



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

PETITION NO. 17 OF 2017

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL

RIGHTS & FREEDOMS UNDER ARTICLES 1, 2,3,4,6,10,19,20,21,

22,23,27,35,47, 48,56, 159,174,175,176,183,185, 186,207,220,221,224,

228 AND 232 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 8, 9, 30, 34, 46, , 102, 103 AND 116 OF

THE COUNTY GOVERNMENTS ACT, (ACT NO. 17 OF 2012)

AND

IN THE MATTER OF SECTIONS 3, 41, 43, 44, 45, 92, 93, 94, 95, 96, 97, 98,

99, 100, 101, 109, 127, 128, 129 AND 135 OF THE PUBLIC FINANCE

MANAGEMENT ACT, (ACT NO. 18 OF 2012)

BETWEEN

THE COUNTY ASSEMBLY OF MACHAKOS.....PETITIONER

-VERSUS-

THE GOVERNOR, MACHAKOS COUNTY.....1ST RESPONDENT

COUNTY GOVERNMENT OF MACHAKOS.....2ND RESPONDENT

THE CABINET SECRETARY, FINANCE &

NATIONAL TREASURY.....3RD RESPONDENT

THE CONTROLLER OF BUDGET.....4TH RESPONDENT

THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

JUDGEMENT

Parties

1. The petitioner, the **County Assembly of Machakos**, is a regional legislative assembly established under Article 176(1) and 177 of the Constitution.
2. The 1st Respondent, the **Governor of Machakos County**, is an elected state official within the meaning of Article 260 of the Constitution and it is established by operation of Articles 176 (1) and 179(2)(a) of the Constitution of Kenya, 2010, and section 30 of the County Governments Act, 2012 (hereinafter referred to as “the Act”).
3. The 2nd Respondent, the **County Government of Machakos**, is created under article 179(1) of the Constitution and by dint of section 6 of the County Government Act, 2012 is a body corporate with perpetual succession.
4. The 3rd Respondent, **The Cabinet Secretary, Finance & National Treasury**, is a National Government office established under the Articles 152(1)(d) and 153 Constitution whose mandate is *inter alia* to oversee the management and use of public finance to ensure smooth operations of both level of government and other public institutions in the service of the public.
5. The 4th Respondent, the **Controller of Budget**, is established by dint of Article 228(1) of the Constitution and is mandated to oversee and manage the public budget to ensure access to and prudent utilization of public finance by County Governments among others, for efficient service delivery to the public.
6. The 5th Respondent, the **Attorney General**, is the chief Legal Advisor of the Government of Kenya established by dint of *inter alia* Article 156(4) of the Constitution whose constitutional mandate is *inter alia* to promote, protect and uphold the rule of law and to defend the public interest.

Petitioner’s Case

7. According to the Petitioner, it did prepare both Program Based Budget and Itemized Budget for the current Financial Year and the same were considered and approved by the Budget and Appropriation Committee of the First Assembly. Accordingly, the said budget figures were debated and approved by the Petitioner as contained in the **Approved Machakos County Appropriation Act, 2017** and based on the **Appropriation Act**, the 4th Respondent has been approving the Petitioner’s requisitions, based on the itemized budget estimates arrived at after negotiations with the Commission on Revenue Allocation (hereinafter referred to as “CRA”).
8. Further, at the beginning of the Financial Year, the Petitioner in consultation with the County Treasury prepared a disbursement schedule on how to release funds to the Petitioner. As a result, an agreement was reached that the Petitioner’s total annual Recurrent Budget of Kshs 710,670,184.00 be divided by twelve months for release of the Itemized and Program based monthly Budget. Pursuant to the said agreement, the Petitioner in liaison with the County Treasury agreed on a monthly disbursement of Kshs 60,164,202.00 to the Petitioner for recurrent expenditure. However, the total recurrent budget for the Petitioner of Kshs 710,670,184.00 was to be less Kshs 48,863,958.00 received for the month of July, 2017, which is Kshs 661,806,226.00.
9. It was therefore the petitioner’s case that the 1st and 2nd Respondents ought to have disbursed, as the Recurrent Budget, Kshs 48,863,958.00 for the month of July, 2017, and Kshs 60,164,202.00 each for the months of August, September, October and November, 2017 totalling Kshs 289,520,766.00 It was however averred that the 1st and 2nd Respondents in blatant breach of the law only forwarded to the 4th Respondent requisitions for authorization to withdraw funds from the County Revenue Fund through Form A for 6/11/17 (Kshs 16,006,613.00), 6/11/17 (Kshs 60,000,000.00) and 6/11/17 (Kshs 63,248,046.00). Further in blatant breach of the provisions of law and the agreements referred to hereinbefore, the 1st and 2nd Respondents only disbursed the **recurrent** funds to the Petitioner for July, 2017 (Kshs 48,863,958.00), August, 2017 (Kshs 21,138,949.00), October, 2017 (Kshs 29,200,456.00 and 25,133,424.00) totalling Kshs 124,336,787.00.
10. It was therefore contended that the 1st and 2nd Respondents as at the time of filing this Petition had not released any monies for the months of September, 2017 and November, 2017 and the outstanding amount is as at then was Kshs. 165,183,979.00, an action that prejudiced the operations of the County *inter alia*; payment of salaries and allowances to the new members and also undertaking of adequate training.
11. It was disclosed that on the 2nd November, 2017, the Petitioner’s representatives met the 2nd Respondent in his office and among other issues discussed was timely disbursement of funds to the Petitioner to enable it operate efficiently. Subsequently, on the 8th November, 2017, the Petitioner forwarded the requisitions to the County Treasury for Recurrent expenditure requisition, Development expenditure requisition and Other transfers (loans) requisition in the sums of Kshs 63,248,046.00, Kshs 16,006,613.00 and Kshs 60,000,000.00 respectively for processing. The requisitions were approved by the County Treasury and were subsequently forwarded to the office of the 4th Respondent on the 11th November, 2017 which approved the first and second requisitions on the 13th November, 2017. However, despite the approval by the 4th Respondent of the said items, the 1st and 2nd Respondents failed, declined and or refused to sign necessary forms to wit: Form C’s to authorize withdrawal of the funds from the County Revenue Fund, an action that gravely affected the operations of the Petitioner in that the Petitioner was unable to carry out its key duties to the prejudice of the residents of Machakos as outlined in Sections 8 of the **County Governments Act** and Articles 1 and 185 of the Constitution *inter alia*;

- a) vetting and approval of nominees for appointment to county public offices as may be provided for in the County Governments Act or any other law as the;
- b) performing the roles set out under 185 of the Constitution and particularly the oversight role over the county executive committee

and any other county executive organs, the receipt and approval of the plans and policies for management and exploitation of the county's resources and development and management of its infrastructure and institutions;

c) approving the budget and expenditure of the county government in accordance with Article 207 of the Constitution, and the legislation contemplated in article 220(2) of the Constitution, guided by Articles 201 and 203 of the Constitution;

d) approving the borrowing by the county government in accordance with Article 212 of the Constitution;

e) carrying out its legislative role;

(f) taking care of the welfare of its members;

(g) approving county development planning; and

(h) performing any other role as may be set out under the Constitution or legislation.

