



Council of County Governors v Attorney General & 3 others; Transition Authority (Interested Party) (Petition 472 of 2014) [2015] KEHC 8014 (KLR) (Constitutional and Human Rights) (11 December 2015) (Judgment)

Council of County Governors v Attorney General & 4 others [2015] eKLR

Neutral citation: [2015] KEHC 8014 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 472 OF 2014

M NGUGI, J

DECEMBER 11, 2015

BETWEEN

THE COUNCIL OF COUNTY GOVERNORS PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY 2ND RESPONDENT

KENYA URBAN ROADS AUTHORITY 3RD RESPONDENT

KENYA RURAL ROADS AUTHORITY 4TH RESPONDENT

AND

THE TRANSITION AUTHORITY INTERESTED PARTY

(Being a Cross-Petition in the original Petition No. 472 of 2014)

JUDGMENT

Introduction

1. The Constitution of Kenya 2010 brought into being a new system of governance in Kenya through the devolution of power to counties. It established 47 county governments, each headed by a Governor, with its own legislative assembly, alongside the national government. Article 186 and the Fourth Schedule of the Constitution set out the functions of the respective levels of government.



2. Since the last elections held in 2013 and the operationalisation of the new system of devolved government, there has been much contestation between the two levels of government with regard to their respective functions and mandates. This petition, which was initially filed on 22nd September 2014 and amended with leave of the Court on 21st October 2014, and the cross-petition filed by the office of the Attorney General on behalf of the 1st, 2nd and 3rd respondents on 6th October 2014, is evidence of that contestation, with the dispute this time revolving around the respective functions of county governments and national government entities with respect to the roads function.

The Petition

3. The petitioner is the Council of Governors (hereafter ‘the petitioner’), a statutory body established under section 19 of the *Intergovernmental Relations Act*, No 2 of 2012. It has the mandate, among others, to facilitate consultation amongst county governments, share information on the performance of the counties in the execution of their functions, and to consider matters of common interest to counties.
4. It has lodged the petition against the Attorney General (hereafter referred to as “AG”), a constitutional office established under Article 156 of the *Constitution*. The AG has been joined to the petition in his capacity as the principal legal adviser to the national government and authorized to represent the national government in any legal proceedings to which the national government is a party.
5. The 2nd and 3rd respondents are national government agencies which were, prior to the promulgation of the new Constitution, vested with the mandate to manage, develop rehabilitate and maintain various categories of roads within Kenya. The 2nd respondent, Kenya National Highways Authority (hereafter referred to as “KeNHA”) is established under section 3 of the *Kenya Roads Act*, 2007 and is responsible for national roads, while the 3rd respondent, the Kenya Urban Roads Authority (hereafter referred to as “KURA”), established under section 9 of the *Kenya Roads Act*, 2007 is responsible for all public roads in the cities and municipalities in Kenya except where those roads are national roads.
6. The 4th respondent is the Kenya Rural Roads Authority (hereafter referred to as “KeRRA”), established under section 6 of the *Kenya Roads Act*, 2007 and mandated to manage, develop, rehabilitate and maintain rural roads.
7. The petitioners have also joined the Transition Authority (hereafter referred to as “TA”) to the petition as an interested party. Established under section 4 of the *Transition to Devolved Government Act*, No 1 of 2012, the TA is mandated to co-ordinate transition to the devolved system of government.

The Cross-Petition

8. By a cross petition dated 14th October 2014, the AG, KeNHA, and KURA cross-petitioned against the Council of Governors as the respondent and the TA as the interested party. The cross-petition was filed pursuant to orders of the Court issued on 6th of October 2014 pursuant to an application by Counsel for the respondents and the interested party.

Background

9. The petitioner’s grievance that gave rise to the present petition was triggered by two events, related but occurring at different times. On diverse dates between 28th and 30th June 2013, pursuant to section 23(2) of the *Transition to Devolved Government Act*, the forty seven (47) county governments applied for the transfer of functions from the TA. The TA only approved and gazetted the transfer of limited functions, declining to transfer certain of the functions which, under the Fourth Schedule, Part 2 of



- the Constitution, are vested in the devolved units. Among the functions that it declined to transfer was the management of county roads.
10. Aggrieved by this decision, twenty nine (29) county governments exercised their right of appeal, conferred by section 23(7) of the Transition to Devolved Government Act, and appealed to the Senate against the TA's decision.
 11. The Senate considered a report prepared by its Sessional Committee on Devolved Government on the appeals and on 17th April 2014, passed a motion, tabled on 16th April 2014, to adopt the report of the Committee. The TA was required to immediately cause the transfer of functions as passed by the Senate on 17th April 2014 to be gazetted. However, the AG, despite a request by the TA to gazette the transfer of the road functions, refused to do so.
 12. The second event related to various advertisements placed in the local media by KeNHA, KURA and KeRRA. By an advertisement in the Daily Nation newspaper of 25th April 2014 KeNHA advertised a tender notice No KeNHA/830/2014 inviting tenders for the use of Class A, B and C roads reserve land and structures for placement of advertisements or notices. Similarly, KURA, through a newspaper advertisement in the Daily Nation of 6th August 2014, invited bids for tenders for maintenance, rehabilitation and improvement of various roads in Class D, E and all other unclassified roads. KeRRA, on its part, through numerous advertisements on its website, invited bids for tenders for improvement of roads in Class D, E and all other unclassified roads.
 13. The petitioner contends that, in accordance with sections 3 and 5 of Part 2 of the Fourth Schedule to the Constitution, these functions are exclusive function of county governments.
 14. The petitioner therefore sought interim orders to stop KeNHA, KURA and KeRRA from entering into legally binding agreements with successful bidders for the respective tenders which would result in their carrying out mandates which, under the Constitution, are the preserve of the county governments, in violation of Articles 186 and 189 of the Constitution.
 15. On 14th October 2014, upon the application of the petitioner but in the absence of the respondents who had been duly served, the Court granted the following orders:
 1. That a conservatory order be and is hereby issued restraining the 2nd respondent Kenya National Highways Authority from implementing or proceeding to award any contracts as advertised on Tender Notice No KeNHA/830/2014 of 25th April 2014 or in any way awarding contracts for advertisements or concessions for the use of Class A, B and C road reserve land and structures for placement of advertisements or notices pending inter partes hearing of the matter on the 22nd October 2014.
 2. That a conservatory order be and is hereby issued restraining 3rd respondent Kenya Urban Roads Authority from implementing or proceeding to award any contracts as advertised on 6th August, 2014 or in any way proceedings further with the procurement, grant of concessions or inviting bids for tenders for maintenance, rehabilitation and improvement of various roads falling within the mandate and control of county governments pending inter partes hearing of the matter on the 22nd October 2014.
 16. Subsequently, by a consent order entered into on 22nd October 2014, the parties agreed to vary the interim orders with an order that any new contracts, tenders and procurement processes in relation to county roads to be undertaken by the 3rd respondent, KURA, would be done in consultation and agreement with the respective county governments. These orders were extended and remain in force pending determination of the petition and cross-petition.



The Petitioner's Case

17. The petitioners case is set out in the amended petition dated 21st October 2014, the affidavit in support of the original petition sworn by Mr. Isaac Ruto, the Governor of the County of Bomet and then the Chairman of the petitioner, sworn on 5th September 2014, the affidavit in support of the amended petition sworn by Ms. Jacqueline Mogeni on 21st October 2014, and a further affidavit sworn by Mr. Isaac Ruto on 12th November 2014. It also filed written submissions which were highlighted by its Counsel, Mr. Muite and Mr. Issa.
18. Mr. Ruto deposes that county governments are established under Article 176 of the Constitution and their functions are set out under Part 2 of the Fourth Schedule to the Constitution as well as section 5 of the County Governments Act, No 17 of 2012. Section 5 of Part 2 of the Fourth Schedule devolves county transport, which includes county roads, both urban and rural, and puts their construction and maintenance squarely under the mandate of county governments. The construction and operation of national trunk roads as well as setting standards for construction and maintenance of all roads is, however, a preserve of the national government under section 18 of Part 1 of the Fourth Schedule.
19. The petitioner avers further that pursuant to section 23(2) of the Transition to Devolved Government Act, the 47 county governments applied for the transfer of functions from the TA on varied dates between 28th and 30th June 2013. The TA only approved the transfer of limited functions vide Gazette Supplement No 116, Legal Notice No 137 – 182 of 9th August 2013. Among the functions that the TA declined to transfer to county governments was the management of county roads. As a result, being dissatisfied with the decision of the TA, twenty nine (29) county governments appealed to the Senate between 23rd August 2013 and 20th September 2013. The appeal was lodged pursuant to the provisions of section 23(7) of the Transition to Devolved Government Act.
20. The petitioner's appeal was referred to the Senate Sessional Committee on Devolved Government and the Liaison Committee by the Speaker of the Senate. The Committees constituted nine (9) sub-committees and had the mandate to ascertain the level of preparedness and capacity of the counties to perform the contested functions, and to undertake and conclude public hearings on the appeals within the shortest time possible.
21. Following the public hearings, the Senate Sessional Committee on Devolved Government and the Liaison Committee prepared a report, the Amended Report on the County Hearings on the Transfer of Functions dated April 2014, containing their recommendations and resolutions, to be tabled before the Senate for debate.
22. The petitioner states that the Report recommended that Class A, B, and C roads should be classified as national roads while Class D and E and unclassified roads should be classified as county roads. It also recommended, among other things, that county roads should be transferred immediately. The Report noted that in order for the counties to take up and operate the functions assigned to them in the Fourth Schedule of the Constitution, there was a need to clearly define the meaning of county roads.
23. On 16th April 2014, a motion to adopt the Report of the Sessional Committee on Devolved Government on the appeals for transfer of functions to the counties was tabled, and the motion was passed on 17th April 2014. The petitioner contends that the recommendations and resolutions of the Senate Committees contained in the Report became binding on the TA once they were passed, pursuant to section 23(8) of the Transition to Devolved Government Act.
24. According to the petitioner, prior to the adoption of the Report, the Ministry of Transport and Infrastructure, in conjunction with the Ministry for Devolution and Planning, initiated talks with



