REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 145 OF 2011

THE COMMISSION FOR THE IMPLEMENTATION

OF THE CONSTITUTION.....PETITIONER

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE SPEAKER OF THE NATIONAL ASSEMBLY.....2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioner, the Commission for the Implementation of the Constitution (hereafter the petitioner or CIC) is an Independent Commission established under **Section 5** of the **Sixth Schedule** to the Constitution of Kenya and pursuant to the provisions of the Commission for the Implementation of the Constitution Act, 2010 (No. 9 of 2010). It has brought this petition challenging the process leading to the enactment of the **Contingencies Fund and County Emergency Funds Act, 2011 (No. 17 of 2011)** and **the National Government Loans Guarantee Act, 2011 (No. 18 of 2011)** (hereinafter referred to as "the *statutes*"). Both statutes were published in the *Kenya Gazette Vol. CXIII-No. 90* dated 9th September, 2011 and were to come into force on 30th August, 2011.

2. CIC contends that the statutes are unconstitutional and invalid *ab initio* in so far as the procedure employed by the respondents in enacting them disregarded the express constitutional requirement that at least a 30 day period be allowed for the CIC to consider the Bills before their enactment. In this regard, CIC states that contrary to the requirements of **Article 261(4)** and **section 14(1)** of the **Sixth Schedule** to the Constitution, it was not consulted before the subject statutes were tabled before Parliament, passed and eventually assented to.

The Pleadings

3. In the Petition dated 25th August 2011 CIC seeks, among other reliefs:

i. THAT a declaration be issued declaring that in preparing the relevant Bills for tabling before Parliament pursuant to the provisions of Article 261(1) of the Constitution and the Fifth Schedule thereto, the 1st Respondent must consult the Petitioner, which consultation must accord the Petitioner

sufficient time so as to ensure that the consultation is effective and meaningful.

ii. THAT a declaration be issued declaring that the laws referred to in Section 2(3)(b) and 15 of the Sixth Schedule to the Constitution may be enacted only after the Petitioner, amongst any other parties as stipulated, has been duly consulted and any recommendations by the Petitioner duly considered by Parliament.

iii. THAT a declaration be issued declaring that in respect of the consultations required under Section 14(1) of the Sixth Schedule to the Constitution, the Petitioner shall be given at least thirty days to consider the proposed legislation.

iv. THAT a declaration be issued declaring that the 1st Respondent's failure and omission to consult the Petitioner as specifically stipulated in the Constitution is illegal and unconstitutional.

v. THAT a declaration be issued declaring that any preparation of any Bill by the 1st Respondent under Article 261(1) of the Constitution, the Fifth Schedule thereto and Sections 2(3) (b) and 15 of the Sixth Schedule and any publication and/or tabling of any such Bills before Parliament prior to due consultation of the Petitioner by the 1st Respondent as specifically required in the Constitution is illegal and unconstitutional and is thus null and void.

vi. THAT a declaration be issued declaring that any debate and/or enactment of any Bill prepared, published and tabled before Parliament prior to due consultation by the 1st Respondent with the Petitioner as specifically required under the Constitution would be illegal and unconstitutional and thus null and void.

vii. THAT a declaration be issued declaring that any legislation passed in violation of the constitutional requirement for consultation of the Petitioner by the 1st Respondent would be unconstitutional and thus null and void.

4. CIC had also sought various interim orders pending hearing and determination of the Petition, but the said prayers were not pursued.

5. The Petition is supported by the affidavit of Charles Nyachae, the Chairman of CIC, sworn on 25th August, 2011.

6. The respondents oppose the Petition The 1st respondent filed Grounds of Opposition dated 7th September, 2011 in which it raised, among others, the following issues:

I. That the petitioner's application does not lie under law the same having been overtaken by events and the orders therein cannot issue by virtue of the Kenya Gazette supplement No. 111(Acts No. 21) and the Kenya Gazette notice supplement No. 112(Acts No. 22)

II. There exists no pending Bills for conservatory orders to issue as prayed in the application and in the petition as there is now in place, the contingencies Fund and County Emergency Fund Act, 2011 and the National Government Loans Guarantee Act, 2011

III. That there are no issues before the court for determination as the substratum of the Application and the entire Petition is lost.

