



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 71 OF 2013
BETWEEN
THE INSTITUTE OF SOCIAL ACCOUNTABILITY.....1ST PETITIONER
CENTRE FOR ENHANCING
DEMOCRACY AND GOOD GOVERNANCE.....2ND PETITIONER
AND
THE NATIONAL ASSEMBLY.....1ST RESPONDENT
THE SENATE.....2ND RESPONDENT
ATTORNEY GENERAL.....3RD RESPONDENT
CONSTITUENCIES DEVELOPMENT FUND BOARD....4TH RESPONDENT
AND
THE COMMISSION FOR THE
IMPLEMENTATION OF THE CONSTITUTION.....INTERESTED PARTY

JUDGMENT

Introduction

1. The petitioners seek declarations that *Constituencies Development Fund Act, Act No. 30 of 2013* (*'CDF Act'*) violates the Constitution. The legislation establishes a fund known as the Constituencies Development Fund (CDF) which has for the past decade disbursed money to the constituencies to finance and implement development projects.

2. The petitioners challenge the constitutionality of the *CDF Act* on two fronts; the process leading to its enactment and the substance of the legislation including the nature, administration and management of the

CDF. The petitioners contend that the **CDF Act** contravenes the constitutional principles of the rule of law, good governance, transparency, accountability, separation of powers and the division of powers between the national and county government and the public finance management and administration.

Parties to the Petition

3. The 1st petitioner, the Institute of Social Accountability, a registered trust whose objective is to promote good governance, transparency and accountability mechanisms in local governance and in utilization of financial resources filed **Nairobi Petition No. 71 of 2013**. The 2nd petitioner, the Centre for Enhancing Democracy and Good Governance, is a civil society organization working to enhance democracy and good governance. It filed **Nakuru Petition No. 16 of 2013**.

4. The 1st and 2nd respondents, the National Assembly and the Senate respectively, are State Organs established under **Chapter 8** of the Constitution. They collectively form Parliament which is the legislative arm of the national government. The 3rd Respondent, the Attorney General is an office established under **Article 156** of the Constitution and is the principal legal advisor to the government.

5. The Constituencies Development Fund Board (“CDF Board”), the 4th respondent, is a body corporate established under the provisions of **section 5** of the **CDF Act**. It has the mandate of ensuring timely and efficient disbursement of funds to every constituency, ensuring sufficient management of the fund and addressing complaints and disputes relating to management of the Fund.

The Proceedings

6. **Nairobi Petition No. 71 of 2013** was filed on 3rd February 2013 while **Nakuru Petition No. 16 of 2013** was filed on 10th May 2013. The latter petition was transferred to Nairobi on 15th May 2013 and consolidated with the Nairobi petition on 22nd May 2013 with the consent of the parties. On 3rd June 2013, the Chief Justice constituted a three judge bench comprising ourselves in accordance with **Article 165(4)** of the Constitution, to hear and determine the matter.

7. After the petitions were filed, the National Assembly passed an amendment to the **CDF Act** through the **Constituencies Development Fund (Amendment) Act, 2013 (Act No 36 of 2013)** (“**the CDF (Amendment) Act, 2013**”) on 6th August 2013. Following the amendment, the petitioners sought and obtained leave to amend the consolidated petition. Thereafter the petitioners filed an amended petition dated 29th January 2013 in which they sought the following orders;

a. That a declaration be issued under Sections 1, 2, 6(2), 10(1)(a), 186, 189(1)(a), 202(2) and Schedule 4 of the Constitution that the Act is unconstitutional, because it offends the principles of public finance, division and separation of powers.

b. That a declaration be issued that the numerous provisions of the Act that violate the Constitution cumulatively render the entirety of the Act untenable and therefore constitutionally invalid ab initio.

c. That a declaration be issued that any organ or body purportedly established by this Act is illegal as it created without the authority of the law.

d. That a declaration be issued that failure to involve the Senate in the consideration, deliberation and passage of the CDF (Amendment) Act 2013 was unconstitutional and therefore renders the CDF (Amendment) Act 2013 as invalid.

e. That a declaration be issued that failure by the National Assembly to provide reasonable opportunity for the members of the public to provide their views on the CDF (Amendment) Act, 2013 and failure by the National Assembly to facilitate public participation in the passage of CDF

(Amendment) Act, 2013 is unconstitutional and therefore renders the CDF (Amendment) Act 2013 invalid.

f. That an order issue striking down the Act for being unconstitutional and so as to pave way for the enactment of a valid legislation to administer conditional grants allocated to counties by the national government.

g. That the costs of, and incidental; to, this petition be awarded to the Petitioner against the Respondents.

h. That this Honourable Court be pleased to grant such further order or orders as may be just and appropriate.

Factual Background

8. The factual background to this petition is uncontested. The petitioners' case revolves around the interpretation of the **CDF Act** in light of the Constitution.

9. The CDF was originally established by the now repealed **Constituencies Development Fund Act, 2003 ("CDF Act, 2003")**. The Act set aside a specific portion of the annual government budget for financing of grassroots infrastructure within the Constituencies. The objective of the **CDF Act** as set out in the preamble was, "to provide for the establishment of the Constituencies Development Fund and for connected purposes". The intentment of the Act was to ensure that the government set aside at least 2.5% of its ordinary revenue and channel it to the CDF to be utilized at the constituency level. For purposes of administration of the CDF fund, a national CDF Board was established and at the constituency level CDF committees were established with the respective Member of Parliament being the Committee Patron.

10. The **CDF Act, 2003** underwent major amendments in 2007. These changes included the formation of a fully-fledged state corporation known as the CDF Board to replace the National Committee. This Board was given the mandate to manage the Fund including the approval of projects.

11. On 22nd June 2009, the Minister of State for Planning, National Development and Vision 2030 through, **Gazette Notice No. 6392**, appointed the CDF Review Task Force to review all aspects of CDF with a view to amending the laws governing it and giving recommendations on how to improve its institutional framework. The Task Force handed over its report on 1st June 2010.

12. In January, 2013 Parliament passed the **CDF Act, No. 30 of 2013** which effectively repealed the **CDF Act, 2003**. On 2nd August 2013, the **CDF (Amendment) Bill** was published. The Amendment Bill was introduced for the first time in Parliament on 6th August 2013. It went through the processes of deliberation and was passed on the same day. The notification that the Amendment Bill had been published was made in the Kenya Gazette of 8th August 2013 and the Bill assented to by the President on 13th September 2013.

13. In the Amended Petition, the Petitioners are therefore impugning some of the provisions of the **CDF Act, 2013** and the **CDF (Amendment) Act, 2013** and the process leading to its enactment. For purposes of convenience, reference to the **CDF Act** in this judgment means the Act as amended by the impugned amendment.

The Petitioners' Case

14. The petitioners' case is contained in the Amended Petition of 29th January 2013, the affidavits of Wanjiru Gikonyo sworn on 4th September 2013 and 4th February 2014 and the written submissions dated 22nd July 2013.

15. The petitioners found their case on the principle of supremacy of the Constitution which means that

this Court is obliged to invalidate an Act of Parliament, omission or any law that contravenes the Constitution. They cite several cases among them, *Jayne Mati & Another v Attorney General and Another Nairobi Petition No. 108 of 2010* [2011]eKLR, *Samuel Momanyi v Attorney General and Another Petition No. 341 of 2011* [2012]eKLR, *Johnson Muthama v Minister for Justice and Constitutional Affairs and Another Petition No. 198 of 2011* [2012]eKLR and the South African Constitutional Court case of *Minister of Health and Others v Treatment Action Campaign and Others* (2002) 5 LRC 216.

16. The petitioners submit that **Article 202** of the Constitution has established a detailed formula for the equitable sharing of revenue between the national government and the county government. That **Article 203** of the Constitution provides the criteria for the equitable share of the funds and that the county governments' share of the budget shall not be less than 15% of the total budget. The petitioners take issue with **section 4(1)(a)** of the *CDF Act* which establishes the CDF as a national fund consisting of moneys of an amount not less than 2.5% "of all the national government ordinary revenue collected in every financial year". This phrase, the petitioners contend, bears the same meaning as the phrase 'revenue raised nationally' or 'of all the revenue collected by the national government' as contained in **Articles 202(2) and 203(2)** respectively, which means that the CDF is created prior to the allocation of the national revenues between the national and county governments. It was therefore their case that the CDF Act has introduced new criteria for equitable sharing from that which is provided for under **Articles 201, 202 and 203** of the Constitution.

17. The petitioners also challenge the manner in which the CDF is administered. It is their case that the *CDF Act* has created the fund to be administered by individual MPs rather than through the machinery of either the national government or the county government, thus in effect creating a third party which can share in the equitable allocation of the national revenue. It is their case that **section 24** of the *CDF Act* is unconstitutional as it allocates certain administrative responsibilities to Members of National Assembly who perform certain implementation and administrative roles as well as an oversight role through the National Assembly Committee on CDF. This, they claim makes the MP both an executor of the CDF projects as well as a legislator. They submit that arming the Members of the National Assembly with the ability to play both of these roles violates the principle of separation of powers which is an integral part of the Constitution as stated by the Supreme Court in the decision in *In the Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011* [2011]eKLR. The petitioners further submit that the administration and implementation of projects for which the National Assembly has determined the allocation of funds is not a function assigned to the National Assembly and in any event such an arrangement undermines the principle of accountability under **Article 10** of the Constitution.

18. The petitioners contend that **sections 4(1)(c), (1)(d) and 4(2)** of the *CDF Act* characterizes the money given to the CDF as a conditional grant, and even so the money is not remitted to the counties, instead, the National Assembly has set its own structures to receive the money and implement projects. This is without the involvement of the counties since there is no representation of county governments in the CDF Board and CDFC. The petitioners further contend that it is irregular within the meaning of **Article 202(2)** of the Constitution to describe the CDF as a conditional grant because counties are not even involved in its implementation and therefore there is no need to impose conditions on the counties in relation to CDF. They thus claim that the effect of **sections 4(1)(c), (1)(d) and 4(2)** as read together with **section 3** of the *CDF Act* is to allow the national government to overstep its restricted constitutional functional mandate by purporting to establish CDF as a conditional grant to the counties yet the counties neither receive any monies nor have any role in the selection and implementation of the projects funded through CDF.

19. The petitioners also take issue with the purpose of the CDF fund in terms of the development projects to be financed through the CDF. They contend that the *CDF Act* has not identified the specific types of projects that should be undertaken but has instead used broad terminology to describe the projects which are allowed. They point to the language used in **Schedule Four** to the Constitution dealing with division of functions between the two levels of government stating that it is instructive that the functions assigned to Counties are localized and whatever functions undertaken by the counties are limited to the geographic

scope of the county. The petitioners maintain that that any projects undertaken through CDF are local and are county projects and not a project of national function. The sum of their argument is that the CDF Board, being a national organ, has unconstitutionally encroached on the functions of the County government and as such, **sections 3 and 22** of the **CDF Act** are invalid.

20. The petitioners further argue that the **CDF Act** is unconstitutional as its design is such that it locates the CDF projects outside the county government planning processes. They contend that whereas the national government may provide money to execute such projects, the only organ with the powers to plan and execute the project is the county government. That therefore, the national government had violated the Constitution by establishing a parallel development scheme in the form of CDF which usurps the powers of the county governments.

21. Apart from the substantive provisions, the petitioners have also challenged the constitutionality of the **CDF Act** on the ground that due process was not followed in its enactment. It is the petitioners' case that the National Assembly failed to facilitate meaningful participation in the enactment of the **CDF (Amendment) Act** rendering it unconstitutional. The petitioners rely on the South African Constitutional Court case of **Doctors for Life International v Speaker of the National Assembly and Others (CCT12/2005) 2006 ZACC 11** where the Court held that Parliament was under a public duty to genuinely consider public views in the enactment of legislation.

