



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTION AND HUMAN RIGHTS DIVISION

PETITION NO. 334 OF 2016

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF THE RIGHTS AND FREEDOMS IN ARTICLES 25(C), 47(1), and (2), 48 and 50(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF THE CONSTITUTION IN ARTICLES 2,3,10,19(1) and 2, 20(1) and (2),21(1),23,258(1) and 259(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT OF THE CONSTITUTION IN ARTICLES 96(3), 226(2), AND 229 (7) and (8) OF THE CONSTITUTION OF KENYA

BETWEEN

KYALO KAMINA.....PETITIONER

VERSUS

THE SENATE.....1ST RESPONDENT

THE SPEAKER OF THE SENATE.....2ND RESPONDENT

AND

NAIROBI CITY COUNTY ASSEMBLY.....1ST INTERESTED PARTY

HON.DR. EVANS KIDERO.....2ND INTERESTED PARTY

JUDGMENT

INTRODUCTION

[1] The Petitioner sues the 1st respondent who is the Senate, as an arm of the Government established under Article 93(1) of the Constitution and its Speaker as the 2nd respondent established under Article 106(1) (a) of the Constitution and who presides over the Senate. The 1st interested party is an organ of the County Government established under Article 176(1) whereas the 2nd Interested Party is the Governor and head of executive of Nairobi City County duly elected under the provisions of Article 180(1) of the Constitution.

[2] The Petition seeks the Court's interpretation of Article 229 (7) of the Constitution which provides that the Auditor General's "**Audit reports shall be submitted to Parliament or the relevant county assembly.**" The petitioner's cause of action arises from summons by the 1st Respondent to the 2nd Interested Party to produce certain documents pursuant to the Auditors' Report of 2013/2014 which the Petitioner

contended has already been considered and appropriate action taken by the 1st respondent County Assembly, and consequently urged that the Senate had no power to consider the Report, in view of the provisions of Article 229 (7) that gave concurrent jurisdiction to the Senate and the County Assembly. The Petitioner's case is that once as the two organs have concurrent jurisdiction and once one of the two organs in the sub-article has considered the auditor's report, the other cannot validly consider the same report.

[3] The petitioner's contention is grounded on the following provisions of the Constitution as follows:

- a. Article 2 of the Constitution is the supreme law of the republic and binds all persons and state organs of the Government.
- b. Article 3 states that every person has an obligation to respect, uphold and defend the Constitution.
- c. Article 10 provides that the national values and principles of governance bind all state organs, state officers, public officers and all persons
- d. Article 19 (1) and (2) asserts that the bill of rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies which is meant to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.
- e. Article 20(1) and 2 of the Bill of rights applies and binds all state organs and persons and further that every person shall enjoy the rights and fundamental freedoms in the bill of rights to the greatest extent consistent with the nature or fundamental freedom and also that Article 21(1), 22(1) of the constitution have been infringed upon.
- f. Article 48 that the state shall ensure access to justice for all persons and if any fee is required, it shall be reasonable and shall not impede access to justice and
- g. Article 50(1) states every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court

[4] The Petitioner sets out the relevant provisions of law and contends that the respondents have also violated Article 96(3), 226(2) and 229(7) and (8) of the Constitution. Article 96(3), the Senate determines the allocation of National revenue among Counties as provided in Article 217 and exercises oversight over National revenue allocated to the County Governments. Article 226(2) which provides that the accounting officer of a National public entity is accountable to the National Assembly for its financial management, and the accounting officer of a County public entity is accountable to the County Assembly for its financial management. Article 229(7) and (8) states that audit reports shall be submitted to Parliament or the relevant County Assembly and within three months after receiving an audit report, Parliament or the County Assembly shall debate and consider the report and take appropriate action. Article 23(1) provides that the High Court has jurisdiction in accordance with Article 165 to hear and determine applications for redress of a denial, violation or infringement, and a threat to a right or fundamental freedom. When a party brings an action under Article 22 then a court can grant appropriate reliefs which include; a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law, an order for compensation and an order of judicial review. Article 258(1) gives every person the right to institute court proceedings claiming that the Constitution has been contravened or is threatened to be contravened. Article 259(1) provides that the Constitution shall be interpreted in a manner that promotes its purpose, values and principles and that the rights and freedoms talked herein permit the development of the law and contributes to good governance.

Facts of the case

[5] The Auditor General has the mandate under Article 229(4) of the Constitution to within 6 months in respect of each year to audit and report among others the accounts, funds and authorities of the National and County Governments. The Auditor General has been doing that at the end of every financial year.