12. The petitioner lamented that the said denial of funds by the 1st and 2nd Respondents paralysed the operations of the various critical Committees created under the County Assembly Standing Orders mandated to exercise oversight roles on the 2nd Respondent and as such the tax payers in the County were adversely affected as there was no accountability by the 2nd Respondent and or provision of services to them, inter alia;

i) **Public Accounts and Investments Committee** mandated to inter alia examine the accounts by showing the appropriation of the sum voted by the Assembly to meet the public expenditure and of such other accounts laid before the Assembly as the Committee may think fit and to examine the reports, accounts and workings of the county public investments.

ii) **Procedure and House Rules Committee** mandated to inter alia consider and report on all matters relating to the County Assemblies Standing Orders;

iii) **Committee on Implementation** mandated to inter alia to scrutinize the resolutions of the Assembly (including adopted committee reports), petitions and the undertakings given by the County Executive Committee and examine whether or not such decisions and undertakings have been implemented and whether or not the legislation passed by the Assembly has been operationalized.

iv) **Committee on Devolution and Intergovernmental Relations** mandated to inter alia liaise with institutions of the National Government on matters of devolution,

13. The petitioner averred that when it vide a letter dated 16th November, 2017 wrote to the 1st Respondent requesting for the release of funds, the 1st Respondent in a letter dated the same day purported to adjust the Budget lines for the Petitioner downwards and also annexed a letter dated 13th November, 2017 allegedly addressed to the Petitioner, which had never been received, and which would require the issues raised therein to be addressed through Supplementary Estimates.

14. To the petitioner, the actions of the 1st and 2nd Respondents grounded the Petitioner's operations in that the Petitioner was denied the funds based on Cash Flow requirements Schedule of Kshs 60M per month approved and submitted to the 1st and 2nd Respondent's office at the beginning of the Financial Year in line with the approved Recurrent Budget of Kshs 710,670,184.00. Consequently, the Petitioner's operations continued to suffer irreparably and more particularly, the Petitioner did not pay the October, 2017 salaries and allowances of its members, staff and service providers exposing it to the risks of being sued and or grounding its operations and more so services for the common good of the public further.

15. The petitioner contended that it was aware that the 3rd Respondent had disbursed the following funds to the 2nd Respondent.

Month	Amount
1. July	Kshs 544,780,867.00
2. August	NIL
3. September	Kshs 544,780,868.00
4. October	NIL
5. November (7/11/17)	Kshs 773,042,959.80
<u>TOTAL</u>	<u>Kshs 1,862,604,694.80</u>

16. The Petitioner was also aware that the 2nd Respondent had collected the following funds from its own resources but that the total funds

held at the County Revenue Fund as at Friday, 24th November, 2017 was Kshs 292,585,407.80.

Month	Amount
1. July	Kshs 132,267,763.40
2. August	Kshs 101,192,535.80
3. September	Kshs 1,151,460.00
4. October	Kshs 7,317,293.00
<u>TOTAL</u>	<u>Kshs 241,929,052.20</u>

17. It was averred that despite the Petitioner having forwarded the various requisitions for the months of October, 2017, November, 2017 and December, 2017 which comply with Sections 109(7) of the Public Finance Management Act, 2012 and the ***Machakos County Appropriation Act, 2017***, the 1st and 2nd Respondents failed, declined and or refused to forward the said requisitions (Through Form B) to the 4th Respondent for approval and or further action.

18. In support of the petition the petitioner relied on the various Articles of the Constitution and sections of the ***County Governments Act, 2013*** and the ***Public Finance Management Act, No.18 of 2012***.

19. The Petitioner contended that failure by the 1st and 2nd Respondents to release the funds requisitioned by the Petitioner is it is unconstitutional and illegal and that the same has occasioned grave prejudice in its operations contrary to the Constitution and the ***County Governments Act, No. 17 of 2012***, which require that all persons and organs should be treated fairly and given equal opportunities in the spirit of equality and equity. It was therefore contended that the Respondents herein have infringed or are likely to infringe the Petitioner's rights further as protected by the Constitution of Kenya and all other relevant laws highlighted above by failing to release the full amounts requisitioned as provided for by the respective budgets.

20. The petitioner further contended that by reason of the 1st and 2nd Respondents' action of denying the Petitioner funds to run its operations smoothly without justification the Respondents jointly and severally have contravened the Constitutional mandate to give audience to the Petitioner and has also to promote the principles of competitiveness, fairness, equality and equitable representation and distribution of resources. In the circumstances, the Petitioner has a legal right to demand from the Respondents adherence to the Natural Justice Right to be heard on the objections in respect of the withholding of its funds thereof.

21. According to the petitioner, it was threatened with not being able to pay its employees and perform other financial obligations within the confines of the ***County Government Act***, the very essence of the Devolution of the Government as envisaged in the Constitution, Chapter Twelve thereof, in the face of the foregoing illegalities without a proper hearing and consideration of their interests by the Respondents. Lacking justification, it is manifest that the said act is oppressive, capricious, and gravely odious hence this Court was urged to intervene.

22. It was further contended that the Petitioner on behalf of its members have a legitimate expectation that a decision by the Respondents whose effect directly affects their enfranchisement, economic and social state would be fairly arrived at, after due consideration of all the facts surrounding the decision and the specific applicable Constitutional and Statutory obligations of the Respondents. However, there is absolutely no justification by the 1st and 2nd Respondents to refuse to release the Petitioner's funds as per the respective Budgets. Accordingly, the 1st Respondent acted oppressively in the face of the foregoing.

23. The petitioners similarly had a legitimate expectation that due process would be followed by the Respondents in so far as the provision of funds and in particular the release of the already approved ones complained hereof. To the petitioner, the process of releasing funds to it by the 1st, 2nd, 3rd and 4th Respondents is based on specific provisions of the Constitution, the ***County Government Act, 2012***, the ***Public Finance Management Act, 2012*** and other Acts and the 1st Respondent has no authority to refuse to release funds and or to revise downwards the Petitioner's Budget.

24. It was contended that the Petitioner had a legitimate expectation that legality will be pursued by the Respondents and more specifically, the 3rd, 4th and 5th Respondents will strive to advise the 1st and 2nd Respondents to uphold the rule of law and observe the Constitutional provisions circumscribing its mandate in arriving at its decisions affecting the Petitioner and not be driven by nebulous considerations that are extraneous to the constitutional criteria and prescriptions and which are outside the scope of its mandate.

25. It was contended that the decision to withhold the Petitioner's funds by the 1st and 2nd Respondents is clearly borne out of ill will, malice, and was out rightly capricious and further that the 1st and 2nd Respondents cannot, and have no power at all under the Constitution, The ***County Government Act, 2012*** and the ***Public Finance Management Act, 2012*** to fail to release funds which had been budgeted for and approved for release by the 3rd and 4th Respondents and that act amounts to an ultra vires act. Further, the decision to withhold the funds by the 1st and 2nd Respondents having been based on a breach of the applicable laws in the first place amounts to an abuse of power. Based on the aforesaid instruments, it was contended that the Respondents failed to carry out their duties in line with the requirements of law.

26. In support of the petition the petitioner filed an affidavit sworn by **Felix Gitari Mbiuki** its Clerk and Accounting Officer in which the foregoing averments were regurgitated.

