



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**PETITION NO. 514 OF 2016**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 20,21, 23, 27, 47, 73, 156, 159, 160, 165, 202, 203, 215, 216, 217, 218, 259 & 260 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 10, 27, 47, 56, 203 AND 216 OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

**COUNTY GOVERNMENT OF MANDERA.....1<sup>ST</sup> PETITIONER**

**COUNTY GOVERNMENT OF WAJIR.....2<sup>ND</sup> PETITIONER**

**COUNTY GOVERNMENT OF GARISSA.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**COMMISSION ON REVENUE ALLOCATION.....1<sup>ST</sup> RESPONDENT**

**KENYA NATIONAL BUREAU OF STATISTICS.....2<sup>ND</sup> RESPONDENT**

**HON. ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT**

**AND**

**THE NATIONAL ASSEMBLY.....1<sup>ST</sup> INTERESTED PARTY**

**THE SENATE.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGEMENT**

By a petition dated 5<sup>th</sup> December 2016, the County Governments of Mandera, Wajir and Garissa

(hereinafter referred to as the petitioners) challenged the decision by Kenya National Bureau of Statistics (the second Respondent) to circulate "adjusted, projected, altered figures or any other figures other than the published 2009 Population and Housing Census Results for the Counties of Mandera, Garissa and Wajir for purposes of determination of the shareable revenue for the financial year 2017/2018" which they claim would constitute contempt of court and a violation of several Articles of the constitution of Kenya, 2010 among them Articles 10,73,27, 47 and 203(1)(d), (f), (g), (h), and (j), 216 (3) (a).

Briefly, on 31<sup>st</sup> August 2010, the Minister of State for Planning, National Development and Vision 2030 (hereinafter referred to as the Minister) released the **2009** Kenya Population and Housing Census, which had been prepared and published by the second Respondent. The Minister is quoted issuing a statement threatening to cancel the results of Eight Districts citing irregularities and indeed the Minister cancelled the Results for Lagdera, Mandera East, Mandera Central, Mandera West, Wajir East, Turkana North, Turkana South and Turkana Central Districts.

The cancellation was successfully challenged in court in *High Court Misc. Civil Application No. 309 of 2010* and on **7<sup>th</sup> February 2012**, the court granted orders of *certiorari* and *prohibition* quashing the decision and prohibiting its circulation to various government bodies more particularly specified in the court decree. An appeal to the court of appeal against the said decision was partly successful as explained later in this judgement.

The petitioners herein are aggrieved by the decision to adjust the population results downwards, a process referred to as "smoothing of figures," which affected their population results at follows:-

- a. *Garissa:- the enumerated population of 623,060 was adjusted to 375,968, a variation of minus 247,092.*
- b. *Wajir:- the enumerated population 661,941 was adjusted to 399,432, a variation of minus 262,509.*
- c. *Mandera:- the enumerated population of 1,025,757 was adjusted to 618,966, a variation of minus 406,790.*

The total enumerated population of 2,310,757 for the three counties was adjusted by 1,394,366, a variation of minus 916,391, thus in aggregate each constituency in the marginalized North Eastern Counties of Mandera, Garissa and Wajir was reduced by **39.7%**. The petitioners aver that the United Nations Principles and Recommendations for Population and Housing Census do not provide for such a drastic adjustment and smoothing of figures is an unknown process in law or census taking, a move calculated to affect resource allocation and yet in other areas the adjustment was between -50 and -4,198 which are statistically insignificant figures compared to the petitioners enumerated above.

The petitioners further plead that the Minister in a Ministerial statement issued to Parliament on **21<sup>st</sup> February 2012** stated that the Government intended to use the 'Smoothened figures' as the final population figures for all planning purposes and that the **2011/2012** allocation for Constituency Development Fund as well as the Revenue allocation to county governments by the Commission for Revenue Allocation. The petitioners state that the said statement lacked legal force and was legally inconsequential in view of the Judgment in the case referred to above which was upheld by the court of Appeal in Civil Appeal No. 64 of 2012 as stated above, hence the decision violates the court decision which prohibited the circulation of the 2009 population results other than to extent allowed by the court of appeal as stated above.

The petitioners also aver that that in carrying out the adjustment in question, the Minister acted in ignorance of the historical fact that the North Eastern region of the country has always been marginalized. It is the petitioners case that the 2009 Census Results were the outcome of the total process of collecting, compiling, evaluating, analyzing and publishing demographic, economic and social data pertaining to the period of enumeration for the entire country and unlike in the past, the process took five days.