[6] Article 229(7) provides that the Auditor General is obligated to submit to Parliament or the relevant County Assembly the audit report and in respect of the reports of the Nairobi City County Government it has always submitted the reports to the Nairobi city County Assembly.

[7] The Nairobi City County Assembly who is the 1st interested party herein is mandated under Article 229(8) to consider the report within 3 months and in this case they considered the 2013/2014 financial audit year report.

[8] On 11/5/2016 the Senate, who is the 1st respondent herein addressed a letter to the 1st interested party herein to submit a list of documents for full interrogations on the financial operations of the Nairobi County Executive for the 2013/2104 financial year

[9] The Petitioner alleges that the said letter to the 1st interested party raises many questions amongst them:

- i. When did the Auditor General submit the Audit Report for the financial year 2013/2014(1st July 2013 to 30th June 2014) to the Senate for consideration?
- ii. Whether it is legal for the Auditor General to submit the Audit Report to both the Senate and the Nairobi City County Assembly.
- iii. Which action between the two bodies named above takes precedence if both recommend different actions/

iv. Is it in the spirit of the Constitution to put two public institutions in a situation of conflict?

[10] In regards to Article 50(1), all the queries raised by the Auditor General were sufficiently dealt with by the Nairobi City County Assembly in a public hearing and it would result to breach of the right to fair hearing if the proceedings were restarted yet the findings and recommendations of the Nairobi City County Assembly were never challenged

[11] The Petitioner also alleged that in violation of Article 125(c) the County Government of Nairobi has been subjected to unending summoning and questioning of its officials in respect of the Audit Report which is a breach of the right to fair hearing to the County Government of Nairobi and its leadership.

RELIEFS SOUGHT

[12] The petitioner thus prays for the following reliefs :

- a. Declaration that the respondents have violated articles 2,3,10,19(1) and 2, 20(1 and 2), 21(1), 22(1), 23, 25(c), 47(1 and 2), 48, 50(1), 96(3), 226(2) and 229(7 and 8)
- b. A declaration that considering for purposes of taking action(s) by the 1st and 2nd respondents, their committees, officials, servants and /or agents or anybody working under the auditor's report for the financial year 2013/2014 is unconstitutional ,unlawful, irregular, illegal, null and void
- c. A declaration that the letter dated 11/5/2016 by the 1st respondent's Sessional County Public Accounts and Investments Committee which was addressed to the County Government through the 1st interested party to submit documents for interrogation is unconstitutional, unlawful, irregular, illegal, null and void,
- d. Costs of the petition and any other relief that the court may deem fit to grant.

THE RESPONDENTS CASE

[13] The 1st and 2nd respondents filed their grounds of opposition on 3/11/2016 in opposition of the petition by stating that;

[14] Article 229(6) (a) of the Constitution requires the Auditor General to audit and report on the accounts of the National and County Governments and Article 229(7) requires the report to be submitted to Parliament.

[15] Article 96(1) gives power to the Senate to represent the Counties and to protect the Counties interests. It further gives the role to be played by the Senate as follows:

- a. It represents the Counties and serves to protect the interests of the Counties and their Governments.*
- b. It participates in law making function of Parliament by considering, debating and approving bills concerning counties.*
- c. It determines the allocation of National Revenue among Counties and exercises oversight over National Revenue allocated to the County Governments*
- d. It participates in the oversight of state officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145.*

[16] Article 190(2) provides that County Governments shall operate financial management systems that comply with any requirements prescribed by National Legislation thus the Senate has to check whether the County has complied. Article 259 requires the Constitution to be interpreted in a manner that promotes it's purpose, values and principles and that it is good governance, integrity, transparency and accountability that form part of the national values and principles of governance.

[17] The respondents relied on Article 254 (2) which states that the President, the National Assembly or the Senate may require a commission or holder of an independent office to submit a report on a particular issue and the sovereignty of the people is exercised either by the people directly or through their elected representatives.

[18] The Senate uses the Auditor Report to exercise its oversight role over the National Revenue that has been allocated to County Governments and it has the power to call for evidence as seen in Article 125(2) a House of parliament and any of its Committees has the same powers as the High Court:

- a. to enforce the attendance of witnesses and examine them on oath, affirmation or otherwise
- b. to compel the production of documents and
- c. to issue a commission or request to examine witnesses abroad.

[19] The role of the Senate is not limited to **national** revenue but they also ensure Governors carry out their duties. Article 179(4) provides that the County Governor and his/her deputy is the Chief Executive and Deputy therefore they are answerable to the Senate. The role of the Senate in Public and County Revenue has been determined by the Supreme Court in the case of **Speaker of the Senate and Anor Vs Attorney General and 4 Others [2013]**.

