) of the Constitution provided that, a person acting on his own behalf or on behalf of another person had a right to institute court proceedings claiming that the Constitution had been violated. In that regard, the court observed that 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 process for the financial year 2014/2015. Therefore, in the circumstances, the Petitioners had the *locus standi* to institute a claim alleging that the Constitution had been violated.

It was an established principle in constitutional litigation that where a person sought redress from the High Court for an alleged 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. With due regard to this principle, the court found that the Petitioner had fulfilled the rule established in *Anarita Karimi Njeru.*

The court looked into and set down the budgetary process as provided by the relevant legal frameworks. The court stated that, according to section 104(1)(a)(b) of the PFMA, 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 was 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 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 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 publicized.

The court held that 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 passed during the budgetary process in each financial year;

a. On 30th 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.

b. By 1st 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.

c. On 30th 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).

d. 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 28th 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 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.

e. On or before the 28th 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)

f. Not later than the 15th June of each financial year, every County Government shall prepare an annual cash flow projection for the County for the next financial year, and;

g. Submit the cash flow projection to the Controller of Budget with copies to the Intergovernmental Budget and Economic Council and the National Treasury.

h. Following approval by the County Executive Committee, the County Executive Committee Member for Finance shall by the 30th 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.

i. 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.

j. The CECF shall within reasonable time after submission publish and publicise the budget estimates.

k. 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.

l. 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 law and any other laws required to implement the budget to be passed by the 30th June in each year. (Section 131 PFMA, 2012)

The judge, in applying the requisite legal provisions in the instant Petition, observed 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. 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. According to the court, 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). With due regard to the above provisions, the court concluded that, since 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.

The court, in view of the facts on record, observed that 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 were expunged and the Budget Estimates were approved as submitted and the Bomet County Appropriation (Amendment) Bill, 2014 was purportedly passed. Therefore, having found that the Bomet County Appropriation Bill originally passed on 16th July 2014, although not assented to, had become law, could it be said that there were two Appropriation Acts for Bomet County?

According to the court, section 24 of the County Government Act 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 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 section 24(6) of the County Government Act. The court held that 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 time frames embedded in the law.

The court observed that 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 cited the case of *Speaker County Assembly of Nakuru & 46 Others v The Commission of Revenue Allocation & 2 Others Petition No.368 of 2014* which had addressed the issue of the CRA ceilings and the Governor's position was vindicated. However, according to the court, that was all that could be said in relation to the Governor's decision to act as if he had the mandate to superintend, supervise or direct the County Assembly on the exact law to enact. According to the court, 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.

The court observed that 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.

The judge further observed 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, he concluded that the title of the end product of that process being Bomet County Appropriation (Amendment) Bill was misplaced. This was because 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.

The court held that 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 participation at the County level. The mode and the manner of giving effect to public participation would vary from case to case and there had to be some clear and reasonable level of participation afforded to the public. According to the court, the evidence was clear that there was public participation in the budget estimates forming the Appropriation Act which became law on 25th July 2014. 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 various sub-counties. 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. The court had no reason to disbelieve the fact that indeed those meetings were held.

The court observed that during the legislative process, amendments to Bills may be moved during the Committee Stage; therefore, to hold that every amendment moved must undergo the process of public participation would negate and undermine the legislative process. The court concluded that, in the unique circumstances of the Petition it would be wrong 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.

The court observed that only the Bomet County Appropriation Act, 2014 and not the Appropriation (Amendment) Act, 2014 was properly passed and to that extent, it was erroneous to argue that there were two Appropriation Acts for Bomet County. Article 199 (1) of the Constitution was 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 also provided for the coming into law of the county legislation. The law was therefore clear that a County legislation took effect upon gazettement. The Appropriation Act aforesaid was never gazetted and that strictly meant that there was no law that could be used to implement the budget for Bomet County for the 2014/2015 financial year. However, it was true that a budget for the 2014/2015 financial year for Bomet County was uploaded in the Integrated Financial Management System and had subsequently been implemented by the 5th Respondent despite the fact of non-gazettment of the said Appropriation laws.

The court, upon referring to article 228(4) of the Constitution, concluded that the mandate of 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 shall not approve any withdrawal from a public fund unless that withdrawal is authorized by law. Further, section 109(6) of the PFMA provided that 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 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, the court observed that no Gazette Notice was produced to support that presumption.

According to the court, 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.

The court stated that article 199(1) of the Constitution provided that, 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 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"*

The court concluded that 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 cannot be a formality and the 5th 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.

The court concluded that 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.

In obiter the judge stated as follows,"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."

The court allowed the petition partly and made orders that;

i. the Budget making process of Bomet County for the financial year 2014-2015 was unlawful and unconstitutional;

ii. the Bomet County Appropriation Act of 2014 and the Bomet County Appropriation [Amendment] Act of 2014 was unprocedural, unconstitutional, null and void;

iii. prayers (c), (d) (e) and (g) of the Petition were dismissed and each Party was to bear its own costs as the matter was in the best interests of the residents of Bomet County and the Public at large.

Court nullifies Procurement Contract awarded for the sum of Kshs. 1.2 billion per year envisaged to run for 15 years

"The Constitution and the County Governments Act (No 17 of 2012) 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…"

Erick Okeyo v County Government of Kisumu & 2 others
Petition no. 1 'A' of 2014
High Court of Kenya at Kisumu
A O Muchelule J
May 7, 2014

The petitioner sought to challenge the award of tender awarded to the 3rd respondent was given the exclusive responsibility to collect garbage and manage all solid waste for 15 years for a sum of 1.2 billion per year. It was alleged that the tender as floated was not fair, equitable, transparent, competitive or cost effective.

The main issue for determination was whether the contracting of the County Government of Kisumu (1st respondent's) obligations in recruitment of service providers as set out in Schedule 4 of the Constitution was a major policy decision requiring public participation.

The court held that 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 could give the best outcome.

The court found that 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.

Petition allowed

Senate had a role to play in the processing of the Division of Revenue Bill

"Under article 215 of the Constitution of Kenya, 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. This 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"

Speaker of the Senate & another v Attorney General & 3 others
Advisory Opinion Reference No 2 of 2013
Supreme Court at Nairobi
W M Mutunga, CJ; K H Rawal, DCJ; P K Tunoi, M K Ibrahim, J B Ojwang,
S C Wanjala & N S Ndungu, SCJJ
November 1, 2013

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 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.

The main issues to be determined were 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 (Act No. 31 of 2013); what was the Senate's role in the legislative process for Bills concerning county government; 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; what was the role of the National Assembly vis-à-vis the Senate in the origination, consideration and enactment of the division and allocation of revenue bills ;whether the Supreme Court had jurisdiction to determine a dispute arising between the Senate and the National Assembly and finally whether the Supreme Court could interfere with the Parliament's legislative authority, and if so in what circumstances.

The court observed that 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 favor of rendering an Advisory Opinion.

The court opined that a matter qualified to be regarded as one of County Government only where: that was the case in the terms of the Constitution; it was the case in the terms of statute law; 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.

An Opinion from the Supreme Court would not only resolve procedural uncertainties in the deliberation upon and passing of Bills, but would also chart out the proper constitutional path, and establish lines of legality. That 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.

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; the vision and ideals reflected in the Constitution.

The Supreme Court had the responsibility for casting the devolution concept, and its instruments in the shape of county government, 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 that expressed those values, such as devolution and its scheme of financing, the court had the legitimate charge of showing the proper course.

The court found that a Bill concerning county government could be categorized as special or ordinary. Article 110(3) 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.

The court observed that 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 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.

The court held 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.

The court further observed that 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.

The court in its finding stated that 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) was 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)).

The court further found 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 incorporated the role of the Senate and of its Speaker.

The majority of the court concluded that 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 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.

Dissenting Per N.S Ndungu, SCJ

Justice Njoki Ndungu dissented stating that the instant case was not one where the Supreme Court's advisory jurisdiction was exercisable. 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.

She noted that it 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 a clearly a situation in which the Supreme Court had to exercise its discretion not to give an advisory opinion.

She observed that 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.

For any Bill to be deemed as one concerning county government 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 government.

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 government. To 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.

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, which was the purview of the National Assembly.

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 National Assembly under article 217.

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.

The court observed that under article 215 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. This 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.

The process of dealing with inter-chamber deadlock as applied to other Bills under article 110(3) 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. This 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.

The court further observed that 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.

In conclusion, Justice Njoki Ndungu held that to ask the Supreme Court to give Senate powers that belonged in plain language to the National Assembly would be to seek an amendment to the Constitution in a manner not recognized by the supreme law. The tools for reviewing the Constitution to address 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.

Mandate of the Commission on Revenue Allocation and the Controller of Budget in National and County Government Budgets

Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 others
Petition No 368 of 2014
High Court at Nairobi
Constitutional and Human Rights Division
Isaac Lenaola, J
February 20, 2015

The Commission on Revenue Allocation issued a circular addressed to all County Governments (Reference No. CRA/CGM/Vol.III/99) in which a ceiling on allocation for all County Assemblies and County Executives in County budgets for the financial year 2014/2015 was recommended. Further circulars addressed to the County Governments were issued on diverse dates, seeking to reinforce the earlier circular, which demanded that County budgets should comply with the ceiling on allocations and if they did not, the Controller of Budget would not approve withdrawals from the County Revenue Fund or any other fund by County Governments.

The Petitioners' claim was that at the time the circulars were issued, the County Assemblies had not passed the County Finance Act for their respective counties for the 2014/2015 financial year for purposes of budgeting. They also claimed that the Controller of Budget was *ultra vires* his mandate in issuing the circulars.

The Petitioners asserted that there had been violations of articles 73, 185, 189, 207, 216 and 228 of the Constitution of Kenya, 2010 by the respondents and that there was also a violation of the right to freedom from discrimination and the right to fair administrative action.

The petitioner's case was that the creation of budgetary ceilings protected the budgets of the National Executive, the National Assembly, the Senate, the Judiciary and the twelve Commissions and Independent offices listed in article 248 of the Constitution of Kenya, 2010 but not the budgets of the counties. The petitioners contended that such an action amounted to a breach of their right to equal protection and equal benefit of the law and freedom from discrimination as recognized in article 27 of the Constitution.

Further, the petitioners claimed that the import of the circulars was to direct County Assemblies on how to legislate and that amounted to unlawful and unfair administrative action which was contrary to article 47 of the Constitution. The petitioners

explained that the legislative authority in counties was vested in the County Assemblies in article 185 of the Constitution and County budgets were part of the legislative mandate of the Assemblies under article 184(4) of the Constitution.

The petitioners also asserted that the circulars breached the procedure, time-lines and systems of checks and balances required to be observed by County Assemblies in enacting County budgets under article 201 of the Constitution and sections 117, 125, 129 and 131 of Public Finance Management Act, No 18 of 2012.

The respondents provided the explanation that the circulars were a reflection of budgetary ceilings established by statutory provisions. Particularly, those statutory provisions were found in the Division of Revenue Act, 2014 and the County Allocation of Revenue Act, 2014. The respondents further explained that the Commission on Revenue Allocation was granted the mandate to ensure that County budges complied with the law under articles 218 & 216 of the Constitution of Kenya, 2010.

It was also elaborated by the Controller of Budget, that the office of the Controller of Budget was established under article 228 of the Constitution of Kenya, 2010 and its mandate was to oversee the implementation of the budgets of the National and County Governments by authorizing withdrawals from public funds and preventing any withdrawal from a public fund unless the Controller of Budget was satisfied that the withdrawal was authorized by law.

The court held that under articles 216, 217 and 218 of the Constitution of Kenya, 2010 the Commission on Revenue Allocation had the mandate to make recommendations to the Senate, the National Assembly, the National Executive, County Assemblies and County Executives. Recommendations were persuasive and not of a binding nature. However, the functions of the Commission on Revenue Allocation were supplemented by legislation such as the Revenue Allocation Act, 2014. It was therefore the court's finding that the circulars issued were not unconstitutional. The court also explained that the Commission on Revenue allocation was not bound to seek information from or consult County Governments before making its recommendations.

Additionally, the court held that the Commission on Revenue Allocation had not usurped the legislative role of County Assemblies with respect to County budgets, as it was within the Commission's mandate to make recommendations on the manner in which the National Revenue was to be shared between the two levels of Government and among the Counties and such recommendation could include prescribing ceilings.

The court noted that the Controller of Budget, under article 228(5) of the Constitution of Kenya, 2010 was required not to approve any withdrawal from a public fund unless the law authorized the withdrawal. However, the court found that the Controller of Budget had no role that allowed him to review the budgets of County Governments before they were enacted. In doing such reviews, the Court held that the Controller of Budgets had encroached on the mandate of County Assemblies.

On the question as to whether there had been breaches of fundamental freedoms and rights recognized in articles 27 & 47 of the Constitution, the court noted that the petitioners were not private individuals but officers serving in public office. The court further held that in the given circumstances, any differences regarding the fiscal and budgetary processes between affected State Organs would not attract the court's intervention under the Bill of Rights. Those differences were to be settled in the manner envisaged by article 189(4) of the Constitution of Kenya, 2010 and not by litigation predicated on the Bill of Rights.

Petition was dismissed.

Equity Inclusivity

3. Equity and Inclusivity

Court orders the Attorney General and the Commission for the Implementation of the Constitution (CIC) to prepare a bill on gender representation within forty (40) days

"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. The AG, in Consultation with CIC, was under a constitutional duty to prepare, for tabling before Parliament, legislation to effect the gender equity rule. 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."

Centre for Rights Education & Awareness (CREAW) v Attorney General & another
High Court of Kenya at Nairobi
Petition No 182 of 2015
M Ngugi J
June 26, 2015

The petitioner brought a petition before the High Court alleging failure on the part of the respondents to prepare a bill for tabling before Parliament for purposes of implementation of articles 27(8) and 81(b) of the Constitution. The Bill was to give effect to the one-third-to-two-thirds gender principle. 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, Reference Number 2 of 2012. The Supreme Court had advised that the said legislative measures for giving effect to the Constitution in relation to the National Assembly and Senate, should be done 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 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.

The issues arising were as follows: whether the advisory opinion of the Supreme Court was binding on the Court as well as the respondents; whether the petitioner had approached the High Court prematurely; whether it should have waited for the 27th of August 2015 to dawn before approaching the Court; whether Parliament was a Necessary Party to the Proceedings; and, 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.

The court held that 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.

According to the court, the instant petition was properly before it, therefore it was not premature. The judge stated that a party did not have to wait for a violation of a right or a contravention of the Constitution to occur before approaching the Court for relief. It was observed 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. Therefore, 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.

The judge stated that 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. Therefore, any orders directed at the two entities 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."

The court referred to Rule 5(b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, which 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. While referring to the above provision, the

court found that the petitioner enjoined the proper parties to the Court.

The court observed that 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.

The court held that the date set by the Supreme Court was in accordance 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.

According to the court, 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. 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 CIC would have prepared the requisite Bills.

The court observed that 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, according to the court, the provisions of article 261(2) were clear, and it was important to set them out alongside article 261(1).

The court stated that 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.

According to the court, 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.

The court found that 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.

According to the court, 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 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.

The court held that 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.

The court observed that 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.

The judge held that 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.

In obiter the judge stated that, "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)."

The court allowed the petition and declared that:

i. *the 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";*

ii. *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;*

iii. *an order of Mandamus be 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;*

iv. *each party was to bear its own costs of the petition.*

Advisory Opinion of the Supreme Court in the matter of the Principle of Gender Representation in the National Assembly and the Senate

"If the legislative measures contemplated ensured crystallization of the two-thirds gender principle into an enforceable right were not taken before the elections of 4th March 2013, then article 81(b) would not have been applicable to the said elections. The effect was that article 81(b) of the Constitution was amenable only to progressive realization – even though it was immediately applicable in the case of County Assemblies under article 177"

In The Matter Of the Principle of Gender Representation in the National Assembly and the Senate
Advisory Opinions Application 2 Of 2012
Supreme Court at Nairobi
WM Mutunga(CJ), PK Tunoi, JB Ojwang SJJ
December 11 2012

The main issues of determination were whether article 81 (b) applied in respect of the very next general elections to be held on March 4th, 2013, or on the contrary, applied progressively over an extended period of time and whether an unsuccessful candidate in the first round of presidential election under article 136 of the Constitution or any other person was entitled to petition the Supreme Court to challenge the outcome of the first round of the said election under article 140 or any other provision of the Constitution.

The court stated that an advisory opinion was given only in exceptional circumstances, when the various organs established under the Constitution were for cause, unable to exercise their authority to resolve major governance issue, when the issues involved were weighty and of constitutional significance; and when the public interest in the matter was manifest.

Only a truly deserving case would justify the court's Advisory Opinion, as questions amenable to ordinary litigation were

prosecuted in the normal manner; and the Supreme Court ought not to entertain matters that properly belonged to first-instance court litigation.

Only by due deference to the assigned jurisdiction of the different courts, was the Supreme Court rightly hold to its mandate prescribed in section 3(c) of the Supreme Court Act, 2011 of developing rich jurisprudence that respects Kenya's history and traditions and facilitated its social, economic and political growth.

Court also found that the basic requirement for an application for an opinion was that it was, as contemplated by article 163(6) of the Constitution, sought to unravel a legal uncertainty in such a manner as that promoted the rule of law and the public interest.

The Attorney General's request for an Advisory Opinion raised issues of great public importance. The general elections were not only the most important since independence, but were complex and novel in many ways. The elections come in the context of the first progressive, public-welfare-oriented, historic Constitution, which embodied the people's hopes and aspirations. Not only were these elections one of the vital processes instituted under the Constitution, but they constituted the first act of establishing a whole set of permanent governance organs. Any ambivalence or uncertainty in the path of such crucial elections were, as a matter of public interest, to be resolved in time: and the task of resolution rested, in the circumstances that prevailed, with the Supreme Court, by its Advisory-Opinion jurisdiction.

The court noted progressive realization connoted a phased out attainment of an identified goal. The expression progressive realization was neither a stand-alone nor a technical phrase. It simply referred to the gradual or phased-out attainment of a goal, a human rights goal which by its very nature, could not be achieved on its own, unless first, a certain set of supportive measures were taken by the State. The exact shape of such measures varied depending on the nature of the right in question, as well as the prevailing social, economic, cultural and political environment. Such supportive measures may have involved legislative, policy or programme initiatives including affirmative action.

In determining the issue whether a right was to be realized "progressively" or "immediately" the court stated that it was not a self-evident question: it depended on factors such as the language used in the normative safeguard, or in the expression of principle; it depended on the mechanisms provided for attainment of gender-equity; the nature of the right in question; the mode of constitution of the public body in question e.g. appointive of elective; if elective, the mode and control process for the election); the identity and character of the players who introduce the candidates for appointment or election and on the manner of presenting candidature for election or nomination.

The expression "progressive realization" as apprehended in the context of the human rights jurisprudence, would signify that there was no mandatory obligation resting upon the State to take particular measures, at a particular time, for the realization of the gender-equity principle, save where a time-frame is prescribed. It was not the classification of a right as economic, social, cultural, civil or political that suited a particular gender-equity claim to the progressive mode of realization; it was the inherent nature of the right that determined its mode of realization.

Article 81(b) of the Constitution stood as a general principle could not 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 were concerned. That was the burden of the court's opinion on the matter, that it could not be enforced immediately.

If the legislative measures contemplated ensured crystallization of the two-thirds gender principle into an enforceable right were not taken before the elections of 4th March 2013, then article 81(b) would not have been applicable to the said elections. The effect was that article 81(b) of the Constitution was amenable only to progressive realization – even though it was immediately applicable in the case of County Assemblies under article 177.

The court observed that the provision in article 27(6) of the Constitution was that for the State to take legislative and other measures, included affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups presupposed open-ended schemes of decision making and programming, which could only be effected over a span of time. By accommodating such prolonged time-spans of action by the legislative and Executive branches, the Judiciary by no means negated the principle of separation of powers.

Hard gender quotas such as may have been prescribed, were immediately realizable whereas soft gender quotas as represented in article 81(b) with regard to the National Assembly and Senate were for progressive realization.

The court was quick to remind itself the terms of article 100 of the Constitution on promotion of representation of marginalized groups and of the Fifth Schedule prescribing time-frames for the enactment of required legislation, 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, were to be taken by 27th August, 2015.

The court also stated that the word "shall" will translate to immediate command only where the task in question was a cut-

and-dried one, executed as it was without further molding or preparation, and where the subject was inherently disposable by action that emanated from a single agency.

The court further stated that the word "shall" was to be used in a different context, to imply the broad obligation which was more institutionally spread-out, and which called for a chain of actions that involved a plurality of agencies; when "shall" was used in this sense, it called not for immediate action, but for the faithful and responsible discharge of a public obligation; in this sense, the word "shall" incorporated the element of management discretion on the part of the responsible agency or agencies.

In the context of human rights, the word "shall" was perceived as an emphasis on the obligation to take appropriate action, in the course of the progressive realization of a right conferred by the Constitution.

The court held that there were potential disputes from Presidential elections other than those expressly mentioned in article 140 of the Constitution. A Presidential election, much like other elected-assembly elections, was not lodged in a single event; it was, in effect, a process set in a plurality of stages.

Article 163(3) suggested that the Supreme Court was intended to adjudicate upon all disputes as would arise from the Presidential election. There was no reason to presume that the framers of the Constitution intended that the Supreme Court should exercise original jurisdiction only in respect of a specific element, namely, disputes arising after the election while excluding those disputes that arose during the conduct of the election.

It was noted that the validity of the Presidential election was not for determination only after the administrative pronouncement of the final result; at any stage in the critical steps of the electoral process, the Supreme Court was to entertain a dispute as to validity.

Presidential-election disputes, in their whole range, should be impartially and expeditiously resolved by the Supreme Court as the ultimate judicial body, within practical time-lines to be read into article 138(5); and in the event of a second round of election, the words "within thirty days after the previous election" was read to mean thirty days from the date on which disputes in respect of the first round would have been resolved. Within such guidelines, the Supreme Court, acting by virtue of its rule making powers under article 163(8) of the Constitution, established more specific and efficient time-lines to guide the hearing of first round election disputes.

In conclusion the court found that article 140(1) provided that, a person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the Presidential election. There was a lacuna in this provision. Election of the President was a process, beginning from primary elections to the final election that would lead to the identification of the President-elect. Article 140(1) provided for disputed settlement only at the final stage, and not at earlier stages. With no provision on the mode of resolution of disputes at the earlier stages, there was no express right to seek the court's intervention, for instance, in respect of the runner-up position. Such a dispute was on the facts and one of merit and, therefore, one to be resolved judicially. The urgency of the issue remained the same as that which attended dispute-settlement in relation to the position of the President-elect; and accordingly, this was still be a contest on an issue of the Presidential election.

Dissenting as per W. Mutunga, C. J.