- stakeholders in the transport and infrastructure sector and organized the first Intergovernmental Consultative Forum on Transport and Infrastructure on 21st November 2013 at KICC to discuss, among others, the classification of roads and technical capacity in counties with regard to transport and infrastructure as well as the draft Kenya Roads Bill, 2013. KeNHA and KURA were among the stakeholders present in the forum.
25. Among the resolutions reached at the forum were that there should be a joint team set up of both levels of government to study the road classification report with a view to identifying all the roads listed by name and to prepare a joint report and organize subsequent joint forums between the two levels of government to harmonize the draft Roads Classification Report, and that the government should provide more funding for the roads sub-sector.
 26. By a letter dated 18th March 2014, the Ministry of Transport and Infrastructure invited County Executive Committees to a second Intergovernmental Forum on Transport and Infrastructure on 11th April 2014. During this second Intergovernmental Forum on Transport and Infrastructure, the TA made a presentation of the transfer of functions in the transport and infrastructure sector, setting out the functions that had already been transferred, those that were yet to be transferred, and its proposals. It proposed that national trunk roads should be roads of Classes S, A and B, which were to be constructed and maintained by national government agencies. All other roads, save for Class C roads servicing the Kenya Forest Service and the Kenya Wildlife Service, would be constructed and maintained by county governments.
 27. The TA also recommended that institutions currently working on roads assigned to counties should be merged and devolved as county agencies or left to support KeNHA in the maintenance of national roads.
 28. It is further deposed on behalf of the petitioner that during this forum, it was also agreed that national roads would be a defined grid of existing or proposed major roads linking Kenya with international borders (at identified entry and exit immigration points); main roads linking county headquarters; primary roads linking all sub-county headquarters and urban roads providing through traffic in cities and municipalities, including roads that cross county boundaries or provide service to the upper tier of road network, defined as Class A and B roads.
 29. It was agreed further that other than these classes of roads, all other roads would be county roads, managed by county governments, and finally, it was agreed that a register of the national trunk roads and county roads would be gazetted. The petitioner states that as a result of these resolutions, the way forward was documented as 'Annex III' of the Report on Second Intergovernmental Consultative Forum on Transport and Infrastructure. It was also agreed at the meeting that the counties would study the road classification documents and reconvene for a further meeting of the forum on 5th May 2014.
 30. The petitioner then sought, by its letter dated 29th April 2014 addressed to the Cabinet Secretary, to engage the Ministry of Transport and Infrastructure to discuss the classification of roads. By its letter dated 22nd May 2014, the Ministry invited the petitioner and the County Executive Committees to the Fourth Intergovernmental Consultative Forum on Transport and Infrastructure on 27th May 2014. The Ministry also, by a letter dated 3rd June 2014 and in recognition of the resolutions and outcome of the second consultative forum meeting, exercised its mandate of setting standards for the construction and maintenance of roads by county governments under section 18 (c) of Part 1 of the Fourth Schedule. It also circulated pavement design guidelines for low volume sealed roads.



31. The gazettelement of the roads function was, however, not effected, and the petitioner contends that as a result of the deliberate delay in the gazettelement of the transfer of functions of maintenance and construction of county roads to the county governments as passed by the Senate, the Ministry of Transport and Infrastructure has reneged on the agreed transfer of functions.
32. The petitioner further avers that by an advertisement in the Daily Nation newspaper of 25th April 2014, KeNHA advertised a Tender Notice No KeNHA/830/2014 inviting tenders for the use of Class A, B and C Roads reserve land and structures for placement of advertisements or notices. It states that under section 3 of Part 2 of the Fourth Schedule, control of outdoor advertising is an exclusive function of county governments. It is its contention that the purported invitation to tender by KeNHA for a function that was the preserve of the county governments is in contravention of the provisions of Article 189 of the *Constitution* on respect of the functional and institutional integrity of government at the county level.
33. The petitioner further deposes that KURA, through a newspaper advertisement in the Daily Nation of 6th August 2014, also invited bids for tenders for maintenance, rehabilitation and improvement of various roads falling within the mandate and control of respective county governments.
34. The petitioner avers that it wrote a letter dated 19th June 2014 to the Cabinet Secretary, Ministry of Transport and Infrastructure, demanding the immediate withdrawal and suspension of all dealings that were likely to interfere with the functions of county governments as set out under Part 2 of the Fourth Schedule to the *Constitution*.
35. In a letter dated 7th August 2014 addressed to the AG and copied to the petitioner, the TA wrote to the AG requesting the AG to facilitate the gazettelement of the devolved functions. It also forwarded copies of the Senate Report and a draft Legal Notice in this respect. However, by a letter dated 18th August 2014, the Clerk of the National Assembly wrote to the AG requesting him to halt the gazettelement of the devolved functions as passed by the Senate, specifically with regard to the county transport function, to enable the National Assembly Committee revisit the issue of the classification of roads with the Ministry.
36. The petitioner contends that the Report of the Sessional Committee of the Senate was final and the AG is bound to gazette the functions in accordance with the Report as adopted by the Senate. Its position is that the continued delay in the gazettelement of the transferred functions by the AG and the action of the Ministry of Transport and Infrastructure through various state corporations is calculated to water down the resolutions arrived at during the forum meetings and ultimately delay the timely implementation of devolution and will continue unabated with the effect of defeating the objects and principles of devolution provided for under Articles 174 and 175 of the *Constitution*.
37. It is its contention further that in failing to gazette the transfer of functions in accordance with the Report of the Senate as requested by the Transition Authority, and in halting the process due to a request by the Committee on Transport, Public Works and Housing, the AG is violating the *Constitution* as the National Assembly cannot veto a decision of the Senate on transfer of functions to county governments.
38. The petitioner further argues that the functions of KURA, established under section 9 of the *Kenya Roads Act*, 2007 and whose mandate is spelt out under section 10 of the Act as being the management, development, rehabilitation and maintenance of all public roads in the cities and municipalities in Kenya save for where those roads are national roads was vested in the national government, now fall within the ambit of the county governments pursuant to section 5 of Part 2 of the Fourth Schedule. It is its contention therefore that the advertisements for tenders by KeNHA and KURA are contrary



- to the provisions of sections 3 and 5 respectively of Part 2 of the Fourth Schedule as well as Article 189 of the *Constitution*.
39. With respect to the 4th respondent, KeRRA, the petitioner avers in the affidavit sworn on 21st October 2014 by Ms. Jacqueline Mogeni, its Chief Executive, that the functions of KeRRA as set out under section 7 of the *Kenya Roads Act* are to manage, develop, rehabilitate and maintain rural roads. It has identified, in its website, rural roads as class D, E and other unclassified roads which now fall within the ambit of county governments pursuant to section 5 of Part 2 of the Fourth Schedule. Yet, subsequent to the filing of this petition, KeRRA has, through numerous advertisements posted on its website, invited bids for improvement of such roads.
 40. In its submissions, the petitioner argues that everything was proceeding smoothly with regard to the devolution of the roads function until the Clerk to the National Assembly, on behalf of the Departmental Committee on Transport, Public Works and Housing, wrote a letter dated 18th August 2014 in which he requested a halt to the devolution of the roads function to counties. In the said letter, the Clerk referred to a meeting between the Ministry of Transport and the Departmental Committee in which an agreement appeared to have been reached that class D roads, which had earlier been agreed should be devolved to county governments, were removed from the counties and placed under the national government.
 41. The petitioner submits that the mandate of the Committee, provided for in the Parliamentary Standing Orders, relates to the national government and to the operations and estimates of assigned ministries. It had no mandate to deal with matters related to the functions vested in county governments under the *Constitution*.
 42. The petitioner submits further that the Fourth Schedule, pursuant to Articles 158(2), 186(1) and 187(2), sets out the divisions of functions between national and county governments. Section 5 of Part 2 thereof sets out the functions of counties as including county transport and county roads. Further, under section 3 of Part 2, advertising is also a function of county government.
 43. It is the petitioner's contention that while the *Constitution* does not provide the manner of identification of roads which would be devolved to counties, the said roads had been agreed upon in a very thorough and systematic all-inclusive manner at meetings which KeNHA and KURA had attended. National roads were identified as Class A, B, and C, while class D, E and all unclassified roads were identified as county roads which would devolve to county governments.
 44. The petitioner submits that the counties had applied for transfer of, among others, the roads function. Upon the failure of the TA to approve the transfer of various functions, including the roads function, 29 counties appealed to the Senate under the provisions of section 23(7) of the *Transitions to Devolved Government Act*. The Senate adopted a report, following hearings and recommendations of two of its committees, recommending the transfer of functions to all 47 counties.
 45. According to the petitioner, the TA had accepted the decision of the Senate on the devolution of the roads function and had sent a notice to the AG for gazette. However, acting on the letter from the Clerk to the National Assembly, the AG had declined to gazette the functions, his argument being that there is a need for legislation to deal with the classification of roads, which has yet to be enacted. In the petitioner's view, any Act of Parliament that deals with reclassification of roads would need the concurrence of the Senate, and the National Assembly cannot start reclassifying roads without involving the Senate.
 46. The petitioner argues that the AG had no basis for declining to gazette the transfer of the roads function. He had no role to play with regard to such transfer, but was merely a conduit, the reason why



a gazette notice goes to his office being merely to give it authenticity. In this case, the AG's function was to confirm that the gazette notice came from the TA, and he could not act on the basis of a letter emanating from a Departmental Committee of the National Assembly, which cannot sit on appeal on a decision of the Senate.

47. The petitioner therefore prays that the Court allows the petition and grants the following orders:
- (a). A declaration that in failing to gazette the transfer of functions, especially in regard to transfer of county roads, as passed by the Senate on appeal from the Interested Party's decision, the 1st Respondent acted violated the objectives and principles of devolution as provided for under Articles 174 and 175 of the Constitution.
 - (b). A declaration that once an on the transfer of functions is allowed by the Senate by way of majority vote, the 1st Respondent is under a constitutional and statutory duty bound to promptly gazette the transfer of the functions to the county governments.
 - (c). A declaration that the 1st Respondent's failure to gazette the transfer of functions as per the appeal allowed by the Senate is unjustified and contrary to Articles 186 and 189 of the Constitution.
 - (d). A declaration that control of outdoor advertising on road reserves is an exclusive function of County governments.
 - (e). A declaration that the management, development, rehabilitation and maintenance of all public roads, save the national trunk roads, is a function of the county governments.
 - (f). An Order of *mandamus* do issue compelling and directing the 1st Respondent to immediately gazette the transfer of functions to the county governments as contained in the Report of the Sessional Committee on Devolved Government on the Appeals for Transfer of Functions to Counties as passed by the Senate on 17th April 2014.
 - (g). An Order of Prohibition do issue prohibiting the 2nd Respondent from proceeding further with the procurement or re-advertising Tender Notice No KeNHA/830/2014 inviting tenders or in any way awarding of contracts or concessions for the use of Class A, B and C road reserve land and structures for placement of advertisements or notices or in any way interfering with the management of roads falling under the mandate of county governments.
 - (h). An Order of Prohibition do issue prohibiting the 3rd Respondent from proceeding further with the procurement or re-advertising tenders inviting bids for tenders or in any way awarding of contracts or in any way awarding of contracts or concessions for maintenance, rehabilitation and improvement of various roads in Class D, E, and all other unclassified roads falling within the mandate and control of the respective county governments.
 - (ha). An Order of Prohibition do issue prohibiting the 4th Respondent from proceeding further with the procurement, inviting bids for tenders or in any way awarding of contracts or concessions for maintenance, rehabilitation and improvement of roads in Class D, E, and all other unclassified roads falling within the mandate and control of county governments.
 - (i). This Honourable Court be pleased to issue any other appropriate order or relief as it may deem fit and just.
 - (j). Costs of the Petition.