[20] The respondents have listed down the role of the County Governments as listed in *section 30* of the County Governments Act 2012 which includes *inter alia* to:

- a. submit the County plans and policies to the County Assembly for approval
- b. consider , approve and assent to Bills passed by the County Assembly
- c. submit to the County Assembly an annual report on the implementation status of the County policies and plans

[21] The respondents state that Article 229(7) of the Constitution does not preclude the Senate from receiving the annual report of the Auditor General. It's not wrong for both the Senate and County Assembly to exercise concurrent jurisdiction over a County Government and there is nothing adverse to any person if both arrive at different conclusions as long as the resolutions made are lawful and constitutional. Finally, they state that there is no violation of the Constitution and the public interest lies in allowing the Senate to continue with its constitutional role of oversight and that the petition should therefore be dismissed with costs.

[22] The 1st Interested Party County Assembly supported the case of the Petitioners and the 2nd Interested Party did not enter appearance to the Petition.

SUBMISSIONS BY THE PARTIES

[23] The petitioner opted to file written submissions whereas the respondents filed grounds of opposition dated 3/11/2016.

The Petitioner's Submissions

[24] Article 229(4) provides that the Auditor General has an obligation to submit the Audit Report for both the National and County Governments within 6 months The Petitioner submits that indeed Article 229 (7) strictly expresses that the Auditor General has to submit to Parliament or the relevant County Assembly. It is urged that the Auditor General is an independent office by virtue of Article 252(3) d of the Constitution. That although the Auditor's report shall be submitted to Parliament or the relevant County Assembly within 3 months upon receipt of the Audit Report for consideration purposes so that they take appropriate action. It is argued that Article 254 (1) and (2) cannot be read in exclusion of Article 229(7) and (8), in that a law that expressly governs a specific matter or issue overrides a provision that governs general matters only.

[25] The Petitioner agrees that both the 1st respondent and 1st interested party have concurrent jurisdiction to take and consider appropriate action. They pose the question and because of that they ask whether the 1st respondent has power to reconsider an Audit Report that has already been considered by the County Assembly. They submit that words appearing in any legislation ought to be given their natural meaning and rely on **Antoine Ndiave vs African Virtual University (2012) eKLR**. **They therefore** submit that the Auditor General is expressly prohibited under Article 229(7) from submitting a financial report of a County for a particular year to Parliament once he submits the same to the respective County Assembly for consideration and subsequent recommendation for appropriate actions.

The effect of concurrent jurisdiction

[26] That the 1st respondent lacks power to reconsider an Audit Report on Nairobi City County which had previously been considered by the 1st interested party pursuant to Article 229(8) together with Article 229(7). Once the concurrent jurisdiction has been exercised by the 1st interested party it is no longer tenable for the 1st respondent to exercise the same jurisdiction. They have relied on a Supreme Court judgment in **Hermanus phillipus Steyn Vs Giovanni Gneccchi –Ruscone (2013) eKLR** where the Court adopted the definition in **Blacks Law Dictionary** on concurrent jurisdiction:

“Concurrent jurisdiction is. Jurisdiction which might be exercised simultaneously by more than one court over the same subject matter and within the same territory, a litigant having the right to choose the court in which to file the action. We would agree with counsel that indeed we have concurrent jurisdiction and when one opts to exercise one's right under either of the entities with jurisdiction, one cannot again go before the other entity with the same subject matter.”

[27] Further that the 1st respondent was not the appellate body and it would be an abuse of the oversight function to purport to consider an Audit Report on Nairobi City County which had already looked at the Audit Report and recommended appropriate actions to be undertaken.

[28] The Petitioner has also relied on **R v Minister for Agriculture and 6 others [2013] eKLR** where the court held; **“My finding therefore is that this matter has been dealt with by a competent court of concurrent jurisdiction and this court is in this respect divested of the jurisdiction to deal with the matter again”**. In view of the above submissions the petitioner prays that the court finds the 1st respondent lacks jurisdiction and power to reconsider the Auditor General's Audit Report for the 2013/2014 financial year.

The 1st and 2nd respondent's submission

[29] The respondents framed the following issues for determination:

- i. *Whether the Senate has a role in the oversight of County Finance*
- ii. *Whether it is constitutional for the Senate to consider the report of the Auditor General presented to Parliament.*

[30] It was pointed out that Article 254(1) and (2) of the Constitution requires the holders of independent office such as the Auditor General to submit a report to Parliament and the Senate has power to call for reports on particulars issues, as follows:

254. (1) As soon as practicable after the end of each financial year, each commission, and each holder of an independent office, shall submit a report to the President and to Parliament.