It is the petitioners case that by the 2<sup>nd</sup> Respondent recommending the use of projected census results, which are lower than the enumerated results for purposes of revenue allocation, the 2<sup>nd</sup> Respondent is not only attempting to circumvent the above decisions of the High Court and Court of Appeal, but also the decision lacks legal validity and violates the principle of the rule of law as provided for under **Article 10** of the Constitution and that allocation of revenue is equally critical and therefore, to ensure equity and equality to the residents of the three counties, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are bound to rely on the enumerated results in their formula for revenue allocation as the enumerated results are a reflection of the true population in the three counties.

The petitioners also correctly aver that the 1<sup>st</sup> Respondent is constitutionally mandated under **Article 216** of the Constitution to make recommendations on the equitable basis for revenue sharing among county governments and that **Article 217(1)** of the Constitution mandates the Senate to determine once every five years the basis for allocating among counties, the share of national revenue that is annually allocated to county governments and that **Section 16** of the **Sixth Schedule** of the Constitution provides that the preparation of the first and second basis of sharing revenue be made at three year intervals despite the provisions of **Article 217(1)**.

The petitioners also state that in fulfilling its constitutional mandate under **Article 216** and **Section 16** of the **Sixth Schedule** of the Constitution, the 1<sup>st</sup> Respondent formulated the first basis for the equitable sharing of revenue among the county governments, which formula was approved by Parliament in **November 2012** and that pursuant to **Section 16** of the **Sixth Schedule** to the Constitution, the 1<sup>st</sup> Respondent formulated the second basis for the equitable sharing of revenue among the county governments, to be applied from the financial year **2017/2018**.

The Petitioners also state that from the parameter weights, population is of utmost importance carrying almost half the weight in consideration and that **Article 203(1) (j)** of the Constitution provides for the desirability of stable and predictable allocations of revenue and that the data used for the parameter of population is based on the 2009 population census results.

It is also averred that the second basis for the equitable sharing of revenue among the county governments as formulated by the 1<sup>st</sup> Respondent pursuant to its mandate under **Article 216** of the Constitution and **Section 16** of the Sixth Schedule to the Constitution, will then be applied to divide revenue raised by the national government among the national government and county levels of government for the financial year **2017/2018**, which division of revenue shall be introduced in Parliament by the Division of Revenue Bill at least two months before the end of the current financial year pursuant to the provisions of Article 218(1) of the Constitution.

The petitioners averred that the decision in question is calculated to prejudice the petitioners hence the reliefs sought herein.

The second Respondent in a Replying affidavit filed by its Director General Zachary Mwangi, adopted an affidavit filed by his predecessor in JR No. 309 of 2010 in which he averred that data quality determines the level of adjustments and referred to a manual attached to the affidavit on international best practices and cited what he called abnormal trends in some of the districts in the counties in question to justify the adjustments in question.

On record is the affidavit of George O. Ooko, the secretary to the first Respondent who averred that on 31<sup>st</sup> October 2016 the Commission received the adjusted population figures for 2009 census from the second Respondent for all the 47 counties and that apart from population which is weighed at 45%, the commission relies on other six parameters including Basic Equal Share at 18%, poverty Gap at 18%, Land Area at 8%, Fiscal Responsibility at 1%, P.E. Factor at 2%, Development Factor at 1%.

The interested parties, namely the National Assembly and the Senate did not file any responses to the petition nor were they represented in court. Counsel for the petitioner submitted that the core of the petition is the decision by the Commission on Revenue Allocation on the criteria to be used to share

Revenue for all the counties for 2016-2017 and 2017-2018 which the petitioners argue will result in inequitable sharing of resources if the adjusted results are used, hence this will be unconstitutional and cited various provisions of the constitution.

Mr. Omosa, for the second Respondent submitted that this case is *res judicata* citing the court of appeal decision and denied that there was discrimination and stated that the revenue allocation was fair. However, as explained above, the court of Appeal decision only partially allowed the appeal and set aside what it referred to a blanket order of prohibition and only set aside the orders to the extent that they prohibited the Commission on Revenue Allocation and the Kenya National Bureau of Statistics from publishing, issuing or gazetting projected results of the counties named in the said judgement which included the petitioners herein.

Miss Irari for the first Respondent adopted the replying affidavit filed on 14<sup>th</sup> February 2017 and associated herself with the submissions by Mr. Omosa.