The court stated that matters of who were people's representatives in Parliament and the Senate were central to county governments. The Constitution and validity of these two houses of Parliament affected their ability to deliver on these key obligations to County Governments. The gender question was one that was quintessential to determining their validity. The issue of two-third gender principle in the elections to Parliament and the Senate was a matter "concerning county government." So was the election of the President. Thus the Supreme Court had jurisdiction to hear the Reference by the Attorney General and deliver an Advisory Opinion.

In interpreting the Constitution and developing jurisprudence, the court would always take a purposive interpretation of the Constitution as guided by the Constitution itself.The obligation of the Supreme Court was to cultivate progressive indigenous jurisprudence- grown out of Kenya's own needs, without unthinking deference to that of our other jurisdictions and courts, however distinguished.

The court held that there was no violation of the principle of separation of powers in the Supreme Court's rendering of this Advisory Opinion under article 163 (6). The court's role was clearly defined in the Constitution. There was no evidence that the court in exercising its constitutional mandate in this Reference had in any way entered the constitutionally preserved mandates of the Executive and Parliament.

The Supreme Court had power to declare Parliament unconstitutionally constituted. It was the Supreme Court's duty to

defend the Constitution, and ensure that all bodies within it were constituted constitutionally and employ all powers donated by the People to it constitutionally.

The Constitution's view to equality, as one of the values provided under the Constitution was not the traditional view of providing equality before the law. Equality was substantive, and involved undertaking certain measures, including affirmative action, reversing negative positions that had been taken by society. Where such negative exclusions pertained to political and civil rights, the measures undertaken were immediate and not progressive.

Article 27 of the Constitution, was clear that disenfranchisement of the Kenyan women in the political arena was a form of discrimination. Kenyans, particularly women, when they voted for a new constitution, had in mind the continuous and consistent struggle for their equity and equality in all spheres of life.

The court found under article 177 of the Constitution (gave a formula for gender equality in county government) was a clear proof of the submission for immediate realization of the two-thirds gender principle. There was no reason that a Constitution that decreed non-discrimination would discriminate against women running for Parliament and the Senate. There was no constitutional basis for discrimination among women themselves as the consequence of the progressive realization of the two-thirds gender principle would entail. A Constitution did not subvert itself. Deciding that women vying for county representation had rights under the Constitution while their counterparts vying for Parliament and the Senate was discriminated against would result in that unconstitutional position.

The State had been implementing the principle as a matter of clear policy. Stakeholder convened and discussed on the two-thirds gender principle had always been about implementation and not interpretation. Parliament could not then, by its silence, deprive women the right to equal representation. There was no reason to doubt the patriotism of the current Parliament that was fully aware of the constitutional consequences of refusing to legislate. In the event that Parliament failed to legislate, any of the elected houses that violated this principle would be unconstitutional and the election of that house was to be null and void.

The court concluded that the immediate implementation of the two-thirds gender principle was reinforced by values of patriotism, equity, social justice, human rights, inclusiveness, equality and protection of the marginalized. Such values would be subverted by an interpretation of the provisions that accepted progressive realization of this principle.

Nomination of Representatives of persons with Disability in the Senate nullified & new Representatives to be Appointed

Ben Njoroge & another v Independent Electoral & Boundaries Commission & 2 others
Petition No 14 of 2013
High Court at Nairobi
R E Ougo, J
September 27, 2013

The petition concerned nominations of representatives of persons living with disability to the Senate. Pursuant to articles 90(1) 98(1)(d) of the Constitution of Kenya 2010, there were two slots for such representatives who had to be a man and a woman selected by political parties on a basis proportional to the number of seats garnered by the political parties. It was The National Alliance (TNA) and Orange Democratic Party of Kenya (ODM) who were to select the nominees.

The 1st petitioner relied on crutches for mobility as his lower limbs had been affected by polio while the 2nd petitioner had a physical disability and relied on a wheelchair as she was living with celebral palsy. The 2nd respondent, a member of TNA, was a person living with visual disability and had been born with the disability and the 3rd respondent was a member of ODM and was living with a physical disability.

There were requirements for formal applications to be made by interested candidates for the nominations. The candidates were thereafter assessed and the results were that the petitioners emerged as the best candidates for the respective party lists of TNA and ODM respectively while the 2nd & 3rd respondents emerged as the second best candidates in the TNA and ODM party lists, respectively. However, it was the second best candidates whose names were submitted as duly nominated candidates for TNA and ODM as representatives for persons with disability in the Senate. Their nomination was published in the Kenya Gazette Notice No 3508 on March 20, 2013. The petitioners in court questioned the validity of the nominations.

The court held that the Independent Electoral and Boundaries Commission (IEBC) under article 90 of the Constitution of Kenya, 2010 was required to ensure that the party lists comprised of an appropriate number of qualified candidates and alternated between male and female candidates in the priority in which they were listed. In a consideration of the party list, no disability was to be regarded as being superior to the other.

A further holding by the court was that the IEBC was required to ensure that they designated the seats while considering the list on priority and in alternates of a woman and a man. The IEBC designated the second best candidate in the TNA and ODM list that was contrary to law. Therefore, it was the court's conclusion that the IEBC had contravened the provisions of article 90 (2) (b) of the Constitution of Kenya, 2010 and the sections 34 (5) (6) (8) and 36 (2) of the Elections Act, No 24 of 2011.

The Petition was allowed. (The IEBC was ordered to publish a Gazette Notice electing the 1st and 2nd petitioners to the Senate.)

County Governments should ensure Representation of Kenya's diverse Communities when considering Appointments

"It was not apparent on the face of the facts before the court that the recruitment complained of was conducted in accordance with the constitutional provisions. The exercise was marred by marginalization and discrimination."

Benson Okera Magana & 12 Others v County Public Service Board & 2 Others
High Court at Kisii
Petition No 34 of 2013
RN Sitati J
February 6, 2014

The High Court prohibited the County Government of Migori from appointing persons to fill vacancies in its offices, without ensuring representation of Kenya's diverse communities as prescribed by the Constitution. Justice Sitati held that the recruitment exercise was marred by marginalization and was discriminatory.

The facts were that the applicant brought an application before the High Court pursuant to Rules 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, *seeking inter-alia* orders that pending the hearing of the application Inter-Parties a conservatory order of temporary injunction do issue restraining the County Government of Migori from employing or appointing persons to fill the vacancies in the offices under their jurisdiction without embracing the prescribed constitutional requirements.

The applicants' case was that all the inhabitants of Migori County had not been considered equally in employment, as the Luos and Kurias had taken the majority slots. The applicant submitted that under the County Governments Act, the County Assembly had powers to ensure compliance with article 10 of the Constitution and that they had to go out of their way to ensure compliance. It was further submitted that the employments that were done by the Migori County Government had been discriminatory arguing that unless the High Court intervened the said employments would be a recipe for disunity and other bad practices.

The High Court considered whether the County Government of Migori in carrying out the recruitment complained had followed the Constitutional requirements. The court held that the law recognized and provided that in the performance of their duties, all State organs, State officers and Public Officers had to be guided by the national values and principles of governance set out under article 10 (2) and that It was not apparent on the face of the facts before the court that the recruitment complained of was conducted in accordance with the constitutional provisions. The exercise was marred by marginalization and discrimination.

The court further held that the conduct of the respondents was counter to the provisions of article 174 (e), which provided that the objects of the devolution of government were, *inter alia*, to protect and promote the interests and rights of minorities, marginalized communities. It was also held that the respondents' conduct was also counter to the provisions of article 232 which set out the values and principles of public service which included accountability for administrative acts and representation of Kenya's diverse communities as well as affording adequate and equal opportunities for appointment at all levels of the public service for men and women, the members of all ethnic groups and persons with disabilities.

Cultural diversity threshold must be achieved in County Government Appointments

"The respondents had a duty to put in place measures to ensure diversity and representation of the minorities and marginalized. Although the respondents were satisfied that they had fulfilled their duty by advertising for the County Executive positions in a national newspaper, that was a minimum step, as the provisions of the County Governments Act envisaged other modes and structures of dissemination that were necessary for purposes of reaching the disadvantaged and aiding public participation."

Republic v Tana River County Assembly & another Ex Parte Ibrahim Bocha
JR Miscellaneous Civil Application 10 of 2013
High Court at Malindi
C W Meoli, J
March 3, 2014

The main issue before the High Court was whether the list of the nominees for County Executive positions 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 six-day advertised period for submission of applications was adequate. The other issue was whether the appointments of the Tana River County Executive members complied with the two-thirds gender rule under article 197 of the Constitution.

The Governor (2nd respondent) of Tana River County gazetted the names of the nominees to serve in the County Executive of Tana River County. However, the applicant (Ibrahim Bocha) sought orders of the court to prohibit the gazettement of the nominees and an order to quash the resolution of the County Assembly (1st respondent) approving the Governor's nominees. The main argument was 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 argued that the period (6 days) advertised for submission of applications was too short and that the public did not get sufficient time to participate in the vetting exercise of the nominees.

The court observed that the objects of devolution under article 174 of the Constitution resonated with the themes espoused as national values in article 10(2)(a) of the Constitution. 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.

The court held that the respondents had a duty to put in place measures to ensure diversity and representation of the minorities and marginalized. Although the respondents were satisfied that they had fulfilled their duty by advertising for the County Executive positions in a national newspaper, the court observed that that was a minimum step, as the provisions of the County Governments Act envisaged other modes and structures of dissemination that were necessary for purposes of reaching the disadvantaged and aiding public participation. 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. Hence, the eventual list of nominees failed the cultural diversity test.

The court further noted that the rationale of the provisions of the law under the County Governments Act was that the outcome of any process was as good as the process itself. Therefore the Governor was 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 the constitutional and statutory requirements.

Application partially allowed; each party to bear their own costs.

Court Awards Ksh. 3M Compensation in Respect to Discrimination on the basis of Marital Status & Violation of Human Dignity.

"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 has any meaningful purpose and worth within Vihiga County…and...proved a perfect case for an award of damages for the breach of the Petitioner's rights"

Mary Mwaki Masinde v County Government of Vihiga & another
Petition Cause No 25 of 2014
High Court at Kakamega
C. Mrima, J
9th July, 2015

The Petitioner's application for the position of Members of the County Management Boards was rejected despite having passed the interview and being picked among 6 other candidates for the final approval appointment. The grounds for rejection were that though born in Emuhaya, she was married and stayed in Mumias and as such she was not able to represent the interests of the people of Emuhaya.

The court sought to determine, the Role of the County Assembly in approval proceedings in the process of appointments of nominees and if the rejection was discriminatory.

The court concluded that Under Section 18(6) of the National Land Commission Act, the role of the Assembly was to approve the appointment of the Board members. That the Assembly was to take into account the national values under articles 10 and 232 of the Constitution and should also endeavor to reflect gender equity and ethnic diversity within that County. The Assembly was not interested in the process towards the nomination of the Board Members for it only comes in during the approval proceedings and with a clear mandate towards the finalization of the appointment process.

It was opined that whereas Section 6 of the Approval Act provided for the process of approval or vetting, Section 7 provided for the issues for consideration by the Assembly in relation to any nomination which included; a consideration of the procedure used to arrive at the nominee, the suitability of the nominee for the appointment and any constitutional or statutory requirements relating to the office.

It was observed that article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) defined discrimination against women as 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.

The court noted that the preamble to CEDAW captured the effect of discriminatory practices against women as that which violated the principles of equality of rights and respect for human dignity, an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hamper the growth of the prosperity of society and the family and made it more difficult the full development of the potentialities of women in the service of their countries and of humanity

The court held that the recommendation by the Committee and the subsequent adoption by the Assembly 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 serving in any public appointment within the Vihiga County. Article 27(3) and (5) provided that women and men had the right to equal treatment, which included the right to equal opportunities in political, economic, cultural and social spheres. The recommendation of the Committee and the subsequent adoption by the Assembly in rejecting the approval of the Petitioner's appointment as a Member of the Board on grounds of her marital status was discriminatory and offended articles 27 and 28 of the Constitution of Kenya, 2010.

That 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. 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.

The honorable court concluded that 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 has any meaningful purpose and worth within Vihiga County. She missed the opportunity to serve her people and further her career. Article 3 (1) of the Constitution to the effect that every person had an obligation to respect, uphold and defend the constitution, provision

which the Respondents ought to have observed. Furthermore article 2 (1) declared the Constitution as the supreme law of the Republic which bound all persons and 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 a perfect case for an award of damages for the breach of the Petitioner's rights.

Decision to reject petitioner quashed, petitioner awarded 3,000,000 as compensation, costs borne by the second Respondent

Removal from Office and Suspension of County Governments

4. Removal from Office and Suspension of County Governments

Court cannot stop the swearing in of Governors or members of County Assemblies pending validity of Presidential Election Results

Calvin Kodongo & 2 others v Transition Authority & 6 others
High Court of Kenya at Nairobi
Petition 174 of 2013
DS Majanja J
March 26, 2013

The petition sought *inter-alia* a declaration that until the Supreme Court had determined the validity of the presidential election results pursuant to article 140 of the Constitution, no person elected to any position contested in the 2013 general election should be sworn in to discharge the duties of a State Office.

The court was faced with the question whether it could stop the swearing in and assumption of office of all the persons elected on 4th March 2013 pending the determination of a Presidential election before the Supreme Court.

The High Court held that the Constitution, Election Act, 2011 and the rules made there under did not contemplate the court taking steps to stop the swearing in of Governors or members of County Assemblies or stopping them from taking up their Constitutional responsibility. An order of that kind that was sought by the petitioner would simply paralyze the County Government system, which was a key part of the Constitution. The petition was therefore dismissed.

Obligation of County Governments to Publicize Petition for Suspension

"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."

Michael Manthi Kisoi v Commission of Inquiry into the Petition to Suspend Makueni County Government & 8 others
High Court at Nairobi
Petition No 158 of 2015
M Ngugi J
May 8, 2015

The High Court at Nairobi, declined to issue the petitioner conservatory orders to restrain the Commission of inquiry into the petition to suspend Makueni County Government 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. Justice M Ngugi held that 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.

The applicant, the 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 *inter-alia* 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.

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.

The petitioners submitted that the County Government did not 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.

The main issue before the court was whether the petition presented to the President for the suspension of Makueni County Government, met the requirements of article 192(1)(b) of the Constitution that dealt with suspension of County Government and section 123 of the County Governments Act, which set out the procedure to be followed with regard to the suspension.

The High Court held that the petition before the President was lodged in accordance with article 192(1)(b) and section 123 of the County Governments 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.

The court also held that the County Government of Makueni was not obliged 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 favor and more importantly, the balance of convenience and the public interest would militate against the grant of such orders.

The High Court went further to fault the petitioner for raising the issues after the Commission had been constituted and stated that it was against public interest in view of the fact that the state had expended considerable resources to set up the Commission, which was set to commence its sittings the day after the application was filed and that by having considered all things, the balance of convenience, as well as the public interest, demanded that the Commission ought to proceed with its mandate.

The application was therefore dismissed.

Impeachment can be a useful tool in appropriate cases

"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"

Martin Nyaga Wambora& 30 others V County Assembly of Embu & 4 Others
High Court of Kenya, Nairobi
Petitions 7 & 8 of 2014(Consolidated)
Mwongo PJ, Korir J, Odunga J
February 12, 2015

The main issues before the court were whether the petitioner had an adequate opportunity to participate in the impeachment process, whether the removal of the Governor required public participation, and if so; whether there was public participation to determine to what extent, if any, the court could intervene in the removal process of a governor by the county assembly and senate. The petitioners sought for the court to issue an order of certiorari to quash the resolution passed by the Senate to impeach the Governor of Embu County.

The court held that the motion to impeach the governor was not unconstitutional and section 33 of the County Governments Act was not in any way inconsistent with article 1 of the Constitution. The court noted that when the county assembly invoked section 33 and debated 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; section 33 was not unconstitutional to that extent. The mandate of impeachment had been placed on the peoples' representatives; the power of impeachment lay with the County Assembly and the Senate.

The Court observed that there were opportunities for the public and the petitioner to participate in the impeachment process. In particular, sections 87(d) and Section 88(1) of the County Governments Act applied to the situation of a governor facing removal where he, or the citizens, desired to participate in the process. The Law also provided several opportunities for a governor to be heard before being removed from office. Section 33 of the Act granted the governor 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.

The court further held that though the Constitution had not expressly tasked the County Assembly with the role of removal of a Governor, article 181(2) of the Constitution empowered Parliament to enact legislation providing for the procedure of removal of a county governor on the grounds specified under the said article. 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. As such the removal of a governor was one of the businesses statutorily assigned to the County Assembly. Additionally, under article 96(1) of the Constitution, the Senate had a role 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 Act.

The court held that it 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.

However the court observed that it could not take over the roles clearly 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 could not severely restrict the constitutional mandates of the other state organs to the extent that those organs cannot execute their work.

The court while upholding Wambora's impeachment concluded that 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.

Petition dismissed, parties were to bear their own costs.

Procedure for removal of a Governor

Martin Nyaga Wambora & 3 Others v Speaker of the Senate & 6 Others
Civil Appeal No 21 of 2014
Court of Appeal at Nyeri
Visram, Koome & Odek, JJ.A
September 30, 2014

The appellants brought an appeal to the Court of Appeal in Nyeri challenging the High Court's decision that the County assembly of Embu and the Senate were best placed to determine whether a motion for the removal of a Governor was in accordance with the Constitution. The appeal was also premised on *inter alia* the ground that the High Court erred in law by failing to determine whether the removal was inconsistent with the Constitution.

The issues before the court included; whether the County Assembly and the Senate as opposed to the courts were best placed to determine whether a motion for the removal of Governor was in accordance with the Constitution; Whether the removal of the Governor on the alleged ground of violation of Constitutional right met the Constitutional threshold under article 181 of the Constitution; What standard should be applied in implementing the threshold for removal of a Governor; and whether the term 'gross violation of the Constitution or any other law" and the term "gross misconduct" in articles 145(1)(a) & (c) and 181 of the Constitution bore the same meaning.

The court held that 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 is a *sui generis* process that is quasi-judicial in nature and the rules of natural justice and fair administrative action must 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.

The Appellate Court affirmed that the constitutional and statutory mandate to initiate and consider a motion to remove a County Governor was vested in the County Assembly and the Senate. Section 33 of the County Governments Act which was an implementing legislation for article 181 of the Constitution did not vest the courts with the jurisdiction to hear charges relating to the removal of a Governor from office as far as the process of removal of a Governor from office was concerned; the province of the court was solely to decide on the rights of individuals and not to enquire how the County Assembly and Senate performed duties in which they had discretion.

Article 165 (6) of the Constitution revealed that the role of the High Court for purposes of removal of a Governor from office was *inter alia* 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 of a Governor is unconstitutional, wrong, un-procedural or illegal, it could not be said that the court had no jurisdiction to address the grievance arising therefrom. In the instant case, in its supervisory role, the High Court was to examine whether any procedural law was violated by the County Assembly or Senate in arriving at their decision.

The court further held that there must be a nexus between the alleged gross violation and the conduct of a Governor. An element of personal knowledge that includes intentional, brazen or willful gross violation of the 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.

The court affirmed that there was need to maintain a high threshold for removal of the Governor and the need to ensure that the law is strictly followed. The standard of proof was neither beyond reasonable doubt nor on a balance of probability. The threshold for removal of a governor involved "gross violation of the Constitution", the standard of proof required for removal of Governor is above a balance of probability but below reasonable doubt.

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. Whether conduct was gross or not would depend on the facts of each case and not every violation of the Constitution or other law was gross violation.

The grounds for removal of a Governor stipulated in article 181 of the Constitution were in *pari materia* 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 is gross violation of the Constitution or any other law or where there are serious reasons for believing that the office bearer has committed a crime under national or international law or if there is gross misconduct on the part of the office bearer.

The court observed that the office of Governor was different from the office of Member of County Assembly although both are subject to a competitive electoral process. The rule of differentiation was inherent in the doctrine of equality; different treatment of different offices is equality of treatment. Parliament through the County Government Act had 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 had to confirm the grounds for removal. 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. 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.

In conclusion, the court held that a court of law could not 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. No appeal was lodged to challenge the decision of the High Court in declaring the said proceedings to be null and void. Therefore the judgment by the High Court was still in force.

Parliamentary Privileges & Immunity and the Jurisdiction of the Court in Impeachment Proceedings

Justus Kariuki Mate & another v Martin Nyaga Wambora & another
Civil Appeal No 24 of 2014
Court of Appeal at Nyeri
Alnashir Visram, M K Koome & J Otieno-Odek, JJA
September 30, 2014

The County Assembly sought to impeach the County Governor on claims that he had not acted on the recommendations of the County Assembly in a procurement process for the facelift of Embu County Stadium and the supply of maize seeds.

The Governor filed a petition asserting that his fundamental rights and freedoms had been breached in the intended impeachment. In the petition (H C Petition 1 of 2014) the court issued orders to restrain the County Assembly from continuing with the impeachment proceedings. The court orders with penal notices were served on the 1st and 2nd appellants, on January 23, 2014 and January 24, 2014, respectively. They also appeared in the Daily Nation and Standard Newspaper on January 26, 2014 and January 27, 2014.

In spite of the existence of the court orders, the appellants continued with the impeachment process. The petitioner sought further orders and the court found that the appellants were in contempt of court and summons were to be served on them to appear in court on May 15, 2014. In response, the appellants filed an appeal against the decision on contempt of court.

Questions were raised as to whether the contempt application was incompetent as it was filed without the issuance of notice to the Attorney General. An issue was also raised on whether there had been proper notification or service of the orders, which were alleged to have been disobeyed by the appellant. Additionally, an issue on whether the High Court had erroneously cited

the appellants for contempt was raised.

The court held that the applicable law in cases of contempt was section 5 of the Judicature Act and section 63(c) of the Civil Procedure Act. Further, under section 5 of the Judicature Act the applicable law in contempt proceedings in Kenya was the law applicable in the High Court of Justice in England at the time the application for contempt was filed in the year 2014.

The court explained that the law as was applicable in England at the material time had changed and the changes applied to Kenyan contempt of court proceedings as per the wording of section 5 of the Judicature Act. In England, it was no longer necessary to give notice to the Crown Office (Attorney General) of the contempt application before filing it in court. Similarly, the petitioner was not required to issue notice of the contempt application to the Attorney General before filing it in court. The relevant amendment from England was the Civil Procedure (Amendment No. 2) Rules, 2012.

The court further held that the amendment of the law on contempt of court in England also meant that personal service of the court orders for which disobedience was alleged could be dispensed with if the recipient had notice or knowledge of the existence of the court orders. The requirement for personal service could be dispensed with if a person had notice of a court order either by being present when the judgment or order was issued or by being notified of its terms by telephone, email or otherwise.