(2) At any time, the President, the National Assembly or the Senate may require a commission or holder of an independent office to submit a report on a particular issue.

(3) Every report required from a commission or holder of an independent office under this Article shall be published and publicised.

[31] The respondents submit that the Auditor is required to submit the Audit Reports of both the National and County Governments as guided by the Supreme Court judgment in ***Speaker of the Senate and Anor Vs Attorney General and 4 Others [2013]*** where court reiterate Article 6 (2) of the Constitution as follows:

“(2) The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation”

[32] It is also the respondent’s submission that the Senate determines the allocation of National Revenue among the Counties and thereafter checks whether the County Governments are operating within the financial management systems. The respondents further submit that Article 259 of the Constitution provides that the Constitution to be interpreted in a manner that promotes its purposes and values, and the Senate is therefore empowered to take care of Counties including to interrogate the report presented to Parliament. They have relied on the Supreme Court in ***Re The Matter of the Interim Independent Electoral Commission [2011] eKLR*** in which the Court held; that the Senate (which brings together County interests at the national level) and the National Assembly (a typical organ of national government) deal expressly with matters affecting County Governments. This decision was also upheld by the High Court in ***International Legal Consultancy Group Vs Senate and Clerk of the Senate[2014]eKlr*** and in the Supreme Court decision in ***Supreme Court Advisory Opinion No. 2/2013*** the Court held that ***“though the Senate is entrusted with a less expansive legislative role than the National Assembly, it stands as the Constitution’s safeguard for the principle of Devolved Government. Therefore the Senate has a critical role in ensuring that the Counties interests are protected at the National level of Government”***.

[33] In opposing the petition the respondents set out the role of the Senate which is outlined in Article 96 of the Constitution as follows;

- a. *The Senate represents the Counties and serves to protect the interests of the Counties and their Government.*
- b. *The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning Counties, as provided in Article 109 to 113.*
- c. *The Senate determines the allocation of National Revenue among Counties, as provided in Article 217, and exercises oversight over National Revenue allocated to the County Government*
- d. *The Senate participates in the oversight of state officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145.*

[34] In furtherance of the roles above the Senate under Article 125 of the Constitution is given powers of the High Court as follows -

“**125. (1) Either House of Parliament, and any of its committees,**

has power to summon any person to appear before it for the purpose of giving evidence or providing information.

(2) For the purposes of clause (1), a House of Parliament and any of its committees has the same powers as the High Court—

(a) to enforce the attendance of witnesses and examine them on oath, affirmation or otherwise;

(b) to compel the production of documents; and

(c) to issue a commission or request to examine witnesses abroad.”

[35] The word oversight means overseeing and the Senate by calling the 1st interested party to produce documents in regard to finance and County Revenue was carrying out its function as outlined in various cases which include judgment in the Supreme Court in ***Speaker of the Senate and Another Vs Attorney General [2013]***, ***High court in Council of Governors and 6 Others V Senate[2015] eKlr*** and in

International Legal Consultancy Group Vs The Senate and the Clerk of the Senate; Kerugoya Constitutional Petition No.8 of 2014.

[36] The respondents emphasize that the County Government in section 30 of the County Governments Act, 2012 requires that the Governor should be accountable for the management and use of the County Resources. Section 30 (2) of the Act gives the functions of the Governor, which he is obligated to exercise in accordance with subsection (3) as follows:

“(3) In performing the functions under subsection (2), the governor shall—

(a) provide leadership in the county’s governance and development;

(b) provide leadership to the county executive committee and administration based on the county policies and plans;

(c) promote democracy, good governance, unity and cohesion within the county;

(d) promote peace and order within the county.

(e) promote the competitiveness of the county;

(f) be accountable for the management and use of the county resources; and

(g) promote and facilitate citizen participation in the development of policies and plans, and delivery of services in the county.”

[37] The respondents submit that Article 185 (3) of the Constitution provides an oversight function on the County Assembly urging as follows:

*“A County Assembly while representing the principle of the separation of powers **may** exercise oversight over the County Executive Committee and any other County Executive Organs; Hence the use of the word **may** gives the Senate the mandate to review the matters raised in the Audit report which had been submitted by the Auditor General.”*

Thus need to have checks and balances and separation of power put in place to ensure that Devolution is sustained.

Was it constitutional for the Senate to consider the report that had been presented to parliament by the Auditor General?