Petitioner's Response to the Cross-Petition

48. In opposition to the cross-petition and the affidavit in support sworn by Engineer John Kipngetich Musonik on 14th October 2014, the petitioner filed an affidavit sworn by its then Chairman, Mr. Isaac Ruto, on 12th November 2014.
49. In the cross-petition and affidavit in support, the respondents challenge the decision of the Senate to recommend the transfer of functions, including the roads function, to all 47 counties. Mr. Ruto deposes in response that although the appeal against the decision of the TA was lodged before the Senate by twenty nine (29) counties, the Senate Sessional Committee on Devolved Government, in conjunction with the Senate Liaison Committee, conducted public hearings and heard submissions of all the forty seven (47) county governments. The mandate of the sub-Committees was to ascertain the level of preparedness and capacity of all the counties to manage the functions that they proposed to have transferred. The sub-committees were required, in carrying out their assessment, to consider the criteria set out in section 24 of the *Transition to Devolved Government Act*. Further, in order to ensure that all the necessary criteria was considered, a list of proposed questions to be posed to the county governments was prepared and used as a guide.
50. It was his averment further that roads throughout the country have classification that helps with their identification and management, and all that had been lacking is a legislative framework for classification. Under the Fourth Schedule, two classifications of roads, namely national trunk roads and county roads, are recognized. Mr. Ruto reiterated the position of the petitioner that the Senate had recommended the immediate transfer of the roads function, and further, that class A, B, and C roads should be classified as national roads while class D, E, and unclassified roads would be classified as county roads. It had also recommended that Parliament should enact legislation on the classification of roads in the entire country to respond to the devolved governance structures.
51. Mr. Ruto further deposes that any laws to be enacted with regard to the classification of roads should follow the transfer of functions of management of county roads to county governments to conform to the *Constitution*, and that the implementation of the *Constitution* should not await the enactment of laws subsidiary to it.
52. The petitioner disputes the allegation by the respondents that the Senate recommendation on the transfer of functions was contradictory. It contended that the failure to gazette the transfer was as a result of a request by the Clerk of the National Assembly to halt the gazettelement. The petitioner argues that the National Assembly's interference in the process of gazetting the transfer of the roads function was based on ulterior motives as the National Assembly is not involved in the process of transfer of functions to county governments under the *Transition to Devolved Government Act*. In its view, the National Assembly, through its Transport, Public Works and Housing Sub-Committee has continued to meddle in the transfer of the roads function to county governments. Mr. Ruto deposes by way of illustration that at a meeting held on 22nd October 2014, during the pendency of this matter in Court, the Committee made a resolution with respect to, among other things, the sharing of the road fuel levy among the 2nd - 4th respondents, and also resolved that:
- “Class A, B, C and D roads remain under the purview of the National Government while Class E roads be under the County Governments.”
53. It was his averment that from its minutes, it was evident that the Committee was intent on reversing and negating the agreements and resolutions made by all the stakeholders in the numerous consultative forums on roads that have been held over the past one year.



54. The petitioner observes that the AG did not raise the issue of the process used by the Senate in arriving at the decision to recommend the transfer of the roads function in April, 2014, until six months later, by his letter dated 3rd October 2014, and only after the petitioner had moved to Court to compel the AG to act. It was the petitioner's submission therefore that the queries and clarifications that the AG was seeking in his letter were made in bad faith and for an ulterior purpose. In the petitioner's view, the AG was purporting to sit on appeal on the decision of the Senate, a decision that was final once it was delivered as provided under section 23 (8) of the [Transition to Devolved Government Act](#). The petitioner therefore termed the cross-petition an abuse of the court process and prayed that it be dismissed with costs.

The Case for the 1st, 3rd and 4th Respondents and the Interested Party

55. The AG filed grounds of opposition to both the application and the petition. He also filed a cross-petition supported by the affidavit of Engineer Joseph Kipngetich Musonik in which he sought dismissal of the petition and the grant of the orders sought in the cross-petition.
56. In the grounds of opposition dated 24th September 2014, the AG opposes the petition and application on the grounds, amongst others, that the petition is contrary to the spirit of the [Constitution](#), the [Transition to Devolved Government Act](#), and the Inter-Governmental Relations Act. It is also his argument that the legislation that would define and or classify roads has not yet been enacted. A further ground relied on is that the counties did not meet the criteria set in section 24 of the [Transition to Devolved Government Act](#), and in addition, it is the respondents' contention that the ruling of the Senate on appeal did not consider whether the criteria had been satisfied, and was therefore incapable of being effected.
57. In his affidavit in support of the cross-petition, Mr. Musonik concedes, on the basis of information from Counsel for the State, that the TA did write to the AG seeking the gazette, of the transfer of the devolved functions relating to county roads in accordance with the Senate decision of April 2014. He avers that upon further consultations between the AG and the TA and other stake holders, including the National Assembly, however, it was apparent that there were outstanding issues that required detailed advice from the AG before the transfer was done. There were consultations still underway, and it was his deposition that as the advisor to the national government and at times to county governments, the AG is required to study and interpret the Senate decision with a view to advising both parties to the dispute whether the Senate's decision is in accord with the principles of the [Constitution](#).
58. Mr. Musonik avers that the AG has analysed the Senate decision and has found that there are irregularities that require to be addressed before the decision is implemented. He refers to the letter from the AG to the Senate dated 3rd October 2014 as illustrative of the said irregularities.
59. Mr. Musonik observes that there are other matters such as health which are important enough for the petitioner to first concentrate on, and that these other sectors require the attention of the petitioner more than the roads sector. In his view, there is no gap in the provision of roads services as KeNHA, KURA and KeRRA still exist under the law and can continue to provide services pending the resolution of the legal and constitutional propriety of the Senate decision. He notes that the Senate looked into various cross-cutting issues which affect the transfer of functions, and as a result recommended, among others, an independent capacity assessment of the county governments, expedition of legislation to help the governments actualise full implementation of the functions, and capacity building to be carried out by both the national and the county governments



60. The respondents and the interested party concede in their submissions and averments that there were various consultative forums held with regard to the devolution of the roads function. They submit that at the time the consultations were being held, there was no classification of any road as a county road, either in the *Constitution* or legislation. They take the position, however, that the present petition is premature. Their case is that the alternative dispute resolution mechanism envisaged in the *Constitution* and the *Intergovernmental Relations Act* has not been exhausted. They allege that the petitioner has not been patient, and that it should have allowed for the matter to be resolved through the dispute resolution mechanism set out in the said Act.
61. The second argument advanced by the respondents and interested party is that prior to the enactment of the *Constitution*, the road sector included specific legislation and structures such as the KeNHA, KURA and KeRRA which were professionally managed. It is the AG's submission that there had been good development of the road structure under the stewardship of these structures, and under the *Constitution*, the transfer of the said functions to the counties would be done if there was no law barring the transfer of the functions.
62. It is the AG's case, further, that section 24 of the *Transition to Devolved Government Act* provides criteria for transfer of functions, which criteria includes the existence of legislation governing the road sector. In order to facilitate the devolution of the roads function, the old roads legislation regime would have to be overhauled. The AG also alluded to the rest of the criteria for devolution of the roads function, which includes the capacity of the receiving level of government to receive the function.
63. The AG contends that the road legislation has not yet been amended to suit the devolution process, a matter that had been the subject of discussion at the inter-governmental forum where it was recognized that legislation was necessary as the *Constitution* did not state what a county road was.
64. It was also the AG's position that many counties did not meet the second criteria set in section 24(1) (b) of the *Transition to Devolved Government Act*. He observed that the Senate itself, in its debate as captured in the Hansard, concedes that many counties are yet to enact enabling legislation and provide policy frameworks to take up the functions. It is also the AG's contention that the Senate did not believe that these counties had the capacity to take up the functions, though it still recommended devolution. The AG therefore submits that the observations of the Senate with regard to the capacity of the counties as captured in the debate did not accord with the conclusion that it reached that the roads function should be devolved, and he submits that there was a lack of logic on the part of the Senate.
65. It is on the basis of the alleged lack of logic on the part of the Senate that the AG explains his letter to the Senate dated 3rd October 2014, attached to the affidavit of Mr. Musonik sworn on 14th October 2014. In the said letter, the AG argues that the decision of the Senate was faulty as it did not adhere to the requirements of Article 47 on fair administrative action as the Senate did not invite all the relevant parties, including the TA, to make representations before it before making its decision.
66. The AG also submits, with reference to the recommendation by the Senate that a comprehensive assessment or audit of county governments should be undertaken in order to ascertain their readiness for the transfer of functions, including the roads function, that such audit should have been a pre-requisite to any recommendation to transfer the function. He observes that instead, both the recommendation to assess readiness and to transfer are contained in one report, begging the question when the audit or assessment would be done.
67. The third argument raised by the AG relates to the issue that the AG raised in his letter to the Senate, namely why the Senate did not deal specifically with the 29 county governments that had appealed against the TA's decision, but instead made a recommendation in respect of all the 47 counties. His