Lastly, the court noted that parliamentary privileges and immunities as recognized in section 17 of the County Government Act, No 17 of 2012 & section 29 of the National Assembly (Powers & Privileges) Act (Cap 6) did not oust the High Court's jurisdiction over impeachment matters. Pursuant to article 165(1) (d) (ii) of the Constitution of Kenya, 2010, the High Court had jurisdiction where constitutional issues were raised with respect to the exercise of powers by constitutional organs.

Appeal was dismissed.

Circumstances where a Court can interfere with Impeachment Proceedings

"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."

Martin Nyaga Wambora & 4 others v Speaker of the Senate & 5 others
Petition No. 3 of 2014
High Court at Kerugoya
B N Olao, C W Githua & H I Ong'udi, JJ
April 16, 2014

The petitioner brought a petition before the High Court challenging the constitutionality of the process leading to his removal as the Governor of Embu County. The petition 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 and 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 1stpetitioner 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 gazettement of the same without providing the 1st petitioner with grounds upon which the impeachment was based on or a fair hearing.

The main issue before the court was 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 and whether the Deputy Governor could assume office where the Governor was removed from office without due regard to procedure.

The High Court held that 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 stated that it would step in and lift the veil of parliamentary privilege if it was of the view that the Senate had violated the Constitution. It was further held that 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 at hand.

The court in addressing the issue of removal of a Governor held that the law regarding the removal of a Governor from office was contained in article 181 of the Constitution of Kenya, 2010 and the bodies mandated to do so were the County Assembly and the Senate. That the Constitution provided that for such a process to commence, gross violation by party had to be proved and the court was of the view that the removal of a Governor being a very weighty matter, it 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 person of their choice to a political office.

The court also held that the right to a hearing had 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, and that the County Assembly of Embu had already made provisions as to the right to a hearing in its Standing Orders, and therefore in ignoring those same provisions and denying the 1st petitioner a right to be heard, the Assembly had violated his right to fair administrative action as enshrined in article 47 of the Constitution of Kenya, 2010. The Judges further stated that the right to be heard should apply whenever any County Assembly member invoked section 33(1) of the County Governments Act.

The court also opined that the Deputy County Governor could not assume office under article 182(2) of the Constitution of Kenya, 2010 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. That article 182(2) of the Constitution of Kenya, 2010 could only apply where a Governor had been removed from office legally and that 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.

The High Court, ultimately issued an order of certiorari quashing the decision to remove the Governor of Embu from office and quashing the Gazette Notice on his impeachment

Availability of Reinstatement to office as an Interim Relief for an impeached County Governor

"This court is alive to the doctrine of separation of powers which is part and parcel of our Constitution's architectural design but we are also of the view that it is the responsibility of the court to ensure that each State organ complies with the Constitution and the law and that where a citizen alleges a contravention of his Constitutional rights, the court has a duty to investigate and determine that complaint so long as it is justiciable"

Martin Nyaga Wambora v Speaker, County Assembly of Embu & 5 others
Petition No 3 of 2014
High Court of Kenya at Kerugoya
H I Ong'udi, C W Githua & B N Olao, JJ
March 5, 2014

The County Assembly of Embu and the National Senate had resolved to impeach the Governor of Embu County. Subsequently, that decision was gazetted in the Gazette Notice No. 1052 of 17th February 2014. The petitioner thus approached the High court seeking conservatory orders of stay of that gazette notice pending the hearing and determination of the instant petition. He further sought conservatory orders restraining any person or authority from executing or presiding over the swearing in of the Deputy Governor of Embu under article 182, Constitution of Kenya, 2010 and also that the petitioner remained in office and continued to discharge his mandate as the Governor of Embu County pending the hearing and determination of the petition.

Resultantly, the main issue before the court was the question whether the High Court could "undo" the impeachment proceedings that had been done by the members of the County Assembly of Embu and the National Senate. The specific issues for determination were whether High Court had jurisdiction to consider matters pertaining to the removal of a County Governor by a County Assembly and the Senate and whether conservatory orders could be issued to effect the reinstatement of a County Governor who had been removed from office, pending the hearing of a petition which question the removal of the Governor from office.

The court noted that, section 33 of the County Governments Act gave members of the County Assembly of Embu and the Senate the powers to set in motion the process of removing or impeaching a governor. However, the court could only be concerned with the manner in which those powers were exercised. Therefore, the High court had the jurisdiction to entertain the instant petition to the extent of interrogating how those powers of the County Assembly and the Senate was exercised with respect to impeaching the governor. However, the instant application was at the interlocutory stage therefore the court was merely concerned with whether conservatory orders sought could either be issued or not.

The court held that the grant of conservatory orders was at the discretion of the court. A party seeking a conservatory order only required to demonstrate that he had a *prima facie* case with a likelihood of success and that unless the court granted the conservatory order, there was real danger that he would suffer prejudice as a result of the violation or threatened violation of the Constitution. Since the applicant stood impeached (by the time of approaching the courts) but he chose to challenge that impeachment before the instant court it would have been prejudicial to the applicant to allow processes meant to give effect to the said impeachment before the matter was heard and determined. The court thus granted conservatory orders restraining any person or authority from executing or presiding over the swearing in of the Deputy Governor of Embu under article 182, Constitution of Kenya, 2010.

As to whether the applicant could be allowed to continue in office, as matters then stood, the court further stated that he had already been removed from office and the court could not order his reinstatement at that interlocutory stage simply because they had not had the benefit of hearing arguments on the merits or otherwise of the petition. The determination of that prayer had to await the outcome of the petition. The court was reluctant to grant an order that would lead to the swearing of the Deputy Governor because such an order would have meant that she would have to serve for the remainder of the term of the County Governor. Such an order would have been prejudicial to the applicant had the court eventually found in his favour when the petition was finally determined. To avoid a power vacuum pending the hearing and determination of the petition, article 179(5), Constitution of Kenya, 2010 as read with section 32(4) of the County Government's Act provided that when the County Governor was absent, the Deputy Governor had to act as the County Governor.

The application was allowed in part. (The Governor was not reinstated into office but the Deputy Governor was allowed to carry on the Governor's duties on terms applicable to a situation where the Governor was temporarily absent.)

Court's Role Does Not Precede County Assembly's Inquiry Role in Impeachment Proceedings

"Article 196(3) of the Constitution gave Parliament powers to enact legislation providing for powers, privileges and immunities of county assemblies, their committees and members. Section 17 of the County Governments Act, 2012, on the other hand, provided that the national law that regulated the powers and privileges of Parliament would, with the necessary modifications, apply to the County Assembly. "

Martin Nyaga Wambora v Speaker County Assembly of Embu & 3 Others
Constitutional Petition No 7 of 2014
High Court at Embu
R Mwongo, J
May 12, 2014

Following the judgment in, *Martin Nyaga Wambora & others v. Speaker of the Senate and others* Petition No. 3 of 2014(*Wambora*'s case) declaring the removal proceedings before Embu County Assembly (the County Assembly) and impeachment of the petitioner null and void, a new motion was filed in the County Assembly for the removal of the petitioner (Martin Nyaga Wambora) from office. The application by the petitioner sought conservatory orders restraining the Speaker of the Senate (3rd respondent) or any member of the Senate from introducing discussing or deliberating his impeachment, and a stay of the resolution passed by the County Assembly regarding the motion to remove him from office.

The respondents on the other hand raised preliminary objections on jurisdiction of the court on grounds that the proceedings before the County Assembly were in contravention of powers, privileges and immunities of the County Assembly as per article 196 of the Constitution read with section 4 and 12 of the National Assembly (Powers and Privileges) Act and section 17 of the County Governments Act and further that the applications and proceedings were *res judicata* considering the judgment in the *Wambora* case.

The issue before court was whether county assemblies and the Senate enjoyed the powers and privileges provided in the National Assembly (Powers and Privileges) Act and whether the High Court had jurisdiction in issues and procedures that were before a County Assembly where these were, by law, within the mandate of the County Assembly and Senate.

The court held that article 196(3) of the Constitution gave Parliament powers to enact legislation providing for powers, privileges and immunities of county assemblies, their committees and members. Section 17 of the County Governments Act, 2012, on the other hand, provided that the national law that regulated the powers and privileges of Parliament would, with the necessary modifications, apply to the County Assembly. Further, that section 7 of the sixth schedule to the Constitution provided that all laws in force immediately before the effective date of the Constitution were to be construed with the

alterations adaptations, qualifications and exceptions necessary to bring them into conformity with the Constitution. In light of that provision, and noting that National Assembly (Powers and Privileges) Act was in existence before the effective date, it was applicable in relation to the Senate and the County Assembly pursuant to article 196(3) and section 17 of the County Governments Act.

The court also stated that the first process of removal of the County Governor was concluded with the rendering of the court's decision, declaring the processes null and void; both at the County Assembly and at the Senate, *inter alia*, on grounds of failure to obey the court's orders. In the contrary, the suit at hand, commenced with a fresh notice of motion in the County Assembly, which resulted in a resolution that was then under consideration in the Senate. The facts and circumstances at hand were not the same as those in the earlier litigation, and the two processes were, completely different. The petitioner had moved to court to litigate on the second process, which was a new matter, the substance of which had not been litigated before.

In terms of section 7 of the Civil Procedure Act, on whether the matter was *res judicata*, the court found that the matter was not one that qualified as being "in the former suit" or as a matter that had "been heard and finally decided". It therefore could not be said to be the same matter as that in the prior suit by the petitioner and was therefore not *res judicata*.

The allegations of breach of fair administrative action on the basis of threshold of seriousness and nexus prescribed by the High Court in the petitioner's prior suit could not stand. When the County Assembly exercised its statutory mandate under section 33 of the County Governments Act and pursuant to the constitutional power under article 181, it was for that Assembly, and not for the court, to ascertain that the legal threshold was satisfied whilst conducting its *quasi-judicial* inquiry. The court's role could not precede the County Assembly's inquiry role. The role of the court was not essentially to conduct a merit review of the Assembly's actions.

The court also observed that there was no indication that the County Assembly did not, in terms of the requirements of natural justice, deliberate on the charges to ascertain their legality or otherwise. Accordingly, the petitioner had not demonstrated a *prima facie* case that called for the issuance of a conservatory order to preserve his right to hold office. The right under article 38(3) (c) was constitutionally circumscribed by article 181 and a statutory process was prescribed under section 33 County Governments Act for effecting the removal of the office holder. If the previous resolution as presented to the Senate and the subsequent Senate proceedings had already been described as non-existent or a nullity, it followed on a *prima facie* basis, that no vote could have taken place there. The petitioner's allegation of breach based on section 33 (8) of the County Governments Act did not therefore assist the Petitioner's plea of a *prima facie* case meriting a conservatory order.

Preliminary objection disallowed and notice of motion dismissed with no order as to costs

Supreme Court stays execution of Court Orders

"The contest had snowballed and transcended the dispute situation between the parties and had crystallized into a matter requiring the interpretation and application of the Constitution to determine the parameters of the doctrine of separation of powers, and to ascertain the scope of privilege for discrete constitutional agencies established under the principle of devolution."

Justus Kariuki Mate & another v Martin Nyaga Wambora & another
Supreme Court of Kenya
Civil Application No. 37 of 2014
P.K. Tunoi & N.S. Ndungu, SCJJ
December 29, 2014

The appellants herein had been aggrieved by the decision of the High Court and filed an appeal to the Court of Appeal. The Appellate Court upheld the finding of the High Court that the applicants were aware of the court orders dated 23rd January 2014 but disobeyed the same. It dismissed the appeal, and ordered the applicants to appear before the High Court at Kerugoya for further Orders. Aggrieved by the Court of Appeal Judgment, the applicants, filed a Notice of Motion at the Supreme Court submitting that the appeal was properly before the court, and that the court had the jurisdiction to hear and determine both the interlocutory application and the appeal, under article 163(4)(a) of the Constitution. Counsel stated that the first question to be determined was whether the provisions of articles 6, 175 and 179 of the Constitution, which created the two levels of government, could be so interpreted as to limit the exercise of the powers of the Assembly. He submitted further that the issues herein concerned the central question of checks and balances in the Constitution. Counsel urged that the appeal raised weighty matters of the interpretation of the Constitution, namely, the doctrine of separation of

powers under the devolved system of government, and the law on contempt of court, requiring the further input and final pronouncement of the Supreme Court.

The question before the Supreme Court was whether the previous courts exceed their jurisdiction by finding the applicants to be in contempt of a court order. The court noted that the whole issue was about the conduct of the applicants with regard to the court order touching on their duties, respectively, as Speaker, and Clerk, of the Embu County Assembly. It observed that the contest had snowballed and transcended the dispute-situation between the parties and had crystallized into a matter requiring the interpretation and application of the Constitution to determine the parameters of the doctrine of separation of powers, and to ascertain the scope of privilege for discrete constitutional agencies established under the principle of devolution.

The Supreme Court agreed with the applicants' argument that indeed, the issues had transcended the parties as individuals, and crystallized into a conflict involving the interpretation and application of the Constitution, thus falling within the jurisdiction of the Supreme Court. Further, that the issues raised were not only cognizable, but were weighty constitutional questions that were, *prima facie,* arguable and further that it was not possible to resolve them with finality in the context of the preliminary motion.

On the issue of public interest, the applicants submitted that the provisions of articles 175, 176 and 196 of the Constitution, the question of privileges of a County Assembly and the principle of separation of powers involve the public at large. The court held in conclusion that it was an issue to be raised in the intended appeal before it and that the determination of the extent of application of the doctrine of separation of powers, which was a vital constitutional concept, was a matter of public interest.

Application allowed.

Court of Appeal orders to rest in abeyance.

Costs to abide in the appeal.

Impeachment of Governor construed to raise a Substantial Question of Law warranting Empanelling of an Uneven Bench of Judges

"A determination as to whether or not impeachment of Governor amounted to "other business" could have a wider impact than what the parties in the petition contemplated. Such a determination could not only affect the procedure to be adopted in impeachment of Governors but also other state officers who were subject to impeachment as well"

Martin Nyaga & Others v Speaker County Assembly of Embu & 5 Others
High Court at Nairobi
Petition No s 7 & 8 of 2014 (Consolidated)
GV Odunga, J
June 16, 2014

The court required examining the issues and ruling as to whether they require empanelling of a bench of more than one judge. The weighty issue *inter alia* was the question as to whether a Governor who was popularly elected by the electorates ought to be removed from office based on a decision of the County Assembly and the Senate without the participation of the electorates. On the other side of the coin was the feasibility of involving the public in the removal of the Governor without conducting what could well amount to mini-election.

Furthermore, the court was set to determine what amounted to gross misconduct, bias and the thorny issue of separation of powers followed by the substantial questions of law. The court held that, the issues had effect not only on how the County Assemblies operated but also on how the parliament operated. Accordingly, the doctrine of separation of powers required serious scrutiny in the circumstances.

The court further observed that; one would envisage a situation where the electorates by popular majority elected a governor whose party neither controlled the County Assembly nor the Senate and who could easily fall victim of his "unpopularity" within the Assembly and Senate rather than his/her popularity with the electorates. The matter raising such serious interpretation demanded an empanelling of a bench of an un-even number of judges.

Petitions to be transmitted to the Hon. the Chief Justice forthwith to consider empanelling the said bench.

Further directions to await the decision by Hon. the Chief Justice.

Circumstances in which Conservatory Orders against impeachment proceedings at the Senate would be granted

Martin Nyaga Wambora & another v Speaker of the Senate & another
Petition No 51 of 2014
High Court at Nairobi
Milimani Law Courts
D S Majanja, J
February 3, 2014

In the case before the Court, there had been orders in force to restrain the County Assembly from impeaching the Governor. Notwithstanding the court orders, the County Assembly went ahead and passed a resolution for the impeachment of the Governor and Deputy Governor of Embu County. The County Assembly, pursuant to section 33(2) of the County Governments Act, No 17 of 2012, forwarded the resolution to the Senate. The Speaker of the Senate issued Gazette Notice No 627 dated January 31, 2014, which called for a special meeting to deal with the charges made against the Governor and the Deputy Governor on February 4, 2014.

The petitioner, who was the Governor facing impeachment, stated that he received notice of the proceedings on February 3, 2014, a day before the Senate proceedings were to commence. He sought orders to restrain the continuation of the impeachment proceedings at the Senate.

The court held that it was the final arbiter on the nature and extent of the relationship between the Governor and the County Assembly and it had a right to pronounce the application of the doctrine of separation of powers.

The court elaborated that the purpose of conservatory orders was to preserve the dignity of the court and the rule of law. The court further explained that the orders issued against the debate and passing of the resolution on impeachment by the County Assembly constituted a solemn pronouncement of the court and could not be wished away.

The court also stated that there was a possibility that the impeachment process was tainted and the Governor risked being denied an opportunity to ventilate his grievance.

Application was allowed.

Court grants Conservatory Orders in a claim challenging lack of Public Participation in Impeachment Proceedings at the County Assembly

". . . it was clear that the obligation to publish related to information "affecting the nation"; that was, information of a national character that affected the welfare of the nation as a whole."

Andrew Ireri Njeru & 34 others v County Assembly of Embu & 3 others
Constitutional Petition No. 8 of 2014
High Court of Kenya at Embu
R M Mwongo, J
May 14, 2014

The applicants brought the instant application that pending the hearing and determination of their petition that the court grants conservatory orders restraining the Speaker of the Senate from convening, introducing the debate of the removal of the Embu County Governor based on the resolution passed by the County Assembly of Embu, and or discussing the impeachment of the Embu County Governor. They alleged that the County Assembly had failed to conduct public participation as provided for under article 196(1) (b) in the process of the removal of the Governor.

The main issues before the court was thus whether the County Assembly of Embu was obliged to publish and publicize the information relating to the removal motion of the Governor for Embu County and whether the applicants had established a *prima facie* case showing that they had a constitutional right under article 196(1) (b) to public participation in the removal process of the Governor, and if so, whether *prima facie*, it was violated.

The court held that from article 35 (3) of the Constitution of Kenya, 2010 on the right to access top public information, it was clear that the obligation to publish related to information "affecting the nation"; was, information of a national character that affected the welfare of the nation as a whole. That kind of information that would attract the sanction of that right could be classified into at least two general categories. Information of a nature that directly and substantially affected any of the Bill of rights or their enforcement as contained in Chapter Four of the Constitution; and secondly, information which a provision of the Constitution itself requires to be published – such as statues and gazettes and also reports required to be published by independent offices or commissions. That list was, of course, not exhaustive.

The court further held that on the basis of the material presented before the court, a *prima facie* case had been established for a finding that there was scant public participation in respect of the removal of the Governor and that the petitioner's rights were violated.

Conservatory orders granted restraining the County Government of Embu, the Speaker of the Embu County Assembly and the Speaker of the Senate or any other person from acting upon or effecting any decision arising from the resolution of the County Assembly of Embu to impeach the Governor pending the hearing and determination of the instant petition

Courts have Supervisory Jurisdiction over Impeachment Proceedings

"Standing Orders made pursuant to section 14 of the County Government Act regulated the procedure for the conduct of the business of the Assembly. Under Standing Order No. 63, a person being proposed for removal from the office was entitled to appear before the relevant committee of the Assembly and was entitled to legal representation."

Bernard Muia Tom Kiala v Speaker of the County Assembly of Machakos & 4 others
Miscellaneous Civil Application 113 of 2014
High Court at Machakos
B T Jaden J
July, 21 2014

The Clerk to the County Assembly of Machakos wrote to the applicant Bernard Muia Tom Kiala the Deputy Governor of Machakos County informing him that the Speaker of the County Assembly of Machakos had received a motion supported by a third of the members of the County Assembly seeking his removal from the office of the Deputy Governor of Machakos County. The said Notice of Motion contained the grounds and particulars for the proposed impeachment. The letter further required the applicant to appear before the *Ad Hoc* Committee formed for purposes of investigating the Machakos Deputy Governor, at the County Assembly offices. The said Notice of Motion was what had triggered the filing of the application herein. According to the statutory statement and verifying affidavit in support of the application, the applicant was elected as the Deputy Governor of Machakos County in the last General Elections.

The main issue for determination was whether the County Assembly had the mandate to commence impeachment proceedings against the Deputy Governor. The court held that Parliament was to operate under the Constitution, which was the supreme law of the land. The English tradition of Parliamentary supremacy did not commend itself to nascent democracies such as Kenya's. 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. Save for the Standing Orders, provisions of the law did not expressly provide for the removal of the Deputy Governor. However, it was observed that the functions of the Deputy Governor were basically to deputize the Governor in the execution of his mandate as well as performing other functions that may be assigned to the Deputy Governor by the Governor.

Court advised that a wholistic reading of the Constitution revealed that it had provided for a mechanism of removal from office of officers who exercise sovereign power on behalf of the people of Kenya and the Deputy Governor was not exempted. The procedure for removal of the Governor was the same one that applied with the necessary modifications to the Deputy Governor.

Satisfied that the Deputy Governor was not insulated from impeachment, the County Assembly had the mandate to commence the impeachment proceedings. The Deputy Governor was therefore not being subjected to an unlawful process.

The court emphasized that the impeachment of the Deputy Governor was not a political matter. The issues of justifiability and the political question doctrine were not jurisdictional issues, but substantive issues that could only be determined once a court was seized of a matter and had heard and considered the arguments on the merits. The justifiability of the case could

not be determined at the preliminary stage of the case.

Article 179 (4) of the Constitution provided that the County Governor was the Chief Executive of the County and he was therefore properly before the court.

The court noted that the applicant was not denied a fair hearing contrary to the principles of natural justice. The requirements of natural justice depended on the nature of the inquiry, the rules under which the administrative and quasi-judicial bodies were making decisions and the subject of the matter. Each application depended on the circumstances of each case.

The court found that the respondents did not subject the applicant to two parallel processes thereby rendering the same oppressive, punitive and malicious. He had been notified of the impending impeachment proceedings. The applicant had also been called before the *Ad Hoc* Committee to respond to the allegations leveled against him. The process was at a preliminary stage. What was to happen at the County Assembly was a matter of conjecture and speculation. The application is therefore premature. There was no decision that had been made that was capable of being quashed. Orders of prohibition could not be issued to restrain the County Assembly from undertaking the proceedings in the circumstances of the case.

The court held that the Standing Orders made pursuant to section 14 of the County Governments Act regulated the procedure for the conduct of the business of the Assembly. Under Standing Order No. 63, a person being proposed for removal from the office was entitled to appear before the relevant committee of the Assembly and was entitled to legal representation.

In conclusion, the Standing Orders provided for the appearance before the Assembly and before the Committee within the same strict time lines there was no merit in the complaint that the Applicant was being subjected to a duo process.

Application dismissed

A motion to remove from office a speaker cannot be moved before the lapse of 6 months from the debate and resolution of a similar motion

"…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) indicated grounds/reasons that were essentially the same. 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 before the expiry of 6 months and in so acting it was acting in violation of its internal procedures."