27. In its submissions, the petitioner averred that it was common ground that this Court on the 21st December, 2017 issued a mandatory injunction compelling the 1st and 2nd Respondents to within 14 days thereof to approve the withdrawal of, release, and or remit a total sum of Kshs 79,254,659/= which consisted of the sum of Kshs 63,248,046/= for the recurrent budget and Kshs 16,006,613/= for the development budget requisitioned for by the Petitioner and approved by the Respondent after the 1st and Second Respondents refused and or declined to release funds to the Petitioner despite approval by the 4th Respondent. Secondly, the 4th Respondent approved Kshs 48,234,754.00 for the month of September, 2018 on 23rd October, 2018 and Kshs 45,218,287.65 for the month of October, 2018 on the 7th November, 2018 and the total amount approved was then Kshs. 93,453,041.00. Thirdly, the Petitioner/ Applicant forwarded to the 1st and 2nd Respondents requisitions for development budgets totalling Kshs 60,000,000.00 for Members of County Assembly mortgage (Kshs 40,000,000.00) and Staff Mortgage (Kshs 20,000,000.00).

28. Based on Article 176(1) of the Constitution, the petitioner submitted that it had the locus to institute these proceedings. It was therefore contended that the view that the petitioner had sued itself had no basis since the County Assembly and the County Executive are by virtue of the Doctrine of Separation of powers independent of the other, and as part of that independence, matters of finance are core. Accordingly, **Article 185** vests the legislative authority of the county and the exercise of that authority on the County Assembly. Therefore though the Petitioner and the 1st and 2nd Respondents are all established under Article 176(1) of the Constitution, they are distinct and separate entities with each being a body corporate capable of suing and being sued. In any event, it was submitted that Article 22 of the Constitution provides that every person has a right to institute court proceedings claiming that a right or freedom in the Bill of Rights has been denied, violated or infringed, or it is threatened including acting in the public interest and Article 23 of the Constitution states the High Court has jurisdiction to hear and determine applications for redress and issue reliefs.

29. As to the question whether this court has jurisdiction to grant the orders sought the petitioner relied on various Articles of the Constitution as well as case law.

30. As regards the allegation that the 2nd Respondent was dissolved on the 7th December, 2018 by a motion passed by the Petitioner, it was submitted that this position is untenable position in both fact and law owing to the following provisions of the law based on **Article 255 (1)** of the Constitution and it was contended that there is no evidence tabled before this Court that the Petitioner or the 2nd Respondent have been or was dissolved through the recognizable means as per the existing laws in Kenya.

31. It was submitted that Article 177(4) of the Constitution provides that a county Assembly is elected for a term of five years. In this case the second county assembly of Machakos was duly constituted on the Thursday, the 7th day of September, 2017 in accordance with section 7A of the **County Governments Act No. 2012**. On this day which was the first sitting of the second county assembly of Machakos, the Clerk of the County Assembly of Machakos administered the oath of office to the members of the county Assembly in accordance with Standing Order No. 3 of the Machakos County Assembly Standing Orders. Further on the same day upon administration of oath to the members, the Clerk of the County Assembly of Machakos presided over the election of the Speaker of the County Assembly in accordance with standing order No.4 of the Machakos County Assembly Standing Orders. In the petitioner's view, since section 42(2) of the **County Governments Act. No. 12 of 2012** provides that the constitution of a new executive committee after a general election shall be finalized within twenty-days of the swearing in of the members of the County Assembly and their term ends when a new one is elected in office, the allegation by the 1st and the 2nd Respondents to this effect is a mere smokescreen to the weighty matters raised in the Petition. In their view, if any motion creating a Peoples' Assembly has been passed, the same has no legal basis and or foundation. In any event, if at all the Petitioner had been dissolved, then the 1st and 2nd Respondents would also stand dissolved and Article 255 of the Constitution provides for succession thereof.

32. In the petitioner's submissions, the Senate has no role to play in the denial of the funds already approved for disbursement by the 1st to 4th Respondents as it has already performed its duty under Article 96 of the Constitution. Since the 4th Respondent approved the funds thereof but the 1st and 2nd Respondents have refused to sign necessary form (form C), the citation of the Standing Orders and the Provisions of Article 195 of the Constitution was misplaced.

33. According to the petitioner, from the correspondence between the parties herein, it had done all it could in exhausting the internal mechanisms herein.

34. Based on various provisions of the law, it was submitted that the County Executive and the County Assembly are distinct and separate entities with different roles and as such the assertion by the 1st and 2nd Respondents that the 1st Respondent is not the signatory to the accounts where funds are deposited is false as he is the key member of the County Executive Committee, the Accounting Officer of the County and a State Officer mandated by the Constitution, the Public Management and the provisions of the **County Government Act**. Further, it is clear that the 3rd, 4th and 5th Respondents are mandated by the Constitution of Kenya to ensure that the law in as far as release of funds to the Petitioner by the 1st and 2nd Respondents are followed. The petitioner therefore submitted that this case has met the thresholds for grant of the reliefs sought in the Petition. This becomes evident upon reflection of the above legal issues and factual issues.

35. The Petitioner therefore sought the following orders:

1) THAT this Honourable Court be pleased to grant a permanent injunction restraining and/ or prohibiting the 1st and 2nd Respondents jointly and severally, their agents, or any person acting under their behest from withholding any funds budgeted for, approved and allocated to the Petitioner by the 4th Respondent.

2) An mandatory injunction order do issue to compelling the 1st and 2nd, 3rd and 4th Respondents to release all the funds due and owing to the Petitioner as per the itemized Budgets submitted to the 2nd Respondent after approval by the 4th Respondent.

2A. A mandatory injunction do issue compelling the 1st and 2nd Respondents to forward with immediate effect all the requisitions already forwarded to them by the Petitioner and the subsequent requisitions by the Petitioner to the 4th Respondent for approval and further action.

3) An mandatory injunction order do issue to compelling the 1st, 2nd, 3rd and 4th Respondents to release all the funds to the Petitioner as per subsequent itemized Budgets submitted to the 2nd Respondent after approval thereof in the subsequent months of all financial timeously and or without delay.

3A. An mandatory injunction order do issue to compelling the 4th Respondents to approve and or review and or act on all subsequent forwarded by the 1st and 2nd Respondent on behalf of the as per subsequent itemized Budgets timeously and or without delay.

3B. An mandatory injunction order do issue to compelling the 3rd and 5th Respondents to ensure that the 1st, 2nd and 3rd Respondents comply with the necessary provisions of the law in as far as disbursement of finances to the Petitioner are concerned to avoid violation of the Petitioner's rights.

4) Declarations that:-

a) By reason of the 1st and 2nd Respondents' action of denying the Petitioner funds to run its operations smoothly without justification the Respondents jointly and severally have contravened the Constitutional mandate to give audience to the Petitioner and has also to promote the principles of competitiveness, fairness, equality and equitable representation and distribution of resources.

b) The Respondents are jointly and severally in breach of the provisions of Articles 174(a)(f)(g), (h)(i), 176(2), 183, 207, 221 and 228 of the Constitution, 2010, Sections 30, 102 and 116 of the County Government Act, 2012 and Sections 45,92,93,94,95,96,97,99,109,128 and 129 of the Public Finance Management Act and Section 5(c) of the Controller of Budget Act, 2016.

c) The 1st and 2nd Respondents have no right to refuse to release the Petitioner's funds as per the respective Budgets and by so doing the 1st and 2nd Respondents have acted oppressively in the face of the foregoing, and the Respondents have in all likelihood the prospect of acting in a replicated fashion so oppressively, capriciously, and unreasonably, and as the acts complained of have the potential of depriving the Petitioner of its Constitutionally enshrined rights.

d) The process of releasing funds to the Petitioner by the 1st, 2nd, 3rd and 4th Respondents is based on specific provisions of the Constitution of Kenya 2010, the County Government Act, 2012, the Public Finance Management Act, 2012 and other Acts and the 1st Respondent has no authority to refuse to release funds and or to revise downwards the Petitioner's Budget.

e) The decision to withhold the Petitioner's funds by the 1st and 2nd Respondents is clearly borne out of ill will, malice, and is out rightly capricious.

f) The 1st and 2nd Respondents cannot, and have no power at all under the Constitution, The County Government Act, 2012 and the Public Finance Management Act, 2012 to fail to release funds which have been budgeted for and approved for release by the 3rd and 4th Respondents and that act amounts to an ultra vires act, in breach of highlighted provisions of law highlighted in this Petition and the decision to withhold the funds by the 1st and 2nd Respondents having been based on a breach of the applicable laws in the first place amounts to an abuse of power.