The 1st Respondent's case

22. The 1st Respondent, the National Assembly, opposes the petition through the affidavits sworn on 23rd July 2013 and 3rd April 2014 by Hon. Moses K. Lessonet, the Chairperson of the National Assembly Committee on the CDF established under **section 28** of the **CDF Act, 2013**. It also filed written submissions dated 14th May 2014 and further submissions dated 25th August 2014.

23. The position of the National Assembly is that the **CDF Act** has set out a clear demarcation of roles for a Member of Parliament as an *ex-officio* member of the CDF Committee and also as a link between the Committee and the people in the constituency. Counsel for the 1st respondent relied on the decision by the Philippines Supreme Court in **Greco Antonius Beba Belgica and 3 Others v Honourable Executive Secretary Raquito n Ochoa JR Secretary of Budget and Management Florencio B. Abad and Another (GR No. 208566)** where it was held that the involvement of individual legislators in post enactment measures such as project identification, release of funds and funds realignment of the Priority Development Assistance Fund are not within the functions of congressional oversight but belong to the execution of the budget. Counsel further submitted that the MPs assist the CDF Committees with views and opinions and that it is the Committee which is the body mandated to disburse the CDF and oversee the implementation of projects in the constituency.

24. On the question of separation of powers, the National Assembly submitted that a pure separation of powers does not exist in any country nor is it desirable. In that regard, counsel relied on the Indian Supreme Court case of **Minerva Hills Ltd & Others v Union of India and Others [1980] 3 SCC 625** where the Court had held that there is no rigid separation of powers but there is a broad demarcation and at times, each of the arm of government may perform the functions of the other. Counsel also pointed to the situations in Tanzania and Germany to illustrate that separation of powers is not pure and that one arm of government normally interferes with the functions of another arm of government.

25. The 1st respondent contends that there was public participation in the process of enactment of the **CDF (Amendment) Bill, 2013**. Counsel submitted that the National Assembly has a broad measure of discretion in how it achieves the object of public participation dependent on the circumstances of the case. The case of **Commission for the Implementation of the Constitution v The Parliament of Kenya & Others Petition No. 454 of 2012 [2013]eKLR** was cited in support of this proposition.

26. Furthermore, National Assembly argued that the impugned Amendment Bill did not require extensive public participation upon publication because the Bill was short and precise as it dealt with the deletion of

section 4(2) of the *CDF Act*. That at the committee stage, an amendment was introduced to amend **section 20** of the Act so as to provide for the manner of equitable sharing of the fund among constituencies and entrench the constitutional principles of equalization as set out under **Article 204** of the Constitution. The National Assembly submitted that the CDF Committee had received considerable public opinion and as such, there was in effect public participation in passing the legislation. It was urged that the CDF Committee had received overwhelming representations from the public that the fund was not additional revenue to the county governments as the funds did not go to the county but to the constituencies.

The 2nd Respondent's case

27. The 2nd Respondent, the Senate, did not participate in these proceedings despite being served.

The 3rd Respondent's case

28. The 3rd Respondent, the Hon. Attorney General did not file any response to the petition but filed written submissions on points of law.

29. The Attorney General submitted that **section 3** of the *CDF Act* providing for the object of the Act resonates well with the Constitution especially with regard to development, equity and devolution of resources and as such, the *CDF Act* and the Fund cannot be declared unconstitutional.

30. The Attorney General submits that under **Article 1 (2)** of the Constitution, the people's participation, which is a form of exercising their sovereign power may either be direct or through their democratically elected representatives, and that the enactment of the *CDF Act* was done through the Members of Parliament who are people's democratically elected representatives. In that regard counsel representing the Attorney General cited *Consumer Federation of Kenya (COFEK) v The Public Service Commission and the Attorney General Petition No. 263 of 2013 [2013]eKLR*.

31. The Attorney General further submits that the various committees established under the *CDF Act* are meant to ensure competitiveness and a people centered approach in the appointment of the members. Counsel cited the provisions of **section 24** of the Act, which provide for an elaborate procedure for the appointment of the CDF Committees through a transparent and people centered process in line with the constitutional principles of inclusiveness in decision making processes.

32. The Attorney General denies that there is a violation of the separation of powers principle as the administration of the Fund is left to the Board and the Constituency Committees, whose membership excludes Members of Parliament. The Attorney General submits that Members of Parliament can exercise oversight over the fund and make their contributions in terms of the development of their constituencies.

33. Regarding the division of powers and functions under the Constitution, the Attorney General submits that the constituency is a unit of representation for the purpose of elections of the Members of the National Assembly but nonetheless, it is taken as a sub-unit of the county and as such, for administration and development purposes, it is under the County and therefore under the administration of the County. In this respect, counsel for the Attorney General submitted that while the Constitution provides for the distribution of functions between the national and county government, such function must be performed in a manner that respects the functional and institutional integrity that respects each level of government as provided in **Article 189(1)(a)** of the Constitution.

34. The Attorney General contends that the principles of public finance management under **Article 201** of the Constitution such as accountability, transparency and public participation are inbuilt in the *CDF Act*. That the Act has provided for clear accountability and transparent measures on the management of the CDF Fund.

35. The Attorney General, in the written submissions, submitted that if the constituency is a unit of the

sub-county then it is squarely under the administration of the County and in that respect, administrative roles that are imposed on national government officials are clearly unconstitutional. It is the position of the Attorney General that the Act is not unconstitutional though the management and administration of the CDF should be under the direction and control of the county government.

The 4th Respondent's case

36. The 4th Respondent, the CDF Board, in response to the petition filed affidavits sworn by Yusuf Mbuno, its Chief Executive Officer on 24th May 2013 and 5th May 2014 and also an affidavit sworn by Clarah Kimeli, its Legal Officer on 13th February 2013.

37. Mr Mbuno deponed that the **CDF Act, 2013** was enacted to repeal and replace the **CDF Act, 2003** in order to align it with the devolved government structure. He denied that the Act in any way interferes with the functions of County Governments.

38. The CDF Board submits that under **section 36** of the **Act**, the function of the County Committee is to coordinate implementation of projects funded under the Act and ensure there is no duplicity in implementation of projects funded within the County. The CDF Board distanced the National Assembly members from project implementation financed by the CDF stating that this is done by a project management committee established under **section 31** of the **Act** and not Members of the National Assembly as alleged by the petitioners. Further, that it is the CDF Board that administered the Fund and not Members of Parliament as alleged by the petitioners. The Board points out that members of the CDF Committee are elected by the constituents of the particular constituency. That the constituents nominate five individuals from each ward to be forwarded to the Officer of the Board in the Constituency, and then the National Assembly member of the area in consultation with the officer of the Board and sub-county administrator appoints eight members from the nominated list. The CDF Board notes that membership of the County Project Committee is representative and includes elected leaders at the county such as the governors, senators in addition to the National Assembly member. The CDF Board contends that the function of the National Assembly Select Committee is that of oversight like any other committee of the National Assembly and as such, the role of the Member of the National Assembly must be viewed in the context of the role of the National Assembly envisaged under **Article 95** of the Constitution.

39. As regards allocation of revenue to the constituencies, the position of the CDF Board is that funds are allocated to the Fund based on the formula established by the Commission on Revenue Allocation and the National Assembly and that the Board does not have any role to play in the allocation process.

40. It is also the Board's position that the **CDF Act** is complimentary to any development and it should therefore be interpreted in the context of **section 47** of the Act. That **section 4(2)** of the **CDF Act** does not violate **Article 202(1)** of the Constitution because the characterization of the moneys from CDF fund as revenue to county governments under **Article 202(1)** is meant to make it clear funds are allocated from the national government share of revenue after taking into consideration the allocation formula set out under **Article 203** of the Constitution. In any event, it was his assertion that the **CDF Act** does not violate the principle on division of functions of the national and county governments as provided for under the Constitution but has instead created structures to align itself to the devolved governing structures and organs under the Constitution. The Board also avers that it has used prudent financial management as provided for under **Article 201** of the Constitution.

41. As regards public participation, the Board submits that the **CDF Act, 2013** was enacted as a result of the Taskforce on CDF which recommended amendments to **CDF Act, 2003** after having engaged various stakeholders, through public hearings and other measures to collect public views. That following the promulgation of the Constitution, a panel of six members from the previous Task Force and three members of CDF Board was constituted to carry out a review of the **CDF Act, 2003** and ensure it was in line with the Constitution. Thereafter, a Special Committee was established to revise the recommendations made by the Panel and to align them with the Constitution and other legislation on devolved government. The Board maintains that throughout this process, the Committee engaged various stakeholders including the petitioners in that task. It is the Board's contention that there was public

participation that led to the enactment of the Act.

42. The Board further submits that the ***CDF (Amendment) Bill, 2013*** was enacted to amend the primary Act so as to correct an error and align it with the spirit of the Act and as such did not require public participation. That in any event, it would be cumbersome, difficult and impossible that every time Parliament intended to amend legislation to correct errors there would be public participation. Counsel for the Board cited the case of ***Moses Munyendo & 908 Others v The Attorney General and Minister for Agriculture Petition No. 16 of 2013 [2013]eKLR***, where the court held that there is presumption of public participation where legislation has been enacted in accordance with National Assembly Standing Orders. It was therefore the Board's position that the Bill was not hurriedly passed and was indeed published in the Kenya Gazette of 8th August 2014.

43. The CDF Board refuted the claim that **section 4(2)** of the Act violates the Constitution because the monies are allocated to constituencies from the national government's share of revenue as a charge to the consolidated fund. According to the CDF Board, **section 4(2)** was amended to appreciate that CDF is not concerned with county governments and that money allocated under ***CDF Act, 2013*** is not additional revenue to county governments but funds allocated to constituencies. The Board therefore submits that it was not necessary to have the ***CDF (Amendment) Bill, 2013*** forwarded to the Senate for debate and passage and consequently the Bill and the Act does not contravene **Articles 110 (3) and 114(2)** of the Constitution as claimed. The Board also discounted the argument that the CDF does interfere with devolved governance and division of functions between the national and county government urging that the amendment of **section 4(2)** brought the Act into conformity with the spirit of the Act as anchored under **section 4(1) (c)** of the Act.

44. The Board submits that the ***CDF (Amendment) Bill*** does not affect the functions and powers of the county governments as stipulated under the provisions of **Article 110** of the Constitution. Citing ***Re Matter of the Interim Independent Electoral Commission (supra)***, the Board contended that the petitioners had not demonstrated how the ***CDF Act*** or ***CDF (Amendment) Act*** bears significant impact on the conduct of the County government.

45. According to the Board, the CDF Committees and the Board are responsible for the monitoring of the implementation of projects in terms of **sections 24 (7), 31(3) and 18** of the ***CDF Act*** and that allocation of funds to the project is the responsibility of the Committee and that therefore, there is no duplication of duties in the implementation of the CDF projects and each of the parties plays a distinct role. Further that the National Assembly Select Committee on CDF plays an oversight role as provided for under **section 5** of the ***Act***.

46. As regards the petitioners' contention that the ***CDF Act*** allowed the national government to encroach on the functions of the County Governments, the Board responds that **Article 95(1)** of the Constitution sets out the key function of the National Assembly as a representative of the people at the constituency level and that the language of **Article 95** was wide and encompassing in so far as constituencies are concerned. That the parliamentary committee's role under **section 10(1)** of the Act should be viewed in the context of the National Assembly's primary function as representatives of the people and its oversight on national revenue. Additionally, that Parliament has powers to appropriate funds as anchored under the provisions of **Article 95(4)(b) and 206** of the Constitution and it has in fact set up other funds such as the Uwezo Fund, Youth Enterprise Fund without enacting an Act of Parliament. The Board also submits that the CDF finances activities not supported by County governments such as education through bursaries to needy students and security.