Republic v Clerk County Assembly of Baringo ex parte William Kassait Kamket
Judicial Review Application No. 1 of 2015
Employment and Labour Relations Court at Nakuru
Stephen Radido J.
July 31, 2015.

On 20 March 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.

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).

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

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 organized by his political opponents.

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 the he was an employee of the Assembly and that pursuant to article 162(2) of the Constitution, Court had the power to deal with all employment and labour related matters.

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.

In its holding court restated the principle under the Civil Procedure Act/rules framework and more specifically under Order 1 rule 9 that a suit would not be defeated merely on the ground of non-joinder or misjoinder of a party.That if a party was not sure of the correct and proper person to sue, he may 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. Radido J. noted that the instant proceeding was not a proceeding under the civil 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.

Judicial review proceedings have traditionally been anchored primarily on the Law Reform Act and Order 53 of the Civil Procedure Rules. Under Order 53 rule 3, the Court has the power to direct that the notice of motion be served upon all persons directly affected. However court noted that in the instant case, no such direction was sought nor did the Court at its own instance give such directions and the question whether the application should fail in that respect was material.

As to whether a clerk could be sued as a representative of the County Assembly, court started by identifying the functions of a clerk and asserted that 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 and was an authorized officer for the purposes of the County Governments Act. The clerk has the same functions and powers as the Clerk of Parliament. The offices of Clerk of Parliament were given constitutional 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).

Radido J. noted that 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.

It was further observed by court that the Clerk and the Speaker represented the collective of the County Assembly and 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.

The question of employment relationship in the case of Speakers of County Assemblies was looked into and was intractably linked with the question of the extent of the jurisdiction of the Employment and Labour Relations Court. Court noted that 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. 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.

Court further noted that the above 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. Court further stated that there were many categories of employees who did not have what was 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) and that 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 do not have contract of services as ordinarily known or as envisaged under the Employment Act, 2007.

Radido J.was clear that a Speaker of Parliament or County Assembly was not an employee for the purposes of the Employment Act, 2007 and the Courts jurisdiction could only be determined by looking outside the said Act. Further looking as to whether the Employment and Labour Relations Court had jurisdiction, court noted that 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. 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 may suggest. The use of the term 'including' in section 12 was therefore 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.

Delving further in to the matter, court explained that the jurisdiction of the Court over the proceedings before the court 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. It therefore followed that 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.

From the foregoing Radido J. ruled that 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 employment. It mattered not that they were employees or servants of the people or the respective Commissions or County Assemblies. The Court therefore has jurisdiction to deal with disputes relating to removal of a Speaker of a County Assembly.

As to whether the removal of speaker through a public petition was illegal and not recognized in law, court began by stating that the Constitution and many other statutes had created certain offices and provided for the appointment and removal from such offices. It followed therefore that 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. 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.

Regarding public petitions, court making reference to the County Governments Act (section 15) and the Standing Orders of the County Assembly of Baringo noted that the two legislations envisaged and allowed receipt of the same and this was in tandem with the constitutional injunction that public participation in governance was now firmly part of our national values and principles of governance. It therefore followed that 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. Court further observed that 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.

As to whether the removal of a speaker was a political process, court observed that 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.

Regarding whether the removal of the speaker was legal, court looked at the process of removal of the speaker. To start with, 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 which 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.

Court further stated that 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. 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.

Radido J. noted that 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. 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. Radido further ruled that 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.

It was further observed by court that natural justice or procedural fairness had become such a cardinal principle in governance that however grievous the allegations one 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 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.

Court ruled that in the instant case, the motion for removal of the speaker was debated on 11 February 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 11 February 2015 and the Petition which came on 3 March 2015 (and subsequent motion) indicated grounds/ reasons that were essentially the same. 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 before the expiry of 6 months and in so acting it was acting in violation of its internal procedures.

Orders for certiorari and prohibition were granted with an order that each party was to bear it's costs.

Court Declines to grant precautionary suspension against the Speaker of the county assembly over integrity questions

"The Court could grant an order for the removal of a public officer for want of compliance with chapter six of the Constitution if seized with sufficient facts to do so. Article 79 of the Constitution bestowed parliament with a duty to enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen of the constitution, for purposes of ensuring compliance with, and enforcement of the provision of chapter six"

Isiolo County Assembly & another v (Mohammed Tubi) Isiolo County Assembly & 2 others [2015]
Petition no. 418 of 2014
High Court of Kenya at Nairobi
Isaac Lenaola J

The Petitioner filed a Notice of Motion seeking among others the declaration for the removal of the Speaker of County Assembly for Isiolo. The Petitioner alleged that the respondent's conduct was unbecoming of a public officer. The application further sought for a temporary order suspending the duties of the respondent and an interlocutory order to prohibit him from performing the duties of a speaker of the Isiolo County Assembly

The main issues were; whether the High Court was seized with jurisdiction in a matter involving the integrity of a Public Officer under Chapter Six of the Constitution and whether the Court, even if it was generally seized with sufficient facts and the requisite law, could order the suspension of the Speaker and if so what was the correct legal position.

The court held that; section 3 of the Leadership and integrity Act obligated state officers in the case of county governments, to respect the values, principles and requirements of the Constitution, and the objectives of devolution provided for under article 174 of the Constitution. Section 4 of the Act granted the Commission the mandate to seek the assistance of any State organ in ensuring the compliance with and enforcement of Chapter Six of the Constitution and where such an organ failed to assist the Commission, then the latter may apply to the High Court when requiring such an entity to comply. Aside from the High Court's original jurisdiction in all matters civil, criminal and constitutional, the law created yet another mechanism to deal with issues of integrity or lack thereof.

The court further stated that; the kind of suspension sought by the petitioners was a precautionary suspension. The thresh hold involving the removal from a Constitutional office was even higher as compared to suspension of an employee and as such the an order may not have met the expectation of justice

Application dismissed

Mode of removal of County Assembly Speaker is not similar to that of other County Assembly Members

"The Speaker of the County Assembly 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."

R v Transitional Authority & 4 others
Ex-parte **Crispus Fwamba & Benjamin Hinga Njeri**
JR Case No 110 of 2013
High Court at Nairobi
Judicial Review Division
W K Korir, J
August 28, 2013

Crispus Fwamba and Benjamin Hinga Njeri, 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.

The main issues before the court were thus; first, whether the election of a speaker of a county assembly could be subjected to the election dispute resolution mechanism envisaged by the Elections Act and whether the election and removal of the Speaker was the same as that of other members of the County Assembly. Thirdly, whether the court could invalidate the election of a speaker where some seats of the county assembly had not been filled.

The court held 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. The Constitution did not provide for the election and removal of Speakers of County Assemblies. 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.

The court also stated that article 194(1)(c) of the Constitution of Kenya, 2010 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 thereof**.** A removal under the Constitution included 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.

Petition dismissed

Removal of a County Assembly Speaker is a Dispute Between Employer and Employee

"The statutory provisions under article 178 of the Constitution and section 11 of the County Governments Act pointed to the fact that there was a clear procedure by which the County Assembly carried out its mandate and which procedure the applicant, as an employee of the County Respondent was subject. Therefore, the instant case was a matter between an employee and his employer and for that matter, it was only the Industrial Court which could enquire into it. "

Peter M. Kingoina v County Assembly of Nyamira
High Court at Kisii
Constitutional Petition No. 8 of 2014
R.N. Sitati J.
June 5, 2014

The applicant was, until 12th May 2014, the Speaker of the County Assembly of Nyamira, having been appointed as such in accordance with the Constitution and the County Governments Act, No.17 of 2012. Through a motion, the Members of the County Assembly of Nyamira intended to present the debate in the Assembly to discuss the applicant in relation to the Public Accounts and Investments Committee (PAIC) Report. On receipt of the said motion, the applicant made efforts through the mover of the motion and the clerk of the respondent not to have the motion tabled since, according to the applicant, the motion was contrary to the provisions of Standing Orders 44 and 58 of the Interim County Assembly Standing Orders.

The applicant averred that he spoke to the would be mover of the motion and to the acting clerk of the respondent concerning the reasons for the proposed impeachment which had to do with the report of the PAIC on investigations into the tendering and procurement of a tender for the provision of a Medical Insurance Cover to the respondent's members. The applicant therefore stated that his impeachment based on the PAIC report was unfathomable and totally incomprehensible since he had nothing to do with the tendering process.

The applicant also averred that if he had been afforded an opportunity to defend himself on the floor of the assembly, before debating the impeachment motion, he would have presented a solid rebuttal to the accusations. That in any event, the PAIC report was not supported by any documentary evidence such as minutes or proceedings showing that the applicant sat and approved the impugned tender. The applicant also alleged discrimination on the part of his accusers.

The court held that the statutory provisions under article 178 of the Constitution of Kenya, 2010 and section 11 of the County Governments Act pointed to the fact that there was a clear procedure by which the respondent carried out its mandate and which procedure the applicant, as an employee of the respondent was subject. Therefore, the instant case was a matter between an employee and his employer and for that matter; it was only the Industrial Court that could enquire into it. It was therefore not a matter for the High Court by way of Judicial Review.

On whether the matter was an abuse of the court process, various applications and counter applications had been made based on issues similar to the issues raised in the instant matter, with the respondent being a common denominator in all the suits. The matter was therefore an abuse of the process of the court because of multiplicity of suits.

The court observed that apart from the fact that the dispute was one between an employee and his employer, it was public knowledge that the respondent had elected a new Speaker who had already been sworn in and had taken office. In the circumstances, any leave granted to the applicant would be an exercise in futility. The applicant's remedy laid elsewhere and not in Judicial Review proceedings.

Application dismissed with no costs.

Court declines to grant Interim Orders to prevent the Election of a New Speaker

Nick Githinji Ndichu v Clerk, Kiambu County Assembly & another
Petition No 11 of 2014
Industrial Court at Nairobi
Mathews N Nduma, J
March 14, 2014

The petitioner was removed from the office of Speaker of Kiambu County via a motion of impeachment passed by the County Assembly. The basis of the impeachment included allegations that the petitioner obtained financing in an irregular manner in order to attend the Annual Law Society of Kenya Retreat in Brazil, irregularly appointed the 1st Interested Party to

provide legal services and used derogatory language against members of the Kiambu County Assembly. The petitioner sought injunctive orders for his reinstatement into office and orders to prevent the election of a new speaker. The respondents, on their part, raised a Preliminary Objection to the effect that the Industrial Court lacked the jurisdiction to hear and determine the petition.

The court held that the Employment Act, 2007, under section 2 defined an employee in a way that indicated that the method of acquiring an employee, either an appointment or an election, was not the consideration. An employee, within the meaning of section 2 of the Employment Act, 2007, was a person who had an oral or written contract of service, provided services to a real or legal person and received a wage or salary for the services rendered. Therefore, a claim concerning the removal of County Speaker from office could be heard and determined by the Industrial Court.

The court explained that 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 would be decided on a balance of convenience.

The court was of the view that it was apparent that there was a right, which had been infringed, given the details, contained the Hansard report of the County Assembly and the applicable law on the removal of a Speaker from office. The court also opined that the petitioner would not suffer irreparable harm, which could not be compensated by an award of damages, if the orders he sought were not granted.

Further, it was the court's conclusion that the balance of convenience did not favour the grant of an injunction. A vacancy in the office of the Speaker would mean that the Kiambu County Assembly would not have the capacity to transact its business. The applicable legal provisions were such that it was only possible to elect an acting Speaker for a specific sitting while the Speaker was absent but if the office of the Speaker was vacant, the County Assembly could transact no business until a new Speaker was elected.

Application was dismissed.

Acting beyond mandate justifies removal of Deputy Speaker

"The function of the Deputy Speaker as provided by section 9(5) of the County Governments Act, 2012 was limited to presiding over the sittings of the Assembly in the absence of the Speaker. The said sub-section alluded to removal since it used the words "unless otherwise removed." situation where the Deputy Speaker was removed was contemplated…. the Petitioner having addressed media on matters to do with the house business following her argument that she was being gagged in exercise of her rights was overstepping her mandate."

Caroline Munanie Musee v Makueni County Assembly & 2 others
Petition 5B of 2014
High Court of Kenya at Machakos
LN Mutende J
July 24, 2014

The main issue was whether the County Assembly of Makueni was justified in moving the motion to removal the Deputy Speaker for Makueni County Assembly over allegations that in her capacity as the Deputy Speaker and in exercise of her rights and freedom of expression, her respond to the media caused disrepute to the speaker of the Assembly and the entire Assembly.The petitioner sought relief that her constitutional rights under the Bill of Rights were infringed, her reasons were that; being the only female member of the Assembly elected out of 47 members of the Makueni County Assembly, she was being discriminated by her male counterparts. The court held that section 21(3) and (4) of the Elections Act, 2011 provided that the Deputy Speaker for the County Assembly should be elected among persons who were members of that County Assembly. The intention to have the Deputy Speaker for the County Assembly elected was laid down in the procedure as set in the first schedule of the Elections Act. The only reasonable modification that could be applied was to adopt the procedure used in respect of the Speaker to the Deputy Speaker.

Furthermore, section 14(8) of the County Governments Act specified that the Standing Orders were required to provide for election of a member to deputize the Speaker of the Assembly. However, there was no provision followed in removal of the Deputy Speaker. The function of the Deputy Speaker as provided for under section 9(5) of the County Governments Act, 2012 was limited to; presiding over the sittings of the County Assembly in the absence of the Speaker. Acting beyond the

aforesaid mandate warranted removal of the Deputy Speaker through due process and in the circumstances of the present case the Assembly was justified to do so.

The court found that none of the petitioner's rights as alleged were violated in the circumstances.

Petition dismissed

Petitioner to pay the respondent's costs

A Candidate for Election as Speaker of County Assembly Need Not Be a Registered Voter within the County

". . . The requirements for election of a County Speaker do not require that the candidate be a registered voter in one of the wards within the county concerned. It only requires that a candidate be a registered voter."

Justus Nyaribo v Clerk to Nyamira County Assembly
In the Chief Magistrate's Court at Nyamira
Election Petition No. 2 of 2013
Nobert Okumu, RM
August 13, 2013

The petitioner sought injunctive orders against the respondent (Clerk of Nyamira County Assembly) from conducting the election of the Speaker to the county Assembly. However, by the time the petition was set for hearing, the said elections had happened and a speaker elected. They thus argued that for one to be elected as a speaker, he/she had to be a registered voter from one of the wards of the County.

The main issues therefore before the courts were; first, whether a candidate for election as speaker to the county assembly must be a registered voter in one of the wards within the county concerned and secondly; whether the magistrate court had jurisdiction to nullify election of a speaker of county assembly.

The court held that, a candidate for the office of the county assembly speaker was subject to qualifications for elections as a member of county assembly stipulated under article 193 of the Constitution of Kenya, 2010. Further, section 21 (1) of the Elections Act also provided that the speaker of a county assembly had to be elected by each county assembly in accordance with the standing orders of the county assembly, from among persons who were qualified to be elected as members of a county assembly but were not such members. Therefore, those requirements did not require that the candidate had to be a registered voter in one of the wards within the county concerned. It only required that a candidate had to be a registered voter, period.

As to the removal of a county speaker from office, it could be done in two (2) ways; the first one was the county assembly process as stipulated by section 11(1) of the County Governments Act, while the second one was the judicial process. The courts as custodians of the law could not hesitate to nullify the election of speaker of a county assembly where there was a breach of the law, for instance, where a person elected as speaker did not meet the requirements of article 193 (1) of the Constitution, or was disqualified under article 193 (2) of the Constitution.

Petition dismissed as the injunction sought was not capable of being enforced.

Transition to Devolved Government and Transfer of Powers and Functions

5. Transition to Devolved Government and Transfer of Powers and Functions

Transitional provisions, relating to Suits filed against Local Authorities, in the Devolved Governance System

"When the Local Government Act was repealed, the legal effect was that all bodies created by it also ceased to exist. Therefore, municipalities created under the statute became disbanded entities."

John Michael Wanjau v Municipal Council of Eldoret
E & L 285 of 2013
(Consolidated with E & L 286 of 2013)
Environment & Land Court of Kenya at Eldoret
Munyao Sila, J
September 26, 2013

The main issue before court was whether a municipal council was a legal entity capable of being sued after the repeal of the Local Government Act. The brief facts of the case were that a suit was filed against the Municipal Council of Eldoret. However, a preliminary objection was raised that the Municipal Council of Eldoret no longer existed given the repeal of the Local Government Act. The issues for determination by the court were whether the Municipal Council of Eldoret was the proper party to sue and whether a suit against it could be sustained given the provisions of the County Governments Act.

The court held that when the Local Government Act was repealed, the legal effect was that all bodies created by it also ceased to exist. Therefore, municipalities created under the statute became disbanded entities. The court observed that at the time the suit was filed by the plaintiff, the Municipal Council of Eldoret was a disbanded entity, and transitional provisions did not cover the suit made against it. Particularly, section 59 of the Urban Areas and Cities Act could only preserve such a suit if it had been filed before the municipality became a disbanded entity, before the repeal of the statute, which created it.

The court exercised its discretion in law to allow for the amendment of the plaint and ordered for the joinder of proper parties.

Preliminary objection upheld and leave to amend the plaint granted.

Government Proceedings Act does not apply to the County Governments and therefore an injunction can issue against county government.

"It was not the intention of the legislature that the County Governments were to enjoy the same status as the National Government and that if that was the intention, then the Government Proceedings Act would have been amended to expressly include County Governments. As a result, the County Government could not therefore come under the umbrella of the Government Proceedings Act, when it comes to injunctions against them as well as their officers"

James Muigai Thungu v County Government of Trans-Nzoia & 2 others
Land case no. 31 of 2015
Environment and Land Court at Kitale
E. Obaga J.
July 21, 2015

The applicant brought a Notice of Motion in which he sought an injunction restraining the three respondents from in any way interfering with the suit property which was registered in his name. The applicant contended that sometimes in February, 2015, the respondents moved into his property, had it fenced and deposited building materials and were threatening to construct on the property.

The respondents opposed the applicant's application and contended that the applicant's application was incompetent, misconceived and fatally defective and that it offended mandatory provisions of the law and further that the applicant had not met the threshold for grant of interlocutory injunction and that an injunction could not issue against a Government. The respondent further contended that the application was not supported by the annexed documents and that the plot in issue was public land which was illegally allocated to the applicant and that the court should not grant an injunction as to do so would amount to the court promoting illegal allocation of public land

The issues before the court were whether an injunction could be issued against a County Government and whether the Government Proceedings Act could extend to the County Government. In its ruling, court referring to the Government Proceedings Act Cap 40, stated that it forbade courts from giving an injunction against the Government and that section

16(2) extended the same protection to government Officers. Court was keen to note that the Act was in place even before the devolved system of government came into force.

Court further stated that the County Governments were body corporate with power to sue and be sued and that there was no provision in the County Government Act of 2012 which protected them from injunction orders.

It was the courts observation that it was not the intention of the legislature that the County Governments were to enjoy the same status as the National Government and that if that was the intention, then the Government Proceedings Act would have been amended to expressly include County Governments. As a result, the County Government could not therefore come under the umbrella of the Government Proceedings Act, when it comes to injunctions against them as well as their officers.

Court further restated the principles for grant of interlocutory injunctions that first an applicant must demonstrate a prima facie case with probability of success; Secondly, the applicant will suffer irreparable loss which would not be adequately compensated in damages and thirdly that if the court was in doubt, it would decide the application on a balance of convenience.

In a bid to elaborate the principles further, court went ahead to state that a prima facie case in a civil application included but was not confined to a genuine and arguable case, that it was a case which on the material presented to the court, a tribunal properly directing itself will conclude that there existed a right which had apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

Court ruled that the applicant had demonstrated that he was the registered owner of the property in issue and that he had been paying rates to the County Government of Trans-Nzoia which was the first respondent. Court further ruled that the acts of the respondents of fencing the property and accumulating building materials on it and further arguing that it was capable of paying costs had clearly infringed on the applicant's right to enjoyment of his property and he was therefore entitled to protection.

Court in granting the injunction and costs to the applicant, concluded by stating that the allegations by the respondents that the property was illegally allocated could only come out during the hearing. Otherwise the applicant had demonstrated that he was entitled to an injunction to preserve the property until the suit was heard and determined.

Court proceedings against the defunct Local Authorities can be sustained against the County Governments

"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."

J A S Kumenda & another v Clerk Municipal Council of Kisii & 6 others
Misc. Civil Application No. 3 of 2013
High Court of Kenya at Kisii
S O Okong'o, J
June 14, 2013

The applicants had instituted the suit against the Clerk of the Municipal Council of Kisii and six others under the Local Government Act, subsequently that Act was repealed under the new devolved government structures that established the county governments.

The issue before the court was whether legal proceedings that were instituted against local authorities prior to the repeal of the Local Government Act, and which were pending before the courts were sustainable, and against whom.

The court held that section 59 of the Urban Areas and Cities Act was clear that suits commenced in a court of law against any local authority prior to the repeal of the Local Government Act could continue to be sustained. However, that section was vague as against who such suits could be sustained or continued. After the repeal of the Local Government Act, local authorities and institutions that were constituted there under like the 1st and 2nd respondents ceased to exist as legal entities and as such could not sue or be sued and could neither proceed with nor be proceeded against with respect to any pending suit. However, those suits that had been instituted by and against the defunct local authorities could not remain in limbo until such a time that the body referred to in section 59 of the Urban Areas and Cities Act was set up. From a reading of the Constitution and the Urban Areas and Cities Act, such suits could be proceeded with by and against County Governments.

The court finalized by stating that the Urban Areas and Cities Act came into force after the repeal of the Local Government Act. Section 59 thereof therefore intended to preserve the rights to sue and defend by and against local authorities existing as of the date of the repeal of the Local Government Act as the process of setting up new units of devolved governments got underway.

Application allowed.

The County Government was the legally established body unit contemplated under the law to take the place of Defunct Local Authorities in pending Legal actions

"Suspending legal proceedings that were existing against defunct local authorities would result in an absurd and a manifestly unjust situation for litigants and would also put courts in very awkward position as they would not know what to do with matters involving the defunct local authorities"

Argos Furnishers Limited V Municipal Council of Mombasa
Civil Suit No. 13 Of 2008
High Court of Kenya at Mombasa
Mary Muhanji Kasango
September 18, 2014

The plaintiff before the court was holding a decree following a judgment that was entered in its favor for over five years since March 2009. The defendant's case was that pursuant to the enactment of the Constitution of Kenya, 2010, a new system of governance came into existence under which the County Governments took over most of the functions previously undertaken by the defunct local authorities but the former did not take over the assets and liabilities of the defunct local authorities.