5) In any event, the costs of the petition be awarded to the Petitioner.

6) Such other order(s) as this Honourable Court shall deem fit to grant.

1st and 2nd Respondents' Case

36. The petition was opposed by the 1st and 2nd Respondent through a replying affidavit sworn by **Francis Wambua Maliti**, the Deputy Governor and the Acting Executive Committee Member of the Executive Arm of the 2nd Respondent in charge of Department of Finance and Revenue Management. According to him, he was a County Executive Committee Member in the first Machakos County Government during which time, the petitioner used political machinations and unreasonable demands to intimidate the executive. The petitioner, in a somewhat condescending manner, deposed that it appears that the era of illegal and unlawful manipulations by the Petitioner is back and offered unsolicited advice to the Courts to exercise restraint lest they be used to aid illegalities.

37. Based on legal advice, the deponent averred that under Article 176 of the Constitution, the County government consists of both the county Assembly and the County Executive. Principally therefore, the Petitioner is part and parcel of the 2nd Respondent and cannot sue itself. To the said Respondents, if the orders sought were to issue, the entire Government of Machakos County (including the petitioner) would be suspended under Article 192 of the Constitution and consequential dissolution thereof. It was their position that this Petition was made prematurely and as such, the Court lacks jurisdiction to entertain it and ought to be struck out with costs.

38. Based on Article 185(3) of the Constitution, it was contended that since the petitioner herein has oversight authority over the County Executive Committee to which the 1st Respondent is member, the Petitioner has not exhausted its internal mechanisms of establishing the veracity of the allegations it has raised thus its actions are ill motivated. It was disclosed that to give effect to Constitutional provision on oversight, the Machakos County Assembly adopted its standing orders on the 9th July 2014 which has since been severally revised. In the said Standing Orders, various relevant house Committees were established and from the said Standing Orders it is clear that the issues raised in the Petition falls squarely within the mandate and powers of the Petitioner's various committees and not this Court. The petitioner, it was claimed, had not produced any report of the said committee before this Court to show that the County Assembly procedures and Processes were fully exhausted before coming to this Court. In the said Respondents' view, pursuant to the principle of separation of powers, this Court cannot usurp powers and privileges of the Petitioner and it is only after the Petitioner exercises its mandate and powers in totality that the jurisdiction of this Court crystallizes which crystallization can only ensue if a committee report of the Petitioner is made and adopted by the County assembly and copies availed to the court. In this respect the said Respondents relied on the power to summon witness granted to the petitioner by Article 195 of the Constitution and submitted that the Petitioner has powers equal to those of this Court to summon the officers of the Executive Arm of the 2nd respondent responsible for release and disbursement of funds to give evidence. However, no evidence of such an enquiry as envisaged under the law has been produced before this Court.

39. It was therefore contended that the Petitioner has abdicated on its constitutional duties and the Court should remind the Petitioner to uphold both its constitutional and statutory duties and powers since the petitioner cannot delegate its Constitutional and Statutory duties to this Court. In the said Respondents' view, once the petitioner exhausts all internal mechanism it has, it also has a chance of escalating the issues to the Senate for determination based on Article 96(3) of the Constitution.

40. It was contended that the 1st respondent is not signatory to any Account whereof funds for the 1st respondent are deposited. Further, he is not a signatory to any Form required to authorize release or disbursement of any funds. Accordingly, under s. 30(2) of **County Government Act**, the alleged actions do not fall within the functions and responsibilities of the 1st Respondent.

41. It was therefore contended that the 1st respondent is maliciously enjoined in these proceedings as the powers of the 1st Respondent are well set out under the Constitution and the **County Government Act**. It was further contended that since under Article 179 of the constitution, the Executive authority of the County is vested in and exercised by a County Executive Committee and the 1st respondent is just one of them, he cannot be questioned on matters falling within a collective responsibility portfolio.

42. In this case it was averred that the Petitioner has not attached the minutes or any other evidence of the alleged consultative meetings with the County Treasury as alleged hence the said allegations are vague, malicious and not substantiated. Further whereas the Petitioner alleged that there was an Agreement of definite and pre-determined requisition and release of funds, it has not provided a copy of the alleged agreement. It was the said Respondents' case that from the pleadings, the Petitioner seems to be oblivious of the procedure of making requisitions from the relevant intergovernmental institutions and that the claims on requisitions are unsubstantiated and unsupported by evidence.

43. It was further contended that the Petitioner has not, in details, stated how they applied the already disbursed funds to enable the Court and the parties herein satisfy themselves of their prudent use, priority allocation and generally necessity-of-use need.

44. According to the said Respondents, the Petitioner admits in its Petition and Affidavit:

- a. THAT it has received disbursements from the Respondents despite the prevailing hard economic times which they also admit.
- b. THAT it received letters from the 2nd Respondent requesting for adjustment of the budgetary allocations but to date, it has never acted on the recommendations, in breach of their statutory and constitutional mandate.
- c. THAT there is no resolution authorizing institution of this Petition on behalf of members of the Petitioner and the pleadings can attest to that.
- d. THAT further, and without prejudice to the foregoing, the Petitioner was dissolved by the Members of County Assembly of Machakos on the 6th December 2017 when they passed a motion to create an amorphous entity that they called People's Assembly.
- e. THAT the peoples' Assembly according to that resolution, developed another entity or organ that completely replaced the Petitioner in that it purports to represent the people of the republic of Kenya and to engage with the national and County Government directly. Consequently therefore, it has replaced the entire purpose of the Petition.

45. The said Respondents averred that they had not in any way infringed on any rights of the Petitioner and that the Petition does not disclose the alleged provisions of the Constitution which it alleges were infringed and the manner in which they were infringed.

46. The deponent averred that from the reports from Controller of budget, Commission on Revenue Allocation, Auditor General and the World Bank it has been disclosed that there is excessive waste of public funds by the petitioner through unwarranted local and international Travels, benchmarking and conferences to the detriment of the people. Accordingly, the petitioner is not being accountable to the public [more particularly the people of Machakos County] for its actions and decisions its making and its personal interest continues to surpass that of the public good.

47. Apart from the averment in the replying affidavit, the said Respondents filed a Notice of Preliminary Objection in which they raised the following issues:

1) That the Petitioner was dissolved by the members of County Assembly of Machakos on the 6th December 2017 when they passed a motion to create an amorphous entity they called People's Assembly. As such, its delegated powers under Article 1(3) ceased thus strangers to this Court and the Constitution of Kenya 2010.

2) THAT the Court should interpret the effect, constitutionality and legal impart of that motion establishing the peoples' Assembly within the Kenyan context.

3) That the Court cannot usurp the powers of the Senate and the Petitioner in dealing with the issues raised herein under the principle of separation of powers.

4) That the issues raised fall squarely within the powers of the Senate and the Petitioner to investigate and while exercising oversight role as provided by various legal instruments.