Before addressing the issues raised in this petition, I propose to make general observations which will form the basis of my determination of the issues in question. One of the most important policy changes ushered in by Kenya's 2010 constitution was an overhaul of the way in which resources are shared across the country. The constitution took this power away from the executive and created new bodies, including the Commission on Revenue Allocation and the Senate, to lead a more transparent and objective process of deciding how to share resources. Article 216 (1) of the Constitution mandates the Commission on Revenue Allocation to make recommendations concerning the basis for the equitable sharing of revenue raised by the National Government between the national and county governments, and among the county governments. Article 216 (2) mandates the Commission to make recommendations on other matters relating to the financing of, and financial management by, county governments and to encourage fiscal responsibility. In 2012, the Commission on Revenue Allocation submitted its first recommendation on revenue sharing to Parliament. That recommendation, which was eventually revised and adopted by Parliament, introduced a new formula that fundamentally altered the distribution of resources in Kenya.

Article 217 (1) requires a revision to the way revenue is shared across the 47 counties every five years. However, for the first formula to guide revenue sharing in 2013 (the first year of devolution), the time period was shortened to three years. The decision about how to share revenues across the counties begins with a recommendation by the Commission on Revenue Allocation. This is forwarded to Parliament, which makes the final determination. The parliamentary process begins in the Senate, which can accept or amend the Commission on Revenue Allocation proposal. Once they have approved it, it moves to the National Assembly, which can only amend it with a supermajority. If they do amend it, it must still go back to the Senate for review or mediation.

Chapter 12 of the constitution lays out both detailed principles and elaborate procedures for making decisions about public finances. The core values in chapter 12 can be reduced to two:- **(a) public engagement throughout the process and equity in distribution of resources.** Article 202 (1) of the Constitution, for example, makes the equity principle explicit: "Revenue raised nationally shall be shared equitably among national and county governments."

Chapter 12 opens by reminding us that public finance should be conducted in an open and accountable manner, with ample public participation. There are actually two key moments when participation is explicitly required in the annual budget process: one is when the decision about the division of revenue between national and county governments is made, the other is when Parliament makes its decision about the executive's proposed budget. Funding for counties was singled out as a decision that particularly required broad participation.

The decision about how much money to give counties actually involves two choices. The first is the issue of how much of the total national pot to give to the two levels of government. This is sometimes referred to as the "vertical" share. The second decision is how much should each individual county get of the total that is given to the counties as a whole. This is sometimes referred to as the "horizontal share."

The constitution clarifies that these two decisions must take into account the principle of equity. This is spelled out in Article 203, which mentions several factors that should guide the horizontal share in particular: developmental needs, fiscal capacity, and incentives for counties to optimize their own revenue collection. “Economic disparities” and “affirmative action in respect of disadvantaged areas and groups,” are also mentioned.

Article 201 of the Constitution provides for openness, accountability and public participation in financial matters.

Article 216(1)(a) of the Constitution mandates the Commission on Revenue Allocation (CRA) to make recommendations concerning the basis for the equitable sharing of revenue raised nationally between the national and county governments. The constitution further stipulates in article 203(1) the criteria to take into account when determining the equitable share between the two levels of Government enumerated above.

The first issue for determination is whether or not this case is *res judicata*. The Ministers decision was challenged in High Court J. R. Misc. Application No. 309 of 2010 and on 7<sup>th</sup> February 2012, the High court issued an order of certiorari quashing the ministers decision cancelling the 2009 Population and Housing Census Results for Lagdera, Mandera East, Mandera Central, Mandera West, Wajir East, Turkana North, Turkana South and Turkana Central Constituencies and an order of Prohibition prohibiting the Minister and the second Respondent from publishing, issuing or gazetting Projected Results for the said constituencies and from circulating any other figures other than the published 2009 Population and Housing Census Results to any other organ of the Government, Constitutional Commissions, offices or organizations.

The court also prohibiting The I.E.B.C. from acting on any other Census data relating to **the said areas** other than the published 2009 Population and Housing Census Results in the determination of boundaries review and/or delimitation of new boundaries.

In the above case the court observed that neither the Minister of State for Planning, National Development and Vision 2030 nor the Kenya National Bureau of Statistics (‘KNBS) disputed at all, **“the accuracy of the number of inhabitants enumerated”** in the affected areas.