The Interested Party's case

47. The case for the Interested Party, the Commission on the Implementation of the Constitution (hereinafter "CIC") is as contained in the written submissions dated 27th May 2013.

48. CIC submits that despite the intended objective to align the ***CDF Act*** with the Constitution, the Act as enacted was fundamentally flawed and was unconstitutional in many respects. First, the Act violated the

provisions of **section 14** of the **Sixth Schedule** as read together with **section 2(3)(b)** of that Schedule which requires that before any laws relating to Chapter Eleven and Twelve are enacted, the CIC and the Commission on Revenue Allocation (CRA) must be consulted and be given at least 30 days to consider the proposed legislation.

49. Second, **section 4(1) (a)** of the Act violated the Constitution in that it failed to exclude the CDF from the Consolidated Fund as provided for under **Article 206(1)** of the Constitution. CIC contended that it was not clear whether the money towards the CDF Fund was to be disbursed by the national government before or after the equitable sharing of revenue between the national and county government as envisaged under **Article 202(1)** of the Constitution or whether it was an additional allocation in line with **Article 202(2)** of the Constitution. That in any event, **Article 202(2)** of the Constitution leaves the discretion to the national government as to whether to grant allocations to county government and that that discretion cannot be limited in the manner proposed under the **CDF Act, 2013**.

50. Third, that under **Section 4(2)** of the Act, monies allocated under the **CDF Act** do not qualify as grants unless they are expressed as such by the national government. That there is an ambiguity under the provisions of **sections 4(1)(c)** and **4(2)** of the **CDF Act** which will lead to conflict between the national and county governments. That in disbursing the monies directly to the constituencies bypassing the county governments, the Act offends the provisions of **Article 202(2)** of the Constitution.

51. Fourth, that the **CDF Act** only excludes projects of a political and religious nature from the Act. As such, the Fund's activities include funding and overseeing the development of projects which relate to functions which are contemplated as being within the exclusive mandate of the county governments as provided for under the **Fourth Schedule** of the Constitution thus rendering the devolution concept meaningless. Further, that **section 48(1) (b)** of the **County Government Act** has decentralized counties into sub-counties which are equivalent to constituencies within the county therefore assignment of funds to new structures outside those created by the county violates the devolved government structure as contemplated under the Constitution. That **section 36** of the **CDF Act** creates project committees to coordinate the implementation of projects financed through the Fund. That under **section 37**, the membership to such committees includes officers who are not part of county governments. As such, CIC submits that the role of the county project committee is in conflict with the constitutional and statutory roles of county governments.

52. CIC also submits that the involvement of the members of the National Assembly in the management of the CDF is a violation of the Constitution. That by giving them a role in the implementation of the CDF directly conflicts with their oversight role as provided for under **Article 95(4)** of the Constitution.

53. Lastly, CIC submits that the **Public Finance Management Act, 2012** has created elaborate mechanisms for planning and funding of the county development projects as provided for under **section 126** of the Act. That the planning process provided for under the **CDF Act, 2013** is diametrically opposed to that process and would in essence lead to duplication of projects and consequent misuse and misapplication of public resources.

Determination

54. Looking at the parties' pleadings and submissions, the core issue presented to us for determination is whether the **CDF Act** as amended is constitutional. We have identified four key issues for our consideration:

- a. Whether the process leading to the enactment of the **CDF Act** is Constitutional;
- b. Whether the **CDF Act** offends the principles of public finance and division of revenue provided under the Constitution;
- c. Whether the **CDF Act** violates the division of functions between the national and county government; and

d. Whether the **CDF Act** offends the principle of separation of powers.

55. The parties do not dispute this Court's jurisdiction to entertain this petition. **Article 258** of the Constitution grants every person the right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention and such is the dispute before us. This task demands that we deal with the issues involving the interpretation of the various provisions of the Constitution as well as the impugned statute. In that regard, it is important to set out the relevant principles that will guide us in the task ahead.

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

57. Second, there is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on any person who alleges otherwise (see **Ndyanabo v Attorney General of Tanzania [2001] EA 495**). We therefore reiterate that this Court will start by assuming that the **CDF Act 2013** is constitutional and valid unless the contrary is established by the petitioners.

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

Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity.

59. Fourth, the Constitution should be given a purposive, liberal interpretation. The Supreme Court in **Re The Matter of the Interim Independent Electoral Commission Constitutional Application (supra)** at *para. 51* adopted the words of Mohamed A J in the Namibian case of **State v Acheson 1991(20 SA 805, 813)** where he stated that;

The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship government and the governed. It is a mirror reflecting the "national soul" the identification of ideas and aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.

60. Lastly and fundamentally, it is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see **Tinyefuza v Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC 3)**).

61. We are duly guided by the principles we have outlined and we accept that while interpreting the impugned legislation alongside the Constitution, we must bear in mind our peculiar circumstances. Ours must be a liberal approach that promotes the rule of law and has jurisprudential value that must take into account the spirit of the Constitution. As this is a matter that concerns devolution, we recall what the

Supreme Court stated in *The Speaker of the Senate & Another v Attorney-General & Another & 3 Others Advisory Reference No. 2 of 2013* [2013] eKLR;

[136] The Kenyan people, by the Constitution of Kenya, 2010 chose to de-concentrate State power, rights, duties, competences – shifting substantial aspects to the county government, to be exercised in the county units, for better and more equitable delivery of the goods of the political order. The dominant perception at the time of constitution-making was that such a deconcentration of powers would not only give greater access to the social goods previously regulated centrally, but would also open up the scope for political self-fulfilment, through an enlarged scheme of actual participation in governance mechanisms by the people – thus giving more fulfillment to the concept of democracy.

Whether due process adhered to in the enactment of the CDF Act

62. Where both the process and the substance of legislation are challenged, it is prudent to begin by first examining the impugned process before proceeding to the substance. This is because if the process leading to the enactment of an Act is constitutionally flawed, then the resulting legislation is also flawed and that would be the end of the matter.

63. Article 93 establishes Parliament comprising the National Assembly and the Senate. Each of these Houses is enjoined to, “*perform their respective functions in accordance with [the] Constitution*” and where the Constitution prescribes a procedure that ought to be followed in enacting a law, that procedure must be followed. Thus, while Parliament may legislate on any matter concerning the Republic (**Article 186(4)**), the legislation must conform to the Constitution both procedurally and in its substance. As was observed in the *Doctors for Life Case (supra)*;

[208] It is trite that legislation must conform to the Constitution in terms of both its content and the manner in which it was adopted. Failure to comply with manner and form requirements in enacting legislation renders the legislation invalid. And courts have the power to declare such legislation invalid ... this Court not only has a right but also has a duty to ensure that the law-making process prescribed by the Constitution is observed. And if the conditions for law-making processes have not been complied with, it has the duty to say so and declare the resulting statute invalid.

64. The petitioners challenge the constitutionality of the **CDF (Amendment) Act** on the basis that the Senate was not involved in its passing yet it was a Bill concerning the County government. In response to that submission, the National Assembly took the position that the **CDF (Amendment) Act** was not considered by the Senate because it was resolved by the Speakers of the two Houses of Parliament that the Act did not concern counties. It was contended that the **CDF (Amendment) Bill** concerned money and not counties. **Article 109(3)** and **(4)** of the Constitution provides:

(3) A Bill not concerning county government is considered only in the National Assembly, and passed in accordance with Article 122 and the Standing Orders of the Assembly.

(4) A Bill concerning county government may originate in the National Assembly or the Senate, and is passed in accordance with Articles 110 to 113, Articles 122 and 123 and the Standing Orders of the Houses.

Under **Article 110(1)** of the Constitution, ‘**a Bill concerning county government**’ means;

a. A Bill containing provisions affecting the functions and powers of the County Governments set out in the Fourth Schedule

b. A Bill relating to the election of members of a county assembly or a county executive; and

c. A Bill referred to in Chapter Twelve affecting the finances of county governments.

Article 110(3) of the Constitution then provides for the procedure for enacting a legislation concerning counties in the following terms;

Before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a Special or an ordinary Bill.

As to whether a Bill is one that concerns county or not, the Supreme Court in ***The Speaker of the Senate Case (supra)*** at para 102 cited the *Final Report of the Task Force on Devolved Government Vol. 1: A Report on the Implementation of Devolved Government in Kenya* [page 18] which stated as follows;

The extent of the legislative role of the Senate can only be fully appreciated if the meaning of the phrase ‘concerning counties’ is examined. Article 110 of the Constitution defines bills concerning counties as being bills which contain provisions that affect the functions and powers of the county governments as set out in the Fourth Schedule; bills which relate to the election of members of the county assembly or county executive; and bills referred to in Chapter Twelve as affecting finances of the county governments. This is a very broad definition which creates room for the Senate to participate in the passing of bills in the exclusive functional areas of the national government, for as long as it can be shown that such bills have provisions affecting the functional areas of the county governments.

65. In this matter we recall that the respondents submitted that the Speakers of the two houses had resolved that the **CDF (Amendment) Bill** was not a Bill concerning counties and as such, was not supposed to be considered by the Senate. The Supreme Court in ***The Speaker of the Senate Case (supra)*** stated as follows in respect to classification of Bills by the Speakers of the Houses;

Where the Speakers determine that a Bill is not one “concerning county government”, such a Bill is then rightly considered and passed exclusively by the National Assembly, and then transmitted to the President for assent. The emerging, broader principle is that both Chambers have been entrusted with the people’s public task, and the Senate, even when it has not deliberated upon a Bill at all the relevant stages, has spoken through its Speaker at the beginning, and recorded its perception that a particular Bill rightly falls in one category, rather than the other. In such a case, the Senate’s initial filtering role, in our opinion, falls well within the design and purpose of the Constitution, and expresses the sovereign intent of the people, this cannot be taken away by either Chamber or either Speaker thereof.

66. Accordingly it is clear that if the Speaker of the Senate signifies concurrence with a Bill that it falls within one category or another, it may well be said that would be the end of the matter. However, the issue whether the matter is one for county government is of constitutional importance and the decision of the respective speakers, while respected, cannot be conclusive and binding on the court whose jurisdiction it is to interpret the Constitution and as the final authority on what the Constitution means. Participation of the Senate in the legislative process is not just a matter of procedure, it is significant to the role of the Senate in our constitutional scheme as the Senate’s legislative role is limited to matters concerning county governments. Through its participation in the legislative process, the Senate is seized of the opportunity to discharge its primary mandate which is, to protect the interests of the counties and county governments as mandated under **Article 96(1)** of the Constitution. It is a means of ensuring that the county voice is heard and considered at the national forum and the interests of counties and their governments secured. This way, the sovereign power of the people is duly exercised through their democratically elected representatives. Therefore, when the speakers of both chambers classify bills under **Article 110**, they are essentially resolving on the question as to whether and to what extent provisions of a particular Bill affect the interests of county governments, and consequently whether county input ought to be invited.

67. Under **Article 165(3)(d)** of the Constitution, the High Court has jurisdiction to hear any question regarding the interpretation of the Constitution. The Court must therefore interrogate any legislation and decide whether, on the principle laid out in ***The Speaker of the Senate Case (supra)***, it is a bill that falls within the provisions of **Article 110** of the Constitution.