IV. That the Petition lacks clarity and precision in setting out the alleged violations.

7. The 1st respondent also filed a Replying Affidavit sworn by **Mr. Joseph Kanja Kinyua**, the Permanent Secretary in the Ministry of Finance, on 6th October, 2011, as well as written submissions dated 3rd October, 2012.

The Petitioner's Case

8. According to the petitioner, prior to the enactment of the two statutes, the only communication that it received from the 1st respondent through the Chief Parliamentary Counsel are two letters one dated 22nd August, 2011 and another dated 23rd August, 2011, just a few days prior to the enactment of the statutes. Accompanying the first letter were the two draft Bills which were forwarded to CIC pursuant to decisions arrived at in a meeting of the Cabinet Committee on the Implementation of the Constitution. The email letter dated 22nd August read in part:

"Following the decision at the meeting of the Cabinet Committee on the Implementation of the Constitution this morning, that in view of the timelines in the Fifth Schedule to the Constitution, the National Government Loans Guarantee and the Contingencies Fund Management aspects of the draft Public Financial Management Bill, 2011 be extracted and processed separately, forwarded herewith please find copies of the above draft Bills for your consideration. Kindly note that due to the urgency, we are forwarding the drafts to you as availed to us by the Office of the Prime Minister at the meeting. More refined drafts will follow."

This letter was followed by another letter the following day attaching further copies of the redrafted Bills.

9. CIC states that upon receipt of the letters and the two Bills, it immediately wrote a letter protesting against the illegal and unconstitutional conduct of the 1st respondent and urged the parties concerned to intervene so as to uphold the constitutional requirements regarding enactment of new legislation. The letter was dated 24th August, 2011 and was addressed to the President and the Prime Minister of the Republic of Kenya as well as the Attorney General, and was also copied to the Speaker of the National Assembly.

10. CIC's case is that despite the urgency for the enactment of the Bills occasioned by the timelines stipulated in the **Fifth Schedule** to the Constitution, the 1st respondent ought to have followed the constitutional requirements of consultation in the enactment of the proposed law; that should it have felt that the timeline was insufficient for consultation, the 1st respondent had the option of applying for extension of time under **Article 261(2);** that the 1st respondent's acts have the effect of undermining CIC's constitutional mandate in the implementation of the Constitution generally and in the enactment of legislation in particular. Further, it contends that the effect of disregarding the procedure expressly stipulated by the Constitution when enacting the subject statutes renders such statutes unconstitutional as stipulated under **Article 2(4)** of the Constitution.

11. Mr. Regeru, Learned Counsel for the petitioner, submitted that as long as the Bills in question were Bills related to the devolved government, CIC should have been given 30 days to consider them before their enactment; that the letter forwarding the two Bills were received on the 23rd of August, 2011, just two days before the deadline for their enactment, and that they were thus hurriedly drafted and forwarded without meeting the 30 day constitutional deadline required by the Constitution.

12. CIC therefore called on the court to intervene and quash the subject statutes by declaring them unconstitutional, arguing that no exceptional hardship or prejudice would be caused if the respondents were compelled to obey the law, and it was in the public interest that the law be followed.

The Respondents' Case

13. The position taken by the respondents is that the requirements of **section 14** of the **Sixth Schedule** to the Constitution were fully complied with in the preparation and tabling of the **Contingencies Fund and County Emergency Funds Bill, 2011** and the **National Government Loans Guarantee Bill 2011**. According to the 1st respondent, the subject Bills were extracts of the **Public Financial Management Bill, 2011** which had been forwarded to the petitioner on 15th June, 2011, and that the decision to fast track the Bills was made at a meeting of the Cabinet Sub-Committee on the Implementation of the Constitution held on 22nd August, 2011 at which the petitioner was present.

14. The 1st respondent contended that despite the petitioner having had the **Public Financial Management Bill, 2011,** from which the two impugned Bills were extracted, since 15th June, 2011, it did not submit any input or recommendations for consideration by the 1st respondent nor did it tender any recommendations to the 1st respondent as required by law nor demonstrate that any provisions of the extracts from **the Public Financial Management Bill, 2011** which were enacted were unconstitutional. It cannot therefore claim that it was not consulted by the 1st respondent in formulation of the Bills as required by law.