As explained above, the court of appeal only set aside the prohibition in so far as it prohibited the second Respondent from releasing the results in question to IEBC. The effect is that the appeal was partially successful but the other orders enumerated above remained in force. It follows that the assertion that the issue now before this court is *re judicata* is not correct. In fact, the correct position is that the judgement of the High court in so far as it was not set aside or varied by the court of appeal decision still remains in force, and this leads us to the next issue that is whether the decision of the second Respondent to propose and recommend the use of adjusted and projected census figures is in contempt of court and a violation of **Article 10** of the Constitution?

Having found that the High Court order still remains in force, I find no difficulty in finding that the Respondents were obliged to comply with the said decision. It is essential for the maintenance of the rule of law and order that the authority and the dignity of Courts is upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.

It must be remembered that court orders must be obeyed at all times in order to maintain the rule of law and good order. This of course means that the authority and dignity of our courts must be upheld at all times and this differentiates civilized societies from those applying the law of the jungle. It is the duty of the Court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with the approved contemnors.

The Court does not, and ought not to be seen to make orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.

A Court order is binding on the party against whom it is addressed and until set aside remain valid and is to be complied with. I shudder to think of the place of our judicial system if parties are left to freely decide what court orders to obey and which ones to ignore. Parties must realize that once they are brought to court they are subject to the jurisdiction of the Court. Under Article 159(1) of the Constitution, Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the Constitution. In exercising judicial authority the Courts and Tribunals are, *inter alia*, to be guided by the principle that the purpose and principles of the Constitution shall be protected and promoted. Under Article 10(1) of the Constitution the national values and principles of governance in the Article bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets the Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Under clause (2)(a) of the same Article the national values and principles of governance include the rule of law.

**Musinga, J** (as he then was) in *Moses P N Njoroge & Others vs. Reverend Musa Njuguna & Another* was of the view, which view I respectfully associate with, that the rule of law requires that orders of the Court be respected and obeyed and that duty equally applies even where a party is dissatisfied with an order and has appealed to an appellate court against the order, ruling or judgment. Willful and flagrant disobedience of court orders undermine the authority and dignity of the Courts and must be dealt with firmly so that the Court's authority is not brought into disrepute.

The next issue for determination is whether the 1<sup>st</sup> Respondent's decision to use the adjusted census results data for the population parameter to determine the shareable revenue for the financial year **2017/2018** to the county governments is arbitrary and irrational. In my view, the 2<sup>nd</sup> Respondent's act of recommending the use of projected census results, which are lower than the enumerated results for purposes of revenue allocation, is a flagrant breach of the above court order, and also it lacks legal validity and violates the principle of the rule of law as provided for under **Article 10** of the Constitution.

The Constitution of Kenya gives prominence to national values and principles of governance. Article 10 (2) of the Constitution provides the national values and principles of governance enumerated earlier in this judgment. Article 232 of the Constitution further provides for the principles that inform public service. These principles are binding on all State organs, State officers, public officers and all persons whenever any of them applies, or interprets, the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.

Article 202 of the constitution provides that Revenue raised nationally shall be shared equitably among the national and county governments. To the extent that the downgraded population results has led or will translate to a reduced revenue allocation to the petitioners, this will obviously disadvantage the petitioners and will in my view go against the provisions of article 202 cited above.

Section 10 (1) of The Commission on Revenue Allocation Act, 2011 provides that the commission shall:-

- a. make recommendations for consideration by Parliament prior to any Bill appropriating money out of the Equalization Fund is passed in Parliament;*
- b. upon request from the Senate, make recommendations on the basis for allocating among the counties the share of national revenue that is annually allocated to the county levels of government;*
- c. submit recommendations to the Senate, National Assembly, national executive, County Assembly and county executive on proposals made for equitable distribution of revenue between the national and county governments and amongst the county governments taking into account the criteria set out in Article 203 of the constitution, including recommendations on the amounts earmarked for*

*specific purposes such as the constituency development fund, among others; and....*

Article 259 of the constitution enjoins the court to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. This court is obliged under Article 159 (2) (e) of the constitution to protect and promote the purposes and principles of the constitution. Also, the constitution should be given a purposive, liberal interpretation. The provisions of the constitution must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other.