68. On the issue of consultation between the Speakers of both Houses of Parliament, Hon. Moses Lessonet deponed at paragraph 4 and 5 of his affidavit as follows;

[4] That I was the sponsor of the CDF (Amendment) Bill 2013 in the National Assembly. I moved the Bill following receipt by the Committee on the CDF of various representations from members of the public and various bodies, including the Petitioners herein in their submissions to court, that the CDF is not additional revenue to county governments'. My Committee agreed with this position particularly taking into account the fact that the funds are not disbursed to county governments' but directly to the constituencies under the mechanisms set out in the Act.

[5] That on the issue of whether the Bill should have been considered by the Senate, that is question for determination by the Speakers of the two Houses of Parliament as provided for under Article 110(3) of the Constitution. I verily believe that this issue was resolved by the two Speakers of Parliament and it was resolved that the Bill was not a Bill concerning counties and therefore did not require to be considered by the Senate.

69. In our view and we so hold, the fact that the legislation was passed without involving the Senate and by concurrence of the Speakers of both House of Parliament, is neither conclusive nor decisive as to whether the legislation affects county government. In other words, while concurrence of the Speakers is significant in terms of satisfaction of the requirements of **Article 110(3)** of the Constitution, it does not by itself oust the power of this Court vested under **Article 165(3)(d)** where a question is raised regarding the true nature of legislation in respect to **Article 110(1)**. The court must interrogate the legislation as a whole and determine whether in fact the legislation meets the constitutional test of a matter, “concerning county government.” We shall revert to this issue when we review the substance of the **CDF Act** and the subsequent amendment to determine whether in fact the legislation is a matter concerning county government.

70. The next procedural challenge was raised by the CIC which submitted that the **CDF (Amendment) Act** violated the provisions of **section 14** of the **Sixth Schedule** as read together with **section 2(3)(b)** of that Schedule which requires that before any laws relating to **Chapters Eleven** and **Twelve** are enacted, the CIC and the Commission on Revenue Allocation (CRA) must be consulted and given at least 30 days to consider the proposed legislation. The two chapters deal with devolved government and public finance respectively. **Section 14** of the **Sixth Schedule** to the Constitution provides as follows;

14. (1) The laws contemplated in section 2 (3) (b) and section 15 may be enacted only after the Commission on the Implementation of the Constitution and, if it has been established, the Commission on Revenue Allocation, have been consulted and any recommendations of the Commissions have been considered by Parliament.

(2) The Commissions shall be given at least thirty days to consider legislation under subsection (1).

(3) Subsections (1) and (2) lapse when the Commission on the Implementation of the Constitution is dissolved.

71. The laws contemplated under **section 2(3)(b)** of the **Sixth Schedule** to the Constitution are the laws relating to devolved government required to be enacted by the **Sixth Schedule** and **Chapters Eleven** and **Twelve** of the Constitution within the period stipulated in the **Fifth** Schedule. In our view the **CDF (Amendment) Bill** was not one of the laws contemplated under **section 14** of the **Sixth Schedule** as it was an amendment to existing legislation.

72. The third and last limb of argument challenges the process of the enactment of the **CDF (Amendment) Act** on the ground of lack of public participation in the enactment process.

73. The petitioners contend that the **CDF (Amendment) Act** is unconstitutional because the National Assembly failed to facilitate meaningful participation and genuinely consider public views in its enactment. In response to that submission, the National Assembly submitted that it has a broad measure

of discretion on how it achieves the object of public participation and that the same varies from case to case. That the Amendment to CDF did not require extensive public participation because the Bill was short and precise dealing with deletion of only **section 4(2)** of the **CDF Act** and that the CDF Committee had received considerable public opinion and as such, there was in effect public participation in passing the legislation. On their part, the CDF Board submitted that the **CDF (Amendment) Act** did not require public participation as it was enacted primarily to amend the **CDF Act** in order to align it with the Constitution.

74. Public participation is anchored in **Article 10(2)** of the Constitution which establishes the founding values of the State which include, among others, transparency, accountability and participation of the people. The Constitution contemplates a participatory democracy that is accountable and transparent and makes provisions for public involvement in legislative affairs hence **Article 118** of the Constitution provides thus;

118 (1) Parliament shall-

a. Conduct its business in an open manner and its sittings and those of its committees shall be open to the public, and

b. Facilitate public participation and involvement in the legislative and other business of Parliament and its Committees.

75. As to the nature and form of public participation, the South African Constitutional Court in **Doctors for Life International Case (supra)** held that;

[105] The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.

(See also Kenya Small Scale Farmers and Others v Republic and Others Nairobi Petition No. 1174 of 2007 [2013]eKLR)

76. How public participation is given effect will vary from case to case but it must be clear, upon examination of the legislative process, that a reasonable level of participation has been afforded to the public. In **Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC)** at para. 630, Sachs J., noted that;

The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.

77. We are in agreement with the exposition of the law as stated above. Applying the same principles in the instant case we find that the **CDF (Amendment) Bill** is dated 2nd August 2013. It was then first introduced in the National Assembly on 6th August 2013. It was debated on the same day and passed. It was then published in the Kenya Gazette Vol. CXV No. 114 dated 8th August 2013 and assented to by the President on 13th September 2013. *Prima facie*, the short time within which the legislation was passed would seem, did not afford an opportunity for public participation.

78. In response to the argument that there was no public participation, Hon. Lessonet depones as follows;

[6] In this regard the CDF (Amendment) Bill 2013, did not require extensive public participation upon publication for the following reasons:

a. The Bill was short and precise, dealing with deletion of only Section 4(2) of the CDF Act, being Section 4(2) thereof. A minor committee stage amendment was introduced to amend Section 20 of the Act to provide for the manner of equitable sharing of the fund among constituencies and to entrench the constitutional principle of equalization as set out at Article 204 of the Constitution. This is also a matter on which the Committee on the CDF has received considerable public fund.

b. The committee on the CDF had received overwhelming representations from the public that the Fund is not additional revenue to county governments' as the funds did not go to county governments' but to the constituencies. Funds allocated to county governments from the national revenue is dealt with by the Division of Revenue Bill and Revenue Allocation Bill as set out at Articles 215, 216, 217, 218 and 219 of the Constitution of Kenya 2010. The Repealed Section 4(2) of the CDF Act, 2013, was therefore misplaced in law and required to be deleted. This is clear even from the report of the CDF Review Task Force on the CDF Act made on 1st July 2010.

c. The object of public participation is to enable the public make known their views to Parliament so as to guide and inform deliberations and legislation. The views of the public were already known with respect to the repealed Section 4(2) and therefore there was no need for further public participation. Indeed, it is instructive that the Petitioners herein have not given any contrary view to Section 4(2) of the principle Act.

d. A house of Parliament is solely responsible for making its own procedure for enactment of laws as set out at Article 124 of the Constitution. There was nothing unconstitutional for the National Assembly to shorten time for consideration and passing of the CDF (Amendment) Bill 2013.

77. The issue as to whether there was public participation is not merely a matter of form but one of substance. The court must look at the process to determine whether it meets constitutional muster. In **Law Society of Kenya v Attorney General Nairobi Petition No. 318 of 2012 [2013]eKLR** the court observed that,

[51] In order to determine whether there has been public participation, the court is required to interrogate the entire process leading to the enactment of the legislation; from the formulation of the legislation to the process of enactment of the statute.

78. There is no dispute that the process of amendment of the **CDF Act** commenced through a task force that engaged stakeholders. After the Task Force presented its report, the CDF Board undertook a further review of the Act where stakeholders were engaged. There are instances that before legislation is proposed, it is preceded by intensive public consultation. These consultation and other pre-legislation activities ought to be taken into account in assessing whether there has been a modicum of public participation. We therefore find that there was public participation in formulation of the law. In the actual Committee Stage, the impugned amendment was moved and accepted. In light of the process of formulation of the CDF legislation, we do not accept that there was no public participation to the extent that the **CDF Act** was rendered invalid.

79. We are aware that during the legislative process, amendments to the Bill may be moved during the Committee Stage and to hold that every amendment moved must undergo the process of public participation would negate and undermine the legislative process. In this case, we are satisfied that the amendment moved was in substance, within the parameters of what had been subjected to public participation during the review process. We find that the public was involved in the process of enactment of the **CDF Act** through the Task Force and review panel earlier set up by CDF Board. The amendment was within the parameters of what was in the public domain and in the circumstances we find and hold that the amendment bill did not violate the principle of public participation.

Whether Section 4 of the CDF (Amendment) Act offends the principles of public finance and

division of revenue

80. The principal question here concerns the nature of the CDF and whether it upsets the formula for equitable sharing of national revenue provided under the Constitution. Is the CDF a conditional grant to the counties?

81. That county governments, just like the national government, require money to perform the functions allocated to them under the Constitution is unassailable. It is no wonder then that there are several provisions in the Constitution governing how revenue is to be shared between the two levels of government. Indeed, a key principle of devolved government is that county governments must have reliable sources of revenue to enable them to govern and deliver services effectively in terms of **Article 175(b)** of the Constitution. Furthermore, an important principle of public finance as enshrined under **Article 201(b)(ii)** is that revenue raised nationally is to be shared equitably among the national and county governments. Similar provisions are echoed by **Article 202(1)** which lays emphasis on equitable sharing of national revenue. County governments' share of revenue must be at least fifteen per cent of 'all revenue collected by the national government' in accordance with **Article 203(2)** of the Constitution. The import of this provision is that any amount that reduces the amount of shareable revenue or revenue collected by the national government effectively affects the amount available to the counties hence an infringement on the requirements of this provision. We must therefore agree with the petitioners that the Constitution does not envisage any other organ, body or fund to have a share of all the revenue collected by the national government before it is shared as between the two levels of government established under **Article 1(4)** of the Constitution.

82. There are two levels of revenue sharing under the Constitution, vertical sharing between the national government on the one part and the 47 county governments collectively on the other. This is done annually through the Division of Revenue Bill. There is also the horizontal sharing of the county's shareable revenue among the 47 county governments under **Article 217** of the Constitution in accordance with the criteria set in **Article 203** of the Constitution. This sharing amongst the 47 county governments is done in form of an annual County Allocation of Revenue Act. A county government's share of revenue must then be promptly transferred to the county 'without undue delay and without deduction' in terms of **Article 219** of the Constitution. The Constitution also provides for the Equalisation Fund established under **Article 204** to which is paid one half per cent of all revenue collected by the national government. This amount may be used by the government directly or indirectly through conditional grants to county governments in areas where there are marginalized communities.

83. The Constitution permits national government to allocate monies in form of grants whether conditional or unconditional to the county government. The germane issue here is whether the CDF qualifies as a national government grant to county governments within the meaning of **Article 202(2)** and whether it disturbs the equitable sharing of revenue between the two levels of government as envisaged under the Constitution.

84. According to the petitioners, national revenue is only shareable between the national and county governments and that the **CDF Act** ushers in a third party, the CDF, to the table of revenue sharing unknown under the Constitution. The petitioners condemn the wording of **section 4** of the **CDF Act** as it demands that the CDF receives money prior to division of the national revenue between the two levels of government. On their part the respondents contend that the **CDF Act** has not introduced new criteria for sharing of national revenue.