15. Ms Munyi, Learned State Counsel for the respondents, made reference to the correspondence between the petitioner and the 1st respondent to demonstrate that the petitioner was in fact consulted throughout the process. She submitted that while the 1st respondent had delivered to the petitioner the draft Bills, the petitioner did not make any input nor indicate it had any relevant inputs until two days before the constitutional deadline for enactment of the Bills. She submitted that the petitioner had not demonstrated that it acted in good faith or in the public interest in challenging the enactment of the two statutes.

16. Ms. Munyi urged the court to dismiss the petition as there was no issue before the court for determination: the substratum of the petition was lost as the Bills were passed into law as evidenced in *Gazette Supplement Nos. 111 and 112 of 2011*. She submitted that declaring the subject statutes unconstitutional would be against public interest; that the enactment process is hectic and that since Parliament was scheduled to be going on recess in December 2012 and will be dissolved in January in readiness for the elections, there would be no time to enact the Bills.

Determination

17. Before dealing with the substantive issues that this petition raises, I will first deal with two preliminary issues raised by the respondents in their grounds of objection. The first is that the petitioner did not set out with clarity and precision the constitutional rights violated.

18. In ***Trusted Society of Human Rights Alliance –v- Attorney General & 2 others, Petition No. 229 of 2012***, the Court, in dealing with a similar objection raised with regard to the failure to cite with precision the provisions of the Constitution alleged to have been violated, observed as follows:

"[46]…However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case. [Emphasis added]

19. I am satisfied that in the pleadings in this matter, the petitioner has set out the alleged violations of the Constitution with sufficient clarity to enable the court to exercise its judicial authority and adjudicate the claims, and that the respondents have been able to respond to these claims.

20. The second issue concerns the timing of the petition and is to the effect that the petition has been overtaken by events as the subject statutes have been enacted and are now in force. In considering this issue, I am guided by the provisions of **Article 165(3),** which grants the High Court jurisdiction to determine ***"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."*** Further, Article 258 gives a right to every person to institute court proceedings, claiming that the Constitution has been contravened or is threatened with contravention.

21. The jurisdiction of the Court to interrogate acts done under the Constitution over allegations of

illegality even after the event or act in question has taken place has been established in several recent authorities by the High Court. In ***Trusted Society of Human Right Alliance (Supra),*** the court stated as follows-

"[59] We have already noted that anybody has a right to bring a Petition challenging the constitutionality of an action, and it should not matter that the Petitioner did not present any complaints during the selection or vetting process. The fact that the person who was appointed does not meet the constitutional threshold will not change merely because the person who brings the matter to Court did not raise it during the selection process, and the Court cannot shy away from making such a determination if sufficient evidence is presented before it.

22. See also **Federation of Women Lawyers of Kenya (FIDA – K) and Others –v- Attorney General and Others Nairobi Petition No. 102 of 2011 (Unreported), Albert Lukoru Loduna & 2 Others –v- Judicial Service Commission & others, Petition no. 480 of 2012**. I therefore find and hold that the matter is properly before me notwithstanding the completion of the enactment process in respect of the two statutes.

The Law

23. Before embarking on an evaluation of the respective cases of the parties, it is important to set out the relevant provisions of the law pertaining to the issue. **Section 5** of the **Sixth Schedule** to the Constitution establishes the petitioner as a constitutional commission and provides for its composition and functions as follows:

5 (1) There is established the Commission for the Implementation of the Constitution.

(2) The Commission consists of—

(a) a chairperson; and

(b) eight other members.

(3) ……

(4) ..……

(5) ……..

(6) The functions of the Commission shall be to—

(a) monitor, facilitate and oversee the development of legislation and administrative procedures required to implement this Constitution;

(b) co-ordinate with the Attorney-General and the Kenya Law Reform Commission in preparing, for tabling in Parliament, the legislation required to implement this Constitution;

(c) report regularly to the Constitutional Implementation Oversight Committee on —

(i) progress in the implementation of this Constitution; and

(ii) any impediments to its implementation; and

(d) work with each constitutional commission to ensure that the letter and spirit of this Constitution is respected.'

26 The **Commission for the Implementation of the Constitution Act ("CIC Act"**) makes further

provisions regarding the Commission, with the purpose of the Act being to ***"… provide for the functions, powers, qualification of, and appointment procedure for members of the Commission for the Implementation of the Constitution and for connected purposes."*** Section 4 of the CIC Act reiterates the functions of the CIC as captured in the Constitution.