5) The Court thus lacks jurisdiction to deal with the issues raised as they fall within the purview and powers of Senate and the County Assembly.

6) That under S. 30(2) of County Government Act, the alleged actions do not fall within the Functions and responsibilities of the 1st Respondent. As such, his name should be struck out with Costs.

48. It was submitted on behalf of the said Respondents that the petitioner in seeking to have the court issue a mandatory injunction to the effect that any monies passed by the applicant be automatically released without any question attempts to avoid any scrutiny and accountability with respect to utilization of public funds. However, the applicant can't seek to use the court to obtain orders which will help it violate the law at will. It was submitted that the process of which funds can be withdrawn is very clear and other bodies have to be involved like the controller of budget who is final once satisfied the law has been complied with. It was therefore submitted that the Court does not have jurisdiction to issue illegal orders whose import is to injunct or authorize withdrawals from the County Revenue fund or County Exchequer account since the Controller of budget is the only body authorized to approve withdrawals. However, the Controller of budget does not operate on its whims but within set down constitutional and statutory framework under Articles 207 as read together with article 228 (4) to (6) and section 5 of *Controller of Budget Act, 2016*.

49. It was therefore submitted that the County Revenue fund is safe and well protected by Constitution and Law and does not require the court to issue orders for withdrawal as prayed by Petitioner. The petitioner has to follow the procedures and not to move the court in an attempt for short cuts.

50. Based on section 8 of the *County Governments Act*, Article 207(3) it was submitted that the applicant is therefore asking the court to authorize withdrawals which is the function of another constitutional body, other than the court namely the controller of budget and that the court has no jurisdiction to issue the orders which would amount to usurping the powers of the controller of budget and thus illegal and unconstitutional.

51. In their submissions the said Respondents reiterated the rest of the averments in the replying affidavit and prayed that the petition be dismissed with costs.

4th Respondent's Case

52. On its part the 4th Respondent, relied on the following grounds of opposition:

1) **THAT** the Office of Controller of Budget is established under Article 228 of the Constitution.

2) **THAT** Article 207 and 228(4) of the Constitution of Kenya as read together with Section 5(a) of the Controller of Budget Act, 2016 and Section 109 of the Public Finance Management Act, 2012 requires that the Controller of Budget must authorize withdrawals from the County Revenue Fund.

3) **THAT** Article 228(5) of the Constitution of Kenya places a caveat on the Controller of Budget's exercise of her power in that she can only authorize withdrawals if satisfied that the withdrawal is in accordance with the law.

4) **THAT** the Controller of Budget is the only person mandated by law to authorize withdrawals of funds from the County Revenue Fund.

5) **THAT** the law is clear that after approval of release of funds by the Controller of Budget, no person has the authority or mandate to withhold release of the funds.

6) **THAT** the Office of Controller of Budget is an independent office whose objects under Article 249 of the Constitution are to protect the sovereignty of the people and ensure constitutionalism and adherence to the rule of law.

7) **THAT** the Controller of Budget has at all times exercised her power judiciously and lawfully by expeditiously authorizing the release of funds whenever requisitions have been submitted by the County Treasury.

8) **THAT** the orders sought do not meet the threshold for the grant of a mandatory injunction as against the 4th Respondent.

53. It was submitted on behalf of the 4th Respondent that Pursuant to Article 228 of the Constitution, the mandate of the Controller of Budget is *inter alia* to oversee implementation of the budgets of the national and county governments, approve withdrawals from public funds and report to Parliament on Budget Implementation. On the other hand Article 207(2) of the Constitution and section 109(6) of the **Public Finance Management Act, 2012**, require that authority to withdraw funds from the County Revenue Fund must be contained in legislation authorizing appropriation of funds or imposing a charge on County Revenue Fund. Therefore, Article 228(4) as read together with Article 207(2) of the Constitution and section 109(6) **Public Finance Management Act, 2012**, the Controller of Budget can only authorize the withdrawal of funds on the basis of county legislation appropriating funds or legislation imposing a charge on the County Revenue Fund.

54. It was submitted that Article 228 (5) of the Constitution imposes a duty on the Controller of Budget to review each requisition for withdrawal of funds for compliance with the law. This involves reviewing and scrutinizing whether the requisition for withdrawal of funds is in conformity with the legislation appropriating funds; legislation governing public finance management; the planning documents as required under the **County Governments Act** (County Integrated Development Plan, the Annual Development Plan, The County Fiscal Strategy Paper and the County Debt Strategy Paper) and the principles of public finance. Further, the Controller of Budget is required to confirm availability of funds in the Exchequer Account. However, Article 228(5) makes it clear that the Controller of Budget has discretion to decline to authorize withdrawal of funds where such withdrawal is based on an illegality or is contrary to the law.

55. It was submitted that in accordance with Section 5(c) of the **Controller of Budget Act, 2016**, the Controller has issued guidelines on the format of requisition for withdrawal of funds. In accordance with section 109(6) of the **Public Finance Management Act, 2012**, the County Treasury makes a written request for authority to withdraw funds from the County Revenue Fund which request is contained in what referred to as "Form A". The Controller of Budget then reviews the requisition for conformity with the law in accordance with Article 228(5) of the Constitution and section 109(6) of the **Public Finance Management Act, 2012** and if satisfied that the requisition complies with the law, the Controller of Budget in accordance with Article 207 and 228(4) approves the withdrawal of funds which approval is contained in what is referred to as "Form B". Once authority for the withdrawal of funds is given, the County Treasury prepares instructions to the Bank (Central Bank) to transfer the funds from the County Revenue Fund (Exchequer Account) to the operations Account and the instructions to the bank are contained in what is referred to as "Form C".

56. It was submitted that the County Treasury and the Central Bank of Kenya have a "Banker-client" relationship. Consequently, it is only the County Treasury that can appoint authorised signatories to the Exchequer Account. The Authorised signatories have the powers to sign "Form C" issuing instructions to the Bank to debit the Exchequer Account and credit the Operations Account with the amount approved by the Controller of Budget.

57. In this case it was submitted that it is not in doubt that the Controller of Budget has performed her duty under the law by approving withdrawal of funds whenever requisitions have been submitted. The bone of contention is that the County Treasury has failed to issue instructions to the Central Bank to transfer the funds approved by the Controller of Budget from the Exchequer Account (in which is held the County Revenue Fund) to the operations account of the County Assembly from where the funds can be utilized. However, the inaction of the County Treasury should not be construed as a fault of the 4th Respondent.

58. It was further submitted that the law does not provide for any institution or entity to stop withdrawal of funds after the Controller of Budget has approved the withdrawal of funds. According to the 4th Respondent, the County Assembly is a constitutional body with the constitutional mandate of representing and protecting the interests of the people of Machakos County and it is not in dispute that for any County Assembly to discharge its mandate, it must be adequately funded. According to the 4th Respondent, in keeping with the principle of separation of powers and to guard against coercion through financial crippling of the County Assembly by the Executive, the law has provided for financial independence of the County Assembly through a number of ways:

a. Section 129(3) of the **Public Finance Management Act, 2012** provides that the County Assembly shall prepare its own budget. The Role of the County Executive is limited to commenting on the County Assembly's budget estimates (Sec. 129(4)).

b. Section 148 of the Public Finance Management Act provides that the County Assembly shall have its own Accounting Officer who shall be the Clerk of the County Assembly.

c. Section 147 specifically provides for the responsibilities of the Accounting Officer of the County Assembly.