85. Section 4 of the **CDF Act** provides thus;

4(1) There is established a fund to be known as the Constituencies Development Fund which shall

—

(a) be a national fund consisting of moneys of an amount of not less than 2.5% (two and half per centum) of all the national government ordinary revenue collected in every financial year;

- (b) comprise of any moneys accruing to or received by the Board from any other source;*
- (c) disbursed by the national government through the Board to constituencies as a grant to be channelled to constituencies in the manner provided for by this Act;*
- (d) be administered by the Board.*

In order to determine the constitutionality or otherwise of **section 4**, the same must be examined through the prism of the principles of public finance as set out under **Article 201** of the Constitution as follows;

201. The following principles shall guide all aspects of public finance in the Republic—

- (a) there shall be openness and accountability, including public participation in financial matters;*
- (b) the public finance system shall promote an equitable society, and in particular—*
 - (i) the burden of taxation shall be shared fairly;*
 - (ii) revenue raised nationally shall be shared equitably among national and county governments; and*
 - (iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;*
- (c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;*
- (d) public money shall be used in a prudent and responsible way; and*
- (e) financial management shall be responsible, and fiscal reporting shall be clear.*

Article 202 of the Constitution has then established for the equitable sharing of national revenue as follows;

202. (1) Revenue raised nationally shall be shared equitably among the national and county governments.

(2) County governments may be given additional allocations from the national government's share of the revenue, either conditionally or unconditionally.

86. As can be seen from the provisions we have outlined above, the equitable sharing of revenue among the national and county governments is one of the principles established under **Article 201** as part of the principles and framework governing public finance in Kenya. This objective is achieved in accordance with the criteria set out in **Article 203(1)** as follows;

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 optimisation of each county and to provide incentives for each county to optimise 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.

(2) For every financial year, the equitable share of the revenue raised nationally that is allocated to county governments shall be not less than fifteen per cent of all revenue collected by the national government.

(3) The amount referred to in clause (2) shall be calculated on the basis of the most recent audited accounts of revenue received, as approved by the National Assembly.

87. We have already reproduced the provisions of **section 4(1)(a)** of the **CDF Act** which provides that there shall, “*be a national fund consisting of moneys of an amount of not less than 2.5% (two and half per centum) of all the national government ordinary revenue collected in every financial year*” [*Emphasis ours*]. A plain and literal reading of this section establishes that the monies forming part the CDF shall be 2.5% of all the national government ordinary revenue collected in every financial year. The issue therefore is what happens after the sharing of national revenue between the two levels of government. From a plain reading of **Articles 202 and 206** of the Constitution, it is clear that the national government has various ways in which it can deal with the revenue allocated to it. The starting point would be the provisions of **Article 202(2)** of the Constitution which empowers the national government to give additional revenue out of its share either conditionally or unconditionally to the county government.

88. National government money shall be dealt with in accordance with the provisions of **Article 206** of the Constitution as follows;

206. (1) There is established the Consolidated Fund into which shall be paid all money raised or received by or on behalf of the national government, except money that—

(a) is reasonably excluded from the Fund by an Act of Parliament and payable into another public fund established for a specific purpose; or

(b) may, under an Act of Parliament, be retained by the State organ that received it for the purpose of defraying the expenses of the State organ.

89. We have combed through the provisions of **Chapter Twelve** of the Constitution which deals with public finance and we must agree with the petitioners that nowhere is it contemplated that a constituency shall be one of the beneficiaries of the national revenue before it is divided between the national and county government. **Article 206 (1)(a)** and **(b)** of the Constitution excludes from the Consolidated Fund such monies excluded by an Act of Parliament and is payable into another fund established for a specific purpose. Counsel for the National Assembly emphasized the fact that the CDF was such a fund established by an Act of Parliament.

90. We wish to emphasize once again that **section 4(1)(a)** of the *CDF Act* provides that the CDF shall ***be a national fund consisting of moneys of an amount of not less than 2.5% (two and half per centum) of all the national government ordinary revenue collected in every financial year.*** It is therefore clear to us that the money paid into the CDF is 2.5% of all the national government ordinary revenue.

91. We recall that our system of governance like many other decentralised systems is such that it is the national government that primarily finances the devolved units. Although counties have limited revenue raising powers provided under **Article 209(3)** of the Constitution, the primary source of funding remains the equitable share emanating from revenue collected by the national government. The money raised or received by or on behalf of a county government is paid into a Revenue Fund for the respective county government established under **Article 207** of the Constitution.

92. Article 218(1)(a) of the Constitution which provides for the Annual Division and Allocation of Revenue Bills talks of a Division of Revenue Bill which is to divide, ‘**revenue raised by the national government**’ between the national and county levels of government. It is thus clear that it is the national government’s revenue that is to be shared between the national and county governments. We therefore find, for purposes of equitable sharing of revenue that the phrase ‘**revenue raised nationally**’ as used in **Articles 201(b)(ii), 202(1) and 203(2)** to be equivalent to ‘**revenue raised by the national government**’ within the wording of **Article 218** of the Constitution. The implication of the wording of the provisions we have cited is that the revenue shared between the national and county government and amongst the counties is not received from anywhere else but from the revenue collected by the national government. In other words all revenue collected by the national government must be pooled in a common pot before it is shared by the level of government. It is in this light the wording of the impugned section ought to be scrutinised.

93. We are in agreement with the CIC that the use of the phrase, ‘**all the national government ordinary revenue**’ in the *CDF Act* introduces ambiguity. However, as case law has established, not all ambiguity necessarily renders a statute unconstitutional, as such ambiguities can be solved by applying rules of interpretation. In *Ruturi & Kenya Bankers Association v Minister for Finance [2002] 1 KLR 84 [2001] EA 253* it was held that a statute or enactment worded in a language which is difficult to follow, ambiguous, contradictory or impossible to apply, is not necessarily rendered unconstitutional since it only gives rise to questions of interpretation by the Court.

94. We are aware that the amendment to **section 4(2)** of the Act which made the CDF a charge on the Consolidated Fund to which is paid, ‘*.. not less than 2.5% of all the national government ordinary revenue collected.*’ Again, it is not clear whether the money is after deduction of the equitable share or not. The principle that must come out clearly is that the ‘*revenue raised nationally*’ within the wording of **Article 202** is the revenue raised by the national government and that the same is only shareable between the two levels of government recognised under the Constitution which are the national and county governments. The question as to whether the CDF violates the formula of equitable sharing can only be properly assessed after establishing whether or not CDF is a conditional grant as envisaged under **Clause (2) of Article 202**.

95. It was argued on behalf of the petitioners that since the national government does not remit CDF moneys to county governments and that the implementing agencies are all creatures of national government, the CDF is not a grant contemplated under **Article 202(2)** of Constitution and it would be irregular to describe it as such as the Counties are not even involved in its implementation. In this respect we are in agreement with the petitioners that the National Assembly that the CDF money is not additional revenue to the County government within the meaning of **Article 202(2)** of the Constitution, the reason that necessitated, we are told, the amendment to the *CDF Act* at **section 4** by deleting **subsection (2)** of the section which read, “(2) All moneys allocated under this Act is additional revenue to the county governments under Article 202 (2) of the Constitution to be administered according to section 5.” The subsection was replaced by one that reads, “(2) All monies allocated under this Act shall be considered as funds allocated to constituencies pursuant to Article 206 (2) (c) of the Constitution.”

96. Conditional grants are a feature of most fiscally decentralized countries. Through conditional grants,

the national government is able to achieve certain national governmental objectives within the decentralized units. What is paramount though is that the nature and design of such grants must respect the constitutional architecture. It is our finding that CDF is not a conditional grant to county governments envisaged under **Article 202(2)** of the Constitution as it is not even expressed to be such.

97. Section 4(1) (c) of the **CDF Act** provides that the CDF money is to be, ‘disbursed by the national government through the Board to constituencies as a grant to be channelled to constituencies in the manner provided for by this Act.’ The section describes the CDF as a grant to the constituencies. This is problematic as we shall see shortly. The constitutionality or otherwise of this subsection can only be appreciated by examining the manner of implementation of the fund under the **CDF Act**. This leads us to the next core question, whether the effect of the CDF is such that it interferes with the functional and power sharing between the national and county government.

Whether the CDF Act, 2013 violates the division of functions

98. It was the petitioners’ case that the design and manner of implementation of the CDF infringes on the Constitution. The petitioners contended that provisions of **sections 3** and **22** of the **CDF Act** have encroached on the functions of county governments. The impugned **section 3** is one dealing with the object and purpose of the Act and reads thus;

The provisions of this Act shall apply, as more specifically provided for in the Act, and shall ensure that a specific portion of the national annual budget is devoted to the constituencies for purposes of infrastructural development, wealth creation and in the fight against poverty at the constituency level.

99. The petitioners take issue with **section 22** of the **CDF Act** which they claim has not specifically identified the projects that should be undertaken but has instead used broad terminology to describe the allowable projects. The section is one that provides for the nature of community based projects that the CDF may be channelled to and reads as follows:

22 (1) Projects under this Act shall be community based in order to ensure that the prospective benefits are available to a widespread cross-section of the inhabitants of a particular area.

(2) Any funding under this Act shall be for a complete project or a defined phase, of a project and may include the acquisition of land and buildings.

(3) All projects shall be projects as defined under this Act and may include costs related to studies, planning and design or other technical input for the project but shall not include recurrent costs of a facility.

(4) Funds provided under this Act shall not be used for the purpose of supporting political bodies or political activities or for supporting religious bodies or religious activities.

(5) Notwithstanding the provisions of subsection (4), the Constituency Development Fund Committee may identify a religious body or organization as an appropriate specialized agency for purposes of section 12 with regard to emergency support.

(6) A Constituency Development Fund Committee office project shall be considered as a development project for purposes of the Act and may include appropriate furniture and equipment for the office.

(7) Notwithstanding the provision of subsection (3), up to a maximum of six per centum of the total annual allocation by the constituency may be used for administration, recurrent expenses of vehicles, equipment and machinery and such use shall be listed in the First Schedule as a project.

(8) Projects may include the acquisition of vehicles, machinery and other equipment for the

constituency

(9) Sports activities shall be considered as development projects for purposes of this Act but shall 'exclude cash awards provided that the allocation to such activities does not exceed two per centum of the total allocation of the constituency in that financial year.

(10) Monitoring and evaluation of ongoing projects and capacity building of various operatives may be considered as a development project provided that not more than three per centum shall be allocated for this pulse.

(11) Environmental activities may be considered as `development projects for purposes of this Act provided that the allocation to such activities does not exceed two per centum of the total allocation of the constituency in that financial year.

(12) Each of the projects shall be listed on the First Schedule including the emergency item under section 11 and, where applicable, the activities under subsections (6), (7); (8), (9), (10, and (11) of this section.

100. On its part, the National Assembly submitted that Parliament has power to appropriate funds for specific purposes through Funds such as Uwezo Fund and the Youth Enterprise Fund anchored in the provisions of **Article 95(4)(b)** and **206** of the Constitution. It is therefore argued that through the **CDF Act**, Parliament has created an oversight role over the funds allocated under CDF and that CDF finances activities not supported by county governments such as education bursaries to needy students and security.

101. Article 186 of the Constitution establishes the respective functions and powers of national and county government as follows;

186 (1) Except as otherwise provided by this Constitution, the function and powers of the national government and the county governments', respectively, are as set out in the Fourth Schedule.

(2) A function or power that is conferred on more than one level of government of a function or power within the concurrent jurisdiction of each of those levels of government.

(3) A function or power not assigned by this Constitution or national legislation to a county is a function or power of the national government.

The **Fourth Schedule** to the Constitution has then specifically dealt with distribution of functions between the national and county governments'. With those provisions in mind and looking at the provisions of **section 3** of the **CDF Act**, it is without a doubt that the CDF seeks to address issues involving infrastructural development, wealth creation and fight against poverty at the constituency level. Are these broadly enumerated functions within the purview of functions of county or national government?