27 The two statutes forming the basis of this petition were enacted pursuant to the provisions of Chapter 12 of the Constitution which deals with Public Finance. **Article 208**of the Constitution establishes a Contingencies Fund, the operation of which is to be in accordance with an Act of Parliamentwhile **Article 214** provides for the enactment of an Act of Parliament to provide for the charging of all or part of the public debt to other funds. Article 214 (1) provides that,

"The public debt is a charge on the Consolidated Fund, but an Act of Parliament may provide for charging all or part of the public debt to other public funds."

28 The role of the petitioner in the enactment of the two statutes is specifically provided for in **Section 14** of the **Sixth Schedule** to the Constitution. The section provides that certain legislation, including the subject statutes which deal with devolved government, can only be enacted after the petitioner and the Commission on Revenue Allocation have been consulted and any recommendations that they make considered by Parliament. Section 14 also requires that the petitioner be given at least thirty days to consider the legislation in question. It provides as follows:

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

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

(3) …..

29 The importance that the Constitution places on consultation in the performance of the functions vested in various bodies and state offices is underscored by the provisions of **Article 259 (11)** which states as follows:

(11) If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise.

General Principles

30 In addition to the express constitutional and statutory provisions governing functions of the petitioner and the respondents, the general principles of governance and the principles of interpretation of the Constitution set out in the Constitution require consideration in the determination of a matter such as this. **Article 10** sets out the national values and principles of governance and provides that the principles bind all state officers, state organs, public officers and all persons whenever any of them applies the Constitution, enacts, applies or interprets the law or makes or implements public policy decisions. Among the national values and principles are the rule of law, inclusiveness, human rights, good governance, transparency and accountability.

31 **Under Article 259(1)** the Constitution is to be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental rights and freedoms in the Bill of Rights and permits development of the law and contributes to good governance.

32 It is now trite law that in interpreting the Constitution, all provisions of the Constitution bearing upon

a matter should be considered together; the so called principle *of harmonization.* This means that where the Constitution contains several provisions relating to an issue, all these provisions must be looked at as a whole. As was held by the Supreme court of Uganda in ***Tinyefuza v Attorney General, Constitutional appeal No. 1 of 1997:***

"The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountacy of the written Constitution. The third principle is that the words of the written Constitution prevail over all unwritten conventions, precedents and practices. I think it is now also widely accepted that a court should not be swayed by considerations of policy and propriety while interpreting the provisions of the Constitution."

See also ***Olum -v- Attorney General of Uganda* [2002]2 EA 508**.

33 The Constitution should also be given a purposive interpretation that furthers its values and purposes. This requirement is encapsulated under **Article 259** cited above. In the Tanzanian case of ***Ndyanabo* v *Attorney General***[2001] EA 485 at p. 493;

"… the constitution… is a living instrument, having a soul and a consciousness of its own … Courts must… endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in (tune) with the lofty purposes for which its makers framed it… *fundamental rights have to be interpreted in a broad and liberal manner… ensuring that our people enjoy their rights, our young democracy not only functions but grows, and the will and dominant aspirations of the people prevail."*

Consultation

34 The main issue that this petition raises relates to the petitioner's involvement in the process of enactment of the subject statutes. It is not in contention that the law requires that the respondents consult CIC and that CIC is granted **at least a thirty day period** to consider legislation regarding devolved government before enactment of such legislation. The question is whether the respondents complied with this constitutional requirement, consulted the CIC and allowed it the time frame required under the Constitution before the statutes were enacted.

35. I have evaluated the pleadings and perused the correspondences annexed to them. CIC concedes that it received the draft **Public Financial Management Bill** from which the two subject statutes were extracted from the 1st respondent on 15th June, 2011. It however contends that it was by-passed in the drafting of the two Bills which are subject of the proceedings. CIC alleges that it was not involved in the decision to segregate the **Public Financial Management Bill** and to present part of it as two separate Bills.

36. The decision to severe the two Bills from the **Public Financial Management Bill** is evidenced by correspondence dated 22nd August, 2011 addressed to the Solicitor General from the Permanent Secretary, Prime Minister's office which read in part as follows;

CONTINGENCIES FUND MANAGEMENT AND NATIONAL GOVERNMENT LOANS GUARANTEE BILLS, 2011

During the Special Cabinet Committee Meeting held on 22nd August, 2011, the Memorandum on the Public Finance Management Bill, 2011 was presented.