It is also important to bear in mind Article 201 (b) (ii) which provides that revenue raised nationally shall be shared equitably among national and county governments and Article 202 (1) which provides that Revenue raised nationally shall be shared equitably among the national and county governments

Article 203 (1) of the constitution provides as follows:-

*203. (1) The following criteria shall be taken into account in determining the equitable shares provided for under Article 202 and in all national legislation concerning county government enacted in terms of this Chapter—*

*(a) the national interest;*

*(b) any provision that must be made in respect of the public debt and other national obligations;*

*(c) the needs of the national government, determined by objective criteria;*

*(d) the need to ensure that county governments are able to perform the functions allocated to them;*

*(e) the fiscal capacity and efficiency of county governments;*

*(f) developmental and other needs of counties;*

*(g) economic disparities within and among counties and the need to remedy them;*

*(h) the need for affirmative action in respect of disadvantaged areas and groups;*

*(i) the need for economic optimization of each county and to provide incentives for each county to optimize its capacity to raise revenue;*

*(j) the desirability of stable and predictable allocations of revenue; and*

*(k) the need for flexibility in responding to emergencies and other temporary needs, based on similar objective criteria.*

The word Equitable used in the above provisions needs no explanation. Equitable is defined as:-

*(a). Of or relating to rights historically enforced in courts of equity.*

*(b). Resolved not simply according to the strict letter of the law but in accordance with principles of substantial justice and the unique facts of the case.*

One of the criteria stated in Article 203 is the need for affirmative action, economic disparities, and need to remedy them and developmental and other needs. The counties in question have for a long time been marginalized and the decision to downgrade the population census results in total breach of a court order to the extent that revenue allocation allocated to them is reduced, is in my view a violation of Article 203 cited above.

The spirit of the constitution must preside and permeate the process of judicial interpretation and judicial discretion. My understanding is that the spirit of the constitution is to ensure equitable distribution, a distribution that must be fair to all the counties.

The counties in question have a right to enjoy a *prima facie*, presumptive inviolability of the above provisions and a right to reasonable expectation of a fair allocation of revenue as guaranteed under the constitution. Louis Henkin wrote in *The Age of Rights*.

*"Government may not do some things, and must do others, even though the authorities are persuaded that it is in the society's interest (and perhaps even in the individual's own interest) to do otherwise; individual human rights cannot be sacrificed even for the good of the greater number, even for the general good of all. But if human rights do not bow lightly to public concerns, they may be sacrificed if countervailing societal interests are important enough, in particular circumstances, for limited times and purposes, to the extent strictly necessary."*

Other than using the phrase "smoothing of figures" which is claimed to be an accepted way of rationalizing census figures, it has not been shown that it was necessary and justifiable to sacrifice the rights and interests of the petitioners and whether the decision was proportionate and justifiable in the circumstances to warrant denial or deprivation of equitable distribution guaranteed under the constitution.

Former President of the Supreme Court of Israel, Aharon Barak, said proportionality can be defined as 'the set of rules determining the necessary and sufficient conditions for a limitation on a constitutionally protected right...'. Leading Authors G. Huscroft, B Miller and G Webber (eds) have authoritatively stated the jurisprudence of proportionality includes this 'serviceable—but by no means canonical—formulation' of the test:--

- i. Does the government action establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?*
- ii. Are the means in service of the objective rationally connected (suitable) to the objective?*
- iii. Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective?*
- iv. Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right?*

A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. Even if the objective is of sufficient importance and the measures in question are rationally connected to the objective, the limitation may still **not** be justified because of the severity of its impact on individuals or groups. When employing the language of proportionality the High Court would ask whether the end could be pursued by less drastic means, and it has been particularly sensitive to decisions that impose adverse consequences unrelated to their object, such as the infringement of basic common law rights.

I am aware that the test as to what is democratically reasonable and justifiable is not susceptible precise legal formulation. Nevertheless, as was recognized by Gubbay CJ in the often-cited case of *In re Munhumeso & Others*:-

*"What is reasonably justifiable in a democratic society is an illusive concept – one which cannot be precisely defined by the courts. There is no legal yardstick save that the quality of reasonableness of the provision under challenge is to be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right."*

I hold that the decision complained of was totally unjustifiable, it is not proportionate, and offended the above constitutional provisions, precisely it is in violation and contravention of the criteria set out under

Article 203(1)(d), (f), (g), (h) and (j) of the Constitution, and further the decision by the 1<sup>st</sup> Respondent's to use the adjusted census results data for the population parameter to determine the shareable revenue for the financial year 2017/2018 to the county governments contravenes the provisions of Article 216(3)(a) of the Constitution.