102. We recall the submission made by the Attorney General that a constituency is a unit of representation for purposes of election of National Assembly members and it is taken as a sub-unit of a county and that its administration and development agendas are under the administration of the Governors and the county government. We have deliberately discussed here the submission by the Attorney General because he has, in our view answered and clarified the question at hand. We are in agreement with the Attorney General that a constituency is a unit of representation of the people in the National Assembly and in that context several constituencies form a county. How then is the CDF, which is funded by the national government supposed to undertake projects within a constituency which is under the administration of the county government and not interfere with the county government functions?

103. Section 22 of the Act set out above demonstrates that the Act is not clear what projects the CDF is supposed to fund and implement. The section broadly refers to unspecified projects which we are unable

at this point to determine to which level of government they belong into as per the **Fourth Schedule** to the Constitution. Nevertheless, we take the position that the drafters of the Constitution did not envisage that there would be a three tier system (national government, county government and constituency) that would be charged with infrastructural development at the county level.

104. We do not think that from a plain and literal reading of the provisions of **Article 186** and the **Fourth Schedule** to the Constitution, it can be said that for instance, infrastructural development and wealth creation at the Constituency level is solely a function of the national government. Infrastructural development in our view is such a fluid term that may include county transport and development of county health facilities which fall within the functions County government enumerated in **Part 2** of the **Fourth Schedule**.

105. Another aspect we wish to point out that entrenches county government is the specific provision that vests executive authority of a county in a county executive committee comprising the governor, deputy governor and members of the executive committee appointed by the governor with the approval of the County Assembly in terms of **Article 179** of the Constitution.

106. Executive authority of a county, including implementing legislation and managing and coordinating the functions of the county administration are roles bestowed on the county executive committee (CEC) under **Article 183** of the Constitution. Indeed, both the Constitution and the law requires the CEC to submit reports regarding affairs of the county to the county assembly. Further, **Article 179(4)** of the Constitution designates the county governor and deputy governor as the chief executive and deputy chief executive of the county respectively. Additionally, **Part XI** of the **County Government Act** has provided for the statutory framework to be used in the county planning. **Section 104** of that Act has made it mandatory for counties to plan for everything being implemented in the County.

107. Article 186(1) of the Constitution has set out that national and county governments are to share certain functions within the County and those functions are clearly stipulated in the **Fourth Schedule** to the Constitution. The creation and assignment of roles to an entity outside the structures of governance established under the Constitution is antithetical to the principles of the Constitution as it threatens to violate the functional competencies of county government within which CDF operates.

108. While we have held that the CDF is not a grant to the counties, we find it necessary to stress here that the national government may impose conditions on grants issued under **Article 202(2)** of the Constitution. These conditions may include naming the specific projects to which such grants are channeled. However, the conditions attaching to these grants, including the manner of implementation must by themselves be in line with the devolution principles and constitutional values. Such conditions must not be such that they undermine the county government autonomy envisaged under the Constitution. **Article 6** establishes the principle of ‘distinctiveness’ which effectively means that each level of government must be free from interference in performance of their functions. The two levels of government are interdependent and are to conduct their mutual relations on the basis of consultation and co-operation. The principle of co-operative governance under **Article 189** of our Constitution requires that each level of government performs its functions in a manner that respects the functional as well as institutional integrity of government at the other level. Moreover, the spirit of co-operative government requires that the national and county governments liaise and co-operate with each other in coordination of policies and administration and performance of functions and exercise of their respective powers.

109. The upshot of the foregoing is that we are in agreement with the petitioners that the national government may only provide grants to county government or additional revenue but it is only the county government that has the constitutional power to execute development within the county except for the projects reserved for the national government as provided for under the **Fourth Schedule** to the Constitution. Put another way, the national government, while free to infiltrate its policies at the county levels, must do so through the structures recognised under the Constitution and not run parallel them. If it so desires, the national government may channel grants, whether conditional or unconditional to the county governments as additional revenue within the meaning of **Article 202** and not any other entity which performs the functions allocated to the county by the Constitution. The national government cannot

purport to channel grants to an entity whose intended projects effectively undermine the role of the government at the county level unless the projects are specifically defined to exclude them from the ambit of **Part 2** of the **Fourth Schedule**.

110. Going back to the impugned provisions, **section 3** of the **CDF Act** which encapsulates the object of the Act and **section 22** introduce a conflict of roles and in this way threaten to violate the division of functions between the national and county governments. The scenario would have been different if the implementation of the same was to be through the machinery of the county government. The problem is compounded when one considers the manner in which the CDF is administered. The **CDF Act** has set out parallel structures to the county government within which these funds are to be managed. This brings us to the fourth and last limb of argument proffered against the CDF.

Whether the CDF Act 2013 violates the principle of separation of powers

111. The petitioners urged that the **CDF Act** violates the principle of separation of powers by involving MPs in the implementation of projects funded by the CDF. The respondents on the other hand refuted this argument, claiming that the Fund is run by committees and not the individual MPs. Further, that their involvement reinforces their role under **Article 95** of the Constitution including that of oversight.

112. The petitioners contended that **section 24** of the **CDF Act** is unconstitutional on two fronts. First, it allocates certain administrative responsibilities to Members of Parliament who play an oversight role through the National Assembly Committee on CDF therefore making the MP both an executor of CDF as well as a legislator. In that regard therefore, they claimed that arming the MP with the ability to play the dual roles has directly violated the principle of separation of powers. Second, that the administration and implementation of projects for which the National Assembly has determined the allocation of funds is not a function assigned to the National Assembly and such an arrangement offends the principle of accountability under **Article 10** of the Constitution.

113. While submitting that there was no absolute separation of powers, the respondents contended that **section 24** of the Act has clearly demarcated the role for the Member of Parliament as an *ex-officio* member of CDF Committee and as a link between the Committee and the people in the Constituency. That the MP's role was limited to issuing opinions and the Committee was the body mandated to disburse CDF and oversee the implementation of projects in the Constituency. The Attorney General submitted that **section 24** of the Act provides for an elaborate procedure in the appointment of CDF Committees and as such the process is transparent, people centered and representative. On the separation of powers, he submitted that the management of the fund is left to the Board and the Committee to which MPs are not members thus does not violate the principle of separation of powers. Similarly, the CDF Board submitted that under **sections 24, 31 and 18** of the Act, the CDF Committees and the Board are responsible for the monitoring of the projects and allocation of funds to the projects was the responsibility of the Committee. Thus, the Board stated, there is no duplication of the CDF projects within the counties.

114. Section 24 of the Act deals with the composition of the CDF Committee and the section as subsequently amended provides in part as follows;

24.(1) There shall be a Constituency Development Fund Committee for every constituency.

(2) Each Constituency Development Fund Committee shall comprise-

(a) the national government official at the constituency as may be designated by the Cabinet Secretary or an alternate;

(b) three men nominated by the ward development committees and one of whom shall be a youth at the date of appointment;

(c) three women nominated by the ward development committees and one of whom is a youth shall be a youth at the date of appointment;

(d) one person with disability nominated by the ward development committees;

(e) one person nominated from among the active Non-Governmental Organisations in the constituency;

(f) an officer of the Board seconded to the Constituency Development Fund Committee by the Board who shall be ex-officio.

115. In our understanding, **section 24** of the Act has been challenged as being unconstitutional because of the role the National Assembly member is considered to play in the CDF administration under **section 24(3)** of the Act which provides thus;

24 (3) The eight persons referred to in subsection (2) (b), (c), (d) and (e) shall be nominated through the following procedure-

(a) within forty-five days of being sworn in, each Member of Parliament for a particular constituency shall convene open public meetings of registered voters in each of the elective wards in the constituency;

(b) each ward shall then elect five persons whose names shall be forwarded to the officer of the Board in the constituency;

(c) upon receiving the names from all the wards in the constituency, the Member of Parliament in consultation with the officer of the Board and the sub county administrator for the constituency, shall appoint eight persons to the Board, taking into account the geographical diversity within the constituency, communal, religious, social and cultural interests in the constituency and the requirements of gender, youth and representation of persons with disabilities;

(d) the eight persons appointed under: subparagraph (c) shall elect from among themselves one person to be the, chairperson of the Constituencies Development Fund Committee for the constituency;

(e) upon conclusion of the election of the chairperson in the manner stipulated in paragraph

(d) the officer of the Board shall forward the names of the ten members of the Constituencies Development Fund Committee to the chief executive officer of the Board for onward transmission to the Cabinet Secretary for gazettelement;

(f) The Member of Parliament for the constituency shall be an ex-officio member of the Committee.

116. We are keen to note that the provision uses the term ‘Member of Parliament’ ostensibly in reference to the National Assembly member who is the elected constituency representative under **Article 97(1)** of the Constitution. This mix up in terminology also emerged in the parties’ submissions whereby the term MPs was used in reference to the National Assembly Members hence need for the Court to clarify here, if only in passing, that under the Constitution, “Parliament” encompasses both Houses; the National Assembly and Senate. Thus, “Members of Parliament” is a collective term for members of both Houses and “Member of Parliament” could mean either Senator or National Assembly member.

117. Back to the substance, the petitioners challenged **section 24** of the Act with regard to the manner in which the **CDF Act** is to be implemented. We have read the **CDF Act** and there are other provisions regarding the implementation of the CDF projects that are of concern to us apart from **section 24** for they have the effect of having Parliament get involved in the administration of the CDF. For instance, **Part V** of the Act at **section 28** establishes a National Assembly Select Committee which consists of a Chairperson and not more than 10 other Members of the National Assembly. **Section 28(5)** sets out the

functions of the National Assembly Select Committee as follows;

28(5) The functions of the National Assembly Select Committee shall be —

(a) to consider and recommend to the National Assembly any matter requiring action by the National Assembly pursuant to the provisions of this Act;

(b) to oversee the implementation of this Act and in this respect, shall after every two years submit a report to the National Assembly and where necessary, propose any amendments to this Act, in particular, with respect to the quantum of funds repayable into the Fund in accordance with section 4 of the Act;

(c) to oversee the policy framework and legislative matters that may arise in relation to the Fund;

(d) to continually review the framework set out for the efficient delivery of development programmes financed through the Fund;

(e) to consider and report to Parliament with recommendations, names of persons required to be approved by Parliament under this Act; and

(f) to carry out any other functions relevant to the work of the Fund.

118. In addition to the above functions, the Committee may make reports other than the statutory report stated in **sub section 5(b)** in order to appraise the National Assembly on various matters relating to the Fund and to seek various approvals as required by the Act. Under **section 29**, the CDF Board is required to submit a quarterly report to the National Assembly Select Committee on CDF on a monthly basis, detailing the following;

(a) a summary of the project proposals received from the constituencies in the preceding month and indicating the approval status of such projects;

(b) a summary of the status of disbursements of funds to the constituencies for that preceding month

(c) a summary of the status of disbursements from the Treasury to the National Account; and

(d) any restriction imposed on a constituency account in accordance with the Act.

Lastly, under **section 30** of the Act, it is the duty of the Board to ensure that the list of projects forwarded to it by each constituency is funded upon approval. The Board and the Constituency Development Fund Committee are responsible for monitoring implementation of projects in terms of **section 31**. The project management committees are responsible for the implementation of the respective projects under the Act, with the assistance of the relevant government department.

119. In addition to the above, **Part VII** of the **Act** establishes the County Project Committee whose main function is to coordinate the implementation of the projects funded through the CDF. The County Project Committee may even make official or impromptu visits to projects if it finds appropriate to do so. Membership to the County Project Committee under **section 37** of the Act comprises among others the senator, Members of Parliament from the County, a county women representative, the governor and a national government official at the county. **Section 24(3)(a), (b) and (c)** of the **CDF Act** which ties the life of the Committee to the life of Parliament leave no doubt in our mind that the CDF is a legislative intrusion in the county government function.