- submission is that since not all counties had appealed against the decision of the TA, then the Senate should have confined its recommendations to transfer to those counties which had appealed.
68. It is the AG's position that he had not refused to gazette the devolution of the roads function. Rather, he had sought clarification from the Senate on the issues raised in his letter which, in his view, was a proper exercise of his mandate, under Article 156 of the Constitution, to protect the public interest and the rule of law. In so doing, in his view, it was necessary to protect the existing legislation and the structures that it establishes until such time as there is legislation to replace them.
 69. It was submitted on behalf of the AG that he was not required to publish each and every document placed before him, whether it has mistakes, or is unconstitutional. In his view, the fact that the TA is said to be bound by the decision of the Senate did not mean that the AG had to gazette a document endorsed through a faulty process. He was entitled, in his view, to lodge an inquisition into both the process and the merits, as well as the constitutionality of the decision that has been made by the Senate, as he handles the process of gazettelement.
 70. In his view, there must be an inquiry with regard to the propriety of the decision made by the Senate, an inquiry that required an engagement between the AG and the Senate for the purpose of midwifing the devolution process to a proper conclusion that will not be challenged by any person on the basis that the Senate had not observed the provisions of section 23 and 24 of the Transfer to Devolved Government Act.
 71. The AG submitted that in any event, the petitioner has not demonstrated any prejudice that would result from the exercise of power vested by the current Kenya Roads Act to KeNHA, KURA and KeRRA. Had such prejudice been demonstrated by showing, for instance, that the bodies had not performed their functions, then there would be a basis for the petition, but as long as the exercise of powers by the three bodies ensures that road construction and maintenance are going on as new legislation is being enacted in Parliament, it was incumbent on all to be happy that there was no vacuum.
 72. With respect to the legislation contemplated, the AG submitted that a Bill, the Kenya Roads Bill 2015, has been introduced in Parliament. The Bill makes provision for classifications of roads in a very exhaustive manner, and it was the AG's submission that the Bill would be the basis on which the classification of roads under the Fourth Schedule of the Constitution should take place, and further, that the Bill should precede the devolution of the roads function.
 73. Mr. Njoroge, Learned Counsel for the AG, therefore asked the Court, should it find that the Bill deals with the issue of classification of roads, to dismiss the petition and instead grant the orders sought in the cross-petition as follows:
 - (a) Of declaration to declare that the instructions to transfer functions to any County Government must be unequivocal and based on factual assessments of each and every criteria in section 24 of the Transition to the Devolved Governments Act;
 - (b) Of declaration, to declare that since the Senate only received appeals from twenty nine county governments yet the decision by the Senate requires the Transition Authority to transfer the functions to all the county governments including those that did not appeal, is contrary to the provisions of section 23 sand 24 of the Transition to Devolved governments Act, 2012 and the Constitution of Kenya;
 - (c) An order that the transitional Authority does not have power to order the transfer of functions to the County Governments that have not applied for transfer of functions;



- (d) Of declaration, to declare that in order for the County Government to have functions transferred to them they must strictly comply with the procedure set out under the *Transition to devolved Government Act*;
- (e) Of declaration, to declare that the Transition Authority is required to make its determination based only on whether or not a county government has met the criteria for transfer of function set out under section 24 of the *Transition to the Devolved Government Act*, 2012.
- (f) Of declaration to declare that the Senate being the body responsible for receiving and determining appeals arising from the decision of the Transition Authority transfer should also be guided by the provisions of section 24 on the criteria for transfer while determining the appeals thereto;
- (g) Of declaration, to declare that the Senate should conduct the appeals made to it under section 23 (7) and (8) to accord with section 24 thereof and Article 47 which relates to fair administrative action;
- (h) Of declaration, to declare that transfer of the functions relating to roads should not be made to all the 47 county governments, including the 29 County Governments that appealed since the recommendation made by the Senate, with respect to transfer of roads is not clear;
- (i) Of declaration, to declare that since the Senate further recommended that parliament should enact legislation on classification of roads in the entire country in order to respond to the devolved government structure, the purported transfer of the roads function in the Senate Decision is premature;
- (j) Of declaration to declare that the transfer of roads should await the enactment of the requisite legislation which shall define, classify and allocate the various categories of roads to the respective level of government following the consultative legislative process that shall ensure that all issues appurtenant thereto are addressed.
- (k) Costs of these proceedings
- (l) Any other relief that the court may deem fit and just to grant.

The Case for the 2nd Respondent

- 74. The 2nd respondent, KURA, filed an affidavit in response to the petition sworn on 26th September 2014 by Engineer Samuel Omer and submissions dated 24th April 2015. Its case was presented by its Learned Counsel, Mr. Munialo, who associated himself with the submissions made by Counsel for the AG.
- 75. In his affidavit, Mr. Omer, the General Manager of the Planning and Environment Department of KeNHA, makes various depositions with respect to the establishment and role of KeNHA, a state corporation established under the *Kenya Roads Act*. Such mandate includes the management, development, rehabilitation and maintenance of national roads, which he identifies as classes A, B and C roads. Under section 4(2) (b) of the Act, the functions of KeNHA include the control of road reserves and access to road side developments in respect to these roads. The road reserves on national roads, according to Mr. Omer, are used by various service providers for the installation of any form of structure for the placement of advertisements, including signage and gantries; the placement of communication cables, water and sewerage pipelines, power lines, and construction or improvement of access roads to property.



76. He further deposes that KeNHA has the mandate, as provided under section 49 of the Roads Act, to grant approvals to any person or body to lay structures or carry out works over or below or on road reserves, and in accordance with this mandate, it grants approval for the placement of any structures on its road reserves upon request of the various service providers.
77. Mr. Omer further deposes that in providing its services, it has the responsibility to ensure the safety of road users and the protection of road assets. It is his deposition that the lack of effective management of placement of structures for advertisements may lead to poorly erected or constructed advertisement structures whose collapse may lead to accidents or closure of highways; blockage of motorists' views at junctions and sharp bends by wrongly placed adverts; the risk to public structures due to destruction of highway structures such as bridges by the irregular or ad hoc fixing of massive advertisement structures on foot bridges and vehicle bridges; insecurity to pedestrians on footbridges in cases where adverts cover the full length and whole height of such facilities; and the obstruction and distraction of road users, especially motorists.
78. Mr. Omer contends that under section 22(2) (d) of the Kenya Roads Act, KeNHA is given powers, with ministerial approval, to determine, impose and levy rates, tolls charges, dues or fees for the use of facilities, including use of road reserve land. Pursuant to such powers as are conferred by section 22(2) (d) and 46 of the Kenya Roads Act, the Minister published the Kenya Roads (Kenya National Highways Authority) Regulations, 2013 under Legal Notice No 86 of May 2013 to enable KeNHA effectively manage the roadside activities and ensure safety to road users and road assets. The regulations also provide for the levying of rates and fees for use of KeNHA's facilities, as well as the procedure to be used when one requires to use the road reserves and abutting areas in respect of national roads.
79. Mr. Omer also makes depositions with regard to fees chargeable under the regulations, which are payable for the structures placed on the road reserves for purposes of placing advertisement and are not the cost of the advertisements themselves. He deposes that such charges amount to rental fees for use of the reserves, which Mr. Omer refers to as KeNHA's premises, for the purpose of installation of structures for the placement of advertisements.
80. It is also his averment that when granting approval for the installation of structures for the placement of advertisements, the service providers confirm that they shall abide by the existing laws, including physical planning department requirements and county by laws which provide for the payment to the county government for outdoor advertisements. KeNHA contends that it has therefore not infringed on the mandate of county government on outdoor advertising, and that it can allow or disallow the placement of adverts on the national road reserves which are managed by the national government in accordance with the Constitution.
81. Mr. Omer further avers on behalf of KeNHA that while the petitioner was seeking an order to restrain it from proceeding to award any contracts as advertised in a tender notice dated 25th April, 2014, the said notice was seeking the payment of unpaid fees for structures and installations owned by various firms and individuals within national roads, and did not call for tenders for advertising. Any tenders that it has issued have been for the purpose of installation of structures on road reserves for the placement of advertisements, and not for advertising purposes.
82. It is KeNHA's position therefore that the orders sought to restrain it from proceeding in any way to award contracts for advertisements is misplaced and baseless as it is premised on the wrong interpretation of the law and the wrong impression that it is charging for the cost of advertisements. It contends that several advertisements can be placed on a structure build for advertisement in a year, while it only charges once a year for the structures and not the advertisements. KeNHA argues that it



is merely exercising the mandate granted to it under section 4(1) of the [Kenya Roads Act](#) by providing space for rental purposes on its land and facilities to enable it fund its activities.

83. Its contention is that whereas the [Constitution](#) gives power to the county governments to charge fees for outdoor advertising, KeNHA has the power to lease and charge for the ground space payable per square foot for the structures placed on the road reserve for purposes of placing advertisements. It is its case therefore that granting of advertisement rights or even the construction of advertisement structures on national road reserves falls under its jurisdiction and not that of the county governments. According to KeNHA, under the Fourth Schedule to the [Constitution](#), the construction and operation of national trunk roads is the preserve of the national government, while the functions of KeNHA, as a national government entity, include the management of road reserves and access to any road side development.
84. It was submitted on its behalf that Part 2 of the Fourth Schedule gives outdoor advertising to county governments but does not tie up the aspect of advertisement with the classification of roads A, B and C, while the 1st schedule to the [Kenya Roads Act](#) sets out what are referred to as national trunk roads. According to KeNHA, what the petitioner is seeking is to prohibit it from proceeding with invitations for tenders for the use of class A, B and C road reserve for advertising and placement of advertising structures on the road reserves. In its view, Article 189(b) of the [Constitution](#) read with Article 209(4) allows it to put up tenders and charge for the services rendered. It reiterates that it does not levy charges for the advertisements placed, which is left to the counties, but charges for the placement of the structures.
85. It is also KeNHA's case that the issue of outdoor advertising has already been dealt with by a court of competent jurisdiction. It submits that the issue was addressed by Korir J in a ruling delivered on 18th March 2013 in Judicial Review Case No 246 of 2012 [R v Kenya National Highways Authority & others ex parte Amica Business Solutions](#). According to KeNHA, the issue before the Court in that matter was whether the role of outdoor advertising was a national or county government function, and the Court found that the role belongs to KeNHA. It was its case further that in that case, the County of Nairobi admitted that its role was to display advertisements.
86. KeNHA submitted that contrary to the petitioner's contention that there had been violation of its constitutional rights, there was no such violation as KeNHA is performing its legislative mandate, and in the absence of other legislation, it has not violated the petitioner's rights. Mr. Munialo therefore urged the Court to dismiss the petition and grant the cross petition.

The Petitioner's Rejoinder

87. In his reply on behalf of the petitioner, Mr. Issa observed, with respect to the submissions made on the role of the AG, that the AG was a member of the TA in accordance with the provisions of section 5(h) of the [Transition to Devolved Government Act](#), and has the mandate to designate an officer to represent him at all meetings of the TA. Accordingly, all the decisions of the TA have been made with the full participation of the AG.
88. With respect to submissions on the phased transfer of functions and the provisions of sections 23 and 24 of the [Transition to Devolved Government Act](#), it was his submission, first, that a reading of the section confirms that under section 23(5), a decision of the TA for transfer is based on the criteria under section 24. He submitted further that where the TA makes a determination that any county does not meet the criteria for transfer of any function, it proposes practical and clear measures for the county to build capacity to undertake the function. It is the TA, according to the petitioner, which makes the determination that a particular county is not ready to undertake the function, and it is that decision of the TA that is amenable to an appeal to the Senate.