[38] In interpreting the Constitution the respondents submit that Article 10, 259(1) and (3) and Article 20 are the provisions that offer an approach on how it should be interpreted and the courts need not go further than what is in the Articles that give guidance into its interpretation. The courts have to give a purposive approach in interpretation of the Constitution in accordance with Article 259. The courts have to ensure that interpretation would best serve the interests of the Constitution and would carry out its object and purpose. Therefore the relevant provisions have to be read together and not in disjoint and the court has to choose a meaning that would give effect to the Constitution in cases where the provisions has two meanings. When taking into account the contextual interpretation approach the courts have to be liberal and not rely on the legalistic approach only, citing the three-judge bench in **Joseph Mbalu Mutava Vs Attorney General and Anor [2014]**.

[39] The respondents submit that the use of the word ‘or’ in Article 229(7) ought to be construed disjunctively by granting the power to review the Auditor General’s report to both Parliament and the County Assembly and neither organ is precluded from debating the said reports in this case 2013/2014 financial audit reports. The role of the Senate Sessional Committee is provided in Section 8 of the Public Finance Act 2012 as follows:

The Committee of the Senate was established to deal with budgetary and financial matters in addition to the functions set out in the Standing Orders which include:

a) Present to the Senate subject to the exceptions in the Constitution, the proposal for the basis of allocating revenue among the Counties and consider any Bill dealing with County financial matters;

b) Review the County allocation of Revenue Bill and the division of Revenue Bill in accordance with Article 218(1) (b) of the Constitution at least two months before the end of the financial year.

c) Examine financial statements and other documents submitted to the Senate under part iv of this Act and make recommendations to the Senate for improving the management of Government’s Public Finance; and

d) Monitor adherence by the Senate to the principles of Public Finance set out in the Constitution and in the Fiscal Responsibility Principles Act.

[40] In carrying out its functions under subsection (1) (a) and (b) the Committee shall consider recommendations from the Commission on Revenue Allocation County Executive Committee members responsible for finance, the Intergovernmental Budget and Economic Council, the public and any other interested persons or groups. Therefore the respondents urge that there is nothing wrong with both the Senate and County Government exercising concurrent jurisdiction and it won’t have an adverse effect on any person.

[41] The respondents rely on the case in **International legal Consultancy Group Vs Senate and Clerk of the Senate; Kerugoya Constitutional Petition No. 8/2014** where the High Court made the following ruling:

“From the reading of the above provision of the law, it is clear that the senate is accorded tools to exercise its oversight function over expenditure of National revenue allocated to the County Governments which include receiving reports by the controller of budget and Auditor General. It is our determination therefore that since the Senate was properly seized of the matters with regard to issues raised by the controller of Budget in the county Implementation report, it had power to summon any person under Article 125 for purposes of giving evidence or providing information concerning the issues raised in that report”.

[42] Finally, the respondents submit that the petitioner has not demonstrated any violation of the Constitution and the public interest lies in allowing the Senate to continue with its constitutional role of oversight, thus the petition be dismissed with costs.

Issues of Determination

[43] The issues for determination by the Court are as follows:

- (a) What is the true meaning of Article 229 (7) and what is the impact of the requirements of Article 254 of the Constitution?
- (b) Whether the Auditor General obliged to file his report to **both** the Senate and the County Assembly under Article 229 of the Constitution.
- (c) Whether concurrent jurisdiction of the Senate and the County Assembly under Article 229 to consider the Auditor’s Report bars one organ from considering the report where the other has already considered the report.
- (d) Whether the reliefs sought by the Petitioner should be granted.

DETERMINATION

General Principles

[44] Article 259 of the Constitution sets out the principles for construction of the Constitution as follows:

“259. (1) This Constitution shall be interpreted in a manner that—

- (a) promotes its purposes, values and principles;*
- (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;*
- (c) permits the development of the law; and*
- (d) contributes to good governance.”*

[45] The values and principles of governance as set out in Article 10 of the Constitution include sharing and devolution of power, the rule of law, good governance, integrity, transparency and accountability as follows:

“(2) The national values and principles of governance include—

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;*
- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;*
- (c) good governance, integrity, transparency and accountability; and*
- (d) sustainable development.”*

[46] The Constitution itself therefore directs a purposive interpretation for the realization of its objects of the values and principles entrenched in it. The court’s interpretation must in relation to this petition accordingly uphold the principles set out above.