120. We have dealt with some of these provisions of **Part V** and **VII** of the Act because they help in understanding the operation of the CDF. What is clear from the above is that the CDF appears to be a

third entity grafted from the national government that operates within the county governments but outside their structures. The involvement of the members of the National Assembly and Senators in the implementation and administration of CDF, infringes the Constitution on in two ways. First, it threatens to violate the division of functions between the national and county governments. We deliberately use the term ‘threatens’ here because as we have ruled above, the purpose of the Act, coupled with the target projects under **section 22** are vaguely worded, and absent a specific cause, it is premature to categorically class the enumerated projects as falling either under the national or county governments. It is nevertheless a safe inference to make at this point that the reference to ‘community based projects’ within the wording of **section 22** would at the very least cause a functional overlap with those of county governments.

121. One of the objectives of devolution is to allow provision of proximate services to the grassroots and allow the people to participate in the governance and decision making. A key underlying principle in this being that of subsidiarity, that recognizes that ideally the local needs and communities are better appreciated, prioritised and localized problems solved at the lowest level capable of dealing. The Constitution requires that the county governments decentralize their functions and services “*to the extent that it is efficient and practicable to do so*” under **Article 176(2)**. This principle is fortified by **Part VI** of the **County Governments Act, 2012** which sets out the decentralisation units in a county. We find that with this cascading mechanism of governance, the Constitution envisaged that although power is shared between the national and county government, the decentralized units within the county would facilitate the achievement of the objects of devolution through to the grassroots. We do not read the Constitution to authorize other competing governance structures outside the national structure, county and sub units of the county government, driving development concerns at the county level.

122. Article 1(4) of the Constitution recognises two levels of government, the national and county governments. Each of these levels exercises power derived from the Constitution itself. Under **Article 1** of the Constitution, the county government does not derive its power from the national government but directly from the People of Kenya and under the Constitution. These two levels of governments are therefore, in theory, equal and none is subordinate to the other. MPs and cabinet secretaries involved in the management or implementation of the CDF constitute the executive and legislative organs of the national government. Their involvement in development activities at the county level not only threatens to undermine the functions of the government at the county level but also blurs the executive and legislative divide that underlies the principle of separation of powers. We therefore find that it is unconstitutional for the national government to extend its mandate in the counties beyond its mandate under the Constitution through the artifice of the CDF.

123. There are available means through which the national government can permeate its agenda into counties within the purview of the Constitution. For instance, through conditional grants to county governments. The national government could also assign or transfer its functions to the county governments if it so desires within the terms set out under **Articles 186(3)** and **187** of the Constitution. The structure of such grants could be tailored to meet specific need in constituencies.

124. The design and architecture of our Constitution is one that is founded on the principle of separation of powers. There is a clear separation of powers between the legislature, executive and the judiciary. Each of the two levels of government has its own executive and legislature, each with specific constitutional mandates. One of the objects and principles of devolved government under **Articles 174 and 175** is separation of powers. At the national level, under **Article 93(1)** of the Constitution, there is established a Parliament consisting of the National Assembly and the Senate. In the same breath at the county level, there is the County Assembly and the County Executive headed by the Governor. In our view therefore, the arrangement introduced by the CDF of having Members of Parliament getting involved in the implementation of the development agenda of a county undermines the county government and especially the role of the county executive. At the County level the Governor and the County Executive Committees are the executives in the county and in charge of development policies.

125. We heard the respondents’ claim that the MPs do not get involved in the day to day administration of CDF but instead play an oversight role over the same. Far from the truth, we have reproduced provisions

of the **CDF Act** that reveal more than that. The provisions of **section 24** of the Act demonstrate that the Members of the National Assembly are charged with the responsibility of selecting the members to the CDF Committee. They also sit in those committees as *ex-officio* members. Senators are members of the County Project Committee whose primary role is to, “*coordinate the implementation of projects financed through the Fund.*” We are thus constrained to ask, where do the Members of Parliament derive such huge powers from? Certainly it is not from the Constitution. The argument that involvement of MPs reinforces parliament’s oversight role is unconvincing. The principle of checks and balances is one that is well embedded in the Constitution. Kenya adopted a largely parliamentary system at both levels of government. Parliament checks on the executive at the national level while the county assembly is the primary body charged with executive oversight at the county level. **Chapter Eight** of the Constitution is crystal clear on the role of the Houses of Parliament and the executive function is not one of those roles. The various roles of State organs are implicated in the doctrine of separation of powers.

126. The Constitution creates various institutions and vests them with State power dispersed both vertically and horizontally. In ***Trusted Society of Human Rights Alliance v The Attorney General and Others Nairobi Petition No. 243 of 2011 [2012] eKLR*** the Court observed as follows;

The Constitution consciously delegates the sovereign power under it to the three branches of government and expects that each will carry out those functions assigned to it without interference from the other two...this must mean that the Courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislative intent. Yet...the courts have an interpretive role-including the last word in determining the constitutionality of all governmental actions. That, too, is an incidence of the doctrine of separation of powers.

127. The principle of separation of powers is at the heart of the structure of our government; each organ is independent of each other but acting as a check and balance to the other and also working in concert to ensure that the machinery of the state works for the good of Kenyans. The Apex Court in the ***In the Matter of the Interim Independent Electoral Commission (supra)*** expressed itself as follows;

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

128. The respondents argued that there can never be complete separation of powers and it is an accepted fact in major constitutional democracies that the principle is not perfect. This state of affairs was exemplified in the former Constitution where, for example, members of the executive were also members of the legislature.

129. Under the current dispensation, the first port of call must be the Constitution and what it says about the role of each State organ. In ***Speaker of the Senate case (supra)***, the Supreme Court observed that;

[135] By a Constitution achieved after many false starts, the people have declared that “All sovereign power belongs to the people of Kenya” [Article 1(1)]; and they have established institutions of governance committed to named functions: the Executive; the National Assembly; the Senate; and numbers of others.

130. Article 94 of the Constitution vests legislative authority of the people of Kenya in Parliament. The roles of the National Assembly and the Senate are specifically delineated in **Articles 95** and **96** of the Constitution. **Article 95(4)** of the Constitution provides as follows;

95(4) *The National Assembly—*

(a) determines the allocation of national revenue between the levels of government, as provided in Part 4 of Chapter Twelve;

*(b) appropriates funds for expenditure by the national government and other national State organs;
and*

(c) exercises oversight over national revenue and its expenditure.

As regards the Senate, **Article 96(1), (2) and (3)** of the Constitution provides as follows;

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

(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.

131. The respective roles of the Houses of Parliament are clearly stated. The oversight role of the National Assembly and the role of the Senate in regulation of county government under the umbrella of legislative authority do not permit the National Assembly and the Senate to get involved in the administration and implementation of development projects in the counties. Members of Parliament cannot legislate on county laws, play oversight role over the county funds in the case of the senators, set policies on the counties and undertake and implement development projects at the constituency level without impinging on the county government function and the all-important principle of checks and balances.

132. In light of the specific grant and definition of legislative powers under the provisions of **Articles 95 and 96** of the Constitution, we find that the involvement of the Members of Parliament in the CDF implementation violates the core principle of separation of powers and to this extent, the **CDF Act** is unconstitutional. We will also add here that, to the extent that the Act conflates the executive and legislative functions, it obfuscates accountability mechanism envisaged under the Constitution underpinned by the doctrine of separation of powers. In that respect, the Act violates key national values and principles enunciated under **Article 10** of the Constitution, to wit, good governance and accountability and we so find.

133. Besides, the Constitution has set up mechanisms of ensuring that the county executive performs their constitutional functions. At the county level, under **Article 185 (3)** of the Constitution, the County Assembly exercises oversight over the County Executive committee and any other executive organs of the county. At the national level, under the provisions of **Article 96(1)** of the Constitution, the Senate represents the counties at the national level and serves to protect the interests of the counties and their governments. The Senate also has an oversight role over the county resources allocated to the counties from the national government. **Articles 190(3)** of the Constitution provides for intervention by the national government in a county government if the latter is unable to perform its functions or does not comply with a system of financial management set under the Constitution.

134. The history and role of the CDF has been noble and was a direct response to the concentration of resources in the central government and development exclusion. In other words, the CDF was a precursor to the devolution ushered in by the Constitution. While there may have been a rationale for the existence of the CDF and the structures of the former Constitution accommodated it, the Constitution founded on among others, the principle of devolution where power to govern the Republic is shared between the national and county levels of government and organs within them does not permit the formation of bodies that would otherwise dilute the principle of devolution. Today, the promise of devolution established under the Constitution has brought development to the people through their democratically elected Governor who implements development policies in the County and through the County Executive under

the oversight of the members of County Assembly.

135. Members of Parliament have a specific and clearly defined role under the Constitution. This role does not include involvement bodies whose functions entail co-coordinating, project approvals or actual implementation of projects as these functions are executive in nature. It is also untenable to permit Senators, who are charged with the constitutional role of oversight over county resources from the national government to the county government, to convene and chair County Project Committee as established under **Part VII** of the Act.

136. Parliament is constitutionally bound to enact legislation that assists and strengthens the county governments in the discharge of their roles rather than one that undermines them, as the **CDF Act** effectively sets to do. The organs of the national government must trust and utilize the machinery that the Constitution now ordains. Even with the noblest of intentions, any Act of Parliament must meet the threshold of constitutionality for it to withstand the test of validity.

137. The submission that an MP as an *ex-officio* member of the CDF Committee acts as a link between the CDF and the government and that an MP's role is not limited to Parliament is misplaced, vague and without any constitutional back up. It is important to enhance separation of powers, checks and balances which are some of the core principles of governance crucial in achieving the objects of devolution. It is therefore clear that for the above reasons the **CDF Act** violates the Constitution and we so find.

138. We have analysed the **CDF Act** and concluded that the CDF and the manner it is administered and projects implemented impacts functions allocated to the county under the **Fourth Schedule** to the Constitution. In terms of **Article 96(2)** and **110** of the Constitution, the **CDF (Amendment) Bill** as legislation affecting the functions and powers of the county governments qualifies as, 'a Bill concerning county government' within the meaning of **Article 110(1)** and ought to have passed by the Senate. The purpose of the **CDF (Amendment) Act** was to amend a law that as we have found violates the division of functions between the national and county governments. Thus, an amendment to the Act would have necessitated the input of the Senate. The purpose of involving the Senate is to ensure that counties, as far as possible, get to effectively participate in the legislative business at the national level in matters substantially affecting interests of county governments. This calls for the court to look beyond the substance or purpose of the statute expressed in the text. The court must unbundle the specific provisions of the proposed legislation to see if and to what extent they satisfy the criteria set out under **Article 110(1)** of the Constitution. An amendment to the Act affecting the manner in which money is allocated to the CDF is the core part of the Act. As the availability of money affects the financing and implementation of projects that fall within the competence of the county government, the provision cannot be severed without undermining the entire Act. The **CDF (Amendment) Bill** is not an insubstantial amendment. We therefore find and declare that the **CDF (Amendment) Bill** unconstitutional for want of involvement by the Senate and we so declare.