The Cabinet Committee deferred the Bill, however, the Committee made a decision to extract and discuss the Contingencies Fund Management (Clause 15) and the National Government Loans Guarantee (Clause 46) as substantive Bills respectively. The Committee forwarded the two Bills to Cabinet for Consideration subject to the following amendments.....

……

Yours

Dr. Mohamed Isahakia, CBS
Permanent Secretary

37. In a letter accompanying the **Public Financial Management Bill** dated **27th June, 2011** addressed to the Chairperson of CIC, and copied to the Kenya Law Reform Commission, the Chief Parliamentary Counsel in the Attorney General's office communicated as follows;

RE: THE PUBLIC FINANCE MANAGEMENT BILL, 2011
……

As requested, we confirm that the draft of the above Bill, forwarded to you by the Ministry of Finance under cover of their letter Ref. AG/CONF.1/022/1 Vol. 2/38 of the 15th June, 2011, suffices for your consideration for the purposes of section 14 of the Sixth Schedule to the Constitution.

38. From the contents of the above letter and the letter dated **15th June, 2011** addressed to the Chairperson of CIC from the Permanent Secretary in the Office of the Deputy Prime Minister's Office, I am satisfied that there was consultation of the petitioner by the respondents with regard to the contents of the two statutes at the stage when they formed part of the merged **Public Financial Management Bill.** What is at issue is whether such consultation was sufficient for the purposes of the Constitution. The answer to this, I believe, depends on what the term 'consultation' is understood to mean.

39. This term has been the subject of judicial determination, both locally and in other jurisdictions. In the South African case of ***Maqoma v Sebe & Another*** **1987(1) SA 483, the court stated as follows:**

"It seems that 'consultation' in its normal sense without reference to the context in which it is used, denotes a deliberate getting together of more than one person or party…in a situation of conferring with each other where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate. The word consultation in itself does not presuppose or suggest a particular forum, procedure or duration for such discussion or debate. Nor does it imply that any particular formalities should be complied with. Nor does it draw any distinction between communications conveyed orally or in writing. What it does suggest is a communication of ideas on a reciprocal basis." *[Emphasis added]*

40. In the case of ***Agricultural, Horticultural and Forest Industry Training Board v Ayleswbury Mushrooms Ltd*** **[1972] 1 All ER 280** the Court observed at page 284 that

"The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice. If the invitation is once received, it matters not that it is not accepted and no advice is proferred. Were it otherwise organizations with a right to be consulted could, in effect, veto the making of any order by simply failing to respond to the invitation. But without communication and the consequent opportunity of responding there can be no consultation."

41. See also the decision of the High Court in ***Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General, Nairobi Petition No. 16 of 2011).***

42. The respondents were under a constitutional duty to consult with the petitioner prior to the enactment of the two statutes. They were under a duty to carry out such consultation 'at least thirty days' prior to the enactment of the statutes. They do not dispute this, contending only that they had already consulted the petitioner with regard to the two statutes when they formed the merged **Public Financial Management Bill.** The question is whether, following the severance of the Bill, there was need for a further period of at least 30 days to be given to the petitioner for consideration of the two Bills before their enactment.

43. The requirement for 'consultation' and expectations therefrom must be read in light of the mandate of

the CIC as stipulated in the **Fifth Schedule** to the Constitution and **Section 14** of the CIC Act. The canons of constitutional interpretation that the Constitution must be interpreted purposively to meet the purpose for which it was intended must also be borne in mind (see ***Ndyanabo case above)***. In determining whether CIC should have been given a further 30 days to consider the two Bills severed from the **Public Financial Management Bill,** it is important to consider the objective that was intended to be achieved by the demand for a specific time frame for CIC to consider the proposed legislation. It cannot have been the primary intention of the framers of the Constitution to simply allow the CIC a one month as a matter of form prior to the enactment of the statutes. The intention, in my view, was to enable greater interrogation of the legislation pertaining to devolved government in view of their centrality and the possibility of controversies arising from their content and implementation. It is not the period of 30 days in and of itself that was important: what was critical was substantive consultation and ensuring that the petitioner had sufficient time to consider and make its input to the legislation. What the framers had in mind, and what should concern the court, is that the petitioner should have had an opportunity to consider the Bills substantively, and not a mere insistence on the period the petitioner was entitled to be in possession of the Bills before enactment.