[47] See **Njoya and 6 Others v. Attorney General and 3 Others** (No. 2) [2004] 1 KLR 261, where the Court said, *“the Constitution is not an Act of Parliament but the supreme law of the land. It is not to be interpreted in the same manner as an Act of Parliament. It is to be construed liberally to give effect to the values it embodies and the purposes for which the makers framed it.”* The principle of purposive interpretation of law was discussed by the Court of Appeal in **Kimutai vs. Lenyongopeta and 2 Others [2005] 2 KLR 317:**

“It is elementary rule that a thing which is not within the letter of a statute will, generally, be construed as not within the statute

unless it also be within the real intention of the legislature, and the words, if sufficiently flexible, must be construed in the sense which, if less correct grammatically, is more in harmony with that intention. It was necessary, in order to arrive at the real meaning, to get to the exact conception of the aim, scope and aspect of the whole Act, to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief. The grammatical meaning of the words alone however is a strict construction which no longer finds favor with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the "purposive approach". In all cases now in the interpretation of statutes such a construction as will "promote the general legislative purpose" underlying the provision is to be adopted. It is no longer necessary for the judges to wring their hands and say, "There is nothing we can do about it". Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it by reading words in, if necessary so as to do what Parliament would have done, had they had the situation in mind."

[48] Moreover, the Articles in the Constitution cannot be read in isolation as standalone stipulations. They have to be read together so that they harmoniously promote its purpose, values and principles. The Constitution ought to be looked at as a whole and all the provisions on an issue should be considered so as to give effect to the purpose of the instrument.

What is the true meaning of Article 229 (7) and what is the impact of the requirements of Article 254 of the Constitution?

[49] Article 229 of the Constitution which is the primary constitutional text under consideration is in the following terms:

"**229.** (1) There shall be an Auditor-General 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 Auditor-General, a person shall have extensive knowledge of public finance or at least ten years experience in auditing or public finance management.

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

(4) Within six months after the end of each financial year, the Auditor-General shall audit and report, in respect of that financial year, on—

(a) the accounts of the national and county governments;

(b) the accounts of all funds and authorities of the national and **county governments;**

(c) the accounts of all courts;

(d) the accounts of every commission and independent office established by this Constitution;

(e) the accounts of the National Assembly, the Senate and the county assemblies;

(f) the accounts of political parties funded from public funds;

(g) the public debt; and

(h) the accounts of any other entity that legislation requires the Auditor-General to audit.

(5) The Auditor-General may audit and report on the accounts of any entity that is funded from public funds.

(6) An audit report shall confirm whether or not public money has been applied lawfully and in an effective way.

(7) Audit reports shall be submitted to Parliament or the relevant county assembly.

(8) Within three months after receiving an audit report, Parliament or the county assembly shall debate and consider the report and take appropriate action."

Article 254 of the Constitution provides as follows:

"**254.** (1) As soon as practicable after the end of each financial year, each commission, and each holder of an independent office, **shall submit a report to the President and to Parliament.**

(2) At any time, the President, the National Assembly or the Senate may require a commission or holder of an independent office to submit a report on a particular issue.

(3) Every report required from a commission or holder of an independent office under this Article shall be published and publicised."

[50] The role of Senate is set out in Article 96 of the Constitution as follows:

“96. (1) The Senate represents the counties, and serves to protect the interests of the counties and their governments.

(2) The Senate participates in the law-making function of

Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113.

(3) The Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments.

(4) The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145.”

[51] The Senate has clear roles in protecting the interests of the Counties and their governments and providing oversight of County Governments with regard to national revenue allocated to them. See also ***Speaker of the Senate and Another Vs Attorney General, Advisory Opinion No. 2 of 2013*** holding that - ***“Article 96 of the Constitution represents the role of the Senate as to protect devolution”***.

[52] If the Auditor General is obligated the Constitution under Article 254 (1) of the Constitution to submit a report to the Parliament (including the Senate) and under Article 254 (2) to submit a report on a particular issue as may be required at any time by the Senate, he cannot be faulted for presenting the Audit Report 2013/2014 to the Senate. Upon receipt of the Report, the Senate is empowered to call for a report on any particular issue under sub-article 2 of Article 254, and in so doing is empowered in the same manner as a High Court to summons the 2nd Interest Party County Governor in accordance with Article 125 of the Constitution.

[53] If the Senate can order a report under Article 254 (2) it must have power to consider a report under Article 229 (7) whether filed in the County Assembly or to Parliament or both.

[54] In exercise of its powers under Article 125 of the Constitution, the Senate is empowered to summon any person, including the accounting officers of the County Governments if such officers can provide information or evidence in relation to the national revenue allocated to a particular County. Section 30(3) (f) of the County Governments Act of 2012 provides that the County Governor shall be accountable for the management and use of County resources. By implication, this provision means that the County Governor as the overall head of the County is accountable for the utilization of County resources including the National revenue allocated to his or her respective County. Since the accounting officers at the County are directly answerable to the County Assembly for the management of financial resources under the Public Finance Management Act 2012, who then is the Governor accountable to under Section 30(3) (f)? The County Governors are not answerable to the County Assembly in terms of fiscal management of the County resources under Section 149 of the Public Finance Management Act 2012, they must be held to account by the Senate for the National revenue allocated to their respective Counties in view of the provisions of Section 30(3) (f) of the of the County Governments Act, 2012 as read together with Article 10(2) (c) on the National Values and Principles of Governance. The Governors being State Officers are bound by the national values of transparency, accountability and observance of good governance when performing their duties as the Chief Executive Officers of the County Governments.