89. Mr. Issa's submission was therefore that under the law, the process under the [Transition to Devolved Government Act](#) is two-step: first, a decision by the TA, and then if a party is not satisfied with the decision, an appeal to the Senate. Once the Senate has made a decision, then its decision is binding on the TA and there is no room for review by the AG, or any other body, except the Court.
90. To the contention that the petition is premature as the petitioner has not utilized the alternative dispute resolution process contemplated under the [Transition to Devolved Government Act](#), Mr. Issa submitted that the TA has discharged its mandate, but the stumbling block is the AG and a departmental committee of the National Assembly. With respect to the AG, his submission was that it is only when TA prepares a gazette notice that is not in conformity with the decision of the Senate that the AG would have the mandate to correct any clerical or drafting errors in the gazette notice. Once his office is satisfied that the TA gazette notice conforms with the decision of the Senate, his duty is to forward it to the Government Printer for publication.
91. Mr. Issa also observed that the letter from the AG to the Senate dated 3rd October 2014 was written during the pendency of this petition. Prior to its filing, however, the Chairman of the TA had written a letter dated 26th August 2014 seeking the intervention and audience of the AG on the gazette notice of the TA. It was his submission, however, that in any event, the letter of the AG to the Senate does not question the process that the Senate undertook in reaching its decision. In the said letter, the AG only questions the transfer of the road functions, and seeks to validate the decision of the AG to delay the transfer of the road function under Article 47, which Article has no application in the transfer of the road function.
92. With regard to the prayers sought in the cross-petition, Mr. Issa submitted that the Roads Act has to be interpreted in conformity with the [Constitution](#). In his view, under section 18 of the Fourth Schedule, what has been allocated to the national government is the construction and operations of national trunk roads, while under Part 2 of the Fourth Schedule, the [Constitution](#) allocates all other functions to county governments. It was his submission therefore that the roles and functions of KeNHA, KURA and KeRRA have to be interpreted in conformity with the [Constitution](#) as provided under section 7 of the Sixth Schedule. The position of the petitioner as articulated by Mr. Issa is that the three bodies cannot undertake any work that has been devolved, and the petitioner would suffer prejudice as the resources that go with any function have to be devolved, the implication being that such resources could not be devolved if the roads function continued to be performed by KeNHA, KURA and KeRRA.
93. Mr. Issa submitted further that there was no role for the national government in the area of outdoor advertising as section 3 of Part 2 of the Fourth Schedule vests control of outdoor advertising in county governments. In his view, control means absolute control of such advertising. With regard to the submission that the issue of outdoor advertising had already been determined, Mr. Issa's submission was that the decision of Korir J had not dealt with the issue, and the Court did not in that case interpret whether outdoor advertising fell within the mandate of the national or county governments.
94. Mr. Issa also dismissed the AG's reliance on the pending Bill on road classification, noting that the Bill had just been published to be tabled to the National Assembly, and could be rejected. It could therefore not be the basis for the AG to submit that the petition should await its enactment, nor could it amend the decision of the Senate that was made pursuant to an existing law under which the road function was transferred in April 2015. He therefore prayed that the transfer should be gazette as prayed in the petition, and urged the Court to dismiss the cross-petition.



Analysis and Determination

95. I have read and considered the extensive pleadings and submissions of the parties which, given the importance of the issues raised in this petition, I have set out in some detail above. I have also considered their oral submissions at the hearing hereof, and the authorities relied on in support of their respective cases.
96. The parties have set out in their respective submissions diverse issues, twelve in number, as falling for determination in this matter. While I am grateful to the parties for their proposals with respect to the issues that the Court should consider, I observe that this is a petition brought before the Court pursuant to the provisions of Articles 1, 2, 3, 6, 10, 123, 156, 159, 160, 165, 174, 176, 186, 189, and 259 of the Constitution. The petitioner specifically alleges violation of Articles 123, 174, 186 and 189 of the Constitution, and as a corollary thereto, a failure by the respondents to abide by the provisions of sections 4 and 23 of the Transition to Devolved Governments Act.
97. At the core of the petition is the question of the devolution of the roads function, and the constitutional provisions with regard to the management and control of the various roads in the country, and in addition thereto, a latent but important question: the control of the resources related to the management of roads, particularly with respect to the control of outdoor advertising. A further key question underlying the present dispute, but which the parties have not addressed directly, is the place of national government entities such as the 2nd, 3rd and 4th respondents which were established prior to the promulgation of the new Constitution.
98. Thus, while the issues proposed by the parties are important and responses thereto will doubtless emerge in the course of this analysis, the main issues for determination, in my view, are as follows:
- i. Has the petitioner failed to follow the alternative dispute resolution mechanism provided by law?
 - ii. Does a Departmental Committee of the National Assembly have a role to play in the transfer of functions to counties?
 - iii. Can the Attorney General challenge a decision of the Senate made under section 23(8) of the Transition to Devolved Government Act?
 - iv. In which level of government does the Constitution vest the disputed roads functions?
 - v. What is the effect of the pending legislation on roads on the transfer of the roads functions to the counties?
 - vi. Should the Senate have recommended the transfer of the roads functions to all 47 Counties or only to those which had lodged an appeal against the decision of the Transition Authority?
 - vii. What reliefs should the Court grant in the circumstances of this case?

Principles of Interpretation

99. In considering the issues set out above, it is important to set out and bear in mind the principles that should guide the Court in reaching a decision in a petition such as this, which calls for consideration of the question whether various acts of state organs have been performed in accordance with or in violation of the Constitution.
100. To begin with, the Constitution has given guidance on how it is to be interpreted. Article 259 requires that the Court, in considering the constitutionality of any issue before it, interprets 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 addition, Article 159(2)(e) requires the Court, in exercising judicial authority, to do so in a manner that protects and promotes the purpose and principles of the *Constitution*.

101. The Court is also required to give constitutional provisions a liberal and purposive interpretation. In its decision in *Re The Matter of the Interim Independent Electoral Commission* Constitutional Application No 2 of 2011, at paragraph 51 thereof, the Supreme Court of Kenya adopted the words of Mohamed A J in the Namibian case of *S. v Acheson*, 1991 (2) S.A. 805 (at p.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 between the government and the governed. It is a ‘mirror reflecting the national soul’; the identification of ideals andaspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the *Constitution* must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion.”

102. I am also guided by 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)).

103. I now turn to consider the constitutional and statutory provisions that are at the centre of the present dispute.

Applicable Constitutional Provisions

104. The parties are, I believe, in agreement with regard to the provisions of the *Constitution* that are at play in this matter, particularly with regard to the supremacy of the *Constitution*. Article 1(1) provides that “All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution” while at Article 2(1) and (2), the *Constitution* provides as follows:

(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

(2) No person may claim or exercise State authority except as authorised under this Constitution.”

105. Article 3 imposes on every person the duty to “...respect, uphold and defend this Constitution.” At Article 6(2), the *Constitution* provides that “The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation.”

106. I am also mindful of the constitutional values and principles enunciated in Article 10, which include “patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.”

107. It is also undisputed that the crux of this petition is the question of the transfer of functions which the *Constitution* has vested in county governments. Article 186 provides as follows with respect to the respective functions of county and national government:

186.(1) Except as otherwise provided by this Constitution, the functions 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 is 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.
- (4) For greater certainty, Parliament may legislate for the Republic on any matter.
108. At Article 189, the *Constitution* makes provision with respect to the relationship between the two levels of government and calls for cooperation between the two levels of government by providing as follows:
189. Government at either level shall—
- “(1)
- (a) perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level;
 - (b) assist, support and consult and, as appropriate, implement the legislation of the other level of government; and
 - (c) liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.
- (2) Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.
- (3) In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.
- (4) National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.”
109. Not to be overlooked are the objects and principles of devolution set out at Articles 174 as follows:
- The objects of the devolution of government are—
- (a). to promote democratic and accountable exercise of power;
 - (b). to foster national unity by recognising diversity;
 - (c). to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
 - (d). to recognise the right of communities to manage their own affairs and to further their development;
 - (e). to protect and promote the interests and rights of minorities and marginalised communities;
 - (f). to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
 - (g). to ensure equitable sharing of national and local resources throughout Kenya;
 - (h). to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and
 - (i). to enhance checks and balances and the separation of powers.
110. At Article 175, the *Constitution* provides that:



County governments established under this Constitution shall reflect the following principles—

- (a) county governments shall be based on democratic principles and the separation of powers;
- (b) county governments shall have reliable sources of revenue to enable them to govern and deliver services effectively; and
- (c) no more than two-thirds of the members of representative bodies in each county government shall be of the same gender.

111. Finally, I will also bear in mind the constitutional provisions with respect to the jurisdiction of this Court, which are set out at Article 159 and 165 of the *Constitution*. While Article 159 contains the provisions vesting judicial authority in the judiciary, Article 165(3) vests jurisdiction in the High Court in the following terms:

- (3) Subject to clause (5), the High Court shall have—
 - (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) ...

112. I have not heard any of the parties question the above constitutional provisions, nor the jurisdiction of this Court in the determination of the petition and cross-petition. What the AG has argued, and which I shall therefore consider as a preliminary issue, is whether the petition is premature as the petitioner has failed to utilize the mechanism provided by law for the resolution of disputes such as this.

Has the petitioner failed to follow the alternative dispute resolution mechanism provided by law?

113. The AG has argued that the petitioner should have continued with consultation in order to have the present dispute resolved under the provisions of the *Intergovernmental Relations Act*, which contains the mechanism envisaged in Article 189 of the *Constitution*.