59. In light of the above submissions, the 4th Respondent was of the opinion that the act of failing to issue instructions to the Central Bank of Kenya through submission of Form "C" which would enable the transfer of funds to the operation account of the County Assembly is unconstitutional as it results in the financial crippling of the County Assembly. It was further submitted that the County Treasury is usurping the mandate of the Controller of Budget by essentially stopping the withdrawal of funds after the constitutionally mandated body which is the Controller of Budget has approved the withdrawal of funds.

60. As for the test for the Grant of Mandatory Injunctions, the 4th Respondent relied on Petition No. 565 of 2014 - **Makueni County Assembly -vs- County Executive Committee Member for Finance of Makueni County & 4 Others (eKLR)** and reiterated that the 4th Respondent has at all times adhered to the law in exercise of her mandate to authorize withdrawal of funds and that this is confirmed by the Petitioner. Therefore the Petitioner has failed to demonstrate any action or inaction/omission by the 4th Respondent that has resulted in the violation of the Constitution. According to the 4th Respondent, since the Controller of Budget is under a duty to ensure all requisitions for withdrawal of funds are in compliance with the law, the coaching of the prayers 3 & 3A in the Petition in essence means an automatic authorization for release of funds which would be unconstitutional as it usurps the role/duty of OCOB under Article 228(5). It was therefore submitted that the grant of a mandatory injunction as coached in Prayer 3 & 3A of the Petition will amount to interference and fettering of the Controller of Budget's constitutional powers under Article 228(4) and 228(5).

61. It was therefore the 4th Respondent's position that the Petitioner has failed to adduce any evidence or grounds of wrong doing or infringement on the part of the 4th Respondent and therefore the prayers sought cannot be granted as against the 4th Respondent.

Determinations

62. The first issue is whether this Court has the power to grant the orders sought herein in light of the doctrine of separation of powers.

63. That the doctrine of separation of powers applies to the national government as well as devolved governments was appreciated in Simon Wachira Kagiri vs. County Assembly of Nyeri & 2 Others (2013) eKLR at page 13 thereof where it was held as follows:

“County governments are miniature national governments structures and ordered in line with traditions and principles that govern the national Government. To this extent the doctrine of separation of powers apply with equal measure.”

64. **Montesquieu** had sought to address this doctrine in his work, *De L'esprit Des Lois [The Spirit of the Laws (1948)]* in the following words:

When the legislative and Executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, there is no liberty if the power of judging is not separated from the legislative and Executive, there would be an end to everything, if the same man or the same body were to exercise those three powers.

65. That this principle is reflected in our own Constitution appears in Article 1(3) thereof which provides that sovereign power which pursuant to Article 1(1) of the Constitution *“belongs to the people of Kenya and shall be exercised only in accordance with this Constitution”*:

“...is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—

(a) Parliament and the legislative assemblies in the county governments;

(b) the national executive and the executive structures in the county governments; and

(c) the Judiciary and independent tribunals.

66. This was appreciated by the High Court in Trusted Society of Human Rights v. The Attorney-General and Others, High Court Petition No. 229 of 2012; [2012] eKLR, at paragraphs 63-64 where it held as follows:

“Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuan influence is palpable throughout the foundational document, the Constitution, regarding the necessity of separating the Governmental functions. The Constitution consciously delegates the sovereign power under it to the three branches of Government and expects that each will carry out those functions assigned to it without interference from the other two.”

67. Thus, while the Constitution provides for several State organs, including commissions and independent offices, the people’s sovereign power is vested in the *Executive, Legislature and Judiciary*.

68. The broad principle of “separation of powers”, certainly, incorporates the scheme of “checks and balances”; but the principle is not to be applied in theoretical purity for its ultimate object is good governance, which involves phases of co-operation and collaboration, in a proper case. This perception emerges from Commission for the Implementation of The Constitution vs. National Assembly of Kenya, Senate & 2 Others [2013] eKLR where Njoki, SCJ opined that:

“The system of checks and balances that prevents autocracy, restrains institutional excesses and prevents abuse of power apply equally to the Executive, the Legislature and the Judiciary. No one arm of Government is infallible, and all are equally vulnerable to the dangers of acting ultra vires the Constitution. Whereas, the Executive and the Legislature are regularly tempered and safeguarded through the process of regular direct elections by the people, the discipline of an appointed and unelected Judicial arm of Government is largely self-regulatory. The parameters of encroachment on the powers of other arms of Government must be therefore clearly delineated, [their] limits acknowledged, and restraint fully exercised. It is only through the practice of such cautionary measures, that the remotest possibility of judicial tyranny can be avoided.”

69. The spirit and vision behind separation of powers is that there be checks and balances, and that no single person or institution should have a monopoly of all powers. This was restated by **Twinomujuni, JA** in Masaluand Others vs. Attorney General [2005] 2 EA 165 (CCU) as follows:

“The Constitution, the supreme law, vests all judicial power of the people in the Judiciary and whether the dispute involves the interests of the Judiciary or individual judicial officers or not, it is only the judiciary which is vested with judicial power to resolve it. However the judiciary must resolve the dispute “in the name of the people and in conformity with law and with the values, norms and aspirations of the people”.....The Constitution was framed on the fundamental theory that a larger measure of liberty and justice would be assured by vesting the three great powers, the legislative, the executive and the judicial in separate department, each relatively independent of the others; and it was recognised that without this independence if it was not made both real and Enduring, the separation would fail of its purpose. All agreed that restraints and checks must be imposed to secure the requisite measure of independence; for otherwise the legislative department, inherently the strongest, might encroach on or even come to dominate the others, and the judicial, naturally the weakest, might be dwarfed or swayed by the other two, especially the legislature...The executive not only dispenses honour but holds

the sword of the community. The Legislature not only commands the purse, but also prescribes the rules by which the duties and rights of every citizen are to be regulated. The Judiciary on the contrary has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgement. This simple view of the matter suggests several important consequences. It proves incontestably that the Judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the two; and that all possible care is requisite to enable it defend itself against their attacks. The complete independence of the Courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, it is one, which contains certain specified exceptions to the legislative authority; such as for instance that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without all this, all the reservations of particular rights or privileges would amount to nothing...A Judge has to pass between the Government and the man whom the Government is prosecuting; between the most powerful individual in the community and the poorest and the most unpopular. It is of the last importance, that in the exercise of these duties he should observe the utmost fairness. The judicial department comes home in its effects to every man's side; it passes on his property, his reputation, his life, his all. It is to the last degree important that he should be rendered perfectly and completely independent with nothing to influence or control him but God and his conscience. The greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent Judiciary.”

70. The Supreme Court has ably captured this fact in Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011 where it expressed itself as follows:

“The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation.”