[55] The 1st interested party vide a letter dated 11/05/2014 was summoned to appear before the Senate for purposes of presenting documents for consideration. The Senate exercised its powers under Article 125 of the Constitution to summon the 2nd interested party vide a letter dated 11th May 2016 In its letter the Senate indicates that they had considered the report of the Auditor General on the Financial Operations of the County Executive for the Financial Year 2013/2014(1st July 2013 to 30th June 2014). The Senate wanted the 2nd interested party to answer various questions amongst them to give documentation evidencing the closure of accounts and transfer of funds to the County Revenue Account, irregular payments for legal services, allocation of County land to private developers, outstanding imprest and rates, loss of Revenue due to computerization of off-street parking, misuse of fuel and poor maintenance of work tickets. The Petitioner stated that the Senate had gone overboard by issuing summons to the 2nd interested party. However the court notes that the letter could not be issued if the 2nd interested party did not have relevant knowledge or information necessary to assist the Senate on clarification. The 2nd interested party may properly be summoned by the 1st respondent.

[56] The Court finds that the action taken by the 1st respondent was within its constitutional mandate to protect the interests of the county government and to give effect to the principles of accountability by oversight of the County Government with regard to national revenue allocated to it and, therefore, not unconstitutional, unlawful, irregular, illegal, null and void as contended by the Petitioner.

Is the Auditor General obliged to file his report to both the Senate and the County Assembly under Article 229 of the Constitution.

[57] The County Government has oversight responsibilities over the County Government under Article 185 of the Constitution as follows:

“185. (1) The legislative authority of a county is vested in, and exercised by, its county assembly.

(2) A county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule.

(3) A county assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other county executive organs.

(4) A county assembly may receive and approve plans and policies for—

(a) the management and exploitation of the county's resources; and

(b) the development and management of its infrastructure and institutions.”

[58] Would the Auditor General be breaking the law in the Constitution by complying with a direction properly made by the Senate to file a report on a particular issue under Article 254(2), if the Auditor General had already presented his report on the particular issue to the County Assembly in terms of Article 229 (7)? I think that the Article 229 (7) of the Constitution is to be interpreted purposively as meaning that the Auditor General will have complied with his duty under that sub-article if he presents his report to either of the two organs but it does not restrain him from presenting the report to both of them. The reference to Parliament or the County Assembly in Article 229 (7) is to indicate **where** or **with whom** the report shall be filed.

[59] It is not a direction that the Auditor General must only file a report with one or the other of the two organs. The Court must seek to harmonious constitutional provisions on related subject of accountability rather than separately give effect to one clause at the expense, or to the exclusion, of another. The Auditor General is required by the purposive and harmonious construction of Articles 254 (1) and 229 (7) of the Constitution to present his audit reports to the Senate **and** the County Assembly, and not to either one or the other organ.

Does the concurrent jurisdiction of the Senate and the County Assembly under Article 229 to consider the Auditor's Report bar the one organ from considering the report where the other has already considered the report.

[60] Article 6 (2) of the Constitution provides as follows, “*the governments at the National and County levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation*”. It requires that the County Assembly in this case the 1st interested party is to work with the Senate, the 1st respondent, so that Article 10 of the Constitution on national values and principles of governance which binds all state organs, state officers, public officers and all persons whenever any of them makes or implements public policy decisions.

[61] Article 2 (1) of the Constitution declares our Constitution as the supreme law of this Republic and it shall bind all persons and all state organs at both National and County levels. In this case the 1st interested party and the petitioner being public officers are not an exemption to being summoned by the 1st respondent. The respondents have relied on a Supreme Court judgment in *Speaker of the senate and Anor vs Attorney General and 4 others* where the court held that indeed the National and county levels are distinct and interdependent, and shall conduct their mutual relations on the basis of consultation and cooperation. This court agrees with the Supreme Court's judgment. In the case of **Doctors for Life International Vs Speaker of the National Assembly and Others** it was held, “*Courts are required by the constitution to ensure that all branches of government act within the law and fulfill their constitutional obligations*”.