114. The petitioner responds that the TA has made a decision with regard to the transfer of the roads function and forwarded the appropriate notice to the AG for publication, and it is the AG and a departmental committee of the National Assembly that were the stumbling blocks. There was



- therefore no dispute for resolution under the *Intergovernmental Relations Act*, and this petition is properly before the Court.
115. I have considered the provisions of the *Intergovernmental Relations Act*. Sections 30 to 35 thereof deal with the mechanism of dispute resolution, as well as the nature of disputes that are subject to the Act. Section 30 provides as follows:
30. (1) In this Part, unless the context otherwise requires, "dispute" means an intergovernmental dispute.
- (2) This Part shall apply to the resolution of disputes arising—
- (a) between the national government and a county government; or
- (b) amongst county governments.
116. Section 31 is in the following terms:
31. The national and county governments shall take all reasonable measures to—
- (a) resolve disputes amicably; and
- (b) apply and exhaust the mechanisms for alternative dispute resolution provided under this Act or any other legislation before resorting to judicial proceedings as contemplated by Article 189(3) and (4) of the *Constitution*.
117. Section 32 requires agreements between national and county governments to include appropriate dispute resolution mechanisms. Section 33 requires the parties, before declaring a dispute, to make every effort to resolve their differences amicably. Where all efforts at an amicable resolution fail, section 35 states that the parties to the dispute can subject the matter to arbitration, or institute judicial proceedings.
118. Is there a dispute in this case involving the national and county government? I have read the documents and minutes detailing the proceedings between the petitioner and various government entities, including the Ministry of Roads and Transport. There is no dispute that the issues forming the subject of this petition fell and were dealt with in accordance with the provisions of the *Transition to Devolved Government Act*.
119. The Act is stated to be an Act of Parliament to provide a framework for the transition to devolved government pursuant to section 15 of the Sixth Schedule to the *Constitution*, and for connected purposes. It is the Act that establishes the TA which has the mandate of overseeing the transition to devolved government, and among the objects of the Act set out in section 3 is to "provide a legal and institutional framework for a coordinated transition to the devolved system of government while ensuring continued delivery of services to citizens."
120. Section 23 of the Act, which is titled "Procedure for phased transfer of functions" provides as follows:
- (1) The Authority shall, by notice in the Gazette at least thirty days before the first elections under the *Constitution*, identify functions which may be transferred to the county governments immediately after the first elections under the *Constitution*.
- (2) After the initial transfer of functions under subsection (1), every county government shall make a request in the prescribed manner to the Authority for transfer of other functions in accordance with section 15 of the Sixth Schedule to the *Constitution*.



- (3) The Authority shall, upon the request of a county government under subsection (2), determine whether a county government meets the criteria set out under section 24, to allow the transfer of a function.
 - (4) The Authority shall—
 - (a) consider and dispose of any application under subsection (2); and
 - (b) make its determination within sixty days of receipt of such an application.
 - (5) The decision of the Authority under subsection (4) shall be based on the criteria for transfer of functions, provided under section 24.
 - (6) Where the Authority determines that a county government does not meet the criteria for the transfer of function under section 24, it shall propose clear and practical measures to build the capacity of the county government during the transition period to enable the county government undertake its functions within the shortest time possible.
 - (7) A county government may appeal to the Senate against a decision made under subsection (6).
 - (8) A decision of the Senate on the appeal, by majority vote in accordance with Article 123 of the Constitution, shall be binding on the Authority.”
121. The transition from a centralised to a devolved system of government must involve consultation between the national and county governments, but I note that the consultation envisaged under the Intergovernmental Relations Act between the national and county governments did take place. From the documents annexed to the affidavit of Mr. Isaac Ruto sworn in support of the petition on the 5th of September 2014, it is apparent that a series of consultative meetings took place between September 2013 and May 2014. One such meeting was convened by a letter from the Ministry of Roads and Infrastructure dated 18th September 2013 and took place on 26th September 2013. A second meeting was convened by a letter from the same Ministry dated 11th November 2013 for the 21st of November 2013.
122. I note further that the agenda for the meetings was, inter alia, the classification of roads and the technical capacities of the counties. In a letter dated 13th May 2014, the Ministry of Roads and Infrastructure forwards the 2nd Report of the Intergovernmental Consultative Forum held on 11th April 2014 in which, at page 5, the issue of classification of roads is discussed. In my view, the consultations necessary with respect to the classification of roads, among other functions, did take place as required by the Constitution and relevant legislation.
123. It is common ground, however, that the TA, following the consultations, declined to transfer the roads function, and 29 of the 47 counties appealed to the Senate, leading to the decision contained in the Senate report that is at the core of the present dispute. The Senate made a decision, recommending, among other things, that the roads function should be transferred to the counties. The TA, in compliance with this decision of the Senate, prepared a notice for gazettelement which it forwarded to the AG.
124. From the pleadings and submissions before me, the problem arose from the dissatisfaction on the part of the AG and the National Assembly Departmental Committee on Transport, Public Works and Housing with the decision of the Senate recommending the transfer of the roads function to counties.
125. In my view therefore, and I agree with the petitioner on this, there is no alternative dispute resolution mechanism that the petitioner could have followed to determine the questions that are at issue in



this matter, for they relate to the acts of the Clerk to the National Assembly, acting at the behest of the Departmental Committee on Transport, and consequent thereto, the omissions of the Attorney General. These are the two issues that I now wish to turn to.

Does a Departmental Committee of the National Assembly have a role to play in the transfer of functions to counties?

126. The petitioner alleges that the failure of the AG to gazette the transfer of the roads function resulted from a letter, written by the Clerk of the National Assembly to the Solicitor General, which was dated 18th August 2014 and copied to the AG and the Chairman of the TA requesting for a halt in the gazettment of the transfer of functions. The letter was in the following terms:

Mr Njee Muturi

Solicitor General State Law Office &

Department of Justice

Harambee Avenue

Nairobi

RE: Request To Halt The Gazettment Of The Devolved Functions Of County Transport In Accordance With Sections 27 And 28 Of The *Transition To Devolved Government Act*, 2012

The Departmental Committee on Transport, Public Works and Housing is mandated amongst other things, “to investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operation and estimates of the assigned ministries and departments.”

Reference is made to the letter REF TA/2/2 dated 7th August 2014 from the Transitional Authority requesting the Attorney General to facilitate the Gazettment of the devolved functions relating to County Transport in accordance with the Senate decision of April 2014.

During its sitting held on 12th August 2014, the Committee considered the content of the Draft Legal Notice and observed that Class D falls under County roads contrary to what had been agreed during a consultative workshop between the Committee and the Ministry of Transport and infrastructure held on 16th June 2014. It was resolved in the said Workshop that Classes S, A, B, C and D would fall under the national government while Class E and other ‘unclassified roads’ be under the County governments.

In view of the foregoing, the Committee therefore requests the Attorney General to halt the Gazettment of the Devolved function of the County Transport to enable it to revisit the matter with the Ministry.

Yours

Justin Bundi, Cbs

Clerk Of The Naitonal Assembly

127. The petitioner alleges that the AG, acting on the basis of the letter from the Clerk to the National Assembly, wrote his letter dated 3rd October 2014 in which he in effect challenged the merits of the Senate decision. He stated as follows in the said letter:

Our Ref: 589/2/27 Vol.II

Hon. Senator Ekwee Ethuro

Speaker of the Senate



KICC Building, 1st Floor,

O. Box 41842 – 00100

NAIROBI

Dear Mr Speaker Sir,

RE: TRANSEFER OF FUNCTIONS TO COUNTIES

The office of the Attorney General & Department of Justice has been undertaking a review of a draft Gazette Notice submitted by the Transition Authority, seeking to gazette the transfer of functions pursuant to the Senate's Sessional Committee on Devolved Government Report on the Appeal for the Transfer of functions to the Counties dated April 2014.

As you may be aware, the statutory regime concerning roads is still in place and the structural framework is still functional. This includes such agencies as the Kenya National Highways Authority, Kenya Rural Roads Authority, Kenya Urban Roads authority, Kenya wildlife Service and Kenya Forest Service. This office is concerned that the Senate decision with regards to the roads function as stated, is not amenable to immediate implementation without further clarification from yourselves, and the various stakeholders including the above mentioned agencies, as well as the Transition Authority and Ministry of Transport and Infrastructure.

Several outstanding issues which if not resolved will frustrate the implementation of the transfer of functions including the following:

1. That the manner in which the Senate conducted the appeal was contrary to the provisions of Article 47 of the Constitution which relates to fair administrative action since the Senate did not invite all relevant parties to respond to issues and or provide additional clarification on the functions that the county governments had appealed on.

You will note that the Constitution envisages a holistic interpretation; an observance of the doctrine of fair administrative action, the principle of consultation, cooperation and sharing. Any decision that does not encompass this may not pass the constitutionality test. This is much more specifically provided for with regards to relations between both levels of Government in Art. 186 – 191 of the Constitution.

In view of the questions raised above, we request for clarification of the Senate decision and further consultation as may be so required between parties, in order to guide our actions in this matter.

Yours

Githu Muigai, Egh, Sch

Attorney GeneraL

128. The petitioner has contended that the AG failed to gazette the transfer of functions as requested by the TA because of the letter by the Clerk of the National Assembly requesting for a halt in the gazettment of the transferred functions to enable the National Assembly revisit the issue of classification of roads with the Ministry of Roads and Infrastructure. The AG did not address the Court on this contention, but it is difficult not to draw the inference, given the timing and contents of the two letters, that the AG did indeed act on the basis of the letter from the Clerk to the National Assembly.
129. In addition, as is evident from the submissions of the AG and his letter set out above, the AG was questioning, not the form or content of the notice by the TA, but the process used by the Senate in arriving at its decision, and the content and merits of the said decision. Which gives rise to the



two related issues for determination: Did the Departmental Committee on Transport of the National Assembly have any role to play in the transfer of functions to counties? Secondly, can the Attorney General challenge the decision of the Senate by refusing to act on the notice sent by the TA for the transfer of the roads function?

130. I have already set out the relevant provisions of the *Transition to Devolved Government Act*. The Act gives the National Assembly no role in the transfer of functions to counties, and indeed, no attempt was made to demonstrate any such role. The *Transition to Devolved Government Act* specifically provided for interaction with regard to the transfer of functions between the TA, counties, and in the event of dissatisfaction with the decision of the TA, appeal to the Senate. There is therefore no constitutional or statutory role for the National Assembly or its departmental committees in the devolution of the roads function.
131. Yet, as is again evident from the letter dated 18th August 2014 from the Clerk to the National Assembly addressed to the Solicitor-General, the call to halt the gazettment was pursuant to a discussion between the National Assembly Departmental Committee on Transport and the Ministry of Transport. It is useful to set out again the relevant part of the Clerk's letter, in which he states as follows:
- “ During its sitting held on 12th August 2014, the Committee considered the content of the Draft Legal Notice and observed that Class D falls under County roads contrary to what had been agreed during a consultative workshop between the Committee and the Ministry of Transport and infrastructure held on 16th June 2014. It was resolved in the said Workshop that Classes S, A, B, C and D would fall under the national government while Class E and other ‘unclassified roads’ be under the County governments.” (Emphasis added)
132. In my view, the Departmental Committee on Transport of the National Assembly, sitting with the Ministry of Transport, could not sit to determine the classification of roads, in the absence of representatives of the counties and the Transition Authority. More importantly, they could not sit to put a halt to a process that had been conducted in accordance with the provisions of the *Transition to Devolved Government Act*, ending with a decision of the Senate as contemplated under section 23(8) of the Act, while they had no role in that process. It thus follows that if the Departmental Committee on Transport had no role to play with respect to the transfer of functions, the AG could not properly act at its request not to gazette the transfer of the roads function.
133. The AG's argument, however, is that he was entitled to seek clarification on a number of issues from the Senate. As submitted on his behalf, the AG was not a conveyor belt and has to confirm and question the constitutionality of many issues passing through his office. The question is whether this is the correct position in law, and if so, what form such challenge may take.