71. However, Article 2(4) of our Constitution which provides as follows:

Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

72. Under Article 165(3)(d)(i) and (ii) the High Court is clothed with the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether any law is inconsistent with or in contravention of the Constitution and the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. Therefore whereas the legislative authority vests in Parliament and the County legislative assemblies where a question arises as to whether an enactment is inconsistent with the Constitution or is passed in contravention of the Constitution the High Court is the institution constitutionally empowered to determine such an issue subject to the appellate jurisdiction given to the Court of Appeal and the Supreme Court. This is in recognition of the fact that there is nothing like supremacy of the legislative assembly outside the Constitution since, under Article 2(1) and (2), the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government and no person may claim or exercise State authority except as authorised under the Constitution. Therefore there is only supremacy of the Constitution and given that the Constitution is supreme, every organ of State performing a constitutional function must perform it in conformity with the Constitution. So, where any State organ fails to do so, the High Court, as the ultimate guardian of the Constitution, will point out the transgression. The contrary argument, in our view, runs counter to the constitutional provisions with respect to the jurisdiction of this Court. The jurisdiction of the Court to invalidate laws that are unconstitutional is in harmony with its duty to be the custodian of the Constitution, which pronounces its supremacy at Article 2. Similarly, the general provisions of the Constitution, which are set out in Article 258 contain the express right to every person to “... *institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.*”

73. My position is supported by the decision in Coalition for Reform and Democracy (CORD) & Another versus the Republic of Kenya & Another (2015) eKLR where the court stated *inter alia* at paragraph 125 that:

“Under Article 1 of the Constitution sovereign power belongs to the people and it is to be exercised in accordance with the Constitution. That sovereign power is delegated to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals. There is however a rider that the said organs must perform their functions in accordance with the Constitution. Our Constitution having been enacted by way of a referendum, is the direct expression of the people's will and therefore all State organs in exercising their delegated powers must bow to the will of the people as expressed in the Constitution... Article 2 of the Constitution provides for the binding effect of the Constitution on State Organs and proceeds to decree that any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid...”

74. Therefore when an issue arises as to the constitutionality of any act done or threatened by either the Legislature or the Executive, it falls upon the laps of the Judiciary to determine the same. As was held in Jayne Mati & Another vs. Attorney General and Another - Nairobi Petition No. 108 of 2011 at paragraph 31:

“...separation of powers between the judiciary, executive and legislature is one of the hallmarks of our Constitution. Each body or organ of state is bound by the Constitution and should at all times acquaint itself of its provisions as it works within its sphere of competence. Constitutional interpretation is not the sole preserve of the judiciary but the judiciary has the last word in the event of a dispute on the interpretation and application of the Constitution.”

75. On that note, the Supreme Court in Speaker of National Assembly -vs-Attorney General and 3 Others (2013) eKLR stated that:

“Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering its opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act.”

76. The Court went on to state as follows:

“Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of “right” and “wrong” in such cases, short of a resolution in plebiscite, is only the Courts.”

77. As was held the case of De Lille & Another vs. The Speaker of the National Assembly (1998)(3) SA 430(c) in which the Court stated as follows:

“The National Assembly is subject to the Supremacy of the Constitution. It is an organ of state and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution. It is subject in all respects to the provisions of our Constitution. It has only those powers vested in it by the Constitution expressly or by necessary implication or by other statutes which are not in conflict with the Constitution. It follows therefore that Parliament may not confer on itself or on any of its constituent parts, including the National Assembly, any powers not conferred on them by the Constitution expressly or by necessary implication.”

78. On appeal the Appellate Court in Speaker of National Assembly vs. De Lille MP & Another 297/98 (1999)(ZASCA 50) rendered itself as follows:

“This enquiry must crucially rest on the Constitution of the Republic of South Africa. It is Supreme- not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No parliament, no official and no institution is immune from Judicial scrutiny in such circumstances.”

79. The South African Constitutional Court in Minister of Health and Others vs. Treatment Action Campaign and Others (2002) 5 LRC 216_248 at paragraph 99 **underscored** the Court’s role to protect the integrity of the Constitution thus:

“The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive that is an intrusion mandated by the Constitution itself.”

80. I am duly guided and this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the invitation to do so is most welcome as that is one of the core mandates of this Court.

81. This however does not mean that the Judiciary should superintend the other two arms of government in all their undertakings in order to determine whether their decisions are “right” or “wrong”. As was appreciated by the Court of Appeal in Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012; eKLR [2012]:

“It is not in doubt that the doctrine of separation of powers is a feature of our Constitutional design and a per-commitment in our Constitutional edifice. However, separation of power does not only proscribe organs of Government from interfering with the other’s functions. It also entails empowering each organ of Government with countervailing powers which provide checks and balances on actions taken by other organs of Government. Such powers are, however, not a licence to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore cannot agree with the High Court’s dicta in the Petition, subject of this Petition that -

‘Separation of powers must mean that the courts must show deference to the Independence of the legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet as the Respondents concede, the courts have an interpretive role including the last word in determining the constitutionality of all government actions.’”

82. It was therefore appreciated by Ngcobo, J in Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) that:

“The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court. It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation... By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1)(a) does.”

83. In the words of Ackermann, J in the South African case of National Coalition for Gay and Lesbian Equality & Others 13 Others, Case CCT No.10/99:

“the other consideration a court must keep in mind, is the principle of the separation of powers and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature.”

84. The rationale for exercise of restraint was explained in Okiya Omtatah Okoiti & 3 Others vs. Attorney General & 5 Others [2014] eKLR in which a 3 judge bench of the Court stated that:

“In our view, Members of Parliament should not look over their shoulders when conducting debates in Parliament. They must express their opinions without any fear. The Court should be hesitant to interfere, except in very clear circumstances, in matters that are before the two Houses of Parliament and even those before the county assemblies.”

85. In Patrick Ouma Onyango & 12 others vs. Attorney General and 2 Others [2005] eKLR the court, on the issue of whether it should interfere with a political or legislative process stated:

“The answer the court gives to this question is that whatever the technicalities or the legal theory, sound constitutional law must be founded on the bedrock of common sense and the courts must now and in the future appreciate the limitations on formulation of policy, legislative process and practical politics because the courts are ill equipped to handle such matters”.

86. It is now trite that the doctrine of separation of powers requires that each of the three arms, the Judiciary, the Legislature and the Executive stick to their lanes and that they ought not to trespass onto the lanes of the other organs. In this case, the Petitioner’s case is that the 1st and 2nd Respondents, which fall under the executive arm have unlawfully and unconstitutionally purported to exercise their mandates in a manner that cripples the Petitioner’s constitutional and legal mandate. If that contention is true then that is an issue falling within the ambit of Article 165(3)(d)(ii) and (iii) of the Constitution. That being the case, this Court cannot be barred from inquiring into the matter on the basis of separation of powers.

87. As regards the existence of alternative remedies, it is my view that if confronted with a question as to which remedy a litigant ought to seek, a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant’s grievance. Articles 22, 23 and 165(3) (b) of the Constitution grants to every person the right to institute Court proceedings claiming that a right or fundamental freedom has been violated or is threatened with an infringement. That right, to access this Court, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms except in the circumstances established by the Court of Appeal of Trinidad and Tobago in the case of Damian Belfonte vs. The Attorney General of Trinidad and Tobago C.A 84 of 2004.

88. In my view, it would not be fair, convenient or conducive to the proper administration of justice to require a Petitioner to split its case into two or more causes and file them before different Tribunals when the matter can be dealt with by one Tribunal. In my view the Petitioner in such circumstances ought to commence the case before the Tribunal with the jurisdiction to hear and determine all the questions in controversy and grant all the reliefs sought. That Tribunal, in the circumstances of these Petitions is the High Court.

89. As was held by this Court in Nairobi High Court Petition No. 613 of 2014 – Patrick Musimba vs. The National Land Commission

and Others:

“...it would be ridiculous and fundamentally wrong, in our view, for any court to adopt a separationistic view or approach and insist on splitting issues between the Courts where a court is properly seized with a matter but a constitutional issue not within its obvious exclusive jurisdiction is raised.”

90. It is therefore my view that this Court has the jurisdiction to entertain the issues raised in this petition and further that the so called alternative remedies do not offer the petitioner efficacious remedies since the said forums are not proper forums in which the issues raised herein can be fully ventilated.