[62] As to the concurrent jurisdiction with probability of two different recommendations, a distinction is to be made between court proceedings as in the two cases cited *Hermanus Phillipus Steyn Vs Giovanni Gneccchi* (2013) and in *R Vs Minister for Agriculture and 6 others* (2013) eKLR and the matter of consideration of audit report by Senate and County Assembly. Firstly, because the Senate has been given an oversight role by Article 96 of the Constitution and the petitioner and 1st interested party are all bound by the Constitution to the principle of accountability, it must be able to discharge this constitutional mandate. Secondly, while the two organs may have concurrent jurisdiction to consider an Auditor's Report, the two have different scopes of consideration so that one, the Senate, has a more expansive jurisdiction to protect the interests of counties and their county governments including the County Assembly and an to oversight of national revenue to the county governments of which the County Assembly is part. Accordingly, while the two organs have a concurrent jurisdiction under Article 229 (7) to consider the Auditor's report, their scope of consideration is not coordinate. The County Assembly for example has no mandate to oversight the County Executive on the national revenue allocated to the County Government. Indeed, Article 185 (3) expressly requires the County Assembly to observe the principle of separation of powers as follows:

“185 (3) A county assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other county executive organs.”

[63] The Constitution has outlined out the role of the Senate together with other bodies which gives rise to separation of powers but with the intention of having checks and balances. The Court of Appeal considered the doctrine of Separation of powers in ***Mumo Matemu v Trusted Society of Human Rights Alliance and 5 Others, Civil Appeal No. 290 of 2012***, where it expressed itself as follows:

“It is not in doubt that the doctrine of separation of powers is a feature of our Constitutional design and a per-commitment in our Constitutional edifice. However, separation of power does not only proscribe organs of Government from interfering with the other's functions. It also entails empowering each organ of Government with countervailing powers which provide checks and balances on actions taken by other organs of Government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Courts dicta in the petition the subject of this appeal that: Separation of power means that the Courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitution democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet as the Respondents concede, the Courts have an interpretive role, including the last word in determining the Constitutionality of all Governmental actions.”

[64] As the oversight of the County Government with regard to national revenue allocated to the County Government is under Article 96 vested in the Senate, the County Assembly must defer to the consideration of the report on such matters to the Senate. The two organs have therefore with regard to the respective extents of their jurisdiction power to consider audits report, whether concurrently or simultaneously or one after the other to their different scopes of jurisdiction. The timelines of Article 229 (8) that within three months after receiving an audit report, Parliament or the County Assembly, shall debate and consider the report and take appropriate action are constitutional provisions for efficient dealing with questions of accountability consistent with good governance and not a limit on one organ's consideration of a report

after the other organ has to the extent of its jurisdiction considered the report.

[65] Because of the different powers of the two constitutional organs, the exercise of concurrent jurisdiction to consider Auditor’s Report by one does not affect the consideration of the report by the other where the other has wider or different ambit of consideration of the Report; that is to say that although the two organs have, in judicial parlance, first instance or original concurrent jurisdiction receive and review an audit report under Article 229, the scope of review may vary in nature and extent making the jurisdictions **unco-ordinate** even though concurrent in that the one is not an appellate or revisionary jurisdiction over the other. For instance, the legislative jurisdiction of the National Assembly and the Senate is concurrent but not coordinate because as noted by the Supreme Court in **Supreme Court Advisory Opinion No. 2/2013** that “[T]he Senate is entrusted with a less expansive legislative role than the National Assembly, it stands as the Constitution’s safeguard for the principle of Devolved Government.”

[66] The Senate and the County Governments are to work together to ensure that the purpose of devolution is achieved. The two bodies cannot work separately and since the County Government receives funds from the National level they cannot check themselves. Accountability has to come from a body not within the County level, thus the Senate.

Is the Petitioner entitled to the reliefs sought?

[67] Having found that in answer to the foregoing issues raised in the Petition that the Auditor General is under Articles 229(7) and 254 (1) of the Constitution obligated to submit his annual reports to parliament and the County Assembly and the Senate has an oversight responsibility over the County Government with regard to national revenue allocated to it, and that therefore, the jurisdiction of the Senate and the County Assembly to consider the audit reports is concurrent but not coordinate and that the Senate has under Article 254 (2) power to call for reports from the Auditor General over any particular issue and under Article 125 authority to summon, the petitioner’s complainant in this petition is without merit. The reliefs sought cannot therefore be granted.

ORDERS

[68] Accordingly, for reasons set out above, the Petition herein is declined.

[69] There shall be no order as to costs.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 25TH DAY OF AUGUST, 2017.

E. C. MWITA

JUDGE

In the Presence of:

..... for the Petitioner

..... for Respondents

..... for the Interested Parties.