Can the Attorney General challenge a decision of the Senate made under section 23(8) of the *Transition to Devolved Government Act*?

134. As I understand the submissions of the AG, he has the discretion, under Article 156, to question the decision of the Senate, and he cannot be deprived of this discretion merely because the decision of the Senate is said to be binding on the TA. As was submitted in the written submissions filed on his behalf, “the decision of the Senate was devoid of logic or reason,” and the AG was therefore under an obligation, in the public interest, to question it.
135. I have set out elsewhere above the provisions of the *Constitution* with respect to the exercise of power. No-one should purport to exercise power other than in accordance with the *Constitution*. With respect to the AG, his office is established, and its constitutional mandate set out, under Article 156 as follows:



156.”(1)There is established the office of Attorney-General.

- (2) ...
- (3)
- (4) The Attorney-General—
 - (a) is the principal legal adviser to the Government;
 - (b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and
 - (c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.
- (5) The Attorney-General shall have authority, with the leave of the court, to appear as a friend of the court in any civil proceedings to which the Government is not a party.
- (6) The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest.
- (7) The powers of the Attorney-General may be exercised in person or by subordinate officers acting in accordance with general or special instructions.”

136. I have considered the submissions of the AG against his constitutional role and functions set out above. I agree that he would have a duty to question any act that he considers unconstitutional, unreasonable or illogical. It is his manner of intervening in the matter of the gazetting of the transfer of the roads function to the counties that is a problem.

137. Assuming the decision of the Senate was made administratively, and in violation of Article 47, the duty of the AG would be to question such decision in the appropriate forum, the High Court, which has the constitutional mandate to supervise bodies performing administrative actions, and to determine whether anything said to be done under the authority of the *Constitution* or any law is in accord with the *Constitution* or the law. In this case, and with the greatest respect to the office of the AG, he overreached himself, apparently at the instigation of the National Assembly Departmental Committee on Transport, which was also overreaching, in failing to gazette the transfer of the roads function as requested by the TA.

138. As pointed out by the petitioner, the actions of the AG are all the more regrettable given that he is, in accordance with the provisions of the *Transition to Devolved Government Act*, a member of the TA, albeit as an ex officio member with no right to vote, and should therefore have been involved in and aware of all decisions made by the TA.

In which level of government does the *Constitution* vest the disputed roads functions?

139. The present matter revolves around the transfer of the roads function. As submitted by KeNHA and the AG, prior to the promulgation of the *Constitution*, the roads function was carried out on behalf of the government by KeNHA, KURA and KeRRA in respect of national, urban and rural roads respectively. As with many other institutions and arrangements, the landscape in respect of the operation and maintenance of roads, and the institutions responsible, has been changed considerably by the *Constitution*. The constitutional changes have left great uncertainty in their wake, and some of the institutions facing this uncertainty are the three state agencies involved in this petition.



140. There is no dispute substantially about the provisions of Part 1 and 2 of the Fourth Schedule to the Constitution with respect to the functions of the national and county governments regarding roads. Section 18 of Part I provides that the functions of the national government include:

Transport and communications, including, in particular—

- (a) road traffic;
- (b) the construction and operation of national trunk roads;
- (c) standards for the construction and maintenance of other roads by counties;
- (d) railways;

....

141. Section 3 and 5 of Part 2 provides that the functions of counties include:

- 3. Control of air pollution, noise pollution, other public nuisances and outdoor advertising .
- 5. County transport, including—
 - (a) county roads ;
 - (b) street lighting;
 - (c) traffic and parking;
 - (d) public road transport; and
 - (e) ferries and harbours, excluding the regulation of international and national shipping and matters related thereto. (Emphasis added)

142. The provisions of the Fourth Schedule set out above are fairly straightforward. In so far as roads are concerned, in my view, the national government, and therefore its agencies such as KeNHA, KURA and KeRRA, have a mandate limited by the Constitution to road traffic, construction and operation of national trunk roads, and the setting of standards for the construction and maintenance of other roads by counties. This may well imply that, upon the implementation of the Constitution and the transfer of functions to the counties, there may be no role for some of these agencies to play, and they may ultimately require winding up.

143. With respect to outdoor advertising, KeNHA has made a valiant attempt to show that it still has a role in the sector. Ultimately, though, in light of the clear constitutional provisions, it is difficult to see how the national government or its agencies has any role to play in outdoor advertising. As submitted by the petitioner, “control of...outdoor advertising” must encompass all elements of the term, from leasing the grounds for the erection of advertising gantries to charging for the advertising signs themselves.

144. The respondents, particularly KeNHA, has relied heavily on the provisions of the Roads Act 2007 as the basis for their maintaining control of various functions in the road sector, including advertising on roads under the jurisdiction of counties. It relies on the provisions of section 49 of the Roads Act to argue that it has the mandate to grant approvals to any person or body to lay structures or carry out works over or below or on road reserves.



145. It must be noted, however, that the Roads Act was enacted in 2007. It predates the Constitution by several years. In accordance with the provisions of section 7 of the Sixth Schedule, it must be read in a manner that accords with the Constitution:

7.(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

(2) If, with respect to any particular matter—

(a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and

(b) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict.

146. KeNHA has also relied on the decision of Korir J in *R v Kenya National Highways Authority & Others ex parte Amica Business Solutions* (supra) to submit that it has the responsibility for outdoor advertising. I have read the said decision, in which the Court stated as follows:

“Does KeNHA have the power to authorize the use of road reserves? This question will be answered together with the question as to whether KeNHA usurped the role of the Council by authorizing the interested parties to construct billboards and gantries on road reserves. KeNHA is established under the KRA and its main mandate is to manage, develop, rehabilitate and maintain national roads. It is empowered under Section 49 of the said Act to grant approvals to any person or body to lay structures or carry out any kind of works over or below roads or road reserves. This mandate is given in the following words:-

“49. Except as provided in subsection (2), no person or body may do any of the following things without the responsible Authority’s written permission or contrary to such permission-

(a) erect, construct or lay, or establish any structure or other thing, on or over or below the surface of a road reserve or land in a building restricted area;

(b) make any structural alteration or addition to a structure or that other thing situated on or over, or below the surface of a road or road reserve or land in a building restriction area; or

(b) give permission for erecting, constructing laying or establishing, any structure or that other thing on or over, or below the surface of, a road or road reserve or land in building restriction area, or for any structural alteration or addition to any structure or other thing so situated.”

Clearly the above quoted section gives KeNHA the power to grant the interested parties the authority to construct billboards and gantries on road reserves. Looking at the submissions of the applicants and the petitioners it appears that they conceded to this obvious fact and I need not say more.

147. In my view, however, bearing in mind the words of the Constitution and the above decision, there is nothing on the basis of which a finding can be made that KeNHA has the constitutional mandate to



carry out or control outdoor advertising. The decision of Korir J in that case was based on the law as it then existed, and not on the basis of the Constitution which required the transfer of various functions to county governments. Further, section 7 requires that legislation in force be read with the alterations and amendments that bring it into conformity with the Constitution, and there is nothing in the Fourth Schedule of the Constitution that would allow the exercise of control over outdoor advertising by national government entities.

148. Inevitably, since the roads function in the counties have been expressly assigned to counties by the Constitution, as have the functions of control of, inter alia, outdoor advertising, bodies such as KeNHA, KURA and KeRRA must be dissolved or wound up as the Constitution has rendered the roles that they were playing prior to the promulgation of the new Constitution redundant. Inevitably also, there must be some resistance to the changes wrought by the Constitution, for good or ulterior motives, and this is what appears to be at the core of the present petition.

What is the effect of the pending legislation on roads on the transfer of the roads functions to the counties?

149. A key plank of the AG's case, both in opposition to the petition and in support of the cross-petition, is that there is not yet in force legislation classifying county and national roads, and that therefore the transfer could not be effected. It was his argument also that the petition is premature as the petitioner should have awaited the enactment of the legislation which has been tabled in Parliament. The petitioner responds that there has already been classification of roads, and what is lacking is the legislation.
150. As I observed elsewhere above, the issue of classification of roads was discussed at various meetings involving the Intergovernmental Consultative Forum, and there appears to have been agreement on what constitutes county roads. Indeed, during the Intergovernmental Consultative Forum meeting held in May 2014 for instance, presentations were made on the classification of roads, and various documents have been cited as containing the information on the county roads in various counties. It was on this basis, following the decision of the Senate that the roads function should be transferred, that the TA had prepared the gazette notice for publication.
151. Secondly, I take the view that it would not be the legislation that identifies either county or national trunk roads. The effect of the legislation would be to among other things, formalise the identified roads, or the criteria or manner of their identification. Thus, in light of section 7 of the Sixth Schedule, I am not satisfied that the pending legislation is a sufficient reason for opposing the transfer of functions.
152. In any event, I note that the Kenya Roads Bill, 2015 was published in June, 2015. It is now December, 2015. The Bill has yet to be debated, and there is no indication when, and if, the legislation will be passed. In my view, the pendency of the Bill, even had it been a valid reason for deferring the transfer of functions, would not be of assistance as it would have meant that the transfer of functions is left at the mercy of Parliament and its calendar.

Should the Senate have recommended the transfer of the roads functions to all 47 Counties, or only to those which had lodged an appeal against the decision of the Transition Authority?

153. The respondents have impugned the Senate decision on the basis that it recommended the transfer of the roads function to all the counties, yet only 29 out of the 47 counties had appealed against the decision of the TA not to transfer the roads function. The AG notes that the Senate had observed that many counties lacked the capacity to handle the function and had recommended capacity building for them, yet it still recommended the transfer to all the counties, including those which had not appealed, and those which it had found to lack the capacity to handle the function should it be transferred.