It was argued that there was an elaborate procedure being undertaken to establish assets and liabilities and to determine the manner of transfer of such assets and liabilities from the defunct local authorities to the County Governments. The defendant submitted that since the defunct Municipal Council of Mombasa was a distinct legal entity from the County Government of Mombasa, it could not be assumed that the liabilities of the former, such as the decree subject matter before the court, automatically attached to the new County Government. In essence, the defendant's case was that the process under which the County Government of Mombasa could assume the assets and liabilities of the defunct Municipal Council of Mombasa was still underway and therefore the County Government of Mombasa should not satisfy the decree until that process was completed. The main issue was whether there could be stay of execution of the decree pending the final determination by the Transition Authority on the transfer of the assets and liabilities of the defunct Municipal Council of Mombasa.

It was observed that although courts had acknowledged that there were no transitional provisions in the County Governments Act, 2012 dealing with actions and legal proceedings that were pending as at the date of the repeal of the Local Government Act, the general legal position adopted was that the legal proceedings which were instituted against defunct local authorities should proceed as against the County Government under whose jurisdiction the concerned local authority was located. The plaintiff was already holding a decree following the judgment that was entered in its favor for over five since March 2009. The execution process could not be stayed unless for just cause. It was agreed that the County Government of Mombasa should take over the case in place of the defunct Municipal Council of Mombasa. The only issue in contention was whether the taking over should be immediate or whether the same could await the so called final determination by the Transitional Authority on the transfer of the assets and liabilities of the defunct local authorities. The defendant had not made it clear when the Transitional Authority was likely to conclude that process.

The court noted that section 2 of the Transition to Devolved Government Act, 2012 defined "Phase One" of the transition period as "the period between commencement of the Act and the date of the first election under the Constitution". The date of commencement of the Act was 9th March 2012. The first election under the Constitution of Kenya, 2010 was held on 4th March 2013. That implied that Phase One of the transition period under the Act was between 9th March 2012 and 4th March 2013. During that period, the Transitional Authority should have carried out an audit of assets and liabilities of local authorities, to establish the asset, debts and liabilities of each Local Authority and provided mechanisms for the transfer of such assets and liabilities. Those activities entailed what the defendant described as "final determination of the Transitional Authority on the transfer of the assets and liabilities of the defunct local authorities". It therefore followed that the activity that the defendant was seeking to be finalized before the execution process could proceed was to have been legally concluded at Phase One of the transition process that ended by 4th March 2013.

The court observed that suspending legal proceedings that existed against defunct local authorities would result in an absurd and a manifestly unjust situation for litigants and would also put courts in very awkward position, as they would not know what to do with matters involving the defunct local authorities.

The court concluded that the county was the legally established body unit contemplated under the law to take the place of local authorities in pending legal actions. That, therefore, meant that there was no need to wait for the establishment of another body unless expressly provided for by law.

Application dismissed with costs to the plaintiff.

County Government liable to satisfy Court Orders that arose from the liability of the now Defunct Local Authorities

"Section 33 of the Sixth Schedule to the Constitution provided for succession of institutions upon promulgation, and hence the County was the legally established body unit contemplated under the law that took the place of local authorities, unless there was a contrary enactment."

Republic v Town Clerk of Webuye County Council & another [2014] eKLR
Misc. Civil Appl. 448 of 2006
High Court at Nairobi (Milimani Law Courts)
D S Majanja, J
January 31, 2014

The main subject in the case was an application for contempt of court, which sought to commit the Town Clerk of Webuye County Council to civil jail for six months for declining to execute a court order. The court order in question directed the Webuye Town Council (respondent) to give vacant possession of the suit property to the applicant and pay him the sum of Kshs. 100,000 with interest arising from a judgment and decree issued in May 2, 2002. The applicant was unsuccessful in enforcing the decree against the Town Council but after several applications to court, judgment was finally rendered against the Town Council of Webuye. Despite service of the court order, the respondent had not taken the necessary steps to settle the judgment, hence the instant application.

The main issue for determination was whether a County Government was liable to satisfy court orders that arose from the liability of the now defunct local authorities and their officers under the Local Government Act (repealed).

The court observed that the legal landscape concerning the liability of local authorities and their officers under the Local Government Act (repealed) had changed since the application was filed. The Constitution had introduced devolved government through counties to replace local authorities.

The court held that under section 18 of the Sixth Schedule to the Constitution, all local authorities established under the Local Government Act existing immediately before the effective date were to continue existing subject to any law that would be enacted. Further the court held that section 33 of the Sixth Schedule to the Constitution provided for succession of institutions upon promulgation, and hence the County was the legally established body unit contemplated under the law that took the place of local authorities, unless there was a contrary enactment. Therefore the proceedings and judgment against the Webuye Town Council and its officers was to continue against Bungoma County, which ought to bear the burden of the judgment.

The court categorically stated that it could not grant orders incapable of enforcement as the Town Council and its Town Clerk no longer existed. Further, the court ruled that a decree holder's right to enjoy fruits of his judgment was not to be thwarted. In such a scenario, the court should adopt an interpretation that favored enforcement and as far as possible secured accrued rights. The reason was underpinned by the values of the Constitution particularized under article 10, the obligation of the court to do justice to the parties and to do so without delay under article 159(2)(a) & (b) and the applicant's right of access to justice protected under article 48 of the Constitution.

Application allowed.

Failure of Transition Authority to come up with the Criteria to determine the Transfer of previously shared assets, liabilities of the Government and Local Authorities defeats claims against County Government.

"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."

Republic v County Secretary Murang'a County Government *Ex-parte* Stephen Thiga Thuita [2014] eKLR
Judicial Review Application No 1 OF 2013
High Court of Kenya at Murang'a
J Ngaah, J
March 12, 2014

The *ex-parte* applicant through a Notice of Motion sought an order for mandamus to compel the town clerk of the then Municipal Council of Murang'a to pay the applicant the sum of Kshs. 49, 635/= being the amount of costs awarded to

him in Murang'a Principal Magistrates Court Civil Case No. 267 of 2003. The applicant's counsel who deposed that his client obtained judgment in a civil suit against the municipal council of Murang'a and was awarded costs that the County Government had neglected, refused and or ignored to settle swore the affidavit verifying the facts.

The main issue before the court was whether Murang'a County was liable to settle the claims on judgment issued against the then Municipal Council of Murang'a and the applicable law (if any) that governed the devolution of assets and the assumption of liabilities of the local authorities prior to their extinction.

The court held that, 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 that was created under section 4 of the Transition to Devolved Government Act. Among its functions set out in section 7 of that 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.

The court further held that as at the time the instant application was argued, there was no evidence adduced to the court that such a criteria was now in place as contemplated under the Transition to Devolved Government Act. Without that criterion, it would have been premature to attribute the local authorities' pre-existing liabilities to the county governments. It followed that even if the applicant's motion was properly before court, there would still have been no basis to hold the county government of Murang'a responsible for liabilities, which were hitherto attributed to the Municipal Council of Murang'a.

Application dismissed.

The Mandate of the Transition Authority to determine the transfer of previously shared assets and liabilities of the Government and defunct Local Authorities.

"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."

County Government of Busia v Julius Orina Manwari & 12 others
High Court at Busia
Petition No 2 of 2014
F Tuiyott J
May 29, 2015

The High Court at Busia has ruled that it was only the Transition Authority that had the constitutional mandate to determine whether proceedings against the defunct local authorities had to naturally continue against the County Government. Justice Tuiyott held that it was not in the place of the High Court to determine 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.

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 suit. 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.

The petitioners *inter-alia* submitted that it would have been premature to enjoin the 1st petitioner i.e 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.

The main issue for consideration before the High Court was whether the County Governments would take up liabilities of the defunct Local Authorities that were located within their jurisdiction.

The High Court held that 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.

The court noted that 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, it would have been premature to attribute the local authorities' pre-existing liabilities to the County Governments.

Petition was dismissed.

Court allows Transfer of Health Services to County Governments.

"Under article 1(3)(b) of the Constitution of Kenya, 2010, there was only one state organ known as the executive with structures at national level and in the county governments. Accordingly, it could not mean that the devolution of health services ipso facto had to lead to loss of jobs or disadvantageous terms of employment, salaries, remuneration, pensions and gratuities which terms were to be determined by the Salaries and Remuneration Commission"

Republic v The Transition Authority & Another *exparte* Kenya Medical Practitioners, Pharmacists and Dentists Union (KMPDU) & 2 others
High Court of Kenya at Nairobi
JR No. 317 of 2013
W Korir, M Ngugi, G V Odunga

The applicants were challenging the transfer of health services to County Governments. It was contended that in transferring these functions, the Respondent, the Transition Authority had *not engaged* the applicants' members and in particular medical practitioners and other key stakeholders in the process of transition, and policy making by the Authority; had disregarded the importance of a legislative framework underpinning the transfer of the health component in direct violation of sections 7 and 24 of the Act; had not determined the readiness of counties to take up devolved functions and in particular in relation to devolution of Health Services as stipulated by section 24 (d), (f) and (g) of the Act; had acted contrary to the County Governments Act 2012 and had failed to take into account the provisions of section 106 of the Act; had not established whether the Applicant's members (many of whom were employed by the Public Service Commission) were being laid off for subsequent re-hiring by the counties and whether any terminal benefits were due and would be paid; had not standardized the system of personal emoluments and promotions and further the issue of pension and the manner in which it would be handled in the absence of the Public Service Superannuation Service Scheme Act had not been set out; and had not set out how inter county transfers would be handled.

The court noted that section 30(1) of the Intergovernmental Relations Act, 2012 provided that disputes that could be resolved under that Act were disputes arising (a) between the national government and a county government; or (b) amongst county governments. Clearly, that section did not expressly apply to disputes by ordinary citizens arising from the exercise of powers by and obligations placed upon the Authority. To interpret that said provision to include disputes by individuals who were aggrieved by actions or omissions of the Authority amounted to overstretching the said provisions too far. Therefore the *ex parte* applicants did not have an effective remedy under the Intergovernmental Relations Act, 2012 since they were neither the National Government nor the County Government.

According to the court, the mere fact that the respondent (The Transition Authority) was alleged to have become *functus officio* did not bar the court from reviewing its decision since the decision it (Transition Authority) made was still enforceable and could attract orders of certiorari to quash or nullify that decision if it was bad.

So long as orders by way of Judicial review remained the only legally practical remedies for the control of administrative decisions, and in view, of the changing concepts of good governance which demanded transparency by anybody of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review orders would continue extending so as to meet the changing conditions and demands affecting administrative decisions.

The court observed that once public participation was attained and the decision making authority after considering the views expressed made a decision, the issue whether or not such decision ought to have been made, could no longer be a subject of

judicial review since the decision was no longer questionable on the process of arriving thereat but could only be questioned on the merits and that was not within the realms of judicial review. Whereas the adequacy and extent of the participation of the public in the decision-making process could be challenged, the applicants failed to demonstrate that the consultative process was inadequate.

The court concluded that Part 1 No. 28 of the Fourth Schedule to the Constitution of Kenya, 2010 was clear that Health Policy remained a function of the national government. The inadequacies of provision of health services was a matter of national concern and it was the obligation of the national government to ensure every person's right to highest attainable standard of health as stipulated under article 43 of the Constitution was attained. Therefore, there was no way how the delay in devolving health services could change the situation with respect to poor health services in the short term since the shortage of personnel and poor infrastructure existed whether the health services were devolved or not.

Application dismissed. No orders as to costs since the matters raised were of general public interest.

The distribution of Functions in the Provision of Healthcare Services by the National and County Governments

"Within the meaning of section 30 of the Intergovernmental Relations Act, No 2 of 2012, there was no dispute either between the national government and the county government or amongst the county governments. The petition was brought by private citizens."

Okiya Omtatah Okoiti & another v Attorney General & 6 others
Petition 593 of 2013
High Court of Kenya at Nairobi
Constitutional and Human Rights Division
Isaac Lenaola, J
August 6, 2014

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 it also concerned an intergovernmental dispute which was to be determined via dispute resolution mechanisms provided for in the Intergovernmental Relations Act, No 2 of 2012.

The court held that the plea of *res judicata* could not be raised successfully because the issue in the concluded suit, JR No 317 of 2013, related to violations of section 7 and 24 of the Transition to Devolved Government Act, No 1 of 2012, failure to adhere to the requirements of article 43 of the Constitution of Kenya, 2010, irrationality and abuse of statutory powers. On the other hand, the issues raised in the petition related to the proper interpretation to be given to the terms 'national referral health facilities' and 'county health facilities.' The issues in the two suits were distinct despite the fact that they all related to the provision of health services.

The court noted that the distribution of functions between the national government and the county government was distinct from the allocation of functions made to local authorities before the devolved system of government came into effect. The structure of government provided for under the Constitution of Kenya, 2010 was not comparable to the local authorities system provided for under the repealed Local Government Act (repealed).

The court observed that the Constitution had not defined the words 'national referral health facilities' and 'county health facilities.' It also did not categorize hospitals into different levels. The classification of hospitals into levels and into national referral health facilities or the national health system and the county health facilities and system was a policy issue, to be determined in accordance with section 15 of the Sixth Schedule to the Constitution of Kenya, 2010.

In conclusion, the court held that the court's jurisdiction was limited to interpreting the law and it could not make policy or enact the law, as that was the mandate of the Executive and Parliament. The court had no ability or mechanism to determine the criteria to be used to categorize hospitals or capacity to examine equipment, facilities and manpower for purposes of such

categorization.

Petition Dismissed

Provision and management of water services is a shared function, distributed between the two levels of government

"Article 6 (2) of the Constitution recognizes the fact that the governments at the national and county levels are distinct and inter-dependent. It enjoins them to conduct their mutual relations on the basis of consultation and cooperation. With regard to water provision, they should 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 require such adaptations as will ensure accord with the Constitution."

Okiya Omtatah Okoiti & 3 others v Nairobi City County & 5 others
Petition No 140, 142 & 143 of 2014 (Consolidated)
High Court of Kenya at Nairobi
Mumbi Ngugi, J
November 26, 2014

The petitioner filed a claim contesting the appointments of directors to a county public corporation. His main contention was that the appointments were not procedural and did not comply with substantive legal requirements. One of the issues before the court on matters devolution was whether the regulation and management of Water Sanitation Services and Water Services Providers (WSPS) was 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 was a shared mandate with the National Government.

The court held that 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 are 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 had 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.

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.)

Regulation of liquor licenses is a function of County Governments

"Article 185(2) of the Constitution of Kenya, gave County Assembly 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."

Meru Bar, Wines & Spirits Owners Self Help Group (Suing through its secretary) Ibrahim Mwika v County Government of Meru
Petition 32 of 2014
High Court at Meru
J.A. Makau, J
December 4, 2014

The petitioner moved the court to challenge the procedure and manner in which the Meru County Alcoholic Drinks Control Act No. 3 of 2014 was formulated, passed and assented to. Their main contention was that there was no public participation and as such the process disregarded what the law envisaged, under article 10 and 196 of the Constitution of Kenya, 2010 read together with section 3(f), 87 and 115 of the County Government Act.

The petitioners asserted that the Act contravened National Legislation; that section 27 of the Meru County Alcoholic Drinks Control Act, 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 averred that the said 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.

The issues inter alia were whether the regulation of liquor licensing was a national or county function and whether County legislation superseded National legislation in matters that were exclusively provided for County Governments. The court found that; article 185(2) of the Constitution of Kenya, gave County Assembly 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.

The court observed that 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 of Kenya, 2010. The court further stated that even if there was a conflict between section 34(2),(a) and (b) of the Meru County Alcoholic Drinks Control Act No.3 of 2014 (which the Petitioner had not demonstrated existed) with the provisions of 31(a), (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 was an exclusive mandate of the County Government and was not a shared function between the National Government and the County Government.

According to the Court, by enacting a law whose objective was to educate country residence on harmful effects, economic and social concerns of the consumption of alcoholic drinks and how to reduce and mitigate such adverse effects, the respondent understood the needs of the Meru County Residents. There were constitutional, rational and reasonable grounds in setting out such objectives of the Act hence marking the enactment of the impugned law a good law.

The court concluded that section 23 of the Alcoholic Drinks Control Act No. 4 of 2010 was similar to section 27 of the subject Act word for word and such the subject Act could not be deemed inconsistent with the National laws or the Constitution. Where such inconsistence existed the County legislation prevailed. 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.

Petition dismissed, each party to bear its own cost

County Governments have the Exclusive mandate over County Transport

"Article 209(4) of the Constitution empowers National and County Governments to impose charges for the services they provide. One such service provided by the County Government is parking under section 5(c)."

Nairobi Metropolitan PSV SACCOs Union Limited and 25 others v County of Nairobi Government and 3 others
Petition No. 486 of 2013
High Court at Nairobi
Constitutional and Human Rights Division
Isaac Lenaola J,
December 18, 2013

The Nairobi County Government had enacted the Nairobi City County Finance Act of 2013, and the issue of contention was schedule 6.1 of the Act, which empowered the County Government with the power to vary parking fee charges. The petitioners claimed they were not consulted prior to the insertion of the schedule. The 1st respondent had put up advertisements in local daily newspapers for Stakeholder Forum for 2013-2014 Budget Estimates, carried out on diverse dates. On April 14, 2013, in the Sunday Nation newspaper, the office of the Governor placed an advertisement inviting the public and other stakeholders to attend a forum on 16th April 2013. It was stated in the advertisement that the forum would be used to influence the activities of Nairobi City County. It was further stated that the budgetary process would in essence guide functions such as agriculture, county health and county transport. It was the petitioners' claims that it was not

sufficient and therefore unconstitutional.

The court stated that article 174 (c) of the Constitution provided for the principles of devolved government and had given powers to the people to enhance self-governance and enhance their participation in decisions that affect them. The making of county laws by members of County Assembly was an essential part of public participation. From the evidence adduced, the court was unable to find that the impugned Act was unconstitutional on account of lack of public participation. The 1st and 2nd respondents involved the public in enacting the Nairobi City County Finance Act as stipulated by article 10(2) and article 196(1) (b) of the Constitution.

Having found that the 1st and 2nd respondents involved the public in the process leading to the enactment of the Nairobi City County Finance Act, the court was convinced that they indeed complied with the law in the budget making process; from the making of the overall estimation of the County government revenue and expenditures, to preparing the budget estimates for the county government and submitting the estimates to the County Assembly approval of the estimates by the County Assembly, enactment of the appropriation laws and all the laws needed for the implementation of the county governments budget.

Section 5(c) of the fourth schedule to the Constitution demonstrated that County Governments had the exclusive mandate over the County transport, which included traffic and parking. The court also further noted that article 209(4) of the Constitution empowered National and County Governments to impose charges for the services they provide. One such service provided by the County Government was parking under section 5(c).

The court affirmed that the Traffic Act must be brought to conformity and must be construed with the devolved County Government structure in mind and it cannot supersede County Legislation on an issue exclusively reserved for the County Government, not by Statute, but by the Constitution itself.

In conclusion, the court stated that it was to be understood that the Traffic Act was enacted in 1968 or thereabouts, way before the Constitution, 2010 was promulgated. Between 1968 and 2010, there were no County Governments and the distribution of functions between the National Government and the County Governments was all but a mirage. Local authorities could not be equated to County Governments as the structure and design of the Constitution has given County Governments an elevated position as one of the organs to which sovereignty of the people of Kenya was delegated under article 1 of the Constitution.

Petition dismissed with no order as to costs.

High Court declares the County Government's (Amendment) Act that introduced the County Development Board as unconstitutional

"…..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….."

Council of Governors & 3 others v Senate & 53 others
High Court at Nairobi
Petition No 381 of 2004 (Consolidated with Petition 430 of 2014)
I Lenaola, M Ngugi & GV Odunga JJ
July 10, 2015

The facts giving rise to the petitions were that the National Assembly of Kenya had pursuant to consultation with the Senate enacted the County Governments (Amendment) Act. The County Governments (Amendment) Act amended the County Government Act by introducing a new provision (section 91A) which 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 were to be chaired by the Senator from the county.

The 1st petitioner sought a declaration 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 CDBs, Senators and members of the National and

County Assemblies would be undertaking executive functions at the County level.

It was argued that under the Constitution and legislation, it was 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. 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.

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 deputize 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. It was further submitted that 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. It was hence argued that the composition and mandate of the CDBs upset 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.

The court held that the CGAA involved 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. 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.

The court opined that 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.

The court noted that separation of powers in its most basic form provided 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 provides at article 94 that the Legislative Authority of the Republic is derived from the people and at National level was vested and exercised by Parliament.

In the court's opinion, 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.

The court observed that the wording of section 91A 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.

The court held that by purporting to create an oversight role for national government in the counties, section 91A purported to allocate to national institutions roles in the counties that were not in compliance with the Constitution.

It was observed that while the CDBs might be said to differ from the 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.

The court opined that 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 fell 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.

According to the Court, 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. 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 was shared out among different organs of government, and that those organs play mutually-countervailing roles. In that set up, it was to be recognized that none of the several government organs functions in splendid isolation.

In conclusion, the court held that 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.

The County Governments Act (Amendment) Act 2014 declared unconstitutional null and void.

Each party to bear own costs since the petition raised issues of public interest & importance.

Court declares the Constituency Development Funds Act Unconstitutional

"…..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 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 violated key national values and principles enunciated under article 10 of the Constitution, to wit, good governance and accountability….."

Institute of Social Accountability & another v National Assembly & 4 others
High Court at Nairobi
Petition No 71 of 2013
I Lenaola, M Ngugi, Majanja J
February 20, 2015

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.

It was submitted that 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.

The court held that 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.

The Court observed that 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.

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 Government.

The court noted that 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.

On the issue of public participation, the court held that 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 from the formulation of the legislation to the process of enactment of the statute.

The court observed further that 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. 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.

The Court affirmed that the 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.

According to the Court, 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 Government. 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. 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 Government 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 to be scrutinized.

The Court pointed out that from a plain and literal reading 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 County Government enumerated in Part 2 of the Fourth Schedule.

The court noted that 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.

It was held that 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. 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 is fortified by Part VI of the County Governments Act, 2012 which sets out the decentralization units in a county. The Constitution envisaged that although power was 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.

The court noted that 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 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.

At the National Level, under article 93(1) of the Constitution, there is 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.

The court held that 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 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 violated key national values and principles enunciated under article 10 of the Constitution, to wit, good governance and accountability.

According to the court, Members of Parliament have a specific and clearly defined role under the Constitution. That role does not include involvement bodies whose functions entail co-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.

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 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.

The court further observed that 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.

Devolution was a panacea to addressing the developmental and equity gaps that existed in our communities. That was 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.

In order to protect the Constitution, the court stated that it would have to be creative in fashioning appropriate relief that is tailored to the facts of the case and that is 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.

In conclusion, the court held that 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 may be repealed earlier by an Act of Parliament or await the expiry of the suspension, whichever comes first.

Orders

Constituencies Development Funds Act, 2013 was unconstitutional and therefore invalid.

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 comes first.

Each party to bear its own costs.