91. The other issue is whether the Petitioner could properly file this petition against the 1st and 2nd Respondents. Article 22(1) and (2) of the Constitution provides that:

(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

92. Article 258 of the Constitution which provides as follows:

(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

93. Article 260 of the Constitution defines “person” as including “a company, association or other body of persons whether incorporated or unincorporated”. To my mind the fact Article 165(3)(d)(iii) empowers this Court to determine “any matter relating to constitutional powers of State organs in respect of county governments” is a clear pointer to the fact that the Constitution contemplates conflicts between constitutional powers of state organs including the Legislature and the Executive whether at national or county level. I therefore do not agree with the 1st and 2nd Respondents that the Petitioner has no locus to invoke this Court’s jurisdiction to determine the question whether the actions of the 1st and 2nd Respondents impedes the petitioner’s constitutional and legal mandate.

94. The 1st and 2nd Respondents also contended that the Petitioner was dissolved by the members of County Assembly of Machakos on the 6th December 2017 when they passed a motion to create an amorphous entity they called People’s Assembly and that as such, its delegated powers under Article 1(3) ceased. The simple answer to this contention is that the Constitution is clear on how a county assembly is to be dissolved and the formation of the so called “People’s Assembly” is not only such mode of its dissolution.

95. As regards the merits of the Petition, it is clear that the 1st and 2nd Respondents have not addressed the factual issues raised by the Petitioner. It would seem that the said Respondents are of the view that they have the powers to oversight the manner in which the Petitioner carries out its Constitutional mandate. With due respect that view is utterly misconceived and has no legal or constitutional basis. Article 228 of the Constitution provides as hereunder:

(1) There shall be a Controller of Budget who shall be nominated by the President and, with the approval of the National Assembly, appointed by the President.

(2) To be qualified to be the Controller, a person shall have extensive knowledge of public finance or at least ten years experience in auditing public finance management.

(3) The Controller shall, subject to Article 251, hold office for a term of eight years and shall not be eligible for re-appointment.

(4) The Controller of Budget shall oversee the implementation of the budgets of the national and county governments by authorising withdrawals from public funds under Articles 204, 206 and 207.

(5) The Controller shall not approve any withdrawal from a public fund unless satisfied that the withdrawal is authorised by law.

(6) Every four months, the Controller shall submit to each House of Parliament a report on the implementation of the budgets of the national and county governments.

96. As rightly submitted by the 4th Respondent, the law does not provide for any institution or entity to stop withdrawal of funds after the Controller of Budget has approved the withdrawal of funds. In other words once the said approval is given, the role of the 1st and 2nd Respondents is facilitative. They cannot question the manner in which the Petitioner intends to use the funds as that function belongs to the office of the Auditor General and the Senate. The 1st and 2nd Respondents must therefore respect the financial independence of the Petitioner as guaranteed by the Constitution and should not impede that mandate by inventing roadblocks on its path. To do so in my view amounts to abuse of their powers. According to **Prof Sir William Wade in his Book *Administrative Law***:

“The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body.”

97. In this case it is clear that the actions or inactions of the 1st and 2nd Respondents were actuated and motivated by ulterior motives. That is the only way one can explain the unwarranted axe grinding voyage that they embarked on. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240** while citing **Reg vs. Secretary of State for the Environment Ex Parte Nottinghamshire County Council [1986] AC**:

“A power which is abused should be treated as a power which has not been lawfully exercised...A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers...Abuse of power includes the use of power for a collateral purpose.”

98. The South Africa Constitutional Court in **Affordable Medicines Trust vs. Minister of Health [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (Affordable Medicines)** at para expressed itself as hereunder:

“The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive ‘are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law’. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.”

99. In **United Democratic Movement vs. Speaker of the National Assembly and Others (CCT89/17) [2017] ZACC 21; 2017 (8) BCLR 1061 (CC); 2017 (5) SA 300 (CC) (22 June 2017)** the same Court held that:

“Public office, in any of the three arms, comes with a lot of power. That power comes with responsibilities whose magnitude ordinarily determines the allocation of resources for the performance of public functions. The powers and resources assigned to each of these arms do not belong to the public office-bearers who occupy positions of high authority therein. They are therefore not to be used for the advancement of personal or sectarian interests. *Amandla awethu, mannda ndiashu, maatla ke a rona or matimba ya hina* (power belongs to us) and *mayibuye iAfrika* (restore Africa and its wealth) are much more than mere excitement generating slogans. They convey a very profound reality that State power, the land and its wealth all belong to “we the people”, united in our diversity. These servants are supposed to exercise the power and control these enormous resources at the beck and call of the people. Since State power and resources are for our common good, checks and balances to ensure accountability enjoy pre eminence in our governance system. This is all designed to ensure that the trappings or prestige of high office do not defocus or derail the repositories of the people’s power from their core mandate or errand. For this reason, public office-bearers, in all arms of the State, must regularly explain how they have lived up to the promises that inhere in the offices they occupy. And the objective is to arrest or address underperformance and abuse of public power and resources. Since this matter is essentially about executive accountability, that is where the focus will be.”

100. In this case the 1st and 2nd Respondents have not explained the basis upon which they decided to withhold the disbursement of the funds that were earmarked for the Petitioner by those constitutionally mandated to approve the same. With due respect the said Respondents were misusing and abusing the state power to settle their own scores rather than to render service to the people of Machakos County. State

power, in my view, is geared towards service to the people and ought not to be annexed for achievement of collateral and I dare say mischievous, improper and collateral purposes. To deliberately set out to cripple the activities of a constitutional body in order to bring its operations to a halt with a view to making it “toe the line” can only call for condemnation from this Court. Therefore the actions or inactions of the 1st and 2nd Respondents were not based on law and were ultra vires their powers and mandate. They were in fact unconstitutional.

101. I must however point out that pursuant to Article 228(4) and (5) of the Constitution, the requisitions by the Petitioner must be subject to the approval of the Controller of Budget. This Court cannot therefore direct the 4th Respondent on how to conduct its Constitutional mandate. As was held in **Diana Kethi Kilonzo & Another vs. Independent Electoral & Boundaries Commission & 10 Others [2013] eKLR**:

“...the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities.

102. Accordingly, this Court cannot issue orders whose effect would be to compel the 4th Respondent to approve the Petitioner’s requisitions for funds without considering the law and the Constitution.

103. In the premises the orders which commend themselves to me and which I hereby issue are as follows:

(1) A declaration that the process of releasing funds to the Petitioner by the 1st, 2nd, 3rd and 4th Respondents is based on specific provisions of the Constitution of Kenya 2010, the County Government Act, 2012, the Public Finance Management Act, 2012 and other Acts and the 1st Respondent has no authority to refuse to release funds and or to revise downwards the Petitioner’s Budget as long as the same have been approved by the 4th Respondent.

(2) A permanent injunction restraining and/ or prohibiting the 1st and 2nd Respondents jointly and severally, their agents, or any person acting under their behest from withholding any funds budgeted for, approved and allocated to the Petitioner by the 4th Respondent.

(3) A mandatory order compelling the 1st and 2nd Respondents to release all the funds due and owing to the Petitioner as per the itemized Budgets submitted to the 2nd Respondent after approval by the 4th Respondent.

104. As this was litigation undertaken for the benefit of the public each party will bear own costs of this petition.

105. It is so ordered.

Read, signed and delivered in open Court at Machakos this 21st day of February, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Adira for Ms Kamende for the Petitioner

Mr Muema for Mr Mungata for the 1st and 2nd Respondents

CA Geoffrey