154. I have considered this argument against the orders sought in the cross-petition and the contents of the report of the Senate. It seems to me that the AG has a valid point in his criticism of the decision of the Senate in this regard, which he has prudently placed before this Court by way of cross-petition. A reading of section 23 of the *Transition to Devolved Government Act* suggests that the Senate could only deal with the issues that had been placed before it on appeal.
155. As with any other body exercising such a power, particularly where, as in this case, its decision is final, it was to act in excess of its powers for the Senate to make recommendations in respect of matters that were not before it. As submitted by the AG in reliance on the proceedings before the Senate, it could be that the counties which did not appeal against the decision of the Transition Authority were not ready to assume the function. There was therefore no basis for the Senate to extend its decision to cover the counties which had not appealed to it, and it should have heeded the caution of some Senators against recommending transfer of some functions to all counties.

Summary of Findings

156. I have made the following findings on the various issues raised in this petition:

- i. Has the petitioner failed to follow the alternative dispute resolution mechanism provided by law?

I have found that the petition is properly before me, and that given that the present petition arose out of dissatisfaction on the part of the AG and the National Assembly Departmental Committee on Transport, Public Works and Housing with the decision of the Senate, there was no dispute for resolution under the *Intergovernmental Relations Act*.

- ii. Does a Departmental Committee of the National Assembly have a role to play in the transfer of functions to counties?

There is no constitutional or statutory role for the Departmental Committee on Transport, Public Works and Housing of the National Assembly in the transfer of functions to counties, nor can the Departmental Committee, in consultation with the Ministry of Transport, sit to determine the classification of roads, in the absence of representatives of the counties and the Transition Authority, or put a halt to a process that had been conducted in accordance with the provisions of the *Transition to Devolved Government Act*, ending with a decision of the Senate as contemplated under section 23(8) of the Act.

- iii. Can the Attorney General challenge a decision of the Senate made under section 23(8) of the *Transition to Devolved Government Act*?

The Attorney General has no power under the *Constitution* to question the decision of the Senate in the manner that he did, by failing to gazette the notice from the Transition Authority on the transfer of the roads function. While he has a right and duty to question any act that he considers unconstitutional, unreasonable or illogical, he can only do so through the appropriate forum, the High Court, which has the constitutional mandate to determine whether anything has been done in accordance with the *Constitution* as provided under Article 165(3)(d).

- iv. In which level of government does the *Constitution* vest the disputed roads functions?

the *Constitution* has vested the function of construction, operation and maintenance of county roads, as well as the control of outdoor advertising, in county governments. In accordance with the provisions of section 18, part 1 of the Fourth Schedule of the *Constitution*, the national



government is vested with the construction and operation of national trunk roads, and the setting of standards for the construction and maintenance of other roads by counties. It has no role in the construction and maintenance of county roads, or in the control of outdoor advertising on roads. Its agencies such as KeNHA, KURA and KeRRA have no role with respect to county roads upon full transfer of the roads functions to the counties.

- v. What is the effect of the pending legislation on roads on the transfer of the roads functions to the counties?

The classification of roads had been discussed and agreed at various meetings of the Intergovernmental Consultative Forum, and it was on this basis that the Transition Authority had prepared the notice gazetted the transfer of the roads function to the counties. In any event, it would not be the legislation that identifies either county or national trunk roads. The effect of the legislation would be, inter alia, to formalise the identified roads, or the criteria or manner of their identification.

- vi. Should the Senate have recommended the transfer of the roads functions to all 47 Counties or only to those which had lodged an appeal against the decision of the Transition Authority?

A proper reading of section 23 of the *Transition to Devolved Government Act* results in the conclusion that the Senate could only deal with the issues that had been placed before it on appeal. It was therefore overreaching when it made recommendations in respect of matters that were not before it. It could only make recommendations for the transfer of the roads function in respect of the 29 counties that had appealed to it against the decision of the Transition Authority.

Conclusion

157. So where do the above findings leave us? Article 259 demands of the Court that it interprets the *Constitution* in a manner that “promotes its purposes, values and principles.” One of the core values of the *Constitution* is devolution of power and sharing of resources, as well as participation of the people. The objects and principles of devolution are succinctly spelt out at Article 174, and the court is acutely conscious of their demands. In the *Constitution*-making process that preceded the promulgation of the 2010 Constitution, one of the threads running throughout the process was the need to ensure that power is devolved to the grassroots so that the people can participate in their governance, and that there would be greater sharing of resources. This required the devolution of power to the counties through the system of devolved government.

158. As a country, we have experimented with decentralisation before, but our experience with devolution or decentralisation of power has not been a happy one. At independence, we had a devolved system of government, akin to what we have now. The central government then in place delayed the transfer of power to the regions, and ultimately, we gave up on decentralisation. In the words of Charles Hornsby in ‘Kenya: A History Since Independence’ (2012) cited by the petitioner in its written submissions:

“As minister for justice and constitutional affairs, Mboya played a central role in restoring the unitary state, assisted by Attorney-General Charles Njonjo. The regional authorities (particularly the KADU-dominated Coast and Rift Valley) tried to establish their identities, responsibilities and powers, but the central government undermined them at every opportunity. The central government continued to budget for the entire civil service, despite the constitutional paperwork stating otherwise. The transfer of powers to the regions had been scheduled for 1st December 1963, with full implementation on 1st January 1964. Some services were transferred to regional control, but the delegation of financial



authorities was administratively delayed until 1st July 1964. In May 1964, with talk of a new republican constitution brewing, the transfer of fiscal responsibilities was postponed again, to 1st December 1964. These delays were probably illegal, but no one challenged them in court, which reflects the low level of institutionalization of the rule of law and the broad support for the restoration of unitary government. The questionable commitment of the government to the Constitution was also evident in December 1963, when the North-Eastern Region Emergency proclamation was before the Senate. On 31st December, Mboya declared that the government would impose emergency regulations whatever the Senate decided, even if it violated the Constitution.”

159. As I see it, we ran the risk of delaying devolution by alleging the incapacity of counties to take up the devolved functions under the Constitution. In doing so, we are likely to end up postponing the transfer of functions indefinitely, and in the process, weaken and undermine devolution.
160. As we have done in the last fifty years of independence, when we have suffered for the sins of our fathers in postponing and ultimately doing away with decentralised government, which engendered resentment and ethnic polarisation, we can leave the same bitter legacy for our children, or do the right thing now, with regard to devolution of power, as dictated by the Constitution.
161. Let me emphasise that the Court is not insensitive to or unaware of the weaknesses endemic in the counties, which even the Senate recognised in its report. I am fully cognisant of the capacity gap in many counties, and of the need, recognised in all the consultative meetings of the intergovernmental consultative forum, to build the capacity of the counties. This cannot be achieved, however, by keeping the devolved functions under the control of the national government. Not only will this run counter to the letter of the Constitution as set out in Articles 174, 175, 186 and 189 as well as the Fourth Schedule, but will also be against the spirit of the Constitution. What is required is that the necessary “...clear and practical measures,” in the words used in section 23(6) of the Transition to Devolved Government Act, are put in place to build the capacity of county governments to enable them undertake their constitutional functions.
162. What remains is a consideration of the appropriate relief to grant in light of the above findings.

Reliefs

163. As is evident from the analysis set out above and the summary of findings, the petition has largely succeeded, while the cross-petition has partially succeeded. In the event, I grant the following declarations:
- (i) That in failing to gazette the transfer of functions, especially in regard to transfer of county roads, as passed by the Senate on appeal from the Interested Party’s decision, the 1st respondent violated the objectives and principles of devolution provided for under Articles 174 and 175 of the Constitution.
 - (ii) That once an appeal on the transfer of functions is allowed by the Senate by way of majority vote, the 1st respondent is under a constitutional and statutory duty to promptly gazette the transfer of the functions to the county governments, unless there is an order of a court of competent jurisdiction staying such gazette.
 - (iii) That the 1st respondent’s failure to gazette the transfer of functions as per the appeal allowed by the Senate is unjustified and contrary to Articles 186 and 189 of the Constitution.



- (iv) That the management, development, rehabilitation and maintenance of all public roads, save the national trunk roads, are functions of county governments.
- (v) That the control of outdoor advertising on road reserves is an exclusive function of county governments.
- (vi) That since the Senate only received appeals from twenty nine county governments, the decision by the Senate requiring the Transition Authority to transfer the functions to all the county governments, including those that did not appeal, is contrary to the provisions of section 23 and 24 of the Transition to Devolved Governments Act, 2012 and the Constitution of Kenya;
- (vii) That the Transition Authority does not have power to order the transfer of functions to the county government that have not applied for transfer of functions.

164. Consequent upon the declarations above, I hereby issue the following directions and orders:

- (i) I direct the 1st respondent to, within ninety (90) days hereof, gazette the transfer of functions to the county governments as contained in the Report of the Sessional Committee on Devolved Government on the Appeals for Transfer of Functions to Counties as passed by the Senate on 17th April 2014, such transfer to be limited to the 29 counties that had lodged an appeal with the Senate.
- (ii) I hereby issue an order of prohibition prohibiting the 2nd respondent from proceeding further with the procurement or re-advertising Tender Notice No KeNHA/830/2014 inviting tenders or in any way awarding contracts or concessions for the use of Class A, B and C road reserve land and structures for placement of advertisements or notices or in any way interfering with the management of roads falling under the mandate of county governments.
- (iii) I hereby issue an order of prohibition prohibiting the 3rd respondent from proceeding further with the procurement or re-advertising tenders inviting bids for tenders or in any way awarding contracts or concessions for maintenance, rehabilitation and improvement of various roads in Class D, E, and all other unclassified roads falling within the mandate and control of the respective county governments.
- (iv) I hereby issue an order of prohibition prohibiting the 4th respondent from proceeding further with the procurement, inviting bids for tenders or in any way awarding contracts or concessions for maintenance, rehabilitation and improvement of roads in Class D, E, and all other unclassified roads falling within the mandate and control of county governments.

165. With respect to costs, which are in the Court's discretion, and bearing in mind the nature of this matter which is of great public importance, I direct each party to bear its own costs.

166. In closing, I must express my gratitude to the parties and their Counsel for the very detailed submissions and authorities, and for the diligent and courteous manner in which they presented their respective cases. If it did not make reference to the authorities relied on, it is not because they were not useful to the Court.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11TH DAY OF DECEMBER 2015.

MUMBI NGUGI

JUDGE

Mr. Issa & Mr. Muite instructed by the firm of Issa & Co. Advocates for the petitioner.



Mr. Njoroge instructed by the State Law Office for the 1st, 3rd, 4th respondent and the interested party.

Mr. Munialo instructed by the firm of Waweru Gatonye & Co. Advocates for 2nd respondent.