Supreme Court's determination on the application seeking Advisory Opinion on whether an issue on the mandate of National Land Commission touches on County Governments

"The instant Reference involved matters concerning county government; in particular, as the relevant issues involved the administration and management of public land, at both the national and the county level, precisely as contemplated under articles 62(2) and 67(2) of the Constitution."

In Re the Matter of the National Lands Commission under Article 163(6) of the Constitution of Kenya in the Supreme Court of Kenya at Nairobi
Reference No. 2 Of 2014
W M Mutunga, CJ & P, K H Rawal, DCJ & V-P, M K Ibrahim, J B Ojwang, S C Wanjala, S N Njoki, SCJJ
October 30, 2014

The National Land Commission sought an advisory opinion from the Supreme Court on their functions and powers as provided for by the Constitution of Kenya, 2010, on the one hand, and the functions and powers of the Ministry of Land, Housing and Urban Development, on the other hand. The Attorney-General, and the Ministry of Land, Housing and Urban Development (1st and 2nd interested parties) filed a Preliminary Objection contesting the jurisdiction of the court to hear and determine the request for Advisory Opinion on many grounds *inter alia*; that the Supreme Court's jurisdiction on rendering advisory opinions was restricted and confined to "matters concerning County Governments and that the Supreme Court had in its previous decisions outlined what constituted "matters concerning county government". Further, it was argued that questions concerning the powers and functions of the National Land Commission *vis a vis* those of the Ministry of Lands, Housing and Urban Development were not contemplated under the Supreme Court's jurisdiction to render advisory jurisdictions. The main issue before the court was whether the Supreme Court had the jurisdiction to render an advisory opinion under article 163(6) of the Constitution on the powers and functions of the National Land Commission *vis a vis* those of the Ministry of Lands, Housing & Urban Development.

The court noted that under the National Land Commission Act, 2012 section 5(2)(b) all land vested in the people and was to be administered by the National Land Commission. Therefore, the applicant as the State organ entrusted with the function of managing public land on behalf of both the national and county governments, its mandate cut across both spectra of national and county government. In the court's view, the instant Reference involved matters concerning county government; in particular, as the relevant issues involved the administration and management of public land, at both the national and the county level, precisely as contemplated under articles 62(2) and 67(2) of the Constitution. From the terms of the Constitution, the applicant (National Land Commission) was a shared institution at the two levels of government, and did not fall within the exclusive sphere of the national government.

The court observed that notwithstanding that a number of issues in the instant reference were proper justiciable causes for adjudication in the High Court, issues relating to institutional mandates assigned by the Constitution especially as it were in the instant matter involving contests between two state organs, properly fell to the advisory – opinion jurisdiction of the Supreme Court. The Supreme Court proceeded on a case-by-case basis in determining whether to exercise its advisory – opinion jurisdiction.

In conclusion, the court affirmed that the Supreme Court was guided by the elaborate principles and values proclaimed in the Constitution, which though affirming independence on the part of separate governance entities, required common purpose in public service. In that context, the Judiciary as an organ of dispute resolution was to be guided under article 159(2)(c) by the principle of promoting alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution. Therefore, the instant matter met the admissibility requirement as set out in article 163(6) of the Constitution.

However Justice Njoki Ndungu dissented on the basis that the questions posed to the court had no direct correlation with county government. Rather, they merely had a remote nexus with county government by virtue of the fact that the operations of the Commission and the Ministry of Land ultimately impacted on both public and private land physically located within the boundaries of each county. She observed that whereas, the majority bench treated the instant matter as concerning the operations of two constitutional institutions that were clearly within the national government, but considered their functions as impacting on the county government hence qualifying the subject of the reference before the court for Advisory Opinion, that view was not correct because all operations at the national level ultimately had an impact upon the county government, no matter how remotely.

According to Justice Njoki Ndungu, to uphold that all matters affecting the national government touched on the county governments would mean that any matter relating to the operations of the national government automatically qualified as subject for Advisory Opinion. That created an absurdity and clearly went against the spirit and the letter of article 163(6) of

the Constitution.

She concluded that for a matter to qualify as once concerning county government hence qualifying to be the subject of advisory opinion, its subject matter had to be significant; that was to say that it had to be one that had some effect, impact, consequence on, or one that affected the role, the structure, management or running of county government.

The preliminary objection dated 15th July, 2014 was disallowed.

Prior to the conduct of a hearing, the court allowed a 90-day interlude during which the parties could undertake a constructive engagement towards reconciliation and a harmonious division of responsibility.

The instant Reference was to be set down for hearing through the office of the Registrar, and a hearing date be given on the basis of priority.

There were no orders as to costs.

Public Participation and Citizen Engagement

6. Public Participation and Citizen Engagement

Scope of the Right to Information under Article 35 of the Constitution

"It is vigilance by citizens that will advance good governance and the rule of law, as well as proper use of resources, at both the National and Devolved government."

Pius Atok Ewoton v Joseph Koli Nanok Governor Turkana County & 3 others [2014] eKLR
Constitutional Petition 554 of 2013
High Court at Nairobi (Milimani Law Courts)
Mumbi Ngugi, J
July 8, 2014

The petition related to the approved budget estimates for Turkana County for the 2013/2014 financial year. The petitioner contended that the Turkana County Executive altered the said budget, and that the altered budget would be detrimental to the residents of Turkana County if implemented.

The main issue for determination was whether the right to information was contravened where the information furnished to a petitioner was not *in tandem* with the information the petitioner had obtained from an anonymous source.

Basing his case on article 35(1) of the Constitution of Kenya, 2010 on the right to information, the petitioner (*Pius Atok Ewoton*) contended that he sought information from the County Government of Turkana and the Controller of Budget but was not furnished with the information he sought. He submitted that the budget estimates presented to the Controller of Budget (3rd respondent) by the Turkana County Executive were not the budget estimates approved by the Turkana County Assembly.

Conversely, the respondents submitted that the petitioner had not demonstrated a violation of article 35(1) since at the time of the filing the petition he had already been furnished with all the documents that he required. Further, the respondents contended that the Controller of Budget had received information of the alterations to the budget for Turkana County but by the time the petition was filed, the mistake had already been corrected and another warrant sent to the Controller of Budget.

The court held that the respondents had complied with the demand for information by the petitioner though he was still insisting on receiving a document from the respondents, which he stated he already had a copy of, having received it from an anonymous source. The origin of that document was thus unclear, as was its relationship to the Turkana County Government budget estimates. The petitioner had not demonstrated that that document was within the possession of the respondents, or that they had failed or refused to furnish it to him.

The court further held that it could not issue orders the petitioner was seeking with regard to the document from an anonymous source. If it were the case that there were yet more irregularities with regard to the County budget, or some acts that violated the law or the Constitution, then it was incumbent upon him to present such information to the appropriate bodies, including the 3rd respondent (Controller of Budget), so that investigations could be undertaken.

The court however commended the petitioner for raising his concerns with regard to the budget estimates for Turkana County, observing that it was his concern that led to the investigation of the irregularities in the budget estimates. The court observed that, it was such vigilance by citizens that would advance good governance and the rule of law, as well as proper use of resources, at both the national and devolved government.

Petition dismissed with no order as to costs.

Ultimate aim of public engagement is the larger public benefit

" . . The ultimate goal for public engagement as envisaged in the Constitution was for the larger public benefit ."

Thuku Kirori & 4 Others v County Government of Murang'a & Another
Petition 1 of 2014
High Court of Kenya at Murang'a
Ngaah Jairus, J
June 13, 2014

The petitioners, suing on their behalf and on behalf of the private veterinary professionals of Murang'a County, sought several declarations against the respondents jointly and severally, including a declaration that the intended initiation of an Artificial Insemination Programme within the County by the respondents without stakeholder and public participation by collecting

their views and concerns was against proper governance and constitutionalism. They further sought an injunction to restrain the respondents from rolling out the Programme.

The petitioners' concern was that they were likely to be driven out of business because the introduction of a government subsidy in artificial insemination services would render their services, as private practitioners in that field, less competitive. That would be unhealthy for the artificial insemination services market, which had been liberalized since 1988 and would cause them financial hardship. The County Government of Murang'a denied that the Petitioners were registered or licensed to provide veterinary services, contrary to their allegation in the petition.

The main issues before the court were whether the petitioners had the *locus standi* to institute legal proceedings alleging infringement of rights or fundamental freedoms in the Bill of Rights against the County government of Murang'a and whether the county government conducted public participation before rolling out the intended initiation of an artificial insemination program within the county.

The court held that article 22 of the Constitution of Kenya, 2010 provided that every person had the capacity to institute court proceedings alleging the infringement of fundamental rights and freedoms. The petitioners had described themselves as professionals in the veterinary services field therefore their cause of action was inextricably intertwined with their identity as professionals in a particular field and by extension, their capacity to sue as such.

Court further held that the petitioners had failed to produce evidence that they indeed were such professionals within the meaning of section 13 of the Veterinary Surgeons and Veterinary Para-Professionals Act was necessary for there to have been a link between the aggrieved party, the provisions in the Constitution alleged to have been contravened and the manner of the contravention or infringement. The Petitioners had been proved not to be the persons they claimed to be and therefore the issue of whether they had any complaint, or whether any particular provisions of the Constitution had been infringed, or the manner in which those provisions had been infringed could not arise.

In conclusion, the court observed that the concept of public participation as contemplated under articles 10 and 174 of the Constitution was that the participation of the public in affairs that concerned them should not have been narrowly interpreted to mean "engagement of a section of people purporting to be professionals who were out to rip maximum profits out of services for which they were neither registered nor qualified to offer." The ultimate goal for public engagement as envisaged in the Constitution was for the larger public benefit.

Petition dismissed with costs.

Uasin Gishu County Finance Act, 2013 declared null and void for failure of Public Participation in the Enactment

"County governments have the right to enact legislations for the effective performance of their functions as provided by article 185 of the Constitution and article 209 (4) empowered the county governments to impose charges for the services they provide"

North Rift Motor Bike Taxi Association (NRMBTA) v Uasin Gishu County Government
Constitutional Petition 3 of 2014
High Court at Eldoret
Grace Wangui Ngenye J
October 2, 2014

The North Rift Motor Bike Taxi Association (NRMBTA) against the Uasin Gishu County Government filed the Petition. The petition was brought pursuant to articles 1, 2, 10, 185, 196, 199, 209 and 210 of the Constitution of Kenya, 2010 and it challenged the Uasin Gishu County Finance Act, 2013 as enacted on the grounds that it was invalid for failure of compliance with articles 10 (2) (a) and 196 (1) (b) of the Constitution of Kenya, 2010 and section 87 of the County Governments Act, 2012. The main ground was that the respondent failed to facilitate public participation including the petitioner before enacting the Act.

The main issue was whether there was adequate and appropriate public participation prior to the enactment of the Uasin Gishu Finance Act, 2013.

The court stated that public participation did not imply that each of the county residents had to give their oral views in the public forums or otherwise write their memoranda respecting their views on a bill. But simple acts of, say, conducting random public forums, posting programmes on popular radio stations and publishing of the Bill in the dailies with wide circulation would do. But in the instant case, none of that was done. What the respondent alluded to as constituting public participation were mere allegations that were not substantiated. According to the court, the respondent violated the petitioner's constitutional right as provided by articles 1, 2, 10 and 196 of the Constitution and sections 87 of the County

Governments Act, 2012.

The court pointed out that the forms of facilitating an appropriate degree of participation in the law-making process were indeed 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. The respondent made no single attempt of making it known what the Bill contained and/or entailed before it became law. The petitioner members appeared to just have been ambushed with demands for increased charges. For that reason, the court concluded that the Uasin Gishu County Finance Act, 2013 was unconstitutional and therefore invalid.

Petition allowed with no orders as to cost.

Kiambu Finance Act 2013, declared Unconstitutional for lack of public participation

Robert N Gakuru & others v Governor Kiambu County & 3 others
Petition No 532 of 2013 & Petitions No 12, 35, 36, 42 & 72 of 2014 & Judicial Review Misc App No 61 of 2014 (Consolidated)
High Court at Nairobi
G V Odunga, J
April 17, 2014

The petitioners' claim was that the Kiambu Finance Act, 2013 was unconstitutional. They based their claim on the contention that the Act was enacted without public participation and that it violated various constitutional provisions.

The petitioners claimed that the taxation terms introduced by the Act were unreasonable, punitive and amounted to double taxation. They stated that the Act exposed them to risks of business closure and loss of livelihood. There were also claims that meat traders would be exposed to unfair competition from traders from other counties who did not pay similar charges as the traders from Kiambu.

The court's holding was that public participation had to be real and not illusory or viewed as a merely formality. Particularly, the court stated that the duty to ensure that public participation was achieved was more onerous where an Act dealt with a matter of particular importance such as taxation and levies.

The court held that the County Assembly was required to ensure public participation 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 were known to converge to disseminate information.

The court further held that huddling a few people into a five star hotel for a day did not meet the constitutional threshold for public participation. It was also the court's view that 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.

The court also found that with respect to the contents of the newspaper publication, there was inadequate facilitation for purposes of public participation, as the advertisement did not provide adequate information or education, on the import of the Finance Bill, which would enable meaningful public engagement.

The court also stated that having members of the County Assembly express the people's views at the Assembly did not attain public participation. The court explained that 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.

The court noted that the nature of taxes a County Government could impose were limited. Under article 209 of the Constitution of Kenya, 2010, 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.

It was the court's conclusion that if a County Government found that it had insufficient revenue to carry out its functions, it had the option of seeking for a larger resource allocation from the National Government or petitioning the National Assembly to pass legislation allowing it to impose new forms of taxes.

Petition was allowed. (The court issued a declaration that the Kiambu Finance Act, 2013 violated the Constitution and was null and void.)

Intergovernmental Relations

7. Intergovernmental Relations

Dispute resolution mechanism between National and County Governments

"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, 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."

Law Society of Kenya v Transition Authority & 2 others [2013] eKLR
Petition 190 of 2013
High Court at Nairobi
DS Majanja J
June 14, 2013

The Law Society of Kenya ("Law Society") exercising its mandate under the Law Society of Kenya Act brought the matter in public interest and in the interests of the proper and effective operation of County Governments and 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-a-vis* the Provincial Administration and County Commissioners. The main issue was whether the court had jurisdiction to determine a dispute between the national and county government where there was a dispute resolution mechanism in place

Accordding to the Court, the court noted that section 19 of National Government Co-ordination Act, 2012 provided that 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; 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.

The case was not ripe for determination in view of the dispute resolution mechanism provided. Furthermore, judicial proceedings were a last resort as section 35 of the Act provided that where all efforts of resolving a dispute under this Act fail, a party may submit the matter for arbitration or institute judicial proceedings. If there was indeed 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.

The court stated that the County Governments had only just come into existence after the 4th March 2013 election. They had to be incubated and supported and the court was an integral part of that process. Article 189 required that the National and County Governments respect each other, assist and support each other and co-ordinate their functions. Granting the declarations sought in the petition would undermine that objective and process of implementation of the Constitution, devolution and the restructuring of the provincial administration, the court concluded.

Petition dismissed with no orders as to costs.

Scope of Intergovernmental Disputes within the Intergovernmental Relations Act

"The Constitution and statute in respect of the dispute resolution between the national and county governments does not oust the jurisdiction of the court but rather it postpones the same until the alternative dispute mechanism has been attempted"

County Government of Nyeri v Cabinet Secretary, Ministry of Education Science & Technology &another
Petition No 3 of 2014
High Court at Nyeri
J Wakiaga, J
February 17, 2014

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 polices throughout the county at all levels national county and district.

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.

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 of students from other counties admitted in its schools over and above the 40% prescribed in the guidelines.

The main issues before the court were whether the court had jurisdiction to determine a dispute between the national and county governments and what constituted a dispute between the national and county governments within the provisions of the Intergovernmental Relations Act and the Constitution of Kenya, 2013.

The court held that 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.

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 Intergovernmental Relations Frameworks Act 2005.

The court observed that 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.

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.

The court concluded that 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 with the meaning of article 22.

Preliminary objection dismissed.

Cases Emanating From Other Common Law Jurisdictions

Cases Emanating From Other Common Law Jurisdictions

South Africa

The South African Constitution allocates legislative powers between central and provincial governments on the basis of the subject matter of the legislation. According to the Final Constitution, the nine provincial legislatures in South Africa are entitled to legislate, inter alia, on a number of subjects that are listed in schedules 4 and 5 of the Final Constitution. These subjects are called 'functional areas'. National and provincial governments share legislative competence in functional areas listed in schedule 4. Schedule 4 embraces crucial matters like 'health services' and 'housing'. The functional areas in schedule 5 are usually the exclusive domain of provincial and local governments. Residual matters, not mentioned in either schedule, are reserved for the national legislature. For example, foreign affairs would be the preserve of the national government

South Africa's devolved system of governance is based on a national government with nine provinces and 278 municipalities provided for by the constitution. The national government consists of the executive which comprises the president as head of state and head of government, the deputy president and the ministers. The legislature consists of the national assembly (lower house) and national council of provinces (upper house) and an independent judiciary.

The provinces on the other hand have their own executive which is elected by the legislature and a unicameral provincial legislature comprises of 30-80 members depending on each province. The provinces do not have a judicial system. The provincial legislature has a role of enacting provincial laws. Its other task is to adopt a constitution for its province whenever two third of members agree to do so.

The local government which consists of municipalities is governed by municipal councilors elected by the people after every five years. These municipalities are divided into three: 8 metropolitan, 44 districts and 226 local municipalities. Their main focus is on growing local economies and providing infrastructure and service. There are a number of cases that illustrate how that Government works.

The national system of registration for producers and wholesalers falls within the national legislature's competence.

Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill
Constitutional Court of South Africa
Case CCT 12/99
November 11, 1999
Chaskalson P, Langa DP, Ackermann, Goldstone, Madala, Mokgoro, Ngcobo, O" Regan, Sachs Cameron AJ Yacoob and Cameron. JJ

President Mandela in exercising his power as invoked in the Constitution S.79, referred the Liquor Bill [B 131B-98], and passed by Parliament in November 1998, to the Constitutional Court to decide on its constitutionality. The President expressed "reservations about the constitutionality of the Bill to the extent that the Bill dealt with the registration for the manufacture, wholesale distribution and retail sale of liquor", thereby intruding on the provincial legislatures" exclusive powers regarding liquor licences. In terms of Schedule 5A of the Constitution the provinces have exclusive legislative powers in regard "liquor licences". The President of the Constitutional Court issued directions inviting interested political parties and organs of state to make representations concerning the constitutionality of the Bill. The Western Cape Provincial Government and the Minister of Trade and Industry responded and appeared before the Court.

The Minister contended that the Bill was not a liquor licensing measure because the matters it regulated fell within the national legislature's competence and its provisions dealing with liquor licensing were incidental to its pursuit of national competencies. He further claimed that even if the Bill encroached on the provinces" exclusive powers that was justified in terms of s.44(2), the provision allowed the national government to "intervene" into the area of exclusive provincial legislative competence when that was necessary for certain purposes, which included the maintenance of "economic unity".

The main issues that arose for determination were: First, In that case, what was the nature and scope of the constitutional obligation of legislative organ of the state to facilitate public involvement in its legislative processes and those of its committees and the consequences of the failure to comply with that obligation. Second, to what extent could the instant Court interfere in the processes of a legislative body in order to enforce the obligation to facilitate public involvement in law-making processes?

And finally, whether the Constitutional Court was the only court that could consider the questions that arose in that case.

The Court held that Liquor Bill was unconstitutional in that the national government had not succeeded in justifying the Bill"s intervention in the field of retail liquor sales, nor in the case of micro-manufacturers of liquor, whose operations were essentially provincial. Cameron AJ held that insofar as it could be said that "liquor licences" in Schedule 5A applied to all liquor licences, the national government had made out a case justifying its intervention in creating a national system of registration for manufacturers and wholesale distributors of liquor and in prohibiting cross-holdings between the three tiers in the liquor trade.

The Court opined that the exclusive provincial legislative competencies against the background of the Constitution's distribution of governmental power were considered. That was located in the national, provincial and local spheres, which were distinctive and interrelated and subject to the principle of cooperative governance. The provinces were accorded power primarily in regard to matters which may appropriately be regulated within each province, though subject to override by the national government in terms of s 44(2).

The provinces exclusive legislative competences in regard to liquor licences were to be interpreted against the backdrop of the national government's concurrent power to regulate trade and industrial promotion. Liquor licences was narrower than liquor trade and that national government had the power to regulate liquor trade other than liquor licensing.

The Court observed that in a case of overlap between the concurrent powers and exclusive powers of provinces it may be necessary to establish the substance of the legislation. The substance of the Liquor Bill was directed at three objectives: (a) the prohibition on cross- holdings between the three tiers involved in the liquor trade, namely, producers, distributors and retailers; (b) the establishment of uniform conditions, in a single system, for the national registration of liquor manufacturers and distributors; and, in a further attempt at establishing national uniformity within the liquor trade; (c) the prescription of detailed mechanisms to provincial legislatures for the establishment of retail licensing mechanisms.

The Court concluded that the Bill's prohibition of cross-holdings fell within the national legislature's competence to regulate trade. The national system of registration for producers and wholesalers may well also fall within the national legislature's competence to regulate trade, since the provinces" exclusive power in relation "liquor licences" was not in the first instance intended to encompass manufacturing and distribution of liquor since those activities were inter-provincial and international. In any event national government had succeeded in showing that if the exclusive provincial competence regarding liquor licences extended to production and distribution, its interest in maintaining economic unity authorised it to intervene in those areas under s 44(2). However, the Court noted that the Minister failed to show that the national interest required uniform national legislation prescribing detailed mechanisms to provincial legislatures for the establishment of retail licensing mechanisms.

The Bill was declared unconstitutional.

Allocation of powers to the Speaker to determine the date of commencement of the Bill, did not implicate the doctrine of separation of powers

In Re: Constitutionality of the Mpumalanga Petitions Bill, 2000 (CCT 11/01) [2001] ZACC 10; October 5, 2001
Chaskalson P, Langa DP, Ackermann J, Kriegler J, Madala J, Mokgoro J, O" Regan J, Sachs J, Yacoob J, Du Plessis AJ and Skweyiya AJ

Being a referral of the Mpumalanga Petitions Bill, 2000 by the Premier of that province to the Constitutional Court for a decision on its constitutionality, the Court was asked to deal with two issues namely:- whether the legislature was permitted by the Constitution to pass the Petitions Bill and whether it was constitutionally correct for the legislature to confer on the provincial Speaker the power to make regulations in terms of a provincial Act and to determine the date on which the Act may came into force.

During the hearing it emerged that the issue had not been referred back to the provincial legislature by the Premier as required of him by section 121 of the Constitution. The Court considered whether it had jurisdiction to deal with an issue under the section 121 procedure which had not been referred to the legislature for reconsideration. It was held that the procedure required that the Premier"s reservations should first be referred to the legislature for its reconsideration before a referral was made to the instant Court. The Court further held that that did not prejudice anyone as any individual would have all the other constitutional remedies available should any provision in the Bill/Act be found subsequently to be a breach of the rights of such individual or of the Constitution.