Conclusion

139. From the many arguments and submissions made before this Court, we distilled four broad issues that called for this Courts determination and we conclude by a summary of our key findings as follows;

a. Whether the process leading to the enactment of the CDF was constitutional.

i. The **CDF (Amendment) Bill** concerns county government and consequently we find and hold that it is unconstitutional on the ground that the Senate was not involved in the enactment of the Bill.

ii. We find that there was sufficient public participation in the process leading up to the enactment of the **CDF (Amendment) Act**.

iii. With regard to consultation of the CIC and the Commission on Revenue Allocation, we find that there was no violation of **section 14** of the **Sixth Schedule** to the Constitution.

b. The nature of the CDF and whether it violates principles of public finance and division of revenue.

i. We have established that CDF is not a conditional grant to the county governments within the meaning of **Article 202(2)** of the Constitution.

ii. That **Article 202** envisages equitable sharing of the national government revenue between the national and county governments. Nevertheless, if national government so desired, it could at its discretion grant additional revenue, whether conditionally or unconditionally through the county governments.

iii. Further, that such grants by national government must respect the structures established under the Constitution. In other words, the national government must tap into the existing structures of the county government.

c. Whether the CDF Act violates the division of powers and functions

i. The Court finds that power and functions are distributed at only two levels of government, the national and county levels.

ii. That the purpose and design of the **CDF Act** is constitutionally flawed in a number of aspects: First, the Act establishes CDF as a mechanism that runs parallel the constitutionally recognised governance structures. By charging it with local projects under **section 22** of the **CDF Act** threatens to upset the division of functions between the national and county levels of governments and interfere with the county government autonomy.

d. Whether the CDF Act 2003 offends the principle of separation of powers

By involving Members of Parliament in the planning, approval and implementation of the CDF projects, the **CDF Act** violates the doctrine of separation of powers between the executive and legislative functions. It also undermines some key national values and principles of governance including devolution of power, accountability and good governance.

140. In making our findings, we are conscious of the fact that CDF has been important in addressing development at the grass root level and has in the past been one of the most significant steps to alleviate poverty and ensure community empowerment. The CDF Review Task Force states in its report that that one of the main purposes of the enactment of the **CDF Act** and the subsequent establishment of the CDF Fund was to devolve funds from the central government to the local communities. As noble as the intention of the CDF was in 2003 when it was first established, the principle of devolution is now one of the pillars of the Constitution anchored through the County governments. The Constitution has made it clear at **Article 1(4)** that sovereign power is exercised between the two levels of government. Indeed, some of the objectives of devolution under **Article 174** of the Constitution include the promotion of social economic development, protection of the rights of marginalised communities and equitable sharing of national and local resources.

141. The Constitution has also set up other mechanisms of ensuring equitable development and sharing of resources such as the Equalization Fund under **Article 204** and the criteria for equitable sharing set out under **Article 203** of the Constitution. Devolution was a panacea to addressing the developmental and equity gaps that exist in our communities. This is not however to say that the national government cannot conceptualise and fund development initiatives at the local level; what is critical is that such initiatives in both design and implementation, must respect the system of governance in existence and the spirit and letter of the Constitution.

142. Good faith and well-meaning intentions are meaningless if the object and design are constitutionally objectionable. As was stated in *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8 at para 100,

Constitutional cases cannot be decided on the basis that Parliament or the President acted in good faith or on the basis that there was no objection to action taken at the time that it was carried out. It is of crucial importance at this early stage of the development of our new constitutional order, to establish respect for the principle that the Constitution is supreme. ... Our duty is to declare legislative and executive action which is inconsistent with the Constitution to be invalid, and then to deal with the consequences of the invalidity in accordance with the provisions of the Constitution.” [Emphasis ours]

143. In coming to the conclusions we have, we draw inspiration from the words of Mutunga C.J., in the *Speaker of the Senate case (supra)* where he stated as follows;

[161] *The Court must patrol Kenya’s constitutional boundaries with vigor, and affirm new institutions, as they exercise their constitutional mandates, being conscious that their very infancy exposes them not only to the vagaries and fragilities inherent in all transitions, but also to the proclivities of the old order.*

Remedies

144. Having reached the above findings, the next crucial action is what is the appropriate relief to grant? **Article 258** of the Constitution which entitles any person to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention does not provide for specific relief to be granted to the applicant or give the court any guidance on how its jurisdiction should be exercised unlike a similar provision in **Article 23** of the Constitution respecting the enforcement of fundamental rights and freedoms which empowers the court to frame or grant, “*appropriate relief.*”

145. It is our view that in order to give effect to the right to enforce the Constitution, the power of the court to award an appropriate remedy must be implied. We hold that the Court has the power to issue any remedy as is necessary to ensure that the Constitution is not threatened or violated. Such relief may include conservatory orders and a declaration of invalidity of any law that is inconsistent with the Constitution.

146. We are also cognisant of our obligation under **Article 2** of the Constitution to declare any law that is inconsistent with the Constitution null and void. However, the court is empowered to deal with the consequences of such invalidity bearing in mind its duty to interpret and apply the Constitution in a manner that, *inter alia*, promotes good governance. **Article 258** of the Constitution does not limit the court’s jurisdiction to fashion an appropriate remedy to deal with the invalidity of the law. It is accepted that the court may suspend the declaration of invalidity in order to deal with the consequences of such invalidity. In *Suleiman Shahbal v Independent Electoral and Boundaries Commission and 3 Others* **Petition No. 3 of 2014 [2014]eKLR**, the Supreme Court expressed the following position;

[42] *The lesson of comparative jurisprudence is that, while a declaration of nullity for inconsistency with the Constitution annuls statute law, it does not necessarily entail that all acts previously done are invalidated. In general, laws have a prospective outlook; and prior to annulling-declarations, situations otherwise entirely legitimate may have come to pass, and differing rights may have accrued that have acquired entrenched foundations. This gives justification for a case-by-case approach to time-span effect, in relation to nullification of statute law. In this regard, the Court has a scope for discretion, including: the suspension of invalidity; and the application of “prospective annulment”. Such recourses, however, are for sparing, and most judicious application – in view of the overriding principle of the supremacy of the Constitution, as it stands.*

147. While in that case, the court declined to hold that the annulment of a specific provision of the *Elections Act, 2011* prospective, the court noted that;

[53] *In the case of Kenya, the High Court bears the primary responsibility for determining whether any law is inconsistent with or in contravention of the Constitution. This discretion also vests in the*

Court of Appeal as well as the Supreme Court. In the Joho and Mary Wambui cases, this Court considered the impugned statutory provision in light of the entire scheme of the Constitution, before making the declaration of invalidity and, further in the Mary Wambui case, before deciding upon the retrospective application of that declaration. This is the appropriate approach, in our view, as regards the instant case.

148. We are convinced that in order to protect the Constitution, the court must be creative in fashioning appropriate relief that is tailored to the facts of the case and is consistent with the values of the Constitution. Suspension of the declaration of invalidity would be appropriate in these circumstances as it would allow the Legislature time to correct the defective legislation while avoiding chaos and disarray in a system that has been established for over a decade. Such a move supports good governance, a core national value under **Article 10** of the Constitution.

149. We have found the **CDF Act** is defective in many respects, from the manner it was enacted, its objective, design and implementation. Are the defective parts severable? The test for severance has been established elsewhere thus;

*[I]f the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and second, if so, is what remains giving effect to the purpose of the legislative scheme? (**Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and others** [1995] ZACC 7; 1995(4) SA 631(CC) at para 16).*

In **Premier: Limpopo Province v Speaker of the Limpopo Provincial Legislature and Others** (CCT 94/10) [2012] ZACC 3 it was observed at para 24, “*It cannot be over-emphasised that severance should be reserved for cases where it is clear from the outset exactly which parts of the statute need to be excised to cure the constitutional deficiency.*”

150. We are satisfied that since the defect in the **CDF Act, 2013** related to the Fund and the manner of its administration and application, its substratum is lost. It is not possible to separate the wheat from the chuff, the good from the bad in order to salvage the Act. The only option is to render the **CDF Act, 2013** invalid in its entirety.

151. The next question is what are the consequences of the declaration of invalidity? Ordinarily, orders of invalidity take immediate effect but the court in framing appropriate relief must be mindful of the circumstances of the case and in particular the need to avoid undue hardship. As the Supreme Court demands, such a consideration must be judicious and dependent on the case. In discussing the issue of suspension orders under South Africa law, Sachs J in *Coetzee* as cited in **Premier: Limpopo Province v Speaker of the Limpopo Provincial Legislature and Others** (*supra*) had this to say;

[36]The words ‘in the interests of justice and good government’ are widely phrased and, in my view, it would not be appropriate, particularly at this early stage, to attempt a precise definition of their ambit. They clearly indicate the existence of something substantially more than the mere inconvenience which will almost invariably accompany any declaration of invalidity, but do not go so far as to require the threat of total breakdown of government. Within these wide parameters the Court will have to make an assessment on a case-by-case basis as to whether more injustice would flow from the legal vacuum created by rendering the statute invalid with immediate effect than would be the case if the measure were kept functional pending rectification. No hard-and-fast rules can be applied.

152. The CDF is a system that has been running over the years and at the moment, the funds for the financial year 2014/2015 have been disbursed and the budgetary process for the next financial year is in progress. Obviously the Fund has entered into legal obligations that need to be dealt with. We must accord leverage to public interest and good order while conscious of our country's political realities. We are of the view that a temporary suspension of the invalidity of the Act is the appropriate relief in the

circumstances.

153. How long should the order of invalidity be suspended? It has been held that, “[v]arious factors must be taken into account in determining the period of suspension, including: the government’s previous conduct; whether there is any legislation in the pipeline; and the nature and severity of the continuing infringement” ought to be taken into account (See **Premier: Limpopo Province v Speaker of the Limpopo Provincial Legislature and Others (supra)** at para 46). In reflecting on this issue, the court has to consider the fact and the circumstances of the case. In **Kenya Country Bus Owners’ Association (Through Paul G. Muthumbi – Chairman, Samuel Njuguna – Secretary, Joseph Kimiri – Treasurer) & 8 others v Cabinet Secretary For Transport & Infrastructure & 5 others** NRB JR No. 2 of 2014 [2014] eKLR, the court made an order suspending invalidity of traffic regulations on the ground that the breaches were minor and could be remedied while protecting the lives of road users which would be at risk without the regulation in place pending re-enactment of the impugned regulations. In this case, we take judicial notice of the government budget cycle and the fact that the financial year ends in June of every year. We are also alive that there are ongoing projects that require completion. In order to allow for transitional and corrective mechanisms, we are of the view that suspension of the invalidity of the **CDF Act** for a period of twelve months from the date of this judgment is a reasonable period. The national government is entitled to remedy the defects in the period either in form of new legislation or other means within the Constitution taking into account the findings we have made. For avoidance of doubt, the Act may be repealed earlier by an Act of Parliament or await the expiry of the suspension, whichever comes first.

Costs

154. As this matter involves matters of public interest and concerns the manner in which the Constitution is being implemented, we shall order that each party bears its own costs.

Disposition

155. Before we make the final orders, we must apologise for the delay in delivering this judgment which was caused partly by the heavy workload and other reasons beyond our control. We are also grateful to all the counsel in this petition for their lucidity in submissions.

156. We find that that the **CDF Act 2013** is unconstitutional for reasons stated above and as a result, we make the following ;

- a. A declaration is hereby issued that the Constituencies Development Funds Act, 2013 is unconstitutional and therefore invalid.***
- b. The order of invalidity above is suspended for a period of twelve (12) months from the date of judgment.***
- c. The national government may remedy the defect within that period and the Constituencies Development Fund Act shall stand invalidated at the expiry of the twelve (12) months or may be earlier repealed whichever comes first.***
- d. Each party shall bear its own costs.***

DATED and DELIVERED at NAIROBI this 20th day of February 2015.

ISAAC LENAOLA

MUMBI NGUGI

DAVID MAJANJA

JUDGE

JUDGE

JUDGE

Mr Waikwa Wanyoike, Advocate instructed by the petitioners.

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