I also find that the 2<sup>nd</sup> Respondent's decision to circulate adjusted, projected, altered figures or any other figures other than the published 2009 Population and Housing Census Results for the Counties of Garissa, Wajir and Mandera to the 1<sup>st</sup> Respondent or any other organ of the Government, Constitutional Commissions, offices or organizations for purposes of determination of the shareable revenue for the financial year 2017/2018 for the three counties was done in total disregard of a court decree, was made in bad faith since reliance of the altered results which had been upheld by the high court would lead to reduced allocation of revenue to the petitioners in total contravention of the above provisions of the constitution.

I find and hold that this petition has merits and that the petitioners have demonstrated to the required standard that the decision to use the altered results for purposes of revenue allocation is unjustifiable, unfair and a breach of the various provisions of the constitution cited above. Consequently, I allow the petition and make the following orders/declarations:-

a) **A DECLARATION** be and is hereby issued declaring that the 2<sup>nd</sup> Respondent's decision to circulate adjusted, projected, altered figures or any other figures other than the published 2009 Population and Housing Census Results for the Counties of Mandera, Garissa and Wajir to the 1<sup>st</sup> Respondent or any other organ of the Government, Constitutional Commissions, offices or organizations for purposes of determination of the shareable revenue for the financial year **2017/2018** is in contempt of court orders issued in J.R. 309 of 2010 and Civil Appeal No. 643 of 2012 and a violation of **Article 10 and 73** of the Constitution and therefore null and void.

b) **A DECLARATION** be and is hereby issued that the rights of the residents of Mandera, Wajir and Garissa Counties under **Article 27** to equal protection and equal benefit of the law under the Constitution have been infringed and threatened with violation by the Respondents.

c) **A DECLARATION** be and is hereby issued that the decision by the Respondents to use adjusted census figures for purposes of determination of the shareable revenue for the financial year **2017/2018** violates the rights of the residents of Mandera, Wajir and Garissa Counties to fair administrative action guaranteed under **Article 47** of the Constitution.

d) **A DECLARATION** be and is hereby issued that the 1<sup>st</sup> Respondent's decision to use the adjusted census results data for the population parameter to determine the shareable revenue for the financial year 2017/2018 to the county governments with the effect of reducing the revenue shareable to the Petitioners is in violation and contravention of the criteria set out under Article 203(1)(d), (f), (g), (h) and (j) of the Constitution.

e) **A DECLARATION** be and is hereby issued that the 1<sup>st</sup> Respondent's decision to use the adjusted census results data for the population parameter to determine the shareable revenue for the financial year **2017/2018** to the county governments with the effect of reducing the revenue shareable to the Petitioners contravenes the provisions of **Article 216(3)(a)** of the Constitution and therefore null and void.

f) An Order of Certiorari be and is hereby issued to remove into this Honourable Court and quash the decision of the 2<sup>nd</sup> Respondent to recommend and propose to the 1<sup>st</sup> Respondent the use of adjusted census results data for the population parameter of the revenue allocation formula to determine the shareable revenue for the year **2017/2018** for the counties of **Garissa, Wajir and Mandera**.

g) An Order of Certiorari be and is hereby issued to remove into this Honourable Court and quash

*the decision of the 1<sup>st</sup> Respondent as communicated in the email dated 26<sup>th</sup> October 2016 to use adjusted census results data as recommended and proposed by the 2<sup>nd</sup> Respondent for the population parameter of the revenue allocation formula to determine the shareable revenue for the financial year 2017/2018 or any other financial year for the counties of **Garissa, Wajir and Mandera.***

*h) An Order of Prohibition be and is hereby issued prohibiting the 1<sup>st</sup> Respondent from using the adjusted, projected, altered figures or any other figures other than the published 2009 Population and Housing Census Results for the Counties of **Garissa, Wajir and Mandera** for the population parameter of the revenue allocation formula to determine the shareable revenue for the financial year 2017/2018 for the counties of **Garissa, Wajir and Mandera.***

*i) An Order of Prohibition be and is hereby issued prohibiting the 2<sup>nd</sup> Respondent from circulating adjusted, projected, altered figures or any other figures other than the published 2009 Population and Housing Census Results for the Counties of **Garissa, Wajir and Mandera** to the 1<sup>st</sup> Respondent, the National Assembly, the Senate, the National Treasury or any other organ of the Government, Constitutional Commissions, offices or organizations for purposes of determination of the shareable revenue for the financial year 2017/2018 for the three counties.*

*j) That the Respondents do pay the Costs of this petition to the Petitioners.*

Orders accordingly.

Right of appeal 30 days.

**Dated at Nairobi this 27<sup>th</sup> day of February 2017.**

**JOHN M. MATIVO**

**JUDGE**