The Court noted that Regulations were usually made by the executive because they, as the implementers of legislation were better placed to do so. However, there was nothing in the Constitution which specifically empowered only the executive to make regulations and to set the date of their coming into operation. Because of the nature of that Bill, the Speaker was well placed to make the regulations as well as determine the date for their coming into operation.

The legislation in that case concerned petitions to the legislature. It had been enacted to give substance to the legislature's responsibility for oversight of the executive and to facilitate public involvement in the legislative and other processes of the legislature. The Bill, if and when it became a provincial Act, was to be implemented by the provincial legislature, including the Speaker, and not by the provincial executive. It would be inappropriate for the executive to regulate the former function, and wholly appropriate for the legislature to regulate both functions itself through its Speaker who by virtue of his or her office should have the necessary expertise and was fully accountable to the legislature. The objection to that power being delegated to the Speaker was thus not valid.

The Court further stated that the power conferred on the legislature by the Constitution was a special one which enabled the legislature to appoint a functionary to determine when the law came into force. The functionary best placed to make such determination was ordinarily the head of the executive responsible for the implementation of the legislation. There was however no provision of the Constitution that required that it be the President or the Premier. The choice of the person was left to the legislature. It would obviously be inappropriate for a legislature to designate a person whose functions were not related to matters which had to be resolved before the law was brought into force.

The legislature conferred a power upon the Speaker to determine when the Bill should come into force as a provincial Act. That functionary was intimately involved in important steps which must be taken before the legislation was brought into force, being responsible for the promulgation of regulations that were evidently a pre-requisite to the effective implementation of the legislation. The Speaker was accountable to the legislature and was well placed to determine when the Act could effectively be brought into force. The Petitions Bill created duties and obligations which were internal to the functioning of the legislature. Since the steps that had to be taken must be taken by the legislature, the Speaker was clearly an appropriate functionary to determine whether or not that had been done. The objection to that provision could therefore not succeed.

In conclusion the Court stated that the allocation of powers to the Speaker to determine the date of commencement of the Bill, did not implicate the doctrine of separation of powers. The operation of the doctrine was not absolute. With regard to the conventions, it was unnecessary to consider their place, if any, under the Constitution. Whatever separate existence they might have could not prevail against express or implied provisions of the Constitution. The clauses which confer those powers on the Speaker were therefore not unconstitutional.

A democratic government is entitled to repeal the racist provisions to bring into line with the new constitutional order.

Western Cape Provincial Government and Others In Re: DVB Behuising (Pty) Limited v North West Provincial Government and Another
CCT 22/99 [2000] ZACC 2
March 2, 2000
Chaskalson P, Langa DP, Ackermann J, Mokgoro J, Yacoob J, Ngcobo J Cameron AJ, Goldstone J, O" regan J And Sachs J Madala J

The issues in that case arose from the enactment by the legislature of the North West Province of the North West Local Government Laws Amendment Act, 7 of 1998, section 6 of which purported to repeal the Proclamation in its entirety. The question was whether section 6 of the North West Local Government Laws Amendment Act, 7 of 1998 (Act 7) of section 6 of Act 7, purporting to repeal Chapters 1, 2, 3 and 9[6] of the Proclamation that made provision for the establishment of a special kind of township by the Minister of Bantu Administration and Development for African citizens in areas of land held by the "South African Native Trust was beyond the legislative competence of the North West.

The apartheid law in question was Proclamation R293 of 1962, issued in terms of the Native Administration Act, 38 of 1927. It made provision for the establishment of a special kind of township by the Minister of Bantu Administration and Development for African citizens in areas of land held by the "South African Native Trust" which was established by the Native Trust and Land Act, 18 of 1936. That Act was one of two infamous statutes that effectively made it impossible for members of the African community, a racial majority by far in the country, to own land in some 87% of the country. There could be no doubt that its terms were in conflict with a number of provisions of the Bill of Rights in the interim

Constitution and the 1996 Constitution and on that account unconstitutional. Its terms were a timely reminder of where the Government had come from and the progress it had made in transformation to democracy.

In the Bophuthatswana High Court, the applicant, DVB Behuising (Pty) Limited, challenged the constitutional validity of that section, contending that the purported repeal of certain provisions of the Proclamation was beyond the legislative competence of the North West. The result, it claimed was to make it impossible for persons to whom it had sold houses in a township established under the Proclamation, to have their deeds of grant registered, or to get bank loans on their properties. Mogoeng J upheld the application, holding that the purported legislative repeal dealt with a question of land tenure, which fell exclusively within the competence of the national legislature. He declared the repeal to be invalid to that extent; his judgment was referred to the instant Court for confirmation.

The majority" s judgment of the Court noted that, proclamation dealt with a number of matters, some to do with regional planning and development, rural and urban development and local government, others related to the registration of land tenure rights. While the province did have the power to repeal the Proclamation insofar as it related to regional planning and development, rural and urban development and local government, it did not have the power to repeal provisions relating to the registration of title. That, latter, he held, was a matter that required to be regulated by the national sphere of government in order to provide uniformity throughout the country. It was therefore competent for the North West to repeal the whole Proclamation, save for those provisions that dealt with registration of title.

Court observed that the North West Province, as a democratic government was entitled to repeal the racist provisions of the Proclamation in order to bring an end to apartheid forms of ownership rights in land so that their local government laws could be brought into line with the new constitutional order. The repeal of the Proclamation was not a negative impact on anyone, since the holders of deeds of grant were already protected by the deeds registration laws. In addition, prospective applicants could still acquire similar rights in land under more recent national statutes. Those made provision for the development of less formal settlements and townships and provided a national framework for the development of land in urban and rural areas for residential purposes, as well as for the grant of full rights and upgrading of lesser rights of ownership in land.

Goldstone, O" Regan and Sachs JJ (dissenting)

They stated that there was doubt as to whether the tenure provisions in the Proclamation were indeed provisions that could have been assigned to the North West Province, in any event, all the matters in issue related to land tenure, required uniform regulation across the Republic and therefore could not be regulated effectively by provinces. They emphasized the complexity of the task of land reform, the constitutional obligation placed on the national legislature to provide redress by legislative means for past discrimination in relation to land, and read section 25(6) of the Constitution to imply that insecure forms of land tenure arising from discriminatory legislation in the past could not be abolished or reformed by any legislature other than Parliament.

They concluded by saying that the jurisprudence of the transitional era necessarily involved a measure of contradiction, so that fundamental fairness at times required that aspects of the old had to survive immediate removal from the statute books and be kept alive pending their replacement by appropriate forms of the new. There was the meritorious desire manifested in the majority judgment for a clean sweep of the past in the name of modernization and de-racialization, as having an unintended and ironic consequence - depriving underprivileged communities from gaining access to a cheap form of land tenure that in terms of national legislation could now be upgraded to full ownership. They accordingly upheld the substance of Mogoeng J's order.

Madala J (dissenting) from the majority on a different aspect

He noted that the Provincial legislature had the power to repeal the whole of the Proclamation since its land registration provisions were incidental to its planning provisions. He stressed that the overarching purpose of the Proclamation was to establish and administer racially and ethnically exclusive townships. Although the section in question provided for the establishment of deeds registries for the registration of deeds of grant (and other land rights), and thus created certain land tenure rights, it had to be read in the context of the whole of the proclamation, which was primarily aimed at the administration and control of black people. The function of the Proclamation was to regulate land use control as part of provincial planning, which was within the provincial legislative competence.

In conclusion he said that the creation and regulation of land tenure rights was accordingly incidental to the achievement of that purpose and the repealed part could not be separated from the rest of the Proclamation. He would hold that the land registration provisions were validly repealed along with the rest of the Proclamation.

The functional area of municipal planning include responsibility over environmental affairs

Le Sueur and Another v Ethekwini Municipality and Others
[2013] ZAKZPHC 6
January, 30 2013
Gyanda J

In 2010, the kwini Municipal Council adopted a resolution amending its town planning scheme to introduce the Durban Open Space System ("D-MOSS"). That system was aimed at protecting areas that had a high biodiversity value in Durban by creating a system of open spaces that were interconnected. In order to achieve that goal, the system provided that land which fell within a D-MOSS area may not be developed without first obtaining an environmental authorization in terms of the municipality's town planning schemes, and even then it may be developed only subject to strict controls aimed at protecting the ecological goods and services the land provided. After the municipal council adopted that resolution, the applicant, who owned land located in the kwini Municipality and whose land fell into a D-MOSS area, applied for an order declaring the resolution to be unconstitutional and invalid. He based his application, inter alia, on the grounds that the subject matter of the resolution was the "protection of the environment"; that the environment was listed in Schedule 4A of the Constitution as a functional area of national and provincial legislative competence; and, consequently, that the resolution fell outside the legislative authority of the municipal council and was therefore unconstitutional and invalid.

It was held that the functional area of "municipal planning", which was set out in Schedule 4B, must be interpreted in the light of section 24 and section 152(1)(d), which sections clearly indicated that the functional area of "municipal planning" included responsibility over environmental affairs.

The functional area of the "environment" was not contained in a hermetically sealed compartment. Instead, it was an area over which all three spheres of government enjoyed overlapping authority. This was because municipalities were in the best position to know, understand and deal with issues involving the environment at a local level, and also because municipalities have historically always exercised legislative responsibility over environmental affairs as a part of municipal planning. Given that authority over the functional area of the "environment" had to reside in all three spheres, it could not be inserted in Part B of Schedules 4 and 5. Instead, it had to be inserted in Part A of Schedule 4.

Legislative and executive authority over environmental matters as a part of municipal planning had been assigned to municipalities by national and provincial legislation. Section 23(1) (c) of the Municipal Systems Act, which dealt with integrated development planning at a municipal level, recognised that there was an obligation on municipalities together with other organs of state to contribute to the progressive realisation of the fundamental rights contained in section 24 of the Constitution, and that was clearly a legislative mandate from the national legislature with regard to environmental matters.

The Court noted that sections 25 and 26 of the Municipal Systems Act provided that not only must every municipality adopt an integrated development plan ("IDP"), but also that every IDP must include a spatial development framework and in terms of the regulations issued under the Municipal Systems Act that every spatial development framework must contain a strategic assessment of the environmental impact of the spatial development framework.

Section 2 of the National Environmental Management Act ("NEMA") contained a set of national environmental management principles that applied to the actions of all organs of state, including municipalities, that may significantly affect the environment, and section 33 of the same Act allowed a person to institute a private prosecution in those cases in which the accused had infringed a municipal by-law and the by-law was concerned with the protection of the environment.

Section 48 of NEMA: Biodiversity Act 58 provided, inter alia, that municipalities must not only align their IDPs with the national biodiversity framework and any applicable bioregional plan, but must also incorporate the provisions of the national biodiversity framework or bioregional plan that specifically apply to them in their IDPs, and demonstrate in the IDP how the national biodiversity framework and any applicable bioregional plan may be implemented in their areas of jurisdiction.

The Court concluded that Municipalities were authorised to legislate in respect of environmental matters to protect the environment at the local level and, consequently, that the resolution amending the town planning scheme to introduce the D-MOSS did not fall outside the legislative competence of the The kwini Municipality:

Nigeria

Nigeria comprises a federal government with 36 states and 774 local governments as provided by the federal constitution of Nigeria. The constitution of Nigeria provides that Nigeria is one indivisible and indissoluble sovereign state whose constituent units are bound together by a federal arrangement. It is thus a federal republic.

The government of Nigeria is provided for by the constitution to be a three- tier government. This consists of a federal government which has the executive, judiciary and the legislature; the states which consists of executive led by the governor and the local levels.

The monarch and the executive, legislature and judiciary branches of government carry out federal responsibilities. Example of cases that demonstrate how that system works include:-

The House of Assembly of State has power to make laws with respect of matters of election of local Government Council's officials.

The Attorney-General of Abia State of Nigeria V. Attorney-General of The Federation & Ors. (2005) LPELR-SC.245/2003
June 10, 2005

The Plaintiff brought a number of issues in that matter regarding the action of the National Assembly on matters of legislation. The issues were:- Whether the National Assembly had any power to increase or otherwise alter the tenure of any of the offices, secondly, whether the National Assembly had any power to make laws with respect to the matters specified in Claim (ii) of that action, thirdly, whether the National Assembly had power to make laws with respect to the qualification or disqualification of candidates for elections to be held pursuit to the provisions of the Constitution of the Federal Republic of Nigeria, 1999 without complying with the requirements of Section 9 of the Constitution of the Federal Republic of Nigeria, 1999, forth, the scope or limit of the legislative powers of the National Assembly with respect to Local Government elections under the 1999 Constitution, fifth, whether the provisions of section 15-73 and 110-122 of the Electoral Act 2001 or of any of the said Sections were constitutional, valid and operative, and lastly whether the Electoral Act, 2001, was unconstitutional, null and void and inoperative in its entirety or constitutional, valid and operative.

The case was simply that the National Assembly enacted the Electoral Act 2001 (hereinafter referred to as the Act) to which the President of the Federal Republic of Nigeria gave his assent. The Federal Government claimed to have acted in the belief that all the provisions contained in the Act were on matters with respect to which the National Assembly was empowered to make laws for the peace, order and good government of the country. The Plaintiffs claimed that the Federal Government transgressed the legislative competence of the Federal Government and made serious incursions into the legislative and executive functions of the States/Plaintiffs as contained in the 1999 Constitution. The Plaintiffs stressed the point that the dispute or controversy therein did not depend on the existence or non-existence of the Act as an enactment of the National Assembly but rather as to the scope or limits of the legislative powers of the National Assembly itself.

The Defendant denied that any provisions of the Act contravened the provisions of the 1999 Constitution and that the Act had not frozen or altered the powers specifically assigned to the Plaintiffs under the Constitution. In addition the Act did not contain any provision that threatened the continued existence of the Federal Republic of Nigeria.

The Court explained that since the relevant Decree 36 of 1998 had been repealed, Section 6(1)(c) of the Interpretation Act (an existing law by virtue of the provision of Section 315 of the Constitution) meant that for elected Local Government Officials remained intact. No law enacted by the National Assembly could validly increase or otherwise alter the tenure of office of elected officers or of Councillors of Local Government Council except in relation to the Federal Capital Territory alone.

The Court stated that the National Assembly had no power except in relation to the Federal Capital Territory alone, to make any law in respect of the prescribing of an event upon the happening of which a Local Government Council stood dissolved or the Chairman or Vice- Chairman of a Local Government Council vacated his office or a Councillor or member thereof vacated his seat in the Local Government Council. Save and except for laws for the Federation with respect to -(a) Registration of voters, and (b) The procedure regulating elections to a Local Government Council;

The Court noted that it was the House of Assembly of a State and not the National Assembly, which had the power to make laws with respect to matters relating to or connected with elections to the office of Chairman or Vice-Chairman of Local Government Council in that State or to the office of Councillor therein.

The Court was of the view that because the National Assembly had the power to make law for peace, order and good governance for the Federation, it was in the discharge of the constitutional duty imposed on it by Section 4 of the Constitution that Section 25 of the Act was enacted to ensure orderliness and peace at elections, which were indispensable conditions precedent to the attainment of a good government and none of the provisions of the Constitution had been violated by the Act.

The Court also stated that the National Assembly had no power to make any law with respect to the qualification or disqualification of candidates for elections to be held pursuant to the provisions of the Constitution without first of all complying with the requirements of Section 9 of the Constitution.

According to the Court, no law enacted by the National Assembly could validly increase or otherwise alter the tenure of office of elected officers or of Chairmen and Councillors of Local Government Councils in Nigeria except in relation to the Federal Capital Territory alone.

The Court explained that the National Assembly had no power except in relation to the Federal Capital Territory alone to make law with respect to the following matters or any of them to wit:(a) ….(b) The division of Local Government Areas into ward for purposes of election into Local Government Councils in Nigeria.(c) The qualification or disqualification of a person as a candidate for election as Chairman, Vice-Chairman, Councillor of a Local Government in Nigeria.(d) The date of election into a Local Government council and (e) The prescribing of the event upon the happenings which a Local Government Council stands dissolved or the Chairman or Vice- Chairman of a Local Government Council vacates his office or a Councilor or member thereof vacates his seat in the local Government Council.

The Court concluded that the provision contained in Sections 15 to 73 and 110 to 122 except Sections 16, 26 to 41, 43 to 73, 116, 117 and 118(l)-(7) of the Electoral Act, 2001 were from the date of the commencement of the Act inconsistent with the provisions of the 1999 Constitution and were accordingly null and void and inoperative.

The Case was dismissed.

The Executive has and exercise the legislative power to modify any existing law as an interim measure under the transitional provisions and savings of the same Constitution in The Supreme Court of Nigeria

SC.227/2002
January 31, 2003
Muhammadu Lawal Uwais, Salihu Modibbo Alfa Belgore, Idris Legbo Kutigi, Michael Ekundayo Ogundare, Sylvester Umaru Onu Anthony Ikechukwu Iguh, Samson Odemwingie Uwaifo (Justices of the Supreme Court)

The main issue was whether section 315 of the Constitution of the Federal Republic of Nigeria, 1999 authorised the President to amend the Allocation of Revenue (Federation Account, Etc) Act, Cap 16 Laws of the Federation of Nigeria, 1990, as amended by the Allocation of Revenue (Federation Account, Etc.) (Amendment) Act, 1992 in the manner and to the extent contained in paragraphs 2(1)(a) and 3 of the Allocation of Revenue (Federation Account, Etc.) (Modification) Order, 2002.

In exercise of the powers conferred upon the President of the Federal Republic of Nigeria, he made an order modifying the Allocation of Revenue (Federation Account Etc.) Act, 1990 as amended by Allocation of Revenue (Federation Account, Etc.) Decree (No. 106) of 1992. By the 1992 Decree (No. 106), Sections 1, 2, 3 and 4 of the principal Act were amended. It was the principal Act as amended by Decree 106 of 1992 that had now been modified. The grouse of the plaintiffs was that the Order was a direct nullification of the Court"s decision in suit No. SC. 28/2001 Attorney-General of Abia State and 35 Ors. v. Attorney of the Federation (2002) 3 S.C. 106; (2002) 6 NWLR (Pt. 762) 542.

Also, it was the contention of the plaintiffs that the President had no power, constitutional or statutory to issue the said Order. The plaintiffs contended that the Constitution in S. 315 thereof had limited the power, which was now exceeded, to make the Order.

The Court held that the exercise of the power to modify the allocation formula in the existing Allocation of Revenue (Federation Account Etc.) Act (Cap. 16, Laws of the Federation of Nigeria, 1990) as amended by Allocation of Revenue (Federation Account Etc) (Amendment) Decree (No. 106 of 1992) was constitutional and within the scope of the president's right under the Constitution. Except in military regime, the supreme law was the Constitution itself.

Both the Federal and State Governments shared the power to legislate in order to abolish corruption and abuse of office. If that was breach of the principles of federalism, then, it was the Constitution that made provisions that had facilitated

breach of the principles. As far as the aberration was supported by the provisions of the Constitution, it could not rightly be argued that an illegality had occurred by the failure of the Constitution to adhere to the cardinal principles which were at best ideals to follow or guidance for an ideal situation.

The Court explained that by subsection (4)(a)(i), the appropriate authority for the present purposes in relation to Federal laws was the President. The 1999 Constitution which provided for separate powers for the Legislature, the Executive and the Judiciary in Sections

4, 5 and 6 respectively also deemed it proper and constitutional for the President (as the Executive) to have and exercise the legislative power to modify any existing law either by addition, alteration, omission or repeal as an interim measure under the transitional provisions and savings of the same Constitution. That was without prejudice to what the National Assembly may decide to do thereafter. It could not therefore be a strong argument that such a power given to the President to modify existing laws under the appropriate provisions of the Constitution was in contravention of the doctrine of separation of powers and ought not to be exercised by him as the need may arise.

The Court was of the view that there was a presumption that words in a statute or constitution are not mere surplusage or tautology. And once the words of any section of the Constitution were to be interpreted and applied, they could not be defeated upon some idealism or doctrine but the court must presume that the framers of the Constitution were well aware of such doctrine but preferred the wisdom of inserting in the Constitution an exigent, though apparently aberrant provision.

Court was of the opinion that the main condition which the modification to an existing law should satisfy, was bring it into conformity with the Constitution in regard to the subject matter of the existing law. In respect of the distribution of the amount standing to the credit of the Federation Account, all that Section 162(3) of the 1999 Constitution demanded was compliance with by any law on Allocation of Revenue and only the three tiers of government were to be the first line beneficiaries. That was what in effect the modification Order made by the President had achieved. The question what percentage each tier gets was a political one which was not justiciable as a direct legal issue.

The Court observed that section 162 (3) of the Constitution simply provided for allocation to be made to the Federal Government, the State Governments and the Local Government Councils. That was what the Order in question had done in line with the decision of the Court. The 7.5 per cent was not stated as a separate allocation in the Order as to offend against Section 162 (3) of the Constitution.

Court finally held that the Order made by the President was constitutional as it was in conformity with Section 162 (3) of the Constitution and in line with the decision of the court.

Case was dismissed.

Canada

Canada is governed by different layers of government i.e. the federal, regional (provinces and territories) and local level (municipalities and local boards and agencies).

Canada has 10 provinces comprising of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Newfoundland and Labrador, Nova Scotia, New Brunswick and Prince Edward Island.

These provinces are constitutionally autonomous. What this mean is that they cannot be abolished by the federal government. The provinces in Canada also are very powerful controlling most of the important resources in the country.

The country is also divided into three territories, namely, North West, Yukon and Nunavut. These territories are constitutionally subordinate to the federal government as the federal government can decide when and how to alter the territories.

Injunctive relief can be issued to suspend operation of the provisions of the Devolution Act to guard Constitutional Rights.

Tlicho Government v Canada (Attorney General)
2015 NWTSC9
February 27, 2015
Justice K. Shaner.

The issues arose from the Royal assent of the Northwest Territories Devolution Act (the "Devolution" Act) in March 2014 and which Act was to come into force on a date to be set by the Order-in- Council. The Devolution Act amended the Mackenzie Valley Resource Management Act (the "MVRMA"), including the statutory authority in the MVRMA for the creation of four land and water boards that each had jurisdiction over portions of the Northwest Territories" Mackenzie Valley. One of those land and water boards was the Wek" èezhìi Land and Water Board ("WLWB"), which had jurisdiction over land and water use and waste deposit within a portion of Tłı̨ch" traditional territory known as the Wek" èezhìi Management Area. The WLWB was a joint management body that had half its members (excluding the chairperson) appointed by the Tłı̨ch" Government. It was created to fulfill one of the federal government's commitments under Tłı̨ch" "s land claims and self-government agreement with the federal and territorial governments (the "Tłı̨ch" Agreement"), which was signed in August 2003. As a modern treaty, the rights created and confirmed under the Tłı̨ch" Agreement are entrenched under s. 35 of the *Constitution Act, 1982*.