44. As I stated earlier, it is clear that the CIC had had an opportunity to consider the content of subject Bills prior to their publication. The **Public Financial Management Bill** had been forwarded to the CIC by the letter dated 15th June, 2011 from the office of the Deputy Prime Minister. At the time the decision to sever the Bills was made in August, 2011, CIC had been in possession of the merged Bill for two months. I have not heard the petitioner to argue that the substance of the severed Bills that resulted in the two statutes was unconstitutional: the gist of their case is that they were not given 30 days prior to the enactment of the resulting two statutes. I am therefore not satisfied that the CIC was not consulted on the substance of the two Bills, or that the provisions of Section 14 of the Sixth Schedule to the Constitution were violated.

45. The question is whether, had I found that there had been a violation of Section 14 of the Sixth Schedule to the Constitution, it would have been against public interest to grant the orders sought. The respondents argued that there was urgency in enacting the legislation, and that certain time limitations with regard to the enactment of the two statutes had to be met. Under the **Fifth Schedule** to the Constitution, legislation relating to the Contingencies Fund and Loan Guarantees by National Government was to be enacted within one year after the effective date in accordance with the requirements of **Section 2(3)(b)** of the **Sixth Schedule** to the Constitution. This urgency, however, as correctly argued by the petitioner, is not and cannot be a legitimate reason to oust clear constitutional provisions. In this regard, I adopt the sentiments of the Court in the case of ***R - v- Kenya Roads Board ex parte John Harun Mwau*** **(Misc. Civil Application No. 1372 of 2000)** where it stated as follows;

Therefore as much as the pressure for immediate results in respect of the horrible status of our roads is intense and as much as emotions are high as against misappropriation of public funds; we must not act on expediency. Every-thing must be done constitutionally. We must look long and hard at our established principles and sort out the enduring values of our society lest we let our problems, whatever they may be, rob us of our values and aspirations embodied in the Constitution*.[Emphasis added]*

Whether This Petition is Moot

46. The petitioner insisted in the course of the proceedings that the issues raised by this petition are still live. However, in my view, even had I found in its favour, I would have been unable to issue the orders that it seeks, for two reasons. First, the orders sought basically ask the court to issue declarations restating what is already in the Constitution: the respondents ***are*** under an express constitutional obligation, under Section 2(3)(b) *an*d 15 of the Sixth Schedule to the Constitution to consult the petitioner, among others, and to give the petitioner at least thirty days to consider legislation relating to devolved government, and for their recommendations to be considered by Parliament.

47. Secondly, and even though none of the parties brought this fact to the court's attention, I take judicial notice that the subject statutes were repealed by **Section 208** of the **Public Finance Management Act,**

No. 18 of 2012. This Act was assented to on 24th July, 2012 and its provisions, save for those touching on county government came into operation on 27th August, 2012. The section provides as follows:

208. The following Acts are repealed—

(a) the Fiscal Management Act;

(b) the Government Financial Management Act;

(c) the Internal Loans Act;

(d) the Contingencies Fund and County Emergency Funds Act; 2011;

(e) the National Government Loans Guarantee Act, 2011; and

(f) the External Loans and Credits Act. (Emphasis added)

48. This petition therefore, and the prayers sought therein, were superfluous or overtaken by events long before it was urged before me. As the court observed regarding declarations in ***Timothy Wafula Makokha & 7 Others v Council for Legal Education & others*, Petition No. 12 of 2012,** citing Hood Phillips and Jackson Constitutional and Administrative Law, 8th Edition;

"…The Court, in its discretion, will not grant a declaration unless the remedy would be of real value to the Plaintiff. The Court will not grant declarations "which are academic and of no practical value".

49. In the circumstances, this petition is dismissed with no order as to costs.

50. I am grateful to Counsel for the parties for their well-researched submissions and authorities.

Signed at Nairobi this 18th day of January, 2013.

MUMBI NGUGI
JUDGE

Dated and Delivered at Nairobi on 18th January, 2013.

D. S. MAJANJA
JUDGE

Mr. Njoroge Regeru instructed by the firm of Njoroge Regeru & Co. Advocates for the Petitioner

Ms. Munyi, Principal Litigation Counsel, instructed by the State Law Office for the Respondents