The amendments to the *MVRMA* would result in the WLWB being eliminated. The jurisdiction and authority of all four regional land and water boards, including the WLWB, would be transferred to one board. Likewise, there would be no guarantee of Tłı̨ch" participation in decision making for the Wek" èezhìi area since the amendments contemplated three-person panels being formed from the new eleven- person board to deal with individual applications that came before it and If an application before the new board related to Wek" èezhìi there would be discretion for the chairperson to put the Tłı̨ch" -designated board member on the decision-making panel, but there would be no obligation to do so.

In May 2010, the federal government announced its Action Plan to Improve Regulatory Regimes and it appointed businessman and former politician John Pollard as its Chief Negotiator to lead consultations and negotiations with the territorial government and Aboriginal governments with respect to statutory amendments to the *MVRMA*. Throughout that consultation period, the Tłı̨ch" Government maintained its objection to the elimination of the WLWB and made its position on the proposed amendments known.

The Tłı̨ch" Government brought an action to challenge the amendments to the *MVRMA* in May 2014, claiming that they violate their right to effective and guaranteed joint management over the Wek" èezhìi under the Tłı̨ch" Agreement and disputing the federal government's claim that the amendments were contemplated or permitted under the Tłı̨ch" Agreement.

Two main issues arose for determination and first being, whether injunctive relief sought enjoining the Government -in-Council from promulgating the Order-in-Council was barred by Crown immunity registration or Common law. Secondly whether issuing injunctive relief would be inappropriate interference with the legislative process.

In determining the issues, the Court stated that it was necessary for the courts to have the power to protect constitutional rights through injunctive relief in order to ensure the enforcement of these rights did not become "a merely academic exercise". Neither the *Crown Liability and Proceedings Act* nor the common law of Crown immunity could bar the relief sought by the Tłı̨ch" Government. The courts, the legislature and the executive had to all respect each other's legitimate sphere of activity.

The Court noted that there would be very few circumstances in which it might be appropriate for a court to directly enjoin the executive branch of government from doing that which had been directed and authorized by Parliament, such as setting a date on which the amendments to the *MVRMA* would come into effect. However, that case involved special circumstances. As the *Devolution Act* had received Royal Assent and parts of it were already enacted, the deliberative stage of its development was complete.

There were also constitutionally protected rights at issue. While it was not appropriate to directly enjoin the Governor-in- Council from promulgating Orders-in-Council, it was held that the court could issue injunctive relief to suspend the operation of the provisions of the *Devolution Act* that empowered the Governor-in-Council to bring those amendments into force.

The Court observed that there was a serious constitutional issue to be tried as there was a legitimate dispute between the parties regarding how the agreement was to be interpreted, the constitutional validity of the amendments to the *MVRMA*, and whether the federal government had met its consultation obligations to Tłı̨ch". There would also be unquantifiable and irreparable harm done to Tłı̨ch" if the amendments came into effect without consultation having occurred as required under the Tłı̨ch" Agreement, given the questions surrounding the adequacy of the federal government"s consultation and the fact that dismantling the WLWB would mean that Tłı̨ch" would play a diminished role in the management of Wek"èezhìi.

The Court concluded that there was a very real public interest benefit to protecting the *status quo*, particularly since it would be necessary to rebuild the WLWB if the federal government"s actions were subsequently found to be unconstitutional. The balance of convenience favoured preservation of the *status quo* and the regulatory certainty that entailed.

Section 253(2) of the Devolution Act, was suspended.

United Kingdom

Since 1998 the constitutional structure of the United Kingdom has undergone dramatic changes. Through the process of devolution certain powers formally vested in the U.K. Parliament have been transferred to new legislative bodies located in Scotland, Northern Ireland and Wales. These legislative bodies are responsible for promulgating primary and/or delegated legislation in a wide variety of areas.

The legislature for Scotland, Wales and Northern Ireland are able to up with laws that are key in addressing or intended to provide a local solution to a local problem. Previously it was the UK parliament that was in-charge of making national laws that affects the whole of nation or regional laws that seeks to provide solutions to the regional problems. There are a number of cases to illustrate that position in the United Kingdom's Government.

Scottish Government has no have powers to modify sentencing powers under Common law

Martin & Miller v Her Majesty's Advocate
[2010] UKSC March 3, 2010
Lord Hope, Deputy President, Lord Rodger, Lord Walker, Lord Brown & Lord Kerr.

In 2007 and 2008 the Court sentenced Sean Martin and Rose Miller to seven and eight months" imprisonment respectively for various driving offences including driving while disqualified under the Road Traffic Act (RTA) 1988 which offence may be to prosecuted in Scotland either summarily for six months or 12 months on indictment under S.103(1)(b) of RTA. The Counsel for both drivers argued that the sentences were unlawful since sentencing powers conferred by Scottish Parliament Legislation could not override the explicit provisions passed at Westminster on reserved matters.

A number of issues were raised for determination, the first issue was whether legislation passed by Scottish Parliament was within the legislation competence of the parliament or not. The Court applied the rules laid down in S. 29 and Part 1 of Schedule 4 of the Scotland Act and held that the available material demonstrated that the purpose of S.45 was directed to a rule of Scots criminal law, so it did not relate to a reserved matter within the meaning of S.29 of the Scottish Act 1988.

The second issue was whether the purpose of S.45 of the criminal proceedings (reform) (Scotland Act 2007 was to modify Scots criminal laws as defined in S.126 (5) and make the law apply consistently to reserved matters and otherwise.

The Court held that S.45 was among the group contained in the Act that increased the sentencing powers of Sheriffs in respect of a number of common law and statutory offences, if the Act had increased sentencing powers in respect to common law but not statutory offences the reform would have been incomplete and confusing. That problem would have been exacerbated if the reform had attempted to distinguish between statutory offences related to reserved matters and those which did not. The purpose of s.45 was to ensure that the law relating to the sentencing powers of Sheriffs was consistent as between offences concerning reserved matters and otherwise. Consequently, s.45 was not related to a reserved matter for the purpose of s. 29(4) of the Scotland Act 1998.

Thirdly, the Court considered if the second issues was answered affirmatively, then could it be considered that s.45 modified was special to reserved matters within the meaning of para 2(3) of Schedule 4. The Court held that in identifying the rule of law that was being modified for the purpose of the test established by para 2(3) of Schedule 4, regard may be had to the purpose of the legislative provision effecting the modification. That was achieved by examining the purpose of the legislative provision which was under scrutiny and [39]]. S.33 and Part 1 of Schedule 2 to the RTOA and s.103(1)(b) of the RTA contain, in effect, two rules of Scots criminal law. Firstly, that the overall maximum sentence in respect of driving while disqualified was 12 months. Secondly, the route by which the maximum sentence could be imposed. The former provision was plainly a rule that was special to the RTOA and RTA and was a reserved matter that the Scottish Parliament had no power to modify. However, the latter was a rule concerning Scots criminal jurisdiction and procedure which was not reserved. The change in the law effected by section 45 did not alter the maximum period of imprisonment for the offence of driving while disqualified. It related to the procedure which determined whether the sheriff had power to impose that sentence. The rule of Scots law being modified was the rule of Scots criminal procedure. That rule of procedure was not special to the RTOA or RTA.

The Court addressed the point, para 3 of Schedule 4 and stated that s. 45 constituted an important modification to a rule of Scots criminal procedure that could not be regarded as incidental or consequential. Accordingly the court held that s.45 was within the legislative competence of the Scottish Parliament.

Lord Rodger (Dissenting) The provision of the RTOA prescribing the maximum term of imprisonment for a summary conviction for driving while disqualified is "special" to a reserved matter, in the sense that the UK parliament has chosen

it specifically for that offence. Lord Rodger did not agree that the purpose of the modifying provision can be a relevant consideration. He also did not agree that the purpose of a provision which purports to modify a rule of Scots law can be used to determine whether that rule is "special to a reserved matter".

Appeal was dismissed.

Local Government Byelaws are within the legislation competence of the National Assembly

[2012] UKSC 53
November 21, 2012
Lord Neuberger, President, Lord Hope, Deputy President, Lord Clarke, Lord Reed & Lord Carnwath

Following a referendum, various provisions of the Government of Wales Act 2006 ("the 2006 Act") came into force on 5 May 2011. Those provisions gave the National Assembly for Wales ("the Assembly") primary legislative competence in certain areas. If there was an issue as to whether a Bill, or a provision in a Bill, passed by the Assembly exceeds legislative competence, the issue could be referred to the Supreme Court. The Local Government Byelaws (Wales) Bill 2012 ("the Bill") was the first Bill to be enacted by the Assembly under those new powers. The aim of the Bill was to simplify procedures for making and enforcing local authority byelaws in Wales. Certain provisions of the Bill were intended to remove the need for the confirmation of byelaws by the Welsh Ministers and by the Secretary of State. That need arose by virtue of the Local Government Act 1972 ("the 1972 Act") and the National Assembly for Wales (Transfer of Functions) Order 1999 ("the 1999 Order"). The effect of section 236(11) of the 1972 Act was that, where a statutory provision giving a local authority the power or duty to make the byelaw either so provided or was silent as to the existence or identity of a confirmatory body or person, before any byelaw made under that provision by a local authority could be effective, the Secretary of State had to confirm the byelaw. Schedule 1 to the 1999 Order provided that the functions of the Secretary of State under section 236(11) of the 1972 Act were to be exercisable by the Assembly concurrently with the Secretary of State.

Section 6 of the Bill (through Part 1 of Schedule 1 to the Bill) removed the need for the confirmation of byelaws under certain specific enactments ("the scheduled enactments") which currently required confirmation under section 236(11) of the 1972 Act. Section 9 would empower the Welsh Ministers to add to the scheduled enactments. The specific issue in relation to sections 6 and 9 was whether either section removed the Secretary of State's role in confirming (or refusing to confirm) byelaws made under statutory provisions which are (i) scheduled enactments, and (ii) provisions to which section 236(11) applies. If either section removed this role, they would be beyond the legislative competence of the Assembly, unless they were "incidental to, or consequential on" another provision contained in the Bill. The Attorney General referred the issue to the Supreme Court.

The main question was whether sections 6 and 9 of the Bill were within the Assembly's legislative competence

The Court held that s. 6 was within the legislative competence of the Assembly. The removal of the Secretary of State's confirmatory powers in relation to the scheduled enactments would be incidental to, and consequential on, the primary purpose of removing the need for confirmation by the Welsh Ministers of any byelaw made under the scheduled enactments. The primary purpose of the Bill could not be achieved without that removal.

The Court further held that the Secretary of State's confirmatory power was concurrent with that of the Welsh Ministers. It was open to either the Secretary of State or the Assembly to exercise any functions which were exercisable concurrently. Where a function was vested in two Ministers concurrently either may perform it, acting alone, on any occasion. It was far more sensible and consistent with the purpose of the Welsh Government legislation to conclude that the Assembly and the Secretary of State were each intended to have the power to exercise the concurrent functions, and that it was to be left to their good sense to decide which should exercise a particular function in a particular case. Further, the confirmatory power was only given to the Secretary of State if no other statute (including one passed after the 1972 Act) conferred the function on any other body or person, which supports the notion that it was not an important function.

The Court opined that the scheduled enactments related to byelaws in respect of which the Secretary of State was very unlikely ever to exercise his confirmatory power. Section 9 was within the legislative competence of the Assembly though had a limited effect, because the jurisdiction of the Assembly was limited to removing, or delegating the power to remove, functions of the Secretary of State where that would be incidental to, or consequential on, the purpose of removing the need for confirmation by the Welsh Ministers of any byelaw made under the scheduled enactments, and the Assembly could not therefore bestow wider powers than this on the Welsh Ministers. The same conclusion could be arrived at by invoking section 154(2) of the 2006 Act, which provided that a provision of a Bill which could be read in a way as to be

outside the Assembly's legislative competence was to be read as narrowly as was required for it to be within that competence.

In concluding the matter, the Court held that the outcome of that reference was in favour of the Assembly, but it could not be regarded as a setback in practical terms for the Secretary of State, because the effect of section 9 of the Bill was one which reflected the terms on which the Secretary of State was prepared to give consent to section 6 of the Bill. The outcome was also entirely consistent with the general thrust of the extended powers given to the Welsh Ministers by the 2006 Act.

Parliament has an obligation to make laws to protect the Health of its citizens.

Imperial Tobacco Limited v The Lord Advocate
[2012] UKSC 61
December 12, 2012
Lord Hope, Lord Walker, Lady Hale, Lord Kerr, and Lord Sumption

In that Appeal, the main issue for determination was whether the sections of the Tobacco and Primary Medical Services (Scotland) Act 2010, which restricted the display of tobacco products and banned their sale through vending machines, were outside the legislative competence of the Scottish Parliament and accordingly not law.

The Appellants argued that sections 1 and 9 of the Tobacco and Primary Medical Services (Scotland) Act 2010 (the "2010 Act") were outside the legislative competence of the Scottish Parliament since s. 1 of the 2010 Act prohibited the display of tobacco products in a place where tobacco products were offered for sale and s.9 prohibited vending machines for the sale of tobacco products. They claimed that the limits to the legislative competence of the Scottish Parliament were set out in the Scotland Act 1998 (the "1998 Act"). Their first broad argument was that, by reference to their purpose, sections 1 and 9 related to "the sale and supply of goods to consumers" and "product safety" which matter were reserved to the UK Parliament under the 1998 Act and on which the Scottish Parliament could not legislate. Their second broad argument was that sections 1 and 9 modify the law on reserved matters. They argued that two sets of Regulations (the Tobacco for Oral Use (Safety) Regulations 1992 and the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002) should be treated as being part of the law on reserved matters since those Regulations contained rules of Scots criminal law which were special to a reserved matter. Sections 1 and 9 modified those rules, which under the 1998 Act they could not do. The Appellants further said that those sections created new offences, in addition to those already provided for in the Regulations, which could only be committed in the course of the sale and supply of goods to consumers.

The Court held that three principles should be followed when undertaking the exercise of determining whether, according to the rules that the 1998 Act lays down, a provision of an Act of the Scottish Parliament was outside competence. First, the question of competence was to be determined in each case according to the particular rules that had been set out in the 1998 Act. Second, those rules must be interpreted in the same way as any other rules that were found in a UK statute. Third, the description of the 1998 Act as a constitutional statute could not be taken in itself, to be a guide to its interpretation. The exercise was essentially one of statutory construction.

The Court went ahead to say the answer to that question was to be found by construing the words used by the 1998 Act and examining the challenged provisions in the light of the meaning that was to be given to those words. In that case, the first stage was to examine sections 1 and 9 and to identify their purpose, secondly, examine the relevant rules in the 1998 Act to identify the tests that had to be applied. But, that stage was of critical importance and it required to be handled with great care. The final stage was to draw those exercises together to reach a conclusion on the legislative competence of sections 1 and 9.

The Court stated further that the purpose of section 1 was to enable the Scottish Ministers to take steps which might render tobacco products less visible to potential consumers and thereby achieve a reduction in sales and thus in smoking. The purpose of section 9 was to make cigarettes less readily available, particularly (but not only) to children and young people, with a view to reducing smoking. The legal effect and short term consequences were consistent with those purposes.

The Court also found that in the 1998 Act, the reserved matter encompassed all aspects of regulation of the sale and supply of goods and services to consumers within the field of consumer protection. The reserved matter of product safety extended to matters falling within the scope of section 11 of the Consumer Protection Act 1987 which gave the Secretary of State power to make product safety regulations. It was not clear how it could be said that the purpose of sections 1 and 9 had anything to do with consumer protection and the aim of s.1 &9 was to discourage or eliminate sales of tobacco products, not to regulate how any sales were to be conducted so as to protect the consumer from unfair trade practices.

The Court noted that the purpose of those sections had nothing to do with the standards of safety to be observed in the production and sale of tobacco products, they were designed to promote public health by reducing the attractiveness and

availability of tobacco products, not to prohibit in any way their sale to those who wish and are old enough to purchase them.

The Court observed that the words product safety in the 1998 Act directed attention to matters that were of concern to the single market in the general area of trade and industry. It was not the purpose of sections 1 and 9 to disrupt or unbalance trading in tobacco products in that way at all. Sections 1 and 9 did not seek to amend or otherwise affect anything that was set out in the two sets of Regulations. In that sense they could not be said to modify them. The purpose of the offences that sections 1 and 9 created was to discourage or eliminate the sale or supply of tobacco products. If this purpose was realised, that would be their effect. This was plain in the case of the vending machines, because the effect of section 9 was to prohibit the sale of tobacco products by way of vending machines.

The Court concluded by saying that there was no connection between the purpose and effect of section 1 and the law on reserved matters. The criminal law relating to any sales in a place where tobacco products were available for sale would not be affected by section 1. Section 1 did not create any new offence in regard to any such sales, and the existing offences were not modified. Section 1 was not a provision within the scope of section 11 of the Consumer Protection Act 1987.

The Appeal was dismissed.

Power Sharing

Kenya has adopted a two-tier approach to devolution, having two levels of government, namely, the national government and the county government (article 1(4) of the constitution). The two levels of government are distinct and interdependent and conduct their mutual relations on the basis of consultation and cooperation. This means there is no absolute autonomy, therefore leading to a cooperative system of devolved government. This devolved system of governance is founded on three principles, namely distinctness, interdependence and consultation and cooperation (article 189). None of the governments is subordinate to the other and none is the agent of the other and as such the concept of hierarchy as a relational principle is ruled out. The principle of interdependence requires a certain form of mutual respect between the two governments.

Power is shared between the national government and the 47 counties outlined in the Kenyan constitution. For the purposes of effectiveness counties are expected to decentralize their services to the extent that is practicable to do so under the constitution (article 176 (2) of the constitution).

The Constitution of South Africa and the Constitution of Kenya, 2010 have a lot in common when it comes to the devolved system of government. In South Africa a three-tier approach is employed in that power is divided between the national government, nine provinces and 278 municipalities. The national, provincial and local levels of government have legislative and executive authority in their own spheres and defined by the constitution as distinctive, interdependent and interrelated. The government of South Africa is run on the principle of cooperative governance. The three spheres are autonomous and neither is a function of the other. However they exist as a unitary South Africa.

In Nigeria intergovernmental power relations is also similar with the Kenyan system in that the three tier of government exercise autonomy and is also based on the principles of cooperation and interdependence. However, the autonomy is not absolute.

Canada has a federal system of parliamentary government where the federal, provincial and territorial governments share government responsibilities and functions. In Canada, power is shared between the federal government and the province while the territories only exercise the power that is delegated to them by the federal government. The provinces in theory have got strong power as they control major dockets such as health and education, however in practice the federal government manipulates their decision due to the revenue allocation that they expect to receive from it and as such they tent to dance to the tune of the federal government.

Revenue Allocation

The key element of devolutions stands or falls on its fiscal decentralization as an economic factor. This calls for examination of how the central government and its decentralized units relate on finances.

In South Africa the provinces have very limited financial resources of their own and mainly depend on the national government for the equitable distribution. Their taxation powers are limited by the government and also parliament has to approve the fiscal resource to be availed to the provinces. This means that the national government has the powers to cut off revenue if it is not impressed by the use of resources by the provinces of find it incapable of handling finances.

In Kenya on the other hand, the Constitution provides that revenue collected by the national government shall be shared equally among the national government and the county government. The revenue allocated to county government every financial year shall be not less than 15% of all the revenue collected by the national government. Additionally, the counties that are considered as marginalized will receive equalization funds in a bid to raise them to the status of other counties.

An examination of Nigeria reveals that the enormous oil resource gives a problem to the fiscal decentralization of the country. As it is provided in the constitution the federal revenue is kept in the consolidated federal account where again the federation account is created to enable sharing of revenue between states and federal government. At the states level there is personal income tax.

Election of County Chief Executives

The governors in Kenya are elected by the people during a general election as well the in Nigeria while the premier who heads the province executive in South Africa is elected by the provincial legislature. On the other hand, Canada being a monarch, lieutenant governors are appointed by the governor general in the name of the queen on the advice of the prime minister to represent the queen in their provinces.

Parliamentary Vs Presidential System of Government

The presidential and parliamentary systems of governments are the most commonly used forms of democratic governments. In the presidential system the president is the leader of the executive who is separate from the legislature and he /she is separately elected by the people. This system provides checks and balances in that both bodies can be able to monitor the others powers.

On the other hand, the parliamentary system provides for chief executive who is part of the legislature. The elected members of the legislature appoint one member among themselves to be the chief executive. In most parliamentary systems the head of state (president/hereditary monarch) is different from the chief executive (prime minister). In this system the executive is fused with and is dependent upon the legislature.

The common consensus of scholars who advocate for parliamentary systems is that compared to a presidential system, there is a more centralized decision making process, parties tend to be stronger, and the government leader is more responsible to the legislature and ultimately more accountable to the citizens.

On the other hand; those who support presidential systems argue, that separation of powers allows for a strong legislature, voting directly for the President confers greater transparency, the system encourages pluralism (which allows for a diversity of views to be expressed), and that proposed bills are scrutinized and voted on by two levels of government, which some argue increases the accountability of the system.

In addition; separation of powers thrives in presidential system. It builds conflict into the system to prevent concentration of powers and governmental tyranny. However; it is more difficult to enact legislation, especially in the event that the president has different views than the legislative body. The president is only answerable to the people as opposed to the legislature. On the other hand; parliamentary system threatens the head of the executive with early elections and votes of no confidence. This makes him/her subservient to the legislature.

One similarity between the two systems is that the chief executive can be removed by the legislature.

However, there are some countries that exercise a hybrid system in that there is a fusion between the two systems. For instance, France has the president who exercises his power independent of the legislature and a prime minister who is directly dependent upon the support of elected members of the French legislature.

Canada and South Africa exercises the parliamentary system. Canada for instance has parliamentary supremacy in that the legislature is the most powerful organ in the country.

On the other hand, Kenya and Nigeria have a presidential system. For instance the Constitution of Kenya clearly provides that the president will be elected by the people in a general election and is the head of government and state.

Conflict of Laws

Article 191 of the Constitution of Kenya provides for the mode of handling conflicts that fall within the concurrent jurisdiction of the national and county governments. There are circumstances where the national legislation will prevail over county legislation. For instance national legislation will prevail in matters of national security, maintenance of economic unity, promotion of economic activities across county boundaries, promotion of equal access to government services. Counties will have the authority to legislate on matters that are unique and specific to their respective counties. The national legislation shall prevail because such applies uniformly to the country and also to prevent unreasonable action by the respective counties that may prejudice health and security interests of the country and also impede national economic policy implementation. The conflict of laws doctrine that applies in Kenya is similar in many of the jurisdictions discussed herein.

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ISBN 978-9966-094-30-8